General Average and the York-Antwerp Rules: The historical quest for international conformity, the divisive effect of more recent amendments to the Rules and recommendations with regard to the way forward to regain more widespread acceptance of the Rules in today's global maritime industry

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UKTCHU001

Thesis Presented for the Degree of

DOCTOR OF PHILOSOPHY

In the Department of Commercial Law

UNIVERSITY OF CAPE TOWN

February 2014

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DECLARATION

I declare that the thesis for the degree of Doctor of Philosophy at the University of Cape Town hereby submitted, has not been previously submitted for a degree at this or any other university, that it is my work in design and execution, and that all the materials contained herein have been duly acknowledged.

Signed by candidate

Chukwuechefu Ukattah Date

ABSTRACT

General average emerged as an independent mechanism in ancient times for the redistribution of losses incurred for the safety of the common maritime adventure from peril. Its robustness and efficiency as a risk and loss distribution device led to its recognition and incorporation in a plethora of medieval codes and the laws of many maritime states. As the concept evolved in different maritime states there emerged a divergence in the principles and practice of general average. The undesirability of a divergence in such a concept of international import led to the adoption of the York-Antwerp Rules by the maritime community as a tool for achieving uniformity.

The York-Antwerp Rules have been amended periodically over the course of more than a century with the object of achieving greater uniformity in the law of general average and to keep abreast of developments in international trade and the maritime industry. The most recent revision of the York-Antwerp Rules adopted in 2004 (York-Antwerp Rules 2004), is the first revision adopted without a consensus amongst the majority of interested parties. Nine years after their adoption, the York-Antwerp Rules 2004 have failed to gain widespread acceptance and use in the maritime industry. An attempt by the Comité Maritime International to resolve the impasse on the use of the Rules at its 2012 Beijing Conference was unsuccessful and it was resolved instead to work towards the adoption of a new set of Rules at its next Conference in 2016.

To ensure that the revision of the York-Antwerp Rules presented for acceptance at the 2016 Conference does not suffer the fate of the York-Antwerp Rules 2004 it is important that the mistakes made with regard to the York-Antwerp Rules 2004 are not repeated. Consequently, this thesis analyses the substantive revisions made in the York-Antwerp Rules 2004 to ascertain why other interested parties, particularly shipowning interests, are opposed to the York-Antwerp Rules 2004. This will assist in the recommendations to be made with regard to the substantive changes to the York-Antwerp Rules 2004 that could ensure the widespread acceptance of the Rules to be adopted in 2016. Furthermore, the factors that led to the periodic revision of the Rules are examined and the ingredients of the previous successful revision processes are identified as a comparative base to ascertain the flaws, if any, in the process that led to the adoption of the York-Antwerp Rules 2004; which culminated in the lack of widespread acceptance of the Rules in the maritime industry. This thesis contends, among other things, that

the York-Antwerp Rules 2004 failed to gain widespread acceptance in the maritime industry because the substantive changes introduced by the Rules did not ensure a measure of equitable balance of the interests of all interested parties. Furthermore, the ingredients of the previous successful revision processes were disregarded in the process of adopting the 2004 Rules. This thesis makes recommendations on the content of the York-Antwerp Rules to be adopted in 2016 and the process of adopting the new Rules in an attempt to enhance their widespread acceptance and use in the maritime industry.

DEDICATION

This thesis is dedicated to my parents Justice FIE Ukattah (rtd) and Mrs Georgina Ukattah, whose unfailing love and dedication gave me the impetus to pursue my dreams

And

Emeritus Professor John Hare (my father in Cape Town) whose belief in me and care for my well-being propelled me through rough ‘shoals’ throughout the duration of my studies in Cape Town

ACKNOWLEDGEMENTS

I am eternally grateful to God for his love and protection. Without Him, my existence will be meaningless.

I wish to express my profound love and gratitude to my parents for their love and support over the years. Mum and Dad, no man could ever ask for better parents. You mean the world to me.

To my siblings, Adaku, Uzunma, Chioma, Paul and Ugochukwu, the world would have been the loneliest place without your love, warmth and support. You guys are awesome.

Emeritus Professor John Hare, you were a light to me in dark places when all other lights went out. You are a father, a mentor and a friend. May your boys never lack help in their times of need.

I am immensely indebted to Associate Professor Graham Bradfield, for his patience with me, his support, invaluable criticisms and comments. This thesis would never have been completed without your invaluable input. My gratitude also goes to Professor A Rycroft for his benevolence. Professors Thomas Bennett and Elrena van der Spuy, thanks so much for your support and encouragement.

My fiancée, Chidera Jones (soon to be Mrs Ukattah), I love you more than any man can ever dream of.

To my Elder brother, Cornelius Ukattah, you believed in me and believed that all things were possible if only I could believe. Your love and support for me, no man will ever fathom. Mrs Roselyn Ukattah, thanks for being a mother to me in Cape Town. Pastor Udochukwu Uwalaka and family, words cannot express what you guys mean to me. I love you all. My spiritual father and mother, Pastor and Pastor (Mrs) Akande, you are my spiritual pillars and covering. Your prayers and love for me helped me through the storm. Mr Magnus Ichiogu, you are a friend, a brother and a father. Thank you for your love. Kenneth Ezeigbo, you are a brother indeed. Dr Collins Chijioke, thanks for being the best mentor any man would have.

Rezen Chiedza Papaya, you are my love and my friend. You picked me up when I was down and you made me to hold on to my dream. You are the best. Lily Nombombo, you mean the world to me.

Oluwole Akinyeye, you are a friend that sticks closer than a brother. You were always there holding me up when it seemed all hope was lost. You checked up on me every day to make sure I was well. Words cannot express what you mean to me. Ibezimako Wogu, my brother from another mother. You have always been there for me for more than three decades and have always been a rock and a brother. I am what I am today because of your love and support. My love and thanks to Emmanuel Ogbonna, Christian Zenim, Benson Olugbuo, Toyin Badejogbin, Marumo Nkomo, Dr Ashimizo Afadameh-Adeyemi, Sophie Nakueira, Nicholas Botha, Fergus Reid, Simon Thompson, Richard Bradstreet, Dr Emma Fergus, Mongezi Mbebe, Livashnee Naido and Lauren Kent for their encouragement and support.

Patricia Philips, Sheryl Ronnie, Maurice Jacobs and Chezlyn Elissac, words cannot express my gratitude for your help and support for the duration of my studies. Dilshaad Brey, Zoelfa Jaffer and Thembeka Sotshononda, thanks for your help in sourcing most of the materials for this research. I am forever indebted to you.

My gratitude also goes to the CMI Secretariat, BIMCO Secretariat, IUMI Secretariat, Ole Wikborg, Jonathan Spencer, Richard Cornah, Ben Browne, Taco van der Valk and Raymond Wong for their invaluable input in my research.

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CHAPTER 1 INTRODUCTION

I BACKGROUND

At its Vancouver Conference in 2004, the Comité Maritime International (CMI)[1] revised the York-Antwerp Rules (YAR) 1994 and adopted a new set of Rules referred to generally as the YAR 2004.[2] Cargo insurers, led by the International Union of Marine Insurance (IUMI), tabled a revision of the YAR 1994 at the CMI 2004 Vancouver Conference and despite opposition to the proposed revisions by the majority of interested parties, particularly shipowning interests,[3] the Conference adopted the YAR 2004 comprising six significant changes.[4]

In the period after the adoption of the YAR 2004, it became apparent that this revision would not achieve the widespread acceptance hoped for and essential for the value of the YAR as a uniform code of general average. Shipowning interests, led by the Baltic and International Maritime Council (BIMCO)[5] declared their rejection of the YAR 2004[6] and thereafter worked towards ensuring that the 2004 Rules were seldom, if ever, used in the maritime industry.[7] To date, the YAR 2004 have failed to gain widespread use in the maritime industry as a result of the opposition of shipowning interests.[8] The general average clauses in most standard carriage contracts continue to provide that general average will be adjusted according to the YAR 1994.[9] The YAR 2004 have also not been enacted in any country's domestic law, as the Scandinavian countries had done with the previous versions of

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[1] The CMI is a non-governmental international organisation composed of national maritime law associations (NMLAs). The CMI since the amendment of the YAR in 1950 has been the custodian of the YAR. For details on the CMI, see www.comitemaritime.org, accessed 5 May 2011.

[2] T Schoenbaum *Admiralty and Maritime Law* 5 ed Vol 2 (2011) 257.

[3] Ibid.

[4] R Cornah 'The Changes Introduced by the York-Antwerp Rules 2004' (2004) 10 *JIML* 403 at 405. The changes are analysed in chap 4 infra.

[5] See chap 5 § II*(b)* infra.

[6] See BIMCO Special Circular, No 1, July 2007, available at www.bimco.org/~/media/Documents/Special_Circulars/SC2007_07.ashx, accessed 20 November 2011.

[7] The reasons for the lack of widespread acceptance and use of the YAR 2004 in the maritime industry are examined in chap 5 infra.

[8] T Schoenbaum op cit note 2 at 257.

[9] Ibid.

the YAR.[10] The Rules were also not incorporated in the recently revised standard hull policy in the United States market[11] nor in the revised cargo insurance policies in the English market.[12]

At its Beijing Conference in 2012, the CMI attempted unsuccessfully to resolve this impasse over the use of the YAR 2004, but the Conference resolved to work towards a general review of the Rules on general average with a view to adopting a new set of Rules at the next CMI Conference in 2016.[13] The CMI has initiated the process of developing a new revision of the YAR for 2016.[14] The question that suggests itself is how the current process can avoid or reduce the likelihood of an impasse amongst interested parties on the new Rules to be adopted.

II AIM OF THE THESIS

This thesis aims to examine the content of the YAR 2004, and the process that led to their adoption to identify the factors that led to the impasse amongst interested parties that culminated in the lack of widespread acceptance and use of the YAR 2004 in the maritime industry. This is with a view to making recommendations that could assist to avoid or reduce the likelihood of such an impasse amongst interested parties on the new Rules to be adopted in 2016. The recommendations relate broadly to the substantive revisions to the content of the Rules that need to be made and the process for reaching agreement on these revisions.

The recommendations as to the content of the Rules are not aimed at a revision of the entire YAR but at the revision of some of the changes introduced by the YAR 2004[15] to ensure a measure of balance of the interests of all parties. This is because shipowning interests are not opposed to all the changes introduced by the YAR 2004. With regard to the content of the revisions, any proposals in this regard need to take account of not only the system of general average in the YAR to ensure that the revisions proposed are consistent

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[10] See chap 5 § V*(b)* infra.

[11] See the American Institute of Marine Underwriters (AIMU) Hull Clauses 2009, available at www.aimu.org/aimuforms/HullClauses2009.pdf, accessed 23 January 2012.

[12] See the Institute Cargo Clauses (ICC) (A), (B) and (C) (2009).

[13] See chap 5 § VI*(f)* infra.

[14] See chap 5 § VI*(g)* infra as to the process that has been initiated by the CMI for the general review of the Rules on general average.

[15] See chap 8 § II infra.

with that system, but also to the place of general average in the broader allocation of maritime risks within the maritime industry. The recommendations as to the process for the revision of the YAR 2004 are based on lessons from history, drawing on the ingredients of past successful revision processes and avoiding the pitfalls of the 2004 revision process.

III SCOPE OF THE THESIS

Myriad issues have been raised with regard to general average and the YAR, ranging from the need to simplify the Rules to take cognisance of developments in the maritime industry to calls by some interested parties for the abolition of general average as an anachronism that has outlived its usefulness.[16] The call for abolition was first made by the Committee of Lloyd's (hereafter 'Lloyd's') in 1877 on the basis that marine insurance could adequately provide cover for the various interests at risk in a maritime adventure.[17] Apart from the argument with respect to the adequacy of marine insurance, the preponderance of abolitionist opinion is that general average adjustment is costly, time consuming and that general average is inequitable.[18]

Though there may be some merit in the abolitionists' arguments, consideration of possible abolition of general average is beyond the scope of this thesis as it was not the IUMI's objective during the process of the revision of the YAR 1994[19] and currently, there is no clamour by any interest group for the abolition of general average as the focus of all interested parties is on the adoption of a new set of Rules in 2016.[20] Thus, this thesis

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[16] K Selmer *The Survival of General Average: A Necessity or an Anachronism* (1958); W Tetley 'Maritime Law as a Mixed Legal System' (1999) 23 *Tulane Maritime Law Journal* 317 at 337.

[17] See Chap 6 § II*(b)(i)* infra. See also R Cornah 'The Road to Vancouver – The Development of the York-Antwerp Rules' (2004) 10 *JIML* 155 at 161.

[18] P Murkherjee 'The Anachronism in Maritime Law that is General Average' (2005) 4 *World Journal of Maritime Affairs* 195; W Tetley 'General Average Now and in the Future', 38-39, available at www.mcgill.ca/files/maritimelaw/genaverage.pdf, accessed 10 May 2011.

[19] E Magee 'General Average: A New Generation of Rules for the Millennium', 7, paper presented at the IUMI Berlin Conference, September, 1999.

[20] See the Report by the CMI International Working Group (IWG) on the general review of the Rules on general average, 2-6, dated 12 August 2013 (updated 13 September 2013); IUMI Position Paper on the CMI 2013 questionnaire on the general review of the Rules on general average, 1, available at www.iumi.com/images/gillian/YAR%20Questionnaire%20-%20IUMI%20Position%20Paper%20-%20August%202013.pdf, accessed 16 September 2013.

examines the substantive changes introduced by the YAR 2004, the level of acceptance and use of the YAR 2004 in the maritime industry, the process that led to the adoption of the YAR 2004 which resulted in the recent impasse on the Rules and how to avoid a repeat of such impasse amongst interested parties with regard to the new set of Rules to be adopted in 2016.

IV STRUCTURE OF THE THESIS

Against this background, chapter two of this thesis examines the nature of the law of general average, its historical origin, legal sources, basic principles and the divergence between the law of general average under the English common law and continental law. This chapter attempts to provide a clear understanding of the law of general average as exemplified in the YAR that will provide the basis for the examination of issues on the law of general average in this thesis and inform the recommendations to be made with regard to the substantive revisions to the YAR 2004.

Chapter three analyses the place of general average in the broader system of risk allocation in the maritime industry. This chapter examines the system of allocation of risk between parties to a maritime adventure through general average prior to the emergence of marine insurance and the present interaction between general average and marine insurance in the re-apportionment of general average risk and loss. The interaction between general average and the principles of carriage of goods by sea in the allocation of general average risk is also analysed as general average generally applies to carriage of goods by sea. This chapter elucidates the active interest of marine insurers in the general average system and provides the basis for analysing, in chapter four, what would have been the likely insurance and carriage effects of the changes introduced by the YAR 2004 on the general average system if the Rules had gained widespread use.

Chapter four analyses the changes introduced by the YAR 2004 to show their likely effects on the general average system. This chapter attempts to provide insight as to why shipowning interests were opposed to the changes introduced by the Rules. This insight will assist in identifying the particular Rules of the YAR 2004 that could be revised to avoid or reduce the likelihood of such an impasse amongst interested parties on the new Rules to be adopted.

Chapter five examines the level of acceptance of the YAR 2004 in the maritime industry and the recent unsuccessful attempt by the CMI at its 2012 Beijing Conference to resolve the impasse on the YAR 2004. The chapter aims to show that the YAR 2004 have failed to gain widespread acceptance and use in the maritime industry and to identify the factors/forces that led to this. This will inform the recommendations that will be made that could assist in ensuring that such pit falls are avoided in the lead up to adopting a new set of Rules in 2016.

Chapter six is an analysis of the evolutionary processes adopted in the previous revisions of the YAR prior to 2004. The analysis aims to identify the ingredients of these processes that led to the successful revision of the previous sets of YAR and the widespread acceptance of the revised Rules in each instance. This provides a comparative base for appraising the process that led to the revision of the YAR 1994 to determine if it took cognisance of the ingredients of the past successful revision processes and whether any disregard of these ingredients caused the YAR 2004's failure to gain widespread acceptance in the maritime industry.

Chapter seven appraises the entire process that led to the revision of the YAR 1994. The process is examined in light of the identified ingredients of the processes that were adopted in the successful revisions of the previous versions of the YAR. The IUMI's proposals for the revision of the 1994 Rules and the objections thereto by interested parties are also examined to determine whether the objections were justified. A consideration of IUMI's proposals is relevant as the examination of the process adopted in the revision of the YAR 1994 is inextricably linked with the contents of the proposals that were made for the revision. This chapter attempts to identify the flaws in the IUMI proposals for the substantive revision of the YAR 1994 and in the process that led to the revision of the YAR 1994. This is with a view to arguing that the substantive revisions to the YAR 1994 proposed by the IUMI and the disregard of the ingredients of the previous revision processes contributed to the lack of widespread acceptance of the YAR 2004.

Chapter eight concludes with recommendations aimed at ensuring or at least increasing the likelihood of the requisite level of acceptance of the new YAR to be adopted.

CHAPTER 2 THE NATURE OF GENERAL AVERAGE

I INTRODUCTION

This chapter aims to provide a clear understanding of the nature of the law of general average from its historical origin and evolution which gave rise to the divergence on the law of general average under the English common law and continental law, to its present legal sources and basic principles. A clear understanding of the nature of general average is germane for an understanding of the principles of general average embodied in the YAR[21] and the 'hybrid' nature of the YAR as a code that unified the divergent notions on general average.[22]

This understanding of the nature of general average and the YAR is pivotal in the analysis of the IUMI's substantive proposals for the revision of the YAR 1994 and the objections of other interested parties to those proposals.[23] This provides the basis for analysing later in this thesis[24] whether the IUMI's proposals were consistent with the original intention of the maritime community in adopting the YAR as a tool for achieving uniformity in the law of general average and balancing the interests of interested parties as exemplified in the previous versions of the Rules.[25] Furthermore, it will inform the recommendations that will be made as to the substantive revisions to the YAR 2004 because it will be argued that any proposals for the substantive revisions of the YAR 2004, while accommodating developments, should be consistent with the existing rules and reflect the original design of the YAR as a tool for achieving uniformity in the law of general average.

II HISTORICAL ORIGIN OF GENERAL AVERAGE

Pivotal to an understanding of the nature of general average and the YAR is the history of general average because it provides an insight into the emergence of the divergent notions of general average which necessitated the adoption of the YAR to achieve uniformity. General average has been peculiar to maritime law since antiquity and is believed to date from the

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[21] See chap 2 § III*(a)* infra.

[22] The unification of the divergent notions of general average in the YAR is analysed in chap 6 § II*(a)(i)* infra.

[23] See chap 7 infra.

[24] Ibid.

[25] See chap 6 infra.

Rhodian Sea Law[26] of approximately 800 BC[27] which stipulated that if a ship was in peril and as a consequence cargo was jettisoned to save the ship, then the ship and the remaining cargo that were saved were required to make a contribution to the owner of the lost cargo.[28] From the Rhodian sea law, the law of general average was incorporated into Roman law[29] as reflected in the Justinian Digest. The Digest provides that 'the Rhodian law decrees that, if in order to lighten a ship, merchandise has been thrown overboard, that which is thrown overboard, that which has been given for all should be replaced by the contribution of all.'[30] From the Roman law this notion of general average that restricted it to losses incurred while the vessel was in danger was received into the European *ius commune* and incorporated into the subsequent medieval codes[31] of maritime customary law as states began to enact their own maritime legislation.[32]

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[26] The authoritative English work on the Rhodian Sea Law is W Ashburner *The Rhodian Sea-Law* (1909). It should be noted that Rhodes was a colony of Phoenicia, as such; it is not inconceivable that the concept of general average existed in Phoenician maritime practice which could have influenced the incorporation of the concept in the Rhodian Sea Law.

[27] T Schoenbaum op cit note 2 at 4; L Buglass *Marine Insurance and General Average in the United States: An Average Adjuster's Viewpoint* 3 ed (1991) 194.

[28] J Cooke & R Cornah (ed) *Lowndes & Rudolf The Law of General Average and the York-Antwerp Rules* 13 ed (2008) 1; H Abbott (Lord Tenterden) *A Treatise of the Law relative to Merchant Ships and Seamen* (1802) 273; *Columbian Insurance Co v Ashby and Stribling* 38 US (13 Pet) 331 at 337-338 (1839) (US SCt); *Burton v English (*1883) 12 QBD 218 (CA) at 220-221; *Anderson v Ocean SS Co* (1884) 10 App Cas 107 (HL) at 114; *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601 (PC) at 606; *Ralli v Troop* 157 US 386 at 393 (1895) (US SCt); *Ultramar Canada v Mutual Marine Office* [1995] 1 FC 341 at 358, 1994 AMC 2409 (Fed Can) at 2417.

[29] General average was received into Roman law as part of the common *lex mercatoria maritama* and there it received detailed treatment and regulation as the *lex Rhodia de iactu.* Zimmermann is of the view that based on 'the idea of community of risk and emanating from the principle of aequitas, late Republican jurisprudence received the *Lex Rhodia* into Roman law not by way of legal surgery but in a most natural or homeopathic manner.' See R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 408. See also F Sanborn *Origins of the Early English Maritime and Commercial Law* (1930, 1989 reprint) 37.

[30] Digest of Justinian, Book IV, Title 2, Fr 1.

[31] The codes include the *Tabulae Amalfitana* (1010), *Ordinamenta et Consuetudo Maris* (1063), *Constitutum Usus* (1156-1160), *Consolatum Trapani* (1345) and the *Guidon de la Me*r (1556). See Schoenbaum op cit note 2 at 9.

[32] T Barclay 'The Definition of General Average' (1891) 7 *Law Quarterly Review* 22 at 23; W Gormley 'The Development of the Rhodian-Roman Maritime Law to 1681, with special emphasis on the problem of Collision' (1961) 3 *Inter-American Law Review* 317 at 320.

The Rolls of Oléron is perhaps the most important of these medieval codes as the Rolls, for some centuries, held considerable authority over the greater part of Europe.[33] Article VIII of the Rolls of Oléron restated the Rhodian law of general average restricted to sacrifices only when a vessel is in peril, by recognising as general average the jettison of cargo for the safety of the common maritime adventure and the liability of the parties to make contributions towards compensating the party whose cargo was jettisoned for the benefit of all. Article IX of the Rolls of Oléron stated the shipowner's right of lien over cargo for general average contribution and the master's right to sell the cargo to compensate for the loss of the party whose cargo was jettisoned to save others.

Most of the medieval sea codes of Europe that were adopted after the Rolls of Oléron copied and reflected the law of general average exemplified in the Rolls of Oléron, albeit with less vivacity.[34] The law of general average stated in the Rolls of Oléron was later incorporated into English law and this led to the recognition, as general average in English law,[35] of only sacrifices made or expenses incurred to save the common maritime adventure from peril.[36] The law of general average exemplified in the Rolls of Oléron was also received into French civil law[37] and it seems that the Rolls had been adopted as the official sea law of France by 1364.[38]

However, the *Ordonnance* of Louis XIV enacted in 1681 (hereafter the '*Ordonnance*') marked the point of divergence on the earlier notion of general average embodied in the

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[33] J Cooke & R Cornah op cit note 28 at 3. The Rolls were the basis of the common maritime law of the North Sea and the Atlantic Ocean. See T Schoenbaum op cit note 2 at 8.

[34] J Cooke & R Cornah op cit note 28 at 4; G Paulsen 'An Historical Overview of the Development of Uniformity in International Maritime Law' (1982-1983) 57 *Tulane Law Review* 1065 at 1070. Examples of these codes include the Law of Flanders, of Catalonia (1243), of Wisby (1288), of Genoa (1313-1314) and of the Hanseatic League (1597). See E Benedict *The American Admiralty, its Jurisdiction and Practice with Practical Forms and Directions* (1850, repr 2009) 98-101.

[35] R Colinvaux *Carver's Carriage by Sea* 13 ed Vol 2 (1982) 1347. The Rolls of Oléron became the operating maritime law in England at the end of the 12th century. See F Sanborn op cit note 29 at 269. Mukherjee notes that the concept of general average 'became firmly established and embodied in the majority of the European maritime codes and the consuetudinary English admiralty law through the *Roles d'Oleron.'* See P Mukherjee *Maritime Legislation* (2002) 12.

[36] See chap 2 § II*(a)* infra.

[37] G Paulsen op cit note 34 at 1070.

[38] See art 42 of the *Ordonnance* of April 1364 of Charles V. Article 42 granted Castillian merchants the right to be judged according to the '*coutume de la mer et les droiz de layron*.'

Rhodian Sea Law and gave force to an expanded definition and notion of general average[39] that encompassed both sacrifices made while the vessel was in danger and expenses incurred, after the vessel had attained safety from peril, to enable the vessel to successfully complete the voyage. This definition of general average in the *Ordonnance* influenced the definition and notion of general average in subsequent sea laws in Continental Europe[40] and 'provided a framework regarding general average that influenced the rest of Europe to set down maritime law in this important area.'[41] The *Ordonnance* provides that:

> 'every "extraordinary expense" … which is made for the ship and merchandise conjointly and every damage that shall occur to them from their loading and departure until their return and discharge, shall be reputed average … extraordinary expenses incurred and damage suffered for the common good and safety for the merchandise and the vessel, are gross and common average … and the gross and common shall fall as well upon the vessel as upon merchandise, and shall be equalised over the whole at the shilling in the pound.'[42]

Thus, the *Ordonnance* extended the concept of general average to every extraordinary expense made both for the safety of the vessel and cargo and for the successful completion of the voyage. By the provision of the *Ordonnance*, general average, unlike in the Rhodian Sea Law and the Rolls of Oléron, is not restricted to only acts done to save the ship from peril but extends to acts done to enable the vessel to successfully complete its voyage, usually from a port of refuge. The *Ordonnance* recognised that there might be instances were subsequent expenses may be pertinent, after the vessel was no longer in peril, for a successful completion of the voyage. The *Ordonnance* gave force to the continental notion that every sacrifice made or expense incurred both while the vessel was in danger and consequent acts done after the adventure was no longer in danger, but necessary for the successful completion of the adventure, were to be brought into general average.

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[39] J Cooke & R Cornah op cit note 28 at 8.

[40] Ibid at 9.

[41] R Cornah op cit note 17 at 156. The principle of general average in the *Ordonnance* was reflected in subsequent sea laws of European states such as the Ordinances of Rotterdam (1721); of Konigsberg (1730); of Hamburg (1731); of Bilbao (1737) and of Stockholm (1750). See J Cooke & R Cornah op cit note 28 at 8; R Rodiere *Droit Maritime* 9 ed (1981) 11-12.

[42] *Ordonnance* Tit 7, arts 2, 3; 4 Pard 380.

(a) Divergence in the law of general average: Common safety v common benefit

As a consequence of the historical evolution of general average, a divergence exists in the respective conceptions of general average under the English common law and continental law.[43] The English common law notion of general average is restricted to sacrifices incurred or expenses made to save the common maritime adventure from peril. This is referred to as the 'common safety' principle and covers sacrifices of property (such as jettisoning of cargo) or expenditure (such as salvage) that are made or incurred while the ship and cargo were in danger in order to save the common maritime adventure.[44] This principle was previously the only category of general average generally recognised by English law and practice.[45]

In contrast, the continental notion of general average encompasses both sacrifices made and expenses incurred in preserving the common maritime adventure from peril and further expenses incurred (mostly at a port of refuge) in ensuring the successful completion of the adventure.[46] This notion of general average sees the successful completion of the adventure as the ultimate goal of a general average act and is referred to as the 'common benefit' principle. This notion of general average is common to European legal systems[47] and is recognised in United States law.[48] Examples of such expenses include the cost of discharging cargo, storing and reloading cargo as necessary to carry out repairs at a port of refuge and port charges.

The common benefit principle is to be preferred to the common safety principle as it underlines the very essence of a general average act; which is to ensure the safety of the vessel and the successful completion of the voyage because a vessel in some instances might

[43] R Cornah op cit note 4 at 404. See also the comment 'International Divergences in Marine Insurance Law: The Quest for Certainty' (1951) 64 *Harvard Law Review* 446 at 452.

[44] *Royal Mail Steam Packet Co v English Bank of Rio De Janeiro Ltd* (1887) 19 QBD 362 (DC) at 370-371. The term 'common maritime adventure' refers to the interests at risk in a sea voyage, ie (primarily) ship, cargo and freight. See F Rose *General Average: Law and Practice* 2 ed (2005) 9.

[45] It should be noted that later decisions of English courts after the adoption of the York Rules 1864 recognised the common benefit principle in English law. See *Attwood v Sellar* (1880) 5 QBD 286 (CA); *Svendsen v Wallace* [1885] 10 AC 404 (HL). *Cf* chap 7 § III*(b)* infra.

[46] *Société Nouvelle d'Armement v Spillers & Bakers Ltd* [1971] 1 KB 865 at 869.

[47] J Cooke & R Cornah op cit note 28 at 43.

[48] A Parks *The Law and Practice of Marine Insurance and General Average* Vol 1 (1998) 493; R Cornah op cit note 17 at 156.

need to put into a port of refuge to carry out repairs or incur other expenses necessary for the safety of the vessel or for the successful completion of the voyage. Thus, the saving of the common maritime adventure from peril, does not entirely achieve the purpose for undertaking a sea voyage which is to ensure that at least part of the interests at risk arrives at the port of destination.[49] Wilmer J aptly notes that 'for commercial men the objective of a voyage is not safety in a port of refuge but safe arrival at destination.'[50] It is submitted that the importance of both principles is the reason they are recognised by the YAR which brought about uniformity of practice and of these two strands.[51]

(b) Divergent definitions of general average

The divergence in the notion of general average in the English common law and in continental law is reflected in the varied definitions of general average underpinning the nature of sacrifices and expenses that would be regarded as general average acts under these two legal systems and when such sacrifices and expenses will be regarded as general average acts. It is relevant to examine the different definitions of general average in case law, statutes and the YAR in order to draw a comparison on their common features and distinctions. This will also assist in the analysis, later in this thesis, of IUMI's proposal for the redefinition of general average in Rule A YAR 1994.[52]

The classic definition of general average given by an English court is that of Lawrence J in *Birkley v Presgrave*:

> 'All loss which arise in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average and must be borne proportionably by all who are interested.'[53]

The above definition confines general average to the common safety principle. It lays down two conditions for a valid general average act which are that the general average act must be extraordinary, and must be done for the safety of the common maritime adventure.

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[49] G Paulsen op cit note 34 at 1066.

[50] *The Glaucus* (1948) 81 Ll L Rep 263 (Admlty) at 267.

[51] See chap 6 § II*(a)(i)* infra.

[52] See chap 7 § III*(b)* infra.

[53] (1801) 1 East 220 at 228; 102 ER 86 (KB).

The definition does not explicitly provide that the voluntariness[54] and the reasonableness[55] of the sacrifice or expenditure are essential criteria for a valid general average act.[56]

This English common law definition of general average which limits it to the common safety principle was codified in the United Kingdom Marine Insurance Act (MIA) 1906 (hereafter 'MIA 1906'). Section 66(2)[57] MIA 1906 provides that '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 property imperilled in the common adventure.' Thus, unlike in the *Birkley* case, the MIA 1906 explicitly provides that the voluntariness and reasonableness of the act are essential criteria for a valid claim in general average.

A similar definition to the English common law definition of general average as codified in s 66(2) MIA 1906 is contained in Rule A YAR 2004 which provides that '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.' This definition seems to suggest that it is only the common safety principle that is recognised by the YAR. However, an examination of the entire provisions of the YAR will show that the Rules recognise both the common safety and common benefit principles. The numbered

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[54] See chap 2 § IV*(d)* infra.

[55] See chap 2 § IV*(g)* infra.

[56] See Rule Paramount and Rule A YAR 2004.

[57] There are also similar definitions in s 65(2) Canadian MIA 1993; art 2599 Quebec Civil Code 1991; art 469 Italian Navigation Code 1942; art 811 Spanish Commercial Code 1885. In *Austin Friars SS Co Ltd v Spillers & Bakers Ltd* [1915] 1 KB 833 (KB) at 835, Bailhache J stated that the statutory definition in the MIA 1906 must now prevail in English law, a view doubted by some authors on the ground that the Act is only concerned with marine insurance. However, the marine insurance aspects of general average are linked with its other aspects. The Act mainly codified the existing common law and states the principle in broad terms. It needs not be interpreted restrictively. Moreover, according to s 87 of the Act, the provisions of the Act may generally be overridden by agreement or usage and in practice general average is in most cases governed by the YAR. Any variation in nuance between the statutory and other definitions seems therefore to be of minimal, if any, practical importance.

Rules[58] in the YAR cover sacrifices and expenses made for the common benefit of the common maritime adventure.

However, the definition of general average in Rule A YAR 2004 differs from the English law definition in s 66(2) MIA 1906. Under Rule A YAR 2004 a general average act need not necessarily be made when the peril is physically present; provided that the act is undertaken for the purpose of preserving the common maritime adventure from peril which threatens it, or which would threaten it if the act were not performed.

In *Watson v Firemen's Fund Insurance Co of San Francisco*[59] which was a claim under a cargo insurance policy governed by English law pursuant to the MIA 1906, the court held that damage caused to the claimant's goods by steam applied to the hold of a ship to quench a non-existent fire was not a general average loss, since the peril of fire which the master thought to exist, was not present. However, for the position under the YAR, the English court in *Vlassopoulos v British & Foreign Marine Insurance Co* (*The* '*Makis*')[60] held that it was not necessary for the ship to be actually in the grip or even nearly in the grip of the disaster that may arise from the danger. However, the peril must be real and not imaginary and it must be substantial and not merely slight.[61] This decision was based on the YAR 1924 which was incorporated by the parties into the carriage contract.

However, the common benefit principle has been recognised in the definition of general average by United States courts. The United States Supreme Court in *The Star of Hope*[62] defined general average as '… 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 … extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise.'[63] This definition recognises both the common safety and common benefit principle by regarding as general average sacrifices made and expenses incurred for the general (common) benefit of all interests involved in a sea voyage. It provides three conditions for a valid general average act, viz, that the general average act

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[58] The numbered Rules in the YAR 2004 provide for particular cases in general average regarding loss, damage and expense. They are 23 in number (Rules I to XXIII). They have been referred to as the 'canons of practice of the average adjuster.' See J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) 967.

[59] [1922] 2 KB 355. *Cf* chap 2 § II*(b)*, IV*(b)*, VI*(c)* infra.

[60] [1929] 1 KB 187. *Cf* chap 2 § II*(b)*, IV*(b)*, chap 7 § III*(b)*, IV*(b)(ii)* and V*(c)(ii)*(a) infra.

[61] Ibid at 199.

[62] 76 US 203 (1869) (US SCt).

[63] Ibid at 228.

must be voluntarily and extraordinarily made and must be for the benefit of all the parties to the adventure. However, like the definition in the English case of *Birkley*, this definition does not explicitly provide that the reasonableness of the act is an essential criterion for a valid general average act.

It could be argued that early English and American jurisprudence on general average was more concerned with the extraordinary and voluntary nature of a general average act than with the reasonableness of the act in the prevailing circumstances. However, it seems that the reasonableness of the general average acts was not directly in issue in earlier cases on general average in both jurisdictions.

Despite these divergent definitions of general average, it could be inferred that general average, in its broadest formulation, is a doctrine of maritime law that provides for the proportionate sharing by all parties to a maritime adventure of losses incurred where cargo is sacrificed in the event of a peril or expenses incurred for the common benefit of the parties to the adventure. Thus general average could be said to be 'the legal relationship with which maritime law exacts payment from the beneficiaries of the sacrifice or expense to those suffering loss.'[64]

Taking cognisance of the divergence in the definition of general average, the question arises as to whether a supra-national definition of general average is desirable. The varied definitions of general average indicate at least that such a supra-national definition of general average may be possible as the essential conditions for a valid general average act in the English common law and continental law are admittedly similar; the divergence being only the nature of the sacrifice or expense that will be regarded as a general average act. It is argued that a supra-national definition of general average is desirable because of the need to reflect the intention of the maritime community of achieving uniformity in the law of general average.[65] To achieve this uniformity, it is argued that the definition of general average in Rule A YAR 2004 should be amended by substituting the phrase 'common safety' with 'common benefit' to explicitly underscore that the YAR embody both the common safety and common benefit principles. The minimum features of such a definition should be that the general average act should be; (i) extraordinary; (ii) voluntarily and (iii) reasonably made;

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[64] J Hare op cit note 58 at 956.

[65] See chap 6 § II*(a)(i)* infra.

(iv) for the common benefit of the common maritime adventure; and (v) the act must be successful.[66]

III LEGAL SOURCES OF THE LAW OF GENERAL AVERAGE

Analogous to other branches of maritime law, there are different legal sources of the law of general average and these sources supplement one another (where there is a lacuna in any source) in most jurisdictions. As such, more than one source of law on general average could be relied upon in general average adjustments and by the courts in a general average claim. It is therefore relevant to examine these sources to ascertain the circumstances in which they might be relied upon in average adjustments and by the courts in adjudicating a claim on general average.

(a) YAR

The YAR are a uniform code of the principles and practice of general average. The Rules unified the divergent notions of general average under the English common law and continental law.[67] They comprise of the introductory,[68] lettered[69] and numbered Rules. The Rules do not cover the entire principles of general average and all legal questions connected with the subject.[70] They do not have inherent binding force; neither are they a convention nor a treaty.[71] The Rules have to be incorporated into carriage contracts by parties to a maritime adventure or enacted in a statute (as in some countries in Scandinavia)[72] for them to be applicable.[73] Parties who agree to be bound by the YAR are not automatically bound by the

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[66] See chap 2 § IV for a discussion of these features.

[67] R Cornah op cit note 4 at 404. The latest edition of the Rules is the YAR 2004.

[68] The introductory Rules are the Rule of Interpretation and the Rule Paramount.

[69] The lettered Rules state the general principles of the law of general average. See Rules A to G YAR 2004.

[70] *Goulandris Bros Ltd v B Goldman & Sons Ltd* [1958] 1 QB 74 at 80, 91; L Buglass op cit note 27 at 119.

[71] F Rose op cit note 44 at 11.

[72] See chap 5 § V*(b)* infra.

[73] T Falkanger, H Bull & L Brautaset *Scandinavian Maritime Law: The Norwegian Perspective* 2 ed (2004) 466; K Pineus 'The York-Antwerp Rules 1974' (1974) *European Transport Law* 349.

latest edition; as parties are at liberty to choose the version of the Rules that will apply to their contract of carriage.[74]

The YAR are presently the primary source of the law of general average[75] as most general average adjustments globally are made pursuant to the YAR as incorporated by reference in standard carriage contracts which provide that general average shall be adjusted in accordance with a particular version of the YAR.[76] It is estimated that 99 per cent of adjustments[77] globally are made pursuant to the different versions of the YAR.[78] Where a carriage contract contains a particular version of the YAR, any dispute arising therefrom will be adjudicated by the courts based on that particular set of Rules.[79]

Thus, the examination of the principles of the law of general average in this thesis will be primarily based on the YAR because this regime most commonly governs general average adjustments;[80] although it is often supplemented by other sources of the law of general average where there are gaps in the Rules.

(b) Law and custom of trade

Prior to the principles and practice of the law of general average being embodied in the YAR, general average adjustments were governed by the laws and customs of the place where the adventure ended.[81] The law of a place in this context refers to the principles of general average that were embodied in the various medieval maritime laws which governed the

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[74] See *Macieo Shipping Ltd v Clipper Shipping Lines* (*The* '*Clipper Sao Luis*') [2000] 1 Lloyd's Rep 645 (QB) where by virtue of a term contained in a charterparty on the New York Produce Exchange (NYPE) 1946 form, general average was to be adjusted 'pursuant to the YAR 1924 as amended.'

[75] T Falkanger et al op cit note 73 at 465.

[76] For example, clause 15(b) BOXTIME 2004 provides: 'General average shall be adjusted at the place as indicated in Box 31 according to York-Antwerp Rules 1994.'

[77] General average adjustment is the process of determining the amount to be contributed and of apportioning this amount among the various contributing interests.

[78] J Macdonald 'General Average and the York-Antwerp Rules: Common Safety and other Considerations' (2003) 9 *JIML* 439 at 447.

[79] *Alma Shipping Corporation v Union of India* [1971] 2 Lloyd's Rep 494 (QB).

[80] J Tamulski 'Uniformity in the Law of Carriage of Goods by Sea' (1990-91) 3 *University of San Francisco Maritime Law Journal* 105 at 120.

[81] J Cooke & R Cornah op cit note 28 at 46.

adjustment of general average in different maritime states.[82] The customs of trade in this context are the earliest forms of established rules and norms governing merchants and maritime matters.[83]

For a practice to be regarded as a custom of trade it must be regarded as so general and universal in a particular trade to justify expectations that it will be observed in the particular trade.[84] However, a court of law will be reluctant to apply a custom, no matter how general and universal, that seems to be unreasonable or unfair in the eyes of the court.[85] Most of these customs of trade on general average have been embodied in the Rules of Practice of average adjusters associations[86] and such Rules may be applied in adjustments where the YAR are not incorporated in a contract of carriage.[87] However, the Rules of Practice of average adjusters associations are not binding but are of persuasive force and will be applied by the court where it is not shown that 'the particular circumstances are such as to render an adherence to the practice in that case against principle.'[88]

(c) Case law

Court decisions are another source of the law of general average. The courts in different jurisdictions have expounded the principles of general average. For instance, in the United States, as in the United Kingdom, the law of general average is expounded by the courts; taking cognisance of the United States common law and the YAR. The requisite conditions for a general average act in American law were set out and elucidated by the United States Supreme Court in *Barnard v Adams.*[89] The principles enunciated in that case constitute the

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[82] N Bogojevic-Gluscevic 'The Law and Practice of Average in Medieval Towns of the Eastern Adriatic' (2005) 36 *JMLC* 21 at 25.

[83] T Plucknett *A Concise History of the Common Law* (1956) 657; G Paulsen op cit note 34 at 1067.

[84] J Cooke & R Cornah op cit note 28 at 46.

[85] *Attwood v Sellar & Co* (1879) 4 QBD 342 (CA) at 352; K Pineus 'Sources of Maritime Law from a Swedish Point of View' (1955-56) 30 *Tulane Law Review* 85 at 92.

[86] See for eg, the Rules of Practice of the Association of Average Adjusters (AAA), available at www.average-adjusters.com/ROP97.pdf, accessed 10 January 2013.

[87] F Rose op cit note 44 at 12.

[88] *Attwood v Sellar & Co* (1879) 4 QBD 342 (CA) at 352.

[89] 51 US (10 How) 270 (1850) (US SCt). See also *Ralli v Troop* 157 US 15 SCt 657, 39 L Ed 742 (1895) (US SCt).

United States law of general average; which supplements the YAR in the United States where there is a lacuna in the Rules.

Thus, where the YAR are silent on any issue in an adjustment in the United States, the common law of general average in the United States will apply.[90] This is also the position in English law, where the courts have held that the YAR do not constitute a complete or self-contained code and need to be supplemented by bringing into the gaps provisions of the general law which are applicable to the contract.[91] This is also the position in Canadian law.[92]

(d) Statutes

In some jurisdictions the law of general average can be found in statutes. Most Scandinavian countries have periodically enacted various versions of the YAR into statute which governs general average adjustment in their jurisdictions.[93] The incorporation of a version of the YAR in a statute does not necessarily make that version of the Rules mandatorily applicable in general average adjustments in a jurisdiction except where it is expressly provided in the statute; thereby giving that version of the Rules the force of law in that jurisdiction.[94] However, some statutes provide that parties can by contract agree that the general average provisions of the statute will not apply in the adjustment process.[95]

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[90] *Generale Italiana v Spencer Kellogg & Sons Inc* (*The* '*Mincio*') 92 F 2d 41, 1937 AMC 1506 (2nd Cir 1937).

[91] See *Svendsen v Wallace* (1885) 10 App Cas 404 (CA) at 415; *Goulandris Bros Ltd v B Goldman & Sons Ltd* [1958] 1 QB 74 at 80, 91.

[92] *Federal Commerce and Navigation Co Ltd v Eisenerz GmbH* (*The* '*Oak Hill*') [1975] 1 Lloyd's Rep 105 (SCt Can) at 110.

[93] See Norwegian Maritime Code No 39, 24 June 1994, with later amendments up to and including Act no 10, 26 March 2010, available at folk.uio.no/erikro/WWW/NMC.pdf, accessed 23 January 2012.

[94] For eg, the YAR 1994 have been incorporated into the Norwegian Maritime Code 1994 and are made mandatory in adjustments in Norway, thereby giving them the force of law in Norway. Section 461 of the Norwegian Maritime Code provides: 'Unless otherwise agreed, allowance in general average of damages, losses and expenses and the apportionment thereof shall be governed by the York-Antwerp Rules 1994.' However, though the YAR 1994 have been incorporated into the Dutch Civil Code, they are not mandatory. See Article 613, Book 8 of the Dutch Civil Code of the Royal Decree of 5 February 2000, Official Gazette 111.

[95] Section 461 Norwegian Maritime Code 1994.

IV ESSENTIAL CONDITIONS FOR A GENERAL AVERAGE ACT

(a) Introduction

An examination of the nature of general average will be incomplete without a consideration of the essential conditions that are required for a sacrifice or expenditure to be regarded as a valid general average act. This is because these essential conditions are the basic principles of general average reflected in the lettered Rules of the YAR; particularly in Rule A. Thus, one cannot properly analyse the IUMI's proposals for the substantive revisions to the YAR 1994 (particularly its proposed amendment of Rule A)[96] without a thorough grasp of the principles of general average reflected in Rule A. In examining these conditions, the YAR as the major source of the law of general average are relied upon as the main framework of reference. However, it should be noted that the essential conditions of a general average act stated in Rule A YAR 2004 are based on and informed by principles expounded in case law and general maritime law.

(b) Danger

There must be a danger common to the whole adventure.[97] Traditionally this has meant a threat to the physical integrity of the property involved. This conforms to the English common law notion that general average is concerned with the preservation of property.[98] Thus, there must be a danger to the safe prosecution of the common maritime adventure.[99] However, the vessel need not be in the grip of a danger which may arise but it is necessary that actual peril should in fact exist and not a mere apprehension of danger.[100] This was illustrated in *Vlassopoulos v The British & Foreign Marine Ins Co Ltd* (*The* '*Makis*').[101] While the vessel was engaged in loading cargo at Bordeaux, the foremast broke, fell on the

[96] See chap 7 § III*(b)* infra.

[97] *Dabney v New England Mutual Marine Ins Co* (1864) 14 Allen 300 at 310 (Mass).

[98] *Montgomery v Indemnity Mutual Marine Ins Co* [1902] 1 KB 734 (AC).

[99] In *The Barge J Whitney* (1968) AMC 995 (Arb NY): asphalt which had solidified on a barge and was not removable except at enormous expense because of the non-functioning of heating coils, so then of no economic value but capable of having value restored, was not in peril for general average purposes.

[100] *Watson v Firemen's Fund Ins Co of San Francisco* [1922] 2 KB 355.

[101] [1929] 1 KB 187.

main deck and caused a derrick to fall into the hold. The ship was at no time in danger, but she was moved into a wet dock for repairs. After the completion of repairs, the vessel put out to sea and had accident which rendered it unseaworthy necessitating it to put into Cherbourg for necessary repairs for the safety of the adventure. Roche J held that the expenses at Bordeaux were not general average expenditure as the ship was at no time in danger. But the expenses at Cherbourg were general average expenditure because the interests in the adventure were in danger. Elucidating the nature of danger required in the context of general average, Roche J opined that;

> 'It is not necessary that the ship should be actually in the grip or even nearly in the grip of the disaster that may arise from a danger. It is sufficient to say that the ship must be in danger, or that the act must be done in order to preserve her from peril. It means, of course, that the peril must be real and not imaginary. It means that it must be substantial and not merely nugatory.'[102]

What amounts to danger was illustrated in *Corrie v Coulthard.*[103] There was real danger of the main mast, being loose, working through the vessel's bottom. Although the court found that the possibility of this happening was minimal, it was held that the loss incurred in averting that peril was a general average loss. In other words, though the danger was not imminent, it was existent.

Hand J in affirming the necessity for the existence of a danger in the American case of *Navigazione Generale Italiana v Spencer Kellogg & Sons*,[104] observed that while 'imminency' of the peril is not a critical test in determining whether a general average act has occurred, there nevertheless 'must be a fair reason to regard a vessel in peril in order to require contribution in general average.'[105]

It is argued that the 'fair reason' must be based on the facts known to the master in each case. What should be considered is the potential peril rather than the present circumstances the vessel finds herself in, though it has to be stressed in the words of Roche J that the peril

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[102] Ibid at 191. See also *Lawrence v Mintum* (1854) 17 How 100 (US SCt); *Charter Shipping Co Ltd v Bowring Jones & Tidy Ltd* (1930) 36 Ll L Rep 272 (Admlty); *Daniolos v Bunge & Co Ltd* (1938) 62 Ll L Rep 65 (Admlty).

[103] (1877) unreported 3 Asp MLC 546. See also *The Bengloe* (1940) 67 Ll L Rep 307 (Admlty).

[104] 92 F 2d 41 (2nd Cir 1937).

[105] Ibid at 43. See also *Orient Mid-East Lines Inc v SS Orient Transporter* (1974) AMC 2593 (5th Cir).

'must be real and not imaginary … it must be substantial and not merely slight or nugatory.' The cardinal point is the reasonably foreseeable consequence of the prevailing circumstances in which a ship finds herself. The act must also be specifically designed to secure the safety of the particular adventure and not merely of a precautionary nature.[106]

(c) Extraordinary

Generally, in a contract of carriage a shipowner has a duty to do all that is required, in the ordinary course of the voyage, for the safe carriage of the cargo to the port of destination[107] and by doing so is entitled to be remunerated by the agreed freight and nothing more. A party can only claim contributions for general average sacrifices and expenditures if made or incurred for something over and beyond the ordinary duties and expenses of navigation.[108] Thus, a general average sacrifice or expenditure must be made or incurred in order to avoid extraordinary and abnormal perils as distinguished from the ordinary and normal perils at sea.[109]

What will amount to an extraordinary expenditure in general average was illustrated in *Société Nouvelle d'Armement v Spillers & Bakers Ltd.*[110] A captain had hired a tug to tow his sailing ship quickly between two ports during wartime to avoid submarine attacks which were likely to occur and from which he wished to take measures to preserve the ship and cargo. It was usual to hire a tug to take the vessel in and out of port, but the general average was claimed in respect of the intervening voyage. The claim was disallowed by the court on the basis that the expenditure was not extraordinary.

It is submitted that the question to be asked is: was the sacrifice or expenditure truly extraordinary and out of the usual course taking cognisance of the prevailing circumstances or was it within the shipowner's obligation as contemplated under the contract of carriage?

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[106] *The West Imboden* (1936) AMC 696 (EDNY).

[107] *Phelps James & Co v Hill* [1891] 1 QB 605 (CA) at 610; *Kulukundis v Norwich Union Fire Insurance Society* [1937] 1 KB 1 (CA) at 16.

[108] *The Bona* [1895] P 125 (CA) at 134.

[109] *Wilson v Bank of Victoria* (1867) LR 2 QB (QB); *The Bona* [1895] P 125 (CA); *Robinson v Price* (1897) 2 QBD 91 (CA).

[110] [1917] 1 KB 865. See also *Birkley v Presgrave* (1801) 1 East 220; 102 ER 86 (KB).

The distinction between ordinary and extraordinary expenses was also illustrated in *Harrison v Bank of Australasia*.[111] The vessel sprang a leak in a cyclone on a voyage from Melbourne to Great Britain. The vessel was fitted with a donkey-engine for loading and unloading cargo, hoisting sails and for pumping the ship. To save the vessel from foundering, the donkey engine was used continuously throughout the voyage and when the existing supply for bunkers was exhausted, the master was obliged to burn spare spars and ship's stores and to purchase additional bunkers from a passing steamer. Further, the donkey-engine needed repairs by reason of its excessive use. A claim by the shipowner for general average contribution from cargo was allowed in respect of the ship's spars and stores, which truly constituted an extraordinary sacrifice for those items, but not for the cost of the coals consumed or for repairing the donkey engine.

It is argued that presently under the English common law the cost of the additional bunkers purchased would be allowed in general average as it was purchased for the successful completion of the common maritime adventure.[112]

Furthermore, it is argued that an expenditure or sacrifice which has been incurred or made in the fulfilment of a shipowner's contractual obligation could, in appropriate cases, be considered general average expenditure or sacrifice. The common benefit principle relates to mostly expenses incurred by the shipowner at a port of refuge which ordinarily could be said to be expenses incurred by the shipowner based on his obligation to ensure the safe transport of the cargo to the port of destination pursuant to the carriage contract. However, the numbered Rules of the YAR provide instances in which those expenses at a port of refuge that are supposedly the contractual obligations of the shipowner could be allowed in general average.[113]

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[111] (1872) LR 7 Ex 39 (Exch).

[112] See *Attwood v Sellar* (1880) 5 QBD 286 (CA); *Svendsen v Wallace* [1885] 10 AC 404 (HL).

[113] In *The Bijela* [1993] 1 Lloyd's Rep 411 (CA) at 420, Hoffman LJ noted that '… the theory of common benefit … cannot logically be divorced from the contractual rights of the parties. The cargo owners certainly benefit from the temporary repairs which enable the voyage to be completed, but if the owner was under a duty under the contract of carriage to make such repairs, the benefit may be said to be one for which the cargo owners have already paid. On the other hand, there seems to be no rigid principle that sacrifice or expenditure cannot qualify for general average because the owner was under a contractual duty to make it.'

(d) Intentional

The sacrifice or expenditure should be with intent and for the purpose, *causa et mente,* of the preservation of the common maritime adventure.[114] Thus, there must be the will and agency of the person making it.

In *Kemp v Halliday*,[115] Blackburn J remarked that 'in order to give rise to a charge as general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy ….'[116]

What is regarded as an intentional expenditure was illustrated in *Athel Line Ltd v Liverpool and London War Risks Insurance Association*.[117] Two ships sailed in convoy from Bermuda to the United Kingdom but had to sail back to Bermuda under the order of the Commodore of the convoy. Consequently, the two ships consumed extra fuel and stores, additional wages were paid, and the cost of maintaining masters, officers and crews was incurred, together with the expense of entering and leaving Bermuda. The owner's claim for cargo's contribution in general average for these expenses under the YAR 1924 was disallowed by the court as it held that the expenses were as a result of a blind obedience to the lawful orders of a superior authority. Tucker J stated that a general average act must 'be the result of the exercise of reasoning power and discretion, intentionally directed to the particular problem with the freedom of choice in acting in one or two ways.'[118]

It is pertinent to note that Rule A YAR 2004 uses the word 'intentional' while English law and the statutory definition of general average in the MIA 1906 use the word 'voluntary.'[119] The delegates at the 1924 Stockholm Conference[120] argued that the word 'voluntarily' was prone to several interpretations that did not imply quite the same decisiveness as 'intentionally.' After careful deliberation, the Conference elected to adopt the word 'intentionally' in the YAR 1924 to emphasise more clearly the idea of deliberate

[114] *Taylor v Curtis* (1816) 6 Tauton 608, 128 ER 1172 (CCP) at 1177.

[115] [1865] 6 B & S 723, 122 ER 1361 (KB).

[116] Ibid at 746. See also *Papayanni and Jeronnia v Grampian Steamship Co Ltd* (1896) 1 Com Cas 4487 (QB).

[117] [1944] 1 KB 87.

[118] Ibid at 94.

[119] Section 66(1) MIA 1906.

[120] See chap 6 § II*(b)(ii)* infra.

choice.[121] This was also to avoid arguments that an act was not voluntary when it resulted from the overwhelming pressure of the circumstances.[122]

However, it is argued that though the word 'voluntary' may not imply the same decisiveness as 'intentional', the cardinal point is that from a pragmatic point of view, the use of either of the words will distinguish the resultant loss as a result of a general average act from a loss that is entirely accidental in origin which is the fundamental distinction. It would appear that Tucker J in the *Athel* case referred to both intention and voluntariness of the act as intention would be the 'exercise by someone of his reasoning powers' whereas voluntariness would be the 'freedom of choice to decide to act' in one way or another.

(e) Success

Only where the venture as such had been saved by some sacrifice or expenditure short of breaking up the whole venture does the sacrifice or expenditure give rise to a general average claim.[123] The essence of general average is sacrifice or expenditure by one party to preserve all. In *Kemp v Halliday*,[124] Blackburn J noted that 'it is essential that there should be a voluntary sacrifice to preserve more subjects than one.'[125]

The essence of the success of the general average act was illustrated in *Chellew v Royal Commission on the Sugar Supply*.[126] The ship sustained damage to her hull and engines, so the master put into a port of refuge, thereby incurring expenses. After leaving the port of refuge, fire broke out and the ship and its cargo were lost. The shipowner's claim, from the cargo consignees, for contributions for the port of refuge expenses failed as the entire interests at stake were lost.[127]

The decision in the *Chellew* case was premised on the fact that if some property is not saved, there will be no fund from which the contributions can be made and also no

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[121] J Cooke & R Cornah op cit note 28 at 82.

[122] Ibid.

[123] *Pirie & Co v Middle Dock Co* (1881) 44 LT 426 (QB) at 430.

[124] [1865] 6 B & S 723, 122 ER 1361 (KB).

[125] Ibid at 726.

[126] [1921] 2 KB 627.

[127] See also *Columbia Insurance Co v Ashby and Stribling* 38 US (13 Pet) 331 at 338 (1839) (US SCt); *Barnard v Adams* 51 US (10 How) 270 at 303 (1850) (US SCt); *Ocean Steamship Co v Anderson* (1883) 13 QBD 651 (CA) at 662.

contributory value will exist upon which adjustment can be made.[128] Therefore, no liability to contribute in general average will arise. Thus, there must be a saving of at least some of the property in peril.

Of note is that Rule A YAR 2004 does not specify that success is a criterion for a valid general average act. It refers to any extraordinary sacrifice or expenditure that 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.' However, it is submitted that the essence of general average act is the preservation of the common maritime adventure, whether as a whole or in part.[129] Although Rule A YAR 2004 does not explicitly provide for the success of the general average act as a criterion for a valid general average act; it is argued that the requirement for success of the general average act is implied by a combined reading of Rules A and XVII YAR 2004. Rule XVII of the YAR 2004 provides that the contributory value of the parties in general average will be determined based on the values of the various interests at the port of destination. In other words, where no part of the common maritime adventure arrives at the port of destination, there can be no assessment of the contributory values of the parties as there will be no interest to assess its value and thus, no apportionment of contribution in general average.[130]

(f) Common maritime adventure

The loss or expenditure must be made or incurred for the general safety and the preservation of the entire common maritime adventure. Losses incurred or expenses made for the benefit of only one interest in the adventure are not general average.[131] For example, the expenses of lightening a vessel by the removal of cargo to enable her to refloat are general average. However, if in order to secure only the safety of cargo, cargo is removed from a vessel and forwarded to its destination by another vessel, this expense is not allowed as general average.

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[128] See Rule XVII YAR 2004.

[129] *Fletcher v Alexander* (1868) LR 3 CP 375 (CCP).

[130] Art IX of the Rolls of Oléron alluding to the requirement for success of the general average act provides that 'when the vessel *arrives in safety at her port of discharge*, the merchants ought to pay the master their shares or proportions without delay....' (Emphasis added). Thus the safe arrival of the vessel at the port of discharge connotes the success of the general average act.

[131] G Gauci 'Piracy and its Legal Problems: With specific reference to the English Law of Marine Insurance' (2010) 41 *JMLC* 541 at 554.

In *Australian Shipping Commission v Green*,[132] Lord Denning remarked that 'general average arises when the master of a vessel gives something for the sake of all ….'[133]

In *Nesbitt v Lushington*,[134] a stranded ship was in the possession of a mob that would not leave her until they had compelled the master to sell at about three-fourths of its price a quantity of the cargo on board. Lord Kenyon held that '… this is not general average, because the whole adventure was never in peril.'[135]

In *The Brigella*,[136] the vessel was outward bound in ballast to her loading port, so that the only interest at stake was that of the shipowner; the port of refuge expenses on this voyage was held not to be general average as they were made for the benefit of only the shipowner.

However, under English law a general average situation can arise when a vessel is in ballast if she is under a time charter. In such instance, the charterer's bunkers constitute a second interest.[137] Additionally, a vessel sailing in ballast to load cargo under an existing voyage charterparty has the freight at risk under the charterparty. The freight is treated as if it is a physical property and will contribute in general average.[138] It is submitted that in *The Brigella*, the shipowners could not validly claim general average contribution for the cost of repairs at the port of refuge as the repairs were carried out on the vessel's outward voyage while the chartered freight was for the homeward voyage only. Thus, the ship during the outward voyage was the only interest at risk.

American law, in contrast to English law, provides that general average is payable although there had been no cargo on board and only one interest involved in the adventure[139] as 'expenses may be said to have been incurred as much for the interest of the

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[132] [1971] 1 Lloyd's Rep 16 (CA).

[133] Ibid at 19.

[134] (1792) 4 TR 783 (Ch).

[135] Ibid at 787.

[136] [1893] 1 KB 189 (PDA). See also *Dunpont de Nemours & Co v Vance* (1856) 19 How 162 (US SCt); *Kemp v Halliday* (1865) 6 B & S 723, 122 ER 1361 (KB); *Barnard v Adams* (1857) 10 How 270 (US SCt); *McAndrews v Thatcher* (1865) 3 Wall 347 (US SCt); *Anderson v Owen SS Co* [1884] 10 AC 20 (HL).

[137] Clause 8.3 International Hull Clauses (IHC) 2003; Clause 10.3 Institute Time Clauses – Hulls (ITCH) 1995.

[138] Rule B26, Rules of Practice, AAA.

[139] *Potter v Ocean Assurance Co* (1837) 3 Sumner 27 (CCDM).

underwriter.'[140] This view has been cited with approval in an English case,[141] although it has not been followed in any subsequent decisions of English courts.[142]

The author agrees that a maritime adventure does consist of the insurer's interest[143] as well as other interests. However, it should be noted that in mercantile language the elements of a marine adventure are referred to as 'the interests' while in the case of marine insurance the subjects insured are referred to as 'the interests insured.' In terms of s 66(2) MIA 1906, a general average act must be made 'for the purpose of preserving property imperilled in the common adventure' and not 'for preserving the interests imperilled in the common adventure.' It would be more tenable if a common carriage adventure is considered as consisting of three 'properties'; ship, cargo and freight. Each of these properties may have parties interested in it (such as insurers); nevertheless, for general average purposes each one is meant to be one property. Thus, it is argued that considering the interests interested in a maritime property, such as insurers, for the purposes of general average is a misconception of the principle of general average that applies to maritime property.

(g) Reasonableness

The sacrifice or expenditure must be reasonable and any sacrifice must be advisable or prudent with respect to the prevailing circumstances. Rule A of the YAR 2004 provides that the sacrifice or expenditure must be 'reasonably made or incurred.'[144] The requirement of the reasonableness of the general average act is also provided in s 66(2) MIA 1906.

The requirement for the reasonableness of the general average act was stated by Tucker J in *Athel Line v Liverpool & London War Risks Association Ltd*.[145] Expense was incurred for bunkers and victuals on a voyage where the ship sailing in convoy from Bermuda to Great Britain had been ordered by the Commodore in command to return to her sailing port because another convoy, ahead and also homeward bound, was attacked by an enemy raider and their escort vessel and others sunk. Tucker J held that the expenditure had been incurred as a result

[140] Ibid at 34, per Story J.

[141] *Montgomery & Co v Indemnity Mutual Marine Insurance Co* [1902] 1 KB 34.

[142] J Cooke & R Cornah op cit note 28 at 107.

[143] See chap 3 § III infra for the examination of the interaction between general average and marine insurance in the re-apportionment of maritime risk and loss.

[144] See also s 66(2) MIA 1906.

[145] [1944] 1 KB 132.

of the master's blind and unreasoning obedience to the lawful orders of a superior authority and was thus not recoverable as general average. In construing the wording of Rule A YAR 1924 in the above case, Tucker J was of the view that 'the language is quite inappropriate to describe the blind and unreasoning obedience of a subordinate to the lawful orders of a superior authority.'[146]

However, in *Corfu Navigation Co v Mobil Shipping Co Ltd* (*The* '*Alpha*'),[147] Hobhouse J assessed the master's conduct based on the master's knowledge of the prevailing circumstances. Commenting on the unreasonable act of the master, Hobhouse J noted that the master did not direct his refloating attempts having regard to what 'he knew about the position of the vessel.'[148] He further stressed that the master 'had obtained tidal information over the radio'[149] but failed to 'time his refloating attempts as to take advantage of the period of high water.'[150]

In determining what is reasonable, it is argued that it is the conduct of the master in all the circumstances and pressures of the casualty which must be considered. It is further argued that Tucker J in his decision in the *Athel Line* case overstretched the requirement of reasonableness as the master at the time of obeying the lawful order (as confirmed by the court) had 'no means of assessing the degree of risk'[151] inherent in obeying the said order and had no practical alternative than to obey the order of a superior authority.[152] It is argued that the master's conduct was not assessed by Tucker J based on facts within the master's knowledge or of which he ought to have had knowledge of at the material time.

The Rule Paramount YAR 2004 in emphasising the requirement for the reasonableness of the general average act provides that 'in no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred.' It could be argued that the Rule Paramount by using the wording 'in no case' has made the reasonableness of the act the paramount requirement for a valid general average claim under the YAR.

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[146] Ibid at 136.

[147] [1992] 2 Lloyd's Rep 515 (QB).

[148] Ibid at 517.

[149] Ibid at 519.

[150] Ibid at 520.

[151] Ibid.

[152] In *The Gratitudine* (1801) 3 C Rob 240 (HL), the master hypothecated ship and cargo to a money lender on most onerous terms. The loss under the contract was held to be general average since the master had no practical alternative than to accept the contract.

V THE BASIS OF GENERAL AVERAGE AND THE NATURE OF THE CAUSE OF ACTION ARISING FROM THE OBLIGATION TO CONTRIBUTE IN GENERAL AVERAGE

In analysing the nature of general average, a pertinent question arises as to the basis of general average. What underlying principle of law or policy underpins the obligation to contribute in general average and what is the nature of the cause of action that arises from such an obligation to contribute in general average? It seems that there is no all-encompassing answer to this question. Several explanations have been suggested in this regard by jurists and scholars alike but a universally accepted view on the subject still remains elusive.[153] However, this research will only analyse a few of the suggestions (as they numerous) of the basis of general average.

Schoenbaum asserts that the basis of contribution in general average was to avoid the unjust enrichment of the party whose interest was saved by the general average act.[154] This assertion is supported by Rose who argues that 'general average appears to be part of the law of restitution for unjust enrichment although with its own specialised rules.'[155] It could be argued that by sacrificing a certain part of a community of interest to save the rest, a benefit has been conferred on the part saved;[156] as such the part saved has to contribute towards restoring the value of the benefit to the owners of the sacrificed part. However, this assertion of the basis of general average is flawed because unlike in the law of restitution for unjust enrichment,[157] the measure of a contributor's liability in general average is not the amount of benefit he has received from the claimant but a proportion of the claimant's loss. Furthermore, the law of unjust enrichment is primarily concerned with corrective justice by restoring economic benefits for the retention of which there is no legal justification, to the person or institution at whose expense they were obtained.[158] However, the law of general

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[153] D Muller 'As much upon Tradition as upon Principle: A Critique of the Privilege of Necessity Destruction under the Fifth Amendment' (2006) 82 *Notre Dame Law Review* 481 at 520; J van Niekerk *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800* Vol I (1998) 74.

[154] T Schoenbaum op cit note 2 at 254.

[155] F Rose op cit note 44 at 8.

[156] *The Winson* [1982] AC 939 (HL) at 961.

[157] See F Rose 'General Average as Restitution' (1997) 113 *Law Quarterly Report* 569, for the similarities between general average and the law of unjust enrichment.

[158] D Visser *Unjustified Enrichment* (2008) 4.

average embodied in the Rhodian Sea Law[159] does not lead to such a conclusion as the basis of general average contribution. Rather, contribution seems to be on the basis of equity and fairness, as the losses were incurred by the parties for the benefit of all.[160] The contribution in general average is not primarily intended to correct any unjust enrichment on the part of the party who benefitted from the losses of others, but for a measure of equitable equalisation of the loss suffered in the preservation of the adventure.[161]

The contribution in general average is also not based on tort as compensation in general average to make good the loss of a party is not based on the wrongdoing of any party[162] and therefore does not give rise to a tortious claim. It has long been established that questions of alleged fault are kept outside the right to general average contribution.[163] The issue of fault only arises after the adjustment process with respect to any remedies or defences that may be available to a party who was not at fault.[164]

Could it then be said that general average is based on the principle of agency between the master and the interests at risk? In the circumstance when the vessel is in danger, it could be argued that the master being the authorised agent of the shipowner has a duty and an extended authority in perilous circumstances[165] to act to safeguard the shipowner's interest in the vessel[166] and to fulfil the terms of the shipowner's carriage contract with the cargo owners. The master could also be presumed, in perilous circumstances, to be an agent of necessity on behalf of cargo owners to protect their cargo though there is no contractual relationship between the master and the cargo owners.[167] Alluding to this agency relationship as the basis of general average, Lord Stowell in *The Gratitudine*[168] referred to the master in circumstances of danger to the common maritime adventure as 'an agent and supercargo.'[169]

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[159] *Cf* chap 2 § II supra.

[160] R Zimmermann op cit note 29 at 407.

[161] *Simonds v White* (1824) 2 B & C 805, 107 ER 582 (CA) at 584.

[162] F Rose op cit note 157 at 570.

[163] *Goulandris Bros Ltd v B Goldman and Sons Ltd* [1958] 1 QB 74 at 107.

[164] Rule D YAR 2004; *Morrison SS Co v Greystoke Castle* (*Cargo Owners*) (*The* '*Cheldale*') [1947] AC 265 (HL). *Cf* chap 3 § II*(b)* infra.

[165] *Morrison SS Co v Greystoke Castle* (*The* '*Cheldale*') [1947] AC 265 (HL) at 281.

[166] J van Niekerk 'Of Ships' Masters, Maritime Salvors, Agents of Necessity, and Negotiorum Gestores' (2002) 14 *South African Mercantile Law Journal* 626-630.

[167] Ibid.

[168] (1801) 3 C Rob 240 (HL) at 257.

[169] Ibid at 260.

In *The John Perkins*,[170] Curtis J stated that he considered that '… the master, in case of necessary voluntary sacrifice to escape peril, was acting as the authorised agent of all concerned in the common adventure.'[171] Articles VIII and IX of the Rolls of Oléron seem to suggest that the master is bound as an agent to act on behalf of the parties to the adventure to safeguard their interests in times of peril to the adventure. Article VIII, in particular, uses the wording 'it being in this case my duty', connoting a duty on the master, coupled with the requisite authority, to perform a general average act in perilous circumstances on behalf of the interests at risk. However, it is argued that even if the agency theory is accepted to explain the basis of a general average act by a master, it does not explain the basis of general average contribution amongst co-adventurers for the re-distribution of risk and losses.

It has also been suggested that contribution in general average arises from an implied contract to contribute by the parties to the adventure.[172] Parties could be said to have implied in their carriage contract, in the absence of express terms, for the obligation on them to contribute in general average as the general average act was done to protect their interests. In *Wright v Marwood*,[173] Bramwell J remarked that from the way general average is claimed 'it would seem to arise from an implied contract *inter se* to contribute by those interested.'[174] However, it is argued that this is a flawed proposition as to the basis of general average. Again an examination of the Rhodian Sea Law and the subsequent sea codes[175] that embody the law of general average does not support the notion that contribution is based on an implied contract between the parties but seems to be based on equity as a result of the exigency of the perilous circumstance the vessel finds herself in.[176] Even if an implied agreement can be read into a contract of carriage, it merely explains the relationship between

[170] (1882) 3 Ware 87 at 97 (DC Mass).

[171] See also *The Hamburg* (1864) 2 Moo PCC (NS) 289 (Admlty) at 321.

[172] *Anderson v Ocean SS Co* (1884) 10 App Cas 107 (HL).

[173] (1881) 7 QBD 62 (CA).

[174] Ibid at 67. See also *Anderson v Ocean SS Co* (1884) 10 App Cas 107 (HL) at 155.

[175] See arts VIII and IX of the Rolls of Oléron; art XXVI Ordinances of Trani.

[176] *Burton v English* (1883) 12 QBD 218 (CA) at 220. In *The Evje* [1973] 1 Lloyd's Rep 509 (CA) at 515, Denning MR stated that contribution in general average arises out of the perils encountered in carrying out the contract of carriage and not out of the contract itself.

the master (on behalf of the shipowner) and the cargo owners and does not explain the contribution in general average between the cargo owners.[177]

However, in contemporary practice, it is argued that the basis of general average and the nature of the cause of action that arises for a general average contribution is contractual; as contribution is mostly based on general average clauses in contracts of carriage incorporating a version of the YAR. In *Alma Shipping Corporation v Union of India*,[178] where the YAR 1950 were incorporated into the charterparty, the court held that since the YAR were incorporated by contract, the claim was clearly a dispute arising under the charterparty and therefore contractual. This decision was subsequently approved by the House of Lords in *Union of India v EB Aaby's Rederi A/S.*[179]

Based on the foregoing, it is argued that in the absence of express contractual provisions governing the adjustment of general average in the contract of carriage, a claim for general average contribution is not based on an implied contract, tort, agency or unjustified enrichment, but seems to be based on equity[180] and to give rise to a claim that is *sui generis*.[181] However, if the contract of carriage between the parties incorporates the YAR or makes other provision relating to general average, the claim for contribution will be contractual.

VI GENERAL AVERAGE AND RELATED LEGAL CONCEPTS DISTINGUISHED

(a) Introduction

Though a unique feature of maritime law, certain characteristics of general average as a concept that pertains, among other things, to peril at sea and as a distributing device for

[177] Other bases for general average that have been propounded by commentators and jurists include mercantile custom, operation of law, convenience, utility, natural justice, public law, etc. See F Rose op cit note 44 at 6-7.

[178] [1971] 2 Lloyd's Rep 494 (QB).

[179] [1975] AC 797 (HL) at 808. See also *Castle Insurance v Hong Kong Shipping Co* [1984] AC 226 (PC) at 233.

[180] *Burton v English* (1883) 12 QBD 218 (CA) at 220-221; *Austin Friars SS Co v Spillers and Bakers* [1915] 1 KB 833 (CA) at 837; *Tate & Lyle Ltd v Hain Shipping Co* (1934) 39 Com Cas 259 (CA) at 280.

[181] *Falcke v Scottish Imperial Insurance Company* [1886] 34 Ch D 234 (CA) at 248; J Hare op cit note 58 at 958.

maritime risk and loss suggest that it may be similar or related to certain other legal concepts. Distinguishing general average from some of these related concepts, such as particular average and salvage, is apposite in this thesis with regard to analysing what sacrifices and expenses would be regarded as particular average or as general average under the YAR 2004 by virtue of the changes introduced by the Rules[182] and for the analysis of the IUMI's proposal for the revision of Rule VI YAR 1994 on salvage remuneration respectively.[183]

(b) General average and particular average

Particular average loss is a partial loss of the subject matter insured caused by a peril insured against[184] and concerns only the owner of the property concerned. It has been described as a loss arising from damage accidentally and proximately caused by the perils insured against to some particular interest, as the ship alone or the cargo alone.[185] Common examples of particular average on a ship are collision damage,[186] damage caused by stranding[187] and heavy weather damage.[188] Particular average damage to cargo includes damage by sea water entering the vessel in heavy weather.[189] Under a freight policy, particular average damage can arise when there is a partial loss of the freight brought about by failure to deliver part of the cargo; where the freight is to be earned on delivery of the cargo at the port of destination.[190]

General average loss differs from particular average loss in that general average loss is incurred for the interests of all the parties in a sea adventure and contribution is made by all the parties to make good the loss. Particular average instead of being contributed by all the parties interested in the adventure falls entirely upon the particular owner of the property which has suffered damage. Where such owner is insured, he has a claim against his insurers in proportion, first, to the degree by which the value to him of the property insured has been

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[182] See chap 4 infra.

[183] See chap 7 § III*(d)* infra.

[184] Section 64(1) MIA 1906. See also s 63(1) Canada MIA 1993.

[185] J Gilman, R Merkin, C Blanchard & M Templeman *Arnould's Law of Marine Insurance and Average* 18 ed (2013) 1410.

[186] *The Niobe* [1891] AC 401 (HL).

[187] *Letchford v Oldham* (1880) 5 QBD 538 (CA).

[188] *The Miss Jay Jay* [1985] 1 Lloyd's Rep 264 (QB).

[189] *Hedburg v Pearson* (1816) 7 Taunton 154 (CCP).

[190] *United States Shipping Co v Empress Assurance Corporation* [1907] 1 KB 259 (CA).

diminished by the damage and second, to the sum which the insurer has agreed to insure the property under the policy.[191]

General average is, therefore, an exception to the principle of particular average that losses lie where they fall as the losses are distributed rateably among parties involved in a maritime adventure.

(c) General average and salvage

Salvage, though a concept that is distinct from general average shares certain similarities with general average; as such an examination of the similarities and differences between both concepts is appropriate in understanding the divergence in the English common law and the law of most maritime states on the re-apportionment of salvage expenditure in general average.[192] For the purposes of this discussion, salvage could be stated to be a voluntary[193] assistance rendered to a maritime adventure[194] or to life[195] in danger[196] by a stranger to the adventure.[197]

The primary similarity between the two concepts is that for a property to be a subject of both general average and salvage, it must be in danger. Though this is a similarity, there is however a distinction in the meaning of danger under the law of general average and the law of salvage. Commenting on the requirement of danger in salvage, Dr Lushington in *The Charlotte*[198] stated that 'all services rendered at sea to a vessel in danger or distress are salvage services … it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the

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[191] Ibid.

[192] This divergence is discussed in chap 4 § II*(a)(i)* infra.

[193] See *The Neptune* (1824) 1 Hagg 227 (Admlty); *The Albionic* (1942) 72 Ll L Rep 91 (CA); *The Sandefjord* [1953] 2 Lloyd's Rep 557 (Admlty).

[194] The term 'maritime adventure' in this context relates to maritime properties ie ship, cargo, freight, ship's apparel and wreck. See R v Two Casks of Tallow (1837) 3 Hagg 294 (Admlty).

[195] See *The Trelawney* (1801) 3 C Rob 216 (Admlty), *The Cargo ex Sarpendon* (1877) 3 PD 28 (PDA).

[196] See *The Charlotte* (1848) 3 W Rob 68 (Admlty); *The Helmsman* (1950) 84 Ll L Rep 207 (Admlty).

[197] *Cf* chap 2 § II*(b)* supra for the discussion on the definition of general average.

[198] (1848) 3 W Rob 68 (Admlty). See also *The Strathnaver* (1875) 1 App Cas 58 (PC); *The Cynthos* (1937) 58 Ll L Rep 18 (HL).

services were not rendered.'[199] Dr Lushington expounded this requirement in *The Phantom*:[200]

> ' … It is sufficient if there is a state of difficulty and reasonable apprehension … I think the removing of a vessel from apprehended danger and real danger, does partake of the character of salvage service.'[201]

However, in general average, as pointed out in *Watson v Firemen's Fund Insurance Co of San Francisco*,[202] the mere apprehension of danger by a master of a ship where no danger existed does not give rise to a general average claim. Such apprehension of danger would however suffice in a claim for salvage[203] if the master of the vessel had received salvage services based on his reasonable apprehension of danger.[204]

Another similarity between salvage and general average is that the property in peril must be saved for there to be a reward or a contribution respectively. In relation to salvage, Dr Lushington in T*he India*[205] noted that 'unless the salvors by their services conferred actual benefit on the salved property they are not entitled to salvage remuneration.'[206] Thus, the property which is in danger must be saved by the exertions of the persons engaged in the salvage for there to be a salvage reward. The International Convention on Salvage 1989 (hereafter 'Salvage Convention 1989') also provides that only 'salvage operations which have had a useful result give rise to a reward.'[207] Similarly in general average, there must also be at least a partial saving of the interests in danger for there to be a general average contribution. In *Fletcher v Alexander*,[208] Bovill J stated that 'if after the jettison … the

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[199] *The Charlotte* (1848) 3 W Rob 68 (Admlty) at 72.

[200] (1866) LR 1 A & E 58 (Admlty).

[201] Ibid at 60.

[202] [1922] 2 KB 355 (KB). *Cf* chap 2 § II*(b)*, IV*(b)* supra.

[203] J van Niekerk 'Salvage and Negotiorum Gestio: Exploratory Reflections on the Jurisprudential Foundation and Classification of the South African Law of Salvage' (1992) *Acta Juridica* 148 at 156.

[204] In the American case of *The Pendragon Castle* 5 Fed Rep 56 (2nd Cir 1924) a salvage award was made when the only danger was an incompetent and apprehensive master.

[205] (1842) 1 Wm Rob 406 (Admlty).

[206] Lord Philimore in *The Melanie v The San Onofre* [1925] AC 246 (HL) at 251, referred to 'meritorious contributions towards success' as a prerequisite for a salvage reward.

[207] Article 12 Salvage Convention 1989.

[208] (1868) LR 3 CP 375 (CCP).

remainder of the goods are totally lost and so no benefit accrues to the owners of the other goods from the jettison, no contribution can be claimed.'[209] Thus, there must be a successful outcome of both the salvage and general average act for there to be a fund from which the successful act would be rewarded or contributions made respectively. Another similarity is that, if successful, the exertions made to save the property in danger create a legal right to charge the saved property to pay a reward to the salvor or make a contribution in general average.

However, the similarities between the two concepts end here as the nature of the right and time at which the right can be exercised differ. In salvage, the exertions to be rewarded are those of persons who are volunteers (strangers) to the common venture. This is because the equitable basis of salvage is to encourage 'disinterested outsiders without any particular relation to a ship in distress.'[210] In contrast, in general average it is the duty of those on board the ship to exert themselves for the safety of the interests involved in the common maritime adventure. Another distinction between the two concepts is that the time and place of assessment of the values of the interests which have been saved differ under salvage and general average. In salvage, the values of the interests that were at risk are assessed at the time and place where the salvage services end,[211] whereas in general average the values are assessed at the place where the common maritime adventure ends.[212]

(d) General average and maritime partnership

The communal risk sharing characteristic of general average suggests that general average may bear comparison with communal risk sharing device of maritime partnership. The notion of maritime partnership was employed in medieval maritime trade.[213] The earliest forms of maritime partnership that existed during the medieval period were the *commenda* and its later variation known as the *De societas marias*.[214] The *commenda* usually involved an investing partner (the *commendator*) providing investment capital for a managing or travelling partner

[209] Ibid at 401.

[210] *The Neptune* (1824) 1 Hagg 227 (Admlty) at 236.

[211] *The George Dean* (1857) Swa 290 (Admlty) at 291.

[212] Rule XVII YAR 2004.

[213] M Brower 'Managing Uncertainty through Profit Sharing Contracts from Medieval Italy to Silicon Valley' (2005) 9 *Journal of Management and Governance* 237 at 240.

[214] Ibid.

(the *commendatorius*) for a maritime adventure to be undertaken by the latter.[215] The travelling partner contributed labour and skill and was obligated by the *commenda* agreement to repay the invested capital together with a certain percentage of the profit only upon the successful completion of the adventure.[216] The investing partner alone bore the risk of the loss of the invested capital though such partner shared in a pre-determined fixed share of the profits of the adventure if successful. The travelling partner did not share in the loss of the capital but was entitled to a share of the profit.[217] The later variation of the *commenda* known as the *De societas marias* involved two or more partners pooling resources[218] for a venture with one or more of the partners continuing to provide skill and labour.[219] Unlike the *commenda*, both or all partners bore the risk of the loss of the invested capital.[220]

General average is akin to the *De societas marias* in that they are not primarily risk transferring devices as they involve the spreading of risk amongst co-adventurers and not an independent transfer of risk to an uninvolved third party. Furthermore, both involve the communal sharing of risk amongst parties to a common maritime adventure. However, the communal sharing of risk in *De societas marais* was based on a pre-existing contract as the parties could 'agree amongst themselves as to the proportion of risk and profit each person would assume *vis-à-vis* the other parties.'[221] Whilst in general average the communal liability to share the risk of the adventure arises automatically by the exposure of the various interests in a ship to a common risk and the parties contribute rateably for losses or damages suffered on the basis of the value of their interests at the end of the adventure and not on the basis of a pre-existing agreement between the parties.

Furthermore, general average, unlike the *De societas marais,* generally does not involve the sharing of profit amongst the parties to the venture but the sharing of risk of the loss of a certain part of the community for the preservation of the rest of the community. However, it could be argued that the sacrifice of cargo or the incurring of expenses to ensure

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[215] J van Niekerk op cit note 153 at 54.

[216] Ibid.

[217] Ibid.

[218] R Zimmermann op cit note 29 at 451; D Daude 'Societas as Consensual Contract' (1938) 6 *Cambridge Law Journal* 391 at 393.

[219] E Anderson 'Risk, Shipping and Roman Law' (2009) 34 *Tulane Maritime Law Journal* 183 at 198.

[220] Ibid.

[221] Ibid.

the suffering of less damage to the common maritime adventure could be seen as a form of profit in general average.

VII CONCLUSION

At its inception, general average as a device for spreading maritime risk and loss amongst co-adventurers[222] was restricted to sacrifices made for the safety of the common maritime adventure and this notion of general average became the basis of the common safety principle in English law. As the concept of general average evolved it was extended in continental law to include acts done for the successful completion of the voyage, thus giving rise to the common benefit principle. This extended notion of general average is exemplified in the YAR which are presently the major source of the law of general average as they govern most general average adjustments globally.[223]

Several explanations have been advanced as to the jurisprudential basis of general average and consequently the nature of the cause of action that may arise for a contribution in general average, but a universally accepted and satisfactory explanation remains elusive.[224] Despite the divergence of opinions, the preponderance of judicial decisions seems to suggest that where the contract of carriage incorporates any version of the YAR, contribution in general average will be based on contract.

Though general average is a unique feature of maritime law that is independent of other areas of maritime law, it shares certain similarities with other legal concepts; although it arises automatically as a result of the community of risk that exists between parties to a maritime adventure.

Presently, though general average is an independent branch of maritime law, there is an interaction between it and marine insurance in the re-apportionment of general average risk and loss where parties are insured against general average loss and where there liabilities to contribute in general average are insured. This interaction ‘drives’ the present general average system. Thus, a clear understanding of the interaction between general average and marine insurance is relevant for a proper analysis of what would have been the likely effects of the changes introduced by the YAR 2004 on the general average system if the Rules had

[222] K Pineus & I Sandström ‘The Hamburg Rules from an Average Adjuster’s Point of View’ (1978) 58 *Nordisk Försäkringstidskrift* 163 at 165.

[223] T Falkanger et al op cit note 73 at 465.

[224] J van Niekerk op cit note 153 at 74.

gained widespread use in the industry. It also explains the reason for the seeming tension between cargo insurers and shipowning interests on what should be allowed in general average as epitomised in IUMI's proposals for the revision of the YAR 1994. This interaction is discussed in the next chapter of this thesis.

CHAPTER 3 ALLOCATION OF RISK OF GENERAL AVERAGE IN THE MARITIME INDUSTRY

I INTRODUCTION

This chapter examines the allocation of risk of general average in the maritime industry prior to the existence of marine insurance and the present interaction between general average and marine insurance in the re-allocation of general average risk and loss. This is to show the pivotal role marine insurers play in the re-allocation of the general average risk and loss of an insured party in the general average system. It is also to show that marine insurers by insuring the general average risk of parties and taking the assured's place, with regard to any rights it may have against third parties, by the doctrine of subrogation have an active interest in the general average system and any proposed revision of the YAR.

The interaction between general average and the principles of carriage of goods by sea is also examined to show how the principles of carriage of goods impact on the re-allocation of general average risk and loss because general average mostly applies to carriage of goods by sea and the carriage contract is the vehicle by which the YAR apply. This chapter aims to provide the basis for analysing, later in the thesis, what would have been the likely insurance and carriage implications/effects of the changes introduced by the YAR 2004[225] on the general average system, particularly with regard to the transference of risk and cost of general average amongst cargo insurers, shipowning interests and hull insurers, if the Rules had gained widespread use in the maritime industry. This will provide the basis for showing which interest is more favoured by those changes and why shipowning interests are opposed to the incorporation of the YAR 2004 in carriage contracts.[226]

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[225] See chap 4 infra.

[226] See chap 5 infra.

II THE INTERACTION BETWEEN GENERAL AVERAGE AND THE PRINCIPLES OF CARRIAGE OF GOODS BY SEA IN THE RE-ALLOCATION OF RISK AND LOSS

(a) Introduction

Carriage of goods by sea is, and always has been the most significant maritime venture in which general average principles find application,[227] and it is also that contracts of carriage by sea are generally the setting for agreement that the YAR,[228] and the specific revision of those Rules will apply to most general average adjustments. Aside from these links between general average and the carriage of goods by sea, there is a further link that is relevant to a consideration of the allocation of risk of general average loss and that is that breach of the contract of carriage may have implications for claims in general average. It is this link that falls to be considered as follows.

(b) The role of fault in the redistribution of risk of general average

(i) Introduction

As noted by leading commentators, the importance of carriage principles in the context of general average is that the question may arise whether the incident that gave rise to the sacrifice or expenditure was caused by a party's actionable fault.[229] Another question which also frequently arises is whether the adventure has been or might be frustrated by damage to the ship or cargo or by delay.[230] This chapter will consider the first question as it plays a

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[227] F Rose op cit note 44 at 20; *Union of India v EB Aaby's Rederi A/S* [1975] AC 797 (HL) at 808; *Morrison SS Co v Greystoke Castle* [1947] AC 265 (HL) at 310; *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234 (CA) at 248-249.

[228] *Federal Commerce and Navigation Co Ltd v Eisenerz G.m.b.H (The 'Oak Hill')* [1970] 2 Lloyd's Rep 332 (Can Ct) at 342; F Rose op cit note 44 at 7.

[229] J Cooke & R Cornah op cit note 28 at 20.

[230] Ibid. The effect in general average of frustration of the carriage contract is examined later in this work. See chap 7 § V*(b)(ii)* infra.

pivotal role in determining the re-apportionment of risk and cost of general average amongst co-adventurers through general average contributions.[231]

The relevant fault is that of a party to the common maritime adventure in causing the peril that necessitates the general average sacrifice or expenditure. A common example would be the failure of a carrier to provide a seaworthy vessel at the commencement of the carrying voyage and that unseaworthiness causes the vessel to get into difficulty that threatens the safety of the common venture during the voyage necessitating making a general average sacrifice or incurring a general average expense. In this scenario the question that falls to be considered is whether the fact that a party's fault brought about a threat to the safety of the common venture has any implications for general average claims that might be made and if so, what those implications might be.

(ii) YAR

Rule D of the YAR 2004 makes it clear that any general average act necessitated by a threat to the safety of the common maritime venture, whether that threat to safety of the common venture was caused by the act of a party to the venture or not, retains its character as a general average act. It follows that such general average act is the basis for a declaration of general average and adjustment of claims for contributions by the parties to the venture would generally follow the normal course.[232]

The Rule further provides, however, that the fact that a general average sacrifice or expenditure retains its general average character as such does not affect claims against the party at fault in causing the threat necessitating the general average sacrifice or the defences that a party may have to claims for general average contribution.[233]

(iii) Effect of Rule D

What Rule D seeks to achieve is to separate questions of fault from general average adjustment but to allow such questions of fault to be considered specifically in relation to

[231] *Goulandris Bros v B Goldman & Sons Ltd* [1958] 1 QB 74 (QB) at 93.

[232] This reflects the position under the English common law. See *Greenshields, Cowie & Co v Stephens & Sons Ltd* [1908] AC 431 (CA); *Strang Steel & Co v A Scott & Co* [1889] 14 AC 601 (PC); *Baumwoll Manufactur v Gilchrist* [1893] 1 QB 253 (CA).

[233] *Goulandris Bros v B Goldman & Sons Ltd* [1958] 1 QB 74 (QB) at 106.

claims for contributions following the adjustment.[234] In other words, the loss or expense of a party whose fault causes the common adventure to be in peril necessitating the general average act is included in the general average adjustment, but that party is precluded from recovering any claim to a contribution from any participant in the general average adjustment who has an action, whether in contract or tort, against such first party at the time of the general average act for recovery of loss attributable to the first party's fault.[235] Thus, under Rule D each party's general average contribution is calculated without considering fault, but the existence of fault affects a party's obligation to obtain the calculated contribution towards the redistribution of its general average loss or expenditure amongst the co-adventurers.

So the general average adjustment and recovery process proceeds as usual subject only to the difference that the party whose fault brought about the threat to the safety of the common venture necessitating the general average act is not entitled to a contribution to its general average losses suffered or expenses incurred from any other party to the common venture who at the time the general average act was done, had a claim for damages against such party based on the party's fault, whether in contract or in tort.

(iv) Implications for allocation of risk

The implications of this Rule for the allocation of risk are restricted to any rights to contribution the party at fault has against any person involved in the common maritime adventure who has an action for recovery of damages based on the fault of the person who would otherwise be entitled to contribution for its personal losses. Barring the party at fault

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[234] Pearson J elucidating the effect of Rule D in *Goulandris Bros v B Goldman & Sons Ltd* [1958] 1 QB 74 (QB) at 93, stated that 'the manifest object of Rule D is to keep all questions of alleged fault outside general average adjustment and to preserve unimpaired the legal position at the stage of enforcement … the first part refers to the right to contribution in general average as they will be set out in the average adjustment and these are properly and naturally called "rights" because normally the holder of such rights is entitled to receive payment. But the second part of the Rule provides that the first part is not to prejudice remedies for fault.' A similar view was held in the Norwegian case of *ND 1995.72 FSC KARELIA*, where the court held that Rule D does not require the adjustment to take account of the unseaworthiness question; this question should instead be dealt with in connection with the claim for general average contribution.

[235] *Goulandris Bros v B Goldman & Sons Ltd* [1958] 1 QB 74 (QB) at 93.

from claiming a contribution from such persons, results in such party having to bear the loss it suffered from its general average sacrifice, unless it can recover same from its insurer.[236]

Furthermore, other parties involved in the adventure are entitled to any remedies they might have in law against the party who was at fault.

(c) The place of the carriage contract in the re-allocation of maritime risk

(i) Introduction

The relevance of the carriage contract is that its breach may provide the basis for fault based action for recovery and as pointed out earlier, the YAR only have effect through their incorporation by reference in carriage contracts.[237] Thus, it is relevant to consider the contractual obligations that may arise under a carriage contract, the breach of which might have an impact on the redistribution of general average risk and loss.

(ii) Contractual obligations

Most carriage contracts contain express terms agreed by the parties that specify their obligations under the carriage contract, breach of which will result in a breach of the carriage contract. For example, such obligations include the carrier's obligation to provide a seaworthy vessel at the commencement of the voyage and the cargo owner's obligation not to load undeclared dangerous cargo. However, every carriage contract is negotiated against a background of custom and commercial usage from which certain obligations are implied which are automatically incorporated into the contract in the absence of agreement to the contrary.[238]

In contracts of carriage which are governed by any of the international carriage regimes (the Hague, Hague-Visby, Hamburg and Rotterdam Rules) the scope and application of some of these implied obligations have been modified and extended in some respects while the ability of the parties to exclude or limit their liability by mutual consent has been restricted

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[236] The shipowner will usually recover such loss from its Protection and Indemnity (P&I) Club while cargo will usually recover its loss form its cargo insurer. See chap 3 § III*(c)(ii)*(c) infra.

[237] *Cf* Chap 2 § III*(a)* supra.

[238] J Wilson *Carriage of Goods by Sea* 7 ed (2010) 9.

considerably. It is pertinent to examine the interaction between general average and the principles of carriage stated in these regimes to show the extent by which the redistribution of the general average risk of a party at fault has been restricted under each regime. This is because most national carriage of goods by sea legislation are modelled after these international carriage regimes.

(iii) Recognition of general average under the international carriage regimes

Article V of the Hague Rules[239] and Hague-Visby Rules (HVR)[240] merely provides that 'nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.' The pertinent question then is what does 'lawful provision' mean? Tetley[241] rightly argues that lawful in the above context must necessarily mean any provision which is not prohibited by law and this would certainly include a prohibition of the Hague Rules and HVR. It should be noted that Article III r 8 Hague Rules and HVR prohibits 'any clause, covenant, or agreement in a contract 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 ….'

Thus, article III r 8 invalidates any clause or provision that derogates from any of the provisions of the Hague Rules and HVR.[242] This provision would invalidate any clause in a bill of lading which gives the carrier the right to contribution in general average from cargo to make good the personal loss of the carrier, notwithstanding the carrier's liability under the Rules.[243]

Article 24 r 1 of the Hamburg Rules[244] provides that the Rules do not prevent the adjustment of general average under the contract of carriage or municipal laws. In terms of article 24 r 2, the right of the cargo owner to refuse contribution in general average is not affected as a result of a general average adjustment or the liability of the carrier who is

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[239] The International Convention on the Unification of Certain Rules of Law Relating to Bills of Lading 1924.

[240] The International Convention on the Unification of Certain Rules of Law Relating to Bills of Lading 1924 as amended by the Brussels Protocol 1968.

[241] W Tetley op cit note 18 at 11.

[242] *The Hollandia* [1983] 1 AC 565 (HL).

[243] S Girvin *Carriage of Goods by Sea* (2007) 229.

[244] The United Nations Convention on Carriage of Goods by Sea 1978.

responsible for cargo loss or damage under the Rules to indemnify the cargo owner in respect of such contribution.

Article 16 of the Rotterdam Rules[245] recognises as general average sacrifice made to preserve the common maritime adventure. Article 16 provides further restriction on the redistribution of the parties' risk and cost of general average loss by providing that the parties to an adventure will only be liable to contribute in general average were the general average act was reasonable in the circumstances.[246] There is no such provision in the Hague Rules, HVR and Hamburg Rules. This conforms to the provisions of the Rule Paramount[247] and Rule A[248] of the YAR 2004.

(iv) Carrier's obligations – Due diligence to provide a seaworthy vessel

The carrier's fault under the Hague Rules and HVR is restricted to where he fails to exercise due diligence to provide a seaworthy ship before and at the commencement of the voyage[249] and such fault was causative of the damage to the vessel.[250]

This was illustrated in *Guinomar of Conakry v Samsung Fire & Marine Insurance Co Ltd*.[251] The vessel was in the course of a voyage with a part cargo of soybeans shipped at Reserve & Westwego, Louisiana, under five bills of lading. The contract of carriage evidenced by the bills of lading included a Clause Paramount incorporating the United States Carriage of Goods by Sea Act (COGSA) 1936 with the consequence that the Hague Rules became terms of the contract. The contract further provided by a 'clause 5' that general average shall be payable according to the YAR 1974 as amended in 1990, if the owner shall have exercised due diligence to make the vessel seaworthy at the commencement of the voyage. There was damage to the vessel during the voyage, the owners declared general

[245] The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009.

[246] A von Ziegler 'The Liability of the Contracting Carrier' (2009) 44 *Texas International Law Journal* 329 at 339.

[247] *Cf* chap 2 § IV*(g)* supra.

[248] *Cf* Chap 2 § II*(b)* supra.

[249] Article III r 1 Hague Rules and HVR.

[250] See *Christian Anderson v Attorney General New Zealand* (*The* '*Danica Brown*') [1995] 2 Lloyd's Rep 264 (QB); *Demand Shipping Co Ltd v Ministry of Food, Government of the People of Bangladesh* (*The* '*Lendoudis Evangelos I*') [2001] 2 Lloyd's Rep 304 (QB).

[251] [2002] 2 Lloyd's Rep 57 (QB).

average and claimed the balance of cargo interest's proportion said to be due under a general average adjustment made in London. The defendant insurer resisted the claim on the grounds that the general average expenditure was caused by the actionable fault of the owners in failing to exercise due diligence in making the vessel seaworthy at the commencement of the voyage. The damage to the engine of the vessel was actually caused by an incompatible spare piston supplied the owners. Dean J held that the shipowners could not recover cargo's proportion of general average contribution because the general average expenditure was caused by the actionable fault of the shipowners by their failure to exercise due diligence to make the vessel seaworthy at the commencement of the voyage as a result of the incompatible spare piston that put the vessel in danger necessitating incurring of expenses to save the common venture.[252]

Thus, under the Hague Rules and HVR, where a carrier has failed in his obligation to provide a seaworthy vessel before and at the commencement of the voyage and such failure is causative of loss or damage to the vessel; such failure would be treated as actionable fault and would result in the non-redistribution of the carrier's general average loss amongst the cargo interests.[253]

The Hamburg Rules has increased the level of responsibility on the part of the carrier and has imposed a greater restriction on the redistribution of its general average risk and loss than under the Hague Rules and HVR.[254] This is because the Rules provide that the carrier is responsible for the goods from the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge[255] and also by virtue of the presumption of the fault of the carrier where a loss has been suffered by the common maritime adventure.[256] The onus is then placed on the carrier to rebut such presumption of fault in order not to be held liable for such loss.

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[252] Ibid at 71. See also *Sunlight Mercantile Pte Ltd & Anor v Ever Lucky Shipping Co Ltd* [2004] 2 Lloyd's Rep 170 (Sing CA) at 174; *Containerschiffs v Corp of Lloyds* 1981 AMC 60 (SDNY 1980) at 69; *Jugoslavenska Oceanska Plovidba v American Smelting and Refining Co and Others* (*The* '*Admiral Zmajevic*') [1983] 2 Lloyd's Rep 86 (QB) at 90; *American Mail Line Ltd v United States of America* (1974) AMC 1536, 377 F Supp 657 (DC Wash); *USA v Eastmount Shipping Co* (*The* '*Susquehanna*') (1974) AMC 1183 (SDNY); *Todd Shipyards Corp v USA* (1975) AMC 753 (SDNY); *North East Shipping Co* (1973) AMC 940 (Arb NY).

[253] Art 4 R 1 Hague Rules and HVR.

[254] E Selvig 'The Hamburg Rules, the Hague Rules and Marine Insurance Practice' (1981) 12 *JMLC* 299 at 299.

[255] Article 4 r 1 Hamburg Rules.

[256] Annex II to the Hamburg Rules.

Article 1 of the Rotterdam Rules extends the carrier's obligation with regard to exercising due diligence to provide a seaworthy vessel beyond just the commencement of the voyage to an obligation that runs throughout the entire duration of the voyage. Extending this obligation increases the instances in which the carrier might be in breach and therefore the instances in which such breaches might endanger the common venture necessitating general average acts. Where the Rotterdam Rules apply to a carriage contract, the instances in which the carrier might be barred from claiming general average contributions are potentially greater in number.

(v) Exceptions to liability for breach of obligations

Under the Hague Rules and HVR, the carrier will be entitled to the redistribution of its general average loss and cost where the general average act was as a consequence of the negligence of its servants in the navigation or management of the vessel;[257] provided it exercised due diligence to provide a seaworthy vessel before and at the commencement of the voyage.[258]

Art 5 r 1 of the Hamburg Rules however brought about a major change in the re-apportionment of the carrier's general average risk and loss by the abolition of the nautical fault defence.[259] Unlike the Hague Rules and HVR that restricted the issue of fault on the part of the carrier to mainly cases of accidents as a result of unseaworthiness of the vessel, the omission of the defence of nautical fault in the Hamburg Rules has increased the level of responsibility and liability on the part of the carrier by making it liable for error in navigation or management of the vessel by his servants or agents. The carrier under the Hamburg Rules can only re-distribute his general average loss where he proves that he and his servants/agents

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[257] Article IV r 2(a) Hague Rules and HVR provides that neither the carrier nor the ship shall be liable 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 and management of the ship. This is referred to as the 'nautical fault' defence. See *USA v Orient Mid-East Lines* (1972) AMC 953 (SDNY).

[258] Article III r 1 Hague Rules and HVR.

[259] Art 5 r 1 provides that 'the carrier is liable for loss resulting from loss 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 article 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.'

took all steps reasonably required in the prevailing circumstances to avoid circumstances necessitating a general average act and the consequent loss or damage.[260]

The requirements for the carrier to take 'all measures' that could be 'reasonably' expected places a high onus on the carrier and it is argued that 'reasonableness' under the Hamburg Rules should be interpreted in light of the Rule Paramount where a version of the YAR is incorporated in the contract of carriage. Where a version of the YAR is not incorporated in the contract of carriage, it is argued that the test should be based on the carrier's knowledge in the circumstances and of facts which he ought to have had knowledge of. It is argued that 'all measures' in this context includes measures required by sound shipping practices and requirements of safety and seaworthiness under any national laws and international instruments.

As in the Hamburg Rules, the defence of nautical fault as an exculpation from liability has been omitted in the Rotterdam Rules as one of the defences available to the carrier.[261] The Rotterdam Rules, therefore, provide a greater level and period of responsibility by the carrier than the Hague Rules, HVR and Hamburg Rules.

(vi) Jason and New Jason Clauses

Despite the nautical fault defence provided in the Hague Rules,[262] in *The Irrawaddy*,[263] the United States Supreme Court held that the shipowner is not entitled to the redistribution of its general average cost where the general average act was as a consequence of its fault, even where such fault is statutorily exculpated. This decision led to clauses[264] being added to bills of lading in United States trade asserting the carrier's right to claim general average notwithstanding its excepted fault. The validity of such clauses was affirmed in *The Jason*[265] where the United States Supreme Court held that contractual exceptions in a bill of lading will allow a carrier who was at fault to claim general average from the cargo interests notwithstanding that the act was caused by the carrier's contractually excused fault. Thus, without such clauses in a bill of lading in United States trade, a carrier who was at fault

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[260] Ibid.

[261] Article 17 r 3 Rotterdam Rules.

[262] The United States adopted the Hague Rules with minor variations as COGSA 1936.

[263] *The Irrawaddy* (1898) 171 US 187, 183 SCt 831 (US SCt).

[264] *The Isis* (1934) 48 Ll L Rep 35 (US SCt) at 41.

[265] *The Jason* (1910) 225 US 32 SCt 560 (US SCt) at 568.

cannot redistribute his general average loss amongst his co-adventurers even where such fault is statutorily excused.

As a result of the decision in *The Jason*, such a clause inserted in a bill of lading was titled a 'Jason Clause.' This Clause has been expanded into the 'New Jason Clause' in the United States COGSA 1936.[266] The carrier's right to the redistribution of his loss in general average under the Jason Clause is subject to the condition that he had exercised due diligence to make the vessel seaworthy; if he had not, it mattered not that there was no causal nexus between his failure and the casualty.[267] However, unlike the Jason Clause, the carrier's right under the New Jason Clause is subject only to the condition that the casualty shall not have resulted from a cause for which the shipowner is responsible by statute, contract or otherwise.[268]

The question arises whether Rule D YAR obviates the need to include a Jason or New Jason Clause in contracts of carriage in the United States. It is argued that based on the decisions in the *Irrawaddy* and the *Jason* cases, Rule D YAR does not obviate the necessity for the inclusion of a Jason Clause or a New Jason Clause in a contract of carriage where the cargo is to be shipped to or from a port in the United States. In the absence of such a Clause, there will be a valid defence to an attempt by the carrier to redistribute its loss in general average on the basis that the need for the general average act arose from its fault, though the carrier is protected from liability by an exceptions clause.[269]

(vii) Cargo's Obligations

Cargo, under the various international carriage regimes, owes certain obligations to the carrier, breach of which will be considered actionable fault where such breach endangered the safety of the common venture necessitating the general average act.

Under the Hague Rules and HVR the cargo has an obligation to the carrier to ensure that the cargo is sufficiently packed[270] and that it is sufficiently and adequately marked.[271]

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[266] Section 4 COGSA 1936, United States.

[267] *The Isis* (1934) 48 Ll L Rep 35 (US SCt).

[268] *Drew Brown Ltd v The Orient Trader* [1972] 1 Lloyd's Rep 35 (Can Ct) at 47-48.

[269] *Asiatic Petroleum Corp v SS American Trader* 354 F Supp 389 at 386, 1973 AMC 497 at 507 (SDNY 1973). Such Clauses will be superfluous in English law, though it has been suggested that it would be wise to include them in carriage contracts *ex abundanti cautela*. See J Hare op cit note 58 at 966.

[270] Article 4 r 2(n) Hague Rules and HVR.

Thus, under both Rules the cargo will not be entitled to redistribute its general average risk and loss where it is in breach of these obligations and such breach endangered the carriage venture.[272] Furthermore, cargo will be barred from redistributing its general average losses and cost where the claim arises from any act,[273] fault or neglect of the shipper, his agents or his servants[274] or from any latent[275] or inherent[276] defects in the cargo or from failure to adequately declare dangerous cargo.[277] This is the same position under the Hamburg Rules[278] and the Rotterdam Rules.[279]

In addition, under the Rotterdam Rules, cargo will be barred from redistributing its general average loss where the loss arises as a result of the cargo's failure to deliver the cargo in such a condition that they will withstand the intended carriage[280] or where the cargo failed to provide information for the proper handling and carriage of the goods and for compliance with law, regulations or other requirements of public authorities in connection with the intended carriage.[281]

(d) Conclusion

The rights and liabilities of parties to a carriage contract are circumscribed by their express and implied obligations under the carriage contract and any applicable legislation. Breach of such obligations by a party to the contract will be considered as fault on the part of the party and such fault will be a bar to the redistribution of the loss of the party at fault where such fault endangered the common adventure necessitating the general average act.

Such implied obligations have been stated and extended in the existing international carriage regimes. However, the Rotterdam Rules will have more impact on the redistribution

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[271] Article 4 r 2(o) Hague Rules and HVR.

[272] Article 4 r 2 Hague Rules and HVR.

[273] Article 4 r 2(i) Hague Rules and HVR.

[274] Article 4 r 3 Hague Rules and HVR.

[275] Article 4 r 2(m) Hague Rules and HVR.

[276] Article 4 r 2(p) Hague Rules and HVR.

[277] Article 4 r 6 Hague Rules and HVR.

[278] Articles 13, 17 r (1) Hamburg Rules.

[279] Articles 17 r 3(g), (h) and (j); 27(3) Rotterdam Rules.

[280] Article 27 r 1 Rotterdam Rules.

[281] Article 29(1)(a) and (b) Rotterdam Rules.

of risk and cost of general average loss[282] than the Hague Rules, HVR and Hamburg Rules, as there will be less redistribution of general average losses and expenditure under the Rules, particularly the carrier's loss. This is because of the continuing obligation on the carrier under the Rotterdam Rules to exercise due diligence to provide a seaworthy vessel throughout the voyage, the exemption of nautical fault as a defence from liability by the carrier and the requirement for the reasonableness of the general average act.

III THE INTERACTION BETWEEN GENERAL AVERAGE AND MARINE INSURANCE IN THE RE-ALLOCATION OF RISK

(a) Introduction

General average at its inception had no interaction with marine insurance as it predated marine insurance.[283] It is, therefore, not part of the law of marine insurance.[284] The parties to a maritime adventure remain bound by the principles of general average regardless of whether they are insured or not.[285] A marine insurance contract by being a contract for full indemnity[286] with the primary function of transferring[287] and spreading the risk by an uninvolved third party (the insurer) amongst a community that shares the same interest is different to general average because general average only provides a form of partial indemnity for loss suffered by a party by redistributing the loss among his co-adventurers.[288]

However, in contemporary practice there exists an interaction between general average and marine insurance in the redistribution of general average risk and loss. Thus, it is relevant to examine how maritime risk and loss was redistributed by the mechanism of general average prior to the advent of marine insurance and the present pivotal role played by marine

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[282] S Johansson 'The Impact of the Rotterdam Rules on General Average' in *Scandinavian Institute of Maritime Law Yearbook* (*SIMPLY) 2010*, 267 at 285.

[283] W Tetley *International Maritime and Admiralty Law* (2002) 363.

[284] *International Navigation Co v Atlantic Mutual Ins Co* 100 Fed Rep 304 (1900) (DCNY) at 310.

[285] *The Brigella* (1893) PD 189 (PDA) at 190.

[286] Section 1 MIA 1906. See also s 6 Canadian MIA 1993; art 216 Chinese Maritime Code 1993.

[287] E Ivamy *Marine Insurance* 4 ed (1985) 4; M Billah *Effects of Insurance on Maritime Liability Law* (2014) 83.

[288] R Foster 'General Average – A Unique Indemnification Feature of Admiralty' (1972-73) 4 *North Carolina Central Law Journal* 114.

insurance in the re-allocation of maritime risk in general average. This provides the basis for understanding the active interest of marine insurers in the general average system and in any revision of the YAR.

(b) General average as a mechanism for redistributing maritime risk prior to the advent of marine insurance

As pointed out earlier[289] maritime venture in ancient times was fraught with dangers, especially in the Mediterranean Sea,[290] were shipwrecks, usually caused by storms, were a frequent occurrence.[291] This necessitated making sacrifices or incurring expenses by the master to save the interests involved in the common venture[292] because of their common interest in the safe arrival of the vessel at destination.[293] However, such sacrifices or expenditure gave rise to a practical need for a mechanism for redistributing such loss and expenditure amongst the parties upon arrival at their destination.[294] Thus, general average emerged as the innovative and independent mechanism that was used for the spreading of the risk and losses suffered by parties in a maritime adventure.[295]

The question arises as to how the mechanism of general average functioned in the redistribution of maritime risk and loss prior to the emergence of marine insurance.

The mechanism of general average in the spreading of losses and expenditure amongst parties to a common venture was applied by parties on the spot after a general average act.[296] Subsequently, upon the attainment of safety at the port of destination, the parties contributed rateably based on the values of their interests to redistribute the losses suffered or expenses

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[289] See chap 2 § II supra.

[290] R Zimmerman op cit note 29 at 23.

[291] Ibid.

[292] D Muller op cit note 153 at 518.

[293] J Cooke & R Cornah op cit note 28 at 5.

[294] Ibid.

[295] M Billah op cit note 287 at 83. See also T Rue 'The Uniqueness of Admiralty and Maritime Law' (2005) 79 *Tulane Law Review* 1127 at 1146; K Pineus & I Sandström op cit note 222 at 165. However, general average as a loss redistribution device only ensured the sharing of the percentage of loss as a party only receives a partial indemnification of its loss through the rateable contributions by the co-adventurers. See R Foster op cit note 288 at 114.

[296] J Cooke & R Cornah op cit note 28 at 10.

incurred for the common good.[297] This loss redistribution mechanism of general average that applied on the spot was facilitated by the fact that merchants often travelled with their cargo in medieval times and constituted what could be termed a 'pool of mutual insurers' for the protection of their interests.[298] Thus, there was no transference and spreading of risk by an uninvolved third party to a community with the same shared interest as the risk was spread by the maritime adventurers amongst themselves. General average, therefore, ensured a measure of equitable redistribution of risk and indemnification of the losses suffered by parties to an adventure as the parties themselves were the administrators of the system and decided what would be included or excluded in general average.[299]

(c) The interaction between general average and marine insurance in the re-allocation of maritime risk with the advent of marine insurance

(i) Introduction

Though general average was an independent mechanism for the redistribution of maritime risk and losses, with the emergence of marine insurance, the mechanism of general average in the redistribution of maritime risk and losses 'metamorphosed' in its application as an interaction between general average and marine insurance emerged with respect to the re-allocation of the risk of general average where the parties insured themselves against general average losses or liabilities to contribute in general average

Thus, for an understanding of the present general average system, the active interest and relevance of marine insurers in the system, there is a need for a proper examination of this interaction that exists between general average and marine insurance in the re-apportionment of risk of general average amongst co-adventurers.[300] This examination is what follows.

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[297] Articles VIII and IX Rolls of Oléron.

[298] J Donovan 'The Doctrine of General Average – Historical Development and Present Application' (1975) 42 *Insurance Counsel Journal* 251.

[299] G Hudson & M Harvey *The York-Antwerp Rules: The Principles and Practice of Average Adjustment* 3 ed (2010) 3. Even as merchants became rich and no longer travelled with their cargo, they appointed agents referred to as 'super cargo' to travel with the cargo to represent their interests.

[300] R Lowndes *The Law of General Average: English and Foreign* 4 ed (1888) Preface, x.

(ii) Allocation of general average in marine insurance

In modern commerce there exists an interaction between general average and marine insurance because marine insurers[301] presently insure parties against general average loss or expense and their liabilities to contribute in general average.[302] This explains the statutory definition of general average in most national marine insurance legislation such as the MIA 1906, though general average in not a branch of marine insurance.[303] In practice general average costs are re-allocated on the insurer that pays for a party's contribution to general average subject to the insurer's subrogated rights with respect to remedies that may be available to the assured party against third parties in the circumstance.[304] This explains the active interest of marine insurers in the general average system because of the involvement of their insured in the system.

In reality, by providing cover for general average losses and expenses, insuring the liability of a party to make general average contributions and by taking the place of an indemnified insured by the doctrine of subrogation; marine insurers ultimately bear the burden of the cost of general average. Thus, questions of what should be allowed and contributed to in general average essentially have more impact on marine insurers as the paymasters of the general average system and such questions are frequently fought out between the respective insurers of the interests that were are risk. This explains the tension between cargo insurers (represented by IUMI) and shipowning interests (and ultimately their hull insurers) on what should be allowed in general average; particularly under the common benefit principle.[305] Thus, it could be argued that the tension between these interests on the general average system is centred on the economics of the system in terms of the cost of general average each interest ultimately bears.

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[301] Shipowners usually take out hull insurance and freight insurance (where freight is at risk) and also have P&I insurance. Most cargo owners have cover for cargo under the ICC (A), (B) and (C) that are available in the London market. These types of cover are examined in chap 3 § III*(c)(ii)*(c) infra with respect to the extent of recovery of general average losses and expenses that can be obtained by parties to a maritime adventure under these policies.

[302] L Hardy 'Ordering Chaos at Sea: Preparing for Somali Pirate Attacks through Pragmatic Insurance Policies' (2010-2011) 55 *St Louis University Law Journal* 665 at 675.

[303] A Mandaraka-Sheppard *Modern Maritime Law and Risk Management* 2 ed (2007) 792.

[304] J Dunt *Marine Cargo Insurance* (2009) 317.

[305] See chap 7 infra.

The basic principles of general average in a marine insurance contract are set out by national legislation in most jurisdictions[306] but the parties may vary them by the terms of the contract itself.[307] Most national insurance legislation have similar wording with respect to general average.[308] Thus, there is a measure of widespread uniformity globally in the way that marine insurance takes away the burden of contributing to general average from the insured interests at risk in a maritime adventure. The same approach is also followed in the standard marine insurance policies in the insurance market.

However, the examination of the interaction between general average and marine insurance in the allocation of risk of general average will be primarily based on the MIA 1906 and English case law. This is because the principles of marine insurance are well-developed in English law and most marine insurance policies that provide cover for general average losses and expenditure in the maritime industry are subject to English law and practice.[309]

The question arises as to the basis for which the insurer could be held liable to indemnify the assured for general average expenses incurred or losses suffered by an assured. The principle which underlines the right of the assured to be indemnified by his insurer in respect of general average loss and contribution is that the general average act was incurred to avert or minimise a loss insured under the policy and which the insurer would have been liable for under the insurance policy.[310] The assured is, therefore, only entitled to be reimbursed for general average losses and contributions if the general average was caused by an insured peril.[311] Where an assured has insured its liability to make general average contributions and has paid or is liable to pay such a contribution in respect of the subject matter insured it is entitled to recover such contribution from its insurer.[312] However, the measure of what the assured can recover from the insurer differs in relation to general average expenditure and general average sacrifice. Thus, it is relevant to examine the extent

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[306] See for eg, s 66 MIA 1906; s 65 Canada MIA 1993.

[307] F Rose op cit note 44 at 123.

[308] See for eg s 66 MIA 1906; s 65 MIA 1993, Canada; s 66 MIA 1908, New Zealand; s 79 MIA 1909, Australia.

[309] See ITCH 1995; IHC 2003; ICC (A), (B) and (C) (1-1-2009).

[310] *Hick v London Assurance* (1809) 1 Comm Cas 244 (KB) at 250.

[311] Section 66(6) MIA 1906. See also *Harris v Scaramanga* (1872) LR 7 CP 481 (CCP) at 488, 496.

[312] Section 66(5) MIA 1906.

of the assured's recovery for general average sacrifice and expenditure to determine the extent of the insurer's liability in each case.

(a) The extent of the insurer's liability for general average sacrifice and expenditure

Where there has been a general average sacrifice as a result of an insured peril, the insurer is liable to its assured as owner of the sacrificed interest for the full amount of such a sacrifice, not merely the proportion of the loss which falls upon the assured. [313]

In contrast to general average sacrifice, where there is a general average expenditure, the insurer is only liable for the assured's proportion of the general average contribution,[314] unless there is a contrary provision in the policy, such as a General Average Absorption Clause.[315] The amount of that proportion is however determined without regard to any question of insurance and as it would have been determined between the co-adventurers.[316]

This raises the question as to the effect of the doctrine of subrogation on the incidence of loss in general average. By paying in respect of a general average loss the insurer is subrogated to the rights and remedies of the assured against any third parties with respect to the subject matter insured.[317] But what is the insurer's subrogated right in general average? Is the insurer's subrogated right the same with respect to both general average sacrifice and expenditure?

Where the insurer has reimbursed the assured for a general average sacrifice the insurer may exercise the assured's right to contribution from the other parties to the adventure. This was exemplified in *Dickenson v Jardine*.[318] The plaintiff insured goods under a policy which included jettison amongst the perils insured against. The goods were jettisoned to save the vessel from danger. The plaintiff sued the insurers for the whole amount insured without first collecting contributions from the ship and other cargo interests. The insurers contended that the plaintiff must first have recourse to its co-adventurers for contributions. Bovill CJ held that the plaintiff was entitled to recover from the insurers without first having recourse to the

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[313] *Dickenson v Jardine* (1868) LR 3 CP 639 (CCP).

[314] Section 66(4) MIA 1906; *Brandeis, Goldschmidt & Co Ltd v Economic Ins Co Ltd* (1922) 11 Ll L Rep 42 (KB) at 44.

[315] See chap 3 § III*(c)(ii)*(c)(v) infra.

[316] J Gilman et al op cit note 185 at 1389.

[317] Section 79 MIA 1906. See also *Dickenson v Jardine* (1868) LR 3 CP 639 (CCP); R Merkin *Marine Insurance Legislation* 4 ed (2010) 108.

[318] (1868) LR 3 CP 639 (CCP).

co-adventurers and that the insurers having paid him would then be subrogated in his place with respect to general average contribution from the co-adventurers.[319]

However, in the case of expenditure and contribution, since the insurer is only obliged to reimburse the assured's rateable proportion, the insurer acquires no rights in general average against the co-adventurers[320] but may acquire rights against co-adventurers for breach of contract or in tort.[321] This was aptly stated by Barnes J:

> 'the proposition which is found in *Dickenson v Jardine* is wholly inapplicable to the case of expenditure … the captain who at this time, under ordinary circumstances, acts as agent for the person whose property is at risk, spends the money on behalf of all who are interested and all who are interested must contribute to it and therefore the shipowner ought only to contribute so much and then the underwriters, who have indemnified him, have got to recoup him what he has paid ….'[322]

Thus, the principle in the *Dickenson* case will only apply to general average sacrifices as Bovill CJ in his decision specifically applied the principle to general average sacrifice and not to 'a general average act' which would have encompassed both general average sacrifice and expenditure. Also, s 79(1) MIA 1906 refers to the right of subrogation of the insurer 'where he pays for … loss', alluding, in our context, to loss as a result of a general average sacrifice.

It could be said that the doctrine of the insurer's subrogated right in the context of general average, whether for general average sacrifice or expenses, is the vehicle by which insurers become active stakeholders in the general average system. Particularly, with respect to general average expenses where the insurer reimburses the general average expenses of the insured without having any right in general average against a co-adventurer whose actionable fault may have necessitated incurring the general average expense; it becomes in the best interests of insurers that there should be a restriction of expenses that are allowable in general average. This explains why cargo insurers are actively interested in restricting the expenses allowed in general average under the common benefit principle, particularly port of refuge

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[319] This is the same position in American law. See *Maggrath v Church* (1803) 1 Caines 196 at 105 (SCNY).

[320] *The Mary Thomas* [1894] P 108 (CA).

[321] Rule D YAR 2004; *Macieo Shipping Lines Ltd v Clipper Shipping Lines Ltd* (*The 'Clipper Sao Luis'*) [2000] 1 Lloyd's Rep 645 (QB) at 652.

[322] *The Mary Thomas* [1894] P 108 (CA) at 118.

expenses, as cargo insurers ultimately bear the bulk of the contribution in general average for such expenses as opposed to shipowning interests who usually incur such expenses at the port of refuge and in whose best interest it would be for most of those expenses to be allowed in general average and be contributed to by the other interests to the common venture.

However, it should be noted that in determining the amount of indemnity for which the insurer is liable the provisions of the policy become relevant. In relation to a general average sacrifice, that amount is determined by the provisions of the policy and the general principles of insurance.[323] For example, where the sacrifice leads to the total loss of property insured under a valued policy, the insurer is only liable to pay the policy value and it is irrelevant that the value on which the general average allowance is based is different.[324] This is similar to the rule with respect to expenditure or contribution because under section 73 MIA 1906, insurers are not necessarily liable to reimburse the full amount of the expenditure or of the contribution, even where the property is fully insured, but only that proportion of it which the insurable value of the interest bears to its value as estimated for the purposes of contribution.[325]

Some commentators[326] have stated that a different rule has been laid down in the United States by virtue of the decision in *International Navigation Co v Atlantic Mutual Insurance Co*,[327] where the court held that the insurers were liable for the full amount, irrespective of the valuations in the policies.[328] Though a different rule was laid down in the *International Navigation* case, there is no uniform law in the United States[329] on the subject

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[323] *Anderson v Ocean SS Co* (1884) 10 App Cas 107 (HL).

[324] Ibid.

[325] The rule is that whatever is paid in contribution, by the excess of the contributory value over the value in the policy, is paid by the assured; but for whatever is paid on a contributory value not exceeding the value in the policy, the assured is indemnified on the proportion insured. However, although s 73(1) is only expressed in terms of contribution, in practice it is treated as applying also to expenditure. This is fully justifiable by virtue of the provisions of s 75(1) MIA 1906. It is instructive to note that s 73(1) MIA 1906 merely codified the English law on the subject as stated in *SS Balmoral Co v Marten* [1900] 2 QB 748; [1901] 2 KB 896 (CA); [1902] AC 511 (HL). See also Rule B 33 Rules of Practice, AAA.

[326] J Gilman et al op cit note 185 at 1393 n 437.

[327] 100 Fed Cas 304 (DCNY 1900).

[328] This decision was affirmed on appeal, 108 Fed R 988 (2nd Cir 1901). See also *Maldonado v British & Foreign Marine Insurance Co* 182 Fed Rep 744 (9th Cir 1910).

[329] It is noteworthy that the provision of the AIMU Hull Clauses 2009, Lines 191-196, is analogous to the provision of s 73(1) MIA 1906.

as there are variations in the law on the subject in different states. Brown J's decision in the *International Navigation* case was based on the New York rule on the subject. In distinguishing the New York rule from English law on the subject, Brown J remarked:

> 'The rule on this point in England and in the Massachusetts appears to be as the defendants contend. If the policy value of the ship is less than her contributory value … the same proportionate rebate is made upon the average assessment against the ship when indemnity is sought against the insurer … the rule in New York is otherwise.'[330]

In taking cognisance of the variation between New York and Massachusetts laws, the Massachusetts Supreme Court in *Gulf Refining Co v Atlantic Mutual Insurance Co*[331] followed the English law as laid down in the *Balmoral* case. The Court held that the insurer is only liable to pay the policy value and it is irrelevant that the value in which the general average allowance is based is different. Thus, it was apposite for the learned authors to have explicitly stated that the decision in the *International Navigation* case stated a different rule on the subject only in the state of New York.

However, in practice in the London market, the provision of section 73(1) is frequently varied by brokers' clauses which provide that 'for the purposes of claims for General Average Contributions and Salvage Charges recoverable hereunder the subject matter shall be deemed to be insured for its full contributory value ….'[332] This clause makes the insurer liable to pay the assured's general average contribution in full where the vessel is underinsured; thereby making the practice in the British market to be analogous to the New York rule on the subject. It is debatable how sound this practice is as the valuation of the subject matter insured under a valued policy would normally be the indemnity paid regardless of the actual loss suffered.[333]

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[330] *International Navigation Co v Atlantic Mutual Insurance Co* 100 Fed Cas 304 at 315-316 (DCNY 1900).

[331] 279 US 708 (1929) (SCt Mass).

[332] J Dunt op cit note 304 at 315.

[333] E Ivamy op cit note 287 at 9.

(b) When does the liability of the insurer to indemnify the assured arise in general average?

A relevant question that arises in the examination of the interaction between general average and marine insurance in the re-allocation of maritime risk is: when does the liability of the insurer to indemnify the assured arise? This is more so, to show later in this thesis,[334] why the time-bar provision in the YAR 2004[335] does not apply to claims in general average by an assured against its insurer. Does liability arise when the general average act is done or when the proportion of the assured's contribution is determined by an adjustment?

This question was answered in the English case of *Chandris v Argo Insurance Co Ltd*.[336] The plaintiff's vessel on a voyage from St John to London suffered damage by an insured peril. Whilst loading ballast at London she suffered a further damage by an insured peril which necessitated the plaintiff making sacrifices and incurring expenses to preserve the imperilled vessel. On the question as to when the cause of action in general average accrued, Megaw J held that the assured's right to be reimbursed by the insurer arises as soon as the expenditure is incurred,[337] though the proportion of contribution which falls on him and the extent of his right to indemnity, depending on values at the end of the common maritime adventure, is subject to fluctuation until the end of the voyage and is usually not quantified until the publication of the general average adjustment.

In *Schothorst and Schuitema v Franz Dauter G.m.b.H*,[338] Kerr J in relying on the *Chandris* decision held that Megaw J's reasoning applied equally to a claim for general average contribution made by one party to the adventure against another party. In *Chandris,* Megaw J appeared to take the view that the inclusion of the words 'liable to pay' in s 66(5) MIA 1906 had the effect that the cause of action against insurers for indemnity against liability to contribute in general average arose as soon as the sacrifice was made or the expenditure incurred.

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[334] *Cf* chap 4 § II*(f)* infra.

[335] See Rule XXIII YAR 2004.

[336] [1963] 2 Lloyd's Rep 65 (QB). The decision was approved by the Privy Council in *Castle Insurance Co v Hong Kong Islands Shipping Co* [1984] AC 226 (PC) at 236-238.

[337] This is the same position in American law. See *Percy R Pyne* (1926) AMC 1582 (SDNY).

[338] [1973] 2 Lloyd's Rep 91 (QB) at 97.

However, in the recent case of *Bradley v Eagle Star Insurance Co Ltd*,[339] Lord Brandon held that the right to indemnity under a liability policy does not arise until the assured's liability has been established by the judgment of a competent court or tribunal or by the agreement of the parties. Lord Brandon in his decision in the *Bradley* case referred with approval Denning MR's decision in *Post Office v Norwich Union Fire Insurance Co*,[340] where he held that the liability of the insurer to the assured under a liability policy 'must be ascertained and determined to exist, either by judgment of the court or by award in arbitration or by agreement. Until that is done, the right to indemnity does not arise.'[341] Thus, the *Chandris* decision, at present, may not be the correct legal position on the subject anymore in English law based on the above recent English Court of Appeal and House of Lords' decisions on liability policies which would be deemed to have overruled Megaw J's decision. The insurer's liability in general average will only arise after the adjustment process and only where such liability is determined to exist by a court judgment, arbitral award or by agreement of the parties.

(c) General average allocation under standard insurance policies

(i) Introduction

Based on the above stated interaction between general average and marine insurance, in practice, cover for general average sacrifices and expenditure for the ship, cargo and freight are provided in marine insurance policies available in the insurance market. It is relevant to examine these policies to determine the extent of cover provided for general average losses and expenses of the various interests involved in a maritime adventure. This is because the practical insurance implications/effects of the changes introduced by the YAR 2004 on the various interested parties in the general average system and ultimately their insurers cannot be properly examined without an understanding of what is covered in general average under such policies and the extent of the liabilities of the various marine insurers under such

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[339] [1989] AC 957 (HL) at 964.

[340] [1967] 2 QB 363 (CA).

[341] Ibid at 374. However, it should be noted that the *Chandris* case was neither cited nor referred to in the *Bradley* and *Post Office* cases.

policies. However, the examination will be based on the wordings of the policies because there is no case law on the general average clauses in these policies.

(ii) Cargo insurance

There are three standard marine insurance policies under which cargo can be insured in the English market. They are the ICC (A)[342] known as the 'All Risk Policy' which covers the cargo from virtually all risk with certain exceptions.[343] The ICC (B), which provides less cover than the 'All Risk Policy' and the ICC (C) which provides the least cover to cargo. ICC (B) and (C) provide cover against only named perils.[344] The ICC cover general average and salvage charges if incurred by cargo to avoid loss from any cause except those specifically excluded from the contract of insurance. For example, the ICC (A) provides:

> 'This insurance covers general average and salvage charges ... incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4, 5, 6, 7 below.'[345]

There is also the same provision in ICC (B)[346] and (C).[347] In all these policies the general average to be covered is that incurred to avoid or in connection with the avoidance of loss from any cause whatsoever except those specifically excluded in the General Exclusions Clause,[348] the Unseaworthiness and Unfitness Exclusion Clause,[349] the War Exclusions Clause,[350] and the Strikes Exclusion Clause.[351] In other words, except where there is an

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[342] References to the ICC in this thesis are references to the ICC (A), (B) and (C) (1-1-2009).

[343] The House of Lords in *British & Foreign Marine Insurance Company Ltd v Gaunt* [1921] 2 AC 41 (HL) at 57, per Lord Summer, stated that though the words 'all-risks' were intended to cover all losses by any accidental cause of any kind occurring during the transit 'there are, of course, limits to "all risks". They are risks and risks insured against.' This decision approved the decision of Wilson J in *Jacob v Gaviller* (1902) 7 Com Cas 116 (KB). See also clause 1 (a) AIMU Hull Clause – All Risks (A/R) 2004.

[344] J Dunt op cit note 304 at 171.

[345] Clause 2, ICC (A); clause 2(b) AIMU Hull Clauses (A/R) 2004.

[346] Clause 2, ICC (B); clause 4(a) AIMU Cargo Clause – With Average (W/A) 2004.

[347] Clause 2, ICC (C).

[348] Clause 4, ICC (A), (B) and (C).

[349] Clause 5, ICC (A), (B) and (C).

[350] Clause 6, ICC (A), (B) and (C).

exception in the policy the cargo insurer is liable to pay for cargo's contribution for general average even if the general average is not as a result of an insured peril as long as it is not caused by a specifically excluded peril.

The wording 'incurred to avoid or in connection with the avoidance of loss from any cause' is an extension of the English common law position on general average with respect to marine insurance policies. Generally, in English law an insurer's liability in respect of general average is limited to the subject matter insured by the policy and losses caused by the perils against which the subject matter is insured.[352]

Furthermore, the ICC (B) and (C) cover losses caused by jettison.[353] However, does the provision contemplate a claim in general average for every jettison of cargo, no matter the reason for such jettison? It is submitted that for there to be a claim in general average for jettison under these Clauses, such jettison of property must be made for the preservation of the common maritime adventure from peril.[354] The requisite intent to save the common maritime adventure from danger is of the essence. The jettisoning of cargo without the intention of saving the common venture, even where it saves the adventure from peril, will not suffice. Furthermore such jettisoning must be directed at saving the common venture from peril because it is unlikely that the insurer will pay in general average for loss occasioned by such jettison unless the jettison is considered a necessary action in the presence of imminent danger.[355] Where the jettison is of deck cargo, such cargo must have been carried in accordance with the recognised custom of trade for the loss to be allowable in general average under the YAR.[356]

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[351] Clause 7, ICC (A), (B) and (C).

[352] Section 66(6) MIA 1906. See also *Hick v London Assurance* (1895) 1 Com Cas 244 (QB) at 250; *Harris v Scaramanga* (1872) LR 7 CP 481 (CCP) at 488, 496.

[353] Clause 1, ICC (B) and (C).

[354] Rule A YAR 2004; *The Gratitudine* (1801) 3 C Rob 240 (HL). See chap 2 § IV*(b)* supra.

[355] P Kwang 'Insurable Risks and the New Institute Cargo Clauses' (1988) 19 *JMLC* 287 at 295.

[356] Rule I YAR 2004.

(iii) Hull insurance

The standard hull cover available in the insurance market provides cover to the ship for general average and salvage where loss is incurred to avoid an insured loss.[357] Unlike the ICC, there is no extension of English law in allowing losses caused by any cause except by the insured perils[358] in the ITCH and IVCH. In hull policies, if there has been a sacrifice of the vessel the shipowner shall be able to recover in respect of the whole loss without first enforcing his right of contribution from other parties to the adventure.[359] This frees the shipowner from the practical necessity of pursuing the recovery.

Where the vessel is under-insured the insurer is only liable for a reduced proportion of the general average contribution.[360] However, in cases of under-insurance the shipowner will be able to fully recover its general average contribution where the policy is based on the IHC 2003.[361]

It should be noted that the position with regards to cover for general average with respect to freight insurance is similar to that of hull insurance but what is covered in freight insurance is the proportion of general average attaching to the assured's freight at risk.[362]

(iv) P&I insurance

Unrecovered general average contributions from cargo are met in many circumstances by the shipowner's liability insurer through a P&I cover. Cover under P&I Club[363] rules include any proportion of general average contribution from cargo which is not recoverable by reason of the carrier's breach of the carriage contract.[364] P&I Clubs also cover the ship's proportion of

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[357] Clause 10.1, ITCH, Clause 8.1, Institute Voyage Clauses – Hulls (IVCH). All references to the ITCH and the IVCH in this thesis are to the ITCH and IVCH of 1-11-1995.

[358] R Hayden & S Balick 'Marine Insurance: Varieties, Combinations and Coverages' (1991) 66 *Tulane Law Review* 311 at 316. See also AIMU Hull clauses 2009, Lines 35-36.

[359] Clause 10.1, ITCH; clause 8.1, IVCH.

[360] Ibid. See also s 73 MIA 1906; AIMU Hull Clauses 2009, Lines 191-196.

[361] Clause 8, IHC 2003.

[362] Clause 11.1, Institute Time Clauses – Freight (ITCF) 1995.

[363] See chap 5 § III*(b)* infra for a discussion on P&I Clubs.

[364] For a typical wording, see Rule 19, section 17 Britannia Steam Ship Insurance Association Rules; Rule 25, section XIV Steamship Mutual Underwriting Association Rules.

general average contribution in case of under-insurance.[365] However, in cases of under-insurance most P&I cover stipulates that the shipowner is entitled to collect from its P&I Club the difference between the insured and contributory values, provided that sufficient periodic review of the market value of the ship was undertaken according to the Club's rules.[366] Under the YAR, P&I Clubs also cover the parties' contribution for cost of measures taken to prevent or minimise damage to the environment[367] referred to as the 'pollution compromise' reached between hull insurers and liability insurers at the CMI Sydney Conference 1994.[368]

(v) Specific insurance provision outside Institute Clauses that relate to general average

As stated above,[369] where a shipowner has incurred general average expenditure he is entitled to recover only the ship's proportion of that expenditure under a standard hull policy. The shipowner would then have to recover the balance from cargo interests, which in practice will involve the collection of a general average security and the preparation of a full general average adjustment by an average adjuster. In practice, collecting general average security from hundreds of cargo interests, especially with respect to container vessels, can be costly and time-consuming for all the parties concerned.[370] If the general average expenses are relatively small, the process of contribution by all parties becomes uneconomic and highly undesirable for all the parties involved.

The solution to this has been the inclusion of what is termed 'General Average Absorption Clause' in hull policies by which the hull insurer agrees to absorb or pay general average expenditure in full up to a specified amount, rather than just the ship's proportion.[371] By so doing the shipowner recovers certain types of expenditure from his hull insurer according to the framework of the YAR, without the commercial and insurance community being involved in the collection of general average security and statements for cargo's

[365] See the Steamship Mutual Underwriting Association Rule 25, section XV.

[366] Ibid.

[367] Rule XI(d) YAR 1994.

[368] J Cooke & R Cornah op cit note 28 at 396. *Cf* chap 6 § II*(c)(vi)*(b)(iv) and chap 7 § IV*(b)(x)* infra.

[369] *Cf* chap 3 § III*(c)(ii)*(a) supra.

[370] M Haines 'Ocean Giants' Seaways February 2013, 10 at 11.

[371] G Hudson & M Harvey op cit note 299 at 277.

contribution in the general average process.[372] The effect of the Clause is that it limits the number of instances in which general average would be declared by the shipowner and ensures that only general averages that are considered to be high enough and economical would be adjusted. Thus, General Average Absorption Clauses remove the effort, time and expenses involved in the adjustment process for any general average considered to be too small for that expense or effort and therefore not economically worthwhile.

Until recently, there existed different wordings of General Average Absorption Clauses in the market.[373] However, in 2002, BIMCO recommended a wording for a standard General Average Absorption Clause.[374] The BIMCO model of General Average Absorption Clause has been generally welcomed in the industry[375] and many of the features of its wording have been incorporated in the IHC 2002. The IHC were revised in 2003 with amendments to the General Average Absorption Clause[376] which brought it much closer to the BIMCO wording.[377]

However, the usefulness of Absorption Clauses can only be measured based on their impact in the reduction of general average declarations and the adjustment of uneconomic general averages. Could the Clause be said to be achieving the purpose for which it was formulated? This question becomes relevant in this thesis because most interested parties during the process of revising the YAR 1994 argued that there was no need for a consideration of the IUMI's proposals as most of the problems referred to by IUMI about the general average system were being solved by the adoption of General Average Absorption Clauses in most hull policies in the market. [378]

It is argued that Absorption Clauses have had a positive impact in the maritime industry. As at 2003, it was estimated that about 60 per cent of hull policies globally contained General Average Absorption Clauses and this had helped to significantly reduce

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[372] J Cooke & R Cornah op cit note 28 at 665.

[373] Ibid.

[374] For a full text of the Clause, see www.bimco.org/~/media/Documents/Special_Circulars/SC2002_08_14.ashx, accessed 20 June 2012.

[375] G Hudson & M Harvey op cit note 299 at 278.

[376] Clause 40, IHC 2003.

[377] J Cooke & R Cornah op cit note 28 at 665.

[378] See chap 7 § V*(c)(ii)*(c) infra.

the number of occasions general average was declared by shipowners.[379] Though there are no current statistics on the subject, presently it is an exception to see a hull policy for an ocean going vessel of any kind that does not have a General Average Absorption Clause of some kind.[380] It is further argued that the effectiveness of the Clause seems to be the reason general average has seldom been declared in most shipping mishaps in the past two decades.[381]

V CONCLUSION

General average as an independent risk and loss redistribution device was administered in ancient times by the interests at risk in a maritime adventure for the spreading of losses suffered for the good of the common venture when the vessel arrived safely at the port of discharge. However, in modern times there exists an interaction between general average and marine insurance in the spreading of risk of general average where parties to the common venture are insured against general average loss or where their liabilities to make general average contribution are insured.[382] By insuring parties against general average losses and their liabilities to contribute in general average,[383] marine insurers play a crucial role in the continued relevance and efficiency of the general average system. Thus, a measure of equalisation of the insurance implications/effects of any changes in the YAR on the main competing interests (cargo insurers and shipowning interests and ultimately hull insurers) in the general average system is critical in ensuring the widespread acceptance and use of any version of the Rules as will be shown in the analysis of the changes introduced by the YAR 2004 in the next chapter.

General Average Absorption Clause in hull policies seems to have become the most innovative device in recent years in reducing the number of general average declarations by

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[379] Report of the CMI International Sub-committee (ISC) on General Average in *CMI Yearbook 2003* (*Vancouver I*) 274 at 296; Position Paper by the International Chamber of Shipping (ICS) on IUMI's proposals for the revision of YAR 1994 in *CMI Yearbook 2004* (*Vancouver II*) 195 at 199.

[380] J Cooke & R Cornah op cit note 28 at 665.

[381] The most recent major shipping mishap in which general average was declared was in the case of the 'Mediterranean Shipping Company (MSC) Flaminia' which was hit by a massive explosion followed by fire in the entire mid-section on 14 July 2012. See MSC Flaminia – Casualty Report No 5, 9 August 2012, available at www.mscgva.ch/news/msc_flaminia.html, accessed 3 March 2013.

[382] R Foster op cit note 288 at 114.

[383] W Tetley op cit note 18 at 34.

shipowners and the cost of general average to insurers, particularly cargo insurers.[384] The effectiveness of the Clause attests to the need for the Clause to be inserted in every hull policy in the market.[385]

In a carriage contract, the breach of a party's obligations under the contract will amount to actionable fault where such fault endangered the common venture necessitating a general average act to be done to save the venture. Such fault as a bar to general average contribution plays a pivotal role in determining the redistribution of general average risk and loss of the party at fault amongst parties to the carriage contract. Under the international carriage regimes, the extent of the parties' carriage obligations and the breach of those obligations determine fault on their part and consequently, the effect of their fault on the redistribution of their risk and loss in general average.

[384] R Cornah op cit note 17 at 165.

[385] R Cornah *A Guide to General Average*, 19, available at www.rhlg.com/pdfs/GAGuide.pdf, accessed 10 March 2013.

CHAPTER 4 THE CHANGES INTRODUCED BY THE YORK-ANTWERP RULES 2004

I INTRODUCTION

The six changes introduced by the YAR 2004 may be reconsidered in the process of consultation leading to the formulation of proposals for the revision of the YAR 2004 to be considered at the next CMI Conference in 2016. The consideration of the effects these changes, as currently formulated may have on the general average system may provide insight into the objections to some of them raised by those interests that were opposed to their adoption in 2004 and particularly why shipowning interests are opposed to the incorporation of the YAR 2004 in carriage contracts. This insight may inform recommendations as to whether any substantive revisions to the YAR 2004 are necessary and if so, what form those might take.

II ANALYSIS OF THE CHANGES

Each of the changes are considered to show what was the position under those Rules prior to the adoption of the YAR 2004, the changes that were introduced by the Rules and what would have been the likely impact/effect of the changes on the general average system if the YAR 2004 had gained widespread use in the maritime industry.

(a) Rule VI – Salvage remuneration

(i) Background

Generally, salvage expenditure has been treated as a general average expense in all maritime states except in the United Kingdom and has always been apportioned, together with other general average losses, over the values of the interests of parties to the common venture at the end of the venture.[386] The divergence of practice in the United Kingdom occurred during the latter part of the 19th century when British adjusters started to distinguish between salvage

[386] J Cooke & R Cornah op cit note 28 at 284.

and general average and treated them differently with salvage being apportioned over values at the place where the salvage services ended.[387] This practice, it is argued, correctly underscored the legal distinction between general average and salvage.[388]

In 1926, a Rule of Practice was adopted by the AAA, United Kingdom, which permitted the allowance of commission and interest on salvage awards. But this Rule of Practice still did not permit the re-apportionment of salvage expenditure in general average in the United Kingdom. It was not until 1943 that the divergence in practice in the United Kingdom regarding the inclusion of salvage awards in general average was finally resolved by a Rule of Practice.[389] To ensure uniformity of international practice on the subject the old Rule VI was removed in the revision of YAR 1950 and a new Rule VI was introduced in the YAR 1974 which provided for the re-apportionment of salvage expenditure in general average, whether the salvage was performed under contract or not. This was retained under the YAR 1994.

(ii) The change

Under Rule VI(a) YAR 1994, expenditure incurred by the parties to a common venture in the nature of salvage, whether under contract or otherwise, is re-apportioned in general average provided that the salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure. This has been changed in the YAR 2004. Rule VI(a) was amended in the YAR 2004 to the effect that salvage payments will be re-apportioned in general average only if one party to the salvage shall have paid all or any of the proportion of salvage due from another party.[390] The change effected is the replacement of the word 'expenditure' in the YAR 1994, with its accompanying explanation of 'expenditure' that made it clear what was included in general average, with the word 'payments' and the proviso that allows the re-apportionment of salvage expenditure in

[387] Ibid at 285.

[388] See chap 2 § VI*(c)* supra.

[389] Rule CI Rules of Practice, AAA, which stated that 'expenses for salvage services rendered by or accepted under Agreement shall in practice be treated as General Average ….'

[390] Minor amendments were also made to paragraphs (b) and (c) of Rule VI YAR 2004 to make them conform to paragraph (a).

general average only where a party to the salvage has paid all or any of the proportion of salvage due from another party.[391]

(iii) Interpretation difficulties

The word 'payments' in the 2004 version of Rule VI is not defined nor is there any indication in the report of the proceedings at the CMI 2004 Vancouver Conference or in the CMI ISC's report[392] prior to the Vancouver Conference as to what the term means. This lack of definition raises a concern that the word 'payments' may be interpreted to extend to extraordinary expenditure such as towage or similar services incurred by a party to the adventure. This would have the effect of disallowing the re-apportionment of such expenditure in general average except where a party to such towage or similar services has paid all or any of the proportion of towage or similar services due from another party.

Despite the difficulty in defining the term 'salvage payments', it is at least arguable that the term may refer to payments where the amount payable in respect of each interest is separately calculated, based on the value of the services rendered to that interest and would not extend to payment for salvage services where the remuneration is calculated on a time basis or fixed lump sum where only one interest is liable for the payment. Furthermore, it is arguable that the term would not extend to contract towage or similar services as the IUMI in its papers distributed before the Vancouver Conference was not concerned about contract towage as it was about 'salvage payments' and moreover, contract towage is mostly paid in full by one party to the adventure.[393]

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[391] N Burges 'Damp Squid or Slippery Slope' (2005) 19 *Maritime Risk International* 10.

[392] *CMI Yearbook 2003* (*Vancouver I*) 274.

[393] This uncertainty as to the meaning of the wording 'salvage payments' led the AAA, United States, to adopt a probationary Rule of Practice at its Annual General Meeting in May 2005 providing as follows: 'For the purposes of applying Rule VI of the YAR 2004 the term 'salvage payments' shall be interpreted to mean payments made in respect of salvage services and for which there is contractual and/or legal provision for apportionment and payment between the salved interests upon termination of the salvage services independent of the YAR 2004.' This probationary Rule, it is submitted, forestalls the argument that simple towage or similar services arranged for the common safety of the vessel and paid for by a party to the maritime adventure is salvage and thus, is not recoverable in general average under Rule VI YAR 2004. It is argued that if the wording 'salvage payment' is to be used in a subsequent version of the YAR there is a need for a definition of the term in the Rules for clarity and certainty. This probationary Rule of Practice has been reviewed by the Association annually and the Association has reported that its Fellows have not yet encountered sufficient cases involving

(iv) Effect of the change

Thus, the extent to which salvage is re-apportioned in general average is now on very limited terms under the YAR 2004. It is however purely an accounting transaction, so that credit is given without the amount being considered as general average.[394] However, the question that arises is what would be the likely impact/effect of the change in Rule VI YAR 2004 on the general average system.

(v) Wider impact of the change

(a) Favours cargo and its insurers

Economically, the change introduced in Rule VI YAR 2004 will in many cases favour cargo and their insurers. This is because cargo and their insurers will save the additional cost and time required to re-apportion salvage expenditure in general average as they will have to cover only salvage charges. This will amount to reasonable savings to cargo insurers, especially where a container vessel is salved; as thousands of cargo interests may be involved in such cases.[395] It is submitted that this change is the most significant change in the YAR 2004 with respect to the interest of cargo interests and their insurers as it is estimated that it would be worth about 10 to 12 per cent of all sums shifted in general average from cargo to shipowning interests.[396] Thus, cargo insurers will benefit the most from the change introduced by Rule VI YAR 2004.

Rule VI of the YAR 2004 to enable it determine whether this would be confirmed as a full Rule of Practice. For a full text of AAA Rules of Practice, see www.average-adjusters.com/R0P97.pdf, accessed 20 November 2011.

[394] R Cornah op cit note 4 at 7.

[395] B Browne 'General Average and Places of Refuge following the CMI Conference 2004', 10, available at www.marineclaimsconference.com/2004/docs/Ben%20Brown%20paper.doc, accessed 11 May 2011.

[396] B Browne 'Which York-Antwerp Rules Apply?' available at www.wplgroup.com/aci/news-items/york-antwerp -rules--by-ben-browne.asp, accessed 2 May 2012.

(b) Favourable for hull insurers

Hull insurers will also save the additional cost of re-apportioning salvage expenditure in general average. There will be a reduction in adjuster's fees as the adjuster will spend less time on the adjustment due to the restricted number of salvages that will be included in general average claims[397] and this will result in the reduction of the total general average cost to both cargo and hull insurers.

(c) Both cargo and hull insurers

Despite the huge benefit that will accrue to cargo and the minimal benefit to hull insurers by the change in Rule VI YAR 2004, both insurers may either benefit or lose as unfavourable differential salvage settlements (where parties settle their contribution to the salvage award separately with the salvor)[398] or disproportionate legal costs will not be shared by the parties to the adventure.

(d) Effect on salvage arrangements

Based on the above stated effect of the change to Rule VI, shipowners may choose a Lloyd's Open Form (LOF)[399] type of salvage agreement (where each party is separately liable) rather than initially funding the whole salvage operation themselves. However, based on Rule XVII YAR 2004 the average adjuster will still have to ascertain the amount of salvage paid and deduct it from the contributory values as a special charge. Thus, it is submitted that the savings in procedural cost in the adjustment process expected by cargo insurers as a result of the change to Rule VI may be marginal.

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[397] J Macdonald op cit note 78 at 446.

[398] See chap 6 § II*(c)(vi)*(a)(iv) infra.

[399] LOF is the most widely used salvage contract which provides a regime for determining the amount of remuneration to be awarded to salvors for their services in saving property at sea and preventing or minimising damage to the environment. The contract has been used since 1890 and was first published in 1908. See J Hare op cit note 58 at 437. The latest edition is LOF 2011.

(e) Further effects

A further effect of this change is that shipowners may be reluctant in the future to make payment on behalf of cargo interests for their proportion of salvage remuneration taking cognisance of the fact that there will be no allowance of interest for the period that the paying party is out of pocket and also because of the abolition of a commission of 2 per cent[400] on general average disbursements allowed under the YAR 1994.[401] This would result in few cases where salvage expenses will be reapportioned in general average under the YAR 2004 (except in some countries were the law mandates the shipowner to fully pay for salvage expenses and to recoup it from the other interests in general average)[402] as the expenses would have been paid by all the parties to the contract.

Furthermore, it has been suggested that the change in Rule VI YAR 2004 might enhance the use and effectiveness of General Average Absorption Clauses in hull policies.[403] It is argued that this view is tenable because the limit in General Average Absorption Clauses in hull policies was exhausted in the past in salvage cases by an actual payment for contract salvage or by anticipated award under LOF, necessitating the need to collect general average security to recover other items of expenditure.[404] Thus, the limit to the re-apportionment of salvage expenditure in general average under the YAR 2004 could enable the full amount of General Average Absorption Clauses in hull policies to be available to pay the remaining general average costs in some cases, obviating the need to collect general average security. This would be invaluable to shipowners in determining whether it would be economical and necessary to collect general average security from cargo owners.

It is argued that the limit to the re-apportionment of salvage expenditure in general average under Rule VI YAR 2004 could lead to a reduction in the number of declarations of

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[400] See chap 4 § II*(e)* infra.

[401] Perceiving a potential inequity facing shipowners who may from time to time not only pay ship's proportion of salvage but also cargo's proportion or part of it, the AAA of the United States approved a Rule of Practice as follows: 'When the adjustment is subject to the York-Antwerp Rules 2004 and includes, applying the provisions of Rule VI(a) of those Rules, contributions to salvage paid by one party to the adventure on behalf of another party to the adventure as well as on its own behalf, the provisions of Rule XXI of the Rules will apply to the paying party's salvage payments, including interest thereon and legal fees associated with such payments as if they were general average expenditure.' See Rule XXII Rules of Practice, AAA, United States.

[402] Examples are Spain and the Netherlands.

[403] R Cornah op cit note 4 at 7.

[404] Ibid at 8.

general average by shipowners as General Average Absorption Clauses in hull policies may in certain instances be sufficient to cover the cost of general average.

(b) Rule XI – Wages and maintenance of crew

The second change that falls to be considered is the change introduced in Rule XI YAR 2004.

(i) Background

Wages and maintenance of crew during the detention of a vessel at a port of refuge was generally allowable as general average in most jurisdictions; some of which admitted the wages and maintenance of crew whilst at sea, bearing up for a port of refuge and regaining position after leaving the port.[405]

(a) American law

In American law the wages and maintenance of master and crew while the vessel was at sea, during its detention at a port of refuge to effect necessary repairs and up to the point of regaining its normal course are allowed in general average. American law views such expenditure as having been incurred for the safe prosecution and completion of the voyage.[406]

(b) English law

English law did not allow the costs of crew wages and maintenance in general average. Under English law, general average was considered terminated as soon as the port of refuge was reached, so that the expenses in question were not considered to form part of the cost of the general average operation. Such costs were considered to arise from delay in a port of refuge in order to effect repairs, which, in the case of at least of accidental damage were costs to be borne by the shipowner under the carriage contract. In *Power v Whitmore*,[407] Lord

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[405] J Cooke & R Cornah op cit note 28 at 373.

[406] Toulmin J in *The Joseph Farwell* 31 Fed Rep 844 (DC 1887) at 845, noted that 'general average expenses include the charges of entering the harbour, pilotage, towage … and allowances of wages of crew and provisions from the moment of departure from the course of voyage until the voyage is renewed.' See also *Hobson v Lord* 92 US 397 (1798) (US SCt).

[407] (1815) 4 M & S 141 (HL).

Ellenborough in dismissing a claim in general average for a master's wages at a port of refuge held that 'general average must lay its foundation in a sacrifice of a part for the sake of the rest; but here there was no sacrifice of any part by the master, but only of his time and patience.'[408]

(c) YAR

In the efforts at achieving uniformity in the law of general average, the allowance of crew wages and maintenance was recognised in the Glasgow Resolutions 1860[409] and the York Rules 1864.[410] Subsequently, Rule XX YAR 1924 provided for the allowance in general average of crew wages and maintenance whilst at sea, bearing for the port of refuge and regaining position after leaving the port. This provision was included in Rule XI of the subsequent sets of YAR up to the 1994 Rules.

(ii) The change

In the change introduced by the YAR 2004, the provision of Rule XI(a) YAR 1994 is unchanged, but all reference to wages is now removed from the new Rule XI(c) YAR 2004 which was previously Rule XI(b) YAR 1994; the paragraphs having been re-ordered. The allowance of crew wages and maintenance in general average while the vessel is detained at a port of refuge has been omitted under the amended Rule XI(c) YAR 2004.

(iii) Effect of the change

Under this amended Rule XI(c) YAR 2004, wages of master, officers and crew during detention of the ship at the port of refuge which was payable under the earlier Rules, would not be allowed in general average under the 2004 Rules.[411] What is allowed under the YAR 2004 is the wages and maintenance of the master and crew during the prolongation of the voyage while entering or leaving a port of refuge. 'Prolongation' in general average parlance

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[408] Ibid at 145.

[409] Resolution 8 Glasgow Resolutions 1860. *Cf* chap 6 § II*(a)(i)* infra.

[410] Rule VIII York Rules 1864. *Cf* chap 6 § II*(a)(i)* infra.

[411] Rule XI(a) YAR 2004.

relates to the extra period spent at sea during a vessel's resort to and from a port of refuge. The period commences from the moment the vessel deviates from the intended route, ceases temporarily on the vessel's arrival at the port of refuge, resumes when she leaves the port and ends finally when the vessel regains its original point of deviation or course.[412] Thus, what is allowed is the cost of the over-time in deviating and entering a port of refuge and departing from the port of refuge and regaining the point of deviation or regaining normal course.

(iv) Broader implications

With regard to the broader implications this change might have, Browne is of the view that it is difficult to estimate how much the change in Rule XI YAR 2004 is likely to save insurers.[413] He estimates that much of the savings will be adjusters' fees and administrative costs.[414] However, Marshall estimates that because a substantial proportion of engine and mechanical failure general averages are built round crew wages, savings to insurers may be as much as between 3 or 4 per cent.[415]

(a) Shipowners and hull insurers

Though the percentage of savings to insurers cannot be stated with certainty, this change may cause shipowners to incur additional costs as the wages and maintenance of master and crew while a vessel is detained at a port of refuge (which might be for an extended period) will not be recoverable in general average. This is because ordinarily, crew wages and maintenance allowable as general average is covered under the shipowner's hull policy together with the vessel without the payment of additional premium.[416] Where such costs are not allowable as general average, the cost will not be recoverable under the hull policy and shipowners will have to find alternative insurance cover for such cost. This involves the payment of premium

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[412] B Browne op cit note 395 at 11.

[413] Ibid at 12.

[414] Ibid.

[415] M Marshall 'General Average – A Statistical Update', 20, paper presented at IUMI Oslo Conference 1996, available at www.jssusa.com/assets/Uploads GA-papers/Marshall0996.pdf, accessed May 2011.

[416] Clause 16 ITCH; clause 14, IVCH.

for such alternative cover in addition to the premium paid under their existing hull policy.[417] Furthermore, shipowners will continue to pay the crew during the period of general average detention at a port of refuge, though the value of the crew's services, in terms of contributing to the earnings of the ship, is lost to them. Hull insurers may also indirectly benefit as shipowners will have to take out a special insurance cover from hull insurers to cover separately the cost of crew wages and maintenance during the detention of the vessel at a port of refuge in addition to the existing hull cover for the vessel. This will result to more premiums being paid to hull insurers.

Presently, it appears that no existing insurance cover in the insurance market can adequately provide cover for the cost of crew wages and maintenance incurred at a port of refuge. Loss of Hire insurance would not be the appropriate cover for such costs as Loss of Hire policies are usually subject to at least 14 days deductible,[418] which means that if the period of detention of the ship at the port of refuge is less than 14 days, there will be no recovery by the shipowner of the cost of crew wages and maintenance. It therefore seems likely that shipowners would need to negotiate with their hull insurers for a special cover for the cost of crew wages and maintenance that would provide cover for the entire duration of the vessel's detention at a port of refuge. Such a policy will be interpreted by the courts based on the terms of each policy. However, it is difficult to ascertain whether the cost (in terms of the premium paid) of such an alternative cover will be greater than the loss that will be incurred by shipowners as a result of the change in Rule XI. This is because the actual loss to shipowners as a result of the change cannot be ascertained as a result of the lack of widespread use of the YAR 2004 in the market and the dearth of adjustments based on the YAR 2004.

Thus, the change in Rule XI places the burden of the cost of crew wages and maintenance at a port of refuge solely on the shipowner and ultimately on his hull insurer.

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[417] Ibid. This is the position under English law which does not allow the recovery of the cost of crew wages and maintenance as particular average cost. Buller J in *Robertson v Ewer* (1786) 1 TR 127 (KB), posited that in English law it is 'perfectly well settled that the insured cannot recover seamen's wages or provisions on a policy on the body of a ship; those are not the subject of the insurance.' See also s 55(2)(b) MIA 1906.

[418] See §16-7 Loss of Hire policy of the Swedish Club.

(b) Cargo insurers

Cargo insurers will benefit from this change as the removal of cost of crew wages and maintenance will lead to a reduction in the total general average cost and consequently a reduction in the proportion of the contribution to be made by cargo owners to general average. Usually, where a vessel is detained for an extended period at a port of refuge, the bulk of the cost of crew wages and maintenance in general average are ultimately met by cargo insurers.[419]

(c) Legal implication

It is instructive to note that the change introduced in Rule XI YAR 2004 is in contrast to the laws of most maritime states as the allowance in general average of crew wages and maintenance incurred during a vessel's detention at a port of refuge has always been admitted as general average under the laws of all Civil law countries[420] and the United States.[421] After a period of uncertainty, it is argued that it is now also allowed in English law.[422] The allowance of crew wages and maintenance during the period of detention of a vessel at a port

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[419] R Golder & L Thorne 'Is Bigger Better' (2004) 18 *Maritime Risk International* 7 at 9. However, it should be noted that such costs are incurred for the safe prosecution of the voyage in one per cent of the cases when a vessel is detained at a port of refuge.[419] It is estimated that 98 per cent of the cases in which a vessel enters a port of refuge is in consequence of an accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety.[419] Furthermore, the other one per cent of the cases in which a vessel is detained in a port of refuge is as a consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety.[419] Thus the bulk of crew wages and maintenance in a port of refuge (99 per cent of the cases) pertains to common safety circumstances than to the safe prosecution of the voyage. See J Cooke & R Cornah op cit note 28 at 384.

[420] G Hudson & M Harvey op cit note 299 at 151. See also art 764(9) Brazil Commercial Code 1890.

[421] See for eg, *The Star of Hope* 9 Wall 203 (1869) (US SCt); *Hobson v Lord* US 397 (1875) (US SCt). The allowance ceases when the voyage is abandoned or the vessel is ready to resume her voyage: *The Joseph Farwell* 31 Fed Rep 844 (DC 1887).

[422] It could be argued that this is the effect of the decisions in *Atwood v Sellar* (1879) 4 QBD 342 (QB), [1880] 5 CA 286 (CA) and *Svendsen v Wallace* (1883) 11 QBD 616, (1884) 13 QBD 69 (CA); (1885) 10 App Cas 404 (HL), which recognised the common benefit principle in English law.

of refuge was also recognised at the beginning of the efforts to achieve uniformity in the principles and practice of general average.[423]

(c) Rule XV – Temporary Repairs

(i) Background

Under the YAR 1994 the cost of temporary repairs to a ship at a port of refuge relating to damage suffered for the common safety or caused by a general average sacrifice is allowed in general average.[424] Such temporary repairs to accidental damage effected for the safe prosecution of the voyage at a port of refuge are allowed up to the savings in general average realised thereby.[425] The following example illustrates this: where the cost of temporary repairs at a port of refuge is US$100 000; if the cost of handling the cargo is US$60 000 and the cost of detention at the port of refuge if permanent repairs are effected is US$30 000, the general average allowance would be US$90 000. The excess of US10 000 is not allowed in general average.

Furthermore, under the YAR 1994, the cost of temporary repairs at a port of refuge for the safe prosecution and completion of the voyage from the port of refuge is allowed in general average.[426]

(ii) The change

The position under the YAR 1994 with regard to the cost of temporary repairs to a ship at a port of refuge relating to damage suffered for the common safety or caused by a general average sacrifice is unchanged in the YAR 2004.[427] However, temporary repairs of accidental damage effected at a port of refuge for the purpose of safely prosecuting the voyage from the port of refuge are treated differently under the YAR 2004. Under the YAR 1994 they are allowed 'without regard to the savings, if any, to other interests but only up to the saving in

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[423] See Resolution 8 Glasgow Resolutions 1860. This practice was also recognised in Rule VII York Rules 1864 and in subsequent sets of YAR until the change in the YAR 2004.

[424] Rule XIV YAR 1994.

[425] Ibid.

[426] Ibid.

[427] Rule XIV(a) YAR 2004.

expense which would have been incurred and allowed in general average, if such repairs had not been effected thereto.' This provision of Rule XIV YAR 1994 has been added a proviso in the amended Rule XIV YAR 2004 that changes the calculation of temporary repairs of accidental damage effected for the safe prosecution of the voyage from the port of refuge.[428]

(iii) Effect of the change

The effect of the amendment in Rule XIV YAR 2004 is that recovery of the cost of temporary repairs to accidental damage for the safe prosecution of the common maritime adventure at a port of refuge is limited to the amount by which the cost of the temporary repairs plus the cost of permanent repairs actually carried out but not at the port of refuge (or if no permanent repairs are carried out, the depreciated value of the vessel at the completion of the voyage) exceeds the cost of permanent repairs that would have been carried out at the port of refuge.[429] The change in the Rule could be expressed as follows:

TRPR + PR (DV) – PRPR = allowance in general average

Where TRPR is the cost of temporary repairs at port of refuge and PR is the cost of permanent repairs actually carried out. DV is the depreciated value of the vessel at the completion of the voyage and PRPR is the cost of permanent repairs that would have been carried out at a port of refuge.

The following example illustrates the effect of the change: A bulk carrier laden with coal from Saldanha to Lagos develops serious leaks in no 3 hold and enters a port in Angola as a port of refuge. Effecting permanent repairs at Angola would have cost US$1m. Temporary repairs are effected in Angola at the cost of US$200 000 and the voyage continues to Lagos where permanent repairs are effected at the cost of US$600 000. Under the YAR 1994 the US$200 000 is allowed in general average, under the YAR 2004 they are not. However, if the temporary repairs effected in Angola had cost US$500 000; US$100 000 of those repairs cost would be allowed under the YAR 2004.

The capping in this manner ensures that in the case of temporary repairs to accidental damage, the savings to the shipowner is brought into account before allowance in general

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[428] See the proviso in paragraph (b) of Rule XIV YAR 2004.

[429] G Hudson & M Harvey op cit note 299 at 260.

average. By this capping on the amount of temporary repairs in this manner shipowners may not recover the full cost of temporary repairs to accidental damage effected for the safe prosecution of the voyage. Browne is of the view that there may not be very many cases when the proviso will come into operation but in a few cases each year there will be a significant redistribution of money.[430] However, it appears that it is difficult to quantify how significant such a redistribution of money will be, especially as the YAR have not been widely used in carriage contracts and many adjustments have not been made based on the Rules.

(iv) Wider implications of the change

(a) Cargo insurer

The change in Rule XIV YAR 2004 leans more in favour of cargo insurers as the shipowner in some cases may not be able to recover in general average the cost of temporary repairs effected for the safe prosecution of the voyage from a port of refuge and cargo owners will not have to contribute to make good such costs in general average. Even where a recovery of temporary repairs cost is possible under Rule XIV YAR 2004; the shipowner may not recover the total cost of the repairs effected. Economically, this will result in lower costs and savings to cargo insurers in most cases. Shipowners will bear the financial burden of temporary repairs for the prosecution of the adventure that are not recoverable under Rule XIV and ultimately such costs will be borne by hull insurers as a particular average claim under the shipowner's existing hull policy, where the shipowner is able to prove that the damage to the vessel was caused by an insured peril.[431] Thus, the change will lead to an increase in particular average claims on hull insurers. Rule XIV YAR 2004, therefore, substantially

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[430] Ibid. Marshall is, however, of the view that the impact of the change on general average will not be more than one per cent. See M Marshall 'General Average – The Figures and Their Relation to the Debate on Reform', 18, paper delivered at IUMI Conference, Singapore, 2004, available at www.iumi.com/images/stories/IUMI/Pictures/Conference/Singapore2004/Tuesday/12.matthewmarshall.pdf, accessed 22 January 2012. Thus it could be argued that shipowning interests should not have much opposition to the change in Rule XIV YAR 2004.

[431] *International Navigation Co v Atlantic Mutual Ins Co* 100 Fed R 304 (SDNY 1900) at 310. See also clause 10.4 ITCH; clause 8.4 IVCH; R Cornah op cit note 4 at 11.

places the burden of the cost of temporary repairs effected for the safe prosecution of a voyage from a port of refuge on the hull insurer.

(b) Cargo, shipowners and their respective insurers

It is argued that the change will ensure a measure of equity between cargo and shipowning interests (and ultimately hull insurers). This is because shipowners will no longer be able to charge on the other interests a cost which at the end of the voyage, without cargo, allows the shipowner to choose the place for permanent repairs on the basis of individual economic considerations (such as cheaper repair cost at another port). This usually gives rise to large savings to the shipowner compared to costs which the shipowner (and ultimately its hull insurer) could have met had it, in the absence of Rule XIV YAR 1994, been obliged to incur by carrying out permanent repairs at the port of refuge. Thus, in contracts of carriage incorporating the YAR 2004, shipowners would likely not choose the place for permanent repairs of the vessel on the basis of the economic benefit that may accrue only to them.

(v) Further impact of the change

The change in Rule XIV YAR 2004 may also lead to shipowners carrying out permanent repairs at the port of refuge (where there are facilities to do so), to the detriment of cargo owners who will have to bear the brunt of the delay with regard to the delivery of their cargoes. The delay could be avoided by the transhipment of cargo under the 'Non-Separation' principle in Rule G.[432] It is argued that the change in Rule XIV YAR 2004 will curtail the activities of unscrupulous shipowners who might want to abuse the provision as a maintenance system for their substandard vessels as the full cost of temporary repairs effected for the safe prosecution of a voyage may not be recoverable in most cases.

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[432] See chap 6 § II*(c)(vi)*(a)(iii) infra.

(d) *Rule XXI – Interest*

(i) Background

Interest under the YAR 1974[433] and 1994[434] is charged on general average expenditure, sacrifices and allowances at the rate of 7 per cent per annum. In preparation for the Vancouver Conference, the CMI ISC on General Average identified two problems:

(a) the variation of bank and other prime rates of interest over periods of time (the time factor), and

(b) the variation between the rates applicable in different countries and currencies (the currency factor).[435]

For the first problem, the ISC proposed a partial solution, namely the provision of an annual review of the rate of interest fixed by Rule XXI. However, no proposal was made by the ISC for the second problem. This had the result of leaving the second problem unresolved.[436] With respect to the second problem, the predominance of the United States dollar as an international commercial currency had led to its acceptance as the currency most frequently adopted for general average adjustments. However, there are instances when general average settlements have to be made in other currencies that are subject to widely varying interest rates and severe inflation. The International Association of European Adjusters – AIDE (now International Association of Average Adjusters – Association Mondiale de Dispacheurs (AMD)) in its Position Paper submitted for the Vancouver Conference proposed the employment of Special Drawing Rights (SDR)[437] or alternatively by the selection of 'such

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[433] Rule XXI.

[434] Ibid.

[435] G Hudson & M Harvey op cit note 299 at 265.

[436] Ibid.

[437] SDR means Special Drawing Rights. SDR are supplementary foreign exchange reserve assets defined and maintained by the International Monetary Fund (IMF). SDRs represent a claim to currency held by IMF member countries for which they may be exchanged. The SDR's value is defined by weighted currency basket of the four major currencies: the Euro, the US Dollar, the British Pound and the Japanese Yen. As at 31 January 2014,

currency or currencies as may be equitable in the interests of the parties, having regard to the currencies in which the major claimants in general average have sustained financial loss.'[438]

To solve these problems (the 'time and currency factors'), the CMI ISC in the Conference proceedings voted to abolish the fixed interest rate of 7 per cent per annum in favour of a rate to be fixed annually by the CMI. It was considered by the majority of the delegates that the fixed interest of 7 per cent was too inflexible and that a system that was more responsive to changing economic conditions should be adopted.[439] Rule XXII of the YAR 1994 was therefore amended to reflect the views of the majority of the delegates.

(ii) The change

The fixed rate of interest of 7 per cent on general average disbursements in Rule XXII YAR 1994 has been removed in the YAR 2004. The amended Rule XXII YAR 2004 provides that the rate of interest on general average disbursements will be based on a rate to be fixed annually by the CMI Assembly; taking cognisance of certain guidelines to be published by the CMI. The CMI has subsequently published these guidelines which can only be amended by a decision of the Conference of the CMI.[440]

(iii) Effect of the change

(a) Shipowners, cargo and hull insurers

The amendment in Rule XXII YAR 2004 will result in likely benefits to cargo and hull insurers as interest on general average disbursements (based on the rate to be set by the CMI annually) will be based on prevailing commercial rates and not on a fixed rate that may be arbitrarily high.[441] It is argued that the change could result in losses to shipowners as the 7 per

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the value of one SDR was equal to 0.423 euros, 12.1 yen, 0.111 pounds and 0.66 dollars. See www.imf.org/external/np/fin/data/rms_sdrv.aspx, accessed 23 July 2003.

[438] G Hudson & M Harvey op cit note 299 at 265.

[439] R Cornah op cit note 4 at 11.

[440] For a full text of these guidelines, see *CMI Yearbook 2004* (*Vancouver II*) 363-364.

[441] The rate of interest as fixed by CMI was 4.5 per cent for 2006, 5.5 per cent for 2007, 5.75 per cent for 2008, 6 per cent for 2009, 4 per cent for 2010, 3 per cent for 2011, 3 per cent for 2012 and 2.5 per cent for 2013, available at www.comitemaritime.org/York-Antwerp-Rules/0,2754,15432,00.html, accessed 10 April 2013.

cent rate in the YAR 1994 was in some instances higher than the prevailing commercial rates thereby resulting in shipowners obtaining increased general average contributions for their general average disbursements as a result of the accrued amount of interest.[442] Furthermore, shipowners could incur losses based on the fact that the financing costs of a shipowner's business (and hence his general average disbursements) are most times considerably higher than bank based rates.[443]

Economically, shipowners under the 2004 Rules will no longer enjoy a windfall as a result of the prevailing bank rates being lower than the fixed interest rate in the Rules as was the case in some instances in adjustments under the 1994 Rules. This amendment, it is argued, equitably balances the interest of cargo owners and shipowners with respect to interest on general average disbursements.

(b) Further effect

It is argued that the amendment would lead to fairer settlements and help avoid the situation witnessed when bank rates climbed into double figures for much of the 1970's and 1980's[444] after the interest rate was put at 7 per cent in the YAR 1974 (though the 7 per cent interest rate reflected the prevailing bank rate at the time).[445]

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[442] Between January 2005 and December 2013 the rate has varied between 2.75 per cent (2013) and 6 per cent (2009) averaging 4.3125 per cent. Accordingly, this represents an average saving by marine insurers of 2.6875 per cent each year between 2005 and 2013 on sums moved in general average under the YAR 2004. See the Position Paper by IUMI to CMI questionnaire on the review of the Rules on general average, 36, dated 30 August 2013.

[443] AAA 'General Average Interest' (2012) 1, available at www.average-adjusters.com/GA%20Interest.pdf, accessed 10 May 2011.

[444] Ibid.

[445] The principle of a variable rate of interest reflecting market forces is compelling; the AAA United States addressed this question in 2002 by adopting the following Rule of Practice: 'When allowance, sacrifices or expenditures are charged or made good in general average, interest shall be allowed thereon at the prime rate prevailing on the last day of discharge, plus 2 %, and continue until three months after the issue date of the general average statement.' See Rule II Rules of Practice, AAA, United States.

(e) XX – Commission

(i) Background

Historically, commission was introduced in the YAR 1924 to act as an incentive to shipowners to put up money for general average disbursements.[446] Interest on general average disbursements was also introduced in the YAR 1924 and this also serves as an incentive to shipowners to provide funds for general average disbursements at a port of refuge.[447] Thus, both allowances served an identical purpose in the YAR 1924 up to the YAR 1994. With the practice of allowing administrative costs in general average adjustments in addition to interest, it was felt by the maritime community that commission could be abolished without adverse effects on the party who disburses funds in general average.[448]

(ii) The change

In terms of Rule XX(a) YAR 1994, parties are entitled to a commission of 2 per cent on general average disbursements except crew wages and maintenance, fuel and stores not replaced during the voyage. However, commission on general average disbursements allowed under the YAR 1994 has been abolished under the YAR 2004.[449]

(ii) Effect of the change

(a) Cargo, shipowner and their respective insurers

Economically, the abolition of commission on general average disbursements in the YAR 2004 will be of benefit to cargo insurers as there will be a reduction in the total cost of general average to cargo owners. However, this will result in some loss to shipowners as they usually incur the port of refuge expenses and the existence of both commission and interest in the YAR 1994 led to an increase in the amount that could be recovered by shipowners in

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[446] J Cooke & R Cornah op cit note 28 at 548.

[447] Rule XXII YAR 1924.

[448] G Hudson & M Harvey op cit note 299 at 263; R Cornah op cit note 4 at 409.

[449] Rule XXI YAR 2004.

general average. The impact of this change may be that shipowners will be reluctant in the future to make payments on behalf of cargo interests such as for their proportion of salvage remuneration as the abolition of allowance of commission in general average reduces the shipowner's total recoverable general average cost.[450] However, it is argued that the abolition of commission is equitable as the existence of interest in the YAR 2004 is sufficient to fully compensate the shipowner for general average disbursements made by it for the benefit of the common maritime adventure; because interest accrues, under the YAR 2004, on general average disbursements up to three months after the issue of the adjustment.[451]

(b) Position in American law

Despite the abolition of commission in the YAR 2004, adjusters in the United States will, under their Rules of Practice, continue to make allowance for reasonable out of pocket expenses relating to general average.[452] However, it is argued that this Rule of Practice is only applicable to claims adjusted in accordance with United States law and practice, in the absence of the YAR. If a contract of carriage incorporates a particular set of YAR, this Rule of Practice will not apply.[453]

(f) Rule XXIII - Time bar

(i) Background

The YAR 2004 is the first set of Rules to introduce a time-bar provision. IUMI had proposed a time bar provision in the YAR to speed up the adjustment process which it criticised for taking too long.[454] This is because hull and cargo insurance is a 'short-tail' business and insurers are always anxious to have a speedy closure of cases.[455] Thus, a new Rule (Rule XXIII) was introduced in the YAR 2004 providing a time-bar for contributions in general average.

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[450] B Browne op cit note 395 at 15.

[451] Rule XXI YAR 2004.

[452] Rule A2 Rules of Practice, AAA, United States.

[453] See *Cia Atlantica Pacifica SA v Humble Oil & Refining Co* 274 F Supp 884 (DC Md 1967).

[454] See chap 7 § III*(f)* infra.

[455] G Hudson & M Harvey op cit note 299 at 270.

(ii) Provisions of the Rule

(a) Issue of conflict

Paragraph (a) of the Rule makes the provisions of the Rule subject to any mandatory rule on limitation contained in any applicable law. This takes cognisance of the fact that certain jurisdictions have mandatory limitation laws[456] that apply to general average claims and that parties cannot by contract derogate from such mandatory limitation laws as the courts in those jurisdictions will not give effect to such a contractual provision. Thus, a litigant in a general average claim where the YAR 2004 apply has to first determine if there is any mandatory limitation law that applies in the jurisdiction where the action is commenced. If there is, then Rule XXIII will not apply as the national law on time-bar in that jurisdiction will apply. This ensures that there is no conflict between the YAR and national laws.

(b) Extinction of rights of action

Paragraph (a) extinguishes all rights of action in general average after one year from the date upon which the general average adjustment was issued.[457] This provision is analogous to art III r 6 HVR which provides that all rights of actions where the HVR are applicable will be extinguished one year after the end of the adventure. However, a cause of action in general average under Rule XXIII is extinguished after six years from the date of the termination of the common maritime adventure.[458] Thus, where an action is commenced within one year after the adjustment was issued, if the adjustment was issued after six years from the date of the termination of the adventure, the action will be time-barred. The fact that it was commenced within one year after the adjustment was issued becomes irrelevant. Succinctly put, all rights of action in general average under the YAR 2004 are extinguished after six years from the date of the termination of the adventure. It is argued that this provision is substantive and not procedural because it extinguishes the cause of action and not merely the remedy.

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[456] For eg, art 263 Maritime Code of the People's Republic of China 1993 provides for a limitation period of one year for claims with regard to contribution in general average counting from the day on which the adjustment was finished. See also art 833 Maritime Code of Croatia 1994.

[457] Rule XXIII(a)(i) YAR 2004.

[458] Ibid.

(c) Calculation of time period

Paragraph (a) of Rule XXIII adopted the English limitation period of six years.[459] However, under English law time begins to run from the date of the general average sacrifice or expenditure,[460] while under the Rule time does not start to run until the date of the termination of the adventure. The important feature of this provision is that it contains a time limit that will apply to all claims in general average, including claims under general average bonds and guarantees, irrespective of the issue of the adjustment and even if no adjustment is made.[461] Also the periods in the Rule may be extended by the agreement of the parties after the termination of the adventure.[462] It is argued that the purpose of this provision seems to be to prevent the parties from agreeing to extend the time limits before the termination of the adventure in order to discourage the parties from inserting provisions that lay down longer periods in their bills of lading or charterparties. However, since the effect of the YAR is contractual, the parties have the liberty to incorporate, vary or exclude any parts of the Rules as they wish.

(d) Scope of the application

The time-bar provision in the YAR 2004 does not apply between parties and their insurers.[463] This provision appears to be based on the English court decision in *Chandris v Argo Insurance Co Ltd*,[464] where it was held that a general average claim under insurance policies arises when sacrifices were made and expenditure incurred and not at the time when the claims were quantified by issuance of an adjustment. However, it is argued that if the issue were to come before the English courts today, the courts might be inclined to follow the approach adopted in recent English judicial decisions on liability insurance which have held

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[459] Section 5 Limitation Act 1980, United Kingdom.

[460] See *Schothorst and Schuitema v Franz Dauter GmbH* [1973] 2 Lloyd's Rep 91 (QB); *Castle Insurance Co v Hong Kong Shipping Co* [1984] 1 AC 226 (HL).

[461] Rule XXIII(a)(i) YAR 2004.

[462] Rule XXIII(a)(ii) YAR 2004.

[463] Rule XXIII(b) YAR 2004.

[464] [1963] 2 Lloyd's Rep 65 (QB). *Cf* chap 3 § III*(c)(ii)*(b) supra. The decision in the case was based in part on *Noreuro Traders v E Hardy & Co* (1923) 16 Ll L Rep 320 (QB) and dicta in *Tate & Lyle Ltd v Hain SS Co Ltd* (1934) 151 LT 249 (CA) and *Morrison SS Co Ltd v Greystoke Castle* [1947] AC 265 (HL) at 283, 312, and in part on s 66(3) MIA 1906.

that unless the policy provides otherwise, the cause of action is not treated as having arisen until the insurer's liability to the assured is established by judgment, arbitral award or agreement.[465] This is because those decisions would be deemed to have overruled the decision in the *Chandris* case.

(e) Impact of the change

It is argued that the time bar provision in the YAR 2004 is a laudable provision as it seeks to ensure that adjustments are carried out without undue delay and that claims are not left open indefinitely. Economically, this is to the advantage of insurers; particularly cargo insurers, as it reduces the cost of the adjustment process especially as there will be a reduction in the adjuster's fees and the interest accruing on disbursements by shipowners where the adjustment is not unduly delayed.[466] Furthermore, the subservience of the Rule to national laws on time-bars is in the best interest of the maritime community as confusion and unnecessary litigation will be avoided in determining what law on time-bar will be applicable in general average claims in any jurisdiction.

III CONCLUSION

The changes introduced by the YAR 2004 were a significant step in the reallocation of risk and cost of general average from cargo insurers to hull insurers. These changes were the most significant step since the emergence of the YAR towards the reduction of the sums paid in general average as a risk and loss redistribution mechanism. With this reduction in the sums paid in general average, particularly by cargo insurers, it appears that the changes introduced by the 2004 Rules intend to favour cargo insurers instead of achieving a compromise that

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[465] See *Post Office v Norwich Union Fire Insurance Society* [1967] 2 QB 363 (CA) and *Bradley v Eagle Star Insurance* Co [1989] AC 957 (HL), in neither of which was the *Chandris* case cited to the court or referred in the courts' judgments. Even though the decision in the *Chandris* case was approved by the Privy Council in *Castle Insurance Co v Hong Kong Shipping Co Ltd* [1984] AC 226 (PC) at 236-238, that was a case under an average bond and guarantee and not under a policy of insurance.

[466] Under Rule XXII YAR 1994 interest is allowed at the rate of 7 per cent per annum on expenditure, sacrifices and allowances charged to general average until three months after the date of the general average adjustment. Thus the shorter the period taken in the adjustment, the lower will be the amount of interest that will accrue. This will lower the total general average costs and the contributions to be made by cargo interests. See H Myerson 'General Average - A Working Adjuster's View' (1995) 26 *JMLC* 465 at 473.

ensures a measure of equitable balance of all commercial interests in the general average system. Browne remarks that;

> 'The principal gainers under the 2004 Rules will be the cargo underwriters. It is estimated that the effect on hull underwriters will be but less pronounced. The effect on shipowners will be marginal ….'[467]

The above effect of the changes introduced by the YAR 2004 highlights the reason shipowning interests are opposed to the Rules as the Rules do not provide a measure of equitable balance of the interests of shipowning and insurance interests. It appears that these changes would primarily result in the transference of cost in general average from cargo to hull insurers. Despite the highlighted equitable aspects of the changes introduced by the YAR 2004, the huge benefits cargo insurers would have by virtue of the changes introduced by the Rules in contrast to the marginal benefits to shipowning interests and their hull insurers depicts the YAR 2004 as a set of Rules that primarily serves the interest of cargo insurers. This explains the opposition of shipowning interests to the incorporation of the YAR 2004 in carriage contracts which militated against the widespread acceptance and use of the Rules in the maritime industry as is shown in the next chapter. This reinforces the need for the review of the changes introduced by the YAR 2004 by the present CMI IWG on general average in the current efforts at reviewing the Rules on general average. This is to identify the changes in the YAR 2004 that could be carried forward, as presently formulated, in the new Rules to be adopted and those that could be revised to ensure that the new Rules to be adopted would be accepted by all interested parties as a set of Rules that balances all commercial interests in the general average system.

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[467] B Browne 'New York-Antwerp Rules Agreed' (2004) 18 *Maritime Risk International* 7 at 10.

CHAPTER 5 THE LACK OF WIDESPREAD USE OF THE YAR 2004 AND THE CMI ABORTIVE EFFORTS TO ENSURE THEIR WIDESPREAD USE

I INTRODUCTION

This chapter aims to show that the YAR 2004 Rules have failed to gain widespread use in carriage contracts in the maritime industry and that the Rules have not been enacted into legislation in maritime states; particularly in the Scandinavian countries that had enacted previous versions of the YAR in national legislation.[468] The examination will provide a broad overview of post-Vancouver developments in the maritime industry and in maritime states with regard to the YAR 2004 to determine the factors and forces that influenced the lack of widespread use of the Rules in the maritime industry and national positions on the Rules. This is aimed at determining the reasons for the low level of acceptance and use of the YAR 2004 globally; to determine whether those reasons have substance or not and whether they should be taken into account or disregarded in the process going forward.

The chapter also aims to identify the reasons for the abortive efforts by the CMI in 2012 at achieving widespread use of the Rules in carriage contracts which resulted in the current efforts towards adopting a new set of Rules in 2016. This will assist in identifying why the proposals that were made for the substantive revision of the YAR 2004 were not adopted. In providing a broad and analytical overview of post-Vancouver developments with regard to the YAR 2004, this chapter assists in informing the recommendations that will be made as regard the substantive changes to the YAR 2004 to ensure that proposals would be made that may be acceptable to all interests in the general average system towards enhancing the requisite level of acceptance and use of the new Rules to be adopted.

II REACTIONS BY SHIPOWNING INTERESTS

(a) Introduction

The YAR 2004 were approved at the CMI Vancouver Conference in 2004 despite strong

[468] Some of the information in this chapter is based on communications the author had with various stakeholders and experts in the industry on the YAR 2004 as a result of the dearth of published works on some of the topics discussed in this chapter. The communications are contained in a file.

opposition by shipowning interests represented by the ICS, BIMCO, International Association of Independent Tanker Owners (INTERTANKO) and International Association of Dry Cargo Shipowners (INTERCARGO).[469] These interests were of the view that significant change was not justified at the time as the 1994 Rules had just been introduced in the market and that a number of the problems which had caused concern to the IUMI had been remedied by developments such as the introduction of General Average Absorption Clauses in hull policies.[470] It is relevant to examine the post-Vancouver reaction to the YAR 2004 by some of these shipowning interests and other interested parties to determine the impact of their position, if any, on the lack of widespread use of the YAR 2004 in carriage contracts.

(b) BIMCO

BIMCO was the first shipowning interest to fire a salvo against the incorporation of the YAR 2004 into contracts of carriage having vehemently opposed the revision of the YAR 1994 prior to the Vancouver Conference. BIMCO through all its post-Vancouver documents has tried to ensure that the YAR 2004 are not incorporated into carriage contracts. Its influence amongst shipowning interests globally is significant[471] and plays a huge part in the acceptance or rejection of any version of the YAR amongst shipowning interests and ultimately in most maritime states. This is because most shipowning interests are members of BIMCO and most standard carriage documents that are used in the market are published by or in collaboration with BIMCO.[472] Presently, 'BIMCO's level of acceptance of the YAR 2004 is zero and there is no likelihood that this position will change in the foreseeable future.'[473]

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[469] R Cornah op cit note 4 at 4.

[470] See chap 7 § V*(c)(ii)*(c) infra.

[471] BIMCO is the oldest of the international shipping Associations with more than 2,500 members in 123 countries (comprising shipowners, managers, brokers and agents.). The shipowner segment alone operates about 65 per cent of the world's merchant fleet measured in deadweight tonnage (representing a fleet of 510 million DWT). For details about BIMCO, see www.bimco.org, accessed 20 November 2011.

[472] A Maurer 'The Creation of Transnational Law – Participatory Legitimacy of Privately Created Norms' (2012) *Zentra Working Papers in Transnational Studies* No 03, 1 at 5.

[473] E-mail communication with Grant Hunter, BIMCO Chief Documentary Affairs Officer, dated 17 June 2011.

(i) BIMCO Special Circular No 1, July 2007

BIMCO in reaction to the changes introduced by the YAR 2004 issued a Special Circular in 2005, which was updated in 2007, urging its members not to incorporate the YAR 2004 in their contracts of carriage on the ground that the Rules are less favourable to shipowners and will lead to the transfer of certain cost from cargo insurers to hull insurers.[474]

Prior to 2005, BIMCO's charterparties and other standard documents contained general average clauses that referred either to the YAR 1974 or the YAR 1994. While general average is still adjusted in a number of cases in accordance with the YAR 1974, BIMCO recommended to its members that general average should be adjusted in accordance with the YAR 1994 in respect of new and revised charterparties.[475] It stated that the previously used additional text to the effect of 'or any subsequent modification thereto' will no longer be used in its documents.[476] It was of the view that the removal of the wording 'or any subsequent modification thereto' was to prevent the YAR 2004 from being used in its standard documents as an amendment to the YAR 1994.

This raises the question as to whether there was a need for the removal of the wording 'or any subsequent modification thereto' in BIMCO's standard carriage documents. There are divergent views on the status of the YAR 2004 as to whether they are a new set of Rules or an amendment of the YAR 1994. Browne argues that the YAR are an amendment of the YAR 1994 and not a new set of Rules.[477] In contrast, Cornah asserts that it was agreed in both the ISC and plenary sessions at the Vancouver Conference that the new Rules should be given the title of 'YAR 2004' to make it clear that these were not simply an amendment to or modification of the YAR 1994 but a new set of Rules.[478] Lending credence to Cornah's assertion, Bent Nielsen (Chairman of the then CMI ISC on General Average) in his presentation on the 2004 Rules stated:

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[474] See BIMCO Special Circular op cit note 6. See also chap 4 supra on the likely effects of the changes introduced by the YAR 2004.

[475] BIMCO Special Circular op cit note 6 at 2.

[476] Ibid.

[477] B Browne op cit note 396 at 1.

[478] R Cornah op cit note 4 at 4. See also J Spencer 'Hull Insurance and General Average – Some Current Issues' (2009) 83 *Tulane Law Review* 1227 at 1247.

> 'The CMI at its Conference held in Vancouver 31 May – 4 June 2004 has completed a revision of the YAR 1994 and approved a new text to be referred to as YAR 2004. The *new rules* are set out below … The CMI will publish a printed version of the *new Rules* ….'[479] (Emphasis added)

From the above extract, it is argued that the word 'amended' used in the first paragraph of the Resolution[480] adopting the 2004 Rules at the plenary session in Vancouver was a wrong choice of word as what was done at the Conference was not an amendment of the YAR 1994 but the approval of a new set of Rules. The intention of the ISC and the delegates at the Conference is clear from the above extract. It is argued that paragraph one of the Resolution adopting the Rules at the plenary session read with the preamble to Bent Nielsen's presentation on the YAR 2004 leads to the inexorable conclusion that the YAR 2004 are a new set of Rules.[481] Thus, there was no need for the removal of the phrase 'any subsequent modification thereto' from BIMCO standard documents.[482]

(ii) Conclusion

The crux of BIMCO's opposition to the 2004 Rules is that the recovery of allowances in general average by shipowners has been curtailed under Rules VI, XI, XIV and XX of the 2004 Rules[483] despite the laudable provisions in Rules XXI and XXIII which shipowning

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[479] B Nielsen 'The York-Antwerp Rules 2004' in *CMI Yearbook 2004* (*Vancouver II*) 363-365.

[480] See *CMI Yearbook 2003* (*Vancouver I*) 366.

[481] It should be noted that Browne in a previous article had stated that the YAR 2004 are a new set of Rules. One cannot approbate and reprobate at the same time on an issue. See B Browne op cit note 467. IUMI had also expressed the intention at its opening remarks at the Vancouver Conference that the Rules to be adopted should be an alternative to the YAR 1994 and not a replacement of YAR 1994. See J Spencer op cit note 478 at 1253.

[482] Presently, all BIMCO's post-Vancouver new and revised charterparties and bills of lading make no reference to the YAR 2004 and the additional wording 'any subsequent modification thereto' has been removed in them. Its new and revised charterparties and bills of lading provide that general average shall be adjusted 'according to the YAR 1994.' For eg, clause 15(b) BIMCO BOXTIME 2004 provides: 'General average shall be adjusted at the place as indicated in Box 31 according to York-Antwerp Rules 1994.' Similar wording can be found in clause 58 BIMCHEMTIME 2005; clause 26 SUPPLYTIME 2005; clause 34(c) BIMCHEMVOY 2008; clause 26(c) GASVOY 2005; clause 32(c) CEMENTVOY 2006; clause 3 BIMCHEMVOYBILL 2008; clause 3 CEMENTVOYBILL 2006 and clause 3 CONGENBILL 2007.

[483] See chap 4 supra.

interests are not particularly opposed to. The Special Circular[484] shows that BIMCO's main reason for opposing the changes introduced by the YAR 2004 is that they will lead to the transfer of certain cost from cargo insurers to hull insurers. This is because shipowners (and ultimately their hull insurers) alone will bear the cost of certain expenses (particularly port of refuge expenses) in general average and pay additional premium for special cover in some instances as shown earlier in this thesis.[485] It is argued that instead of entirely rejecting the 2004 Rules, BIMCO could have encouraged its members to use the Rules and replace the provisions they are opposed to with the provisions of the YAR 1994 that are acceptable to shipowners; since parties who agree to be bound by the YAR are not automatically bound by the latest edition[486] and have the contractual right to merge the provisions of two or more versions of the YAR.[487]

(c) INTERTANKO

INTERTANKO adopted the same approach as other shipowning interests in opposing the revision of the YAR 1994 and supported the submission of the ICS to the CMI on the proposed revision of the YAR 1994.[488] However, unlike BIMCO, INTERTANKO since the Vancouver Conference has neither officially expressed its opposition to the YAR 2004 nor advised its members against the incorporation of the 2004 Rules in their contracts of carriage. Presently, the only charterparty form in the market that makes reference to the YAR 2004 is the EMVOY 2005[489] issued by INTERTANKO. Clause 27(iii) EMVOY 2005 provides:

> 'General average shall be adjusted, stated, and settled according to the York-Antwerp Rules ~~1994~~ 2004 ('Rules') and, as to matters not provided for by those Rules, according to the laws and usages at the port of New York ….'

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[484] *Cf* chap 5 § II*(b)(i)* supra.

[485] See chap 4 § II*(b)* supra.

[486] *Macieo Shipping Ltd v Clipper Shipping Lines* (*The* '*Clipper Sao Luis*') [2000] 1 Lloyd's Rep 645 (QB).

[487] For example, clause 19 NYPE 1946 does not simply incorporate the YAR 1924 but provides that 'general average shall be adjusted, stated and settled according to Rules 1 to 15, inclusive, 17 to 22, inclusive and Rule F of the York-Antwerp Rules 1924 ….'

[488] See ICS Report on the CMI Vancouver Conference 2004, 1, available at www.jssusa.com/assets/Uploads/GA-papers/ICSVCR.pdf, accessed 21 January 2012.

[489] Exxon Mobil Tanker Voyage Charterparty 2005.

However, other INTERTANKO post-Vancouver charterparty forms such as SHELLVOY 2006[490] provides that general average shall be settled according to the YAR 1994. It is argued that the failure by INTERTANKO to issue any official statement to date of its acceptance or rejection of the YAR 2004 seems to suggest that it has relaxed its opposition to the Rules as the EMVOY 2005 is being used by charterers of the vessels of its members in the United States.[491] However, the non-incorporation of the 2004 Rules in its other post-2004 documents sends a mixed message in the shipping industry as to its position on the Rules.

(d) ICS

ICS as stated above was the only shipping organisation that made a submission to the CMI (supported by BIMCO, INTERTANKO and INTERCARGO) and argued against the revision of the YAR 1994.[492] After the Vancouver Conference, the ICS issued a report on the outcome of the Vancouver Conference.[493] In the report, the ICS reiterated its earlier position that the shipping industry (especially shipowning/chartering interests) still remained unconvinced about the need for change at the time and that the changes produced would only result to some extent in the transference of costs between insurers.[494] It further stated that there would likely be uncertainty and resulting questions of interpretation about the new provisions.[495] The ICS then advised shipowners 'to review the new provisions, probably guided by whether existing more comprehensive cover can be maintained at no additional cost, before taking a decision as to whether or not to apply the new Rules or to stay with YAR 1994, or even YAR 1974.'[496]

The tenor of the report and particularly the above advice shows a 'diplomatic' approach to the new Rules, as ICS (unlike BIMCO) did not unequivocally advise shipowners against the use of the YAR 2004. However, it could be evinced from the advice the expectation of the ICS that shipowners after reviewing the benefits accruing to them under the YAR 1994,

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[490] Clause 36.

[491] See chap 5 § V*(c)* infra.

[492] See chap 7 § V*(c)* infra.

[493] A full text of the ICS report is available at www.jssusa.com/assets/Uploads/GA-papers/ICSVCR.pdf, accessed 21 January 2012.

[494] Ibid at 2.

[495] Ibid.

[496] Ibid at 3.

which have been curtailed by the changes introduced by the YAR 2004 and the additional cost of insurance cover for some of the expenses that will not be recoverable under the 2004 Rules,[497] would opt to continue incorporating the YAR 1994 or even the YAR 1974 in their carriage contracts.

(e) Shipping companies

General average has been stated to be mostly declared by container-shipping companies annually.[498] Thus the acceptance of the YAR 2004 by shipping companies (particularly container-shipping companies) is critical to the use of the Rules in the market; hence, Nielsen's advice to IUMI to lobby for the development of a new BOXTIME.[499] The largest shipping companies in the world,[500] as carriers, have their standard bills of lading which they use in contracts of carriage and which contain general average clauses.

The 2004 Rules to date have not found favour with these shipping companies as the Rules have not been incorporated into their bills of lading.[501] The bill of lading terms of these companies continue to provide that general average shall be adjusted in accordance with the YAR 1994.[502] The bill of lading terms of these shipping companies underline the continued opposition by the shipowning community to the incorporation of the YAR 2004 in standard carriage contracts as a result of its opposition to the changes introduced by the Rules.

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[497] See chap 4 § II*(b)* supra.

[498] M Marshall op cit note 415 at 9.

[499] B Nielsen 'The Vancouver Conference', 4, available at www.iumi.com/images/stories/IUMI/Pictures/Conferences/Singapore2004/Tuesday/09.bentnielsen.pdf, accessed 22 January 2012.

[500] For a list of these shipping companies, see A Sharda '10 Largest Shipping Companies in the World', available at www.marineinsight.com/marine/10-largest-container-shipping-companies-in-the-world, accessed 15 February 2012.

[501] T Schoenbaum op cit note 2 at 257.

[502] See clause 22 MSC bill of lading; clause 24 Maersk multimodal transport bill of lading; clause 24 Nippon Yusen Kabushiki Kasha (NYKK) bill of lading. To buttress the rejection of the 2004 Rules by these shipping companies, CMA-CGM in its bill of lading terms unequivocally excludes the YAR 2004. See clause 14(2) CMA-CGM bill of lading terms.

III REACTIONS BY INSURERS

(a) IUMI

IUMI achieved a partial success in its call for the revision of the YAR 1994 as a result of the changes introduced by the YAR 2004.[503] Shortly after the Vancouver Conference, IUMI held its Annual Conference in Singapore in September 2004.[504] At the Conference, presentations on general average and the YAR 2004 were made by Bent Nielsen[505] and IUMI's members who had been at the vanguard of its call for the revision of the YAR 1994.[506]

Nielsen stated that it was doubtful if the YAR 2004 were generally accepted. Taking cognisance of the fact that other interested parties were averse to the YAR 2004, he advised that IUMI should, among other things, use all influence towards shipowners and their organisations and provide possible incentives towards hull insurers' clients to use YAR 2004.[507] He also advised IUMI to lobby lawmakers in countries, like in Scandinavia where the YAR are made part of legislation by reference in maritime Codes, and strive for the amendment of hull insurers' own documents,[508] at least with respect to ballast general average where modern hull conditions make reference to the YAR 1994.[509] He further stated that a new BOXTIME charterparty[510] was urgently needed.[511]

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[503] See chap 4; chap 7 § III infra.

[504] For a full text of all the presentations at the Conference, see www.iumi.com/conferences/singapore-2004, accessed 22 January 2012.

[505] B Nielsen op cit note 499.

[506] See B Browne 'The York-Antwerp Rules 2004 – Setting the Scene', available at www.iumi.com/images/stories/IUMI/Pictures/Conferences/Singapore2004/Tuesday/08.benbrowne.pdf, accessed 22 January 2012; N Gooding 'York-Antwerp Rules 2004 – Implications for Hull and Cargo Insurers', available at www.iumi.com/images/stories/IUMI/Pictures/Conferences/Singapore2004/Tuesday/13.nicholasgooding.pdf, accessed 22 January 2012; M Marshall op cit note 430. This was an update of the old statistics by Marshall prior to the Vancouver Conference.

[507] B Nielsen op cit note 499 at 5.

[508] Ibid.

[509] See clause 10.3 ITCH; clause 8.3 IVCH.

[510] BOXTIME charterparty is the BIMCO standard charterparty for container vessels.

[511] B Nielsen op cit note 499 at 6.

Recognising the possibility of the YAR 2004 not gaining widespread use in the industry because of the influence of shipowning interests in the general average system, Nielsen concluded:

> 'The changes [brought about by the 2004 Rules] were not supported by the representatives of shipowners' interests … These interests are very influential with respect to the use of the Rules, as they mainly come into use via clauses in charterparties and bills of lading. One has to realise, therefore, that the application of the YAR 2004 will not be wide-spread unless and until owners in general, and their organisations, have been convinced that they should be applied.'[512]

Nielsen's comments underscore the influence shipowners have in the general average system as carriers who determine the version of the YAR that will be incorporated in their standard carriage contracts. His comments allude to the truism that no version of the YAR will gain widespread use in the market without their acceptance by the shipowning community.

Gooding in his presentation stated that a new clause was desirable for hull policies that will incorporate the YAR 2004. His suggested wording for the new clause was:

> 'Notwithstanding anything contained herein to the contrary this policy will only respond to claims for general average sacrifice or expense when adjusted in accordance with the York-Antwerp Rules 2004.'[513]

The incorporation of the above clause in the standard hull policies in the market could have had the effect of making shipowning interests to rethink their positions on the YAR 2004 and to incorporate the provisions of the Rules in their standard carriage contracts in order to be able to recover general average costs under their hull policies.

However, the IUMI failed to proactively engage in general lobbying of interested parties in the industry (particularly shipowners) and law makers in countries, as the CMI is the only body that officially lobbied shipowning interests (particularly BIMCO) to accept the

[512] Quoted in J Spencer 'York-Antwerp Rules 2004 – Recent Development', 1-2, available at www.jssusa.com/assets/Uploads/GA-papers/FallNL.pdf, accessed 16 November 2011.

[513] N Gooding op cit note 506 at 16.

new Rules.[514] In Scandinavia, where the YAR are made part of legislation by reference in maritime Codes,[515] no country has enacted the YAR 2004 in her maritime Code. Current hull policies still make reference to YAR 1994 and amendments to hull policies after the Vancouver Conference failed to make reference to the YAR 2004.[516] Also, BOXTIME 2004[517] published after the Vancouver Conference makes no reference to the YAR 2004.[518] These developments are a major encumbrance to the acceptance and use of the YAR 2004 in the maritime industry. Wikborg aptly notes that;

> 'The chances of finding the 2004 Rules in bills of lading are slim, since it is the carrier who has to agree and change the forms. The status is that most of them will not. I believe that BIMCO is a better place to seek an answer as to the question on their actual use as IUMI did not internally at least, do any propaganda ….'[519]

Wikborg's statement affirms that IUMI did not carry out a vigorous lobbying campaign to reach out to shipowners, lawmakers and other interested parties to reach a compromise that could have ensured the widespread use of the YAR 2004 in the market. It is argued that IUMI after the Vancouver Conference clearly rested on its oars and this torpor contributed to the lack of widespread acceptance and use of the 2004 Rules globally. Remarkably, the lack of widespread use of the YAR 2004 was not discussed in any of the post-2004 IUMI's Annual Conferences till 2012.[520]

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[514] The CMI's former President, Jean-Serge Rohart, at BIMCO Centenary also expressed the CMI's concern about BIMCO's position on the YAR 2004 and urged BIMCO to reconsider its position. See CMI Newsletter No 3 September/December 2005, 5-6.

[515] The Maritime Codes of some Scandinavian countries are discussed in chap 5 § V*(b)* infra.

[516] AIMU's 2009 Hull Clauses make no reference to any provision of YAR 2004. See AIMU 2009 Hull Clauses op cit note 11.

[517] BIMCO standard charterparty for container vessels, first issued in 1990 and revised in 2004.

[518] Clause 15(b) BOXTIME 2004 provides that general average shall be adjusted according to the YAR 1994.

[519] E-mail communication with Ole Wikborg, President of IUMI, dated 16 May 2011.

[520] N Gooding 'General Average Update', 4, available at www.iumi.com/images/stories/IUMI/Pictures/Conferences/SanDiego2012/TuesdayMorning/04_cargo_gaupdate_gooding.pdf, accessed 7 November 2012.

(b) P&I Clubs

P&I Clubs are independent, non-profit making mutual insurance associations providing cover for its shipowner and charterer members against third party liabilities relating to the use and operation of ships.[521] The 13 largest P&I Clubs in the world have grouped together to form the 'International Group of P&I Clubs' (the 'International Group')[522] providing cover for approximately 90 per cent of the world's ocean going tonnage.[523] The International Group did not make any submissions to the CMI prior to the Vancouver Conference on IUMI's proposals for the revision of the YAR 1994; presumably because the proposed amendments did not affect the liability of P&I Clubs under the YAR 1994. By Rule XI(d) YAR 1994, P&I Clubs cover claims in general average for measures taken to prevent or minimise pollution damage.[524] The changes introduced by the YAR 2004 did not change this.

Presently, P&I Clubs remain largely neutral on the differences between the 1994 Rules and the 2004 Rules, since the 'pollution compromise' reflected in Rules C and XI(d) YAR 1994 was not disturbed.[525]

IV REACTIONS BY AVERAGE ADJUSTERS

(a) AAA

Average adjusters are experts in law and practice of marine insurance and general average who may be appointed by a party in a marine claim or dispute. They provide professional and independent view on claims arising from marine casualties.[526] Average adjusters are expected to be neutral and fair in general average adjustments as equity is the foundation of the general average system.[527] The AAA was founded in 1869 with the prime object of promoting correct

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[521] J Hare op cit note 58 at 947.

[522] See the Group's website at www.igpandi.org, accessed 16 February 2012.

[523] Ibid.

[524] *Cf* chap 3 § III*(c)(ii)*(c)(iv) supra and chap 6 § II(*c*)*(vi)*(b)(iv*)* infra.

[525] J Cooke & R Cornah op cit note 28 at 64. However, it should be noted that the International Group at the CMI Singapore Conference 2000 voted against the revision of the YAR 1994. See chap 7 § VI*(c)* infra.

[526] J Spencer op cit note 478 at 1257.

[527] The following description of that role was given by E R Lindley in 1904 and remains true today: 'The use of the adjuster individually is to grease the wheels of commercial machinery, to do work which neither the assured

principles in the adjustment of marine insurance claims and general average, uniformity of practice amongst average adjusters and the maintenance of good professional conduct.[528]

Though the AAA did not submit a Position Paper to the CMI on IUMI's proposals for the revision of the YAR 1994, Fellows of AAA played an active part in formulating the Working Party Report and in the discussions at Vancouver.[529] AAA after the Vancouver Conference gave assurance that its Fellows would play their usual role in helping to make the 2004 Rules, where applicable, work fairly and commercially in practice.[530] Average adjusters are expected to be neutral in the discharge of their duties[531] and to take no official position on any set of Rules; as such the AAA to date has not taken any official position on the YAR 2004.[532] However, it is argued that it is not inconceivable that if shipowners were to seek advice from average adjusters on the YAR 2004 that average adjusters would not advise them that they are entitled to more allowances and a broader protection under the YAR 1994.

(b) Association Mondiale de Dispacheurs (AMD - International Association of Average Adjusters)

Though AMD submitted a Position Paper to the CMI cautioning against the revision of the YAR 1994 at the time in accordance with IUMI's proposals,[533] AMD did not recommend to

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nor the underwriter have either time, training or inclination for, in such a manner as to expedite settlements without resort to the expensive machinery of the law: His duty is to act fairly to both parties to the contract of insurance or the contract of carriage ….'

[528] See the Association's website at www.average-adjusters.com, accessed 2 June 2012.

[529] See AAA 'York-Antwerp Rules 2004 – New', AAA News Archive, available at www.average-adjusters.com/NewsArch.htm, accessed 2 June 2012.

[530] Ibid.

[531] J Spencer op cit note 478 at 1257.

[532] As at 2006, it was reported that no Fellow of AAA had been involved in any case where the YAR 2004 were to be applied. See AAA Annual Report 2006, available at www.average-adjusters.com/AAA%20Annual%20Report%202006.pdf, accessed 5 June 2012. Since 2006 to date, the issue of the YAR 2004 has not been raised in any AAA Annual General Meeting. see AAA Annual Report 2007/2008, available at www.average-adjusters.com/AAA%20Annual%20Report%202007-8.pdf, AAA Annual Report 2008/2009, available at www.average-adjusters.com/AAA%20Annual%20Report%202008-9.pdf, AAA Annual Report 2009/2010, available at www.average-adjusters.com/Annual%20Report%202009-10.pdf and AAA Annual Report 2010/2011, available at www.average-adjusters.com/Annual%20Report%202010-11.pdf, accessed 10 June 2012.

[533] See chap 7 § V*(b)* infra.

shipowners against the incorporation of YAR 2004 in their carriage contracts. It could be argued that this is because average adjusters are expected to be 'neutral' parties in the general average system.[534] Presently, AMD has been very active in the current efforts by the CMI to review the Rules on general average.[535]

V POST-VANCOUVER DEVELOPMENTS IN COUNTRIES

(a) Introduction

An examination of the lack of widespread acceptance and use of the YAR 2004 will not be complete without examining the acceptance and use of the Rules in maritime states bearing in mind that the law of the place where the adventure ends will apply where no version of the YAR is incorporated in a carriage contract.[536] Particularly, some states (especially in Scandinavia) had enacted previous versions of the YAR in their national legislation; thereby making those versions applicable to adjustments in those states in the absence of agreement to the contrary by the parties. Thus, it is relevant to understand the factors and forces that influenced the failure of these states to enact the YAR 2004 into legislation to take them into consideration in the recommendations on how the widespread acceptance and use of the new Rules to be adopted may be achieved.

(b) Scandinavian countries - **Norway and Netherlands**

(i) The position before the adoption of YAR 2004

Norway is one of the Scandinavian countries that had enacted previous versions of the YAR into domestic law by making reference to the Rules in her Maritime Code.[537] The Norwegian

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[534] J Spencer op cit note 478 at 1257.

[535] See AMD's Response to the CMI's 2013 questionnaire on the general review of the Rules on general average, available at http://comitemaritime.org/Uploads/Questionnaire%20Responses/Reply_AMD_QuestGA2013.pdf, accessed 10 January 2014.

[536] *Chellew v Royal Commission on the Sugar Supply* [1922] 1 KB 12 (CA). See also chap 2 § III*(c)* supra.

[537] Norwegian Maritime Code No 39, 24 June 1994 with later amendments up to and including Act no 10, 26 March 2010, available at folk.uio.no/erikro/WWW/NMC.pdf, accessed 23 January 2012.

Maritime Code makes reference to the YAR 1994 (the Code was enacted after the adoption of the YAR 1994 at the CMI Sydney Conference).[538] In terms of section 461 of the Norwegian Maritime Code, the YAR 1994 are mandatory in general average adjustments in Norway except the parties agree otherwise. The Netherlands, like Norway, enacted previous versions of the YAR into Dutch law. Article 613, Book 8[539] of the Dutch Civil Code 1992 incorporates the YAR 1994 into Dutch law.

(ii) Post-Vancouver developments

After the adoption of the YAR 2004 in Vancouver, a comment period was set by the Norwegian Department of Justice on whether the YAR 2004 would be incorporated into the Norwegian Maritime Code. Prior to receiving comments, the Norwegian Department of Justice had suggested that the YAR 2004 should replace the YAR 1994 (just as the YAR 1994 replaced the YAR 1974 in the Code).[540]

During the comment period, the Norwegian Shipowners' Association pointed out that the YAR 2004 reduce shipowners' prospects of receiving allowances from cargo interests in general average and referred to BIMCO's Circular[541] recommending against general average adjustments pursuant to the YAR 2004. Based on this, the Norwegian Shipowners' Association urged the Norwegian Department of Justice to wait until the YAR 2004 are accepted by the shipping market before incorporating them into Norwegian law.[542]

Similarly, in the Netherlands, the Dutch Shipowners' Association,[543] like their Norwegian counterpart, also advised Dutch shipowners against the use of the YAR 2004 at the same time warning against the use of clauses like 'general average shall be stated, adjusted and settled in accordance with the YAR 1994 or any modification thereof (or … as

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[538] Section 461 Norwegian Maritime Code 1994.

[539] This deals generally with transport law and means of transport.

[540] G Gjelston 'YAR 1994 v 2004', available at www.maritimeadvocate.com/editorial/yar_1994_v_2004.htm, accessed 23 January 2012.

[541] See chap 5 § II*(b)(i)* infra.

[542] W Rein 'Shipping Offshore Update: Shipping in Singapore – A Norwegian Perspective', available at www.legal500.com/assets/images/devs/norway/tr/notr_001.pdf, accessed 23 January 2012.

[543] Royal Association of Netherlands Shipowners (*Koninklijke Vereniging Van Nederlandse Reders* – KVNR). See its website at www.kvnr.nl, accessed 23 January 2012.

amended)',[544] as it felt that these clauses might have the undesired effect of including the YAR 2004.[545]

(iii) Present position on the YAR 2004

Presently, the Norwegian Department of Justice has not taken any official position on the YAR 2004. However, there are strong indications that it will heed the advice of the Norwegian Shipowners' Association and postpone the incorporation of the YAR 2004 in the Norwegian Maritime Code.[546] It is argued that, from recent developments, the Norwegian Department of Justice seem to have suspended moves to amend the general average provisions in the Norwegian Maritime Code to make reference to the YAR 2004. This conclusion is reached because the Norwegian Maritime Code was amended in 2010 and the section on general average was not amended to make reference to the YAR 2004.[547] It could be inferred from these developments that reference to the YAR 2004 may only be made in the Norwegian Maritime Code when they gain widespread acceptance and use in the market. However, with the recent efforts towards adopting a new set of Rules in 2016,[548] it is argued that reference to the YAR 2004 may no longer be made in the Norwegian Maritime Code.

Similarly, the YAR 2004 have not received any relevant acceptance in the Netherlands. Shipowners, cargo interests and insurers within the Netherlands Maritime and Transport Law Association, are not in favour of the YAR 2004 as they are of the view that the YAR 1994 were still trying to gain widespread acceptance in the market at the time of their revision.[549] Presently, reference in Dutch statute law[550] to the YAR remains a reference to the YAR 1994

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[544] This seems to be in accordance with BIMCO's directive to its members as most Dutch shipowners are members of BIMCO.

[545] E-mail communication with Taco van der Valk, President of the Netherlands Maritime and Transport Law Association, dated 26 April 2011 (hereafter 'E-mail Communication with Taco van der Valk').

[546] Ibid at 5.

[547] Act No 10, 26 March 2010. It should also be noted that the current Norwegian Marine Insurance Plan 1996 version 2010 makes no reference to the YAR 2004. Clause 4-8 on general average in the Plan provides that adjustment under the clause shall be based on the YAR 1994.

[548] See chap 5 § VI*(g)* infra.

[549] At the Vancouver Conference, the Netherlands Maritime and Transport Law Association opposed the revision of the YAR 1994 on the basis that the YAR 1994 had not been given sufficient time to have an impact in the industry. See E-mail communication with Taco van der Valk.

[550] Article 613, Book 8, Dutch Civil Code 1992.

as incorporated into Dutch law by means of the Royal Decree of 5 February 2000, official Gazette 111 and there is no discussion within the Dutch government to have the Royal Decree amended to make reference to the YAR 2004.[551]

Thus, in both Norway and the Netherlands, the national position on the YAR 2004 seems to have been influenced by the opposition of the shipowning community to the Rules. It is axiomatic that the position of the national shipowning associations on the Rules was influenced by BIMCO's opposition to the YAR 2004. It would appear that the non-enactment of the YAR 2004 in domestic legislation by the governments of these states was not to alienate shipowning interests who are important stakeholders in the maritime industry in these states. However, unlike in Norway, the Netherlands Maritime and Transport Law Association also played a significant role in the rejection of the YAR 2004 in the Netherlands.

(c) Other countries – United States, United Kingdom and Hong Kong - China

(i) Background

Unlike the Scandinavian countries, the YAR are not enacted into legislation in most maritime states but only apply in adjustments in those states where a version of the YAR has been incorporated into the contract of carriage. Thus, it is pertinent to examine the level of acceptance and use of the YAR 2004 in some of these states.

The YAR are not enacted in statute in the United States as they apply to adjustments in the United States through their incorporation in carriage contracts.[552] The United States COGSA 1936 provides for the insertion in a bill of lading of any lawful provision regarding general average.[553] A number of contracts of carriage and particularly those employed by United States' carriers provide for the YAR to be supplemented by United States law and practice.[554] Similarly, the YAR are not enacted into statute in the United Kingdom though during the early years of the efforts at achieving uniformity in general average suggestions

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[551] E-mail communication with Taco van der Valk.

[552] *Eagle Terminal Tankers Inc v Insurance Co of USSR* 637 F 2d 890 (2nd Cir 1981) at 893.

[553] § 1305 United States COGSA 1936.

[554] J Macdonald 'General Average – English and US Law and Practice, Against the Background of the York-Antwerp Rules 1994', available at www.jssusa.com/assets/Uploads/GA-papers/JAMcomp.pdf, accessed 20 April 2012.

were made to have legislation on general average in England.[555] The Rules also apply to adjustments in Hong Kong - China only through their incorporation in carriage contracts.

(ii) Post Vancouver developments

In the United States, as a common law country, there are various legal decisions on the previous versions of the YAR and on general average[556] and none so far on the YAR 2004. There are relatively few United States-based shipowners and none has incorporated the 2004 Rules in their charterparties and bills of lading. However, some of the oil companies as charterers, not owners, have adopted the YAR 2004 in their current charterparty forms.[557] The YAR 2004 have also been adopted in contracts of carriage that fall under the auspices of the United States government General Accounting Office.[558] Insurers have taken so little cognisance of the Rules as the YAR 2004 were not included in the AIMU Hull Clauses 2009.[559]

Thus, the YAR 2004 have only found favour with charterers and not shipowners in the United States. It is argued that hull insurers were not proactive in ensuring that the YAR 2004 gained widespread use in the United States market. The incorporation of the 2004 Rules in the AIMU Hull Clauses 2009 could have been a major stride in making shipowners in the United States to reconsider their position on the Rules taking cognisance of the fact that most hull policies in the United States market will make reference to the YAR 2004. However, it could be argued that the incorporation of the Rules in the AIMU Hull Clauses 2009 may not have necessarily had any major impact on shipowners in the United States, as they would have recourse to hull policies in other markets, especially in the English market.

Similarly, in the United Kingdom, since the adoption of the YAR 2004, practitioners have seen a small number of cases where YAR 2004 have been specified in non-standard voyage charterparty wordings, usually on the basis of a misunderstanding that using the YAR

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[555] R Cornah op cit note 17 at 161.

[556] See for eg, *Barnard v Adams* (1850) 10 How 270 (US SCt); *The Irrawaddy* 171 US 187; 183 SCt 831 (1897) (US SCt); *The Jason* 225 US 32 SCt 560 (1910) (US SCt); *Eagle Terminal Inc v Insurance Company of USSR (Ingosstrakh) Ltd* 637 F 2d 890 (2nd Cir 1980).

[557] See for example, EMVOY 2005.

[558] See J Spencer's web page titled 'General Average and the York-Antwerp Rules', available at www.jssusa.com/general-average, accessed 10 May 2011.

[559] See AIMU Hull Clauses 2009 op cit note 11.

2004 was obligatory.[560] The increasing use of General Average Absorption Clauses in hull policies has had a much greater impact in reducing the number of uneconomic/unnecessary collections of general average contributions from cargo.[561] Some operators and charterers of large container ships also take out special insurances to cover cargo's proportion of salvage and general average, but insurers have found such policies difficult to rate. On the one hand major casualties are rare but on the other hand, when they do happen the exposure is very high with LOF salvage award in excess of US$20m becoming common place.[562]

Thus, with the exception of the EMVOY 2005, the YAR 2004 are not been incorporated in most contracts of carriage in the United States nor in the United Kingdom.

The Position with respect to the YAR 2004 in the above two countries is the same in Hong Kong – China. During the debate on the revision of the YAR 1994, Hong Kong Shipowners Association's (HKSOA) Insurance and Liability Sub-committee discussed the issue and decided that it would be better to keep the 1994 Rules in line with the recommendations of IUMI at the time.[563] The Asian Shipowners Forum also discussed the issue of the revision of the YAR 1994 and came to the same conclusion as that of the HKSOA.[564] However, presently, it seems that no Hong Kong shipowner as recommended by BIMCO would proactively choose to incorporate the YAR 2004 in its contract of carriage and none has so far incorporated the YAR 2004 in its carriage contracts.[565] The HKSOA[566] has also not made any recommendations to its members to incorporate the YAR 2004 in their contracts of carriage. Such a recommendation has not also been made by the Hong Kong Maritime Law Association (HKMLA) to the maritime community in Hong Kong.

Thus, as in the Scandinavian countries, BIMCO's position on the YAR 2004 seems to have influenced the position of the HKSOA on the YAR 2004. The non-recommendation of the use of the 2004 Rules by the HKMLA could limit the incorporation of the 2004 Rules by Hong Kong shipowners in their contracts of carriage. Furthermore, the non-recommendation by the HKSOA to its members to incorporate the YAR 2004 in their carriage contracts could

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[560] E-mail communication with Richard Cornah, average adjuster and former Chairman of AAA, United Kingdom, dated 20 May 2011 (hereafter 'E-mail Communication with Richard Cornah').

[561] See chap 3 § III*(c)(ii)*(c)(v) supra.

[562] E-mail communication with Richard Cornah.

[563] E-mail communication with Arthur Bowring, Managing Director HKSOA, dated 21 February 2012.

[564] Ibid.

[565] E-mail communication with Raymond Wong, average adjuster, dated 31 May 2011.

[566] See the Association's website at www.hksoa.org, accessed 16 February 2012.

play a pivotal role in the acceptance or rejection of the YAR 2004 in the Asian region as the HKSOA 'has long been regarded as a knowledgeable, proactive and a very respected voice of Asian shipping'[567] and 'as a balancing influence to harmonise the regulatory demands that tend to originate in the "West", with well-considered and "sharp-end" response from the "East".'[568]

(d) Conclusion

Countries that had enacted previous versions of the YAR into legislation have failed to update their laws to include the provisions of the YAR 2004 and no efforts are being made to enact the YAR 2004 in domestic legislation by other countries who had not enacted earlier versions of the YAR into domestic legislation. It is evident that BIMCO's opposition to the 2004 Rules played a pivotal role in the opposition by national shipowners' associations to the adoption of the 2004 Rules in maritime states, particularly in Scandinavia. This opposition of national shipowners' associations appear to have influenced national positions on the YAR 2004. Proactive steps were also not taken by NMLAs in different states to canvass for the acceptance of the 2004 Rules in the market; while in the Netherlands, the Netherlands Maritime and Transport Law Association played an active part in the rejection of the Rules.

Significantly, the insurance market failed to take proactive steps to ensure the widespread use of the 2004 Rules in the market; which led to hull insurers disregarding the YAR 2004 in the AIMU Hull Clauses 2009. It is argued that these militating factors contributed to the failure of the YAR 2004 to gain widespread acceptance and use in most maritime states and in the maritime industry.

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[567] See the Association's Chairman's (Kenneth Koo) 2010 Annual Report, 7, presented to the 54th Annual General Meeting of the Association in *HKSOA Yearbook 2011*, available at www.hksoa.org/association/yearbook2011/chairmanreport.pdf, accessed 20 May 2012.

[568] Ibid.

VI CMI ABORTIVE EFFORTS TO ACHIEVE WIDESPREAD USE OF THE YAR 2004

(a) Introduction

In 2012 the CMI, as the custodian of the YAR, made an unsuccessful attempt at ensuring that shipowning interests (especially BIMCO) compromised on their position on the YAR 2004. The efforts started in 2011, when the CMI representatives met with representatives of BIMCO[569] to discuss the fact that the YAR 2004 are rarely being used in the market and whether a compromise could be found to rectify this. This discussion was because BIMCO is an influential shipowning organisation and also considering the fact that BIMCO has been at the vanguard of the opposition by shipowning interests to the YAR 2004.[570] It is relevant to examine the reasons for this abortive effort by the CMI to take them into consideration, in proceeding towards adopting a new set of Rules, with respect to the substantive changes that could be made to the Rules.

(b) Joint Working Group (JWG)

At a further meeting in 2012 between the CMI and BIMCO representatives, there were discussions on the possible amendment of the YAR 2004 and the promulgation of a new 'YAR 2012'[571] at the CMI Conference to be held in Beijing in October 2012. Following subsequent conversations by both parties' representatives, a JWG was formed to consider the

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[569] The meeting was held on 12 September 2011 between Karl-Johan Gombrii (former CMI President) and Bent Nielsen for CMI and Torben Skaanild and Soren Larsen of BIMCO. Another meeting was held on 28 September 2011 between the same persons except that Karel Stes, the chairman of BIMCO Documentary Committee, attended in the place of Torben Skaanild.

[570] Mr Gombrii noted in his report at the CMI Executive Council Meeting held on 25 September 2011 that BIMCO's main reason for opposing the incorporation of the YAR 2004 in carriage contracts is because of the restriction on the allowance of salvage expenditure in general average under the YAR 2004. See CMI Newsletter No 3 October/December 2011; chap 4 § II*(a)* supra.

[571] B Browne op cit note 396 at 1.

matter further and try to agree on 'a solution/wording which could form the basis for general agreement and acceptance by all interested parties.'[572]

At the meeting of the JWG, possible amendments to the YAR 2004 were debated.[573] There was agreement at the meeting in principle to support a solution relating to salvage (including a new Rule of Application).[574] However, CMI representatives could not support BIMCO's proposal to reinstate Rule XI YAR 1994 regarding the allowance in general average of crew wages and maintenance in a port of refuge. CMI's opposition to BIMCO's proposal was based on CMI's view that the proposed change to Rule XI[575] would not attract general support and would be opposed in particular by cargo interests.[576] However, a decision was made to continue to find a solution.[577]

(c) IWG

Based on the discussions between the CMI and various interested parties, the CMI decided to include the revision of the YAR 2004 on the agenda for its Beijing 2012 Conference and to establish an IWG to consider the proposed amendments further, particularly the drafting.[578] The IWG had its meeting on 21 March 2012 that was attended by representatives of the various interest groups[579] and reached a definite agreement regarding the principles and

[572] See the CMI IWG's Report on the proposals for the amendment of the YAR 2004, available at www.comitemaritime.org/Uploads/YAR/CMI%20Report%20to%20NMLAs%20210612%20doc%20(2).pdf, accessed 1 August 2012 (hereafter 'CMI IWG's Report on the proposals for the amendment of the YAR 2004').

[573] The possible amendments were debated *ad referendum*, on the understanding that the participants had no authority to bind any party.

[574] See chap 5 § VI*(d)(iii)* infra.

[575] See chap 5 § VI*(d)(ii)* infra.

[576] Subsequent informal consultations between the CMI and IUMI showed that the proposed amendments as a package (including the restoration of Rule XI YAR 1994) would carry IUMI's approval assuming no new concessions were requested, the Rule of Application went in and BIMCO's Documentary Committee amended their standard documents as quickly as reasonably practicable to incorporate the proposed YAR 2012 if they were adopted at the CMI's 2012 Beijing Conference. See CMI IWG's Report on the proposals for the amendment of the YAR 2004 op cit note 572 at 2.

[577] CMI IWG's Report on the proposals for the amendment of the YAR 2004 op cit note 572 at 2.

[578] Ibid.

[579] The idea was to create a group with representation from major stakeholders in the industry. However, for the group to be efficient and since the work was still at an initial stage and would be submitted for consideration by all interested parties and organisations at the Conference in Beijing, the IWG was limited in size.

drafting of the proposed amendments in order to create a set of Rules ('YAR 2012'). The CMI was of the view that the agreement reached within the IWG on the proposed amendments would pave the way for their general acceptance[580] and that the '2012 Rules' that was to be adopted at the Beijing Conference would be widely applied.

(d) Analysis of IWG proposed amendments to YAR 2004

The proposed amendments were in relation to Rules VI and XI YAR 2004.[581] The proposed amendments are analysed in what follows.

(i) Rule VI – Salvage Remuneration

In order to resolve the impasse on the YAR 2004, the IWG proposed the re-draft of Rule VI[582] YAR 2004 as follows:[583]

> Rule VI Salvage Remuneration
>
> '(a) Except as provided in sub-rules VI(b) and (c) expenditure incurred by the parties to the adventure in the nature of salvage, whether under contract or otherwise, shall be allowed in general average provided that the salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure.
> (b) Salvage payments including interest and legal costs shall not be allowed in general average if they exceed x per cent of the total sums allowable in general average if salvage were included. The foregoing shall not apply where salvage payments have been paid by one party on behalf of all salved interest.
> (c) If one party to the salvage shall have paid a proportion of salvage payments (including interest and legal costs) due from some, but not all, of the salved interests (calculated on the basis of salved values and not general average contributory values), the unpaid contribution to salvage due from the other parties plus interest pursuant to

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[580] CMI IWG's Report on the proposals for the amendment of the YAR 2004 op cit note 572 at 2.

[581] Ibid.

[582] The IWG considered that the proposed Rule should mirror Rule VI(a) YAR 2004, with minor amendments.

[583] For a full text of the proposed redraft of Rule VI YAR 2004, see CMI IWG's Report on the proposals for the amendment of the YAR 2004 op cit note 572 at 4.

Rule XXI shall be credited in the adjustment to the other party that has paid it and debited to the party on whose behalf the payments were made.

(d) …

(e) …

(f) For the purpose of applying this Rule the term 'salvage payments' shall mean payments made in respect of salvage services and for which there is contractual and/or legal provision for apportionment and payment between the salved interests upon termination of the salved services independent of these Rules.'[584]

The proposed sub-rule (a) restated to some extent the provision of Rule VI YAR 1994. It makes it clear that expenditure will be re-apportioned in general average under the Rule for services rendered in the nature of salvage, whether under contract or otherwise. This was an attempt to solve the problem of construction of Rule VI YAR 2004 as to whether the Rule applies to contract towage or similar services in the nature of salvage.[585] This problem of construction of the Rule led to the AAA forming a Sub-committee to consider the issue [586] and also led to the AAA United States issuing a probationary Rule of Practice[587] with respect to Rule VI YAR 2004.[588]

It is submitted that the proposed Rule VI would have applied to charges by salvors for salvage services rendered as defined by s 65(2) MIA 1906 and under contracts such as LOF (which impose separate liability on each party) and to contract salvage or similar services which were contracted for and funded initially by the shipowner. However, the re-apportionment of salvage expenditure in general average would have been restricted under the proposed Rule as sub-rule (a) was made subject to sub-rules (b) and (c). In other words, only salvage payments that met the criteria provided in sub-rules (b) and (c) would have been re-apportioned in general average. This is the implication of the phrase 'except as provided in sub-rules VI(b) and (c)' in sub-rule (a) of the proposed Rule.

Sub-rule (b) was an attempt by the IWG to achieve a compromise between shipowning interests and insurance interests on the re-apportionment of salvage expenditure in general

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[584] Sub-rules (d) and (e) of the proposed re-draft of Rule VI restated verbatim the wordings of sub-rules (b) and (c) respectively of the YAR 2004.

[585] *Cf* chap 4 § II*(a)(iii)* supra.

[586] See AAA Sub-committee Report on Rule VI YAR 2004, available at www.usaverageadjuster.org/AAA_Ga_Sub-committee_on_Rule_VI.pdf, accessed 30 April 2012.

[587] See note 393 supra.

[588] *Cf* chap 4 § II*(a)* supra.

average. The proposed amendment was to confine the re-apportionment of salvage expenditure in general average only to cases where the re-apportionment would have 'a substantial effect.'[589] The most significant aspect of sub-rule (b) was that it tried to limit the number of salvages that would be re-apportioned in general average. Thus, a salvage payment which exceeds a certain percentage of the total general average sums would not be allowed in general average. This was an attempt at allowing salvage expenditure in general average only where the result would be a substantial re-distribution of the costs between cargo and hull interests.

The difficulty in this proposal would be to achieve a consensus amongst shipowning and insurance interests on the percentage to be adopted in the Rule. Furthermore, it might be difficult at an early stage for a shipowner to determine whether the limit would be exceeded (where he might still incur subsequent port of refuge expenses) to determine whether there would be a need to incur the expense of collecting general average security for cargo interests. The proposal, if it had been adopted,[590] would have had the effect of excluding a substantial proportion of salvage cases in general average under the Rule. It is argued that such an effect might have been strongly opposed by shipowners as their main opposition to the changes introduced by the YAR 2004 was with respect to the substantial limit in Rule VI on the re-apportionment of salvage expenditure in general average.[591]

However, the proposed sub-rule (b) would not have applied where a party makes the salvage payment on behalf of all salved parties. Thus, where a party pays for salvage on behalf of all the other parties to the adventure, the salvage expenditure would be allowed in general average even where it is the main element of the general average act. No restriction was, therefore, placed on the re-apportionment of salvage in general average (no matter the effect of such re-apportionment); where it is paid by one party on behalf of other parties to the adventure. It is argued that sub-rules (b) and (c) were commendable provisions in attempting to amend the provision of Rule VI YAR 2004,[592] by providing that salvage whether paid by one party on behalf of other parties or settled by all the parties to the adventure, will be re-apportioned in general average, though subject to the provisions of the

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[589] B Browne op cit note 396 at 2.

[590] IUMI expressly noted that it would only support the proposed amendment to Rule VI if the percentage, to be decided at Beijing, had the effect of excluding a substantial proportion of salvage cases from general average. See CMI IWG's Report on the proposals for the amendment of the YAR 2004 op cit note 572 at 2.

[591] See note 570 supra.

[592] See chap 4 § II*(a)* supra.

sub-rules. Furthermore, sub-rule (f) was a laudable provision of the proposed re-draft of Rule VI by proposing a definition of 'salvage payments' in the YAR. This could have resolved the uncertainty that existed in the market as to the meaning of the wording 'salvage payments' used in Rule VI YAR 2004.[593]

It is argued that the approval of the proposed amendment to Rule VI would have resulted in smaller savings to cargo insurers in adjustments unlike the higher percentage of savings to cargo insurers that would have resulted in adjustments under the YAR 2004.[594]

(ii) Rule XI - Wages and maintenance of crew

The IWG proposed the deletion of Rule XI(c)(i) and (ii) YAR 2004 and to replace it with a new Rule XI(c) as follows:

> Rule XI(c)
>
> '(i) When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, the wages and maintenance of the master, officers and crew reasonably incurred during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage shall be allowed in general average, fuel and stores consumed during the extra period of detention shall be allowable in general average.'[595]

This proposed amendment (though not an amendment per se) was to restore the provision of Rule XI YAR 1994, thereby restoring the allowance of the cost of crew wages and maintenance while a vessel is detained at a port of refuge. Marine property insurers were of the view that the restoration of crew wages and maintenance while a ship is detained at a port of refuge to Rule XI will increase the sums shifted in general average by 1 to 2 per

[593] Ibid.

[594] Ibid.

[595] CMI IWG's Report on the proposals for the amendment of the YAR 2004 op cit note 572 at 5.

cent.[596] It is argued that this was a commendable proposal as it could have resulted in a compromise between shipowners and cargo insurers on the proposed amendments to the YAR 2004; as this provision is important to shipowning interests because it enables them to recoup expenses incurred on the crew while the vessel is detained at the port of refuge. Pertinently, since this proposed amendment leaned more in favour of shipowners it might have had the effect of achieving a compromise between shipowners and cargo insurers on the proposed amendment to Rule VI.

(iii) Rule of Application

The IWG proposed the insertion of a new Rule to be titled 'Rule of Application' in the proposed 2012 Rules:

> 'These York-Antwerp Rules shall be considered to be an amendment or modification of the previous versions of the York-Antwerp Rules. Notwithstanding the foregoing, these York-Antwerp Rules 2012 shall not apply to contracts of carriage entered into before the formal adoption of the Rules.'[597]

It is argued that this proposed Rule of Application was necessary as the status of YAR 2004 had been the subject of speculations and arguments amongst stakeholders, thereby creating confusion and uncertainty on the issue in the industry.[598] However, the proposed Rule of Application would not have applied to contracts of carriage entered into before the formal adoption of the proposed 2012 Rules. The adoption of this proposal would have saved the printing of new standard documents and helped resolve any uncertainty in the market as to whether any subsequent YAR are covered by terms such as 'any amendments/modifications thereof.' Furthermore, the Rule would have assisted in the fast application of revised Rules.

However, the proposal would have fettered the contractual right of parties to decide which version of the YAR to use. Furthermore, certain insurance policies[599] refer to specific versions of the YAR and might have been prejudiced by this proposed Rule.

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[596] B Browne op cit note 396 at 2.

[597] CMI IWG's Report on the proposals for the amendment of the YAR 2004 op cit note 572 at 5.

[598] See chap 5 § II*(b)(i)* supra.

[599] For eg, clause 10.3 ITCH specifically refers to the YAR 1994.

(e) Analysis of replies by NMLAs to IWG's proposals for the amendment of the YAR 2004[600]

Generally, the replies showed that majority of the NMLAs were of the view that the YAR 2004 should not be amended in accordance with the proposals until there was a confirmation of the willingness of the different representatives of organisations in the industry to accept such amendments or some others. Most importantly, the acceptance of the IWG's proposals by shipowning interests was stressed. It is argued that this view was based on the need to avoid the rejection of any subsequent set of Rules in the market because of lack of consensus amongst interested parties. Of note is the fact that only one of the replies expressed a total support for the IWG's proposals.[601]

With respect to the amendments proposed by the IWG, mixed feelings were expressed by the NMLAs. The majority of the NMLAs felt that the proposal on salvage would pose a difficulty especially with respect to achieving a consensus on the percentage to be adopted and also that there would be difficulty in defining the moment when the threshold must be exceeded in order to exclude salvage expenditure from general average. This is because determining at an early stage whether the threshold will be exceeded will enable the shipowner to determine whether it will be necessary to incur the expense of collecting general average security for cargo interests.[602] This concern was germane as it would be difficult to reach a consensus between shipowners and insurers on the percentage to be adopted. It is argued that this difficulty was exacerbated by IUMI's position that it would accept the proposed amendment of Rule VI YAR 2004 only if a high percentage was chosen;[603] which position would have been opposed by shipowners. It is instructive to note that it was on the issue of salvage that concerns of potential difficulties were raised by the NMLAs.[604] The proposal on crew wages and maintenance was accepted by the majority of the NMLAs,

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[600] This analysis is based on the replies of NMLAs received before the CMI Beijing Conference and which are published on the CMI website at www.comitemaritime.org/York-Antwerp-Rules/0,27130,113032,00.html, accessed 2 February 2013. The replies are from the NMLAs of Argentina, Australia and New Zealand, Belgium, Great Britain, China, Finland, France, Germany, Japan and the Netherlands.

[601] The NMLA of Finland was the only Association that expressed total support for all the proposals.

[602] This point was stressed by the NMLA of Australia and New Zealand.

[603] See note 588 supra.

[604] The NMLAs of Japan and Germany, however, cautioned that that there should be no amendment of Rule VI until after the outcome of the review of the Salvage Convention 1989 at the CMI 2012 Beijing Conference.

indicating a consensus amongst the NMLAs for the restoration in the YAR of the allowance of crew wages and maintenance while a vessel is detained at a port of refuge.[605]

The British Maritime Law Association (BMLA), as an alternative to the IWG proposals, proposed the merger of the non-contentious 2004 amendments to Rules XIV(b) (temporary repairs), XX (commission), XXI (interest) and XXIII (time-bar) with the provisions of the YAR 1994. It is argued that based on shipowning interests' opposition to the YAR 2004, the BMLA's proposal could have ensured that these non-contentious provisions of the YAR 2004 would be used in contracts of carriage as shipowning interests might not necessarily have opposed such a merger.

The replies showed that the requisite consensus amongst interested parties on the proposals had not been achieved prior to the CMI 2012 Beijing Conference. Importantly, there was not sufficient time for interested parties to thoroughly deliberate on the proposed amendments and reach a consensus amongst themselves on the proposals before the Conference. The CMI letter to NMLAs was sent on 25 June 2012[606] with a directive that the Associations' comments on the proposed amendments should be sent to the CMI no later than 31 August 2012. This was barely two months before the Beijing Conference and was clearly not a sufficient period for proper consultations and deliberations by interested parties on the proposed amendments before the Conference. It seems likely that this contributed, at least in measure, to the rejection of the proposals at the CMI 2012 Beijing Conference.

(f) CMI Beijing Conference 2012 - The demise of the YAR 2004?

At the CMI Beijing Conference 2012,[607] it was evident that there was no enthusiasm amongst majority of the NMLAs for the IWG proposals.[608] It was also evident that the late involvement of the NMLAs and particularly shipowning interests (such as the ICS) at an early stage in the discussions for the amendment of the YAR 2004 made it difficult for proper

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[605] The NMLA of Japan was the only NMLA that was not convinced that allowance of crew wages and maintenance in general average should be restored in the YAR. However, it did not adduce reasons for its position.

[606] A copy of the letter is available at www.comitemaritime.org/York-Antwerp-Rules/0,27130,113032,00.html, accessed 1 August 2012.

[607] A report of the outcome of the discussion on general average at the Beijing Conference by Michael Harvey is available at www.amdadjusters.org/assets/Uploads/York-Antwerp-Rules/AMD-CMI-Conference-YAR.pdf, accessed 5 February 2013.

[608] Ibid at 1.

consultations and discussions on the proposed amendments and this resulted in the failure by interested parties to reach a consensus amongst themselves on the proposed amendments before the Beijing Conference. [609]

It is argued that the CMI was right in continuing the second session on the YAR at the Conference in the form of a workshop to identify and discuss issues that might be usefully received with a view to presenting a text of YAR for discussion and possible ratification at the next CMI Conference in 2016.[610] This was recognition by the CMI that the adoption of the proposed amendments with the apparent opposition of majority of the NMLAs and shipowning interests to the proposed amendments, due to their late involvement in the amendment process, would have likely resulted in the rejection of the amended Rules in the market. The outcome of the Beijing Conference seems to be the 'final nail in the coffin' of the YAR 2004 as the Conference concluded that the YAR 2004 had not found acceptance in the shipowning community and recommended for a new IWG on General Average to be formed to carry out a general review of the YAR with the aim of drafting a new set of Rules with a view to their adoption at the CMI Conference in 2016.[611]

Pertinently, the importance of a consensus amongst interested parties and the equitable balancing of their interests were emphasised as the Conference specifically recommended that the new Rules to be drafted had to meet the requirements of shipowners, cargo owners and their respective insurers.[612] It is argued that if this recommendation is adhered to, the new set of Rules to be drafted will have a reasonable chance of being approved at the CMI Conference in 2016 as the various interested parties would have been duly consulted and compromises reached before drafting the new set of Rules. Such draft Rules, if approved at the CMI Conference in 2016, will likely not suffer the same fate as the 2004 Rules as they will be Rules that epitomise the equitable balance of the interest of the various interest groups and will consequently gain widespread acceptance and use in the maritime industry.

Significantly, the outcome of the Conference reinforced the premise that the YAR 2004 were doomed to fail without the support of all interested parties, particularly shipowning interests.

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[609] Ibid.

[610] Ibid at 2.

[611] Ibid.

[612] Ibid.

(g) Towards adopting a new set of Rules in 2016

In furtherance of the resolution at the CMI Beijing Conference, the CMI has initiated the process to generate proposals to be considered at the next CMI Conference in 2016 that may lead to the adoption of a new set of Rules. The new IWG on General Average has prepared and circulated to the NMLAs a questionnaire on a general review of the Rules on general average. The questionnaire[613] is divided into four sections. Section one relates to general questions on general average and recent issues on general average with respect to, among other things, the Rotterdam Rules, piracy and arbitration. Section two relates to questions on the introductory Rules; section three deals with questions on the lettered Rules and section four relates to questions on the numbered Rules. The questionnaire is an attempt at a holistic review of the Rules on general average in a bid to ensure the adoption of a new set of Rules that will be acceptable to all interested parties.

It is beyond the scope of this work to consider all the questions in the questionnaire as they are numerous. This thesis will examine questions on the changes in the YAR 2004 which, in the opinion of the author, paid a pivotal role in the lack of widespread acceptance of the YAR 2004 by shipowning interests and their lack of widespread use in carriage contracts in the market. These are questions on the main issues in contention between cargo insurers and shipowning interests and it is argued that achieving a compromise between these interests on these issues will likely result in the widespread acceptance of the new set of Rules to be adopted. Thus, this examination will be with respect to salvage expenditure and crew wages and maintenance as shipowning interests' objections to the YAR 2004 seem to be centred on the changes introduced with respect to salvage and crew wages and maintenance.[614]

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[613] For a full text of the questionnaire, see www.comitemaritime.org/Uploads/Correspondence%20President/YAR%2015%2OMarch.pdf, accessed 7 May 2013.

[614] See the Reply of the BMLA to the CMI questionnaire on the review of the Rules on general average, 1, available at www.comitemaritime.org/Uploads/Correspondence%20President/Briitsh_MLA.pdf, accessed 5 January 2013.

(i) Rule VI – Salvage remuneration

The IWG in the questionnaire restated the divergence in opinion of shipowning interests and cargo insurers on the re-apportionment of salvage expenditure in general average and stated that in looking to the future the current options would appear to be: (a) retaining the 1994 position; (b) adopting the 2004 position; (c) adopting a compromise position as put forward by the CMI in Beijing which would involve deciding on the percentage figure;[615] (d) continuing as in (a) but encouraging adjusters' 'ad-hoc' approach wherever possible ie for the adjuster to approach the parties where it seems that re-apportioning salvage expenditure in general average will be disproportionate to the time and cost involved; (e) continuing as in (a) and (d) but including an express provision obliging the adjuster to consider the possibility of not including salvage, perhaps linked to the Rule Paramount.

As pointed out earlier in the analysis of the 2004 IWG proposals[616] and from the outcome of the Beijing Conference,[617] it is argued that the IWG's proposal for the amendment of Rule VI at Beijing should not be adopted because achieving a consensus amongst the various interested parties on the percentage to be adopted is an arduous task and may never be achieved. In addition, Rule VI 1994 was criticised by cargo insurers for resulting in insurers incurring more costs by the re-apportionment of salvage remuneration in general average, especially in cases where such re-apportionment is uneconomical[618] and this resulted in the change in Rule VI YAR 2004. Thus retaining the YAR 1994 position would not be acceptable to insurers.

However, it is argued that a compromise could be achieved by retaining the 1994 position but including an express provision in the Rule encouraging adjusters to approach the parties where it seems that the effect of such a re-apportionment will be disproportionate to the time and cost. It is argued that this option could work in practice especially where the adjuster is regarded as reputable by the parties. Furthermore, parties could be willing to co-operate to ensure that valuable time and cost are not wasted in re-apportioning uneconomic salvage expenditure.

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[615] See chap 5 § IV*(d)(i)* supra.

[616] *Cf* chap 5 § IV*(d)* supra.

[617] *Cf* chap 5 § IV*(f)* supra.

[618] See chap 7 § III*(d)* infra.

It could be argued that such a provision leaves the decision to re-apportion salvage expenditure in general average at the discretion of the parties and does not provide for what would be the adjuster's duty where a party insists on the re-apportionment of an uneconomic claim. It is argued that option (e) as stated above, would be more suitable as the adjuster would bear the onus (regardless of the decision of the parties) of considering the reasonableness of re-apportioning salvage expenditure in general average in making his decision whether to re-apportion salvage expenditure in general average in any given case. Thus option (d) merely encourages the adjuster to approach the parties while option (e) imposes an obligation on the adjuster to exercise his professional skill and training in the circumstances. The effect of option (e) as a Rule in the YAR will be that the adjuster will bear the onus of determining the reasonableness of re-apportioning salvage expenditure in general average irrespective of the outcome of his discussions with the parties.

(ii) Rule XI - crew wages and maintenance

The questionnaire stated that crew wages and maintenance are allowed in general average while a vessel is detained at a port of refuge for the common safety or to effect repairs necessary for the safe prosecution of the voyage under the YAR 1994[619] but not in the YAR 2004.[620] Both sets of Rules allow wages during the deviation to a port of refuge. What then should be the position under the YAR 2016?

As stated earlier,[621] crew wages and maintenance while the vessel is detained at a port of refuge was allowed in Civil law countries and the United States prior to the existence of the YAR. They were recognised in the early years of the unification process in both the Glasgow Resolutions 1860 and the York Rules 1864.[622] It could also be argued that the effect of the decisions in *Svensen v Wallace*[623] and *Attwood v Sellar*[624] in which the common benefit principle was recognised in English law was to allow crew wages and maintenance incurred while a vessel is detained at a port of refuge.

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[619] Rule XI(b) YAR 1994.

[620] Rule XI YAR 2004. See chap 4 § II*(b)* supra.

[621] See chap 4 § II*(b)* supra.

[622] See chap 6 § II*(a)(i)* infra.

[623] (1880) 5 QBD 286 (CA). C*f* chap 7 § III *(b)* infra.

[624] [1885] 10 AC 404 (HL). *Cf* chap 7 § III *(b)* infra.

Taking cognisance of the extra cost that would be incurred by shipowners under Rule XI YAR 2004 in providing special insurance cover for crew wages and maintenance when a vessel is detained at a port of refuge,[625] it is argued that the allowance of the cost of crew wages and maintenance while a vessel is detained at a port of refuge in the proposed YAR 2016 could play a pivotal role in the acceptance of the Rules by shipowners. The provision is important to them because over and above a shipowner's loss of time at a port of refuge, the shipowner has an extra burden by having to pay and maintain its crew, who would be paid off at the end of the voyage. Thus, if this outlay is not made good to the shipowner, it is not compensated for its expenditure.[626]

It is argued that such a provision in the draft of the proposed YAR 2016 could have the effect of making shipowners to be willing to reach a compromise with cargo insurers on other provisions of the Rules, particularly on the re-apportionment of salvage expenditure in general average.

VII CONCLUSION

The YAR 2004 failed to gain widespread use in the maritime industry[627] as efforts by BIMCO and national shipowners' associations ensured that the Rules were not incorporated in contracts of carriage in most jurisdictions. The failure of insurers and NMLAs to campaign proactively for the use of the 2004 Rules and to ensure that a compromise was reached with shipowning interests that could have ensured the widespread acceptance of the YAR 2004 in the maritime industry, also contributed to the lack of widespread use of the Rules in the industry and their non-enactment into legislation in countries, particularly in Scandinavia.

Most importantly, national positions on the 2004 Rules seem to have been significantly influenced by the stance of national shipowners' associations on the Rules. The stance of national shipowners' associations on the 2004 Rules was evidently influenced by BIMCO's opposition to the Rules. Thus, it is axiomatic that BIMCO remains the principal obstacle to the widespread use of the 2004 Rules in the market.

It could be inferred from the outcome of the CMI Beijing Conference that the 2004 Rules have been consigned to the recesses of maritime history as the maritime community

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[625] See chap 4 § II*(b)* supra.

[626] J Cooke & R Cornah op cit note 28 at 374.

[627] A Mandaraka-Sheppard op cit note 303 at 788.

has shifted its focus to drafting a new set of Rules to be adopted in 2016. The lack of widespread use of the 2004 Rules in the market underlines the enormous influence shipowning interests exert (as carriers) in the general average system and this reinforces the premise that without the co-operation of shipowning interests no set of YAR will gain widespread use in the market.[628] Hebditch remarks that;

> 'The 2004 Rules … have been very rarely used since their introduction and are unlikely to be given the opposition to them of all shipowning bodies and perhaps most importantly BIMCO … It was a sad day when the CMI was captured by IUMI.'[629]

This view seems justified taking cognisance of the lack of widespread use of the Rules in the market. It is argued that the lack of widespread acceptance and use of the YAR 2004 in the industry shows the disapproval by majority of interested parties of the Rules and the process that led to their approval. In retrospect, the author argues that the CMI should not have heeded the IUMI's call for the revision of the YAR 1994 as the IUMI at the time was a 'unilateral bandwagon'[630] in the call for revision of the YAR 1994[631] as was Lloyd's in its call for the abolition of the YAR in 1877.[632]

The CMI has initiated the process for a holistic review of the Rules on general average and it is hoped that the maritime community will join ranks and work towards achieving a set of Rules that will gain widespread acceptance and use in the maritime industry.

However, to understand the present failure of the 2004 Rules to gain widespread acceptance and use in the maritime industry, one would have to look at the past to identify the ingredients of previous successful revision processes of the Rules, as a comparative base in analysing the process that led to the present impasse on the YAR 2004 in the maritime industry, in order to identify the flaws (if any) in the process. This is to assist the maritime community to avoid such pitfalls in any subsequent amendments of the YAR. These discussions are provided in chapters six and seven respectively of this thesis.

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[628] J Macdonald op cit note 78 at 440.

[629] Remarks of Charles Hebditch (2010) 16 *Journal of International Maritime Law* 488, in his review of G Hudson & M Harvey op cit note 299.

[630] G Hudson & M Harvey op cit note 299 at 282.

[631] See chap 7 infra.

[632] See chap 6 § II*(b)(i)* infra.

CHAPTER 6 THE PREVIOUS SUCCESSFUL REVISION PROCESSES OF THE YORK-ANTWERP RULES

I INTRODUCTION

This chapter examines the previous revision processes of the YAR. This is aimed at identifying the ingredients of the previous successful revision processes of the YAR prior to 2004. However, a discussion of these previous successful revision processes is inextricably linked with the content of the previous sets of Rules. This is because a thorough examination of the said processes cannot be made without determining the defects in the contents of the different versions of the Rules that necessitated the amendments and the consequent amendment of those Rules to rectify the defects. These defects in the content of the Rules and other factors that will be identified in this chapter (such as environmental concerns and changes in international trade) resulted in the process towards the revision of the previous sets of YAR. However, it is not intended to examine all the changes that were made in every revision as they are numerous in some of revisions that were made. Thus, this chapter will examine the major amendments that were made to the different versions of the YAR prior to 2004.

The analysis in this chapter will form the comparative base to show, in chapter seven, that the disregard by the IUMI and the CMI of the ingredients of the previous evolutionary processes in the revision of the YAR 1994 contributed to the failure of the YAR 2004 to gain widespread acceptance and use in the maritime industry. This is to highlight the need for those ingredients to be taken into consideration in the present process towards adopting a new set of Rules.

II INGREDIENTS OF THE PREVIOUSLY ADOPTED PROCESSES IN THE REVISION OF THE YAR

(a) 'Timing' of calls for revision

In the process adopted in approving or amending the previous versions of the YAR the proper timing of the efforts to adopt a set of Rules or amend any existing Rules was crucial in achieving a successful outcome of the revision process. The international community

recognised the essence of raising the issue of the revision of any set of Rules at the appropriate time taking cognisance of the state of affairs in the maritime industry and in the commercial world. An examination of the issue of timing of calls for revision will show the progression in the time-frame allowed by the maritime community prior to 2004 (from the Glasgow Resolutions 1860 to the YAR 1994) for any set of Rules to be used in the market before efforts were made to approve or amend any set of Rules.

(i) 1860 to 1877 – Efforts to achieve uniformity

This period reflects the early efforts by the maritime community to achieve uniformity in the principles and practice of general average as a result of the divergence that existed in various jurisdictions on the law of general average.[633] The efforts aimed at achieving uniformity commenced in 1860 with the intention by the maritime community for the adoption of an international uniform law that would ensure uniformity in the law of general average.[634] In the bid to achieve uniformity, the process of adopting the Rules was hastened and various versions of the Rules were adopted within a period of four to ten years as there were constant calls by all interested parties at the time for concrete measures to be taken to achieve uniformity.[635]

In 1860 the intention of the maritime community was to initiate the unification process and for onward continuation of the process in later years.[636] This goal was reflected in the Resolutions that were adopted at the Glasgow Conference in 1860. To achieve the goal of uniformity, the Resolutions recognised both the principles of common safety and common benefit in the law of general average. Resolutions 1, 2, 3, 5 and 7 covered instances where acts are done when a ship is in peril and stated what would be allowed in general average in such instances. Resolutions 6 and 8 epitomised the intention of the maritime community to allow in general average certain port of refuge expenses, wages and provisions of the ship's crew.[637]

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[633] A Knauth 'Renvoi and Other Conflicts Problems in Transportation Law' (1949) 49 *Columbia Law Review* 1 at 11.

[634] J Cooke & R Cornah op cit note 28 at 44.

[635] G Hudson & M Harvey op cit note 299 at 9-10.

[636] J Cooke & R Cornah op cit note 28 at 46.

[637] For a full text of the Resolutions, see J Cooke & R Cornah op cit note 28 at app 2A.

The merger of these two principles and the bid to actualise the desired uniformity resulted in constant calls for continuous work to be done and the brevity in the time-frame within which Rules were approved within this period. This explains the adoption of the York Rules 1864 at a congress in York, barely four years after the adoption of the Glasgow Resolutions.[638]

The York Rules 1864 were a progression of the underlying principles exemplified in the 1860 Resolutions[639] and covered cases were sacrifices and expenses are made both for the common safety and the common benefit. The process of unifying the two strands in the concept of general average had begun to yield results. The York Rules were the first concrete steps in that direction. In the York Rules 1864, Rule VII specifically provided that port of refuge expenses made for the continuation of the voyage would be admissible as general average. Rule VIII provided that the wages and cost of maintenance of master and crew from the time the ship entered the port of refuge (in the circumstances described in Rule VII) to the time it departs from the port would be admissible as general average. Rules I, II, IV, V and VI covered instances relating to the common safety principle and provided for what would be allowed as general average in those instances.

The 1877 Rules were a product of the continuation of the efforts by the maritime community to achieve uniformity.[640] However, contrary to the relatively short period of time between the Glasgow Resolutions 1860 and the York Rules 1864, the efforts at achieving uniformity took a relatively longer period (approximately 13 years) before the YAR 1877 were adopted. It is argued that this longer period cannot necessarily be attributed to the desire by the maritime community to allow for a longer period before the continuation of efforts at achieving uniformity but it was as a result of opposition by Lloyd's to the uniformity process.[641] However, in the continuation of the uniformity process, four major changes were made in the YAR 1877 that reflected the practice in those areas in different jurisdictions and were aimed at achieving uniformity. It will suffice for the present purposes to analyse two of the major changes that were made in the YAR 1877 to show that the driving force behind the changes remained the objective of achieving uniformity.

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[638] G Hudson & M Harvey op cit note 299 at 47.

[639] Ibid at 10.

[640] N Boeg 'The International Maritime Committee and Development of Maritime Law' (1964) 34 *Nordisk Tisskrift for International Ret* 200.

[641] This opposition by Lloyd's is discussed in chap 6 § II*(b)(i)* infra.

In Rule I, the exception in favour of timber or deals jettisoned from deck was deleted, so that no jettison of deck cargo would be allowed in general average. Generally, loss occasioned by jettisoning goods carried on deck was not made good in general average, the reason being that the ship's deck was, at the time, an improper place for cargo. In English law, the practice of average adjusters, which was recognised by the courts, was to exclude in general average the allowance of cargo jettisoned from deck, if carried on deck without the shipper's consent.[642] Later in the timber trades in Britain, ships were being constructed to carry deck cargo as a result of the repeal of earlier Acts of Parliament[643] that prohibited that practice. In the United States there was considerable timber trade with up to one-third shipped on deck, however, the practice was to exclude from general average the jettison of any deck cargo.[644] This was the same practice in the European countries.[645] Rule I of the 1864 Rules that provided for the allowance in general average of the jettison of timber from deck seems to have been influenced by the English delegates at the 1864 York Conference, though there is no record of this. However, the change to the Rule in the 1877 Rules seems to be as a result of the fact that there were more European delegates at the Antwerp Conference 1877 unlike at the 1864 York Conference[646] and it is argued that this influenced the final voting on the subject; thereby making the rule conform to the practice in the United States and the European countries. It could be argued that this amendment to Rule I in reflecting the objective of achieving uniformity also shows the extent national/regional interests influenced the amendment of the provisions of the YAR at the time.

An amendment was also made to Rule III by adding a provision that no compensation was to be allowed in general average for water damage to packages which were already on fire. In England the practice of average adjusters prior to 1873 was not to allow such damage in general average.[647] However, in *Stewart v West India and Pacific SS Co*,[648] Quain J held that such loss properly formed the subject of general average contribution according to the

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[642] See *Gould v Oliver* (1837) 4 Bing NC 134 (CCP); *Milward v Hibbert* [1842] 3 QB 120 (QB).

[643] See Trade of British Possessions Act 1845, 8 & 9 Vict, c 93, ss 24-26; Customs Consolidation Act 1853, 16 & 17 Vict, c 107.

[644] J Cooke & R Cornah op cit note 28 at 234.

[645] Ibid.

[646] Ibid.

[647] R Stevens *An Essay on Average and other Subjects Connected with the Contract of Marine Insurance* 4 ed (1822) 243.

[648] (1872-73) LR 8 QB 88 (Exch) at 93.

law of England. But since the parties had agreed to make the custom of British average adjusters a part of the contract, the plaintiff's claim in general average failed. Quain J expressed the view that in the future the practice of average adjusters would take cognisance of the English common law.[649] Following this decision, the AAA in 1873 passed a Rule of Practice allowing in general average damage done by water poured down a ship's hold to extinguish fire.[650] However, the Rule was amended the next year disallowing in general average damage to cargo by water voluntarily used to extinguish fire where the packages were on fire at the time water was thrown upon them.[651] This was also the practice in the United States.[652] It is argued that this amended Rule of Practice of British average adjusters influenced the wording of Rule III YAR 1877. Like the amendment to Rule I, it could be argued that the amendment to Rule III epitomises the influence of the national interests of influential maritime states in the amendment of the provisions of certain Rules of the YAR at the time.

The amendments introduced by the YAR 1877 crystallised the uniformity process and laid the foundation for subsequent consideration of the law of general average within the context of rectifying the defects in the Rules, simplifying and updating the YAR to take cognisance of developments in the maritime industry and the commercial world.[653]

(ii) 1890 to 1994 – Modernisation of the YAR

The uniformity process that started in 1860 had gained momentum and had resulted in the formulation of the early sets of YAR to achieve the desired uniformity. After the adoption of the YAR 1877, the objective of amendment of the YAR was no longer primarily the unification of the divergent strands of general average, but to rectify defects in the Rules, simplify and modernise the Rules to take cognisance of developments at the time.[654] To achieve this change in the primary objective, particularly the modernisation of the Rules, it is

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[649] Ibid at 94. The court's decision the *Stewart* case was followed in subsequent cases such as *Pirie v Middle Dock Co* (1881) 44 LT 426, Asp MC 388 (QB); *Whitecross Wire Co v Savill* (1882) 8 QBD 653 (CA). The law was later confirmed by the House of Lords in *Greenshields v Stephens* [1908] AC 431 (HL).

[650] Rule F2.

[651] Rule F3. This Rule was rescinded in 1973 and a wording identical with Rule III YAR 1974 was substituted in its place.

[652] See *Crockett v Dodge* (1835) 3 Fairf 190 (SCt Me); *Slater v Hayward Rubber Co* (1857) 26 Conn 128 (QB).

[653] G Hudson & M Harvey op cit note 299 at 10.

[654] Ibid.

argued that the urgency of achieving initial uniformity was no longer present. Rather the maritime community allowed the existing set of YAR to be used for a reasonable period for their impact in the market to be assessed and to identify any defects in the Rules before calls were made for revision. Thus, after the adoption of the YAR 1877, the Rules were allowed to undergo a practical test of 10 years, after which it was recognised by the maritime community that the YAR 1877 did not conform to changes[655] in the commercial world; necessitating the amendment of the 1877 Rules that culminated in the approval of the 1890 Rules.[656]

From 1890 to the adoption of the YAR 1994, periodic amendments to the Rules were only made after the Rules had operated in the market for a period of 20 to 25 years[657] within which the various sets of Rules were incorporated into contracts of carriage and in marine insurance policies. This shows the progression in the time-frame allowed for existing Rules to have an impact in the industry before revisions were made. It is argued that this extended period was to provide sufficient time for interested parties and organisations (governmental and non-governmental) to identify any defects in the existing set of Rules in the maritime industry. This enabled interested parties to articulate their views on the desired amendments to be made in order to rectify any identified defects in the existing Rules and to simplify or update the Rules; before efforts were made by the maritime community to revise any set of Rules. Thus, the different sets of Rules prior to the 2004 Rules were given sufficient time to have an impact in the industry and were amended only after it was recognised by the maritime community that an amendment was requisite to rectify defects in the Rules and for the Rules to keep abreast of developments in international trade and in the maritime industry.[658]

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[655] See chap 6 § II*(c)* infra for a discussion of the change in the commercial world at the time that necessitated the amendment of YAR 1877.

[656] J Cooke & R Cornah op cit note 28 at 50.

[657] J Macdonald op cit note 78 at 439; J Spencer 'The Proposed 2004 Revisions to the York-Antwerp Rules: Some Insurance Issues', available at www.jssusa.com/assets/Uploads/GA-papers/2004comm.pdf, accessed 20 March 2011; J Spencer op cit note 478 at 1247.

[658] J Macdonald op cit note 78 at 439.

(b) Consensus amongst majority of interested parties

(i) 1860 to 1877

The history of the YAR and the amendments that have been made to the different sets of the YAR have been characterised by a consensus amongst majority[659] of interested parties in the general average system on the need for amendment and the consequential amendments to be made in ensuring that the YAR continued to be an efficient risk and loss spreading mechanism.[660] This was a reflection of the institution of general average which was 'founded upon the consensus of parties to the adventure.'[661] Feinberg CJ aptly notes that 'the YAR represent an important consensus of the international shipping industry.'[662] The genesis of the uniformity process in 1860 epitomises this consensus amongst interested parties as the call to the National Society for the Promotion of Social Sciences (hereafter 'the Association') to take up the arduous task of achieving uniformity in the law of general average was made by both insurers and shipowning interests; with Lloyd's being at the vanguard.[663] Thereafter, as a result of the circular letter and memorandum issued by the Association to all maritime states on the need to achieve uniformity, all interested parties in the general average system participated in the discussions at the Glasgow Conference 1860 and the resulting Glasgow Resolutions 1860 were a product of the compromises and consensus reached by the parties on the manner to proceed in achieving uniformity in the law of general average.[664]

Pertinently, this process of encouraging participation and consensus amongst all interested parties from maritime states before the adoption of any uniform Rules on general average continued in the efforts to achieve uniformity. By 1864, experts in maritime law were involved in analysing a draft Bill to consolidate and amend the laws relating to general

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[659] The term 'majority' is used in this context with respect to the number of interested parties (such as average adjusters associations, shipowning interests, insurance interests and subsequently NMLAs as the Rules were revised under the auspices of the CMI) that consented to a revision of the Rules at any time and not with regard to the number of delegates that voted in favour of revisions at the different conferences at which amended Rules were adopted.

[660] G Magone *United States Admiralty Law* (1997) 103.

[661] G Hudson & M Harvey op cit note 299 at 5.

[662] *Eagle Terminal Tankers Inc v Ins Co USSR* (1981) AMC 137 at 145 (2nd Cir).

[663] G Hudson & M Harvey op cit note 299 at 9.

[664] J Cooke & R Cornah op cit note 28 at 46.

average sacrifices and contributions.[665] Furthermore, a committee was appointed to further analyse the Bill and the committee had as its members, representatives of different interest groups. The committee drew up a statement of the various principal issues in dispute in general average and elicited opinions and criticisms from all interest groups.[666] This process of engagement of all interested parties led to their meaningful participation in the three days discussion on the issue of uniformity in the law of general average at the Third International General Average Congress at York in September 1864.[667] The resulting 11 Rules that were titled the 'York-Rules 1864' were a product of the consensus that was reached amongst the interested parties at the said congress. It is argued that the process of engagement and consultation of all interest groups and the adoption of Rules by the consensus of majority of interested parties had been entrenched and this characterised the subsequent efforts to achieve uniformity.

The engagement of all interested parties in the discussions on achieving uniformity continued at the Antwerp Conference 1877 which was attended by 68 delegates[668] representing various interest groups; particularly shipowning and insurance interests. At the meeting views were presented by the various delegates and after three days of discussion, a consensus was reached amongst majority of the interested parties which led to the approval of the YAR 1877. It is argued that events at the Conference underlined the established trend of the adoption of any set of Rules based on the consensus of the majority of interested parties as it was the first time that there was dissension on the uniformity process. Lloyd's which had been at the vanguard of the uniformity efforts in 1860 was of the view that uniformity was no longer required but that the whole system of general average should be abolished, as in its view, all interests in a maritime adventure were, or at least ought to be insured and that general average was expensive.[669]

Incidentally, Lloyd's was a lone voice in the insurance market in the call for the abolition of general average as other insurers associations together with shipowning interests passed resolutions at a meeting in London in 1878 for the YAR 1877 to be carried into

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[665] Ibid at 47.

[666] Ibid.

[667] Ibid at 48.

[668] J Cooke & R Cornah op cit note 28 at 47.

[669] H Dowdall 'Suggestions for the Codification of the Law of General Average' (1895) 11 *Law Quarterly Review* 32 at 37. However, Lloyd's delegates joined in the discussions at the Conference but expressly disassociated themselves from the general approval of the proceedings.

operation through provisions to be inserted in bills of lading.[670] Lloyd's sentiments were also not shared by the maritime community as it was announced at the next Conference of the Association for the Reform and Codification of the Law of Nations in 1879, that the owners of more than two-fifths of the entire registered world tonnage and charterparties had agreed to include the 1877 Rules in their bills of lading and charterparties. The 1877 Rules had also being adopted by a large number of mutual insurance associations.[671] Moreover, insurers generally, despite the continued opposition by Lloyd's, agreed to the inclusion of the new Rules in their insurance policies without additional premium.[672] Most importantly, delegates at the Antwerp Conference did not express support for Lloyd's view.[673] Thus, the view of the majority of the interested parties with respect to the importance of the general average system prevailed in the maritime industry.[674]

(ii) 1890 to 1994

As in the process that was adopted in achieving uniformity, efforts to amend the Rules were based on the acknowledgement by the majority of interested parties on the need for amendments and the amendments that were made were a product of the consensus reached amongst them in order to achieve a measure of equitable balance of their interests. In 1890, majority of the interested parties acknowledged the need for the amendment of the YAR 1877 in order to update the Rules to take cognisance of developments at the time.[675] Pertinently, average adjusters, under the auspices of the AAA, were proactive in the revision process by drafting a report suggesting the amendments to be made. This report was deliberated upon by interested parties at the Liverpool Conference of the Association for the Reform and Codification of the Law of Nations in 1890. At the end of the Conference, a consensus was reached amongst the majority of the interested parties, resulting in the adoption of 18 Rules known as the 'YAR 1890.'[676]

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[670] J Cooke & R Cornah op cit note 28 at 50.

[671] Ibid.

[672] Ibid.

[673] R Cornah op cit note 17 at 162.

[674] Ibid.

[675] This development is discussed in chap 6 § II*(c)* infra.

[676] J Cooke & R Cornah op cit note 28 at 51. The Conference was attended by representatives of shipping, insurance and commercial communities from most maritime nations.

This consensus amongst the majority of interested parties on the need for the amendment of any set of Rules before embarking on such an amendment was further reflected in the efforts by interested parties to amend the YAR 1890 to provide general principles on the law of general average, which were not contained in the YAR 1890.[677] As in the previous amendments, majority of the interested parties and delegates from maritime states participated in the discussions at the thirty-third Conference of the International Law Association at Stockholm in 1924 and after four days of discussions a consensus was reached amongst majority of the delegates on the requisite amendments to be made. The amended Rules were titled the 'YAR 1924.' This consensus amongst majority of interested parties on the amendments to be made ensured the widespread acceptance and use of the revised Rules in the market and in countries except in the United States.[678]

Shipowners in the United States were principally opposed, among other things, to the definition of general average in Rule A of the YAR 1924 on the ground that it restricted general average to sacrifices made or expenses incurred for the common safety and did not cover expenses incurred for the common benefit of the adventure which is allowed under United States law.[679] Rule A YAR 1924 provides that 'there is a general average act when and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made for the common safety for the purpose of preserving from peril the property involved in the common maritime adventure.'[680] The wording of this provision was clearly based on English law[681] and seemed to disallow in the YAR expenses incurred for the common benefit of the parties to an adventure which is allowed under United States law.[682]

It is argued that this opposition by the United States shipowners shows the role national interests played in the development of the YAR.[683] However, it is argued that the opposition of shipowners in the United States was not necessary as the numbered Rules[684] of the 1924 Rules provides for allowances for acts done for the common benefit of the maritime

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[677] Ibid.

[678] J Cooke & R Cornah op cit note 28 at 54.

[679] L Felde 'General Average and the York-Antwerp Rules' (1952-53) 27 *Tulane Law Review* 406 at 430; L Buglass op cit note 27 at 198. See chap 2 § II*(a)* supra.

[680] This wording of Rule A has remained unchanged in the subsequent sets of YAR.

[681] *Cf* chap 2 § II*(a)* supra.

[682] Ibid.

[683] See chap 6 § II*(a)(i)* supra.

[684] Rules X, XI and XIV YAR 1924.

adventure. However, for clarity and certainty, it is argued that Rule A YAR 1924 should have been drafted to reflect that acts done both for the common safety and common benefit of the common maritime adventure are allowed in general average under the Rules.[685]

Furthermore, apart from it being the first time shipowners in any state opposed the Rules, it also marked the first time the Rules were partially applied in any jurisdiction by means of special clauses.[686] However, cognisance should be taken of the fact that the disenchantment of the United States shipowners was not with the process adopted in the amendment of the YAR 1890 or the entire regime of the YAR.

As in the previous amendments, subsequent amendments of the Rules in 1950, 1974, 1990 and 1994, under the auspices of the CMI, were as a result of a consensus amongst majority of interested parties on the need for amendments in order to simplify and update the Rules to take cognisance of developments at the time.[687] In the process of the amendment of the YAR under the auspices of the CMI, Working Groups on General Average were formed to examine the issues raised by different interested parties on the need for amendment. The Working Groups on General Average ascertained the views of interested parties through questionnaires that were circulated to NMLAs on the principal issues for consideration.[688] This process of consultation afforded all interested parties the opportunity of considering the issues that were raised and to proffer suggestions on the requisite amendments to be made. Though the CMI questionnaires were only sent to NMLAs, other interested parties were given the opportunity to make submissions to the CMI (as consultative members of the CMI) on the issues raised in the questionnaires and on other issues they considered to be germane.

Thus, the amendments under the auspices of the CMI prior to 2004 were as a result of a consensus amongst majority of interested parties on the need for any existing Rules to be amended to take cognisance of developments at any given time.[689] Amendments were never undertaken by the CMI as a result of the clamour for revision by any sectarian interest.

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[685] *Cf* chap 2 § III*(a)* supra.

[686] The YAR Rules 1924 were partially applied in the United Sates by means of special clauses. For eg, clause 19 of the NYPE charterparty (1946 revision) reads '… general average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive and Rule F of YAR 1924.'

[687] G Hudson & M Harvey op cit note 299 at 12-15.

[688] J Cooke & R Cornah op cit note 28 at 55-62.

[689] K Jones 'Feeling Frustrated and Abandoned? Consider the York-Antwerp Rules', 1, 2013 Chairman's address, AAA, available at www. Average-adjuster.com/Chairman's%20address%202013.pdf, accessed 4 May 2013.

Pertinently, the adoption of the YAR 1994 was based on the acknowledgement by all interest groups that the revision of YAR 1974 (as amended in 1990) was necessary as there had been changes in shipping and commercial techniques and substantial developments in the environment in almost 20 years of the operation of the YAR 1974.[690] The effort towards the amendment of the 1974 Rules was not as a result of disenchantment with the general average system by any interested party. This is shown in a rider to the 1991 preliminary report of the CMI Working Group on General Average:

> 'The current examination of the law of General Average and the York-Antwerp Rules is not inspired by any call for the abolition of General Average, or by any significant criticism of the present position. Nor is it either a response to the results or conclusions of any particular study or initiative. Rather it is inspired by the wish, by critical periodical examination, to consider the validity of the present regime in the modern fast-developing context ….'[691]

Hudson remarks that the review was 'inspired by the desire by all interested parties for a critical and periodic examination of the Rules in order to test the validity of the Rules in the then commercial context where documentary techniques and operational techniques were developing rapidly.'[692] This consensus amongst interested parties on the need for amendment of the YAR 1974 led to the consultation and involvement of majority of interested parties in the process that led to the adoption of the YAR 1994. Magone notes that 'the YAR 1994 were approved after extensive consultation with all interested parties and associations, governmental and non-governmental interested in general average.'[693] It is argued that this involvement of the majority of interested parties in the revision process culminated in the

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[690] The issues that had to be considered included the treatment in general average of liabilities, costs and expenses relating to pollution clean-up and environmental damage, the application of general average to tugs and barges, considerations of the currency of adjustment and interest, general average franchises, Absorption Clauses and time limits in relation in particular to production of documents. See CMI Documentation Genav-17 ter, 14-17.

[691] Quoted in G Hudson 'The York-Antwerp Rules: Background to the Changes of 1994' (1996) 27 *JMLC* 469 at 470.

[692] Ibid.

[693] G Magone op cit note 660 at 109.

unanimous adoption of the YAR 1994 at the CMI Sydney Conference[694] and the widespread acceptance of the YAR 1994 by the majority of interested parties in the maritime industry.[695]

(c) Developments in the industry

The third important ingredient of the previous successful revision processes of the YAR is that amendments were undertaken as a result of the recognition by majority of interested parties that it was necessary to amend the existing set of Rules to take cognisance of significant developments in the industry. These developments were changes in international trade and shipping techniques, judicial decisions and environmental concerns. The amendments of the YAR from 1890 to 1994 were in a bid to modernise the Rules to take cognisance of developments at the time.[696]

These factors drove the evolutionary development of the YAR prior to 2004. Thus to show how these factors drove the revision of the YAR, it is apposite to examine these developments and to show the amendments that were made to the previous sets of Rules as a result of these developments. However, in the examination, there will be more detailed analysis of the development that led to the need for the revision of the YAR 1974 (as amended in 1990), key proposals that were made by NMLAs for the revision and the cardinal changes introduced by the YAR 1994. This is to provide the necessary context for understanding the amendments that were made in the YAR 1994 to take cognisance of developments at the time: for a proper contextualisation and examination of IUMI's call for the revision of the YAR 1994 in the next chapter of this thesis.

(i) 1890 Rules – Changes in international trade

The 1890 Rules were adopted as a result of the acknowledgement by the maritime community that the 1877 Rules, after a decade of their operation in the industry, did not entirely conform to the changing needs of international commerce and that some revision was required.[697] These changing needs of international commerce were as a result of the gradual

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[694] J Cooke & R Cornah op cit note 28 at 62.

[695] See chap 7 § II*(c)* infra.

[696] G Hudson & M Harvey op cit note 299 at 10.

[697] J Cooke & R Cornah op cit note 28 at 50; S Cole *The Stockholm Conference on General Average and the York-Antwerp Rules 1924, with notes* (1925) 1.

replacement at the time of sailing vessels by steamships.[698] Thus it was necessary to amend the Rules to provide for allowances in the YAR for certain circumstances that relate to the use of steamships in international trade. This development led to the introduction of new Rules VII and IX in the YAR 1890.

Rule VII allowed in general average damage caused to machinery and boilers of a ship which is ashore and in a position of peril, in endeavouring to refloat when it is shown to have arisen from an actual intention to refloat the ship for the common safety at the risk of such damage. The Rule recognised that when a steamer is aground in a position of peril and the engines are kept going in order to back her off or over the ground, the vessel's machinery may be strained in the process, bearings may become overheated or the propeller may sustain damage.[699] Damage done to the vessel in this manner was analogous to the loss of sails blown away when set in order to force the ship off the ground and which was treated as general average.[700]

Rule IX allowed in general average; cargo, ship's materials and stores or any of them necessarily burnt for fuel for the common safety at a time of peril only when an ample supply of fuel had been provided. Rule IX recognised that as sail was giving way to steam, there were bound to be times at sea when the ship's bunkers would be exhausted or about to be exhausted and it would be necessary for the cargo or ship's materials to be burnt in the furnace for the safety of the common maritime adventure.

It is argued that Rule IX 'codified' in the Rules the decision in *Harrison v Bank of Australasia*,[701] where it was held that spare parts, planks and other ship's materials used upon emergency for fuel for the ship's engines to avert a peril and when there has been no original insufficiency in the supply of bunkers, are allowable in general average.

(ii) 1924 Rules – Rectifying defects in the Rules and changes in international trade

The adoption of the YAR 1924 was for two primary purposes, viz, to rectify defects in the YAR 1890 and to take cognisance of changes in international trade.

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[698] F Raikes 'The York-Antwerp Rules 1890' (1890-1891) 16 *Law Magazine and Law Review* 5th series 286 at 291; T Barclay op cit note 32 at 24. The commercial demise of sail ship took place during the period from 1840 to 1925. See J Rodrigue *The Geography of Transport Systems* 3 ed (2013) 54.

[699] J Cooke & R Cornah op cit note 28 at 304.

[700] This was allowed under the Custom of Lloyd's collected in 1896 and is now Rule F6 Rule of Practice, AAA.

[701] (1872) LR 7 Ex 39 (Exch). This decision was relied upon in *Robinson v Price* (1876) 2 QBD 91 (CA).

(a) Defect in the Rules

The YAR 1924 were a product of the need to address the identified weakness of the YAR 1890. The 1890 Rules consisted merely of a group of Rules[702] dealing with certain specific points and did not contain Rules laying down the general principles of general average[703] and this made the Rules not to be based on a coherent and logical principle. This flaw made the Rules susceptible to various interpretations by average adjusters which was detrimental to the uniformity process.[704]

To rectify this defect in the YAR 1890, eight lettered Rules[705] were introduced in the YAR 1924 which laid down the general principles of general average.[706] The lettered Rules established principles which would be applied in those cases not provided for in the numbered Rules.[707]

(b) Changes in international trade

Furthermore, like the YAR 1890, there was a need to produce a set of Rules that would take cognisance of changes in international trade because the replacement of sailing vessels with steamships resulted in rapid growth in international trade and it was acknowledged by the maritime community that the 1890 Rules would lose their value as circumstances changed.[708] It is argued that this concern of the maritime community was predicated on the fact that the YAR up to the 1890 Rules contained provisions that applied to sail ships and it was necessary to amend the Rules to take cognisance of the dominance of steamships in international trade. Thus, the dominance of steamship in navigation and its effect on international trade played a pivotal role in the amendment of the YAR 1890.[709]

Thus, amendments were made to certain numbered Rules in the YAR 1924 to reflect the effects of changes in the type of vessel used in navigation to the provisions of the YAR.

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[702] Rules I to XVIII YAR 1890.

[703] J Cooke & R Cornah op cit note 28 at 51; G Hudson & M Harvey op cit note 299 at 10.

[704] Ibid.

[705] Rules A to G.

[706] B Yancey 'York-Antwerp Rules 1950' (1951-1952) 6 *Loyola Law Review* 121 at 124.

[707] R Cornah op cit note 17 at 162.

[708] Ibid.

[709] The period between 1890 and 1925 underlines the dominance of steamship as a support to global trade with its diffusion to ports across the globe. See J Rodrigue op cit note 698 at 55.

Rule X(b) was amended in the YAR 1924 to allow in general average the cost of fuel and stores at a port of refuge, call or loading; thereby recognising that steamships (and motor ships) had ousted sailing vessels. Furthermore, Rule XII was amended to allow in general average damage to or loss of cargo, fuel or stores caused in the act of handling, storing, reloading and stowing when such measures are admitted in general average.

(iii) 1950 Rules – Effect of judicial decision and defect in the Rules

Analogous to the adoption of the YAR 1924, the YAR 1950 were primarily adopted for two main purposes, viz, to remedy the effect in the maritime industry of a judicial decision with respect to the YAR 1980 and to rectify a defect in the Rules.

(a) Effect of judicial decision

The adoption of the YAR 1950 marked the first time a judicial decision played a principal role in the revision of the Rules. It was the intention of the framers of the 1924 Rules and of the delegates that adopted them at the Stockholm Conference 1924 that all cases provided for by the numbered Rules should be considered as general average and that the lettered Rules laid down general principles in those cases not specifically covered by the numbered Rules.[710]

However, Roche J discarded this intention of the framers of the Rules in his decision in *Vlassopoulos v British & Foreign Marine Insurance Co Ltd* (*The* '*Makis*').[711] Roche J held that the numbered Rules were merely specific examples of types of general average situations, subordinate to the principles set forth in the lettered Rules. Consequently, there could be no general average case within the particular Rules unless it would also be covered by the provisions of the general Rules. This decision led to the introduction of what was called the 'Makis Agreement'[712] in which shipowners and insurers in England agreed to restore the precedence of the numbered rules over the lettered rules.[713]

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[710] J Cooke & R Cornah op cit note 28 at 55.

[711] [1929] 1 KB 187 (KB).

[712] The Makis Agreement read as follows: '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.'

[713] G Hudson & M Harvey op cit note 299 at 11.

It is argued that the adoption of the 'Makis Agreement' underlined the need to amend the 1924 Rules to remedy the effect of Roche J's decision and to clarify the relationship between the numbered rules and the lettered rules.

In solving the problem caused by *The Makis* decision, a new 'Rule of Interpretation'[714] was inserted at the beginning of the YAR 1950 which gave priority to the numbered Rules over the lettered Rules, making it clear that if the facts support a general average under the numbered Rules it matters not that there has been no general average act within the meaning of Rule A.[715]

(b) Defect in the Rules

Another factor that led to the amendment of the 1924 Rules was the provision of Rule XXII of the Rules. Rule XXII YAR 1924 had provided for allowance of interest on general average expenditure and sacrifices at the legal rate per annum prevailing at the port of destination or at the rate of 5 per cent per annum where there is no recognised legal rate at the port of destination. There was a need to amend Rule XXII by providing a fixed rate as the legal rate at different ports varied considerably. Furthermore, there was no recognised legal rate in the majority of the importing countries and this led to profits or losses that were not warranted by the reason behind the Rule to be made.[716] It is argued that an amendment to Rule XXII YAR 1924 was necessary in order to achieve uniformity and certainty as every shipowner at the beginning of the adventure would be conversant with the fixed rate at which interest would be calculated instead of the legal rate which he might only be aware of at the port of destination.[717]

With respect to Rule XXII, a fixed rate of 5 per cent was provided for the calculation of interest in general average. This amendment provided certainty in the calculation of interest in general average unlike the 'legal rate' that was used in the 1924 Rules.

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[714] The Rule of Interpretation provides: 'In the adjustment of general average the following lettered 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.'

[715] See *Eagle Terminal Insurance Co v Insurance Co of USSR (The 'Eagle Courier')* 637 F 2d 890, 1981 AMC 137 (2nd Cir 1981). The decision in the Eagle Courier was also cited with approval by the Federal Court of Appeal of Canada in *Ellerman Line v Gibbs* [1986] 2 FC 463 (Fed Can) at 475-477.

[716] J Cooke & R Cornah op cit note 28 at 559.

[717] The legal rate of up to 8 per cent or even 10 per cent in some parts of the world was exorbitant in light of the cheap money policy of 1948. See J Cooke & R Cornah op cit note 28 at 559.

(iv) 1974 Rules – Simplifying the Rules

The adoption of the YAR 1974 was primarily directed towards simplifying the task of general average adjustment and modernising the Rules in order to expedite the adjustment process[718] as a result of changes at the time in commercial procedures and shipping techniques that were brought about by technological advancements.[719] This need for the simplification and modernisation of the YAR was stressed in the preliminary report and questionnaire on the possible revision of the YAR 1950 which was circulated by the CMI to its NMLAs[720] and in the replies by NMLAs to the questionnaire.[721] The main object of the amendments introduced by the YAR 1974 was to simplify the Rules to 'facilitate the drawing up of adjustments with the minimum of expense and delay.'[722]

In the amendments introduced in the YAR 1974, the lettered Rules were unaltered apart from a small change that clarified the text of Rule D. The word 'defences' was inserted in Rule D to clarify that a party could have recourse to any remedies and defences available in any law; where the fault of a party gave rise to the general average act. However, important changes were made within the framework of the numbered Rules. Importantly, Rules X and XI were amended in order to exclude from general average the cost of cargo handling and expenses incurred at a port of call or loading, when the accident giving rise to such expenses had occurred prior to the common adventure. This amendment was because in solving the problem that arose from the decision in *The Makis,*[723] the Rule of Interpretation had also allowed situations where nothing untoward had happened during the common venture other than the mere discovery of pre-existing damage. If the damage found required repairs necessary for the safe prosecution of the voyage, then allowances could be made under Rules X and XI YAR 1950.[724] While cargo interests could and very often did decline to pay their share of contribution in such cases, it was anomalous that the expenses incurred in these circumstances should remain within the ambit of general average.

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[718] See J Cooke & R Cornah op cit note 28 at 57.

[719] CMI Documentation 1970 (IV) 74.

[720] Ibid.

[721] CMI Documentation 1971 (IV) 254-294.

[722] CMI Documentation 1974 (I) 58.

[723] [1929] 1 KB 187 (KB).

[724] R Cornah op cit note 17 at 163.

(v) 1974 Rules as amended in 1990 – Response to environmental concerns

The amendment to the YAR 1974 in 1990 was as a result of the global concern for the protection of the environment due to shipping disasters at the time that resulted in the pollution of the marine environment and significant physical damage of marine life and resources in coastal waters.[725] To address this concern, a new Salvage Convention 1989 was approved at an International Convention on Salvage organised by the International Maritime Organisation (IMO).[726] Article 13 of the Salvage Convention 1989 provides that one of the factors to be taken into account while determining a salvage award is the skill and efforts of the salvor in preventing or minimising damage to the environment. To ensure that adequate incentives are available to salvors, particularly where there is a prospect of salving a maritime property with a value that might be small, article 14 of the Convention introduced a new special compensation which is payable when the ship or cargo to be salved threatens damage to the environment and the value of the property salved was insufficient to provide an adequate result or where the property is lost despite the salvage operation.

It was necessary to amend the YAR 1974 to clarify which of the expenses incurred by a salvor in preventing or minimising damage to the environment would be allowed in general average.[727] Thus, an amendment was made to Rule VI of the 1974 Rules by adding new paragraphs, the first of which allowed in general average the element of enhancement of the award for the salvor's efforts in avoiding or minimising damage to the environment,[728] and the second of which excluded the special compensation paid under article 14 from being allowed in general average.[729]

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[725] Ibid. For eg, on 16 March 1978, the oil tanker the Amoco Cadiz, transporting 227,000 tonnes of crude oil, suffered a failure of her steering mechanism, and despite the efforts of the crew of a German tug boat and two unsuccessful towing attempts, ran aground on Portsall Rocks, on the Breton coast. The entire cargo spilled out as the breakers split the vessel in two, progressively polluting 360 km of shoreline from Brest to Saint Brieuc. See www.cedre.fr/en/spill/amoco/amoco.php, accessed 4 May 3012.

[726] L Chen 'Recent Developments in the Law of Salvage of the Marine Environment' (2001) 16 *International Journal of Marine and Coastal Law* 686.

[727] S Rible 'A Juxtaposition of Hull and Protection & Indemnity Coverages' (2009) 83 *Tulane Law Review* 1189 at 1215.

[728] Rule VI(a) YAR 1974 (as amended in 1990).

[729] Rule VI(b) YAR 1974 (as amended in 1990). See also N Gaskell 'The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement' (1991) 16 *Tulane Maritime Law Journal* 1 at 60.

(vi) 1994 Rules – Response to containerisation

The revision of the 1974 Rules (as amended in 1990) was as a result of the acknowledgement by the maritime community of the need for revision as a result of changes in shipping and commercial techniques and substantial developments in the environment in almost 20 years of the operation of the YAR 1974.[730] Recognising the clamour in the maritime community by shipowning interests, insurers, average adjusters, NMLAs and international organisations[731] for a revision of the YAR 1974 (as amended in 1990), the CMI ISC on General Average, appointed a Working Group[732] to prepare a preliminary report and questionnaire[733] for distribution to NMLAs on the possible need for updating or revising the YAR 1974 (as amended in 1990).[734]

The replies of the NMLAs to the questionnaire indicated a serious interest in the continuation of efforts to update, simplify and improve the Rules to take account of circumstances at the time. Central to these efforts was the need to continue to increase uniformity while at the same time trying to identify ambiguity and uncertainty so as to reduce delay and expense.[735] The majority of the replies showed that containerisation was the main commercial and technical development identified by the NMLAs for consideration in the amendment of the Rules.[736] This is because the practice of containerisation of cargo (in which thousands of cargo interests might be involved) called for special consideration of the problems involved in identifying the owners and insurers of the containers as well as

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[730] The issues that had to be considered included the treatment in general average of liabilities, costs and expenses relating to clean-up and environmental damage, the application of general average to tugs, ro-ro ships, barges, considerations of the currency of adjustment and interest, general average franchises and Absorption Clauses and time limits in relation in particular to production of documents. See *CMI Yearbook 1992*, 99-100.

[731] The United Nations Conference on Trade and Development (UNCTAD) published two papers titled 'General Average - A Preliminary Review', UNCTAD document TD/B/C.4/ISL/58, 19 August 1991 and 'The Place of General Average in Marine Insurance Today', UNCTAD document SDD/LEG/I, 8 March 1994, in which it urged the CMI in the former document to consider, in collaboration with marine insurers, if there was any insurance arrangement that could take the place of general average and in the event there was none, to find ways to simplify the general average system.

[732] *CMI Yearbook 1992*, 97.

[733] For a full text of the questionnaire, see *CMI Yearbook 1993 (Sydney I)* 193.

[734] *CMI Yearbook 1993* (*Sydney I*) 140.

[735] Ibid at 141.

[736] CMI Document Genav-17 ter, 14-16.

problems of valuation in assessing the contributory values in general average of the various interests.[737] Thus, containerisation brought about a practical need for early information on the identities of cargo owners and their insurers in the documentation for the various consignments as well as the question of general average securities for the release of cargo.[738] Having such early information expedites the adjustment process and helps save costs occasioned by delays in adjustments.

(a) Proposals by NMLAs for revision of YAR 1974 (as amended in 1990)

As part of the amendment process, some NMLAs in their reply to the CMI 1991 questionnaire on the possible amendment of the YAR 1974 (as amended in 1990) made proposals for the amendment of certain provisions of the Rules in order to update and simplify the Rules. Some of these proposals that relate to the issues raised by IUMI for the revision of the YAR 1994[739] are analysed in what follows. This is to provide the context for analysing whether all or some of the IUMI's proposals had being considered by the maritime community in the process of adopting the YAR 1994, as contended by some interested parties during the revision process of the YAR 1994.[740] This analysis also provides the context for understanding the amendments that were made to the YAR 1974 to simplify and update the Rules.

(i) Rule of Interpretation

The Maritime Law Association of the United States (MLAUS) made a proposal that the Rule should be renamed 'The Rule of Interpretation and Rule Paramount' and that new third and fourth paragraphs should be added. The proposed third paragraph was as follows:

> 'There shall be no allowance in general average for sacrifice or expenditure unless reasonably made.'[741]

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[737] R Hayden & K Leland 'General Average – Issues to Consider' (2010-2011) 23 *University of San Francisco Maritime Law Journal* 114.

[738] Ibid.

[739] See Chap 7 § III infra.

[740] See chap 7 § IV*(b)(i)* infra.

[741] *CMI Yearbook 1993* (*Sydney I*) 144.

The reason for this proposal was the decision in *Corfu Navigation Co and Bain Clarkson Ltd v Zaire S.E.P and Petroca S (The 'Alpha').*[742] The Alpha was grounded in the mouth of the Zaire River in heavy silt conditions and damage to the main engine occurred during refloating operations. The master had been warned by the crew that such an attempt to refloat the vessel would be unsuccessful and would damage the engine; but he ignored the warning. The shipowners claimed general average under Rule VII YAR 1974. The cargo interests denied liability in general average on the ground that the actions of the master were unreasonable. The court found that the master's act was not merely unskilful but was also unreasonable. However, the court held that the cargo interests were liable to contribute in general average as the word 'reasonably' is not used in Rule VII YAR 1974. As such the reasonableness of an act is not a requirement for a claim under Rule VII YAR 1974.

It is argued that this decision was correct taking cognisance of the fact that the Rule of Interpretation in the YAR 1974 gives the numbered Rules precedence over the lettered Rules.[743] In construing the numbered Rules under the YAR 1974, the requirement of reasonableness in Rule A should not be applied. Where an act falls under the provisions of a numbered Rule in the 1974 Rules, there would be a valid claim; irrespective of the fact that the requirement of reasonableness in Rule A is not met. However, it is doubtful that this was the intention of the framers of the YAR in allowing unreasonable acts of parties in the general average system. It is argued that the proposal by the MLAUS was necessary in order to clarify that the requirement of reasonableness also applies to the numbered Rules.

(ii) Rule E

A proposal was made by the BMLA for an addition to Rule E to provide for a time limit for the notification of claims and the production of documents to average adjusters. It is argued that such an addition to Rule E was necessary as the majority of the replies by the NMLAs to the CMI 1991 questionnaire[744] showed that one of the reasons adjustments were being delayed in the market was because documents in support of general average claims were not been promptly sent by parties to average adjusters.[745] The proposed addition to the Rule was

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[742] [1991] 2 Lloyd's Rep 515 (QB). *Cf* chap 6 § II*(c)(vi)*(b)(i) infra.

[743] C Fernandez & A Fernandez 'Interpreting the Rule of Interpretation in the York-Antwerp Rules' (1999) 30 *JMLC* 413 at 415; AAA 'YAR 1994 and Rules of Practice' (1995) 26 *JMLC* 481.

[744] C*f* chap 6 § II *(c)(vi)* supra.

[745] See CMI Document Genav – 17 ter, 32-33.

to spur parties to promptly forward documents in support of their claims to adjusters; thereby hastening the adjustment process and reducing costs occasioned by delay in adjustments.

(iii) Rule G

The BMLA proposed a text to be added as second and third paragraphs in Rule G:

> 'When a ship is in any port or place in circumstances which would give rise to an allowance in general average under the provisions of Rules X and XI, and the cargo or part thereof is forwarded to destination by other means, the general average shall be adjusted so that the rights and liabilities of the parties in general average shall remain as nearly as possible the same as they would have been in the absence of such forwarding, as if the adventure had continued in the original ship for so long as justifiable under the contract of affreightment and the applicable law. In these circumstances the cargo and other property shall contribute on the basis of its value upon delivery at original destination, unless sold or otherwise disposed of short of that destination, and the ship shall contribute upon its actual net value at the time of completion of discharge of cargo. The proportion attaching to cargo of the allowances made in general average by reason of applying the second paragraph of this rule shall not exceed the cost which would have been borne by the owners of cargo, if the cargo had been forwarded at their expense.'[746]

This proposal was to introduce a standard wording of what is known as 'Non-Separation Agreement' (NSA) in the Rules. For over a century, it had been the custom to ask cargo interests, in return for the forwarding of their cargo and an earlier delivery, to agree to contribute to general average adjusted as though their cargo had remained at the port of refuge during the repairs to the ship and had been carried to destination in the original carrying ship; even though their cargo had been carried to destination by another ship from the port of refuge.[747] This was achieved by incorporating a NSA into the average bond[748] and average guarantee signed by the consignees and the cargo insurers, respectively.[749] The NSA

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[746] *CMI Yearbook 1993 (Sydney I)* 157.

[747] See also AAA Rule of Practice F15, adopted in 1876.

[748] This is an undertaking by the consignee of goods to pay the proper proportion of any salvage and/or general average and/or other charges attaching to goods and also to provide the information necessary to value the cargo and any loss or damage thereto. See J Cooke & R Cornah op cit note 28 at 630.

[749] Ibid at 207.

ensures that cargo is forwarded from the port of refuge to the port of destination without delay.[750] The second paragraph of the proposal was to include what is known as the 'Bigham Clause' in the wording of the NSA to be introduced in the Rules. The Bigham Clause is included in a NSA in order to give protection to cargo interests fearful of what they may be undertaking when signing a NSA. The Bingham Clause provides:

> 'It is understood that the amount charged to cargo under this agreement shall not exceed what it would have cost owners if cargo was delivered to them at … (port of refuge) and forwarded by them to destination.'[751]

The above Clause ensures that cargo interests cannot be called upon to contribute towards general average expenditure during an extended period of repairs more than it would have cost them to forward the cargo themselves from the port of refuge to destination.[752] It is argued that BMLA's proposal was necessary in order to crystallise in the Rules a practice in the industry[753] which worked for the benefit of all parties to a maritime adventure; particularly cargo interests, in getting cargo to destination without much delay.

(iv) Rule VI

In addition to the proposals by NMLAs, the ISC also discussed whether differential settlement of salvage costs should be brought into the general average apportionment as is the case under Rule VI YAR 1974 (as amended 1990).[754]

It is conceded that material inequity is worked by the Rule when it obliges other otherwise advantageous individual salvage settlements to be cast into the general average pot and re-apportioned amongst the parties. A party who has used his commercial influence to secure a more favourable salvage settlement than others should ordinarily enjoy this advantage.

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[750] Ibid.

[751] Ibid.

[752] See *The Julia Blake* (1882) 107 US 418 (US SCt); *Ellerman Lines v Gibbs Nathaniel* [1976] 2 FC 463 (Fed Can); *The City of Colombo* (1986) 26 DLR 161, (1986) AMC 2217 (4th Cir); *The ABT Rasha* [2002] 2 Lloyd's Rep 575 (CA).

[753] G Hudson & M Harvey op cit note 299 at 82.

[754] *CMI Yearbook 1993 (Sydney I)* 148.

However, it is argued that the re-apportionment of differential salvage settlements in general average is nevertheless a practical tool to give effect to the community of interest that underlines the notion of general average and for the burden of salvage expense to be equitably shouldered by the parties to an adventure. The importance of the re-apportionment of differential settlement of salvage costs has long been recognised in United States law.[755] The re-apportionment of differential salvage costs in general average was also indorsed in 1983 in the United Kingdom by the Advisory Committee of the AAA. The committee stated that;

> 'Rule VI is mandatory as between the parties to a contract of affreightment providing for adjustment according to the YAR 1974 … subject to the overall requirement of reasonableness in the amounts claimed by parties to the adventure, differential expenditure, including costs, on account of the salvage should be allowed in general average and apportioned as such.'[756]

It could be argued that the committee hinged the re-apportionment of differential salvage settlements on the 'reasonableness in the amount claimed.' However, the phrase is ambiguous as it is not clear whether the committee was advocating for the exercise of the discretion of average adjusters on whether or not to re-apportion differential salvage expenditure in general average by taking cognisance of the 'reasonableness in the amount claimed.'

(v) Rule XIV

The MLAUS proposed to delete the second paragraph of Rule XIV YAR 1974. The second paragraph of the Rule provides:

> 'where temporary repairs of accidental damage are effected in order to enable the adventure to be completed, the cost of such repairs shall be admitted as general average without regard to the saving, if any, to other interests, but only up to the saving in

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[755] In *The Jason* 162 Fed Rep 56 (SDNY 1908) at 62; Hough J pointed out that the salvage expenditure was incurred for the common good and 'whether several persons pay or promise to pay at one time or another is of itself no evidence to show or disprove a community of interests.'

[756] G Hudson & M Harvey op cit note 299 at 115.

> expense which would have been incurred and allowed in general average if such repairs had not been effected there.' [757]

The MLAUS' proposal was based on the decision in the English courts in The *Bijela,*[758] which showed the inherent problems of construction that could arise from the provision of the second paragraph of Rule XIV YAR 1974. On the facts, the shipowners' vessel was chartered for the carriage of cargo from Providence, Rhode Island, to the West Coast of India, under a charterparty which provided that general average was to be settled in London according to the YAR 1974. Whilst still in Rhode Island Sound, the vessel grounded and sustained damage. She put into the port of Jamestown, where it was discovered that she could not safely reach New York, the nearest port where permanent repairs could be carried out in dry dock, without discharging the whole of her cargo. The shipowners elected to carry out temporary repairs in Jamestown at a cost of US$282,606. The cost of discharging, storing and reloading the cargo to allow permanent repairs in New York would have exceeded US$535,000. After the completion of the vessel's voyage to India, the shipowners declared general average. The adjusters did not allow the cost of temporary repairs. The shipowners instructed a second firm of adjusters who included the cost of the temporary repairs in general average, as being less than the expense which would have been incurred and allowed if temporary repairs had not been effected, within Rule XIV of the 1974 Rules.

The shipowners in the court of first instance argued that they were entitled to general average contribution from cargo owners as the temporary repairs at Jamestown were substituted expenses for the saved expenses of reloading, storing and warehousing the cargo that would have been incurred if permanent repairs had been carried out and that such expenses would have been allowable in general average under Rule X(b) and(c). The shipowners contented that in applying the second paragraph of Rule XIV it would have to be assumed that it was not possible to carry out temporary repairs at Jamestown. The defendants contended that had the vessel discharged its cargo and proceeded to New York for permanent repairs none of the expenses incurred would have been allowable in general average because the alternative of carrying out temporary repairs which were all that was required to enable

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[757] *CMI Yearbook 1993 (Sydney I)* 153.

[758] *Marida Ltd & Ors v Oswal Steel and others (The 'Bijela')* [1992] 1 Lloyd's Rep 636 (QB); confirmed [1993] 1 Lloyd's Rep 411 (CA). It should be noted that at the time the MLAUS made this proposal the appeal of the case to the House of Lords was still pending. The House of Lords subsequently reversed the decision of the Court of Appeal in [1994] 2 Lloyd's Rep 1 (HL).

the adventure to be completed or for the safe prosecution of the voyage could be carried out at Jamestown, as in fact occurred.

At first instance Hobhouse J held that for the shipowners' case to succeed they would have to show that there was some other expenditure which if incurred would have been allowable as general average expenditure under the YAR. The shipowners in order to rely on Rule X had to show that the repairs in dry dock in New York were necessary for the safe prosecution of the voyage. The court in dismissing the case held that the expenses that would have been incurred in carrying out permanent repairs at New York would not have been allowable in general average because all that was necessary in the circumstances for the safe prosecution of the voyage were the temporary repairs that were carried out at Jamestown. Thus there was no basis for the assumption proposed by the shipowners. This decision was upheld by the majority in the Appeal Court.[759]

Hoffman LJ in dissenting stated that in construing the second paragraph of Rule XIV to achieve business efficacy; it would have to be assumed that temporary repairs, not only were not, but could not have been carried out in Jamestown. In such a case the expenses incurred in carrying out permanent repairs at New York would be allowable in general average as necessary for the safe prosecution of the voyage. The shipowners' appeal was allowed by the House of Lords. Lord Berwick in giving the decision of the court stated that in giving effect to Rules X and XIV, it was not necessary to assume that the vessel could not have been repaired in Jamestown. It was necessary only to assume that she was not so repaired as Rule XIV requires. Thus the discharging, storing and reloading of cargo at Providence would have been carried out in New York instead of Jamestown and therefore recoverable in general average, since such repairs, would, on the assumption, have been necessary, within the meaning of Rule X(b) for the safe prosecution of the voyage.

The decision of the House of Lords took a purposive approach that was based on the need to give business efficacy to Rule XIV in ensuring that the cost of temporary repairs are recoverable in general average under the second paragraph of Rule XIV. However, with respect to the House of Lords, it is argued that there was no basis for applying such an assumption to Rule XIV of the YAR 1974. The provisions of the Rule should have been given its literal interpretation as the wording is unambiguous. The wording of the second paragraph of Rule XIV explicitly provides that such temporary repairs of accidental damage will be allowable in general average 'only up to the saving in expense that would have been

[759] Neil and Mann, LJJ.

incurred and allowed in general average if *such repairs had not been effected there'* (emphasis added).

Thus, for the expenses in carrying out permanent repairs at New York to have been allowable in general average in *the Bijela case,* there was a need for them to have been incurred because temporary repairs could not have been carried out at the port of refuge and permanent repairs at New York then became necessary for the safe prosecution of the voyage under Rule X(b). However, where temporary repairs of accidental damage are effected at a port of refuge and those repairs are what were necessary to prosecute the voyage, no basis exists to allow such expenses as substituted expenses under Rule F. It is respectfully argued that there was no need for assumptions by the House of Lords in construing the second paragraph of Rule XIV. Though the modern trend in the construction of commercial contracts is the application of the purposive approach,[760] the courts should not in the guise of giving business efficacy 'amend' any Rule of the YAR through assumptions, where the wording of a Rule is clear and unambiguous. It is argued that such business efficacy could have been best achieved through the amendment of Rule XIV by the maritime community at a CMI Conference.[761]

(b) Cardinal amendments introduced by YAR 1994

As a result of the developments in the maritime industry at the time and the proposals of the NMLAs, certain changes were introduced in the YAR 1994 that was adopted in the CMI Conference 1994 in Sydney in order to simplify and modernise the Rules. The paramount changes introduced in the Rules are analysed in what follows.

(i) Rule Paramount

This Rule was introduced by the YAR 1994 as a result of the decision in the English case of *The Alpha*.[762] The Rule ensures that for a sacrifice or expenditure to qualify as a general average act under any provision of the Rules, it must have been reasonably made or

[760] See *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd* [1997] 2 WLR 945 (HL); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL); *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 (CA).

[761] *The Bijela* [1992] 1 Lloyd's Rep 636 (QB) at 645, per Hobhouse J.

[762] [1991] 2 Lloyd's Rep 515 (QB).

incurred.[763] The Rule seeks to influence the ship's master to make reasonable sacrifices and incur reasonable expenses at ensuring the successful completion of the common maritime adventure. It is argued that the Rule will prevent allowances in certain cases where the working of the previous Rules may have allowed a more generous interpretation than was originally intended as illustrated in the *Alpha* case. However, the test should be what a reasonable master would do in the circumstances, the more immediate the peril at the time of the act, the greater latitude in judging after the event whether the master's act was reasonable.[764]

(ii) Rule E – Onus of proof

Rule E was first introduced in YAR 1924. The Rule was amended in the YAR 1994 to provide that the claimant in proof of its claim has 12 months from the date of the termination of the adventure to give notice to the average adjuster of the loss or damage in respect of which it claims contribution. Where it fails to give such notice and upon request by the average adjuster fails to proffer evidence in proof of its claim within 12 months of such a request by the average adjuster, the average adjuster is at liberty to estimate the extent of allowance or the contributory value on the basis of the available information to him/her. Such estimate can only be challenged for being manifestly incorrect.[765]

It is argued that such a challenge of the estimate being manifestly incorrect should be on the basis of the available information to the adjuster which he/she used in the adjustment and not based on information which was not made known to the adjuster and which would have made the adjuster arrive at a different estimate if it had been made available to him/her. The claimant has the onus to provide all the necessary information to enable the adjuster arrive at an equitable and manifestly correct estimate which would be acceptable to all parties to the maritime adventure or bear the consequence of its failure to do so.

This amendment is significant as it was an attempt to address one of the main criticisms of the general average system, which is that average adjustments take time.[766] The amendment curtails the length of time taken to produce general average adjustments caused

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[763] See chap 2 § IV*(g)* supra.

[764] *Corfu Navigation Co v Mobil Shipping Co Ltd* (*The* '*Alpha*') [1992] 2 Lloyd's Rep 515 (QB).

[765] Paragraphs 2 and 3 Rule E YAR 1994. The paragraphs were added in the YAR 1994 to speed up the adjustment process.

[766] See chap 7 § II*(b)* infra.

either by parties claiming in general average failing to give prompt notice of their intention to claim or having given prompt notice of their intention, failing to produce adequate evidence in support of their claim promptly despite being requested to do so by the adjuster. This provision reduces the task of average adjusters as it requires the claimant to produce documentary evidence of the matters relied upon to justify its claim, and it reduces the opportunities for argument when the evidence is insufficient to justify allowance in general average.[767]

(iii) Rule G – Valuation of Losses and Contributory Values, Non-Separation Agreement

Rule G was first introduced in the YAR 1920. The amendment of the Rule in 1994 was the addition of two new paragraphs, as a reaction to developments in the maritime community, which imported the NSA in the YAR 1994. This addition to Rule G in the YAR 1994 crystallised the practice of using standard Non-Separation forms in the market, thereby reducing paper work and avoiding the use of irregular wording.[768]

(iv) Rule XI(d)

This provision was introduced in the 1994 Rules to support the global efforts in preventing and minimising environmental pollution. This Rule was based on an understanding between marine property insurers and liability insurers at the CMI Sydney Conference referred to as the 'pollution compromise' which was to exclude from general average liabilities and clean-up costs in connection with pollution which had already occurred under Rule C YAR 1994, but to admit certain of the costs of avoidance measures under Rule XI(d) YAR 1994. This forms a limited exception to the principle expressed in the second paragraph of Rule C YAR 1994. It is submitted that the formulation of Rule XI(d) as part of the pollution compromise has the effect of providing a uniform framework for practice of many average adjusters.[769] This amendment in Rule XI(d) has the support of hull insurers and the International Group of

[767] G Hudson & M Harvey op cit note 299 at 56.

[768] Ibid at 82.

[769] J Cooke & R Cornah op cit note 28 at 397, G Hudson & M Harvey op cit note 299 at 163. Majority of the NMLAs in their replies to the CMI 1991 questionnaire on the possible revision of the YAR 1974 had requested for the allowance in general average of the cost of measures to protect the environment. See CMI Document Genav – 17 ter, 26-33.

P&I Clubs as the property and liability insurers respectively that were affected by the amendment.[770]

III CONCLUSION

The evolution of the YAR from 1860 to 1994 epitomises the collective efforts by the maritime community towards achieving uniformity in the principles and practice of general average, rectifying identified defects in the YAR, simplifying and updating the Rules. Allen aptly notes that the periodic amendments of the YAR were 'to keep pace with changes in shipping and to remedy deficiencies revealed by experience.'[771]

The periodic revisions of the Rules were dictated by a consensus amongst the majority of interested parties of the need to keep abreast of developments in international commerce and in the maritime industry. This consensus amongst the majority of interested parties on the need for amendments provided the platform for the proper involvement of the various interest groups in updating and simplifying the YAR. The revision of the Rules in 2004, as will be shown in the next chapter, was the first time the Rules were revised without a consensus amongst the majority of interested parties on the need for the amendment of the Rules.[772]

Significantly, before embarking on the amendment of any previous set of the YAR, sufficient time was allowed by the maritime community for the Rules to apply in the maritime industry for a proper assessment of the impact of the Rules before calls for revisions were made.[773] The Rules were never revised as a result of a lone crusade by any interest group or as a result of any one interest acquiring more relative power in determining the scope of the Rules. This consensus amongst the majority of interested parties on the need for the amendment of any set of Rules and the requisite amendments to be made ensured the widespread acceptance and use of the various sets of the YAR from 1887 to 1994 in the maritime industry.[774]

Regrettably, the outlined ingredients of the previous successful revision processes of the YAR were disregarded in the process that culminated in the approval of the YAR 2004,

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[770] G Hudson & M Harvey op cit note 299 at 166.

[771] J Allen 'Peril in the Fifth Circuit' (1975-1976) 7 *JMLC* 409 at 410.

[772] R Cornah op cit note 4 at 4.

[773] J Macdonald op cit note 78 at 5.

[774] R Cornah 'The Evolution of the York-Antwerp Rules – On hold till 2016', Gard News 209, February/April 2013.

as is shown in the next chapter, and it is argued that this contributed to the failure of the YAR 2004 to gain widespread acceptance and use in the maritime industry.

CHAPTER 7 THE DISREGARD OF THE INGREDIENTS OF PREVIOUS SUCCESSFUL REVISION PROCESSES IN THE REVISION OF THE YORK-ANTWERP RULES 1994

I INTRODUCTION

This chapter aims to show that the IUMI in its call for the revision of the YAR 1994 and the CMI in revising the YAR 1994 disregarded the earlier identified ingredients of the previous successful revision processes of the YAR and this contributed to the lack of widespread acceptance and use of the YAR 2004 in the maritime industry. Using the discussion in chapter six as a comparative base, this chapter examines the IUMI's proposals for the revision of the YAR 1994 and the entire process that culminated in the adoption of the YAR 2004 in order to identify the flaws in the proposals and in the process of revising the YAR 1994. An examination of IUMI's proposals is relevant as they relate to the content of the Rules which is inextricably linked with the revision process of the YAR 1994. This chapter informs the recommendations that will be made in this thesis with respect to the substantive revisions to the YAR and the process to be followed leading to consideration of any proposals to revise the YAR in 2016; with a view to avoiding the identified pitfalls in the revision of the YAR 1994.

II IUMI'S CALL FOR THE REVISION OF THE YAR 1994

(a) Timing

Very soon, a matter of months in fact, after the adoption of the YAR 1994 at the CMI's Sydney Conference, marine cargo insurers, led by the IUMI, initiated a call for revision of the YAR 1994.[775] This call for revision was made so soon after the adoption of the YAR 1994 because the IUMI was of the view that its position on the amendment of the YAR 1974 (as amended in 1990) had not been considered at the Sydney Conference.[776]

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[775] J Spencer op cit note 657 at 1. This was a departure by the IUMI from the evolutionary process that had previously been followed in revising previous sets of YAR. See chap 6 § II*(a)* supra.

[776] To the extent that this may have been so, it might be attributable, at least in part, to the fact that the IUMI had failed to make its 1994 report on proposals for the revision of the YAR 1974 (as amended in 1990) available for consideration by delegates at the Conference.

It is relevant to examine the basis for IUMI's call for the revision of the YAR 1994 so soon after the Sydney Conference and its proposals for revision, to determine if there was any significant development in the maritime industry at the time that necessitated its call for revision immediately after the adoption of the YAR 1994 and the flaws, if any, in its proposals for revision.

(b) The statistical basis for IUMI's call for revision – A holistic assessment of the state of the general average system at the time?

(i) Introduction

The statistical basis for IUMI's call for the revision of the YAR 1994 was the findings of Matthew Marshall contained in his paper[777] presented to IUMI in 1994 (the findings were updated in 1996 and 1999) in which he carried out research into about 1700 general average adjustments.

(ii) Identified flaws

Marshall's research principally showed that:

(i) General average is expensive.

The annual cost of general average claims to insurers at the time was about US$300 million. 10 per cent was made up of adjusters' fees and a further 10 per cent was interest and commission.

The statistics showed that salvage occupied the most significant part of claims in general average and represented over half of total claims in collision and grounding cases, while in fire losses it was relatively restricted.[778] This echoed the assertion by cargo insurers that general average claims were made up mostly of salvage claims and that they had seen claims made up of mostly salvage and little else.[779]

[777] M Marshall op cit note 415.

[778] Ibid at 9.

[779] See UNCTAD 'General Average and Its Impact on Marine Insurance Today', 33, UNCTAD document UNCTAD/SDD/LEG/1 (hereafter 'UNCTAD report').

(ii) General average takes too long.

The statistics showed that the adjustment of claims was a time consuming and lengthy process. In seven years only 95 per cent of adjustments could be expected to be completed. Two-thirds of the adjustments were produced in the first two years but unfortunately that accounted for only one-third of the money moved.

Many general average adjustments were produced in under a year (about 30 per cent) and about two-thirds were produced within two years of the date of the casualty. However, in terms of the values involved in those claims the production of adjustments was much slower – about 5 per cent in a year while it took four and half years for the two-thirds mark to be reached.[780] These statistics were similar to UNCTAD statistics (in its study of the general average system in 1993) which showed that 20 per cent of the adjustments sampled were completed within a year, 60 per cent in two years and 83 per cent in three years.[781] However, Marshall was of the view that one change to the YAR in 1994 might have a marginal effect – the introduction of a time limit for the production of documents in Rule E,[782] after which adjusters will be able to estimate the relevant values.

It is argued that Marshall's assertion on the likely effect of Rule E YAR 1994 should be regarded as a general assertion without evidentiary basis as his study failed to assess the impact of Rule E in the market with respect to the length of time it took to produce average adjustments; to ascertain whether Rule E would have a 'marginal effect' or a 'significant effect' on general average adjustments. Marshall's statistics also showed a different position from the assertion of IUMI members who had stated that adjustments were being produced in their local markets more speedily in recent years.[783]

(iii) General average is inequitable.

The statistics showed that 80 per cent of cases were acknowledged as being caused or likely to have been caused by the shipowner's fault. Nevertheless, 60 to 65 per cent of the total cost of general average claims was borne by cargo interests. Engine failures[784]

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[780] M Marshall op cit note 415 at 7.

[781] See UNCTAD report op cit note 779 at 33.

[782] *Cf* chap 6 § II*(c)(vi)*(b)(ii) supra.

[783] See chap 7 § II*(c)* infra.

[784] Includes any problems with the ship's machinery, generators or electrical equipment.

accounted for 30 per cent of the number of general averages and 8 per cent of claims value.[785] Thus, engine failures accounted for the single largest source of general average though shipowners' share of the total claims in monetary terms was much lower. About a third of engine failure losses seemed to be as a result of the unseaworthiness of the vessels.

These findings were also similar to UNCTAD's findings.[786] UNCTAD statistics, it could be argued, gave credence to the findings of Marshall on the causes of general average incidents and their percentages in terms of number and claims value.

Marshall's findings also showed that the age of ships also had an impact on the general average system. The older the ship the more likely it was to be involved in a general average. There was a very sharp increase in the number of general averages occurring to ships at around the age of six years, especially involving container and general cargo ships.[787] This finding was also analogous to findings in the UNCTAD study.[788]

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[785] Groundings (refers (as in all categories) to loss caused by a peril and not to grounding which follows engine failure or deliberate beaching to save the ship from sinking) accounted for 24 per cent of the number of general averages and 29 per cent of claims value. Fires (in the statistics engine fire was amalgamated with fire in the hold or cargo spaces) accounted for 13 per cent of the number of general averages and 25 per cent of claims value. Weather (includes a wide range of loss which includes losses from listing or cargo shifting, some of which may have occurred in a relatively calm weather and losses from structural failure which seemed more related to the condition of the ship than the agitation of the sea) accounted for 12 per cent of the number of general averages and 8 per cent of claims value. Collision (refers to collision with other vessels) accounted for 8 per cent of the number of general averages and 22 per cent of claims value. Contact (refers to vessel contact with other vessels) accounted for 3 per cent of the number of general averages and 2 per cent of claims value and other hazards (refers to fouling by nets, wires or ropes and contact with unidentified objects such as wrecks or debris - cases where the condition of the ship or the standard of navigation has little or no bearing on the accident) accounted for 3 per cent of the number of general averages and 2 per cent of claims value.

[786] Of the 440 cases in UNCTAD's study, 37 per cent of general average cases was caused by break down or damage of the ship's machinery. In addition, engine fire accounted for 4 per cent of the causes of general average. In total, 41 per cent of the cause of general average related to the ship's machinery. This should be compared to incidents of navigation and grounding which represented a quarter of the total (24 per cent) and cases of collision and contact which accounted for 8 per cent and 3 per cent respectively. See UNCTAD report op cit note 779 at 19.

[787] M Marshall op cit note 415 at 5.

[788] The UNCTAD study also showed that the average age of ships involved in general average was 13.7 and it was rare for a vessel under the age of four to be involved in general average. General average incidence then increased more rapidly at a fairly consistent rate between the age of four and 18 for vessels. See UNCTAD report op cit note 779 at 17.

This surely has an effect on the way general average loss is distributed. Different trades are affected by ageing tonnage with declining values as the ship grows older leading to ever higher shares borne by cargo. It becomes more attractive for a shipowner of an ageing ship to declare general average since the ship's value will represent a lower proportion of the total contributory values. Cargo owners therefore pay significantly higher contributions as the ship gets older, especially in relation to container vessels where there might be several cargo interests. This leads to heavier financial burden on cargo in the general average system.

The statistics also showed that the size of the general average loss influenced the distribution of losses between cargo and hull. Proportions due from both interests were reasonably similar in the smaller claims, but much higher for cargo in large claims.[789]

Marshall's statistics showed that most general average incidents were as a result of negligence in the maintenance, operation and navigation of vessels. Despite this fact, cargo owners and ultimately their insurers continued to bear the bulk of general average contributions especially with respect to container vessels. General average incidents were more prevalent in older vessels that were poorly maintained and owners of such vessels would be more inclined to declare general average as their proportion of the general average contribution would be less than that of cargo. The statistics showed that a very low percentage of all costs involved sacrifice or expense to cargo and very few incidents involved partial or total loss to cargo. Thus, there was a measure of transference of burden of losses and general average expenditure (and ultimately general average contribution) from hull to cargo.

However, it is argued that the statistics cannot be regarded as a complete reflection of the state of the general average system at the time as it failed to consider the effects of the International Safety and Management (ISM) Code[790] and Port State Control on the general

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[789] Overall, cargo bore almost two-thirds (64.4 per cent) of total general average payments though its share of contributory values was 60 per cent. The ship bore 35.3 per cent of general average payments while its contributory value was 39.4 per cent. Bunkers bore 0.1 per cent of general average payments while its contributory value was 0.2 per cent and freight bore 0.2 per cent of general average payment which was the same as its contributory value.[789] See M Marshall op cit note 415 at 5.

[790] The ISM Code provides an international standard for the safe management and operation of ships and for pollution prevention. The Preamble to the Code provides that the purpose of the Code is to ensure safety at sea, prevention of human injury or loss of life and the avoidance of damage to the environment and to the ship. The Code was adopted in 1994 and incorporated into chapter IX of the International Convention on the Safety of Life at Sea (SOLAS) 1974. A recent study has shown that where the ISM Code is fully implemented, there has

average system.[791] Furthermore, Rule D YAR 1994 ensures that were the general average act was necessitated by the carrier's fault in providing an unseaworthy vessel, cargo owners will not contribute to make good the carrier's personal loss. To further address any inequities that may arise and the issue of the cost of general average, the Rule Paramount was introduced in YAR 1994 to ensure that only sacrifices and expenses that were reasonably made and incurred would be reapportioned in general average.[792] The statistics also failed to examine the impact of modern technology and the change introduced in Rule E YAR 1994 in hastening the adjustment of claims and cutting down the cost of adjusters fees.[793] Thus, the statistics were not a holistic finding of the state of the general average system at the time and it is argued that the statistics cannot be regarded as sufficient basis for IUMI's call for revision immediately after the Sydney Conference. Furthermore, the statistics did not show any new significant development in the maritime industry so soon after the adoption of the YAR 1994. It could be argued that Marshall's study did not raise any new issue that the maritime community was not aware of at the time of adopting the YAR 1994. This is because the findings in Marshall's statistics were similar to the UNCTAD findings about the general average system which the maritime community had studied in 1993 prior to adopting the YAR 1994.

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been a decline in the number of vessels detained by maritime authorities for being unseaworthy and also there has been a decline in casualties at sea. See 'Role of the Human Element: Assessment of the Impact and Effectiveness of the ISM Code', 4, IMO Document MSC 81/17/1, available at www.imo.org/OurWork/HumanElement/SafetyManagement/Documents/17-1.pdf, accessed 8 March 2013.

[791] Port State Control is the inspection of foreign ships in national ports to verify that the condition of the ship and its equipment comply with requirements of international regulations and that the vessel is manned and operated in compliance with these regulations. This measure is aimed at eradicating unseaworthy vessels from international trade and has proven to be a reasonably effective measure. Inspections carried out in recent years have shown a steady decline in the number of deficiencies identified in inspected vessels. See the Paris Memorandum of Understanding Annual Report 2011, 18.

[792] It should be noted that UNCTAD's study was carried out before the adoption of the YAR 1994 at the Sydney Conference. It is argued that the study cannot rightly be relied upon as a basis for the call for the revision of the YAR 1994 with regard to any defects in the Rules. Rather it could be argued that the study, contributed, at least in part, to the amendments that were introduced by the YAR 1994.

[793] It is argued that Marshall's failure to allow the YAR 1994 to have an impact in the market before carrying out his research was the bane of his study as it failed to reflect any defect in the YAR 1994.

(c) IUMI 1996 questionnaire on general average

(i) Introduction

Based on the above non-holistic statistics, IUMI, prior to its Oslo Conference in 1996, sent out questionnaires to its members and it received a good response from member associations from all over the world, with 33 replies[794] received as at the date of the Conference. The questionnaire was divided into two parts: Part A contained general questions on the YAR 1994 and Part B were questions on market attitudes to the general average system. It is relevant to examine the replies to determine if they showed any defects in the YAR 1994 or any significant development in the industry after the adoption of the YAR 1994 to justify IUMI's call for revision.

(ii) The replies

The replies[795] to the questionnaire gave a useful insight into the general average system and the activities of marine insurers with regard to general average at the time. The replies showed that IUMI member associations after the CMI Sydney Conference had not undertaken any study on the YAR 1994 to determine their effect on the general average system and on insurers;[796] signifying that marine insurers were not proactive enough in their local markets on issues relating to general average.

With respect to the YAR 1994, the replies clearly showed that the Rules had not attracted significant criticisms in most local markets. The Rules had been accepted in most markets and more markets were in the process of accepting and using the Rules.[797]

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[794] G Brunn & M Marshall 'General Average – The 1996 IUMI Questionnaire', paper presented at IUMI Oslo Conference, 1996, available at www.jssusa.com/assets/Uploads/Ga-papers/IUMIstats.pdf, accessed 20 November 2011. Copies of the said replies are unpublished and the author was informed by IUMI's Secretariat that the replies are not in IUMI's archives. These copies would have given an insight into the arguments/reasons and statistics proffered by the different Associations for their answers to the questionnaire.

[795] The replies were sent by members from the following countries: Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Finland, France, Germany, India, Ireland, Israel, Italy, Japan, Hong Kong, Netherlands, New Zealand, Pakistan, Poland, Portugal, Romania, Spain, Switzerland, Taiwan, United Arab Emirates, United Kingdom and United States.

[796] G Brunn & M Marshall op cit note 794 at 1.

[797] 20 members in their replies stated that some shipowners had already inserted a reference to the YAR 1994 in their own documentation.

Furthermore, the changes introduced in the YAR 1994 had not caused great concern to hull and cargo insurers in most local markets.[798] This clearly showed widespread acceptance of the Rules globally and that no defect in the Rules had yet been identified.

The replies showed that General Average Absorption Clauses were being used in most jurisdictions and had reduced the number of general average claims; though some cargo insurers claimed they were still seeing uneconomic claims in general average.[799] Significantly, the better known and quality shipowners, mostly in the container trade, made it a rule not to declare general average even to the extent of meeting cargo's proportion of general average contribution;[800] clearly showing that the quality shipowners did not consider general average as a vessel maintenance system. These developments had the effect of reducing the cost of general average to marine insurers; particularly cargo insurers. Most importantly, two-third of IUMI member associations stated there was a tendency for adjustments to be prepared more quickly in recent years.[801] It is argued that this assertion contradicted Marshall's finding that general average adjustments were taking too long to be completed.[802]

Thus, the replies showed that there had not been any major criticisms of the YAR 1994 and no developments at the time showed any defects in the Rules that necessitated a revision of the YAR 1994.[803] Noteworthy is the fact that IUMI's questionnaire was sent out two years after the Sydney Conference when the YAR 1994 were still in their infancy in the market (but gaining much acceptance) and also when the impact of the changes introduced by the YAR 1994 had not been felt in the general average system. It was evidently still premature to assess the full impact of the changes introduced by the 1994 Rules,[804] let alone to advocate for the revision of the Rules.

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[798] G Brunn & M Marshall op cit note 794 at 4.

[799] 17 of the members indicated that General Average Absorption Clauses appeared to have had a practical effect in eliminating small general average claims within their markets.

[800] G Brunn & M Marshall op cit note 794 at 6.

[801] Ibid.

[802] See chap 7 § II*(b)* supra.

[803] *Cf* chap 6 § II*(c)* supra.

[804] *Cf* chap 6 § II*(a)(ii)* supra.

(d) IUMI's disregard for the ingredients of previous successful revisions

(i) IUMI Oslo Conference 1996

Despite the replies to IUMI's questionnaire showing that there was no significant development necessitating the revision of the YAR 1994 and the evident lack of support for revision at the time, IUMI remained undaunted in its call for revision. Its call for the revision of the YAR 1994 was then discussed at its Oslo Conference in 1996. The Conference considered papers presented to it on the subject. Gooding (one of the IUMI's members that formulated its proposals for revision) in his paper stated that the YAR 1994 should be amended to 'do away with safe prosecution of the voyage and all the layers of extraneous expense that go with it.'[805]

Thus, Gooding was advocating for the restriction of general average to the common safety principle by the abolition of the common benefit principle.

Alluding to the wrong timing of IUMI's call for revision, Taylor (then chairman of the CMI ISC on the revision of the YAR 1974) in his remarks at the Conference stressed the fact that the Sydney Conference was not yet two years old when IUMI's proposals for change were put forward.[806]

On IMUI's complaints about the general average system as reflected in Marshall's study, Taylor was of the view that 'the complaint that the shipowner, who operates badly maintained and incompetently crewed vessels can benefit under general average and the YAR is, to my mind, not a criticism of the general average system, but a criticism of the fact that such shipowners are tolerated and even insured.'[807]

The point made by Taylor is very pertinent. Most standard hull policies impose a duty on the assured to ensure at the inception and throughout the duration of the insurance that the

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[805] N Gooding 'General Average - Time for a Change', 1, paper presented at IUMI Oslo Conference, I996, available at www.jssusa.com/assets/Uploads/GA-paper/NGOslo96.pdf, accessed 7 November 2011.

[806] Remarks of David Taylor on the General Average Session, 6, IUMI Oslo Conference, 1996, available at www.jssusa.com/assets/Uploads/Ga-papers/IUMITaylor.pdf, accessed 21 November 2011. It is argued that Taylor's view on the timing of IUMI's proposal was correct as it underscored the fact that previous Rules had been given sufficient time to operate in the market before calls for changes were made, while IUMI's call for revision started almost immediately after the Sydney Conference. *Cf* chap 6 § II*(a)(ii)* supra.

[807] Remarks of David Taylor op cit note 806 at 6.

vessel is classed with a Classification Society[808] agreed by the hull insurer and that the vessel's class within the Society is maintained.[809] The shipowner also has a further duty of ensuring that any requirements made by the Classification Society in relation to the seaworthiness of the vessel or to her maintenance are complied with by the dates required by that Society.[810] Where the shipowner fails to comply with the above requirements the insurer will be discharged from any liability arising from the policy.[811] In practice, most insurers take this duty imposed on shipowners seriously and only accept class certificates from a Classification Society that is a member of the International Association of Classification Societies (IACS).[812]

However, the depressed insurance market of the recent past made the insurance market less selective and cover was made available to owners of manifestly sub-standard vessels without making relevant enquiries.[813] Insurers by this act were contributing to the problem in the general average system as sub-standard vessels are more prone to be involved in general average situations. Without insurance cover for such sub-standard vessels, the owners would be compelled to carry out the necessary repairs in order to obtain insurance cover.

Furthermore, IUMI's concern about the activities of unscrupulous shipowners at a port of refuge had been addressed by the maritime community through the introduction of the Rule Paramount in the YAR 1994.[814]

However, in disregard of Taylor's caution against a premature call for the revision of the YAR 1994, IUMI's Executive Committee at the end of the Oslo Conference set up a Working Group to discuss the whole system of general average, the benefits and

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[808] A Classification Society sets standards for the quality and integrity of vessels and performs surveys to determine whether vessels are in compliance with the Classification Society's rules and regulations, national laws and international conventions. See *Carbotrade SPA v Bureau Veritas* 99 F 3d 86 at 88, 1997 AMC 98 (2nd Cir 1996) per Walker J.

[809] Clause 4 ITCH.

[810] Ibid

[811] Ibid.

[812] J Dunt op cit note 304 at 167.

[813] See the Report 'The Cost to Users of Substandard Shipping', prepared for the Organisation for Economic Co-operation and Development (OECD) Maritime Transport Committee by SSY Consultancy Research Ltd, January 2001, available at www.oecd.org/sti/transport/maritimetransport/1827388.pdf, accessed 4 February 2013. See also E Gold 'Criminal Action, Professional Duty and Corporate Responsibility in the Maritime Menagerie' (2005) 24 *University of Queensland Law Journal* 251 at 257.

[814] *Cf* chap 6 § II*(c)(vi)*(b)(i) supra.

shortcomings of the YAR (specifically the 1994 Rules).[815] After the deliberations of the delegates at the meetings of the Working Group, the Working Group produced a report titled 'General Average - How should it be changed?' the articulated purpose of which was to restrict general average to the common safety principle by disallowing in general average expenses incurred for the safe prosecution of a voyage from a port of refuge.[816] This report was presented at the Open Council Meeting of IUMI in Lisbon, in September 1998[817] and at the IUMI Conference in Berlin in 1999.[818] This resulted in a formal request by IUMI to the CMI the following year for further reform of the YAR to be given urgent consideration.

(ii) IUMI Open Council Meeting, Lisbon, 1998

In furtherance of IUMI's disregard of the premature timing of its call for revision, the report of its Working Group on the proposed changes to the YAR 1994 was presented at its Open Council Meeting in Lisbon in September 1998. The proposed changes in the report were to restrict the concept of general average in the YAR to the common safety principle.[819] The report was of the view that the restriction of general average to the common safety principle would take out a very substantial number of the flaws of the general average system.[820] IUMI noted that the changes would be at the expense of the shipowner, but the better quality, the less impact.[821] It however, conceded that the proposed changes would present

> 'some problems to the cargo owner with respect to forwarding cargo to destination in case the shipowner abandons the voyage, but again, the better the quality he buys the less impact.'[822]

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[815] Report of IUMI General Average Working Group, 2, IUMI Open Council Meeting, Lisbon, 1998, available at www.jssusa.com/assets/Uploads/Ga-paper/WGLisbon98.pdf, accessed 21 November 2011.

[816] *Cf* chap 2 § II*(a)* supra.

[817] The full Report is available at www.jssusa.com/assets/Uploads/Ga-papers/WGLisbon98.pdf, accessed 21 November 2011.

[818] J McCormack 'The Impetus for Change in the 1994 York-Antwerp Rules – Real or Fanciful', 16, available at www.jssusa.com/assets/Uploads/GA-papers/HMMAAA.pdf, accessed 20 November 2011.

[819] Report of IUMI General Average Working Group, 5, IUMI Open Council Meeting, Lisbon, 1998, available at www.jssusa.com/assets/Uploads/Ga-papers/WGLisbon98.pdf, accessed 21 November 2011.

[820] Ibid at 6.

[821] Ibid at 7.

[822] Ibid.

The above concession by IUMI correctly stated what would have been the effect of its proposals. Where there is a restriction of general average to the common safety principle, the effect will be that acts done for the common benefit of the parties to the adventure will not be allowed in general average and this will have adverse effects on shipowners as such acts are usually done at a port of refuge and in most cases the shipowner makes the disbursements for such port of refuge expenses with a view that such costs will be re-apportioned in general average.[823] However, cargo owners will also be affected. Under Rule G YAR 1994, the shipowner where he terminates a voyage at a port of refuge can forward cargo in another vessel to the port of destination by availing himself of the NSA principle in Rule G; thereby avoiding unnecessary delays[824] and such transhipment cost is allowed in general average. The abolition of the common benefit principle will lead to the abolition of the NSA principle in Rule G and this will result in cargo owners bearing the cost of forwarding cargo to the port of destination. Such cost will be more than the cost cargo interests and ultimately their insurers would have incurred under Rule G because cargo owners will bear the cost alone.

Economically, cargo insurers will incur less cost under a general average system that is confined to the common safety principle as most port of refuge expenses are incurred by shipowners.

It is argued that having been cautioned in Oslo of the wrong timing of its call for revision and by its concession in Lisbon of the likely negative impact of its proposal, especially on cargo, IUMI should have been discouraged at this stage from persisting with its call for revision.

III IUMI'S PROPOSALS TO THE CMI FOR THE REVISION OF THE YAR 1994

(a) Introduction

After its Oslo and Lisbon meetings, IUMI made several proposals for the revision of the YAR 1994 with the aim of restricting general average to the common safety principle. The proposals are analysed to determine if they were justified. This thesis will restrict its analysis to the proposals that resulted in the changes introduced by the YAR 2004 because the proposals made by IUMI were numerous.[825] An examination of the proposals is what follows.

[823] L Buglass op cit note 27 at 278.

[824] H Myerson op cit note 466 at 470.

[825] The full text of the IUMI's proposal is available in the *CMI Yearbook 2000 (Singapore I)* 298-313.

(b) Redefinition of general average

IUMI proposed that a definition of general average be drawn from a slightly amended section 66 MIA 1906 which would then read:[826]

> '(1) A general average loss is a loss reasonably, proximately and directly caused by or consequential on a general average act. It includes general average expenditure as well as general average sacrifice.
> (2) 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 in time of peril for the purpose of preserving from peril the property.'[827]

The most significant change would be the deletion of the words 'imperilled in the common adventure', coupled with the insertion of 'for the common safety' in paragraph two. The effect of this would be to restrict allowances in general average to the common safety principle. Thus, all allowances in general average under the common benefit principle would be excluded in general average.

The proponents for retaining the common benefit principle opposed this proposal and argued that the general philosophy of co-operation which underlies general average encourages the parties to incur the expenditure necessary to ensure that the ship and cargo reach their ultimate destination.[828]

It is argued that this proposal was flawed. Although the MIA 1906 in its definition of general average in section 66(2) limited it to the common safety principle, English courts had recognised the common benefit principle shortly after the commencement of efforts in 1860 to achieve uniformity in the principles and practice of general average.

In *Attwood v Sellar*,[829] the Court of Appeal in recognising the common benefit principle for the first time in English law held that the costs of port entry, discharging, warehousing cargo, reloading it and leaving the port were to be allowed in general average. Thesiger LJ posited that those expenses 'are all events part of one act or operation contemplated, resolved

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[826] IUMI 'General Average – How should it be changed?' Report of IUMI General Average Drafting Working Group in *CMI Yearbook 2000* (*Singapore I*) 298.

[827] *Cf* chap 2 § II*(b)* supra.

[828] *CMI Yearbook 2000 (Singapore I*) 284.

[829] (1880) 5 QBD 286 (CA).

upon and carried through for the common safety and benefit and properly to be regarded as continuous.'[830]

Subsequently in *Svendsen v Wallace*,[831] the House of Lords confirmed the common benefit principle in English law by deciding that the costs of port entry and discharge of cargo were general average.

These decisions of the English courts took cognisance of the provisions of Resolutions 6 and 8 of the Glasgow Resolutions 1860 and Rules VII and VIII YAR 1864 which allowed in general average expenses in discharging and warehousing cargo at a port of refuge and crew wages and maintenance at a port of refuge respectively.[832] The above cases show that English law on general average codified in the MIA 1906, which IUMI's proposal referred to, had embraced the common benefit principle some years after the uniformity process began in 1860. Thus, IUMI's argument that its proposed redefinition of general average in Rule A would bring it into line with the concept of general average in English law as reflected in the MIA 1906 is without foundation in reality.

Of note is that after the English courts' decisions mentioned above, neither insurers nor shipowners sent any more test cases on the subject of common benefit to trial. Also the AAA extracted some of the principles stated in their Rules of Practice from these judgments.[833] Thus, IUMI's proposal for a restriction of general average to the common safety principle codified in s 66 MIA 1906 involved a 'jettisoned' English law of general average.

The common benefit principle ensures that the adventure is completed, which is the essence of a sea adventure, by providing allowances for general average expenses incurred for the safe prosecution of the voyage from a port of refuge. This importance of the common benefit principle was recognised at the inception of the efforts to achieve uniformity in the law of general average.[834] The safety of the vessel without a successful completion of the venture does not aid international trade and the economic growth of states.

Alluding to the practical importance of the common benefit principle in a maritime adventure, Wilmer J notes that '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 as well be at

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[830] *CMI Yearbook 2000 (Singapore I)* 289.

[831] [1885] 10 AC 404 (HL).

[832] *Cf* chap 6 § II*(a)(i)* supra.

[833] Rules of Practice F8 to F13 inclusive (previously 17 to 21).

[834] See chap 6 § II*(a)(i)* supra.

the bottom of the sea.'[835] Selmer, the most renowned abolitionist of general average, concludes that;

> '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 … 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.'[836]

By stating the positive effect of the common benefit principle above, the practical benefit of the principle is even apparent to those who have had strong criticisms of the concept of general average.

(c) In time of peril

IUMI proposed that a peril should only continue until ship and cargo are in a condition of reasonable safety. It should not, therefore, continue after the arrival of the vessel at a port of refuge.[837]

This proposal was a continuation of the proposal to restrict general average to the common safety principle. However, as stated earlier, it had long been established in English law that a vessel need not be in the grip of peril in order to justify a general average act.[838] In *Vlassopoulos v British & Foreign Marine Insurance Co* (*The* '*Makis*'),[839] the court held that 'it is not necessary that the ship should be actually in the grip, or even nearly in the grip, of the disaster that may arise from a danger. It would be a very bad thing if shipmasters had to wait until that state of things arose in order to justify them doing an act which would be a general average act.'[840]

Furthermore, the IUMI did not state what it meant by the vessel and cargo being in a 'condition of reasonable safety.' Is such 'condition of reasonable safety' attained upon the arrival of a vessel at a port of refuge? It should be borne in mind that in some cases the arrival

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[835] *The Glaucus* (1948) 82 Ll L Rep 263 (Admlty) at 267.

[836] K Selmer op cit note 16 at 291.

[837] *CMI Yearbook 2000 (Singapore I)* 299.

[838] *Cf* chap 2 § IV*(b)* supra.

[839] [1929] 1 KB 187 (KB). *Cf* chap 2 § IV*(b)* supra.

[840] Ibid at 191.

of a vessel at a port of refuge does not put it in a condition of safety. Where a ship arrives at a port of refuge and is on fire or leaking, the danger is as much present as it was when the vessel was in danger at sea, until the fire is put out or the leakage staunched. In certain circumstances expenses have to be incurred at a port of refuge to enable a vessel attain a condition of safety at a port of refuge.[841] If this proposal is followed, then once a vessel arrives at a port of refuge, allowances in general average will cease. Whatever expenditure is incurred after the vessel has arrived at a port of refuge (even if done for the safety of the vessel at the port of refuge) will be excluded in general average. It is argued that this proposal was even contrary to the common safety principle which IUMI wanted to govern the general average system, as safety in some cases will not be attained immediately a vessel arrives at a port of refuge.

(d) Rule F - Substituted expenses

IUMI proposed that the allowance of substituted expenses in Rule F should be abandoned. Rule F YAR 1994 states:

> 'Any extra expense incurred in place of another expense which would have been allowed 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.'[842]

IUMI noted that the most usual substituted expenses scenario occurs when a vessel has suffered damage and put into a port of refuge where it will be necessary to carry out repairs before the voyage can be completed.

In support of this proposal IUMI relied on essentially two arguments. First, IUMI argued that if it is intended to substantially amend the YAR to remove general average expenses and sacrifices incurred or made once ship and cargo are no longer in the grip of a peril, then it would follow that this usual scenario could not arise because the cost of discharging, storing and reloading would not in any event be recoverable in general

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[841] For eg, the expenses incurred in discharging and storing cargo from a leaking vessel at a port of refuge or of carrying out temporary repairs to make the vessel watertight.

[842] *CMI Yearbook 2000 (Singapore I)* 299.

average.[843] This rightly would have been the effect of the restriction of general average to the common safety principle.

Secondly, it argued that to abandon substituted expenses would merely be to restore the English common law position.[844]

Substituted expenses are expenses incurred in respect of a course of action undertaken as an alternative to, or in substitution for the expense of an action that would be allowable in general average.[845] These include forwarding of cargo to destination by other vessels from the port of refuge and towing the vessel to destination with the cargo on board after only minimal repairs.[846]

Contrary to IUMI's assertion, there was uncertainty in English law with respect to substituted expenses. This uncertainty is evident in the decisions of English courts on substituted expenses. In *Wilson v Bank of Victoria*,[847] the court held that the purchase of coals to work the auxiliary engine of a sailing ship, incurred in place of the greater expense of repairing masts and spars damaged in a storm, should not be made the subject of general average contribution since it was the shipowner's duty under the contract of carriage to adopt the most economic course available to him. However, in *Lee v Southern Insurance*,[848] the principle of substituted expenses was applied to a claim under a policy of insurance on freight for the cost of forwarding cargo to destination by rail from a port where the voyage had been abandoned. This uncertainty in English law led the AAA to adopt two Rules of Practice in 1876 on substituted expenses – Rule F14 (previously B16) and Rule F15 (previously B17) – relating to towage of a vessel from a port of refuge and forwarding of cargo from a port of refuge respectively. Thus, English practice recognised the importance of substituted expenses. Of importance is that these Rules of Practice formed the basis of the Rule on substituted expenses in the YAR introduced for the first time in Rule X(d) YAR 1890 and presently Rule F YAR 2004. Thus, the adoption of IUMI's proposal would have been a radical departure from the original Rules.

A further consideration to be weighed in this regard is that by introducing a Rule on substituted expenses in 1890 the maritime community recognised the importance of

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[843] Ibid at 304.

[844] Ibid.

[845] J Cooke & R Cornah op cit note 28 at 185.

[846] Ibid.

[847] (1867) LR 2 QB 203 (QB).

[848] (1870) LR 5 CP 397 (CCP).

substituted expenses in the commercial community. Allowing substituted expenses as provided in Rules F, G and XI helps avoid costly repairs at a port of refuge to the benefit of all. It also reduces delay in the delivery of cargo by ensuring that the cargo is forwarded promptly to destination by transhipment under Rule G and also helps in making the ship more readily available for repairs. In general, substituted expenses help minimise the quantum of general average expenses at a port of refuge. The advantages to both shipowner and cargo of substituted expense of forwarding cargo to destination under Rule G YAR 1994 was affirmed by Steel J in the recent case of *The ABT Rasha*: [849]

> 'Cargo owners can promptly recover their cargo in circumstances where substantial delay might otherwise ensue while the shipowners, anxious to earn their freight, store the cargo, carry out repairs and then resume the voyage. From the shipowners' point of view, they are able to treat the general average situation as continuing when otherwise it would terminate and recover contribution pro rata for value for post-separation expenses which would otherwise fall entirely on them.'[850]

Thus, IUMI's proposal was not based on current English law on substituted expenses and the abolition of substituted expenses in the Rules will eliminate the advantages to both the shipowner and cargo owner alluded to by Steel J.

(e) Rule VI – Salvage remuneration

IUMI proposed the amendment of the wording of Rule VI YAR 1994 as follows:

> '(a) salvage payments (including legal fees associated with such payments) shall lie where they fall and not be brought into general average save only that any amounts paid by one party to the general average in respect of the proportion (calculated on salved values and not general average contributory values) of another party or parties shall be apportioned between the parties to the general average in accordance with these Rules.
> (b) In paragraph (a) of this section references to salvage payments and the like expressions shall be construed as excluding payments under article 14 of the Salvage Convention and similar provisions (including SCOPIC).'[851]

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[849] [2000] CLC 354 (QB).

[850] Ibid at 356.

[851] *CMI Yearbook 2000 (Singapore I)* 305.

IUMI stated that Rule VI was only introduced in the YAR 1974 and has been accused of creating more work for general average adjusters and more expenses for marine property insurers than almost any other single change to the YAR in the last 50 years.[852]

This assertion is correct because adjusters, among other things, would have to collect two sets of securities for salvage remuneration and general average and would have to ascertain the contributory values of the salved interests in order to ascertain the contributions to be made by each interest in general average. This can be a herculean task with respect to a container vessel involving thousands of cargo interests.[853] Marine insurers incur more costs in covering their assured's contribution both for the salvage remuneration and the re-apportionment of the salvage remuneration in general average.[854]

IUMI's arguments for the exclusion of salvage expenses from general average were, among other things, that the inclusion of salvage expenses involves unnecessary duplication of the apportionment of the salvage remuneration between contributing interests, and in most cases the proportions are not changed significantly but the cost of readjustment may be relatively high. It requires collection of two sets of security to cover basically the same moneys, it prolongs the whole operation, sometimes for years; and it involves additional work for cargo insurers.[855]

With respect to IUMI's argument that including salvage expenses in general average prolongs the adjustment process, it should be noted that in practice, the exclusion of salvage expenses will not necessarily hasten the adjustment process. By Rule XVII YAR 1994 general average is adjusted based on the value of the property at the termination of the adventure and the value can only be quantified when charges, other than general average charges, that are incurred in respect of that property subsequent to the general average is ascertained. In other words, the salvage has to be settled before the average adjuster can be able to calculate the contributory value of the property. Thus, average adjusters will continue to collect two sets of security even if salvage is not re-apportioned in general average.

[852] Ibid.

[853] M Haines op cit note 370 at 11.

[854] E Magee op cit note 19 at 7.

[855] *CMI Yearbook 2003 (Vancouver I)* 291.

On the argument that the cost of readjustment may be relatively high, it is submitted that most reputable adjusters calculate their fees on a time basis.[856] Thus, a contributing party can rightly decline to pay adjusting fees which an adjuster cannot adequately demonstrate to be justified by the work involved.[857]

Also the equitable distribution of the overall expenditure could be distorted where a party pays a lower percentage of salvage than another, because to arrive at its contributory value a smaller deduction from sound value would have to be made. Where the general average is bigger in monetary terms than the salvage, a party that reaches a more favourable salvage settlement with the salvor than other parties to the adventure could pay more in the aggregate than it would have done had the salvage settlement been re-apportioned in general average.[858]

It could be argued that the removal of salvage expenses from general average could give rise to inequities, particularly where there is differential settlement of salvage as one commercial interest can strike a bargain with salvors at the expense of other commercial interests. However, it is argued that the shipowner is likely to be in a stronger position to make an advantageous settlement with the salvor (with whom he may have had dealings with in the past) leaving the salvor to recover the bulk of his remuneration from cargo.[859]

Thus, the arguments for and against the inclusion of salvage expenses in general average certainly had their merits and as such there was a need for a compromise in relation to the reapportionment of salvage expenditure in general average under the YAR.

(f) Rule XX - Commission

IUMI proposed that all general average commission should be abolished.[860] It also proposed that administrative costs such as telephones, telexes and other communication charges should be excluded from general average completely. In support of this proposal, it argued that originally commission served as a useful incentive to parties to fund general average disbursements, but the introduction of interest by the YAR 1924 had created unwarranted

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[856] J Macdonald op cit note 78 at 446.

[857] J Spencer op cit note 657 at 5.

[858] Ibid.

[859] J Macdonald op cit note 78 at 446.

[860] CMI *Yearbook 2000 (Singapore I)* 309.

duplication, and that shipowners' communication, banking and office expenses are now allowed separately which equally has created unwarranted duplication.[861]

IUMI was right in making this proposal. Commission was introduced in Rule XXI of the YAR 1924 as an incentive to parties to fund general average disbursements. This was in recognition of the practice in most European States and in the United States.[862] English law, as confirmed in *Schuster v Fletcher*,[863] did not allow commission for general average disbursements. Rule XXI YAR 1924, therefore, brought uniformity on the issue. However, Rule XXII was also introduced in the YAR 1924 allowing interest payable on accounts expended which was also to serve as an incentive to parties to fund general average disbursements.[864] Thus, Rules XXI and XXII both aimed at encouraging parties to fund general average disbursements.

It is argued that the allowance of interest is sufficient incentive for parties to fund general average disbursements as it provides them with adequate recompense for advancing funds for general average disbursements. Commission could, therefore, be abolished without any adverse effect on the parties as it was a duplication of the purpose served by the allowance of interest in general average.

(g) Time bar

In order to speed up the general average process, IUMI proposed a general contractual time limit for general average claims. It proposed a clause that might read:

> 'All parties to the general average and their guarantors (if any) shall in any event be discharged from all liability whatsoever in respect of claims for general average contributions unless judicial or arbitral proceedings have been instituted within a period of one year after the date upon which the general average adjustment has been published or six years after the general average act (whichever is the earlier). These periods may however be extended if the parties so agree after the cause of action has arisen.'[865]

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[861] *CMI Yearbook 2003 (Vancouver I)* 295. See also B Browne 'General Average - The Progress of the IUMI Proposal for the Reform of the York-Antwerp Rules', 17, paper presented at IUMI Conference in Seville, September 2003.

[862] J Cooke & R Cornah op cit note 28 at 546.

[863] (1878) 3 QBD 418 (DC).

[864] L Buglass op cit note 27 at 281.

[865] *CMI Yearbook 2000 (Singapore I)* 310.

IUMI argued that this rule shall supersede any domestic law which provides for a different time limit to that specified herein for the commencement of suit in respect of claims for general average contributions between parties to the general average and their guarantors.

This proposal was an attempt to speed up the adjustment proposal. Rule E 1994 Rules[866] was the first attempt by the maritime community to speed up the adjustment process by providing a 12 month time-limit in which documentation in support of general average claims should be sent to an average adjuster. This was to ensure that the average adjuster receives such documentation promptly in order for the adjustment to be completed on time; thereby cutting down the administrative costs involved in the process.

However, IUMI's proposal would not have been applicable in certain jurisdictions that have mandatory time bar provisions on general average and which cannot be departed from by parties through contract.[867] Thus, any rule that seeks to supersede such mandatory domestic laws on time bar will be declared null by the courts in such jurisdictions.

(h) Rule XXI - Interest

IUMI proposed the amendment of the rate of interest in Rule XXI to provide for a more flexible rate.[868] A 7 per cent rate of interest is specified in Rule XXI YAR 1994, but it had widely been recognised that it could give rise to injustice if the rate is only revised every 20 to 25 years when the YAR are revised.[869] IUMI noted that the abolition of the 7 per cent fixed rate would give rise to uncertainty but it was felt that fixing the new rate by reference to the currency of the adjustment would be fairer in view of the very wide differences in the interest rates from country to country.

It is argued that this proposal was necessary as commercial rates would always fluctuate substantially during long intervals between the revisions of the Rules. Having a

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[866] *Cf* chap 6 § II*(b)(vi)*(b)(ii) supra.

[867] For eg, s 501(9) Norwegian Maritime Code 1994 provides that a claim for compensation for damage, loss or expense in general average shall be time barred one year from the day on which the ship reached port after the average, or, if the ship was lost, from the day of the average. Also article 833 Croatian Maritime Code 1994 also provides that a claim for the payment of general average contribution shall be time limited to a period of one year from the ship's arrival in the first port of common adventure termination during which the accident occurred and which presents the basis for contribution in general average.

[868] *CMI Yearbook 2003 (Vancouver I)* 293.

[869] Ibid.

fixed interest rate in the Rules could cause hardship on cargo owners and shipowners alike as such a fixed rate will not take cognisance of changes in commercial bank rates and inflation. Such a fixed interest rate might sometimes be inadequate in fully compensating a party who has made the sacrifice or incurred the expenditure (where the fixed rate is lower than the prevailing bank rate)[870] and could also represent a windfall to a party that has incurred such expenditure or sacrifice (where the fixed rate is much higher than current bank rate). This shows the need for the amendment to Rule XXI in YAR 2004[871] to be retained in the new Rules to be adopted in 2016.

IV THE CMI'S ROLE IN THE REVISION OF THE YAR 1994 – A DISREGARD OF THE INGREDIENTS OF PREVIOUS SUCCESSFUL REVISION PROCESSES?

(a) Introduction

In considering the CMI's role in the revision of the YAR 1994, it is pertinent to analyse the replies of the NMLAs to the CMI 1999 questionnaire on the possible revision of the YAR 1994, the submissions made to the CMI by other interested parties on IUMI's proposals and the views of delegates at the various CMI pre-Vancouver meetings in an attempt to ascertain whether the identified ingredients of the previous successful revision processes were reflected in the CMI's revision of the YAR 1994. This comparison of the revision process of the YAR 1994 with the previous revision processes will provide the proper context for drawing a conclusion on whether, in amending the YAR 1994; the CMI disregarded the ingredients of previous successful revision processes.

(b) CMI 1999 questionnaire on the possible revision of the YAR 1994

The CMI, in considering IUMI's call for revision, established a Working Group on General Average which prepared a questionnaire that was sent to all NMLAs.[872] The questionnaire

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[870] It is relevant to note that the low rate of the fixed interest rate of 5 per cent in the 1950 Rules as compared to prevailing bank rates at that time necessitated the call for an amendment of Rule XXI 1950 Rules. This led to the increase of interest rate to 7 per cent in the YAR 1974. See the Preliminary Report of the President of the ISC on the revision of YAR 1950 in CMI Documentation 1970 (IV) 98.

[871] *Cf* chap 4 § II*(d)* supra.

[872] For a full text of the questionnaire, see the Report of the CMI Working Group on General Average in *CMI Yearbook 2000 (Singapore I)* 290.

was aimed at ascertaining the views of NMLAs on the IUMI's call and its proposals for the revision of the YAR 1994. Replies[873] to the questionnaire were received from 21 NMLAs.[874] The analysis of the replies[875] is relevant in order to determine the level of support or opposition by the NMLAs to IUMI's proposals and the proposed revision of the YAR 1994 at the time to determine if there was a consensus amongst the NMLAs for the revision of the YAR 1994 at the time.

(i) Question 1

The first question asked whether time had come to reduce the scope of the YAR to the principle of common safety. The question was prefaced by the statement that the YAR originally provided for the distribution of expenses and sacrifices over the contributing interests only as far as they were incurred for the common safety of ship and cargo. Later on the scope was extended to include expenses incurred for the common benefit – like port of refuge and substituted expenses.

The MLAUS[876] and the BMLA[877] were in agreement that the question as formulated was incorrect. They stated that the first Rules (York Rules 1864) were not solely limited to the principle of common safety but included several instances of the common benefit

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[873] The replies are unpublished by the CMI; however, electronic copies of some of the replies were kindly made available to the author by the CMI Secretariat. The replies are contained in a file.

[874] Report of CMI Working Group on General Average in *CMI Yearbook 2000 (Singapore I)* 291. See also *CMI Yearbook 2003 (Vancouver I)* 277.

[875] The author was unable to obtain all the replies of the 21 NMLAs that replied to the questionnaire from the CMI and the Associations involved despite repeated requests. Thus effort is made in this work to analyse replies that represent views from at least one Association in each of the different continents. This is an attempt to have a sense, though limited, of the views of NMLAs on the IUMI's proposals. However the reply of the Maritime Law Association (MLA) of Australia and New Zealand is not analysed as the Association informed the CMI Secretariat that it would not be commenting on the questionnaire. The Senegalese MLA was the only African MLA that replied to the questionnaire and answered 'yes' to all the questions without proffering reasons for its answers. The Gulf MLA and the Slovenia MLA also gave 'yes' and 'no' answers to the questionnaire without explanations. The replies of BMLA, MLAUS, Associacao Brasileira de Dirreito Maritimo ('ABDM' – Brazilian Maritime Law Association) and China Maritime Law Association (CMLA) are what is analysed.

[876] The MLAUS' reply to CMI 1999 questionnaire on general average (hereafter 'MLAUS' reply') dated 30 March 2000.

[877] BMLA's reply to CMI 1999 questionnaire on general average (hereafter 'BMLA's reply') 1.

principle. As stated earlier,[878] Rule VII 1864 Rules allowed the cost of discharging, reloading and stowing cargo at a port of refuge and also the cost of leaving the port. Similarly, Rule VIII 1864 Rules allowed wages and maintenance of the master and mariners from the time of entering a port of refuge until the ship shall have been made ready to proceed on her voyage.

The Associations' views correctly stated the position under the York Rules 1864.[879] Furthermore, it has been noted in this thesis that the Glasgow Resolutions also recognised the common benefit principle in Resolutions 6 and 8.[880] Thus, the first question in the questionnaire was incorrect.

Based on the above view, the MLAUS expressly did not support any proposal to restrict general average to the common safety principle.[881] The MLAUS further emphasised that after all the intensive work done by member associations of the CMI, leading up to and at the Sydney Conference when the YAR 1994 were adopted; there was simply no good reason to embark on another review of the Rules at the time. It felt that all the issues in the CMI questionnaire were fully debated at the Sydney Conference and that there had been no significant developments in maritime trade at that time to require a review so soon after the 1994 Rules.[882]

The above view reiterated the view of David Taylor in his remarks at the IUMI Oslo Conference 1996[883] and the view of shipowning interests represented by the ICS,[884] on the wrong timing of IUMI's call for revision. Furthermore, the view underscored the fact that significant developments in international trade and in the maritime industry had played a pivotal role in the amendment of previous versions of the YAR and that there was no development at the time necessitating a review of the YAR 1994.[885]

The BMLA, although it pointed out that the York Rules 1864 contained Rules on the common benefit principle, could not provide an answer to this question as opinions within the

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[878] *Cf* chap 6 § II*(a)(i)* supra.

[879] Ibid.

[880] Ibid.

[881] This view was supported in the replies of the NMLAs of France, Venezuela, the Netherlands, Denmark and Germany.

[882] MLAUS' reply, 1. *Cf* chap 6 § II*(c)* supra. This view was also shared by the Italian Maritime Law Association (IMLA).

[883] See chap 7 § II*(d)(i)* supra.

[884] See chap 7 § V*(c)* infra.

[885] *Cf* chap 6 § II*(c)* supra.

Association were polarised between those who were in favour of the abolition of the common safety principle (cargo and hull insurers) and those who were in favour of the retention of the common benefit principle (shipowners and average adjusters).[886] Of note is that the view of shipowners and average adjusters in the BMLA concurred with the view of the MLAUS that it was premature for a revision of the 1994 Rules barely six years after the adoption of the 1994 Rules; which Rules had not been demonstrated to work unsatisfactorily.[887] It is submitted that the polarisation within the BMLA underline the divergent interests that make up a NMLA and how their varying interests shape the response of a NMLA to CMI questionnaires.

The CMLA was unable to make any comment on questions one and two and did not adduce reasons for its inability to do so.[888] It could be inferred that, like in the BMLA, there was divergence of opinion on the questions within the CMLA.[889]

The ABDM concurred with the view of the MLAUS and contended that there was no reason to change in the YAR 1994, the common benefit principle to the common safety principle. It stated that in the event of the non-acceptance of the common benefit principle, if a ship changes her course to a port of refuge in order to safeguard the common interests, only one interest (usually shipowning interest) will have the burden to pay extraordinary expenses at the port of refuge, in order to proceed with the common adventure to reach the destination.[890] If the Rules are altered only for the sake of common safety principle, it would result in a position in which the cargo interests will take advantage from the extraordinary expenses that should be incurred by all concerned, only to be paid by the shipowner, in order for the ship to carry the cargo in safety to their destination.[891]

[886] There was also a similar divergence in opinion between these interests within the German MLA. See German MLA's reply dated 11 April 2000.

[887] BMLA's reply 1. See chap 7 § II*(c)* supra.

[888] CMLA's reply to CMI questionnaire on general average dated 30 March 2000 (hereafter 'CMLA's reply') 1.

[889] It should be noted that art 193 of the Chinese Maritime Code 1993 recognises only the common safety principle in its definition of general average. The definition is akin to Rule A YAR 1994. However, arts 194 and 195 recognise the common benefit principle by allowing in general average certain port of refuge expenses and substituted expenses respectively.

[890] ABDM's reply to CMI 1999 questionnaire on general average (hereafter 'ABDM's reply') 1.

[891] Ibid.

The view of ABDM underscores the fact that the common benefit principle has long been recognised in Brazilian law.[892] Article 764(9) of the Code allows in general average the wages and board of the crew during delay at a port of refuge. Furthermore, art 764(11) allows in general average the rent of warehouses for the deposit of goods at a port of refuge during the repair of the ship.

Thus, the views of these Associations show that there was support for the retention of the common benefit principle in opposition to IUMI's proposal for the restriction of general average to the common safety principle.[893]

(ii) Question 2.1

The question asked whether there was support that sacrifices and expenses should be included in general average only if made or incurred while ship and cargo are 'in the grip of a peril.'

There was unanimity in the Associations' replies to this question. The MLAUS [894] and BMLA[895] concurred that an attempt to limit general average to only those sacrifices and extraordinary expenditures whilst in the grip of peril had been dealt with in Roche J's decision in the English case of *Vlasspoulos v British and Foreign Insurance Co* (*The* '*Makis*').[896] Furthermore, the MLAUS stated that the practical result of IUMI's proposal would probably be a prolonged argument and litigation as to when the period considered 'grip of peril' commenced and ceased.[897] The BMLA, in concurring with the view of the MLAUS, stated that the phrase 'in the grip of peril' might be understood as meaning that the peril must actually have begun to operate before any allowances can be made. It was of the view that even if allowances ceased when common safety was attained, expenses incurred as a direct consequence of a general average sacrifice for the common safety (eg cost of repairs to the ship of damage caused by sacrifice) would continue to be allowed whenever incurred.

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[892]Article 764 Brazil Commercial Code 1850.

[893] Though copies of the entire replies could not be obtained, it is pertinent to note that the over-all replies by NMLAs showed that majority of the NMLAs (10 as opposed to seven NMLAs) were in favour of the retention of the common benefit principle. See *CMI Yearbook 2000 (Singapore I)* 291.

[894] MLAUS' reply, 1.

[895] BMLA's reply, 2.

[896] [1929] 1 KB 187 at 191 (KB). *Cf* chap 2 § II*(b)*, IV*(b)*, VI*(c)* and chap 7 § III*(c)* supra.

[897] MLAUS' reply, 2.

In support of the above view of the MLAUS and BMLA, the ABDM stated that expenses and sacrifices in general average should not be accepted only when the vessel is in the grip of peril. It stated that they should be maintained in general average until such time as the peril terminates and the safe prosecution of the common adventure is attained and completed.[898]

These views underscored the difficulties inherent in the IUMI's proposal[899] in ascertaining at what stage a vessel will be said not to be 'in peril' as the mere arrival of a vessel at a port of refuge does not stop it from being in peril in certain circumstances. Of note is that there was no divergence of opinion within the BMLA on this issue. It could be argued that the proponents of the abolition of the common benefit principle within the BMLA had conceded the fact that this proposal was impracticable.

(iii) Question 2.2

The question asked whether there was support that temporary repairs of the vessel in a port of refuge should be excluded from GA.

The NMLAs in their replies gave divergent opinions on this issue. The MLAUS was of the view that the language of the proposition in the questionnaire overlooked those cases where the temporary repairs are necessary for the common safety. It argued that certainly, it was not the intention to eliminate from general average the cost of temporary repairs in those circumstances. In American practice it has always been the position that, when reasonably incurred to save other general average expenses, temporary repairs of accidental damage should be allowed as a substituted expense.[900]

The MLAUS also noted the concerns about some of the abuses that might occur as a result of the decision in *The Bijela*[901] case and stated that the Association's delegation at the Sydney Conference 1994 was similarly concerned and proposed a tripartite solution to deal with what it perceived to be an over-expansion of general average in these situations.[902]

First, the MLAUS proposed that the second paragraph of Rule XIV be excised from the Rules, thus placing the question of temporary repairs in the ambit of Rule F dealing with

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[898] ABDM's reply, 2.

[899] See chap 7 § III*(c)* supra.

[900] L Buglass op cit note 27 at 275.

[901] *Marida Ltd v Ors v Oswal Steel and others (The 'Bijela')* [1990] 1 Lloyd's Rep 636 (QB).

[902] MLAUS' reply, 2.

substituted expenses in general. Secondly, it proposed that the second paragraph of Rule X(a) be changed so as to allow in general average the cost of proceeding from a port of refuge, where repairs could not be effected, to a port where they could only in those cases where the first port could not provide repairs of any sort which were sufficient for the safe prosecution of the voyage. It was immaterial if the first port could only effect temporary repairs; as long as they could do the job sufficient for the voyage, one could not look to theoretical alternatives, such as those considered in *The Bijela*.[903]

It should be noted that Rule X(a) 1994 Rules only applies to cost incurred were a vessel is 'necessarily removed from a port of refuge because repairs cannot be carried out.' It is argued that the repairs contemplated are those necessary to complete the voyage, which may or may not be permanent repairs. If it is possible in a commercial sense to carry out temporary or permanent repairs, the paragraph will not apply. In *The Bijela,*[904] Hobhouse J held that the paragraph did not apply if either temporary repairs or permanent repairs were possible at the first port of refuge. It is argued that this is the only logical conclusion of the wording of the paragraph.

Thirdly, the MLAUS stated that the Rule Paramount requiring reasonableness would always be a restraining force in those situations and some of the abuse feared by IUMI would be controlled.[905] This assertion correctly emphasised the effect of the Rule Paramount[906] in ensuring the non-recovery of a shipowner's expenses in general average for temporary repairs at a port of refuge for the safe prosecution of the voyage, where the temporary repairs were unreasonable in the circumstances, thereby curbing abuses of Rule XIV.

However, the MLAUS conceded that to limit temporary repairs only to those situations were an actual danger is present is to run in the face of universal law and practice of all maritime nations.

The BMLA was of the view that there was no need to disallow temporary repairs allowed in their own right such as repairs of damage caused by sacrifice, or when effected for the common safety, the allowance of which is not in conflict with IUMI's proposals.

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[903] [1992] 1 Lloyd's Rep 636 (QB).

[904] Ibid at 644. The decision was upheld in the Court of Appeal [1993] 1 Lloyd's Rep 411, but reversed in the House of Lords [1994] 1 Lloyd's Rep 1. However, in neither of those courts did the point under the second paragraph of Rule X(a) arise directly for decision. Thus it is argued that Hobhouse J's decision on the second paragraph of Rule X(a) remains valid.

[905] MLAUS' reply, 2.

[906] *Cf* chap 6 § II*(c)(vi)*(b)(i) supra.

However, opinions of members were polarised as regard the allowance in general average of temporary repairs effected at a port of refuge for the safe prosecution of the voyage, which are allowable only on a substituted expense basis.[907] Its members that were in favour of restricting general average to the common safety principle were in favour of disallowing this while those in favour of retaining the scheme in the YAR 1994 considered that temporary repairs, as other substituted expenses, should continue to be allowed.

The views of the MLAUS and BMLA show that both MLAs were in support of retention of the allowance in general average of temporary repairs made at a port of refuge for the common safety of the adventure. However, the views show that there was support within the MLAUS for the amendment of paragraph two of Rule XIV 1994 Rules in view of the decision in *The Bijela*.[908] The divergence of opinion in the BMLA signified that this was a thorny issue that needed to be addressed.

Unlike the MLAUS, the ABDM did not see any need to amend Rule XIV and stated that since such temporary repairs are effected in order to proceed to the destination of the common maritime adventure, they should be included in general average up to the amount of the economy saved.[909] This view was in support of the retention of the second paragraph of Rule XIV YAR 1994. This allows the cost of temporary repairs at a port of refuge necessary in order to proceed to destination to be allowed on a substituted expense basis.[910] Thus, where a vessel carries out temporary repairs instead of permanent repairs at a port of refuge which would have taken longer than temporary repairs and the vessel thereby avoids costs such as port charges, crew wages, cost of discharging, storing and reloading of cargo during the detention for permanent repairs; the cost of the temporary repairs should be allowed in general average up to these general average expenses saved.[911]

(iv) Question 2.3

The question asked whether there was support for the exclusion of crew wages and maintenance in the port of refuge in the Rules.

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[907] MLAUS' reply, 2.

[908] [1992] 1 Lloyd's Rep 636. The MLAUS' view was supported by the view of the IMLA.

[909] ABDM's reply, 2.

[910] Rule F YAR 1994.

[911] The view is in support of the decision of the House of Lords in *The Bijela* [1994] 1 Lloyd's Rep 1 (HL).

The MLAUS stated that the United States common law has always confirmed that port of refuge expenses, including wages and maintenance of the crew, that are for the common benefit are an inherent part of general average. It argued that there was no rationale to change this view through the Rules.[912] The ABDM in support of the MLAUS' view stated that crew wages and maintenance expenses should be maintained in general average where they are exclusively necessary for the common maritime adventure.

The MLAUS' view underlines the fact that United States law since *Campbell v Alknomac*[913] has recognised the allowance of crew wages and maintenance in general average and the decision of the court in that case has been followed in subsequent judgments.[914] The view of the ABDM was based on the fact that crew wages and maintenance at a port of refuge has long been recognised in Brazilian law.[915]

However, there was divergence of opinion within the BMLA on this issue. The BMLA's members who were in support of the restriction of the scope of general average to common safety favoured the abolition of allowances for crew wages and maintenance after reaching the port of refuge and achieving a point of safety (except during delay caused by making good damage caused by sacrifice).[916] Those in favour of the system in the YAR 1994 saw no reason to alter the allowance of crew wages and maintenance.[917] The BMLA therefore did not present an official position on this issue.

(v) Question 2.4

The question asked whether there was support that the cost of discharging; storage and reloading of cargo in the port of refuge should no longer be allowed in general average.

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[912] MLAUS' reply, 2.

[913] Bee 124, 4 Fed Cas 1155, No 2350 (DCSC 1798).

[914] See *The Star of Hope* 9 Wall 203 (1869) (US SCt); *Hobson v Lord* 92 US 397 (1875) (US SCt). However, the allowance ceases when the voyage is abandoned or the vessel is ready to resume her voyage: *The Joseph Farwell* 31 Fed Rep 844 (DC Ala 1887).

[915] See art 764(9) Brazil Commercial Code 1850. Though the CMLA did not reply to this question, crew wages and maintenance during the extra period of detention of a vessel at a port of refuge for repairs for the safe prosecution of the voyage is allowed in Chinese law by art 194 Maritime Code of the People's Republic of China 1993.

[916] This view was also supported by the Gulf MLA and the Slovenia MLA.

[917] BMLA's reply, 2. This view was supported by the IMLA. See IMLA's reply to CMI 1999 questionnaire, 2.

The Associations agreed that such expenses should be allowed in general average except the BMLA which could not provide a definite answer as there was a divergence in opinion on the subject between its shipowning and insurance members. The MLAUS noted that the questionnaire overlooked those instances where the discharge of cargo is necessary for the common safety. It stated that the expense should continue to be allowed, since that expense and the subsequent cost of storage and reloading were allowed not only in the 1864 Rules, but in the law and practice of almost all maritime nations and also in those cases where it is necessary in order to carry out repairs necessary for the safe prosecution of the voyage.[918] It is submitted that this view was in recognition of Rule VII 1864 Rules and Rule X(b) and (c) YAR 1994. ABDM, in support of the MLAUS' view, stated that costs of unloading, storage and reloading the cargo should be allowable in general average, while they are effected for the common benefit of all interests involved in a common maritime adventure.[919] It is argued that this view is ambiguous as it seems to suggest that such cost should not be allowed when incurred for the common safety. However, it is doubtful that this was the intention of the ABDM.

Unlike the MLAUS and ABDM, BMLA's members who were in support of restricting the scope of general average, favoured disallowing the costs of discharging (except when necessary for the common safety) storing and reloading of cargo. Those in favour of the 1994 Rules saw no reason to alter the provision.[920]

(vi) Question 2.5

The question asked whether there was support that substituted expenses should be made good in general average.

There was unanimity in the replies for the retention of substituted expenses in Rule F. The MLAUS stated that allowing substituted expenses aims at keeping the quantum of general average as low as possible and to achieve an earlier delivery of the cargo; either by incurring a shorter repair period through temporary repairs or by transhipment under a NSA. It also aims to make the ship more readily available for repairs.[921] The MLAUS was of the

[918] MLAUS' reply, 2.

[919] ABDM's reply, 2.

[920] BMLA's reply, 2.

[921] MLAUS' reply, 3.

view that it would seem that each of these aims would be to the benefit of all parties to the common maritime adventure and should continue to be allowed in general average.

The MLAUS' view was supported by the BMLA. The BMLA, with the exception of the representatives of marine property insurers, did not favour any change in NSAs since according to the BMLA it is impossible to prohibit NSAs and the NSA in Rule G, which the parties can adapt as they choose, fulfils a useful practical function as a model and assists the parties to reach agreement on the terms on which cargo is forwarded.[922] Also the Bigham Clause[923] in Rule G prevents the abuse of the Rule. This view was also shared by the ABDM.[924]

The replies emphasised the effect of the NSA wording in Rule G in ensuring that there is no delay in the delivery of cargo to destination.[925] The Bigham Clause ensures that cargo interests do not contribute towards general average incurred during the extended period of repairs more than it would have cost them to forward the cargo by themselves from the port of refuge to the port of destination.[926] Thus, there was a clear intention by the NMLAs for the retention of allowances for substituted expenses.

(vii) Question 2.7

The question asked whether Rules X and XI should be abolished.

The MLAUS[927] and ABDM[928] stated that Rules X and XI should not be abolished. It should be noted that Rules X and XI first appeared in the York Rules 1864 as Rules VII and VIII respectively. Since then they Rules have been amended to simplify and improve the text for a better application and to bring them up to date to the needs of commerce and the maritime industry.

The BMLA's members who were in favour of restricting general average were in support of terminating Rules X and XI allowances in general average as soon as the common safety had been achieved but permitting them up to a point. However, the supporters of the

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[922] Ibid.

[923] See chap 6 § II*(c)(vi)*(a)(iii) supra.

[924] ABDM's reply, 3.

[925] *Cf* chap 6 § II*(c)(vi)*(a)(iii) supra.

[926] Ibid.

[927] MLAUS' reply, 3

[928] ABDM's reply, 3.

YAR 1994 were opposed to such change.[929] Thus, the BMLA had no definite answer to the question.[930]

(viii) Question 3

The question asked whether any non-compliance with international conventions like the ISM Code or the Standards of Training, Certification and Watch-keeping (STCW) Convention should be considered a fault under Rule D irrespective of the merits of the individual case and the applicability of such Convention.

There was unanimity in the Association's views that non-compliance with international conventions should not be considered as fault under Rule D.

The BMLA was of the view that the effect of Rule D is to leave all questions of fault outside the scope of the YAR.[931] It noted that under English law, a party resisting contribution on the grounds of fault must show that the event which gave rise to the general average was caused by the actionable fault, under the applicable law, of the person claiming contribution.[932] In the BMLA's view, it is unnecessary and undesirable for the YAR to concern themselves with fault.[933]

It is pertinent to note that there was no divergence of opinion within the BMLA on this issue and it seems that both factions were in agreement against non-compliance with international conventions being considered a fault.

In support of the BMLA's view, the MLAUS stated that it has long been the position of average adjusters, usually endorsed by members of the maritime bar, that it is not the province of the Rules to deal with issues of liability. Indeed under Rule D, the Rules textually detach themselves from questions of remedy and defence. It argued that no good case had yet

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[929] BMLA's reply, 3.

[930] The CMLA also had no answer to this question.

[931] BMLA's reply, 4.

[932] *Goulandris Bros Ltd v B Goldman and Sons Ltd* [1958] 1 QB 74 at 109. *Cf* chap 3 § II*(b)* supra.

[933] Further objections by BMLA to IUMI's proposal that non-compliance with the ISM Code or STCW should constitute fault were that: (i) where the non-compliance causes or contributes to the event which gives rise to the general average, the provision is largely unnecessary, since the non-compliance will almost invariably amount to a failure to exercise due diligence to make the ship seaworthy/properly manned, it will therefore amount to actionable fault under the contract of carriage and will provide a defence to a claim for contribution; and (ii) where the non-compliance does not cause or contribute to the event there is no reason why it should affect rights of contribution in any way.

been made for changing that position.[934] ABDM in concurring with the BMLA and MLAUS' views stated that a shipowner must take care of his ship and respect international conventions including the ISM Code and STCW. Such compliance will improve the shipowner's performance and reduce the average records. However, it stated that non-compliance with the ISM Code and STCW should not be considered a fault irrespective of the merits of the individual case and the applicability of such conventions.[935] The CMLA supported the view that non-compliance with international conventions should not be considered as fault irrespective of the merits of the individual case and the applicability of such convention.[936]

These views were based on the decision of the English court in *Goulandris Bros Ltd v B Goldman & Sons Ltd*[937] where the court held that if the necessity for a general average act arose as a result of the fault of one of the parties to the adventure, the act retains its general average character and contribution is due between the parties to the adventure. However, contributions will not be made to make good the loss of the party at fault. Thus, it is submitted that non-compliance with the ISM Code and STCW, even if considered as fault, will not be a bar to general average adjustments.

(ix) Question 4

The questionnaire asked whether there was support that salvage remuneration should not be distributed in general average if settled separately by ship and cargo with salvor.

There was divergence of opinion in the replies by NMLAs. The MLAUS stated that the question had been the subject of much deliberation. It stated that the cost of salvage should continue to be reapportioned over the arrived values of ship and cargo at the destination.[938]

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[934] MLAUS' reply, 3.

[935] ABDM stated that there are various good reasons for re-adjusting salvage expenditure in general average, viz, (i) it is a particularly pure form of expenditure in time of peril made for the common safety, (ii) adjusting it on the basis of arrived values removes such anomalies as salvage being paid by an interest that, on account of some subsequent misfortune, never arrives at destination; and (iii) it also brings contribution from sometimes large amounts made good in respect of general average sacrifice, when ship or cargo might otherwise enjoy something of a windfall, if the salvage is settled separately and determined on the physical value of the property on termination of the salvage services. See ABDM's reply, 4.

[936] CMLA's reply, 1.

[937] [1958] 1 QB 74 (QB) at 104. *Cf* chap 3 § II*(b)* supra.

[938] MLAUS' reply, 4.

It is submitted that the MLAUS' view was based on the fact that the inclusion of salvage in general average has a particularly American genesis. Under American law, when salvage services meet the requirements of general average, the salvage award is re-apportioned as a general average on the basis of values at the termination of the voyage.[939] In explaining the basis for the American law on re-apportionment of salvage expenses in general average, the United States Supreme Court in *The Jason* stated that '… salvage expense, however or whenever liquidated, was something done for the common benefit and therefore should under American law be brought into general average adjustment.'[940]

ABDM was in support of the MLAUS' view and stated that salvage remuneration should be distributed in general average even if settled by ship and cargo. ABDM stated that the remuneration of all interests involved must be apportioned by the average adjuster who will have the actual value of each interest at destination and is the only person that can calculate the exact and fair value of the contributory values.[941]

However, the views of the MLAUS and ABDM were not shared by the BMLA. The BMLA stated that there were some cases in which the distribution of salvage expenses in general average will yield a fairer result than leaving each party to bear his own liability to the salvor. However, it was of the view that the additional complications to which it gives rise are disproportionate to the benefit and advocated for the adoption of IUMI's proposal on salvage.[942]

The BMLA's reply does not show that there was a divergence of opinion within the BMLA on the issue. It could reasonably be inferred that there was a consensus amongst the different interest groups within the BMLA on the need for the revision of Rule VI in accordance with IUMI's proposal. The CMLA's view was analogous to the reply of the BMLA. However, the CMLA was of the view that salvage expenditure should not be distributed in general average only where there is differential settlement of the salvage remuneration by ship and cargo with the salvor.[943] This view was not completely in support of IUMI's proposal on the amendment of Rule VI YAR 1994.[944]

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[939] L Buglass op cit note 27 at 331.

[940] *The Jason* (1909) 162 Fed Rep 56, (1910) 178 Fed Rep 414 (US SCt) at 418.

[941] ABDM's reply, 4.

[942] BMLA's reply, 4.

[943] CMLA's reply, 1.

[944] See chap 7 § III*(b)* supra.

It is argued that the divergence in opinion amongst the NMLAs on the issue of re-apportionment of salvage expenditure in general average showed that there was a need for a consideration of the issue at the Vancouver Conference in order to provide a Rule on salvage expenditure that would be a compromise of the interests of interested parties. This further iterates the need for this issue to be reconsidered in the present efforts to adopt a new set of Rules.

(x) Question 5

The question asked whether expenses in preventing or minimising damage to the environment should not be allowed in general average.

The Associations[945] were unanimous in their views that such expenses should continue to be allowed in general average. They noted that a wide variety of pollution liabilities and expenses were recoverable under the YAR 1974 where reasonably incurred as an incident of a general average act or as a direct consequence of such act. The purpose of the provisions introduced in Rule XI(d) YAR 1994 was not to introduce or increase all allowances in general average in respect of liabilities and expenses, but to limit them, hence the restriction of the allowances to costs and expenses of preventing or minimising damage to the environment; thereby excluding any allowances in respect of liability in damages for pollution already occurred.

The Associations stated that Rule XI(d) YAR 1994 was determined upon after elaborate discussion between interested parties and there was no need to change them.

It should be noted that IUMI did not propose a change in Rule XI(d) and the P&I Clubs who bear the cost of the allowance in general average of such measures to avert or minimise pollution[946] did not make such a proposal and had no criticism of the Rule. The replies showed that there was no criticism of the Rule and of note is that there was no divergence of opinion within the BMLA on the issue. It is argued that the question on the Rule should not have been included in the CMI's questionnaire as there was no development at the time that necessitated a review of the Rule. Furthermore, such costs were and are still been met by the P&I Clubs without any complaints.[947]

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[945] BMLA's reply, 4; MLAUS' reply, 4; ABDM's reply, 4; CMLA's reply, 1.

[946] See chap 3 § III*(c)(ii)*(c)(iv) supra.

[947] G Hudson & M Harvey op cit note 299 at 166.

(xi) Question 6

The question asked whether a time bar should be introduced in the Rules so as to prevail over national law.

There was divergence in the views by the NMLAs on this issue. The MLAUS,[948] ABDM[949] and CMLA[950] were of the view that time bar and commencement of legal proceedings relate to legal issues. As such, they should be outside the scope of the YAR in the same way that matters of liability are concerned. They stated that such matters should be best left to the national law called for in the contract of carriage. The ABDM was of the view that there would be great difficulty in obtaining amongst the nations consensus on a text that would be included in the YAR which would prevail over national law.[951] The CMLA stated that under Chinese law the limitation period is considered a matter of substantive law and cannot be altered by the parties through contractual agreement. The limitation period for claims with regard to general average contribution has been prescribed in the Chinese Maritime Code[952] and Chinese courts will not give effect to any agreement on time bar if it differs from the Code.[953]

However, the BMLA differed from these views and stated that it had no objection in principle to a time bar in the Rules, provided that the time limit is not unreasonably short. It proposed a period of two years after the publication of adjustment or six years after the completion or abandonment of the voyage.[954] However, it conceded that a provision of this nature will not be effective in all jurisdictions, since some legal systems impose time bars which cannot be departed from by private contract.

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[948] MLAUS' reply, 5.

[949] ABDM's reply, 5.

[950] CMLA's reply, 1.

[951] ABDM's reply, 5.

[952] Article 263 Maritime Code of the People's Republic of China 1993 provides that the limitation period for claims with regard to contribution in general average is one year, counting from the day on which the adjustment was finished.

[953] CMLA's reply, 1.

[954] BMLA's reply, 5. This proposal was based on s 5 English Limitation Act 1980 which provides that an action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. However, under English law time begins to run from the date of the general average sacrifice or expenditure and not from the date of the termination of the adventure. See *Castle Insurance Co v Hong Kong Islands Shipping Co (The 'Potoi Chau')* [1984] 1 AC 226 (PC).

It should be noted that the views of the MLAUS, ABDM, CMLA was supported by majority of the replies from NMLAs which indicated that the issue of time bar should be left to national law because it cannot validly be dealt with through contractual agreement.[955] Thus, the replies did not show a consensus for the provision of a time bar in the YAR.

V OTHER INTERESTED PARTIES' RESPONSE TO IUMI'S PROPOSALS

(a) Introduction

Other interested parties in the general average system, especially CMI's consultative members, made submissions to the CMI on IUMI's proposals. Their submissions are examined to determine their views on the IUMI's proposals and their level of support for the revision of the YAR 1994 at the time. As interested parties in the general average system, their views (in addition to that of the NMLAs) are relevant in ascertaining whether there was a consensus amongst the majority of interested parties for the revision of the YAR 1994 at the time, as was the trend in the previous amendment processes.[956]

(b) AMD

(i) Introduction

AMD set up a Working Group to examine the proposed revision of the YAR 1994 and this consequently led to a consideration of IUMI's proposals by the Association.[957]

(ii) AMD's views

(a) Common safety v common benefit

AMD stated that in practical terms, the purpose of general average is indeed to achieve common safety in time of peril, but in doing so, also to enable the common adventure to be

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[955] *CMI Yearbook (Vancouver I)* 293.

[956] See chap 6 § II*(b)* supra.

[957] AMD's views were stated in its initial Position Paper on IUMI's proposals dated 12 November 2003, available at www.jssusa.com/assets/Uploads/GA-papers/AIDE111503.pdf, accessed 20 November 2011.

completed so that it would be unrealistic to dissociate these two aspects which affect all parties involved.[958]

This view rightly underscored the truism that merchants and sea carriers in today's global economy are more than ever pressed to co-operate in order to meet the growing requirements for more efficient service implying tighter schedules which increasingly lead to prompt deliveries. Therefore, the removal of the common benefit principle may affect this co-operation between parties and make them to shy away from their common efforts which would be against their best common interest.

AMD further stated that the more port of refuge expenditure is removed from general average the less expenditure will qualify by way of substituted expenses under Rule F to forward the cargo to destination under NSAs. It stated that without the incentive of the common benefit principle, frustration of the voyage is likely to occur more frequently when repairs result in a long detention period; leaving cargo owners and their insurers to bear substantial additional costs alone.

The frustration of an adventure, as an English law concept, is an event that allows the carrier to rescind the contract of carriage. According to Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council*,[959] frustration occurs 'whenever the law recognises that without the fault of the parties a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from what was undertaken under the contract.'[960] Frustration as a principle is very narrowly applied by the courts.[961] In American law, for an event to lead to the frustration of a contract it must not be as a result of a party's fault nor should the contract have allocated the risk of the occurrence of the event.[962] Inordinate delay in the performance of a carriage contract may lead to the frustration of the contract of carriage, although this will depend on whether the delay is so prolonged as to be regarded to have defeated the

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[958] Ibid at 2.

[959] [1956] AC 696 (HL).

[960] Ibid at 729. *See also National Carriers v Panalpina Ltd* [1981] AC 675 (HL).

[961] *CTI Group v Transclear SA* [2008] EWCA Civ 856 (CA) at 859.

[962] *Transatlantic Financing Corp v United States* 363 F 2d 312, 1966 AMC 1717 (DC Cir 1966). See also K Heard 'Frustration, Maritime Law and General Average', 6, MLAUS Newsletter, Spring 2011. However, under English law the operation of the doctrine of frustration is not excluded merely by a clause in the contract in which the parties make certain provisions for the subsequent event. See *Jackson v Union Marine Insurance Co Limited* (1874) LR 10 CP 125 (QB).

commercial object of the adventure.[963] In *Jackson v Union Marine Insurance*,[964] the shipowner contracted to pick up a cargo at Newport with all possible dispatch, 'dangers and accidents of navigation excepted.' When the ship ran aground in Caernarvon Bay en route for Newport and suffered damage which would take six months to repair, all further liability under the contract was discharged despite the exceptions clause. The court held that the carriage contract had been frustrated and that the parties had not expected the exceptions clause to cover such a fundamental alteration in the nature of the contract.

In *Bankline Ltd v Capel & Co*,[965] where the issue was whether delay caused by requisition of the ship had frustrated a time charter, Lord Sumner noted that 'delay even of considerable length and of wholly uncertain duration is an incident of maritime adventure, which is clearly within the contemplation of the parties … ultimately the frustration of an adventure depends on the facts of each case.'[966] Thus a pure simple delay will not be considered sufficient, unless other circumstances join in complicating the matter, making the charter as a matter of business a totally different thing from what the parties agreed to.[967]

However, it is submitted that in considering the length of delay at a port of refuge that will give rise to the frustration of the carriage contract, it will be relevant to consider the length of time which the voyage would normally be expected to last, the nature of the cargo and whether the cargo is intended for a particular market or use which makes it of fundamental importance that it should arrive on time.

It is argued that the non-allowance of port of refuge expenses in general average based on IUMI's proposal might have resulted in increase in cases of frustration of the voyage as shipowners might not be willing to make disbursements for the prompt repair of accidental damage to the vessel at the port of refuge, resulting in inordinate delay of a vessel at a port of refuge that could lead to the frustration of the adventure. However, such inordinate delays must be delays that would be seen to have changed the character of the contract of carriage; rendering it impossible to perform the contract as originally contemplated by the parties. However, each case should be decided on its facts and the test should be an objective one.[968]

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[963] *The Sea Angel* [2006] EWHC 1713 (Comm) at 1717.

[964] (1874) LR 10 CP 125 (CCP).

[965] [1919] AC 435 (HL).

[966] Ibid at 458.

[967] Ibid at 460.

[968] *Anglo-Northern Trading Co v Emlyn Jones & Williams* [1917] 2 KB 372 (CA).

(b) Complaint about general average

AMD stated that general average and the YAR are unique and valuable instruments to assist parties in achieving a fair resolution of most issues which arise at the time of a casualty requiring measures for the common good. It argued that the complaints about general average being abusively used by unscrupulous owners operating substandard vessels certainly warrant attention, but general average would not be a useful scapegoat to hull insurers who agree to insure substandard vessels and to cargo insurers who agree to cover cargo carried on them.[969]

This view reiterates Taylor's view stated earlier in this thesis.[970] However, this view further alludes to the fact that cargo owners were also contributing to general average situations by entering into contracts of carriage with owners of substandard vessels in exchange for cheaper freight and cargo insurers were agreeing to insure cargo placed on such vessels.[971] This fact was not considered by Marshall in his statistics.[972] It is submitted that cargo insurers by accepting to insure cargo carried on such vessels were helping increase the number of general average situations as such substandard vessels are more prone to be involved in general average situations than seaworthy vessels.

It is further argued that this act of cargo insurers was as a result of the weak insurance market of the time.[973] Ordinarily the condition of a ship in which cargo is carried is controlled by cargo insurers in two ways. First, is the requirement that the vessels used by the assured are classed with a particular Classification Society and the vessel should not exceed a certain age.[974] Secondly, the ICC absolve the cargo insurer from liability arising from unseaworthiness or unfitness of the vessel where the unseaworthiness is known to the assured.[975] However, in practice, cargo insurers are of the view that in some cases the assured may not be aware of the unfitness of a vessel, though it is classed with a Classification Society.[976] Thus, to a large extent in practice, cargo insurers pay out a claim in cases of unseaworthiness (where the assured is not privy to the unseaworthiness) and then

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[969] Ibid at 3.

[970] *Cf* chap 7 § II*(d)(i)* supra.

[971] See also McCormack op cit note 818 at 33.

[972] See chap 7 § II*(b)* supra.

[973] Remarks of Charles Hebditch op cit note 629.

[974] J Dunt op cit note 304 at 163.

[975] Clause 5 ICC (A), (B) and (C).

[976] J Dunt op cit note 304 at 162.

bring an action for recovery against the carrier.[977] It is argued that though the assured in most instances may not be privy to the unseaworthiness of a vessel, such practice by cargo insurers is prone to abuse by assureds and in such instances it could be difficult for the insurer to prove that the assured was privy to the unseaworthiness of the vessel.

(c) Partial application of amended Rules

AMD stated that in view of shipowners' strong resistance of any major changes, sea carriage contracts may either maintain the YAR 1994 or introduce special wordings such as 'general average to be adjusted in accordance with YAR 2004 but including Rules X and XI of the YAR 1994.'[978] It is submitted that such a scenario is within the contractual rights of shipowners as carriers. Of note is that shipowners in the United States had partially applied the YAR 1924 by special clauses because of their opposition to some of the provisions of the 1924 Rules.[979]

(d) Rule XIV – Temporary repairs

AMD, like the MLAUS, conceded the fact that Rule XIV needed to be amended. According to AMD, Rule XIV dealing with temporary repairs offers room for improvement to eliminate undue advantage to shipowning interests but any revision of this Rule should ensure that it does not delay the final adjustment nor render it unduly complicated.[980] However, it failed to make any proposals on how the Rule should be amended.

(e) Rule IV – Salvage remuneration

With respect to IUMI's proposal on salvage, AMD was of the view that salvage is the archetype of a general average expense and that in certain countries the shipowner is liable for the payment of the entire salvage charges.[981] It stated that frequently and independently from any legal obligation, the shipowner provides security on behalf of all parties and that

[977] Ibid.

[978] AMD initial Position Paper op cit note 957 at 3.

[979] See chap 6 § II*(a)(ii)* supra.

[980] AMD initial Position Paper op cit note 957 at 4.

[981] Examples are Netherlands and Germany.

some cargo interests have a stronger bargaining position than others leading to an unfair result if the salvage charges are not reapportioned in general average.[982] It argued that the exclusion of salvage expenses from general average would neither hasten nor simplify the adjustment as salvage charges together with interest and legal costs would need to be considered in the calculation of contributory values.[983]

AMD's view on salvage is similar to that of the MLAUS and ABDM in which the Associations proposed that salvage expenditure should be re-apportioned in general average.[984] However, AMD's view is not supported by the view of the BMLA who supported IUMI's proposals that salvage expenditure should not be re-apportioned in general average.[985] AMD's view is also supported by the view of the CMLA; however, the CMLA's view partially differs from that of AMD as the CMLA only proposed that differential salvage settlements should not be re-apportioned in general average.[986]

(f) Time bar

AMD argued that national laws already provide for a time limit. It stated that the provision of a time bar rule in the YAR would not be a vital addition since with the use of modern technology, particularly by means of instant communication, general average adjustments are seldom unduly delayed.[987] This view reiterates the views of the NMLAs on this issue and clearly shows that IUMI's proposal on time bar was not seen by the maritime community as a necessary addition to the YAR. AMD's view also alludes to the fact that modern technology has aided adjusters in preparing adjustments on time.[988] As argued earlier in this thesis,[989] Marshall failed to consider this fact in his statistics.

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[982] AMD initial Position Paper op cit note 957 at 5.

[983] Ibid.

[984] See chap 7 § IV*(b)(ix)* supra.

[985] Ibid.

[986] Ibid.

[987] AMD initial Position Paper op cit note 957 at 6.

[988] The assistance of modern technology in ensuring fast adjustments had also been confirmed by the AAA. See C Hebditch, J Macdonald & P Stacey 'General Average: Briefing Notes', 6, available at www.jssusa.com/assets/Uploads/GA-papers/AAA030496.pdf, accessed 6 May 20013.

[989] *Cf* chap 7 § II*(b)(ii)* supra.

(g) Rule XXI - Interest

AMD stated that the Rule on interest had to be addressed to be more in line with prevailing rates. It stated that a simple rule should be devised to avoid complicating adjustments and should a variable rate be favoured, this should be left to the CMI to be suitably dealt with. AMD by this view conceded the fact raised by IUMI that the 7 per cent fixed rate in Rule XXI YAR 1994 could lead to unfair results in some cases as the Rule does not provide for flexibility with respect to changing bank rates and inflation.

(h) Rule XX - Commission

AMD was of the view that the 2 per cent rule on commission in the YAR 1994 is simple to apply and stated that the proposed changes were liable to lead to complication and result in increased adjustment costs instead of simplifying matters.[990] However, it failed to state how the abolition of commission will lead to complication and increase in cost.

(c) ICS

(i) Introduction

ICS was the only trade Association known to have commented on the proposed changes to the YAR 1994.[991] It submitted a Position Paper to the CMI on IUMI's proposed changes to the YAR 1994.[992]

[990] AMD submitted a further Position Paper dated 4 May 2004, available at www.jssusa.com/assets/Uploads/GA-papers/AIDE050404.pdf, accessed 21 November 2011. See also *CMI Yearbook 2004 (Vancouver II)* 188-194.

[991] ICS Report on the CMI Vancouver Conference 2004, available at www.jssusa.com/Uploads/GA-papers/ICSVCVR.pdf, accessed 20 November 2011.

[992] Position Paper by ICS on General Average in *CMI Yearbook 2004 (Vancouver II)* 195-200. The Position Paper was supported by the BIMCO, INTERTANKO and INTERCARGO.

(ii) ICS' views

(a) Common benefit versus common safety

ICS stated that the YAR are a result of general concerted effort to ensure a uniform approach to general average and the Rules unified the two strands of general average.[993] It argued that narrowing down the scope of general average to only the common safety principle would exclude many of the allowances allowed in the YAR 1994, particularly port of refuge expenses. This view reiterates the views of ABDM and the majority of NMLAs on the issue.

With respect to IUMI's proposal that allowances should only be allowed in general average where sacrifices or expenses are made when the ship is in peril, ICS stated that much argument would arise on the extent of the peril which would present problems. It stated that English law long ago decided that though the peril must be real, the vessel need not be in the actual grip or even nearly in the grip of danger. ICS further stressed that the difficulty was in assessing 'peril' and 'reasonable safety' based on IUMI's proposal.

The NMLAs in their replies to the questionnaire had expressed a similar view on the issue of 'peril' based on the decision of the English court in *Vlasspoulos v British and Foreign Insurance Co* (*The* '*Makis*').[994] Thus, there was a consensus amongst shipowning interests and the NMLAs that IUMI's proposals would give rise to difficulties in construing when a peril would be said to have commenced and when reasonable safety could be said to have been attained.

ICS further argued that the elimination of port of refuge expenses might exclude cargo owners from having their cargo forwarded to destination through substituted expenses. It stated that shipowners whose vessels put into a port of refuge for repairs after a peril are unlikely to be under any obligation to forward cargo to destination and depending on its position and stow could be reluctant or unable to discharge the vessel in whole or in part. Cargo would thus remain on board pending repairs and cargo owners would likely have no remedy under the contract of carriage.[995] It stated that if expenses such as handling fall away in general average, many of them will fall on the shipowner/hull insurer. Such cost could be added to repair costs and the ratio between repair costs and the sound value of vessel would

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[993] Ibid at 195.

[994] [1929] 1 KB 187 at 191.

[995] Position Paper by ICS op cit note 992 at 197.

likely increase the number of abandoned voyages. Cargo owners would deal with the forwarding of cargo and probably be responsible for the resulting costs.[996]

It should be noted that this argument was also canvassed by Hudson at the CMI Toledo Colloquium 2000 as the likely consequence of the non-allowance of port of refuge expenses in general average.[997] IUMI had also conceded that such an abandonment of the voyage would result in cargo owners incurring additional cost to forward cargo to destination[998] as the NSA wording in Rule G YAR would not be available where the common benefit principle is abolished. The NMLAs also reiterated this consequence and canvassed for the retention of the NSA wording in the YAR.[999] Thus, it is submitted that there was a consensus between the shipowning community and cargo insurers on the benefit of NSA.

(b) Timing

Similar to the views of MLAUS[1000] and Taylor,[1001] ICS decried the wrong timing of IUMI's call for revision and stated that the Rules had not been given sufficient time to operate in the market before calls were made for their revision.[1002]

(c) Complaints about general average

ICS was of the view that general average is not a panacea for protecting poor quality operators. This view is correct because by Rule D YAR 1994 cargo interest have a defence to a claim for general average contribution where the incident was caused by breach of the carriage contract, particularly the unseaworthiness of a vessel.[1003] Furthermore, the ISM Code, with its requirement for shipowners to fully be aware of all operational and safety

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[996] Ibid.

[997] See chap 7 § VI*(b)* infra.

[998] See chap 7 § II*(d)(ii)* supra.

[999] See chap 7 § IV*(b)(vi)* supra.

[1000] See chap 7 § IV*(b)(i)* supra.

[1001] See chap 7 § II*(d)(i)* supra.

[1002] Position Paper by ICS op cit note 992 at 200. *Cf* chap 7 § IV*(a)(i)* supra.

[1003] Such a defence was successfully raised by cargo owners in *Guinomar of Conakry & Anor v Samsung Fire & Marine Insurance Co Ltd* [2002] 2 Lloyd's Rep 57 (QB), where the court held that the shipowner could not recover cargo's proportion of general average as a result of his failure to exercise due diligence to make the vessel seaworthy before the commencement of the voyage as the vessel had incompatible and cracked pistons.

issues connected with their vessels and take early remedial action when problems arise represents a further means of encouraging higher standards in the industry.[1004]

ICS argued that the likely consequences of accepting IUMI's proposal for restriction of general average to the common safety principle might be that there would be fewer general average settlements. However, costs would still be met and it seemed likely that some of the new costs would fall to hull insurers in terms of a transfer of risk from one sector of the insurance industry to another. This view correctly reflects the fact that IUMI's proposals would primarily result in the transfer of risk and cost from cargo insurers to hull insurers.[1005] Where the common benefit principle is abolished, most of the port of refuge expenses will not be allowed in general average. These expenses would be borne alone by the shipowner and ultimately by the hull insurer as particular average claims.[1006]

Finally, the ICS stated that the principle of general average is sound; however, the advantages can be outweighed in relation to smaller, uneconomic claims or adjustments involving large numbers of individual cargo interests where collection of security represents a significant proportion of the cost. In the view of the ICS, General Average Absorption Clauses are the satisfactory market-based solution that has been adopted. The Clauses were favoured by container operators but in the ICS' estimate, the Clauses were being used by 65 per cent of operators at the time.[1007]

It should be noted that the IUMI members in their replies to IUMI's 1996 questionnaire[1008] had conceded that there had been some reduction in the declaration of general average by shipowners as a result of the General Average Absorption Clauses in their hull policies.[1009] Thus, there was a consensus amongst shipowners and cargo insurers on the effectiveness of the Clause in reducing general average declarations and costs.

[1004] See paras 2 to 12 ISM Code 2010.

[1005] The likely insurance implications of the changes introduced by YAR 2004 as a result of IUMI's proposals are analysed in chap 4 supra.

[1006] The transference of risk and cost of general average from cargo insurers to hull insurers pursuant to the changes introduced by the YAR 2004 is analysed in chap 4 supra.

[1007] Position Paper by ICS op cit note 992 at 197.

[1008] See chap 7 § II*(c)* supra.

[1009] Ibid.

VI CMI PRE-VANCOUVER 2004 MEETINGS

(a) Introduction

As a consequence of IUMI's persistence with its call for revision, the CMI at various meetings considered IUMI's proposals for revision and provided a platform for IUMI and other interested parties to present their views on the IUMI's proposals. The views expressed by delegates at these CMI meetings prior to its Vancouver Conference are analysed in what follows to determine the level of support amongst delegates for the IUMI's proposals and the revision of the YAR 1994 at the time.

(b) CMI Toledo Colloquium 2000

At the CMI Colloquium in Toledo in September 2000, IUMI's position on the need to revise the YAR 1994 was considered. IUMI's proposals were presented by Eamonn Magee. His paper contended that IUMI's proposals were aimed at addressing the inequities in the general average system shown in Marshall's statistics.[1010] Geoffrey Hudson, former chairman of the AAA, United Kingdom, in his reply to IUMI's proposals[1011] argued that IUMI's proposals would remove the positive incentive which the YAR provide to encourage a shipowner to take proper measures to fulfil his obligations under the contract of carriage.[1012] He further stated that the proposed curtailment of general average allowances put forth by IUMI at a port of refuge would directly increase the number of valid abandonment cases. IUMI's proposals according to him would do away with all issues of avoiding delays at a port of refuge by forwarding of cargo on a NSA to the port of destination, since IUMI's proposal would have no allowances for general average in a port of refuge and moreover would abolish the principle of substituted expenses altogether.[1013]

It is argued that Hudson's argument correctly underscored the effect restriction of general average to the common safety principle might have on the general average system. However, it should be noted that the law on abandonment of voyage is not universally clear

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[1010] *Cf* chap 7 § II*(b)* supra.

[1011] It should be noted that Hudson gave his reply to the IUMI's proposals in his individual capacity and not as a representative of the AAA as the AAA did not submit any Position Paper on the IUMI's proposals to the CMI.

[1012] G Hudson 'Let's Be Realistic' in *CMI Yearbook 2000 (Singapore I)* 314 at 321.

[1013] Ibid at 324.

as there is a dearth of legal precedents on the subject. In *De Cuadra v Swann*,[1014] the court held that the master of a vessel will be justified in abandoning the voyage where the ship is so seriously damaged as to be incapable of repair so as to prosecute the voyage except at an expense exceeding her value together with the freight when repaired. In such a case, the shipowner may abandon the vessel at the port of refuge, especially, as the extent of the repairs to be considered in this connection are those that are necessary to complete the voyage.[1015] Where there is a valid abandonment of a voyage, liability in general average ceases from the moment the voyage was abandoned.[1016]

In *Assicurazioni Generali v SS Bessie Morris Co Ltd*,[1017] Lord Esher pointed out that if the cost of repairs, which are necessary to enable a vessel complete her voyage, is more than the benefit which the owner will derive from them, it is impossible in a business sense to have the vessel repaired and the owner in such circumstances could validly abandon the vessel.

Lord Esher seems to suggest that a 'business sense' test should be applied in determining the right to abandon a voyage. If a 'business sense' test is to be applied, it could be argued that shipowners could validly abandon a voyage where the cost of repairs will exceed the value of the vessel when repaired as held in the *De Cuadra* case. Thus, from the decisions in the above cases it could be argued that in ascertaining the shipowner's right to abandon the voyage the test should be whether effecting temporary repairs would be contrary to sound business reasoning by the shipowner, taking cognisance of the repair cost *vis* à *vis* the vessel's sound value after the repairs are effected.

Thus, since by IUMI's proposals allowances for all expenses incurred at a port of refuge (especially temporary repair costs) which are currently uninsured would have been excluded; there would likely have been an increase in the number of valid abandonment cases as the cost of effecting temporary repairs might exceed the ship's value when repaired in some instances. Cargo owners would have to collect their cargo and forward cargo to their destination at their own expense. However, if the cargo is insured, the cost involved, may in principle be recovered from the insurers.[1018] Of note is that this effect of IUMI's proposals

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[1014] (1864) 16 CB (NS) 772 (CCP).

[1015] *Kulukundis v Norwich Union* [1937] 1 KB 1 (CA).

[1016] Ibid at 60.

[1017] [1892] 2 QB 652 (HL) at 664.

[1018] Clause 12 ICC (A), (B) and (C).

was conceded by IUMI at its Lisbon meeting in 1998.[1019] Thus, abolition of the common benefit principle would have adverse effects on both the ship and cargo with more adverse effects on the shipowner as most port of refuge expenses are made by the shipowner.

(c) CMI Singapore Conference 2001[1020]

The subject of the revision of the YAR 1994 was again open for discussion at the CMI Conference in Singapore in 2001. The Conference provided a platform for interested parties to air their views on the IUMI's proposals without any efforts being made to bring any of the subjects under discussion to a conclusion. In the discussions at the Conference, many of the delegates were of the view that the time was not ripe for a consideration of the review of the YAR 1994 as the Rules had just been introduced in the market.[1021] It is submitted that this was a reiteration of the views of interested parties[1022] and commentators[1023] that it was premature to revise the YAR 1994 at the time.

Despite this strong objection by a majority of the delegates at the Conference, it was decided at the Conference that the CMI should continue its work on the possible revision of the YAR 1994 without restricting its terms to the IUMI's proposal.[1024] However, the ICS, the International P&I Group and the MLAUS voted against the proposal at Singapore for a consideration of what changes would be made, if any, to the YAR 1994.[1025]

It could be argued that the outcome of the Singapore Conference shows that IUMI was beginning to get an audience receptive to the proposals that it had been making since the CMI Sydney Conference. However, it is argued that the view amongst majority of interested parties, particularly shipowners and liability insurers, underpin the fact that the IUMI's proposals were ill-timed as the YAR 1994 had just been introduced in the market and their impact was yet to be assessed.[1026]

[1019] *Cf* chap 7 § II*(d)(ii)* supra.

[1020] See *CMI Yearbook 2000 (Singapore I*) for the documents of the Conference.

[1021] G Hudson & M Harvey op cit note 299 at 241.

[1022] See chap 7 § IV*(b)(i)and* V*(c)(ii)*(b) supra.

[1023] See chap 7 § II*(d)(i)* supra.

[1024] *CMI Yearbook 2001 (Singapore II)* 213.

[1025] H McCormack op cit note 818 at 18.

[1026] The MLAUS contended that there was no need to consider the issue of the revision of the YAR 1994 at the time as the Rules had not been given sufficient time to achieve their desired effect in the market. *Cf* chap 7 § IV*(b)(i)* supra.

(d) CMI Bordeaux Colloquium 2003

Subsequently, the CMI held a Colloquium in Bordeaux from 10 to 13 June 2003, which was attended by 226 delegates from 30 NMLAs and three observers.[1027] The CMI ISC on General Average at the Colloquium discussed the General Average Working Group's report on the proposals by IUMI for changes to the YAR 1994 and other issues on general average. At the end of the meeting, Bent Nielsen (the Chairman of the ISC) prepared a summary of the conclusions at the meeting which was unanimously approved by the ISC.[1028]

The views at the meeting showed that there were divergent opinions on issues such as: (i) the abolition or incremental changes to the common benefit principle in the Rules; (ii) redistribution of salvage expenses; (iii) time bar; (iv) interest; and (v) commission. The divergence in opinion on these issues made it difficult to reach any final decisions on the issues. However, it would be evinced that at this stage the majority of the delegates were of the view that there should be a restriction of allowances permitted in the YAR under the common benefit principle. This could be inferred from the recommendation at the meeting that draft wordings should be made to amend the YAR to exclude from general average allowance for crew wages, maintenance, fuel and stores and to limit allowance for temporary repairs so as to avoid any undue advantages for shipowners; particularly in cases where a temporary repair makes it possible for the ship to make final repairs at a place where repairs can be made cheaper than at or close to the port of refuge.[1029]

With respect to salvage, there seemed to be some support of the proposal to exclude allowance for salvage expenses from general average. However, the support was not enough to make a final decision on the issue at the meeting.[1030] With respect to interest, the majority of the delegates were in support of a change whereby the interest rate is made variable in a more simple way, possibly by providing for the CMI to fix the interest rate at suitable intervals.[1031] It is argued that this was a reflection of the need to provide for a flexible system that would take cognisance of prevailing bank rates; unlike the 7 per cent fixed rate in Rule

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[1027] CMI Newsletter No 2 May/August 2003, available at www.sjorettsforeignen.no.no/fileUploads/cmi_newsletter_2003-2.pdf, accessed 20 July 2011.

[1028] Ibid at 1.

[1029] Ibid.

[1030] Ibid at 2.

[1031] Ibid.

XXI YAR 1994. This shows the support of the delegates for the IUMI's proposal on the amendment of the Rule.

However, no decision was made on the abolition of commission and there is no record of whether there was support by the majority of the delegates for the abolition of commission as proposed by IUMI. With respect to the issue of time-bar, there was much resistance, in particular by South American countries and other civil law countries against the proposed draft clause. This resistance was because certain countries have mandatory time bar provisions that cannot be departed from by the agreement of parties.[1032] However, there was a likelihood that a compromise could be reached about an amended wording.

It is argued that at this stage in the deliberations on IUMI's proposals, though there was no support for the abolition of the common benefit principle, the delegates were beginning to be more amenable to the restriction of certain allowances in general average that were allowable under the common benefit principle. Nonetheless, divergent opinions still existed on the need for amendments, the amendments to be made and how best to effect such amendments; showing a lack of consensus amongst interested parties for the revision of YAR 1994.

VII COMPARISON OF THE PROCESS ADOPTED IN THE SUCCESSFUL REVISION OF PREVIOUS VERSIONS OF THE YAR AND THE PROCESS ADOPTED IN THE REVISION OF THE YAR 1994

In the process adopted in the successful revision of the previous versions of the YAR, either in amending the Rules to ensure uniformity in the principles and practice of general average or to take cognisance of developments in international trade and in the maritime industry, the existing Rules were given sufficient time to operate in the market before efforts were made by the maritime community to amend them.[1033] However, IUMI's call that initiated the process of the revision of the YAR 1994 started barely months after the adoption of the YAR 1994 at the CMI Sydney Conference in 1994.[1034] Significantly, Marshall's study of the general average system, which was the basis for IUMI's call for reform, was carried out in 1994 (the same year the 1994 Rules were adopted).[1035] Furthermore, IUMI circulated its

[1032] Ibid at 3.

[1033] See chap 6 § II*(a)* supra.

[1034] See chap 7 § II(a) supra.

[1035] See chap 7 § II*(b)* supra.

questionnaire on the general average system and the YAR 1994 to its member associations two years after the YAR 1994 were adopted.[1036] Thus, the YAR 1994, unlike previous versions of the YAR, were not given sufficient time to have an impact in the maritime industry (for a proper assessment of their effect) by the advocates for revision contrary to the previous trend in the maritime industry.

In the revision of the previous versions of the YAR, there was usually a consensus amongst majority of interested parties; first, on the need for the amendment of the existing set of Rules at the time and secondly, on the requisite amendments to be made.[1037] This consensus amongst majority of interested parties ensured the widespread acceptance and use of amended Rules as the Rules epitomised the compromises reached amongst majority of interested parties.[1038] However, in revising the YAR 1994, there was clearly no consensus amongst majority of interested parties for the revision of the Rules at the time as the majority of interested parties felt that the Rules had not operated for a sufficient time in the market to necessitate a revision of the Rules.[1039] Second, there was no consensus amongst majority of interested parties on the revisions to be made as parties were divided on the issue of amending the Rules along the lines of the common safety principle or the common benefit principle.[1040]

Furthermore, previous amendments were necessitated by significant changes in international trade and in the maritime community; as well as judicial decisions, environmental concerns and identified defects in the YAR.[1041] Thus, previous amendments of the YAR were aimed at simplifying and updating the Rules and rectifying the defects identified in the Rules in their operation in the market. However, there was no significant change in international trade or in the maritime community that necessitated a revision of the YAR at the time and IUMI did not allude to any.[1042] Marshall's study also failed to identify any defects in the YAR 1994 that required a revision of the YAR 1994 at the time.[1043] Significantly, the replies by IUMI's member associations to IUMI's 1996 questionnaire on

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[1036] See chap 7 § II*(c)* supra.

[1037] See chap 6 § II(*b)* supra.

[1038] Ibid.

[1039] See chap 7 § IV*(b(i))*; V*(c)(ii)*(b).

[1040] See chap 7 § IV*(b)(i)*, V and VI supra.

[1041] See chap 6 § II(*c)* supra.

[1042] See chap 7 § II*(b)* and *(c)* supra.

[1043] See chap 7 § II*(b)* supra.

the YAR 1994 did not identify any defects in the YAR 1994. Rather, the replies showed that the YAR 1994 had been accepted in most markets and were in the process of being accepted in more markets.[1044] Thus, there was no significant development at the time that necessitated a call by the IUMI for the revision of the YAR 1994.

VIII CONCLUSION

The IUMI proposals for the revision of the YAR 1994 were based on its perceived inherent flaws in the general average system. It perceived the abolition of the common benefit principle as a means of achieving a measure of equitable balance of the interests of cargo insurers and shipowners. However, the restriction of general average to the common safety principle would have had the legal effect of disallowing in general average expenses incurred for the safe prosecution of the voyage. This would have negated the intention of the maritime community of achieving a merger of the common benefit and common safety principles in the YAR. Furthermore, English law (referred to by IUMI as the legal basis for its proposals) had long recognised the common benefit principle.[1045]

Economically, a restriction of general average to the common safety principle would have had an adverse effect on the world's economy. Merchant shipping is the life blood of the world's economy[1046] as such undue delays in the delivery of cargo to destination as a result of the frustration or abandonment of voyages would have the multiplier effect of adversely affecting international commerce and the world's economy.

The discussions at the CMI meetings showed that there was a measure of support for the consideration of some of IUMI's proposals, although there were strong views that the proposals would have a negative impact on the effectiveness of the general average system as a casualty management system. Though IUMI's proposals raised some relevant issues for consideration, they were ill-timed as the YAR 1994 had not operated in the industry for a sufficient time to assess their impact in the market before IUMI started its call for reform.[1047]

[1044] See chap 7 § II*(c)* supra

[1045] See chap 7 § III*(a)(i)* supra.

[1046] ICS 'Energy and Transport: The Challenge of Climate Change', 1, International Transport Forum, 28 January 2008.

[1047] See chap 7 § IV*(a)(i);* V*(c)(ii)*(b) supra. Rose aptly notes that 'insufficient time had passed to know whether the 1994 Rules were appropriate to become the market standard.' See F Rose op cit note 44 at Preface, vii.

Furthermore, most of the issues raised by IUMI had been raised by interested parties prior to the CMI Sydney Conference 1994[1048] and were dealt with at the Sydney Conference.[1049]

The views of various interested parties show that the CMI did not have the consensus of majority of interested parties in the maritime community for a revision of the YAR 1994 at the time. The CMI in the past had undertaken the amendment of any version of the YAR only where there was a consensus amongst the majority of interested parties on the need to amend the Rules to take cognisance of significant developments in the industry.[1050] There was clearly no significant development at the time that was referred to by IUMI as the basis for its proposals and it is argued that none existed at the time. IUMI was a lone voice on the need for change at the time and such lone voices in the past had been ignored by the maritime community.[1051] It is argued that the pockets of support within the CMI for the consideration of IUMI's proposals were not enough impetus for the CMI to have neglected the ingredients of the previous successful revision processes of the YAR.[1052]

This lack of consensus amongst majority of interested parties on the need for revision and the premature call for the revision of the YAR 1994 contributed to the failure of the YAR 2004 to gain widespread acceptance and use in the industry. This reinforces the need for the maritime community to take cognisance of the identified ingredients of the previous successful revision processes of the Rules in the present efforts at adopting a new set of Rules in 2016.

Significantly, the current process of the general review of the Rules on general average is as a result of the consensus amongst all interested parties of the need for the adoption of a new set of Rules.[1053] It is argued that with the existence of this essential ingredient exemplified in previous successful revisions of the YAR, what is now required is a compromise amongst interested parties on the substantive revisions to be made to the YAR 2004 that will enhance the widespread use of the new Rules to be adopted in 2016.

[1048] See chap 6 § II*(c)(vi)*(a) supra.

[1049] See chap 6 § II*(c)(vi)*(b) supra.

[1050] *Cf* chap 6 § II*(c)* supra.

[1051] Lloyd's call for the abolition of general average in 1877 was ignored by the maritime community as Lloyd's was a lone voice in the industry on the subject at the time. See chap 6 § II*(a)(i)* supra.

[1052] *Cf* chap 6 supra.

[1053] *Cf* chap 5 § VI*(f)* supra. This has even surpassed the previous trend of revising the Rules as a result of a consensus amongst the majority of interested parties for the revision of any existing set of Rules.

CHAPTER 8 CONCLUSION AND RECOMMENDATIONS

I INTRODUCTION

The CMI, as the custodian of the YAR, has initiated the process for the general review of the Rules on general average in a bid for the adoption of a new set of Rules in 2016. The failure of the YAR 2004 to gain widespread use in the maritime industry as a result of the opposition by shipowning interests and the subsequent abortive efforts by the CMI to resolve the resulting impasse between cargo insurers and shipowning interests have meant that the maritime industry's focus has turned to the drafting of a new set of Rules to be approved at the next CMI Conference in 2016. It has been argued in this thesis that the failure of the 2004 Rules to gain widespread acceptance and use in the maritime industry was as a result of the disregard by the IUMI and the CMI of the ingredients of the previous successful processes of the Rules that ensured the widespread acceptance of revised Rules in the maritime industry.[1054] Furthermore, the failure of the changes introduced by the YAR 2004 to achieve a measure of equitable balance of the interests of all interested parties also contributed to the lack of widespread acceptance of the Rules, particularly by shipowning interests.[1055]

If the current efforts aimed at a general review of the Rules on general average are to have any prospects of succeeding, there is a need for the maritime community to take cognisance of the identified ingredients of the processes adopted in the successful amendments of previous sets of YAR prior to 2004.[1056] This will at least ensure that amendments that will be made to the YAR, going forward, will achieve a measure of equitable balance of the interests of all interested parties.

The recent impasse between shipowning interests and cargo insurers on the YAR 2004 is inimical to the cohesiveness and efficiency of the YAR as a risk and loss distribution system and this is detrimental to achieving the objective of uniformity in the principles and practice of general average which was the original reason for the generation of the Rules.[1057] This reason for the generation of the Rules has been the guiding theme of subsequent

[1054] See chaps 6 and 7 supra.

[1055] See chap 4 supra.

[1056] Ibid.

[1057] See chap 6 § II*(a)(i)* supra.

revisions of the YAR prior to 2004; as well as the need to simplify and update the YAR to keep abreast of developments in the commercial world and in the maritime industry.[1058] It is, therefore, of the utmost importance that a similar impasse does not develop in the process of generating the next version of the YAR. The over-arching objective of all involved in the general average system during this process of the review of the Rules on general average should be the avoidance of the repeat of such impasse to ensure that the new Rules to be adopted will not be consigned, like the YAR 2004, to the recesses of maritime history.

Based on the foregoing, recommendations are made in what follows with regard specifically to certain substantive revisions of the Rules and more generally, the process for considering these and any other revisions that might be proposed leading up to the CMI Conference in 2016. The proposals with regard to substantive revisions consider the effect of such amendments and are informed by a recognition of the need to balance the interests of the parties involved. The recommendations relating to process recognise the need for reaching a level of acceptance of any revision that will ensure not only their formal adoption but also implementation. In this process, there is a need for concerted efforts by all interested parties in the general average system; particularly cargo insurers and shipowining interests, as the main interest groups, to be prepared to compromise.

II RECOMMENDATIONS AS TO SUBSTANTIVE REVISIONS OF CERTAIN RULES

For the YAR to remain attractive as a risk and loss distribution system it should not be perceived by any interest as a system that is designed to merely transfer the bulk of the risk and cost of general average from one interest to another.[1059] To achieve a balance of the interests of these interest groups that will lead to the acceptance of any adopted Rules, there is a need for a the spreading of the risk and cost of general average with at least a measure of equalisation among the interests and ensure that the Rules reflect current commercial realities.[1060]

The current review of the Rules on general average is pivotal in ensuring that amendments made to the content of the YAR will not only be accepted by all interested

[1058] See chap 6 § II*(c)* supra.

[1059] See chap 7 § II*(b)* supra.

[1060] Remarks of David Taylor op cit note 806 at 7.

parties in the general average system but also implemented. Bearing this in mind, the recommendations made with regard to the substantive Rules are restricted to Rule VI on salvage remuneration and Rule XI on crew wages and maintenance whose amendment in 2004 appear to have been the main reason for shipowning interests' refusal to implement the Rules. This seems so because those changes will lead to the transference of significant cost from cargo to shipowning interests than the other changes.[1061] Thus, these recommendations are made with the view that the other changes made in the YAR 2004 should be carried forward, in their present form, to the new Rules to be adopted as they ensure a measure of equitable balance of the interests of the parties with regard to the circumstances covered by those Rules. Significantly, shipowning interests are not opposed to those changes in their current form.[1062]

In making these recommendations with regard to the substantive revisions, an attempt has been made to address the objections to those Rules in their current form by formulating a compromise text that might be viewed by cargo and shipowning interests as a more equitable redistribution of risk and cost. An attempt has also been made to make them linguistically consistent with the existing Rules, so that if adopted, they will fit coherently into the whole.

(a) Rule VI - Salvage remuneration

The main reason shipowning interests are opposed to the changes introduced by the YAR 2004 is that the re-apportionment of salvage expenditure in general average has been limited in Rule VI to instances in which a party pays salvage remuneration on behalf of another party or other parties.[1063] This is because the change will lead to the transference of a significant percentage of the cost of general average from cargo insurers to shipowning interests.[1064] Cargo insurers, however, are of the view that the re-apportionment of salvage expenditure in general average delays the adjustment process, is not equitable in some instances and leads to

[1061] See chap 4 § II*(a)* and *(b)*.

[1062] See the Response of the BMLA to the CMI Report on the general review of the Rules on general average, 1, available at www.comitemaritime.org/Uploads/Work%20In%20Progress/Rules%20of%20General%20Average/Reply_MLA_UnitedKingdom_QuestGA2013.pdf, accessed 20 August 2013. See also B Nielsen & R Shaw 'Report on the meetings of the CMI Ad-hoc Working Group on General Average' in *CMI Yearbook 2013* (*Beijing II*) 337.

[1063] See note 570.

[1064] See chap 4 § II*(a)* supra.

increase in the cost of general average adjustments;[1065] particularly to cargo insurers. Thus, there is the need for an amendment to Rule VI that will ensure a compromise between shipowning interests and cargo insurers on the Rule. The compromise recommended is that the provisions of Rule VI YAR 1994 should essentially be retained with certain additions. The first of these amendments is aimed at ensuring that uneconomic salvage expenses are not re-apportioned in general average. The second amendment has been proposed as a trade-off that could ensure a compromise by cargo insurers on the proposed amendment of Rule VI.

(i) *Amendment addressing problem of uneconomic adjustments*

It is proposed that a new paragraph (c) should be included in Rule VI that will read as follows:

> '(c) The average adjuster shall determine the reasonableness of the allowance of salvage expenditure in general average without prejudice to the right of the parties to be approached by the average adjuster, before making such determination, where the adjuster is of the opinion that allowing salvage expenditure in general average will not be reasonable in any given case. Such determination may be challenged on the ground that it is manifestly incorrect.'

This is to guard against the re-apportionment of uneconomic salvage expenditure in general average. Based on the earlier analysis of the options, on the amendment to be made to Rule VI, proposed by the CMI IWG in the CMI 2013 questionnaire on the general review of the Rules on general average,[1066] it is recommended that the new paragraph should be worded in such a way as to require average adjusters to first approach the parties involved in the adventure where adjusters are of the view that the likely effect of re-apportioning salvage expenditure in general average in any given case will be disproportionate to the time and cost involved. This is with a view for the parties to be intimated of the need for such uneconomic salvage expenditure not to be re-apportioned and for them to reach an agreement amongst themselves that there be no re-apportionment. Second, the adjuster should be empowered to decide the reasonableness of re-apportioning salvage expenditure in general average irrespective of the outcome of the adjuster's discussion with the parties. This is necessary as

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[1065] See chap 7 § III*(e)* supra.

[1066] See chap 5 § VI*(d)(i)* supra.

there might be instances where a party could insist on the re-apportionment of uneconomic salvage expenditure after been advised against such re-apportionment by the adjuster. Thus, the re-apportionment of salvage expenditure in general average should be left to the discretion of average adjusters as skilled and reputable neutral parties in the general average system.[1067] Such exercise by the adjuster of his/her skill and expertise could ensure that uneconomic salvage expenses are not re-apportioned in general average and ensure a measure of balance of the interests of parties with regard to the provisions of Rule VI. The competence and neutrality of average adjusters was judicially recognised by Kaufman J:

> 'The members of this profession enjoy a very high reputation for fairness to ship and cargo alike, and their services are customarily sought whenever there is a situation of general average.'[1068]

As pointed out by Allen, average adjusters 'successfully conclude hundreds of cases annually without the necessity of litigation'[1069] and it is argued that the dearth of cases on general average in the past two decades attests to this fact.

However, such discretion by the adjuster should be exercised in light of the Rule Paramount[1070] and can be challenged by a party who is of the view that the determination by the adjuster was manifestly incorrect taking cognisance of the facts made known to the adjuster at the time of the adjustment. Thus, the recommended re-apportionment of salvage expenditure in general average based on the adjuster's discretion has two safe guards. First is that the adjuster's discretion will be exercised in light of the Rule Paramount and the second is that such exercise of his/her discretion is subject to be challenged for being manifestly incorrect (this is analogous to the safe guard provision in Rule E[1071] YAR 1994 and YAR 2004 with respect to the production of documents in proof of a general average claim).

[1067] J Spencer op cit note 478 at 1247.

[1068] See *Cia Atlantica Pacifica SA v Humble Oil & Refining Company* 247 F Supp 884 (DC Md 1967) at 892; G Gilmore & C Black *The Law of Admiralty* (1957) 225.

[1069] J Allen op cit note 771 at 416.

[1070] See chap 6 § II*(c)(vi)*(b)(i) supra.

[1071] See chap 6 § II*(c)(vi)*(b)(ii) *supra.*

(ii) Amendments with regard to legal fees and other costs incidental to salvage operation

Furthermore, it is proposed that legal fees and other costs incidental to a salvage operation should be excluded; leaving only the allowance of interest on disbursements for salvage operations. This is because such legal and other incidental costs (together with interest) enhance the expense of the re-apportionment of salvage expenditure in general average on cargo owners and ultimately on cargo insurers.[1072] Though no reference to such costs is made in Rule VI YAR 2004, they are customarily allowed by adjusters under Rule C as a direct consequence of engaging salvors.[1073] It is argued that the removal of such legal and other costs from Rule VI by letting them lie where they fall (and ultimately reducing the cost on cargo of the re-apportionment of salvage expenditure in general average) could enhance cargo interests' co-operation with other salved interests, particularly shipowning interests, resulting in early negotiated settlements.

It is argued that the proposal with regard to the re-apportionment of uneconomic salvage expenditure will have the effect of addressing the concerns of interested parties on the provisions of Rule VI by ensuring that though salvage expenditure will be allowed to be re-apportioned in general average (as canvassed by shipowning interests) there will be no re-apportionment of uneconomic salvage expenditure. In addition, the proposed trade off could achieve a compromise by cargo insurers on the proposed amendment to Rule VI that could ensure the avoidance of any impasse on the provisions of Rule VI.

(b) Rule XI - Wages and maintenance of crew

It is recommended that the text of Rule XI(b) 1994 YAR should be retained in the new YAR to be adopted in 2016, without amendment. This will allow in general average the wages and maintenance of crew during the extra period a vessel is detained at a port of refuge undergoing repairs to accidental damage in addition to the allowance in Rule XI(a) YAR 2004 of the cost of crew wages and maintenance in deviating to a port of refuge and regaining the normal route from a port of refuge.

Crew wages and maintenance during the extra period of detention of a vessel at a port of refuge was allowed as general average under the law of many countries prior to the

[1072] J Spencer op cit note 657 at 5.

[1073] Ibid.

YAR.[1074] The importance of the allowance of crew wages and maintenance at a port of refuge was underscored in the early years of the efforts aimed at achieving uniformity in both the Glasgow Resolutions 1860[1075] and York Rules 1864.[1076] Such costs are allowed in general average as they are incurred as a consequence of efforts to ensure the successful completion of the voyage from a port of refuge. The cost of crew wages and maintenance could involve a considerable outlay on the part of the shipowner, particularly where a vessel is detained at a port of refuge for a considerable period of time. The shipowner bears an additional burden of paying and maintaining his crew though he is deprived of their services and consequent loss of earnings. Thus the cost of crew wages and maintenance when a vessel is detained at a port of refuge represents a real cost to the shipowner, especially in a weak freight market where shipowners may experience difficulty in covering their running costs.[1077] Furthermore, such costs are incurred for the mutual benefit of the interests involved in a sea adventure as they are incurred while the vessel is detained at a port of refuge carrying out needed repairs (or performing other acts) necessary for the successful completion of the voyage.

The YAR 2004 amendment to Rule XI disallowing such costs in general average is likely to have the effect that the shipowner will be compelled to incur additional expense in the form of premium for a special cover for crew wages and maintenance where a vessel is detained at a port of refuge as he will not be able to recover this cost as a particular average claim under the existing hull policies in the market.[1078] It is argued that allowing the cost of crew wages and maintenance while a vessel is detained at a port of refuge will not impose undue burden on cargo insurers as it is estimated that the removal of such cost in general

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[1074] See chap 4 § II*(b)* supra.

[1075] See chap 6 § II*(a)(i)* supra.

[1076] Ibid.

[1077] R Shaw 'CMI Conference Vancouver 2004' (2004) 10 *JIML* 440 at 441.

[1078] See chap 4 § II*(b)* supra.

average will not necessarily give rise to significant savings to cargo insurers[1079] because such costs are normally insignificant in light of the total sums allowable in general average.[1080]

Furthermore, as shown earlier,[1081] such costs are incurred for the benefit of both cargo and the shipowner as they are incurred both for the common safety and common benefit of the adventure.

Rule XI(b) YAR 1994, though subject to the Rule Paramount, provides that such cost must be 'reasonably' incurred. Though this criterion in Rule XI(b) YAR 1994 is superfluous in light of the Rule Paramount, it underscores the intention of the draftsman of the Rule that only such cost that is reasonably incurred in the prevailing circumstances that will be allowed under the Rule. This prevents the abuse of the Rule by unscrupulous shipowning interests.

In making this recommendation, it is recognised that other interests do not enjoy the equivalent of the preferential treatment reserved for shipowners under Rule XI(b) YAR 1994; though these interests could also suffer economic losses, which are not allowed in general average, in consequence of the prolongation of the voyage.[1082] However, it is argued that the restoration of the cost of crew wages and maintenance while a vessel is detained at a port of refuge could have the effect of persuading shipowning interests to reach a compromise with cargo insurers on other provisions of the YAR to be adopted in 2016; particularly Rule VI.

There seems so little scope for compromise on the part of shipowners on this that it seems safe to predict that any amended version of the YAR not retaining the provisions of Rule XI(b) YAR 1994, even if adopted by the CMI, will not be implemented by shipowners.[1083]

[1079] Brown estimates that the savings to cargo as a result of the removal of crew wages and maintenance in the YAR 2004 will be with regard to adjuster's fees and administrative fees. See B Browne op cit note 396 at 12. Furthermore, Brown estimates that the restoration of crew wages and maintenance while a vessel is at a port of refuge will increase the sums shifted in general average by only 1 to 2 per cent. See B Browne op cit note 395 at 2.

[1080] See the Reply of the Norwegian MLA to the CMI IWG on General Average Report on the proposals for the revision of the YAR 2004, 1, available at www.sjorettsforeningen.no/site/wp-content/uploads/2012/11/YAR.pdf, accessed 3 July 2013.

[1081] See note 419 supra.

[1082] For eg, cargo might suffer financial loss because of its inability to dispose valuable goods or loss of profit as a result of the prolongation of the voyage.

[1083] The importance of the restoration of crew wages and maintenance while a vessel is detained at a port of refuge in avoiding an impasse on the new Rules to be adopted is underscored by the fact that 95 per cent of the replies of NMLAs to the CMI 2013 questionnaire on the review of the Rules on general average stated that the

III RECOMMENDATIONS AS TO THE PROCESS OF ADOPTING THE RULES

(a) Introduction

The author in making recommendations on the process of adopting the new rules draws from the ingredients of past successful revision processes as compared with the revision process of the YAR 1994.[1084] These recommendations are made pursuant to the identified flaws in the revision process of the YAR 1994 to ensure that such pitfalls are avoided in the process of adopting the new set of Rules. The recommendations that follow are essentially centred on the ingredients of proper timing of calls for revision and the level of consensus necessary for the call for revision and in adopting any proposed amendments.

(b) Proper timing of efforts to revise the Rules

History has shown that the previous successful amendments of the Rules were as a result of the sufficient time that was allowed by the maritime community for any given set of Rules to have an impact in the industry before efforts were made to rectify any identified defects in the Rules or to amend the Rules to take cognisance of significant developments in international trade and in the maritime industry.[1085] Thus, the proper timing of efforts at revising any set of Rules is of the essence in ensuring widespread acceptance of the amended Rules.

Seen against this background, the IUMI's call for the revision of the YAR 1994 barely months after the Sydney Conference was a significant flaw in the process of revising the YAR 1994 and this contributed to the opposition by shipowning interests to the revision of the YAR 1994 and the incorporation of the YAR 2004 in carriage contracts.[1086]

It is recommended that in future revisions of the YAR, after the adoption of the new set of Rules in 2016, sufficient time should be allowed for any set of Rules to have an impact in the industry before efforts are made to amend the Rules. In making this recommendation, it is not proposed that any set of Rules must be allowed to operate in the market for up to 25 years

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provision should be restored in the YAR. See the Report of the CMI IWG on General Average, 88-89, dated 12 August 2013. This view was expressed in the replies by the NMLAs of Argentina, Belgium, Brazil, Canada, China, Croatia, Denmark, Finland, France, Germany, Israel, Italy, Japan, Netherlands, Norway, Slovenia, Spain, Switzerland, Ukraine and the United Kingdom.

[1084] See chap 7 § VII supra.

[1085] See chap 5 § II*(a)(ii)* supra.

[1086] See chap 7 supra.

(as was the case in the previous amendments of the Rules from 1890 to 1994). This is because the pace of developments in the maritime industry at the moment is different from the pace of developments in the late 19th century and in the 20th century.[1087] The maritime industry has evolved from the era of sailing vessels and steamships to the era of sophisticated vessels and electronic data that ensure the prompt transportation of large volume of cargo to destination within specified time schedules and changes in the industry continue at a fast pace as a result of technological advancements.[1088] Thus, there should be no hard and fast rule on the subject.[1089] Owing to the present fast pace of developments in the industry, it is recommended that existing Rules should be allowed a minimum of 10 years to operate in the industry through their incorporation in carriage contracts and marine insurance policies before efforts are made to amend the Rules. A minimum of 10 years, it is argued, should be sufficient to identify any weakness in the existing Rules that should be rectified or any additions to be made to the existing Rules to enhance their effectiveness as a risk and loss distribution system.

(c) Consensus amongst interested parties

The lack of consensus amongst the majority of interested parties on the need for the revision of the YAR 1994 and the requisite changes to be introduced by the Rules contributed significantly to the failure of the 2004 Rules to gain widespread acceptance and use in the market.[1090] The YAR from inception and subsequent amendments to the YAR prior to 2004 have been a product of the consensus reached amongst majority of interested parties on the need for revision and the amendments to be made, thereby making any approved set of Rules a product of 'the distillation of the thoughts of dedicated parties and the consensus they represent; reached through the process of reason, negotiation and compromise in achieving a

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[1087] Remarks of David Taylor op cit note 806 at 7.

[1088] For eg, Maersk Line Shipping Company on 13 November 2013 took delivery of the largest container ship in the world as part of the batch of such vessels that are being constructed for it. Such 'ocean giants' and other developments that may arise in the maritime industry will definitely have an impact on general average and may require the Rules to be amended within a shorter period of time to address any issues that may arise in the application of the Rules in the market with respect to these developments. For more details on these vessels referred to as 'Triple- E' vessels, see www.worldslargestship.com, accessed 2 January 2014.

[1089] Remarks of David Taylor op cit note 806 at 7.

[1090] See chap 7 supra.

blend of principles towards achieving uniformity.'[1091] The lack of widespread acceptance of the YAR 2004 in the industry has reinforced the premise that consensus amongst the majority of interested parties on the revision or adoption of any set of Rules is pivotal to the acceptance and use of any set of Rules in the industry.

To achieve a consensus amongst interested parties on the revision of any set of Rules, it is recommended that a close working relationship should be established amongst shipowning, insurance and adjusting associations in pre-conference considerations of proposals to review the Rules on general average.[1092] Such active collaboration would enable parties to listen and appreciate the arguments presented by all interested parties in the maritime industry.[1093] Such a collaborative measure could lead to compromises that could ensure a consensus amongst the interested parties on the requisite amendments to be made to any set of YAR. Particularly such pre-conference collaboration should be encouraged between BIMCO and the IUMI as they are the main interest groups that need to reach a compromise with respect to the provisions of the YAR. Taking cognisance of their influence in the shipowning and insurance communities respectively, it is argued that such collaborative efforts between these bodies could ensure the adoption of Rules that will gain widespread acceptance and use in the maritime industry.

(c) Equitable balance of interests of parties

The inequitable balance of most of the changes introduced by the YAR 2004 in favour of cargo interests significantly contributed to the opposition by shipowning interests to the Rules and the subsequent lack of widespread acceptance and use of the YAR 2004 in the market.[1094] This is in contrast to previous versions of the YAR prior to 2004 which had ensured a measure of equitable balance of the interests of majority of interested parties and this resulted in their widespread use in the market. Commenting on the previous versions of the YAR, Taylor notes that 'close regard should be had to the unique uniformity of acceptance of the

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[1091] F Pietropola 'Why Change the Y/A Rules 1994? Who benefits; who doesn't? An Adjuster's Viewpoint', 4, 2003 Chairman's address, AAA, United States, available at www.averageadjustersusaca.org/assets/Uploads/2002HMM.pdf, accessed 3 December 2012.

[1092] G Hudson & M Harvey op cit note 299 at 282.

[1093] Remarks of David Taylor op cit note 806 at 9.

[1094] See chap 4 supra.

Rules and to the extent to which those Rules balance the interest of all parties.'[1095] Of significance was the introduction of the Rule Paramount in the YAR 1994 to ensure a measure of equity in the general average system by ensuring that only general average acts that are reasonable in any given circumstance would be allowable in general average.[1096] Pertinently, the need to ensure a measure of equitable balance of the interest of all parties was underscored in the resolution adopted at the CMI Beijing Conference in 2012 for the adoption of a new set of Rules.[1097]

The question remains how the varying interests of all interested parties can be balanced and whether an 'equitable balance' can ever be achieved. It is argued that achieving an equitable balance of the interests of interested parties is an arduous task that may not be feasible. What could be achieved, it is argued, is an appreciable degree of equitable balance of the interests of parties. It is argued that achieving this might require a change of practice by the CMI. In achieving a measure of equitable balance of the interest of all parties, it is recommended that the CMI as the custodian of the Rules should first carry out a study of the present general average system to identify measures that could be adopted in the YAR that could result in a measure of equitable balance of the interests of insurers and shipowning interests. This is because the CMI in recent years has not carried out any study on measures that could be adopted to achieve a measure of equitable balance of the interest of the various interested parties in the YAR.[1098] It is argued that such a study is imperative as the perception of the general average system, as exemplified in the YAR, as a mechanism that tilts in favour of shipowning interests[1099] seems to be the pith of the agitations by cargo insurers against the system. Furthermore, achieving a measure of equitable balance of the interests of interested parties is not feasible without first understanding the present general average system.

It is argued that such a study would be invaluable and would be accorded recognition by the various interest groups as it would not be seen as an attempt by any interest to advance

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[1095] *CMI Yearbook 1992*, 98.

[1096] See chap 6 § II*(c)(vi)*(b)(i) supra.

[1097] See chap 5 § VI*(f)* supra.

[1098] Studies of the general average system were carried out by Matthew Marshall and UNCTAD and these studies contributed invaluably to the debate on the revision of the YAR 1994. See chap 7 § II*(a)* and chap 6 note 652 supra.

[1099] G Gilmore and C Black op cit note 1068 at 248.

its sectarian interest.[1100] The findings in the CMI study should then form the basis of a questionnaire to be drafted by an IWG on General Average and circulated to the NMLAs on the amendment of the YAR.[1101] Such a questionnaire should be circulated on time[1102] to NMLAs to provide interested parties with sufficient time for proper analysis of the CMI study, consultations and deliberations amongst themselves towards reaching compromises on the requisite changes that would ensure a balance of their interests prior to any CMI Conference for the amendment or adoption of any set of Rules. Reaching compromises prior to CMI Conferences amongst interest groups could ensure that the Rules to be adopted at the CMI Conference would be a mere formal endorsement of the understanding that has already been reached by the parties at ensuring a balance of their respective interests.

In making this recommendation, the author is aware of the CMI practice of forming an IWG that sends questionnaires to NMLAs and collates replies from the NMLAs; which then form the basis for further discussion and study on the issues raised in the replies.[1103] However, it is argued that such practice may not necessarily produce an effective result in balancing the interest of all interested parties in the present general average system as the questionnaires are sent to NMLAs without first conducting a study of the general average system to understand the current state of the system through information and data that would be collated from a wide spectrum of interested parties. A holistic study of the general average system, it is argued, should precede the drafting and circulation of questionnaires to NMLAs.

[1100] UNCTAD had requested the CMI to carry out a study, in collaboration with marine insurers, on the possible insurance arrangement that could take the place of general average where the concept is abolished or to find ways to simplify the Rules if abolition is deemed impracticable. See note 729 supra. However, the author is of the view that such a study by the CMI at present should be to find ways of achieving a measure of equitable balance between the various interest groups and to enhance the efficiency of the general average system.

[1101] It is argued that the failure by the CMI to carry out a study of the general average system before preparing the CMI 1999 questionnaire on the possible revision of the YAR 1994 resulted in the then IWG asking a wrong question in the first question of the questionnaire. See chap 7 § IV*(b)(i)* supra.

[1102] The short period between the circulation of the CMI IWG proposals for the possible amendment of the YAR 2004 and the CMI Beijing Conference 2012 contributed, at least to some measure, to the failure of the parties to reach a consensus on the proposals before the Conference as parties did not have sufficient time to consult and deliberate amongst them. See chap 5 § VI*(f)* supra.

[1103] J Sweeney 'From Columbus to Cooperation – Trade and Shipping Policies from 1492 to 1992' (1989-1990) 13 *Fordham International Law Journal* 481 at 495.

IV LOOKING TO THE FUTURE

The YAR epitomise the efforts that have been made by the maritime community, over a century, to achieve uniformity in the principles and practice of general average and to constantly modernise the Rules to take cognisance of significant developments in the maritime industry and the commercial world. Though not a convention or a treaty, the YAR represent one area of maritime law where uniformity has been achieved to a great extent towards driving maritime commerce. Despite objections to certain provisions of the YAR, the Rules continue to serve a useful purpose as a risk and loss distribution system. As noted by leading commentators, the YAR 'continue to perform a useful function in patrolling between two important borders that lie between matters that form part of the shipowner's reasonable obligations to carry out the contracted voyage and the losses and expenses that arise in exceptional circumstances and property and liability insurers as their differing responsibilities meet and sometimes merge, in the context of a serious casualty.'[1104]

However, the continued effectiveness and attractiveness of the YAR as a casualty management system depends on its robustness and ability to adapt to prevailing circumstances in the market and in the maritime industry in order to continuously ensure a measure of equitable balance of the interest of all interested parties in the general average system. For the system to continue to enjoy the acceptance of all interested parties it must not be perceived as a system that tilts in favour of any interest and places the bulk of the burden of general average on one interest group. In echoing this sentiment, Cornah cautions that 'however successful in the past, general average and the YAR must earn their place in the future on the basis of practical merit and relevance to modern trade.'[1105] The Rules must not only be abreast of prevailing commercial realities through a systematic review but must epitomise such commercial realities. Taylor aptly notes that 'the systematic re-examination of the Rules is crucial so that account can be taken of current changes, current attitudes, current case law, current legislation and indeed insurance current attitudes and policy forms.'[1106] Such a holistic re-examination of the Rules will ensure that the Rules are examined taking cognisance of all factors that relate to general average which affect the various interested parties.

[1104] J Cooke & R Cornah op cit note 28 at 18-19.

[1105] R Cornah op cit note 17 at 165.

[1106] Remarks of David Taylor op cit note 807 at 7.

The current process initiated by the CMI towards a general review of the Rules on general average must be based on current commercial realities and developments in the maritime industry for it to culminate in the adoption of a set of YAR that will gain widespread acceptance and use in the industry. To achieve the desired result in the current amendment process, cogent concerns raised by all interested parties about the general average system and the YAR should be examined and compromises reached by parties on the issues that are raised towards reaching a consensus that will ensure increased uniformity in the general average system. As noted by Schumacher:

> '… the codes which regulate man's social and economic conduct do not arrive full-blown, nor do they "just happen". Such codes – and the York-Antwerp Rules are among them – are the distillation of the thoughts of dedicated men and the accord they represent is reached through the process of reason, negotiation and compromise to achieve that which may not be perfect, but which blends principles and practices in such a way as to be both workable and enduring.'[1107]

Thus, to achieve an effective general average system the need for collaboration and consultations amongst the various interest groups is of the essence for the realisation of a general average system that will balance their interests. Interested parties in the general average system, instead of regarding themselves as opposing interests, should regard themselves as 'general average partners' with the task of providing a system that will effectively drive global commerce and at the same time take cognisance of their varied interests. As noted by Wigmore, 'what is needed is more self-sacrifice among the interests concerned (ie more enlightened self-interest).'[1108] At a time when Port-State Control,[1109] the ISM Code,[1110] and General Average Absorption Clauses[1111] are having a positive impact in the reduction of general average situations and the adjustment of uneconomic general average claims, the YAR should provide an enabling framework that complements these efforts by

[1107] Quoted in F Pietropola op cit note 1091 at 5.

[1108] J Wigmore 'The International Assimilation of Law – Its Needs and its Possibilities from an American Standpoint' (1915-1916) X *Illinois Law Review* 385 at 390.

[1109] *See* note 791 supra.

[1110] *See* note 790 supra.

[1111] See chap 3 § III*(c)(ii)*(c)(v) supra.

the maritime industry. This should be the over-arching aim of all involved in the general average system.

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