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GENERAL AVERAGE A STUDY OF EMIRATI LAW, YORK-ANTWERP RULES AND ENGLISH LAW

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ABSTRACT

The rules concerning general average are amongst the oldest in the maritime field. They have their basis in the fact that, during a voyage, the ship, cargo and freight form part of a common venture. The principle underlying the rules is simple. If the common venture comes under threat during a voyage - for instance, because the ship springs a leak and is in danger of sinking - then extraordinary sacrifices and expenditure necessary to prevent the loss of the venture must be apportioned according to the value of each respective interest.

The rules on general average have developed over time and the main legal source of the rules today is the so called York- Antwerp Rules. Emirate has adopted the York-Antwerp Rules into its Maritime Code.

It is proposed to discuss in this article the principle of general average; and to show how far it has been established, and what rules based on it have been laid down by judicial authority.

B. INTORDUCTION

In every adventure involving the carriage of goods by sea, maritime law implies an agreement between all interested in that adventure to underwrite each other against deliberate losses suffered by any of them for the greater benefit of all. In this respect, maritime law recognises that the shipper, the carrier and even the crew of a ship engaged in the carriage of goods are bound by a joint adventure in which all share a common interest in the safe arrival of the ship at her destination. Implicit also therefore is an understanding between these joint venturers that circumstances may arise during the voyage which require the master of the ship to make an extraordinary and justifiable sacrifice, perhaps by jettisoning cargo, by intentionally subjecting his ship to damage, or by incurring extraordinary expenditure, and thereby avoid the loss of both ship and cargo carried on board. In these circumstances, the party sustaining loss or incurring expense for benefit of the whole may look for recompense to the other interested parties who have benefited from the safe conclusion of the voyage. The legal relationship with which maritime law exacts payment from the beneficiaries of the sacrifice or expense to those suffering loss, is known as

'general average'.(2) It is a relationship, which flows from the nature of the circum-stances in which the ship finds herself and from the type of sacrifice reasonably made to extricate her and her remaining cargo from those circumstances. It requires neither a contractual nexus nor the fault of any party, and is a remedy which rests on this equitable principle - that it is most consistent with justice, where the property of several has been equally in peril that those whose property has been saved, by the sacrifice of the property of others, share the loss of what has been sacrificed, in common with its owners.(3)

Notwithstanding the universality of the principle of general average, the method of assessment of general average contribution varies materially from one country to another. This gave rise to very troublesome problems under conflict of laws. Shipowners, merchants, underwriters and average adjusters have therefore collaborated, and after joint deliberations produced a standard set of rules relating to general average.(4) These rules are known as the York-Antwerp Rules, so called from the seats of the conferences which first brought them into being. The first general average rules

(2) General average is said to date from the Rhodian Law of approximately 800 B. C., which stipulated that if a ship was in danger and cargo was jettisoned to save the ship, then the ship and the remaining cargo were required to make a contribution to the owner of the lost cargo; see C. Abbott, A Treatise of the Law relative to Merchant Ships and Seamen, 14th ed., p. 752: "The principle of this general contribution is known to be derived from the ancient laws of Rhodes, being adopted into the Digest of Justinian with an express recognition of its true origin. The wisdom and equity of the rule will do honor to the memory of the state, from whose code it has been derived, as long as maritime commerce shall endure."

(3) "The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument, as upon a general rule of maritime law" per Abbott C.J. in ***Simonds v. White*** (1824) 2 B&C 504, at p. 811. Brett L.J., in ***Burton v. English*** (1883) 12 Q.B.D. 218, 220 said:
"I do not think that it (the right to contribution) forms any part of the contract to carry, and that it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify the loss of property which is sacrificed by one in order that the whole adventure may be saved."

(4) 'It may safely be said that general average is the field of maritime law where the international unification effort has succeeded to the greatest degree.' N G Hudson 'The New York-Antwerp Rules Examined' 1974 LMCLQ 162.
The York-Antwerp Rules, it should be particularly understood, are not the subject of national statutes or international conventions, but are imposed by special clauses in standard form contracts - principally bills of lading; see ***Goulandris Brothers Ltd. v. B. Goldman & Sons Ltd.*** [1958] 1 Q.B. 74 at p. 91. A typical general average clause reads as follows:
'General average shall be adjusted, stated and settled according to York-Antwerp Rules 1994 at the port of or last port of discharge at Carrier's option and as to matters not provided for in these Rules, according to the laws and usage at the port of or any other place at the option of the Carrier.'

were agreed upon in 1860 as the Glasgow Rules. These were followed by the York Rules of 1864 and the York-Antwerp Rules of 1877. As from that time the rules have been more and more frequently incorporated in contracts of affreightment, and also in policies of marine insurance, until now it is the usual practice to adopt them. At the same time they have been revised from time to time, that is in 1890, 1924, 1950, 1974 (amended in 1990), 1994 and 2004.(5)

Some countries have incorporated the Rules into their maritime legislations,(6) while others leave it to the contracting parties to agree to their

(5) Since 1924 the Rules have consisted of a number of lettered rules (A-G), which deal with matters of general principle, followed by numbered rules (I-XXII) which provide for specific points in more detail. Both sets of Rules are proceeded by a rule of interpretation, providing that in the adjustment of general average, the lettered and numbered rules shall apply to the exclusion of any law and practice inconsistent there with. It furthermore provides that the numbered rules will proceed on the lettered rules.
Without going into details, the various numbered rules, relating to particular cases, can be listed as follows:

- Rule I: jettison of cargo
- Rule II: damage by jettison and sacrifice for the common safety
- Rule III: extinguishing fire on shipboard
- Rule IV: cutting away wreck
- Rule V: voluntary stranding
- Rule VI: salvage remuneration
- Rule VII: damage to machinery and boilers
- Rule VIII: expenses lightening a ship when ashore, and consequent damage
- Rule IX: ship's materials and stores burnt for fuel
- Rule X: expenses at port of refuge, etc.
- Rule XI: wages and maintenance of crew and other expenses bearing up for and in a port of refuge etc. ...
- Rule XII: damage to cargo in discharging, etc.
- Rule XIII: deduction from costs of repairs
- Rule XIV: temporary repairs
- Rule XV: loss of freight
- Rule XVI: amount to be made good for cargo lost or damaged by sacrifice
- Rule XVII: contributory values
- Rule XVIII: damage to ship
- Rule XIX: undeclared or wrongfully declared cargo
- Rule XX: provision of fund
- Rule XXI: interest on losses made good in general average
- Rule XXII: treatment of cash deposits.

There are a number of differences between **YAR** 1974, 1994 and 2004the three sets of Rules, of which the most important are:
'(1) The 1994 Rules introduced (a) a Clause Paramount, which excludes from general average any sacrifice or expenditure which was not reasonably made or incurred, and (b) provisions relating to pollution and damage to the environment.
(2) The 2004 Rules (a) exclude from general average salvage remuneration, and crew wages, and (b) introduce a time bar for claims.'
(6) ***Emirati Maritime Code 1981*** adopted, in general, 1974 Rules; see the ***Explanatory Note to the Draft of the Emirati Maritime Code***, p. 106.

application.(7) In the increasingly rare instances where the Rules do not apply to a particular case of general average or where the Rules, not being a self-contained code, require supplementation, the law of the country whose law governs the general average must be applied.

The rules concerning general average are laid down in Articles 340 till 365 of the *Emirati Maritime Code 1981*.

This article attempts to explore various issues within the general average system itself in the context of *Emirati Maritime Code 1981* (hereinafter referred to ***EMC***) and York-Antwerp Rules (hereinafter referred to **YAR**).(8) It will cover the following main issues:

1. Definitions of General Average.

2. Essentials of General Average Claim.

3. Adjustment of General Average.

Because of the lack of decided cases in general average matters in Emirate, reference will be made in the present study to English law(9) because owing to more activity in its courts, England has developed the law of general average. Emirate has enjoyed no opportunity to do the same.

To prevent confusion, we must realize that the term 'general average' is used in three distinct, though connected, senses, viz., to denote the act of making the sacrifice, the loss sustained by the sacrifice, and the contributions levied on the adventure to recoup the loser.(10)

A final point, in considering the subject of general average it is necessary for the present to dismiss altogether the question of marine insurance.

1. DEFINITION OF GENERAL AVERAGE

According to Article 342/1 of the ***EMC***, general average consists of '(Free translation) *extraordinary sacrifices or expenditures intentionally and reasonably made for the common safety for the purpose of preserving the ship or its cargo from peril threatening them.*'(11)

(7) The Rules do not have the force of law in the United Kingdom except by express agreement in particular transactions; see Carver, Carriage by Sea, 13th ed., para. 1350.
(8) Unless otherwise stated the comments apply equally to the 1974, 1994 and 2004 Rules.
(9) Reference also has to be made to American law where this appeared to be desirable.
(10) Carver, Carriage By Sea, 13th ed., para. 1351.
(11) *EMC*, Article 342/1 reads in Arabic as follows:

YAR also provide a definition in Rule A:

'There is a general average act, when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure'.

The Marine Insurance Act 1906 of the United Kingdom defines 'general average act', in virtually identical terms at Section 66 (2):

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

The above definitions are, in themselves, a codification of the principles laid down in past English cases of which the definition provided by Lawrence J. in ***Birkley v. Presgrave*** [(12)] is particularly noteworthy:

"All losses which arise in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of ship and cargo, comes within general average and must be borne proportionately by all who are interested."[(13)]

2. ESSENTIALS OF GENERAL AVERAGE CLAIM

According to the above definitions, there is a general average whenever property, either the ship, her cargo or the freight, which are involved in a

'تعتبر خسائر مشتركة التضحيات والنفقات الاستثنائية المبذولة قصدا وبطريقة معقولة من أجل السلامة العامة اتقاء لخطر داهم يهدد السفينة أو حمولتها.'

(12) (1801) 1 East 220.

(13) (1801) 1 East 220, at 228. A more comprehensive definition of general average was provided by Blackburn J. in ***Kemp v. Halliday*** (1865) 34 LJQB 233,34 a case which concerned a ship, loaded with cargo, which put into Falmouth for repairs, but which later sank in a squall. The ship was later raised, and both ship and cargo were salved. The court was then faced with deciding who was liable in general average. Thus, the issue of general average was analysed in some depth. In delivering his judgment Blackburn J. said:

"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; but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if, instead of money being expended for the purpose, money's worth were thrown away. It is immaterial whether the shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off. It is quite true, that so long as the expenditure by the shipowner is merely such as he should incur in the fulfilment of his ordinary duties as shipowner, it cannot be general average; but the expenditure in raising a submerged ship with cargo is extraordinary expenditure, and is, if incurred to save the cargo as well as the ship (which, prima facie, is the object of such an expenditure), chargeable against all the subjects in jeopardy saved by this expenditure".

common maritime adventure, are voluntarily sacrificed in times of peril, and this for the common benefit of ship, cargo and freight, or else, when extraordinary expenses are incurred, also in the common benefit of this endangered property.(14)

Thus, a claim in general average must satisfy the following distinguishing requirements(15):

(i) There must be an extraordinary sacrifice or expenditure.

(ii) The sacrifice or expenditure must have been intentionally and reasonably made or incurred.

(iii) The sacrifice or expenditure must be made or incurred in a time of peril.

(iv) The sacrifice or expenditure must be made or incurred for the specific purpose of preserving the property imperilled in the common adventure.

A loss that does not satisfy each of these conditions will amount to 'particular average'(16) and the party sustaining it will have no right to contribution from the other interests.

2.1. EXTRAORINARY SACRIFICE OR EXPENDITURE

For there to be a general average loss, there must be an 'extraordinary' sacrifice or expenditure which is made for the benefit of all the parties to the common adventure. 'Extraordinary' means that what is done to escape the calamity is something not incidental to an ordinary voyage of the kind on which the ship is engaged. Ordinary losses and expenses, which are incurred during

(14) See the ***Explanatory Note to the Draft of the Emirati Maritime Code,*** p. 108.

(15) The requirements for a general average were also set out by the US Supreme Court in ***Barnard v. Adams*** 51 U.S. (10 How.) 270, 303 (1850):

"In order to constitute a case for general average, three things must concur-

1st. A common danger, a danger in which ship, cargo, and crew all participate; a danger imminent and apparently 'inevitable,' except by voluntarily incurring the loss of a portion of the whole to save the remainder.

2d. There must be a voluntary jettison...or casting away, of some portion of the joint concern for the purpose of avoiding this imminent peril...or, in other words, a transfer of the peril from the whole to a particular portion of the whole.

3d. This attempt to avoid the imminent common peril must be successful."

(16) See ***EMC***, Article 341 reads as follows:

'(Free translation) *Any loss, on which the provisions of (Article 246/1) are not applicable, shall be considered as a particular average.'*

"تعتبر خسائر خاصة الخسائر التي لا تتوافر فيها شروط الخسائر المشتركة..."

the course of the voyage, cannot be recovered by general average.(17) If, for example, a ship meets with heavy weather, which threatens to become worse, and the master decides to increase the speed of his ship in order to reach port, the cost of extra fuel consumed is not a general average expense. Nor is additional expenditure for fuel, and wages and provisions of the crew, necessitated by reason of the voyage being prolonged owing to the ship having sustained damage: such expenditure the shipowner is bound to incur in order to fulfil his duty towards the owners of the cargo he has contracted to carry.

Property that is sacrificed may consist of the cargo, the ship, or the freight or any combination of them. Sacrifice of each type of property will be treated separately, then expenditures are discussed.

2.1.1. GENERAL AVERAGE SACRIFICES

i) Of the Cargo

The most common instance of cargo being sacrificed for the common safety of the adventure is when it is jettisoned (i.e. throwing overboard of cargo or part of it) in order to lighten the ship and keep her afloat.(18)

(17) See the ***Explanatory Note to the Draft of the Emirati Maritime Code,*** p.108.

(18) See the Article 342/(a) of the ***EMC*** *which provides that:*
'General average shall include in particular...intentionally jettison of the goods into the sea...'
The modern law concerning the masters' right to jettison cargo in case of imminent danger begins with the case of ***The Gratitudine*** (1801) 3 C.Rob. 240, 257, where Lord Stowell gave judgment as follows:
"Though in the ordinary state of things [the master of a ship) is a stranger to the cargo, beyond the purposes of safe custody and' conveyance, yet, in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that valuable property in his hand is to he left without protection and care. 1t must unavoidably be admitted that in some cases he must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea, as in intermediate ports, into which he may be compelled to enter. The case of throwing overboard parts of the cargo at sea, is of that kind. Nothing can be better settled than that the master has a right to exercise this power in case of imminent danger. He may select what articles he pleases; he may determine what quantity; no proportion is limited; a fourth, a moiety, three-fourths, nay, in cases of extreme necessity, when the lives of the crew cannot otherwise be saved, it never can be maintained that he might not throw the whole cargo overboard. The only obligation will be, that the ship should contribute its average proportion. It is said, this power of throwing over the whole cannot be but in cases of extreme danger, which sweeps all ordinary rules before it; and so it is. So likewise with respect to any proportion, he can be justified only by that necessity: nothing short of that will do: the mere convenience of better sailing, or more commodious stowage, will not justify him to throw overboard the smallest part. It must be a necessity of the same species, though perhaps differing in the degree."
In the American case of ***Lawrence v. Minturn*** (1854) 17 How. 110, the ship sailed from New York laden with under-deck cargo and a heavy deck cargo, bound for San Francisco. In this voyage, she encountered heavy weather during which it was found that the deck cargo caused her to labour very hard. After the storm had passed the ship was leaking and her pumps had to be working constantly to keep her afloat. Therefore, the master jettisoned the deck cargo, as a precaution, for it was likely for the ship to encounter

However, under Article 347/1 of the ***EMC*** a sacrifice by jettison of cargo stowed on deck (which is not a usual or proper place of stowage)[19], will give rise to a general average contribution only when carried in accordance with a recognised maritime custom,[20] or by consent of its owner.[21] Article 347/1 of the ***EMC*** states that: [22]

'(Free translation) *Goods which are carried on deck contrary to Article (273) shall contribute in general average if they have been salvaged. But if they have been jettisoned or damaged it shall not be permissible for the owner of the same to consider them as general average unless he establishes that he did not approve of the method of shipment (being carried on the deck) or if the maritime custom at the port of loading does not allow their shipment in deck.*'

Rule I of the **YAR**, also requires any jettisoned cargo to be carried in accordance with the recognised custom of the trade:

'No jettison of cargo shall be made good as general average unless such cargo is carried in accordance with the recognised custom of the trade.'[23]

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other storms in her voyage. It was held that the master's action was justifiable and it was therefore a general average act. But see ***The Pendragon Castle*** (1924) 5 Fed.Rep.56 (2nd Series), where the danger to a ship was her master who was incompetent and in fear of her sinking, although no real imminent danger existed, the master in his panic, called for and received salvage services from another ship, and he jettisoned some cargo. Hough J. said *inter alia*, at page 58: "... it was a measure of precaution to jettison some grain. Whether that jettison did more than calm the nerves of the ... master is rather doubtful ...". Thus, he rejected the precautionary measure of jettison, on the grounds of it not achieving the intended beneficial result. In other words, the danger, i.e. the master's panic and incompetence was not avoided or minimised by the jettison of the cargo. Therefore, the jettison of the cargo, was not a general average act.

(19) "According to the rules of maritime law, the placing of goods upon the deck of a sea-going ship is improper stowage, because they are hindrances to the safe navigation of the ship; and their jettison is therefore regarded, in a question with the other shippers of cargo, as a justifiable riddance of incumbrances which ought never to have been there, and not as a sacrifice for the common safety": *per* Lord Watson, ***Strang v. Scott*** (l889) 14 App.Cas. 601, 609.

(20) In ***Gould v. Oliver*** (1865) 19 C.B. (N.S.) 563, twenty-six pieces of timber were shipped on deck. There was a custom in the timber trade to carry lumber on deck. The twenty- six pieces were properly jettisoned. It was held, that cargo owner was entitled to a general average contribution from ship to freight: *semble*, also from cargo.

(21) As would be the case where all cargo was carried under bills of lading that gave the shipowner a liberty to carry on deck.

(22) ***EMC***, Article 347/1 reads in Arabic as follows:
"البضائع المشحونة على سطح السفينة خلافا لأحكام المادة (273) تسهم في الخسائر المشتركة إذا أنقذت، أما ان ا ألقيت في البحر أو تلفت فلا يجوز لمالكها اعتبارها خسارة مشتركة إلا إذا أثبت أنه لم يوافق على شحنها على سطح السفينة أو إذا كان العرف البحري في ميناء الشحن لا يجري على شحنها بهذه الكيفية."

(23) To constitute a custom of the trade to carry cargo on deck, much more is required than the occasional or even frequent carrying of deck loads. There must be a practice so general and universal in the trade that

Although Rule I does not mention deck cargo specifically, but it follows from its wording that jettisoned cargo carried on deck in accordance with a recognized trade custom ranks as a general average loss. Thus, only such cargo does not so rank that is not stowed in accordance with a custom, and that applies both to deck and under-deck cargo.

Under English law, as a general rule the loss by jettison of cargo carried on deck is not made good by general average contribution, unless carriage in this manner is sanctioned by established maritime custom, or where the owners of the other cargo carried had consented to the jettisoned cargo being thus carried.[(24)]Where, however, the whole cargo is the property of the same owner, and by express agreement between him and the shipowner in the charter-party a portion of it is carried on deck, then, unless otherwise provided in the contract of carriage, a loss by jettison of the deck load will give rise to a right of contribution.[(25)]

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everyone in that trade must be taken to know that his goods will or may probably be put on deck. It must also be consistent with the express terms of the contract of affreightment. In ***Dixon v. Royal Exchange Shipping Co.*** (1886) 12 App. Cas. 11 Brett M.R. said:
"It is suggested that there is a practice which it must be taken that they knew. Now the only practice which it can be taken in law that they impliedly knew (that is, taken that they knew, although they did not) is a general practice; so general and universal in the trade and at the port from which these goods were taken, that everybody who ships cotton on board a ship at New Orleans for England must be taken to know that his goods probably will, or may probably be put on deck. ... To say that there is a practice, or to say that there is a frequent practice, is only to say that it is sometimes done, leaving it open that as often, or oftener, it is not done. Such evidence as that is not evidence to go to a jury, upon which they would be justified in finding a general usage."

(24) See ***Wright v. Marwood*** (1881) 7 Q.B.D. 62 a steamer had shipped 100 head of cattle on her upper deck, to be carried from New York to England, under a written agreement with the shippers specifying that the cattle were to be carried on deck. The bill of lading contained the following clause 'Not accountable for mortality or for any accident or injury of any kind or nature whatever.' On the voyage, owing to stress of weather, the master, justifiably for the safety of the ship, threw overboard the whole of these cattle. The owner of the cattle brought an action against the shipowner for his share of the loss as " general contribution." At the trial, no evidence was given of any custom allowing cattle to be carried as deck cargo. It was held by the court that the shipper was not entitled to recover a general average contribution from the shiponwers for the jettison of the cattle. The court laid stress on the fact of the ship being a general ship, and held it impossible to imply any agreement to pay contribution merely from the fact that the shipper and owner had agreed for cargo to be shipped on deck, and that apart from such an agreement there was no foundation for the shipper's claim.

(25) See ***Johnson v. Chapman*** (1865) 19 C.B. (N.S.) 563 where a cargo was carried under a charterparty contract which expressly provided for a full cargo, including a deck load. Part of the deck cargo was necessarily jettisoned during the voyage. There was no custom authorising the carriage of deck cargo in such a voyage. The cargo-owner claimed for a contribution, while the shipowners contended that the jettison was, under the circum- stances of the case, only a particular average loss and not a loss entitling him to a contribution. The Court of Common Pleas decided in favour of the claim, on the ground that the charterparty contemplated a deck cargo. "Then, immediately you find that the deck cargo is within the contemplation of the parties, you must deal with it as if shipping a deck cargo was lawful. When you have established that it is a deck cargo lawfully there by the contract of the parties, it becomes subject to

In certain trades it is customary for deck cargo to be carried 'at shipper's risk'. The clause 'at shipper's risk' which appears in the contract of carriage protects the shipowner from liability for improper jettison, resulting from acts of the crew done as the servants of the shipowner, but not from liability for general average contribution in respect of a proper jettison which is made by the captain as agent of the cargo-owner.(26)

If the goods are stowed on deck without the shipper's consent or a binding custom so to stow, and are then jettisoned, the shipowner will be liable for such a jettison as a breach of his contract to carry safely in the absence of an effective exception.(27)

There is equally a general average loss where, in consequence of a fire on board, the cargo is damaged by water being poured on it to extinguish the fire, or through the ship being scuttled with the same object (28); or where, through

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the 'rule of general average".

(26) Cargo carried on deck 'at shipper's risk' may be the subject of allowance under ***EMC***, Article 246/1 and **YAR**, Rule A, if it is jettisoned for the common safety in a time of peril, and is cargo which in the particular trade is customarily carried on deck. In ***Burton* v. *English*** (1883) 10 Q.B.D. 442; 12 Q.B.D. 218, the ship was chartered to carry a full cargo of timber from a port in the Baltic for London, and the charterparty contained the clause, 'The teamer to be provided with a deck load, if required, at full freight, but at merchant's risk.' It was proved that there was a custom or usage in such voyages to carry a deck load of timber. Cave J. delivering the judgment of the Queen's Bench Division, held that the word 'at merchant's risk' exempted the shipowner from liability to contribute towards the loss of deck cargo lawfully jettisoned.' The Court of Appeal, reversing Cave J. decided that the shipowner was not protected by the words 'at merchant' risk' from liability to contribute to the general average.

(27) In ***Royal Exchange S.S. Co v. Dixon*** (1886) 12 App.Cas. II, cotton was shipped under bills of lading excepting 'jettison' and 'stranding'. Some of the cotton was stowed on deck without the cargo owner's consent; the ship stranded, and the deck cotton was properly jettisoned. An attempt to prove a custom to stow on deck failed. It was held that the cargo-owner was entitled to recover the full value of the cotton from the shipowner.

(28) See Article 342/2(c) of the ***EMC*** which provides that:

'General average shall include in particular...damage caused to ...the cargo by reason of pouring of water or other materials or scuttling the ship in order to extinguish a fire on board.'

In ***Whitecross Wire & Iron Co. v. Savill*** (1882) 8 Q.B.D. 653, a ship bound for W had arrived at that port, and had landed the greater portion of her cargo, when a fire broke out on board, which was extinguished by pouring water into her hold. Among other portions of the cargo damaged by the water poured in was a quantity of iron wire. The owners of the wire made a claim on the shipowners for contribution towards their damage, as general average, and the court gave judgment in their favour. This was appealed against. The judgment of the court was unanimous against the appeal. Brett L.J. said at p. 662 "If there is an imminent danger, and if the captain sacrifices part in order to save the rest of the adventure, a claim for a general average contribution arises...here the captain intentionally inundated the cargo and thereby necessarily damaged it by water. ... All the circumstances seem to me to exist which constitute a general average loss."

Where the **YAR** apply this principle is recognised in Rule II:

stress of circumstances, it becomes necessary to burn part of the cargo to enable the engines to keep going.(29) Thus, in ***Robinson v. Price***(30)a ship bound with timber from Quebec for London, was, and had been for several years, supplied with a donkey-engine adapted for the loading and discharge of cargo and ballast and also for pumping the ship, to aid the ship's hand pumps, when required.

'Damage done to a ...cargo...by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.'

But damage done by smoke and heat alone does not attract a contribution. Rule III of the **YAR** provides that:

'Damage done to a ... cargo...by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average, except that no compensation shall be made for damage by smoke however caused or by heat of the fire.'

For engendering smoke and heat was not intended. Of course, smoke created by pumping water on the fire was created intentionally, but no one can distinguish between smoke created by fire and smoke created by water. So all smoke damage must be borne by whoever owns the affected property. In American case of ***Marine Ins. Co.* v. *New York & Cuba Mail S.S. Co.*** (1896) 70 Fed. Rep.262. fire broke out in a cargo of hemp on board the Seneca. The hatches were closed, live steam from the boilers was let into the 'tween decks for about seven hours, and the ship put back into Cuba where part of the cargo was discharged into lighters and the ship then submerged. The insurers of sixty-four bales of tobacco claimed compensation in general average for damage to the tobacco by smoke driven into the compartment for the purpose of extinguishing the fire. The evidence was contradictory and inconclusive whether the tobacco was damaged by smoke, and District Judge Brown held that a general average claim was not allowable for damage done through the undesigned and unavoidable spread of fire or smoke in the proper efforts to extinguish them. In the course of his judgment he said:

"Here not only is there very great doubt whether the tobacco was tainted by smoke at all, but if it was, the smoke was an incident of the fire, and caused by the fire, and not by the act of man .... If the smothering of the fire by closing the ship's hatches, or by forcing water or steam upon the fire, temporarily increased the smoke, the fire was none the less the true and original cause of all the smoke, and hence of all the damage it may have done; and this damage, if there was any such damage, must be classed with fire damage, as particular average and not as general average, because done by smoke alone, as an incident of the fire, and not by the steam voluntarily employed to extinguish it. . . . Often the first efforts to extinguish a fire give it breath and extend the flames or smoke to articles before untouched. That is an unavoidable result of the endeavor to put out the fire. But damage thus arising is not a voluntary sacrifice giving rise to a general average claim. And similar is the damage arising from any unavoidable spread of smoke by the use of steam. . .. The fire, as the original cause of the smoke, must be treated as a whole, and as including whatever damage may arise from the fire or the smoke during all proper efforts made to extinguish them. . .. I cannot find any support for the contention that the spread of fire or smoke damage incidental to proper efforts to extinguish the fire, gives rise to general average demands.... Only where the damage is done by the agency employed to extinguish the fire, as in the case of water damage, can the damage be deemed a voluntary sacrifice.... "

(29) See Article 342/2(e) of the ***EMC*** which provides that:

'General average shall include in particular...things and provisions required by the common safety to be used as fuel provided that the ship was supplied with sufficient fuel before sailing then it ran out for any reason.'

(30) See (1876) 2 Q.B.D. 91., a ship sprang a leak while at sea and was kept afloat only by constant pumping, the pumps being driven by the donkey engine. The coal, which was sufficient for an ordinary voyage, ran short, and ship's spars and cargo were used for fuel. It was held that the damage occurred was to be made good by general average contribution.

Such engines were often, though at that time not universally, used in that trade. At the time of sailing the ship had five tons of coal on board, which was admitted to be a sufficient supply of fuel for all purposes of the ship while at sea, other than pumping, for a much longer voyage than that from Quebec to London. While at sea the ship fell in with bad weather, and sprang so bad a leak that she could hardly be kept free by constant pumping. For this purpose it presently became necessary to have the pumps worked by the donkey-engine, and as the supply of coal threatened to run short, the captain ordered some of the ship's spare spars, and a portion of the cargo, to be used with the coal to keep up the fire of the donkey-engine; by which means the ship was eventually brought safe into port. The questions for the court were whether the burning of the spare spars and whether the burning of the cargo, were to be made good as general average. The court held, that the sacrifice of the spars and cargo was a general average. The judgment of the court was delivered by Lush J. who said:

"The circumstances under which the ship's spars and the cargo were used as fuel for the donkey-engine satisfy all the conditions of a general average claim. The peril was imminent; the sacrifice voluntary, in the sense of being an act of will on the part of the master; it was, in the emergency, necessary in order to save the ship from sinking, and was, of course, made with a view to the safety of the whole adventure-ship, freight, and cargo. Prima facie, therefore, the case of the plaintiff is made out."

The sale of part of the cargo at a port of refuge is a general average sacrifice if it is necessary for the purpose of completing the voyage, and if it is in the interest of the rest of the cargo that the voyage should be completed, but not in any other case.(31) Moreover, any damage done to the cargo or depreciation in its value caused by putting into a port of refuge to escape a peril is a general average loss.(32)

(31) See Article XX of the **YAR** which provides that:
'Provision of funds.
...the necessary cost of obtaining the funds required by means of a bottomry bond or otherwise, or the loss sustained by owners of goods sold for the purpose, shall be allowed in general average.'
(32) In ***McCall v. Houlder*** (1897) 66 L.J.Q.B. 408., damage was done to the cargo at a port of refuge, in tipping the ship by the head to repair her propeller. For that purpose water was run into her forward ballast tanks; and owing to a break in one of the pipes the water got into the cargo. The break was due to an accident in the course of the voyage; it was not known to the master, but he feared the possibility of it. Tipping with cargo on board was an unusual operation, and the master knew it involved special risks and might damage the cargo. He adopted this method of repairing the propeller because he could not discharge the cargo (frozen meat) and store it in safety at the port. Mathew J. held that the damage was a general average sacrifice, the tipping having been done " for the safety of the whole adventure and for the

ii) Of the Ship

Sacrifice of the ship may be of the whole ship, such as when it is intentionally stranded,(33) or of parts of it or of some of its machinery, equipment, or stores.(34) In ***Birkely v. Presgrave*** (35) the ship was entering Sunderland harbour with a cargo of corn on board when she was hit by a violent squall. In order to save the ship and cargo, the master endeavoured to tie her up to the south pier. In this, he was successful but, during the process of manoeuvring the ship and saving the cargo, extra personnel were required for

advantage of everyone interested in the ship or cargo." The ship" was lying unnavigable in the harbour and she and the cargo must have lain there till both perished if the ship had not been tipped." It must be noted that the cargo was perishable, and Mathew J. seems to have held that the unusual act was necessary for the preservation of both ship and cargo.

In ***Anglo -Argentine Live Stock Co. v. Temperley SS Co.,***[1899] 2 Q.B. 403 the ship took on board in the River Plate a deck cargo of cattle and sheep for England, under a contract which provided that the ship should on no account touch at any Brazilian or Continental ports before landing her livestock. Soon after sailing she sprang a leak, and as the water could not be kept down, the master put into Bahia, a Brazilian port, for repairs. The consequence was that, by reason of an Order in Council then in force, the cattle could not be landed in England and they were taken instead to Antwerp where they realised much lower prices than they would have fetched in England. The court held that the owners of the livestock were entitled to recover in general average the difference in prices as a loss which was the direct and immediate consequence of the general average act. "The moment the ship touched the Brazilian port," he said, "the plaintiffs' property was *ipso facto* rendered of less value than it was before, because by that act the plaintiffs were deprived of one of their means, and that the best, of realising their property."

(33) See ***EMC***, Article 342/2(b) which provides that:

'General average shall include in particular...stranding the ship intentionally for the common safety ...'

See also **YAR**, Rule V:

'**Voluntary Stranding.**

When a ship is intentionally run on shore for the common safety, whether or not she might have been driven on shore, the consequent loss or damage to the property involved in the common maritime adventure shall be allowed in general average.'

In ***The Seapool*** [1934] P. 53 the master deliberately put the ship broadside against a pier, in order to minimise damage that must otherwise inevitably have been suffered by running ashore. It was held that Rule V did not apply because running against a pier was not voluntary stranding or running on shore within the meaning of the rule. Langton J. stated at p. 62 that "stranding" means going with the bottom on shore, and held that since Rule V did not apply, the owners were entitled to a general average contribution by virtue of Rule A of the 1924 Rules.

(34) See ***Robinson v. Price*** (1876) 2 Q.B.D. 91, where a ship sailed well equipped, having a donkey-engine and a sufficient supply of coal for all purposes other than pumping purposes; she met with heavy weather and leaked considerably, the donkey-engine was used to pump, and it was only by this steam pumping that the leak was kept under; the coal ran short, and some of the spare spars were used for fuel. It was held, that the sacrifice of the spars was a general average. But see the **YAR** 1994, Rule IX:

'...Ship's materials and stores, or any of them, necessarily used for fuel for the common safety at a time of peril shall be admitted as general average, but when such an allowance is made for the cost of ship's materials and stores the general average shall be credited with the estimated cost of the fuel which would otherwise have been consumed in prosecuting the intended voyage.'

(35) (1801) 1 East 220.

assistance. An anchor and its cable were deliberately sacrificed for safety reasons, and some hawsers were also lost. The shipowners claimed as general average the value of the cable and also that of the hawsers.

The court ruled that the actions of the master amounted to general average acts, for which the cargo-owner was liable by way of a contribution.

In delivering his judgment, Lord Kenyon C.J. said:

"...all ordinary losses and damage sustained by the ship happening immediately from the storm or perils of the sea must be borne by the shipowners. But, all those articles which were made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern, and the other expenses incurred, must be paid proportionately by the defendant as general average".(36)

In ***Charter Shipping Co. Ltd. v. Bowring, Jones & Tidy, Ltd***.(37) a ship shortly after leaving Jacksonville ran aground and was for a time in danger of breaking her hack. After trying for approximately 3 hours to refloat by means of her own engines, a tug rendered her assistance and thus she was refloated. It was in respect of damage to machinery, boilers etc. caused by the accident that a general average contribution was claimed. The shipowners claimed that the damage to the machinery was caused entirely by the efforts to get the ship afloat while lying aground and in particular due to the fact that the water pump of the machinery, which was positioned pretty well amidships, was drawing in mud or silt and depositing it in the boilers.

On the other hand, the cargo-owners contended that when the ship was upon the ground she was not in a position of peril; that she was in no real danger, since she was in inland water 20 miles from the sea, and the rising of the water or the assistance of a tug would have been adequate to get her off.

In this case one of the question raised by the shipowners, was in relation to the seaworthiness of the ship and whether if any general average expenditure or sacrifice was incurred was due to this. The pilot did state that while rendering his service to the ship, he experienced lack of power in consequence of which the ship went aground.

Roche J. stated, *inter alia,* in delivering the judgment of the court:

(36) (1801) 1 East 220, at p.227.
(37) (1930) 36 Ll. Rep. 272, decided under the **YAR** 1890.

"On the voyage to London and Hamburg, upon which she had started when she took the ground, she ... met with heavy weather ... and her engines and boilers worked very unsatisfactorily".

He went on to add that:

"In fact, she put into more than one port of refuge by reason of shortage of coal and other matters. When she ultimately arrived at Hamburg it was found that her boilers were in a state which can only be described as dreadful ... they were a mass of scale".

Roche J. did not allow the whole claim for machinery damage in the contribution. On the point of danger, he observed:

"The danger was not very great, but still I am satisfied that there was a position of peril ... the danger was real and substantial enough to necessitate the use of the engines".

In ***Harrison v. Bank of Australasia***(38) a sailing ship left Melbourne bound to London with cargo on board. The ship encountered a cyclone and sprung a leak. The ship was fitted with a donkey-engine for working the cargo, hoisting the sails and for pumping the ship, and in consequence of the excessive use of the engine for pumping the ship, the coal supply (which was enough for use of the donkey engine, for an ordinary voyage) began to run low and the master was obliged to burn spare spars and ship's stores. Subsequently the master purchased further supplies of coals, as it was necessary to pump the ship throughout the voyage in order to save her from foundering. The donkey engine broke down as the ship entered the Thames. The shipowner sought to recover from the cargo a contribution towards the cost of the ship's fittings which were used as fuel, the cost of the coal purchased, and the cost of repairing the donkey-engine. It was held that the burning of the spars and the ship's stores was an extraordinary sacrifice made in time of peril, but that there was no right to contribution in respect of the cost of the coals or of the cost of repairing the donkey-engine.

It is submitted that loss or damage consequent upon the ship being intentionally run on shore for the common safety is allowable as general average, whether or not the ship might inevitably have been driven shore.(39) Therefore, the unintentionally stranding of a disabled ship is not a general

(38) (1872) 25 L.T. 944.

(39) See ***EMC,*** Article 342(b) and **YAR**, Rule V. In ***The Cepheus***, 1990 AMC 1058 the owner's claim for a general average contribution from cargo was denied where the panel majority found that the ship had made an unreasonable deviation which the owner failed to prove was not the cause of the ship's stranding.

average act, nor is the intentionally stranding of a disabled ship, if the intention in doing so was to save the lives of those on board rather than protect the ship and cargo.

Damage caused to the ship or its machinery in attempting to refloat it after intentionally stranding may be admissible in general average,(40) but damage sustained by cutting away wrecked parts of the ship may not be claimed in general average.(41) Loss incurred by scuttling or beaching a burning ship(42) or through efforts to extinguish the fire on board is recoverable in general average.(43)

(40) See ***EMC***, Article 342/2(b) which provides that:
'General average shall include in particular...stranding the ship intentionally for the common safety or increasing the sail or steam in order to refloat the ship, and the damage which caused to the ship or the cargo as a result of this.'
and see also **YAR**, Rule VII which provides that.
"Damage caused to any machinery and boilers of a ship which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage...".
In ***Corfu Navigation v. Mobil Shipping*** [1991] 2 Lloyd's Rep. 52, ship-owners claimed contribution in general average under Rule VII for machinery damage, suffered during attempts to refloat which had been made without sufficient preparation or planning to ascertain whether they had a reasonable chance of success, as well as being negligently executed. The negligence in question was an excepted peril, but the cargo owners contended that its effect was to break the chain of causation between the general average act and the damage. This argument failed because the general average loss, under the provisions of Rule VII, was the damage to the machinery in endeavouring to refloat at the risk of such damage.
(41) See **YAR**, Rule IV:
"Loss or damage sustained by cutting away wreck or parts of the ship which have previously been carried away or are effectively lost by accident shall not be made good as general average."
"If", said Willes J. in ***Johnson v. Chapman*** (1865) 35 L.J.C.P. 26-29 "a mast were sprung and a part of it were to go overboard with a quantity of spars and sails attached to it, hanging on by a stay which must give way in a minute or two, whilst in the meantime, by battering against the side of the ship, it adds to the danger, and if the stay were cut to let it go at once, it would be very difficult to say that that was anything more than wreck. A lawyer could not lay down as a matter of pure law, that all cumber cut loose is wreck. But what I say is, if it was virtually lost, if not recoverable, if the act of cutting the rope was only hastening the moment at which it would be lost, you would properly call that wreck, and you would not say it was general average. The reason given is because you cannot keep it. There is no intentional sacrifice in cutting it away. You must lose it, and the losing it a minute or two sooner can make all the difference of its doing great injury or not; but you cannot help losing it".
(42) ***Anglo-Grecian Steam Trading Co. v. T. Beynon & Co***. (1926) 24 Ll.L.R. 122.
(43) See ***EMC***, Article 342/2(c)
'General average shall include in particular...damage caused to ...the cargo by reason of pouring of water or other materials or scuttling the ship in order to extinguish a fire on board.'
In ***Stewart v. West India & Pacific S.S. Co.,*** (1873) L.R. 8 Q.B. 88. the Divisional Court approved the judgment of the Supreme Court of Pennsylvania in ***Nimick v. Holmes*** (1855) 2 Pennsylvania. 366 that:
"... When a ship or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam in extinguishing the fire, and by tearing up part of the ship in order to get at it, is general average.... It makes no difference how the water is applied, by the aid of fire-engines on the land, or in the form of steam, or by the scuttling of the ship...."

Damage done to the ship by knowingly causing her to come into collision, in avoiding a common peril, may be a general average sacrifice.(44)

Damage inflicted on third parties, such as pier and dock-owners, may constitute a general average sacrifice, and all parties must contribute to the damages which one of them becomes liable to pay. In ***Austin Friars S.S. Co. v. Spillers & Bakers***,(45) a ship laden with maize, stranded in the Bristol Channel in such a position that the ship and cargo were in imminent peril. The ship was refloated with the assistance of tugs, and the intention at first was to beach her in a safe place, but owing to serious leaks which developed, the pilot decided instead to take her into Sharpness Docks. Both the master and the pilot contemplated that the ship would strike the pier in entering the docks. Owing to the strong tide and to the fact that the ship was without steam, the ship did in fact strike the pier, and damaged herself to the extent of £1,600, and the pier to the extent of £5,000.

Bailhache J. found as a fact that the action taken in putting into Sharpness Docks, knowing that the ship would strike the pier, was a reasonable and prudent action, and that the damage done to the ship was consequently a general average sacrifice. He further held that the cost of making good the damage to the pier, even though the expenditure was incurred in making good damage done to the property of a third party, was a general average expenditure, inasmuch as it was foreseen as the natural consequence of the general average act.(46)

In ***Pool Shipping Co. v. Northern Maritime Insurance Co***.,(47) the owners of a steamer claimed in general average the damage done to their ship through striking a pier head, and also the sum they had been compelled to pay for the damage done to the pier. The owners contended that the ship was intentionally allowed by the master to drift on to the pier, knowing that damage would be done and sustained, in order to avoid the greater risk of driving ashore. It was

(44) ***Austin Friars Co. v. Spillers & Bakers*** [1915] 3 K.B. 586.
(45) [1915] 1 K.B. 833, affirmed [1915] 3 K.B. 586.
(46) A similar result was reached by the Court of Appeal in ***Australian Coastal Shipping Commission v. Green*** [1971]1 QB 456 in respect of liabilities incurred by the shipowner under a contract of towage. In that case ships in peril in New South Wales employed tugs under United Kingdom Standard Towing Conditions to avert the peril. In the course of the operation one tug became a total loss and one required salvage assistance; the shipowners were bound to indemnify the tugowners under the conditions. The shipowners claimed general average contribution for the expenditure so incurred. Mocatta J. allowed their claim, and the Court of Appeal dismissed an appeal from that decision.
(47) (1933) 47 Ll.L. Rep. 331.

held that there had been an extraordinary sacrifice intentionally and reasonably made for the common safety, and the owners' claim therefore succeeded.

In ***The Seapool***,[48] a ship with a cargo of coal on board was anchored off the pier. A sudden gale sprang up causing the ship to drag her anchor. There was a danger of the ship losing the propellers and possibly breaking her back. The master accordingly decided to put the ship broadside against the pier, using the latter as a lever so as to get the ship's head into such a position that he could steam out to sea. The operation was successful, but through bumping the ground and grinding the pier, £14 000 damage was caused to ship and pier. It was held that the action taken by the master was reasonable in the circumstances and the loss was a general average loss.

iii) Of the Freight

There is a general average loss of freight where, in taking steps to avert the danger to the whole adventure, the shipowner so damages a portion of the cargo as to render it unfit to be carried to its destination, and thus sacrifices his opportunity of earning freight on that portion[49]. There is, however, no general

(48) [1934] P. 53·

(49) In ***Pirie v. Middle Dock Co.***, (1881) 44 L.T. 426, a fire had broken out on board the ship Attila bound for Singapore with a cargo of coals, owing, as was admitted, to the spontaneous combustion of the coal. Water was poured into the cargo continuously for three days and the ship was taken into Batavia for safety, where the fire was quenched. Owing to the damaged state of the coal from the sea water, it was found necessary to sell the whole of it at Batavia. The result was that the shipowner lost his freight, while the owner of the coals, receiving the proceeds freight free, suffered no loss, but on the contrary made a profit by the mishap. The shipowner thereupon claimed from him, as general average, contribution towards this loss of freight, occasioned by the means taken to extinguish the fire. The owner of the coals disputed his liability. It was held, that the shipowner was entitled to a general average contribution from the cargo on account of the freight thus lost. *Cf.* ***Iredale v. China Traders Ins Co*** [1900] 2 Q.B. 515, where a ship on a voyage with a cargo of coal from Cardiff to Esquimalt was obliged to put into a port of refuge in the River Plate owing to the cargo having become so heated that there was a danger the ship and cargo would have been totally lost had the voyage been proceeded with. Part of the cargo was discharged, when it was found that the whole cargo was in such a condition that no portion of it could with safety be forwarded to its destination. The balance of the cargo was accordingly discharged and the voyage abandoned, and the cargo was sold and the freight was lost. It was contended that this abandonment, involved in the act of putting in, was a general average act, and that there was therefore a sacrifice of the freight. Bigham J. held that that was not so. The condition of the cargo, at the time the master altered his course for Buenos Aires, was such that it had become impossible to carry it to its destination so as to earn the freight; nothing of value was sacrificed. His judgment was affirmed by the Court of Appeal, on the ground that there was no abandonment of the voyage until the cargo was sold, and at that time the common danger had ceased.
On the other hand, the freight on the coal jettisoned was held, by Bigham J. to be a subject for contribution. For, " although it was subsequently ascertained that the freight was at this time wholly lost, the circumstances as then known did not justify that conclusion, and thus the captain may be properly said to have substituted a certain loss of part for a probable loss of the whole of the adventure, so as to give rise to a general average claim."

average sacrifice of freight where, owing to the inherent defect of the cargo, the shipowner has been compelled to put into a port of refuge and abandon the attempt to carry it further, so that the freight was already lost. (50)

2.1.2. GENERAL AVERAGE EXPENDITURES

Having enumerated those cases of general average loss which arise out of sacrifices, we will now proceed to consider those which are founded on expenditures.

Expenses made on behalf of the common interests in the voyage are, in many cases, admissible in general average.(51) The cost of salvaging ship and cargo(52) or expenditure incidental to repairing the ship in a port of refuge are common examples. Expenses made in anticipation of greater general average expenditure - known as "substituted expenses" - and costs incurred to protect the environment may also be recovered in general average. The requirement that those expenditure must be "extraordinary" is obviously of particular importance, since the charterer or bill of lading holder is entitled to expect that the shipowner will bear all the ordinary expenses of safeguarding ship and cargo during the voyage in consideration of the payment of freight.(53) Thus, in ***Wilson v. Bank of Victoria***,(54) a large clipper ship with an auxiliary screw, whilst on a voyage from Australia to England with cargo on board, hit an iceberg in the southern ocean and her masts and rigging were so damaged that she had to continue to Rio de Janeiro under steam alone and, in so doing, exhausted her stocks of coal. Finding when at Rio that complete repairs would cost several thousands of pounds more than in England, and would entail the unshipping of the cargo and considerable delay,

(50) ***Iredale v. China Traders Ins Co*** [1900] 2 Q.B. 515,

(51) "Wherever, under extraordinary circumstances of danger to both ship and cargo, a voluntary sacrifice of money is made in order to save both ship and cargo, by the expenditure of which both ship and cargo are saved, the person who has made the voluntary sacrifice is entitled to call upon the others whose property has been saved, by the voluntary sacrifice made on their behalf as well as on his own, for general average contribution." *per* Brett M.R., ***Ocean SS. Co. v. Anderson*** (1883) 13 Q.B.D. 651 , 622

51 In ***Kemp v. Halliday*** (1866) LR 1 QB 520, where a ship which sank in Falmouth harbour was later salved and the issue of general average was foremost. Erle C.J. said at p. 527: "...We infer from the statement in the case that there was a common peril of destruction imminent over ship and cargo as they lay submerged; that the most convenient mode of saving either ship or cargo, or both, was by raising the ship together with the cargo; that the expense required for such raising would be an extraordinary expense for the common benefit of both; that the cargo would be liable to a general average contribution towards the expense; and the shipowner would have a lien on the cargo to secure the payment of that general average. See the ***Explanatory Note to the Draft of the Emirati Maritime Code,*** p. 239. See, also, ***EMC***, Article 342/2(i) and **YAR**, Rule VI.

(53) Carver, Carriage by Sea, 13th ed. para 1399.

(54) (1867) LR 2 QB 203

the master had sufficient repairs done to her in three days, without taking out the cargo, as would carry her home. He then sailed and arrived in England by means of her auxiliary screw, having purchased coal at Rio and again at Fayal at an extra cost to the owners of £1,472. The owners sought to recover some of the cost of the coal from the cargo-owners by way of a general average contribution.

The court held that the master had done no more than it was his duty to do, and that the expenditure on coal was not an extraordinary expenditure, but was really an expenditure which could have been envisaged as part of the operation of a ship equipped with auxiliary power.

Blackburn J. in the course of the judgment of the court said:

"The shipowners by their contract with the freighters are bound to give the services of their crew and their ship, and to make all disbursements necessary for this purpose. In the case of such a ship as this, which is equipped with an auxiliary screw, their contract (1) includes the use of that screw, and consequently the disbursements necessary for fuel for the steam engine. Now, the disaster which occurred in this case, no doubt, caused the engine to be used to a much greater extent than would generally occur on such a voyage, and so caused the disbursement for coals to be extraordinarily heavy; but it did not render it an extraordinary disbursement. The case is similar to that of an ordinary sailing ship, in which, owing to disasters, the voyage is unusually protracted, and consequently the owner's disbursements for provisions, and for the wages of his crew, if they are paid by the month, are extraordinarily heavy. It is not similar to that of the master hiring extra hands to pump when his crew are unable to keep the ship afloat, or any other expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature".(55)

(55) (1867) LR 2 QB 203, at p 212.
Yet there may be circumstances in which the shipowner is under a duty to incur general average (i.e., extraordinary) expenditure and it follows that the test proposed in ***Wilson v. Bank of Victoria*** cannot be universally valid. If a ship is involved in a collision as a result of which she loses power and is making water, her owners remain under an obligation to take reasonable care of the cargo, and the performance of this obligation might well require the making of a towage contract. For the owners to refuse to enter into such a contract, if practicable, would then be a breach of duty, but no one would doubt that the remuneration payable under the contract was extraordinary expenditure. Extraordinary expenditure is fore probably best defined as expenditure incurred on an extraordinary occasion, in order to preserve the adventure from peril, which involves more than expenditure to pay for consumption of ship's stores or materials for their usual purpose, even though in an unusual amount.

We will discuss, first, expenditures incurred in rescuing the ship and cargo when they are at sea, or after the ship has stranded or sunk; and, later expenses incurred in putting into port of refuge for the general safety.

i) Salvage Costs

The expense of rescuing a ship from disaster so it may complete its intended voyage is a clear example of general average expenditure.(56)

In ***Kemp v. Halliday***,(57)during a voyage from Liverpool to Rio de Janeiro, the ship encountered severe weather and had to put into Falmouth for the safety of the ship and cargo and, in so doing, sustained a general average loss. In order to carry out repairs, part of the cargo had to be discharged, but, whilst the repairs were being carried out, a violent storm hit Falmouth and the ship, with the portion of cargo still aboard her, sank at her moorings. The shipowner claimed for a constructive total loss, although the ship's agents, acting on their own initiative, later raised the ship together with the remaining cargo left on board.

The case turned on whether, in estimating the cost of repairs, the cost of raising and salvaging the sunken ship and her cargo amounted to a general average act and whether, if it was a general average act, the general average contributions payable by cargo interests should or should not be deducted from the total cost of repairs.

The Exchequer Chamber held that the raising and salving of the ship amounted to a general average act, because both ship and cargo were in imminent danger of becoming a total loss. "We" said Erle C.J. "infer from the statement in the case that there was a common peril of destruction imminent over the ship and cargo as they lay submerged, that the most convenient mode of saving either ship or cargo or both was by raising the ship together with the cargo, that the expense required for such raising would be an extraordinary expense for the common benefit of both, that the cargo would be liable for a general average contribution towards that expense, and that the shipowner

Where the **YAR** apply, several of the numbered rules permit the allowance of expenditure which is not abnormal in kind, but only in degree, for example crew wages during the prolongation of the voyage occasioned by entering and leaving a port of refuge, and fuel costs and port charges at a port of refuge are allowed under Rule XI.

(56) See ***EMC***, Article 342/2(i).
'General average shall include in particular...the costs of the salvage and towage of the ship.'

(57) (1866) LR 1 QB 520

would have a lien on the cargo to secure the payment of that general average."[58]

Complex salvage operations

Suppose a ship with her cargo has been stranded, and the ship and cargo have been brought into safety by a series of connected, though distinct, operations; for example, the first operation being discharging and landing the cargo, the second being attempts to tow the ship off the strand, which, in the event of failure, is followed by the third operation of digging out a channel to facilitate the refloating, In such circumstances the question arises: How is it to be determined whether the entire cost of those operations, from their commencement to their termination, should be treated as general average, or whether the charges should be apportioned and allocated specifically to the property saved by each distinct stage in the operations?

This issue is illustrated by a number of cases, the first of which to be considered is that of ***Job v. Langton***.[59] In that case a ship on a voyage with cargo from Liverpool to St. John's, N.F., stranded off the coast of Ireland. The whole of the cargo was discharged and taken to Dublin, where it was placed in store. A channel was then cut, and by this means, and with the assistance of a tug, the ship was refloated and towed to Liverpool for repairs. The question was, whether the expenses incurred in getting off the ship and taking her to Liverpool to repair, after the entire cargo was discharged, were chargeable to general average, or to particular average on the ship alone. Lord Campbell, delivering the judgment of the Court of Queen's Bench, pronounced that the expenses were not chargeable to general average, but to the ship alone.

(58) (1866) LR 1 QB 520, at p. 527. Blacburn J. said at p. 242:
"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; but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if, instead of money being expended for the purpose, money's worth were thrown away. It is immaterial whether the shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off. It is quite true, that so long as the expenditure by the shipowner is merely such as he should incur in the fulfilment of his ordinary duties as shipowner, it cannot be general average; but the expenditure in raising a submerged ship with cargo is extraordinary expenditure, and is, if incurred to save the cargo as well as the ship (which, prima facie, is the object of such an expenditure), chargeable against all the subjects in jeopardy saved by this expenditure".
(59) (1856) 6 E. & B. 779.

"The expenses, to constitute general average, must therefore be brought within the second category, 'extraordinary expenses incurred for the joint benefit of ship and cargo ....' Although the stranding was fortuitous, all expenses incurred from the misadventure till all the cargo had been discharged confessedly constituted general average. But how can it be said that the subsequent expenses in getting off the ship and taking her to Liverpool for repair were of the same character? The employment of the steam-tug, and the cutting of the channel by which the ship was rescued cannot, as was contended for, be part of the same operation as the unloading of the cargo; for the case expressly finds that 'the steam-tug did no work at the ship until after the cargo was landed, and the coals and ballast taken out of her.' We therefore, do not see how these expenses are to be distinguished from the expenses of repairing the ship when she had been brought to Liverpool, which, it is admitted, must fall exclusively on the owner of the ship or the underwriter on the ship, as particular average. If the owner of the ship was to earn the stipulated freight by carrying the cargo to Newfoundland, it was his duty to repair her and to carry her to a place where she might be repaired..."

But, in the case of ***Moran v. Jones***(60) which tried in the same court in the following year, ***Job v. Langton*** was distinguished. In that case the facts were that the ship, shortly after sailing from Liverpool for Callao, ran aground on East Hoyle Bank. She was in ballast, under charter to fetch a cargo from the Chinchas on which the freight was at risk; but she had on board, by the charterer's permission, a small quantity of goods belonging to other parties. Two days after she ran ashore, the weather being more moderate, assistance was procured from Liverpool, and men were employed saving from alongside the wreck of the ship's foremast which had been cut away, the materials of the ship, and the goods, all of which were sent in lighters to Liverpool. Afterwards, a stream anchor was carried out, the ship was scuttled, about 300 tons of ballast were thrown overboard, and then the ship, being kept free by pumping, floated, She was then towed by two steamers back to Liverpool, and there repaired. The question raised was, whether the sum of £643, which had been expended after the cargo was taken out, for the purpose of floating the ship and bringing her to Liverpool for repair, should be treated as general average. Lord Campbell, delivering the judgment of the Court of Queen's Bench, said that the expenses were chargeable to general average:

(60) (1857) 7 E. & B. 523.

"In this case we never doubted that the defendant, as underwriter on the freight was liable for a contribution to general average in respect of the sum of £643, the expenses incurred in order to get the ship off from the bank on which she was stranded, whether the goods were or were not liable to contribute to this portion of the loss. It is admitted that the ship could not have been got off and completed her voyage unless these various expenses had been incurred. Therefore, without these expenses, there would have been a total loss of the freight, amounting to the sum of £6,750 ...

But the sum for which this defendant is liable will depend, to a certain degree, upon the question whether, under the circumstances stated, these goods are to contribute in respect of the £643. And upon this question likewise we are bound to give our opinion. The goods had been taken from the ship and put on board a lighter before these expenses were incurred; and if this had been a separate operation by which they were intended to be saved for the benefit of the owner of the goods, we should have thought (as in ***Job v. Langton***) that the goods were not liable to contribute to the expenses subsequently incurred. Looking, however, to the facts stated in this special case, it seems to us that the act of putting the goods in the lighter was only part of one continuous operation, *viz*, getting the ship off the bank on which she was stranded, and sending her to Liverpool, where she might be repaired with a view to prosecute the original adventure. When she got to Liverpool, the operation of saving her from shipwreck was completed, and the whole expense of the repairs fell upon the owner as owner, and must be borne by him in that capacity, or by the underwriters on the ship: but the expenses of this continuous operation, for the common benefit of ship, goods and freight, are the subject of a general average. In ***Job v. Langton***, we considered that the goods had been saved by a distinct and completed operation, and that afterwards a new operation began which could not be properly distinguished from the repairs done to the ship to enable her to pursue the voyage. . .. But in the case on which we have now to adjudicate, the goods were put into a lighter by the master of the ship, along with materials of the ship saved from the wreck and they remained in the custody and under the control of the master till the ship was repaired, when they were reloaded in the ship and carried forward, without any interference by the owner of the goods, to their destined port. Unless it had been intended that an operation should be undertaken and

completed by which both ship and goods should be rescued from the peril to which they were exposed nothing might have been done and the goods might have perished. Because the goods happened to be saved in the earliest part of the operation, this can be no sufficient reason for saying that they ought not to contribute to all the expenses of the operation which contemplated the benefit of all the interests imperilled by the stranding.... "

In the latter case of ***Walthew v. Mavrojani*** (61)a ship laden with cargo for London broke from her moorings in a storm at Calcutta and was driven fast aground on a mud-bank. In the surveyor's opinion refloating was impossible. It was therefore recommended that the cargo should be discharged and the ship dismantled. However, when the cargo had been discharged and safely warehoused in Calcutta, further efforts by extraordinary means were made to refloat the ship. Finally, after the first attempt had been abandoned, a fresh contract was made for an embankment to be constructed round the ship in the form of a dock which was then filled with water enabling the successful refloating of the ship. The cost of this contract to refloat the ship was held both in the Court of Exchequer and unanimously on appeal not to be general average.

Under ***EMC***, Article 342/2(d) and **YAR**, Rule VIII, the cost of lightening a ship that has gone ashore, by removal of its fuel, stores or cargo, as well as any damage done in the process is admissible in general average.(62) More generally, **YAR**, Rule VI admits expenses 'in the nature of salvage, whether under contract or otherwise,' as general average expenditures provided '(they are) carried out for the purpose of preserving from peril the property involved in the common maritime adventure.'(63)

(61) (1870) L.R. 5 Ex. 116.

(62) ***EMC***, Article 342/2(d) reads as follows:

'General average shall include in particular...expenditures incurred in the event forced stranding to lighten the ship, to hire the barges for such purpose and to reload the goods on the ship.'

YAR, Rule VIII reads as follows:

'When a ship is ashore and cargo and ship's fuel and stores or any of them are discharged as a general average act, the extra cost of lightening, lighter hire and reshipping (if incurred), and any loss or damage to the property involved in the common maritime adventure in consequence thereof, shall be admitted as general average'.

(63) Rule VI was introduced in **YAR**, 1974 to deal with a difference in practice between the United Kingdom, and the United States and Europe over the inclusion of salvage payments in general average. Since the case of ***The Raisby*** (1885) 10 P.D. 114, English practice was to exclude the cost of salvage services rendered by volunteers, as opposed to those incurred contractually. The effect of Rule VI has been to bring English practice into line with existing U.S. practice, which has long held that amounts paid for salvage, however obtained, are admissible in general average.(63)

ii) Temporary Repair

The cost of necessary permanent repairs to the ship is not admissible in general average because they are an incidental part of the shipowner's responsibility to prosecute the voyage, unless the damage was sustained by a general average sacrifice. However, temporary repairs are a general average expenditure when made for the safe completion of the voyage or to enable the ship to reach a port where proper repairs can be effected,(64) because, in

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Rule VI has been amended in **YAR** 1990, to reads as follows:
'(a) 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 (taken over from the previous rule VI).

Expenditure allowed in general average shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimizing damage to the environment such as referred to in Article 13 paragraph 1(b) of the International Convention on Salvage, 1989, have been taken into account.
(b) Special compensation payable to a salvor by the shipowner under Article 14 of the said Convention to the extent specified in paragraph 4 of that Article or under any other provision similar in substance shall not be allowed in general average.'
This amended Rule VI is the result of the amendment to the International Convention on Salvage which itself resulted in the amended LOF 1990. It includes possible rewards for salvors who prevented oil pollution or other damage to the environment, even if at the end of their intervention, they were not successful in their salvage attempts. In that case they will still be entitled to a remuneration refund of the expenses made in order to avoid damage to the environment.

However, under the **YAR** 2004 salvage payments and associated costs lie where they fall, and are not allowed in general average. Rule VI of the **YAR** 2004 is directed to salvage payments of the kind referred to in the International Convention on Salvage 1989, i.e., where the remuneration is fixed according to the success of the operation, and where the owners of the salved property contribute to the payment in proportion to salved values. Rule VI does not exclude from general average payments made under a contract for services, such as towage, where these features are absent. Rules VI reads as follows:
'**SALVAGE REMUNERATION**
a. Salvage payments, including interest thereon and legal fees associated with such payments, shall lie where they fall and shall not be allowed in general average, save only that if one party to the salvage shall have paid all or any of the proportion of salvage (including interest and legal fees) due from another party (calculated on the basis of salved values and not general average contributory values), the unpaid contribution to salvage due from that other party shall be credited in the adjustment to the party that has paid it, and debited to the party on whose behalf the payment was made.
b. Salvage payments referred to in paragraph (a) above shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment such as is referred to in Article 13 paragraph 1(b) of the International Convention on Salvage 1989 have been taken into account.
c. Special compensation payable to a salvor by the shipowner under Article 14 of the said Convention to the extent specified in paragraph 4 of that Article or under any other provision similar in substance (such as SCOPIC) shall not be allowed in general average and shall not be considered a salvage payment as referred to in paragraph (a) of this Rule.'
(64) **YAR**, Rule XIV and Rule X(a). Rule XIV provides that:
'**Temporary repairs.**

principle, they do not add value to the ship. But the extent of inclusion in general average of temporary repairs of accidental, as opposed to sacrificial, damage may be limited by reference to the savings in expenses that otherwise would have had to be incurred.

iii) Port of Refuge Expenses

A ship that is forced to seek a port of refuge in the course of its voyage may also claim some of the expenses it incurs there in general average.(65) However, it is not sufficient that the expenses should have been incurred for the common benefit of the ship and cargo; they must either themselves fall within the definition of a general average sacrifice, or, if not in themselves a general average sacrifice, be nevertheless caused or rendered necessary by one.(66) In ***Societe Nouvelle d'Armement v. Spillers and Bakers Ltd***,(67) the ship *Ernest Legouve,* chartered to take grain from San Francisco to Queenstown, thence to Sharpness, was in Queenstown on May 20, 1915, when bodies from the ship *Lusitania* were brought to land. On May 26 there was a meeting of the crew, and the master was persuaded to take a tow across the Irish Sea to

Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or of damage caused by general average sacrifice, the cost of such repairs shall be admitted as general average.
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 expense which would have been incurred and allowed in general average if such repairs had not been effected there.
No deductions "new for old" shall be made from the cost of temporary repairs allowable as general average."
Rule X (a) provides that:
'When a ship shall have entered a port or place of refuge or shall have returned to her port or place of loading in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place of refuge consequent upon such entry or return shall likewise be admitted as general average.
When a ship is at any port or place of refuge and is necessarily removed to another port or place because repairs cannot be carried out in the first port or place, the provisions of this Rule shall be applied to the second port or place as if it were a port or place of refuge and the cost of such removal including temporary repairs and towage shall be admitted as general average. The provisions of Rule XI shall be applied to the prolongation of the voyage occasioned by such removal.'

(65) See ***EMC***, Article 342/2 (f).

(66) In ***Hamel v. P. & O. S.N. Co***.[1908] 2 K.B.298 owners of cargo claimed contribution in general average in respect of damage suffered by the cargo during unloading; the unloading was necessary for the purpose of repairing particular average damage suffered by the ship, by which, until repaired, she was rendered unfit to prosecute the voyage. Lord Alverstone C.J., having found as a fact that there was no common peril of ship and cargo, held that the plaintiffs' claim was unfounded.

(67) [1917]1 KB 865.

Sheerness because of the danger of enemy submarines. The weather was fine. The usual practice for sailing ships was to take a tow in and out of port. The court held that the expenditure on towage was not general average. Although the expenditure was unusual, or extraordinary, the risk or danger, in 1915, of submarine attack, particularly on sailing ships, was slight and not out of the ordinary as a risk.

Sankey J. stated, in delivering the judgment of the court:

"Extraordinary expenditure must to some extent be connected with an extraordinary occasion. For example, an abnormal user of the engines and an abnormal consumption of coal in endeavouring to refloat a steamship stranded in a position of peril is an extraordinary sacrifice and an extraordinary expenditure: see The Bona. A mere extra user of coal, however, in order to accelerate the speed of a ship would not be a general average act. Again, suppose the master, instead of hiring a tug, had purchased guns and hired a crew of gunners at Queenstown on the chance that he might be attacked by a submarine. I doubt if the expenses of the guns and gunners could have been recovered as a general average expenditure: see Taylor v Curtis ... It is not sufficient to say that the expenditure was incurred to benefit the property; it must be proved that it was abnormal in kind or degree and incurred to preserve the property".[(68)]

The ***EMC*** and **YAR** allow charges for entering or leaving the port of refuge and the cost of handling, moving, and storing any of the cargo, fuel, or stores.[(69)]They also include the extra wages and maintenance costs of the ship's

(68) [1917] 1 KB 865, at p 870. In ***Power v. Whitmore*** (1815) 4 M. & S. 141. the ship being in heavy weather, and having been damaged, put into Cowes to repair, as a measure necessary for safety of ship and cargo. She put in on December 7 and remained till the 11th, when, having repaired, she sailed on her voyage; but she returned to Cowes next day, owing to adverse winds and bad weather, and was detained there by the winds till the 29th. General average contribution was claimed in respect of the wages and provisions from the time of first putting in until the final sailing. But the claim was disallowed. Lord Ellenborough said: "General average must lay its foundation in a sacrifice of part for the sake of the rest, but here was no sacrifice of any part by the master, but only .of his time and patience."

(69) See **YAR**, Rule X which states that:

'**Expenses at port of refuge etc.**

a) When a ship shall have entered a port or place of refuge or shall have returned to her port or place of loading in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place of refuge consequent upon such entry or return shall likewise be admitted as general average.

When a ship is at any port or place of refuge and is necessarily removed to another port or place because repairs cannot be carried out in the first port or place, the provisions of this Rule shall be applied to the

crew,[70] fuel, and stores consumed, and port charges incurred consequent on the prolongation of the voyage or the detention of the ship in port of refuge as a result of an accident or a sacrifice en route.[71]

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second port or place as if it were a port or place of refuge and the cost of such removal including temporary repairs and towage shall be admitted as general average. The provisions of Rule XI shall be applied to the prolongation of the voyage occasioned by such removal.

(b) The cost of handling on board or discharging cargo, fuel or stores whether at a port or place of loading, call or refuge, shall be admitted as general average, when the handling or discharge was 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, except in cases where the damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstances connected with such damage having taken place during the voyage.

The cost of handling on board or discharging cargo, fuel or stores shall not be admissible as general average when incurred solely for the purpose of restowage due to shifting during the voyage, unless such restowage is necessary for the common safety.

(c) Whenever the cost of handling or discharging cargo, fuel or stores is admissible as general average, the costs of storage, including insurance if reasonably incurred, reloading and stowing of such cargo, fuel or stores shall likewise be admitted as general average. The provisions of Rule XI shall be applied to the extra period of detention occasioned by such reloading or restowing.

But when the ship is condemned or does not proceed on her original voyage, storage expenses shall be admitted as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date'.

At common law, there has been uncertainty as to the extent to which associated costs can be allowed in general average. These consist mainly of the inward and outward port charges, and the costs of unloading and warehousing cargo. In ***Atwood v. Sellar*** (1880) 5 Q.B.D. 286), the Court of Appeal allowed all of these costs in general average when the ship was forced into a port of refuge in consequence of a general average incident. In contrast, in ***Svendsen v. Wallace*** (1885) 10 App Cas, the ship was forced into the port of refuge in consequence of a particular average incident. The House of Lords allowed only the inward charges and the costs of discharging cargo as general average. They reasoned that, after this point, the cargo was safe, and further expenditure could not therefore be said to relate to the common safety of both ship and cargo.

However, the conflict between these authorities has lost much of its importance, due to the widespread use of the **YAR**. Rule X, as we have seen, allows as general average all of the costs associated with a port of refuge" and does not require a general average incident to have been the cause of the ship having to seek refuge.

Where, however, a ship on her voyage, in consequence of damage not the subject of a general average contribution, such as springing a leak, puts into a port of refuge, and, in order to repair the ship, the cargo is necessarily landed, the expenses of reloading the cargo to enable the ship to prosecute her voyage are not the subject of a general average contribution from the cargo (see ***Svendsen v. Wallace*** (1884) 13 Q.B.D. 69) nor is damage to the cargo sustained in discharging it, in order to repair the ship, the cargo being in no danger (see ***Hamet v. P. & O. Co.*** [1908] 2 K.B. 298)

(70) Rule XI. **Wages and maintenance of crew and other expenses bearing up for and in a port of refuge, etc.:**

'(a) Wages and maintenance of master, officers and crew reasonably incurred and fuel and stores consumed during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be admitted as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X(a).

(b) 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

EMC, Article 342/2 and **YAR**, Rule X allow as general average all of the costs associated with a port of refuge(72) and do not require a general average incident to have been the cause of the ship having to seek refuge(73). The effect

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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 admitted in general average.
Provided that when damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstance connected with such damage having taken place during the voyage, then the wages and maintenance of master, officers and crew and fuel and stores consumed during the extra detention for repairs to damage so discovered shall not be admissible as general average, even if the repairs are necessary for the safe prosecution of the voyage.
When the ship is condemned or does not proceed on her original voyage, wages and maintenance of the master, officers and crew and fuel and stores consumed shall be admitted as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.
Fuel and stores consumed during the extra period of detention shall be admitted as general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.
Port charges incurred during the extra period of detention shall likewise be admitted as general average except such charges as are incurred solely by reason of repairs not allowable in general average.
(c) For the purpose of this and the other Rules wages shall include all payments made to or for the benefit of the master, officers and crew, whether such payments be imposed by law upon the shipowners or be made under the terms or articles of employment.
(d) When overtime is paid to the master, officers or crew for maintenance of the ship or repairs, the cost of which is not allowable in general average, such overtime shall be allowed in general average only up to the saving in expense which would have been incurred and admitted as general average, had such overtime not been incurred'.
Under the **YAR** 2004, Rule XI wages incurred in putting into the port of refuge are allowed, but those incurred while the ship is at the port are excluded. Rule XI reads as follows:
'WAGES AND MAINTENANCE OF CREW AND OTHER EXPENSES PUTTING IN TO AND AT A PORT OF REFUGE, ETC.
a. Wages and maintenance of master, officers and crew reasonably incurred and fuel and stores consumed during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be allowed as general average when the expenses of entering such port or place are allowable as general average in accordance with Rule X(a).
b. For the purpose of this and the other Rules wages shall include all payments made to or for the benefit of the master, officers and crew, whether such payments be imposed by law upon the shipowners or be made under the terms of articles of employment'.
(71) ***EMC,*** Article 342/2(h) provides that:
'General average shall include in particular... the wages of the master and crew and the value of the fuel and stores consumed during the prolongation of the voyage occasioned by a ship entering a port or place of refuge for protection or for repairs to be carried out shall be considered to be general average provided that this is within a reasonable period for the ship to be in proper condition to continue the voyage.'
Once the ship has reached her final destination, even though cargo remains on board, such expenses cannot be allowed under **YAR**, the numbered Rules, and can only be allowed under Rule A, if incurred for the common safety: ***Trade Green Shipping v. Securitas Bremer (The Trade Green)*** [2000] 2 Lloyd's Rep. 451.
(72) Or a second port of refuge if repairs cannot be effected at the first place.
(73) However, **YAR**, Rule X (b) excludes costs incurred solely for restowage due to shifting during the voyage, unless such restowage is necessary for the common safety.

of the ***EMC***, Article 342/2 and YAR, Rule of Interpretation is that these costs can amount to general average, even though they might not be covered by the definition of general average in ***EMC***, Article 342/1 and YAR, Rule A(74). Furthermore, ***EMC***, Article 342/2(h) and YAR, Rule XI allow the shipowner the additional wage and fuel costs caused by the prolongation of the voyage, due to the stay at the port of refuge. Recovery under ***EMC***, Article 342/2 and YAR, Rule Xl is not, however, possible in respect of costs incurred at the port of discharge. In ***The Trade Green***,(75) no recovery was allowed under this rule in respect of tug costs incurred when a fire broke out on the ship during discharge, which led to the port authority ordering tugs to remove her from the berth. The shipowners attempted to claim such costs as 'port charges' under Rule XI (b). However, their argument tailed, as they first had to show that the ship had been 'detained' in the port by reason of repairs necessary for 'the safe prosecution of the voyage', which they were unable to establish as the voyage had terminated at the time that the fire broke out consequently, their only prospect of recovering these costs in general average would have been under Rule A. For the purpose of this rule, the 'common maritime adventure' would still have been afoot at the time of the fire. However, recovery would still not have been possible as the tug assistance could not be described as having been for the common benefit of the ship and cargo, as the fire could more readily have been extinguished had the ship stayed at berth.

If the ship is condemned or the voyage abandoned, no costs incurred after that date are allowable under either rule. Rule XII allows damage to cargo when damage results from operations at the port of refuge, where the cost of such operations is itself allowable as general average under Rules X or XI.

iv) Environmental Costs

The 1994 and 2004 Rules contain provisions which restrict the right to recover in general average any costs, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutants from the property involved in the common maritime adventure. Rule C prima facie excludes all such claims, but this exclusion takes effect subject to the specific provisions of the numbered Rules. Of these, Rule XI (d) of the 1994 and 2004 Rules contains elaborate provisions the effect of which is to allow

(74) In ***Vlassopoulos v British and Foreign Ml (The Makis)*** [1929]1 KB 187, decided prior to the adoption of the Rule of Interpretation, a claim under Rule X was disallowed for this very reason.
(75) [2000] 2 Lloyd's Rep 451, QB.

most kinds of expense incurred in avoiding or minimising pollution or damage to the environment. Overall, the effect is that the expenses of ensuring that pollution or damage to the environment resulting from a general average act is eliminated or kept to a minimum are allowable, but that the costs of cleaning up pollution or making good damage which has already occurred are excluded, as are the costs of meeting good claims by third parties in respect of such damage. Rule XI (d) reads as follows:

'The cost of measures undertaken to prevent or minimise damage to the environment shall be allowed in general average when incurred in any or all of the following circumstances:

(i) as part of an operation performed for the common safety which, had it been undertaken by a party outside the common maritime adventure, would have entitled such party to a salvage reward;

(ii) as a condition of entry into or departure from any port or place in the circumstances prescribed in Rule X(a);

(iii) as a condition of remaining at any port or place in the circumstances prescribed in Rule X(a), provided that when there is an actual escape or release of pollutant substances the cost of any additional measures required on that account to prevent or minimise pollution or environmental damage shall not be allowed as general average;

(iv) necessarily in connection with the discharging, storing or reloading of cargo whenever the cost of those operations is admissible as general average.'

v) Substituted Expenses

It sometimes happens that expenses at a port of refuge, which would be general average, can be avoided by adopting a course which will be more economical, on the whole, but which will involve a loss or expenditure that would not ordinarily be contributed to. When, for example, a ship is at a port of refuge in a damaged condition, it may be possible, by adopting an alternative course, to avoid the expense which would be entailed by repairing her there. For instance, suppose a ship is at a port of refuge where, in order to repair her, it would be necessary to discharge the whole of her cargo, warehouse it, and subsequently reload it. It might be possible, as an alternative course, to tow her to her port of destination at considerably less expense than would be entailed by discharging, warehousing and reloading the cargo. In these circumstances the

alternative course would be prudently and rightly adopted, and the expenditure would be called a 'substituted expense', which would be apportioned in the same ratio as the expenditure that would have been borne by the various parties had the more expensive course been followed.

The "substituted expenses" are regulated by ***EMC***, Article 346 which states "(Free translation) *expenses incurred instead of other expenses which could have been regarded as general average shall be regarded as general average had they been extended up to up to the amount of the general average expense avoided* "[(76)] They are also regulated by Rule F of the **YAR**: 'Any additional expenses incurred in place of another expense which would have been allowed in 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.' In practice most substituted expenses are those incurred with a view to reducing port of refuge expenses which would have been incurred and allowed under ***EMC***, Article 342/2 (f,g,h) and **YAR**, Rules X and XI. Some examples of substituted expenses are towage of the ship from a port of refuge to its destination, transshipment and forwarding of the cargo from a port of refuge to destination, drydocking of the ship in the port of refuge with cargo on board, and temporary repairs.[(77)] The additional expense may only be substituted for general average expenditures that are thereby avoided. They may not be accounted against ordinary ship's costs of the voyage. Therefore, towing the disabled ship to destination or forwarding the cargo there

(76) ***EMC***, Article 250/3 reads in Arabic as follows:
"تعتبر خسارة مشتركة المصاريف التي انفقت عوضاً عن مصاريف أخرى كان من الممكن اعتبارها من الخسائر المشتركة لو أنها انفقت وذلك في حدود مبلغ المصاريف التي لم تنفق."

(77) See ***The Bijela*** [1994] 2 Lloyd's Rep. I where the ship was engaged on a voyage from Providence to Kandla and grounded shortly after sailing. She put into Jamestown, the nearest anchorage, and was faced with the choice of either effecting temporary repairs there, or discharging the cargo into barges while she proceeded to New York for permanent repairs, for which there were no suitable facilities at either Providence or Jamestown. The shipowners chose the former option, which cost US $282,000, whereas the latter option would have resulted in general average expenditure of US $535,000.
Cargo owners submitted that, in making the calculation required by Rule XIV, one was forced to the conclusion that there had been no saving in general average as a result of the temporary repairs. This is because, had permanent repairs been undertaken in New York, the associated costs would not have been allowable in general average under Rule X(b) as those repairs would not have been 'necessary for the safe prosecution of the voyage', which could have been achieved by temporary repairs in Jamestown.
This very literalist argument was accepted at first instance and by the Court of Appeal. However, the House of Lords adopted a more purposive approach and found for the shipowner. Lord Lloyd held that, for the purposes of the comparison required by Rule XIV, the only assumption that needed to be made in construing Rule X (b) was that temporary repairs were not, *in fact*, made. On that assumption, repairs at New York would have been necessary for the safe prosecution of the voyage and the port of refuge costs there would have been allowable in general average. As these exceeded the actual cost of the temporary repairs, it followed that the cost of the latter must be allowable under Rule XlV.

separately are ordinarily the price the shipowner must pay for earning the freight;[78] but when such measures replace the need to make general average expenditures, their cost may fairly be set off against the expenses that would otherwise have been made.[79] Even so, as Article 346 and Rule F state, these substituted expenses are allowed only up to the amount of general average expenditure thereby saved. Further, only expenses and not losses may be substituted. ***EMC,*** Article 346 and **YAR**, Rule F also state that no account will be taken of any saving that might be occasioned to other interests, such as a reduction in the shipowners cost of repairs.

2.2. INTENTIONALLY AND REASONABLY INCURRED

To qualify as general average an extraordinary sacrifice or expenditure must be intentionally and reasonably made or incurred.[80]

2.2.1. Intentionally made or incurred

The sacrifice or expenditure must be made or incurred intentionally or deliberately. The act must be the result of the exercise of reasoning power and discretion, directed to the particular problem of saving the ship and cargo concerned.[81]A sacrifice or an expenditure, which in given circumstances becomes inevitable, does not give rise to a claim in general

(78) See **YAR**, Rule VI (a), paras.2 and (b).

(79) See ***The Bona*** [1895] P. 125 CA where the ship was grounded on Galveston Bar for three days and eventually got herself off by using her own engines. It was calculated that 52 tons of coal were used in those three days that would not be used in ordinary steaming. A claim was made for contribution in respect of the damage to the engines and the cost of the coal, against which it was argued that there was nothing abnormal in the nature of the user of the ship's appliances, though the circumstances were no doubt extraordinary. It was held, however, that to use engines by working them ahead and astern while the ship was fast on a bank, instead of being afloat, was a use for which they were never intended, and that the engines having been intentionally put to such a use in order to rescue ship and cargo from danger, both the injury to the engines and the extra coal consumed must be contributed for.

Cf. ***Power v. Whitmore*** (1815) 4 M.&.S. 141. a ship was in imminent danger of being driven ashore during a gale, and in order to avoid this danger was stood out to sea with a press of sail greater than she was able to bear in such weather, with the result that serious damage was sustained to the masts, sails and the hull itself. It was held, as counsel for the shipowners had admitted in argument that no part of this damage was the subject of general average.

(80) ***EMC,*** Article 246/1; **YAR**, Rule A.

(81) One of the best examples of a voluntary sacrifice was the stranding of the ship in ***Barnard v. Adams*** 51 U.S. (10 How.) 270 (1850). Caught in a heavy rainstorm with thunder and lightning, the acting master intentionally stranded the ship on a comparatively safe shore to avoid the virtually certain destruction of the ship upon a rocky and more dangerous part of the shore. The court explained the requirement for a voluntary sacrifice thus:

"The necessity of the case must compel him to choose between the loss of the whole and part; but however metaphysicians may stumble at the assertion, it is this forced choice which is necessary to justify the master in making a sacrifice (as it is called) of any part for the whole."

average.[82] Only when the loss is intentionally incurred may it amount to general average. In ***Papayanni and Jeromia v. Grampian Steamship Co Ltd.***[83]a ship which was on fire was intentionally scuttled under orders of the captain of the port, the court still decided that it amounted to a general average sacrifice. In that case the facts were that the cargo-owners shipped a cargo with the shipowners in their ship under bills of lading which incorporated the **YAR** 1890; Rule III of which stated: 'Extinguishing fire on shipboard: Damage done to ship and cargo, or either of them, by water or otherwise ... in extinguishing a fire on board the ship, shall be made good as general average.' During the voyage, a fire developed in the ship's bunkers and she was, in the interests of all concerned, put into a nearby port for assistance. However, the captain of the port, to whom intimation of the state of affairs had been given, ordered the ship to be scuttled in the interest of safety, and the cargo was effectively destroyed. The cargo-owners then claimed a general average contribution from the shipowners.

The court ruled that, although the scuttling was intentional, it still amounted to a voluntary act for the benefit of all, and, therefore, the cargo-owners were entitled to recover in general average. The court said:

> "This evidence shows that what was done was in the interest of ship and cargo. There is no evidence that there was any other motive for scuttling the ship. The captain, who had not parted with the possession of his ship, did not object. There seems to be clear evidence that he sanctioned what was done. The loss must be adjusted as a general average sacrifice."[84]

(82) See the ***Explanatory Note to the Draft of the Emirati Maritime Code***, p.108:
It is submitted that an action which is forced upon the master cannot be said to be voluntary and is not accountable as a general average act. Thus in ***Athel Line v. Liverpool and London War Risks Insurance*** [1944] K.B. 87. two ships of the plaintiff line, sailing in convoy from Bermuda to the United Kingdom, put back to Bermuda under order of the convoy commodore. These orders were pursuant to Admiralty instructions, owing to the convoy ahead having been attacked by an enemy raider with considerable loss thereto. The plaintiffs' ships lost six days on their voyage and extra fuel and stores were consumed. Accordingly the plaintiffs claimed from their War Risk underwriters the ships' contribution towards these expenses in general average under Rules A and X (a) of the York-Antwerp Rules 1924. Tucker J. held that the language of Rule A was inappropriate to cover mere obedience to lawful orders of a superior authority, and that the plaintiffs could not rely upon the acts of the masters of the ships as general average acts. He also decided that the plaintiffs could not rely upon the acts of (a) the commodore or (b) the Admiralty, as in his view of the facts the orders were given as part of the general naval and strategic dispositions in the North Atlantic, and not for the sole purpose of preserving from peril the property involved in the adventures in the plaintiffs' two ships.
(83) (1896) 1 Com Cas 448.
(84) (1896) 1 Com Cas 448 at p. 452.

Further, the property is not deemed to have been "sacrificed" if it was already constructively lost at the time of the sacrifice and consequently there would be no claim for contribution.(85)

By way of illustration on this point, the cases of ***Shepherd v. Kottgen***(86) and ***Corrie v. Coulthard*** (87) could be put forward. Although both cases involved cutting away mainmasts, they nevertheless provide a good indication of the factors considered by the courts in relation to the reality of the sacrifice or expenditure.

In ***Shepherd v. Kottgen***(88) a ship met with a heavy storm, which caused parts of the rigging to give way. The mainmast in consequence began to lurch violently, and threatened to rip open the deck. In these circumstances the mate, by the master's orders, cut the mast, whereby its loss, which was already inevitable, was accelerated by a minute or two. The action was by the shipowners against the cargo-owners for a general average contribution for the loss of the mast. The question arose as to whether at the time of sacrifice the mast was virtually a wreck and valueless. At the trial the jury found as a fact that the mast was valueless at the moment when it was cut down. Therefore, a general average contribution claim by the shipowners was not allowed.(89)

In the Court of Appeal, Bramwell L.J. said,:

"Where the thing destroyed has some peculiar condition attached to it, so that it will be lost whether the whole adventure is saved or not, then the destruction cannot be deemed a sacrifice... The mast was in such a state that it must have been lost, whether the ship got safely to port or not. Consequently there was no sacrifice of it when it was cut away, and the plaintiffs have no claim for contribution."(90)

Brett L.J. also said on the point that:

"Where, whether the act relied upon as the act of sacrifice had been done or not, the thing in respect of which contribution is claimed would, by reason of its own state or condition, have been of no value whatever, or

(85) Carver, Carriage by Sea, 13th ed., at para 973.
(86) (1877) 2 C.P.D. 578.
(87) (1877) 3 Asp.M.C. 546. Unreported case mentioned in ***Shepherd v. Kottgen*** (1877) 2 C.P.D. 578.
(88) (1877) 2 C.P.D. 578.
(89) (1877) 2 C.P.D. 578, at p. 581.
(90) (1877) 2 C.P.D. 578, at p. 589.

would have been certainly or absolutely lost to the owner, although the rest of the adventure had been saved, there is nothing lost to the owner by the act, and therefore there is nothing sacrificed, that is to say, there is no sacrifice." (91)

In ***Corrie v. Coulthard***(92) a ship met with a storm, which caused parts of the rigging to give way. In consequence, the mainmast began to sway from side to side and although crew and master attempted to tighten the rigging in order to steady the mast, their attempts resulted in making the mast settling into the ship. Consequently the master thought that there was danger of the mast going through the ship's bottom, and ordered to cut it away. The jury found that it was possible to save the mast, and it follows that the mast was of some value.

As Brett L.J. put it, "If, at the moment you sacrifice a thing it is of no value, whatever future circumstances might arise, then if there is a sacrifice there is no loss ...."(93)

Therefore, in the former case, it was not possible to save the mast and consequently the mast was of no value, whereas in the latter case the opposite was found to be true by the jury. In other words, in ***Corrie v. Coulthard*** the sacrifice was real whereas in ***Shepherd v. Kottgen*** it was not.

A further important question arises as to who must make the sacrifice or incur the expenditure. Is it essential for it to be the master or someone acting under his authority?

Under ***EMC***, the act must be ordered by the master.(94) It makes no difference that the actual order is given by some other authority, provided

(91) (1877) 2 C.P.D. 578, at p. 590. See, too, ***Iredale v. China Trader's Insurance Co.*** [1899] 2 Q.B.356, where a claim for contribution in respect of loss of freight upon a cargo of coal was disallowed on the ground that the coal was in any event doomed to destruction, and could under no circumstances have been carried to its destination. Bigham J. said, at page 358, that "the law is plain that where the thing sacrificed is already valueless at the time of the general average act there can be no claim to contribution."
The same view appears to have been held in the U.S.A., where in the case of ***The Adele Thackera*** (1885) 24 Fed. Rep. 809, the court said: "If the lumber, in the condition which it had come to occupy through a peril of the seas at the moment when the cutting of the lashings rook place, was practically irrecoverable and of no *value*, then the cutting of the lashings, which was the only voluntary act, did not properly cause the loss of the lumber. Practically it was lost already. The cutting of the lashings did not cause the loss of anything having then any value, and hence would not be a ground of claim."
(92) (1877) 3 Asp. M.C. 546.
(93)(1877) 3 Asp. .C.546, at p. 567
(94) See the ***Explanatory Note to the Draft of the Emirati Maritime Code,*** p. 109 where it said '(free translation) that every sacrifice or expense shall not be considered as a general average unless decided to be made or incurred by the master.'

that the master sanctions it. The **YAR** do not, however, restrict the power to decide upon a general average act to the master alone.

In England, the act may be considered of general average even where it is ordered by a stranger to the common adventure (e.g. a local port authority),(95) provided that it is necessary for the common safety. Carver pointed out that:

'The sacrifice ought, generally speaking, to be made under the directions, or with the authority, of the master, or other person in command of the ship. But that does not appear to be an essential; the real questions are, was a sacrifice necessary for the general safety? and were the measures taken reasonably prudent in view of that necessity?'(96)

All direct losses that flow from the intentional act of the master are capable of amounting to general average.

Under Article 345/1 of the ***EMC***, a general average contribution can be claimed only for the direct consequences of a general average act, that is, those which flow in an unbroken sequence from the act, as opposed to indirect consequences, where the sequence is broken by an intervening extraneous cause. Article 345/2 declares not allowable, as not being direct consequences of the general average act, loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage or loss of market suffered by the cargo.(97)

(95) See ***Papayanni v. Grampian SS Co*** (1896) 1 Com. Cas. 448. In this case a fire broke out on board and the master put into port where the fire increased so that he sent for the captain of the port. The latter ordered the scuttling of the ship, and the master believed this course to be best in the interests of the ship and cargo, raised no objection, and in the opinion of the court, sanctioned it and thereby made it his own. It was, therefore, held that the loss must be adjusted as a general average sacrifice.
A different rule has, however, been laid down by a majority in the Supreme Court of the United States. In ***Ralli v. Troops***, 157 U.S. 386 (1894), a case of a ship on fire, which was scuttled by the harbour authorities, it was held that:
"The power and duty of determining what part of the common adventure shall be sacrificed for the safety of the rest, and how and when the sacrifice shall be made, appertain to the master of the ship, *magister navis*, as the person intrusted with the command and the safety of the common adventure, and of all the interests comprised therein, for the benefit of all concerned, or to someone who, by the maritime law, acts under him or succeeds to his authority."
Applying this rule, the court held that a sacrifice of ship or cargo by the act of a stranger to the adventure gives no right of contribution, and that the port authorities were strangers to the maritime adventure and to all interests included therein.
(96) Carver Carriage by Sea 13th ed. para. 1379.
(97) ***EMC,*** Article 345 reads in Arabic as follows:
1- تدخل في الخسائر المشتركة الأضرار المادية والمصاريف الناشئة مباشرة عن عمل له صفة الخسارة المشتركة.

Rule C of the **YAR** specifies that:

'Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average. Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever, such as loss of market, shall not be admitted as general average.'

The meaning of "direct consequences" was considered in ***Australian Coastal Shipping v. Green***,[(98)] the facts of which were as follows. A ship "*Bulwarra"* was in port in New South Wales when a storm struck and put the ship in imminent danger. A tug was engaged to tow *Bulwarra* to safety, but, during the operation, a tow rope broke and wrapped itself around the tug's propeller. Although *Bulwarra* reached safety, the tug drifted aground and became a total loss. The tug's owners unsuccessfully claimed against *Bulwarra's* owners under the contact of towage (UKSTC), but, in putting up a defence, legal costs were incurred. *Bulwarra's* owners then claimed those legal costs from their insurers as a general average expenditure.

The Court of Appeal ruled that the towage contract amounted to "general average act"[(99)] under Rule C of the **YAR** 1950, and the loss and expenses incurred were the direct consequence of such general average act.

Lord Denning MR put the matter in this way:

"...In the case of ***Bulwarra***, the tug became a total loss.... The plaintiffs have become bound under the indemnity clause to indemnify the tug owners. Is this expenditure, under the indemnity clause, a 'general average loss'? ....In these circumstances, I propose to go back to the concept, as 1 understand it, in 1924, when the York-Antwerp Rules were made. 'Direct consequences' denote those consequences which flow in an unbroken sequence from the act; whereas 'indirect consequences' are those in which

2- أما الأضرار والمصاريف غير المباشرة الناشئة عن التأخير أو تعطيل السفينة أو انخفاض أسعار البضائع أو غير ذلك فلا تدخل فى الخسائر المشتركة.

In ***Anglo-Argentine Livestock v. Temperley*** [1899] 2 Q.B. 403 the extra expense of looking after the cattle at the port of refuge were disallowed as being expenses caused by delay.

(98) [1971] 1 Lloyd's Rep.16; [1971] 1 Q.B. 456.

(99) The provision in the towage contract reads as follows:

'The Tug owner shall not, whilst towing, bear or be liable for damage of any description done by or to the tug ... or for loss of the tug... arising from any cause, including negligence at any time of the Tug owner's servants or agents... and the Hirer shall pay for all loss or damage... and shall also indemnity the Tug owner against all consequences thereof... Provided that any such liability for loss or damage as above set out is not caused by want of reasonable care on the part of the Tug owner to make his tugs seaworthy.'

the sequence is broken by an intervening or extraneous cause ... If the master, when he does the 'general average act', ought reasonably to have foreseen that a subsequent accident of the kind might occur - or even that there was a distinct possibility of it - then the subsequent accident does not break the chain of causation. The loss or damage is the direct consequence of the original general average act... If, however, there is a subsequent incident which was only a remote possibility, it would be different...In (***Bulwarra***)... the master, when he engaged the tug, should have envisaged that it was distinctly possible that the towline might break and foul the propeller. When it happened, therefore, it did not break the chain of causation".(100)

There is no additional requirement that the particular losses that flow from the intentional act should also be intended by the master. In ***McCall v. Houlder Bros***,(101) the ship's propeller sustained damage so that the ship ceased to be navigable and the master put into a port of refuge for repairs. There was a perishable cargo on board which could not be warehoused. In order to facilitate repairs the master set the ship down by the head with cargo on board. The tipping of the ship caused seawater to run into the hold and to damage part of the cargo. It was contended that this was not a general average loss inasmuch as

(100) [1971] 1 Q.B. 456, 482-3. In ***Federal Commerce & Nav Co Ltd v Eisenerz GmbH (The Oak Hill)*** [1975] 1 Lloyd's Rep.105,112 Ritchie J. in delivering the judgment of the Canadian Supreme Court said:
"if it be shown that loss or damage to cargo has been caused by the negligence of the master in carrying out the general average procedure, it can no longer be said that it was direct consequence of the general average act The chain of causation is broken by the intervention of a new cause"
In that case the facts were that the ship ***Oak Hill*** loaded two part cargoes of pig iron at Sorel, P.Q., for carriage to Genoa. Owing to negligence of the pilot, for which the shipowners were by contract not responsible, the ship stranded in the St. Lawrence river and put into the port of Levis, P.Q., as a port of refuge for repairs. It was necessary to discharge and subsequently reload the pig iron in order that repairs could be carried (Jut and, during the course of these operations, the cargoes became intermingled and to a limited extent lost and destroyed. The cargo owner claimed for the full amount of the loss and damage. The shipowners relied on Rule XII of the York- Antwerp Rules 1950 as a defence. It was found that the loss and damage was caused by negligence of shipowners. The shipowners contended that the port of Levis was so ill equipped for the reception of pig iron that the mixing and breaking might have taken place without anybody's negligence, but this contention was rejected. The Supreme Court held the shipowners liable. Richie J. said:

"In entering upon the general average act and in making all reasonable and necessary expenditures consequent thereon, the master is to be taken as acting with the implied authority of the cargo owners as well as the ship, but this authority does not extend so as to identify the cargo owners with the negligence of the master or those employed by him in carrying out the general average procedure or to derogate from his over- riding responsibility to care for the cargo in his capacity as the servant of the ship owner."
(101) (1897) 66 LJQB 408.

the damage to the cargo had not been foreseen as a consequence of the tipping of the ship, and that the damage to the cargo was not incurred voluntarily. The court held that the resultant damage to cargo was allowable in general average, although the master had not intended it as a consequence of his manoeuvre.(102)

2.2.2. Reasonably made or incurred

In carrying out the general average act the master must act reasonably in the interests of all concerned, even if his act is one of considerable hazard.(103)

EMC in Article 342/1 and **YAR** 1994 in Rule Paramount(104) qualify both a general average sacrifice and a general average expenditure being 'reasonably made'. Presumably, this infers that the master of a ship must act reasonably when making a sacrifice for which others will eventually be partly liable.

(102) See also ***Anglo-Grecian v. Benyon*** (1926) 24 Ll.Rep. 122 a ship's propeller fouled a wreck-marking buoy in bad weather, and for the safety of the ship and cargo it was decided to beach her. The ship took the ground sooner than was intended, and when the tide rose, she was carried on to rocks and seriously damaged. It was held that at the time it was decided to beach her, the ship and cargo were in danger, and that there was an intentional beaching, notwithstanding that the ship grounded at a place other than the selected place. Furthermore, it was held that there having been no intervening act of negligence between the beaching and the striking of the rocks, the damage done to the ship in striking the rocks was a direct consequence of the beaching, and therefore allowable in general average. Roche J. said :

"... although the grounding on the rocks was not at any rate foreseen as either a necessary or even a probable consequence by the pilot, yet it was not a subsequent accident unconnected with the grounding. It was at all times a possibility and it was a possibility which did not render the action of beaching illegitimate, or render the subsequent materialisation of the possibility into an actuality so disconnected with the beaching which brought it about as to break the chain of causation and prevent the plaintiffs from recovering in respect of the damage done by the rocks."

(103) Chorley & Giles's Shipping Law, 18th ed. at p. 295. In ***The Seapool*** [1934] P 53, a ship at anchor was caught up in a sudden gale and was at risk of losing her propellers and breaking her back. To avoid this, the master engaged in a risky manoeuvre designed to get her out to sea and, although he was successful, he caused damage to the ship and the pier in the process. These losses were held to amount to general average.

(104) The Rule Paramount reads as follows:

'In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred.'

The Rule Paramount was introduced in the **YAR** 1994 in response to the case of ***The Alpha*** [1991] 2 Lloyd's L.R. 515 (Q.B.) in which the court held that, unlike the lettered Rules, the numbered Rules (in this case, Rule VII) were not subject to the test of reasonableness. The facts of ***The Alpha*** as follows: damage caused to the ship's engines while trying to refloat the ship, which was stranded in a perilous position. The facts precisely satisfied the conditions of rule VII for admitting the injury to the ship's engines in general average except for the additional element that the negligence of the master contributed substantially to the damage sustained. That fact was treated as irrelevant by the court but now, under the Rule Paramount, the unreasonableness of the master's conduct in attempting to refloat the ship would inhibit any allowance in general average for the resulting damage. This example is clear enough, yet the same result might be achieved in Emirati law, even in the absence of the Rule Paramount,

Similarly, any expense incurred must be governed by the same criteria of reasonableness.(105)

It is submitted that the reasonableness of the act must be judged in the light of the emergency in which it was carried out, and the question is whether the act was reasonable in the circumstances as they appeared at the time, not whether it subsequently turns out to have been a good course to adopt. The purpose of the requirement of reasonableness is to exclude those cases where it should have been obvious, even in the agony of the moment, that the act was unnecessary or imprudent, and there are few if any cases where an act has forfeited its general average character merely on the ground that it was unreasonable.

In the case of expenditure, not only must it be reasonable, in the sense described above, to adopt the course of action which involves the expenditure, but the amount paid, or agreed to be paid, must also be reasonable. Where services have been provided on fixed terms agreed in advance, the question is whether it was reasonable for the master or owners, in all the circumstances, to agree to the terms.

The issue of excessive or unreasonable expenditure was raised in ***Anderson v. Ocean SS. Co***.(106) an arrangement existed between two shipping companies, the Ocean Steamship Company and the China Navigation Company, both of whom operated up the Yangtze River. This arrangement was such that, should either company's ships need assistance, the other company would provide that assistance for a fixed fee of £2,500. Thus, when the steamship *Achilles* ran aground in the river, *Shanghai* came to her assistance and towed her off for the fixed sum previously agreed. When the Ocean Steamship Company, the owners of *Achilles*, sought to recover from the cargo-owners in general average, the cargo-owners objected to the payment, as they contended that the price had been fixed by the owners and not the master, and that the fee was unreasonable.

The House of Lords reversed the decision of the Court of Appeal and ruled that, although the assistance amounted to general average, the sum charged was unreasonable and, with respect to the cargo-owners, should be reduced.

In delivering his judgment Lord Blackburn said:

(105) See the ***Explanatory Note to the Draft of the Emirati Maritime Code***, p. 108.
(106) (1884) 5 Asp. M.L.C 401, HL.

"I have come to the conclusion that, on the evidence given at the trial, it was not a simple issue whether the whole sum actually paid by the shipowners to the owners of Shanghai was chargeable to general average, and, if that was not made out, that nothing was to be recovered. I do not think that it would follow merely from the shipowner having become liable to pay and having paid that sum, that the whole of it was chargeable to general average. I think it might well be that, on this evidence, the proper conclusion was that something differing from that sum might be chargeable, and I think that, till it is ascertained whether any sum was chargeable, and what that sum was, the case is not ripe for decision.

... And though I quite agree that there is some evidence here that Achilles and her cargo were both in danger, and were both saved by the services of *Shanghai*, and though I also agree that it is not a question of law whether the amount of the sum charged as a disbursement was exorbitant or not, still I cannot find that any question as to the amount was submitted to the jury. It seems to me that if such a question had been submitted to a jury, there is much in the evidence that might make it very doubtful whether the jury would think this sum properly chargeable against the owners of the goods if uninsured".(107)

2.2. 3. Fault

While the sacrifice or expenditure may have been made intentionally and reasonably and, so, qualify as a general average act, if the peril which necessitates the extraordinary sacrifice or expenditure arose as a result of the fault or negligence 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, subject to the important exception that the party at fault is not entitled to recover contribution from any other at whose suit the fault was actionable at the time at which the sacrifice or expenditure was made or incurred. ***EMC*** Article 344/1 provides that:

"(Free translation) *The loss shall be considered as a general average even though the accident resulted therefrom is* due to the fault of one of the parties to the adventure. *This is without prejudice to the right of the other parties for recourse to the individual by whom such error is made.*"(108)

(107) (1884) 5 Asp MLC 401, 404.
(108) ***EMC***, Article 344/1 reads in Arabic as follows:

Rule D of the **YAR** provides that:

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

In England, despite the earlier view, which apparently was that sacrifice or expenditure occasioned by fault could not be treated as a general average act,(109) it is now settled that innocent victims of a general average sacrifice may claim contributions *inter se* as well as from one whose wrong caused the danger. The rationale of this legal development was expressed by Lord Watson, delivering the judgment of the Privy Council in ***Strang v. Scott***:(110)

"When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which immediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property ... But the negligent navigation of the master cannot ... afford any pretext for depriving those shippers whose goods were jettisoned of their claim to a general contribution. They were not privy to the master's fault, and were under no duty, legal or moral, to make a gratuitous sacrifice of their goods, for the sake of others, in order to avert the consequences of is fault. The Rhodian law, which in that respect is the law of England, bases the right of contribution not upon the causes of the danger to the ship and cargo, but upon its actual presence...."(111)

Thus, a carrier will not receive contributions in general average for expenses reasonably made to save the ship and cargo when they are necessitated by the unseaworthy condition of the ship," or, where the carriage contract is subject to the Hague-Visby Rules, the failure of the owner to exercise due diligence to make the ship seaworthy," as "the law is ... clear that a carrier is not entitled to recover from a shipper a contribution in general average where the general average

"تعتبر الخسارة مشتركة ولو كان الحادث الذي نتجت عنه وقع بخطأ أحد ذوي الشأن في الرحلة وذلك بغير إخلال بحق ذوي الشأن الآخرين في الرجوع على من صدر منه الخطأ."

(109) Carver, Carriage by Sea, 13th ed., para. 1363.

(110) (1889) 14 App Cas 601 (PC).

(111) (1889) 14 App Cas 601, at pp. 608, 609 (PC). See also ***Pirie v. Middle Dock Co.*** (1881) 44 L.T. 426.

situation was brought about by his own actionable fault".(112) In ***The Aga***(113) the defendants were owners of a cargo of timber shipped under ten bills of lading in the '***Aga***' from V to L. The bills of lading incorporated all the terms, conditions, clauses and exceptions including arbitration clause, deviation clause and general average of the charter party under which the ship was held. The charter party stated that the owners were not to be liable for unseaworthiness of the ship unless caused by a want of due diligence on the part of the owners of the ship. It further stated that general average should be payable according to the **YAR**.

The ship while at port took a list. The master, discovering the starboard ballast tank to be unfilled (it was later discovered to have a hole in it) ordered it to be filled. The list however continued and the master therefore beached the ship and the list was remedied. In order to get the ship off the beach it became necessary to get the assistance of a tug, and the ship was subsequently towed to K. There she was dry docked and found to be need of repair and in order to carry out such repairs it was necessary for the cargo to be unloaded. The ship was finally fully repaired and reloaded by the 4th October, and she sailed for London the next day.

Before the shipowners would permit the cargo owners to collect their cargo they forced them to sign a Lloyd's general average bond in the usual form under which they agreed to pay such general average contribution as should be owed by them. The shipowners brought an action on the bond for the money owing to them as a contribution in relation to the general average sacrifice and expenditure incurred by them in the course of the above incidents. The cargo owner contested the claim n the grounds of the shipowners lack of due diligence to provide a seaworthy ship.

It was held, that the shipowners had established a prima facie case to a general average contribution, but that the facts of the case showed that the ***Aga***

(112) ***St. Lawrence Construction v. Federal Commerce and Navigation Co.,*** [1985] 1 F.C. 767 at 788.

(113) ***Diestelkamp v. Bayes (Reading) Ltd., The Aga*** [1968] 1 Ll.Rep.431. See also ***The Ettrick*** (1881) 6 P.D. 127 where the question was whether the shipowner could claim contribution from the cargo towards the expense of raising ship and cargo which had been sunk owing to negligent navigation by his servants. He had limited his liability under section 54 of the Merchant Shipping Act 1862 and claimed that he should not be answerable in damages except as provided by that section. Brett L.J. said at p. 135: " He has been in fault, and the authorities are decisive that if the general average contribution· which he claims is a general average contribution which arose by reason of a default of his, he cannot claim anything." And Cotton L.J. said at p. 137: "It would be against equity to say that the person who himself has 'done the wrongful act which caused the expenditure shall claim thereupon from anybody else."

had insufficient reserve stability when she left her port f loading, and that due diligence to make her seaworthy in that respect had not been exercised, therefore the plaintiffs' claim failed.

It is submitted that in order that the party at fault be banned from recovering, it is necessary that his "fault" be an "actionable fault" as Kennedy L.J. put it in ***Reenshields, Cowie & Co. v. Stephens & Sons Ltd***.(114) this default "must be something which is wrongful in the eyes of the law, that is to say, something which constitutes an actionable wrong". (115)

In this case a cargo of coal went on fire and as a result of water used in putting it out, the cargo suffered badly. The cargo owners were held entitled to claim a general average contribution since they were not guilty of any actionable wrong.(116)

2.2.4. Fault and Exception Clauses

It is only actionable fault which bars the right to claim contribution, and accordingly if the claimant is relieved, either by statute or by the terms of his contract, of the consequences of his fault, that relief extends to his claim for contribution, which is then not barred.(117) It is sufficient to preserve the claim for contribution that the statute or contract exempts the claimant from liability for physical loss or damage arising from the fault in question. It is not necessary that it should wholly exonerate him from responsibility.(118) However, where the statute or contract merely limits, as opposed to excluding, the claimant's liability, or where it extinguishes his liability unless suit is brought within a particular time, he will be unable to recover.

Under ***Emirati law*** the rights and liabilities of carrier is principally governed by the *Maritime Code*. However, it is common for contracts of carriages to exclude or restrict the carrier's liabilities. In these circumstances, the

(114) [1908] A.C. 431.

(115) Pearson J. in concluding his judgment on the point of fault, in ***Goulandris Brothers Ltd. v. B. Goldman & Sons Ltd.*** [1958] 1 Q.B. 74, said, *inter alia*, at p. 104:

"It appears, therefore, in my opinion, that for the relevant purpose a 'fault' is a legal wrong which is actionable as between the parties at the time when the general average sacrifice or expenditure is made."

This point was restated forcefully in 2001 in ***The Kamsar Voyager*** [2002] 2 Lloyd's Rep. 57 at p. 65:

"Under English common law a shipowner is only debarred from recovering a G.A. contribution if the expenditure was caused by his actionable fault...."

(116) The court further held that both parties were equally familiar with liability of coal to spontaneous combustion in a climate like that of India.

(117) ***The Carron Park*** (1890) 15 P.D. 203; ***Milburn v. Jamaica Fruit, etc. Co*** [1900] 2 Q.B. 540 (C.A.).

(118) ***Louis Dreyfus & Co v. Tempus Shipping Co*** [1931] A.C. 726; ***The Makedonia*** [1962]1 Lloyd's Rep. 316.

carrier will not be prevented from making a general average claim, if his fault is covered by a statutory provision or by special terms in the contract of carriage absolving him from liability, e.g. for negligent navigation or for fire on board happened without his actual fault.(119)But, where for example the carrier is exempt from liability resulting from negligence of the master or crew, but not from liability resulting from unseaworthiness, and the common adventure is imperilled by both negligence and unseaworthiness, then the carrier will not be entitled to general average contribution if the unseaworthiness is a real cause, even though the negligence has contributed to the peril, which might not have been brought about by the unseaworthiness alone.

English law is the same. It has been held that where the incident bringing about the purported general average act is one for which the party at fault is excepted from liability under the contract, then that party may recover general average contribution from the other parties, the fault no longer being actionable.(120)Thus, in ***The Carron Park***(121) water got into the ship, through the ship engineer's negligence, which consequently damaged some of the cargo. A claim was made for contribution from the cargo in respect of general average expenditure incurred in consequence of the water getting into the ship. It was further contended that the shipowners could not recover the contribution claimed. The charter-party stated *inter alia* that "any neglect or default whatsoever of the pilot, master, crew, or other servants of the shipowners," was to be excepted. It was held, that this exception justified the shipowner's claim.

(119) ***EMC***, Article 344/2 provides that:
'The person who committed the mistake may not request that the damage he has incurred be considered to be a joint loss. Notwithstanding this, if the accident resulted from a navigational error on the part of the master, the disponent owner may ask that the damage he has incurred be considered as a general average.'
"ولا يجوز لمن صدر منه الخطأ أن يطلب اعتبار ما لحقه من ضرر خسارة مشتركة ومع ذلك إذا كان الحادث ناشئا عن خطأ ملاحي صادر من الربان جاز لمجهز السفينة أن يطلب اعتبار الضرر الذي أصابه خسارة مشتركة ."

(120) ***The Admiral Zmajavic*** [1983] 2 Ll.Rep.86: due diligence proper1y exercised by carrier, therefore general average contribution payable; ***The Daffodyl*** **'B'** [1983] 1 L1.Rep.498. Even if the exceptions clause only protects against physical loss of or damage to the goods themselves, the shipowner is entitled to recover contribution from cargo in respect of expenditures incurred to preserve it from such loss or damage not withstanding that the peril was brought about by his own breach of contract: ***The Makedonia*** [1962] 1 Lloyd's Rep, 316 at p.341.
It is, however submitted, that an exemption clause in favour of a party to the adventure only preserves his right to claim contribution despite the fact that the peril arose as a result of his actionable fault, but does not exonerate him from liability to contribute to a loss suffered by another party. In ***Schmidt v. Royal Mail SS Co*** (1876) 45 L.J.Q.B. 646, it was held that an exception in a bill of lading of fire on board and its consequences only relieved the ship-owners from their obligation to deliver under the circumstances to which the exception related, and did not affect their liability to make a general average contribution.

(121) (1890) 15 P.D. 203.

In delivering his judgment Sir James Hannen said:

"The claim for contribution as general average cannot be maintained when it arises out of any negligence for which the shipowner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered by it. The loss would not have fallen on the shipowner, and the expenditure or sacrifice made by him is not to avert loss from himself alone, but from the cargo-owners."(122)

Further, in ***Dreyfus (Louis) & Co. v. Tempus Shipping Co.***,(123) a steamship was chartered to proceed to various ports in the River Plate and there load a cargo of grain for carriage to Hamburg. The shipowners had provided bunkers coal more than enough to take the ship to the loading ports. However, the coal was not stowed properly and it was unfit for the voyage. In this respect the ship was unseaworthy. Whilst the ship was loading in the River Plate fire broke out in the bunkers. The fire was extinguished, but, after sailing from the final loading port, fire again broke out, and it became necessary to put into Montevideo in order to discharge coal from the affected bunkers. As the ship was British, the owners were entitled to the protection afforded by the Merchant Shipping Act 1894. Section 502 of that Act is as follows: 'The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely, (I) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship...'. The House of Lords held that the shipowners were not deprived of the protection of this section of the Merchant Shipping Act, even though the ship was unseaworthy by reason of fire in the bunkers, as the unseaworthiness was without their actual fault or privity, and that they were therefore entitled to recover the cargo's proportion of the general average expenditure.(124)

(122) In ***Milburn v. Jamaica Fruit Co*** (1900) 2 Q.B. 540 a time charter had provided that negligence of the master, etc., was to be " always mutually excepted"; but on the charterers' instructions, bills of lading were given to shippers without any such exception, under indemnity from the charterers against the consequences. The ship was damaged by collision, and general average expenditure was incurred by having to put into port; but as the collision was due to the master's negligence, no contribution to that could be recovered from the cargo. The Court of Appeal held that the charterers must make good the loss of this contribution under the usual indemnity, on the ground that it would not have been lost if the bills of lading had contained the negligence clause.

(123) [1931] A.C. 726.

(124) Under American law, however, contrary to English law, the mere fact that the negligent carrier is immunized from liability for the loss or damage sustained by cargo by one or more provisions of the Carriage of Goods by Sea Act (COGSA) does not permit him to claim a general average contribution from

In delivering his judgment, Lord Atkin said:

"It is now well established in our municipal law that a shipowner cannot claim a contribution for a general average sacrifice or expenditure where the peril that occasioned the sacrifice or expenditure was due to the fault of himself or his servants. But this proposition is of little practical value until a correct connotation is given to the word "fault"...(125)

I have dwelt upon the necessity for the fault to be actionable to illustrate the cases relied on by the shipowner which seem to me to decide that, where the act causing the peril is by convention of the parties not actionable, the claimant who has committed the act is not precluded from obtaining contribution...(126)

If by convention between the parties the so-called fault is an act which is not actionable as between them, the foundation for the doctrine invoked disappears. It is no longer a wrong of the shipowner which has caused the peril: it is no longer inequitable for him to enforce a contribution."(127)

Where there is a combination of causes, one of which is the shipowner's responsibility and the other is not, the matter will depend upon whether the cause for which the shipowner is responsible was a real cause: if it was a real cause, but not necessarily the dominant cause, the shipowner will not be entitled to claim contribution to general average despite the fact that neither cause operating alone would have given rise to the general average act.

So, in the case of ***Smith, Hogg & Co. Ltd. v. Black Sea & Baltic General Insurance Co. Ltd***.,(128) the ship after loading at the commencement of the voyage had a slight list which was not unusual and would have

cargo (see ***The Irrawaddy*** 171 U.S. 187 (1898)). If the carrier at fault is to recover from cargo in general average the carrier's bill of lading must include a "Jason clause", which has evolved into the "New Jason clause" since the enactment of COGSA in 1936. The New Jason Clause reads as follows:
'In the event of accident, danger, damage or disaster; before or after commencement of the voyage resulting from any cause whatsoever; whether due to negligence or not, for which or for the consequence of which the carrier is not responsible by statute, co tract or otherwise, the cargo, shippers, consignees or owners of the cargo shall contribute with the carrier in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the cargo. If a salvaging ship is owned or operated by the carrier, salvage shall be paid for as fully as if the salving ship or ships belong to strangers'.
(125) [1931] A.C. 726 at p. 745.
(126) [1931] A.C. 726 at p. 747.
(127) [1931] A.C. 726 at pp. 749-750.
(128) H.L. (1940) 67 Ll.L.Rep. 253.

been no cause for concern had the ship merely been loaded unsymmetrically with sufficient weight concentrated low in the ship for stability. The ship was, in fact unstable and therefore unseaworthy owing to all excessive deckload of timber. During the voyage the master found it necessary to fill the forepeak with ballast in order to compensate for the loss of weight in the bottom of the ship as the coal stowed below the center of gravity was consumed. At an intermediate port where the ship had called to replenish the bunkers, the master had the forepeak pumped out, and thinking it would be undesirable to have further coal put into the starboard side, to which side the ship was still listing, the master and officers had the coal directed towards the port side resulting in the ship first coming to a level keel and then as a result of her unstable condition suddenly keeling disastrously over to port. Expert evidence was later given that the ship was so tender and unstable owing to the excessive deckload that the weight of coal could not have been put on board in the ordinary way without the ship going on to her beam ends, although it might have been possible for calculations to have been made for the coal to have been taken on board without the disaster. The shipowner, under the terms of the charter-party, was not exempt from loss arising from unseaworthiness caused by want of due diligence on his part, although he was exempt from loss arising from act, neglect or default of the master, mariners, pilot or the servants of the shipowner in the navigation or management of the ship. It was held that the disaster would not have occurred had due diligence been exercised to make the ship seaworthy and therefore the shipowner was liable for the loss of and damage to the cargo and was not entitled to any contribution to his general average expenditure from the insurers of the cargo who had given a guarantee to pay the amount of general average contribution properly due in respect of the cargo.

The interaction of fault and excuse becomes peculiarly difficult where the ship's wrongdoing amounts to an unreasonable deviation. The case of ***The Orient Trader***(129) before the Supreme Court of Canada illustrates the difficulties. Slabs of tin were shipped at Penang in the *Orient Trader* for delivery at Hamilton, Ontario. The bills of lading incorporated United States
C.O.G.S.A. 1936, Fire Statute sections, and York-Antwerp Rules. After suffering heavy weather damage she began discharging cargo at Toronto with a view to sending it to Hamilton by road. Fire broke out destroying

(129) ***The Orient Trader*** [1974] S.C.R. 128. In ***The Cepheus***, 1990 AMC 1058 the owner's claim for a general average contribution from cargo was denied where the panel majority found that the ship had made an unreasonable deviation which the owner failed to prove was not the cause of the ship's stranding.

ship and damaging cargo. Bill of lading holders claimed damages from shipowner. Shipowner counterclaimed for general average contribution.

The Exchequer Court of Ontario heard evidence of United States law, and gave judgment for the shipowner on claim and counterclaim. The bill of lading holders appealed.

The Supreme Court of Canada held that the exemption from liability provided by the United States Fire Statute was lost in the case of deviation only where the fire was causally connected with the deviation; it was not. The shipowner was nevertheless entitled to general average contribution under a New Jason Clause in the bills of lading. The court allowed an appeal by the shipowner as to its question: interest was ordered to be paid as from date of adjustment. The bill of lading holders' appeals were dismissed.

The **YAR** respect the common law rule regarding fault in a way that allows the process of general average to continue unhindered. Rule D states: 'Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault.' The Courts(130) accept the common view that the effect of Rule D is, first, to provide for the adjustment of general average without reference to any fault that may have led to the general average act and, second, to preserve the remedies available at law against any party in fault. This expedient rule divides the complex issues of adjusting general average and determining legal liability into a two-step process, which conveniently respects the great difference in laws and professional experience that each stage engages.

One final point may be added here when the danger which necessitated the sacrifice or expenditure was due to cargo's unfitness for the voyage, the cargo owner can still claim contribution, subject to his conduct in shipping them. Thus, where the condition of a cargo of oilcake had deteriorated during the voyage due to inherent vice, unknown to the shipowners, the court in delivering its decision stated *inter alia*:

"It would be unreasonable to make the shipowners responsible for deterioration or damage caused by latent imperfection or defects of the

(130) ***Federal Commerece & Nav Co Ltd v Eisenerz Gmbh (The Oak Hill)*** [1975] 1 Lloyd's Rep. 105.

oilcake, which could not be supposed to have been known to them at the time of shipment."(131)

In ***Greenshields, Cowie & Co. v. Stephens***(132) a ship loaded a cargo of coal at Calcutta for Bombay. Shortly after sailing, fire broke out in a hold, and subsequently, after the ship had put into Colombo as a port of refuge, the fire spread to two other holds. Water was used in an endeavour to extinguish the fire, but it was found necessary to discharge the whole of the cargo and abandon the voyage at Colombo. The plaintiffs, the owners of the steamer, claimed from the defendants, the owners of the coal, a contribution to their general average expenditure, and the defendants counterclaimed for the ship's proportion of the damage done to the coal by water used in extinguishing the fire. The grounds on which the shipowners denied that they were liable to contribute to the water damage to the coal included: (I) that the immunity given to them by Section 502 of the Merchant Shipping Act 1894 in respect of damage arising by reason of fire,(133) automatically extended to cases of general average damage arising in consequence of fire, and (2) that the fire arose from spontaneous combustion of the coal. It was held by the Court of Appeal, and affirmed by the House of Lords that Section 502 of the Merchant Shipping Act 1894 did not relieve the shipowners from the obligation imposed by common law to contribute to a general average sacrifice. It was also held that the shipowner's plea in regard to spontaneous combustion failed, as the owners of the cargo had not been guilty of any negligence in the shipment of the cargo since both parties were familiar with the liability of coal to spontaneous combustion in a climate like that of India.

Finally, in ***Pirie v. Middle Dock Co.***,(134) some coal cargo took fire due to spontaneous combustion. Water was thrown on the coal to extinguish the fire and thus a loss of the shipowners' freight occurred. The question before the court was whether such loss should be treated as a general average loss. It was held that the shipowner was entitled to a contribution in general average for the lost freight, and that there was no claim on account of the cargo because the vice in it was the cause of the sacrifice.

(131) ***The Freedom*** (1869) L.R. 3 P.C. 594, per Sir J. Napier, at p. 660.
(132) [1908] AC 431 (HL)
(133) 'The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely, (I) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship...'.
(134) (1881) 44 L.T. 426; 4 Asp. M.C. 388.

2.3. IN TIME OF PERIL

A loss may be claimed in general average if the general average act which caused that loss was carried out 'in time of peril'.[(135)]The peril must be substantial, not slight or nugatory.[(136)] In ***Daniolos v. Bunge & Co. Ltd.***[(137)] the ship loaded a cargo of grain at Rosario and Buenos Aires and proceeded to Esbjerg, where she discharged part of her cargo, and then left for Randers. While she was sailing up a narrow navigable channel, due to the strong current she grounded. Efforts to refloat her by her own engines were unsuccessful, and later a tug refloated her momentarily, but she was grounded again due to the strong current and wind. Though continual efforts to refloat her were made, she remained aground for approximately 4 days, in constant danger of being taken further up the bank and of receiving damage to her bottom and structure, and of collision with passing ships. She was refloated as a result of the water having risen owing to the change in the wind direction. She then proceeded to Randers where she discharged her cargo.

The court held that the ship and cargo were never in any substantial danger, nor was there any added exposure to the danger of collision. Furthermore, it was held that even if there was danger, everybody connected with the ship was of the view that they were in no peril, and therefore any particular act done could not be a general average act.

The peril must be real in the sense that a mistaken belief on the part of the master that a peril threatens, even if his mistake is reasonable, will not justify a sacrifice made or incurred to avoid a factually non-existent danger. The courts

(135) Under Article 342/1 of the ***EMC***, actual peril must exist if a sacrifice or expenditure is to be treated as a general average act and this condition is also adopted by the **YAR**, Rule A.
The word 'peril' is used in the ***EMC*** definition without any qualification, although in many of the definitions given of general average it is stated that the peril must be imminent, which means that it must be substantial and threatening and something more than the ordinary peril of the seas; see ***Societe Nouvelle d'Annement v. Spillers and Bakers Ltd.*** [1917] 1 KB 865, per Sankey J. at p. 871: "a general average expenditure must be incurred to avoid extraordinary and abnormal peril, as distinguished from the ordinary and normal perils of the sea."
(136) See ***Vlassopoulos v. British & Foreign Marine Insurance Co (The "Makis")*** [1929] 1 K.B. 187, 200, per Roche J. put it(136):
"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, that it must be substantial and not merely slight or nugatory. In short, it must be a real danger."
(137) (1938) 62 Ll. Rep. 175.

appear united in their view that "real" refers to a peril that is existent as opposed to imaginary.(138) Thus, in ***Watson (Joseph) and Son v. Fireman's Fund Insurance Co. of San Francisco***,(139) during the course of the voyage smoke was seen issuing from the hold in which the resin was stowed and water was played on the cargo in that hold. Steam was also injected into the hold and considerable damage was done to the cargo. On arrival of the ship at Hull, however, no evidence was found that there had ever been a fire in the ship. The Court held that there had not been a general average sacrifice, inasmuch as the damage arose from the mistaken idea that the ship and cargo were in peril, whereas in fact no peril existed.(140) As Rowlatt J. put it:

> "... It has been contended that there is a 'peril' within the Marine Insurance Act 1906 in every case where the captain believes that it exists. I do not think so.... It is one thing to say that where a peril in fact existed one must take the view of the captain formed at the time the peril existed as to what would be the outcome of that peril, and must not say to him, 'If you had held on you would have found that all would have come right', or something of that sort. It is another thing to say that one must take the captain's view whether the state of facts existed which are alleged to have constituted the peril ... The words of the Marine Insurance Act 1906 do not justify me in saying that there is a peril whenever it looks as if there was a peril."(141)

In ***The West Imbodene***,(142) whilst a ship was in the height of a hurricane, it was found that the deck above one of the holds was hot and later on vapour and

(138) ***Vlassopoulos v. British & Foreign Marine Insurance Co. Ltd., The Makis*** [1929] 1 KB. I87.
(139) [1922] 2 KB 355. Although the dispute arose under a policy of insurance, covering a cargo of resin from New York to Hull, the case was decided upon the footing that the question was one of the English law of general average.
(140) Under **YAR** 1974, Rule V the master is protected when, in a situation of actual danger, he makes a sacrifice that later turns out to have been unnecessary:
'When a ship is intentionally run on shore for the common safety, whether or not she might have been driven on shore, the consequent loss or damage shall be allowed in general average.'
(141) ***Watson (Joseph) and Son v. Fireman's Fund Insurance Co. of San Francisco*** [1922] 2 KB 355, at p. 358.
(142) ***The West Imboden*** (1936) A.M.C. 696. *Cf.* ***The Wordsworth***, 88 F. 313 (S.D.N.Y. 1898) , where the master allowed sluices to be opened when the forepeaks tank was found to be flooded. This action caused cargo damage as the water was intentionally run off into the engine room where it was removed by the pumps. It was later discovered that water had not entered through the shell plating, as the master believed, but through the hawsepipes and, therefore, there was no need to open the sluices. Despite this mistaken belief, the ship was allowed general average contribution. The ***West Imboden*** court distinguished the case on the ground that in ***Wordsworth*** there was an actual peril to the cargo, the master being merely mistaken as to its degree.

steam was rising from that hold. Consequently, the master and officers concluded there was a fire in the hold, and steam and water was injected into the hold. At destination it was found that no fire had ever existed but a steam pipe in the hold near the deck was broken. It was held that although in this case the act of the master was a "reasonable" one, there was no actual peril to the cargo and therefore, there was no real danger of the ship being lost through fire, as fire did not exist.

In a given situation the danger to a ship and cargo may be real and substantial albeit not imminent.(143) In ***Vlassopoulos v. British & Foreign Marine Insurance Co (The Makis)***(144) a ship was engaged in loading cargo at Bordeaux, the foremast broke, fell on the main deck and caused a derrick to fall into the holds. The ship was at no time in danger, but she was moved into a wet dock for repairs. After repairs were completed she finished loading and put out to sea. There she fouled with a submerged wreckage and damaged her propeller blades. This accident made the ship unfit to encounter the ordinary perils of the sea, and she put into Cherbourg for inspection and repairs, which were necessary for the common safety of the ship, cargo and freight. It was held, that expenses at Bordeaux were not general average expenditure since the ship was at no time in danger. But the expenses at Cherbourg were general average expenditure, for the properties involved in the adventure were in danger.

Roche J. stated, in delivering the judgment of the Court, that it was not necessary for the ship to actually be:

(143) In US, while the early cases such as ***Barnard* v. *Adams*** 51 U.S. (10 How.) 270,303 (1850) speak of the need for an imminent peril threatening the ship, modern cases have liberalized this requirement. A showing of a peril is still required, but it need not be imminent. The change was explained in ***Navigazione Generale Italiana v. Spencer Kellogg & Sons, Inc.*** (1937) 92 Fed. Rep.(2nd) 41 "we think the 'imminence' of the peril is not the critical test. If the danger be real and substantial, a sacrifice or expenditure made in good faith for the common interest is justified". *Cf.* ***The Alcona*** (1881) 9 Fed.Rep.l72, "it seems ... that we must look only to the circumstances in which the ship was placed, and not to the particular measures employed, to determine whether the case is a proper one for contribution." *per* Brown D.J. at p. 173.
In ***Come v. Coulthard*** (1877) 3Asp. M.L.C. 546 there was a real danger of the mainmast, being loose, working through the bottom of the ship. Although the possibility of this happening was found later by the courts to be minimal, and that the peril would have had no disastrous results, it was held that the loss incurred in averting that peril was a general average loss. In other words the danger was existent, but not imminent.

(144) [1929] I K.B.187, decided under the **YAR** 1924. See also ***Corrie v. Coulthard***(144) where there was a real danger of the mainmast, being loose, working through the bottom of the ship. Although the possibility of this happening was found later by the courts to be minimal, and that the peril would have had no disastrous results, it was held that the loss incurred in averting that peril was a general average loss. In other words the danger was existent, but not imminent.

"... 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 thing arose in order to justify them doing any act which would be a general average act." (145)

EMC and **YAR** adopt the same approach. Under ***EMC***, the peril must be real in the sense that a mistaken belief on the part of the master that a peril threatens, even if his mistake is reasonable, will not justify a sacrifice made or incurred to avoid a factually non-existent expenditure danger. Any other view would mean that the general average act has been made unnecessarily.

It seems that, provided the danger was real, ***EMC*** does not require it to be imminent.(146)

Under **YAR**, while Rule A demands the general average act be made in a time of peril, two of the numbered rules, which have overriding effect, admit expenditures on certain measures in general average though incurred in the absence of any immediate danger. Rule X (b)(147) and the dependent Rule XI(b)(148) allow as general average the expenses of handling and discharging

(145) [1929] I K..B.187, at p. 199.
(146) See the ***Explanatory Note to the Draft of the Emirati Maritime Code***, p. 108.
(147) YAR 1974, Rule X(b):
'**Expenses at port of refuge etc.**
The cost of handling on board or discharging cargo, fuel or stores whether at a port or place of loading, call or refuge, shall be admitted as general average, when the handling or discharge was 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, except in cases where the damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstances connected with such damage having taken place during the voyage.
The cost of handling on board or discharging cargo, fuel or stores shall not be admissible as general average when incurred solely for the purpose of restowage due to shifting during the voyage unless such restowage is necessary for the common safety.'
(148) YAR 1974, Rule XI(b):
'**Wages and maintenance of crew and other expenses bearing up for and in a port of refuge, etc.**
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 admitted in general average.
Provided that when damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstance connected with such damage having taken place during the voyage, then the wages and maintenance of master, officers and crew and fuel and stores consumed during the extra detention for repairs to damage so discovered shall not be admissible as general average, even if the repairs are necessary for the safe prosecution of the voyage.
When the ship is condemned or does not proceed on her original voyage, wages and maintenance of the master, officers and crew and fuel and stores consumed shall be admitted as general average only up to the

cargo, fuel, and stores in a port of refuge as well as the wages and maintenance costs of the crew during the period of the ship's detention in specified circumstances. As long as these expenses are incurred for the common safety of the ship and cargo in a time of peril, they are entirely within the general principles of general average. Thus a ship that is holed by a collision at sea and limps into a port of refuge still in danger of sinking may claim the cost of moving cargo and other detention expenses made in the course of securing its safety. Similarly, a ship that calls at an intermediate port where it suffers a collision or a fire may claim similar expenses in the course of coping with the common peril. But once the ship has achieved safety in the port of refuge, there is no longer any peril facing ship and cargo, which requires expenditure in common. The costs of necessary repairs to the ship and, along with them, any expenses for caring for the cargo and maintaining the crew during the period of detention, would ordinarily be an incident of the voyage for the shipowner's account. However Rules X (b) and XI (b) allow these kinds of expenses during detention of the ship in the port of refuge for repairs as general average "if the repairs were necessary for the safe prosecution or the voyage." Since no reference is made to the presence of any common peril, expenses admitted in these circumstances have been called "artificial general average."[(149)] An alternative view of them is that, even though the ship be made safe in the port of refuge, it would not be fit to proceed further on the voyage unrepaired; if it were to do so, it would immediately face peril at sea.

In other words, under rules X (b) and XI (b), common peril is still a prerequisite to general average expenditure but it need not be imminent or impending; it is sufficient if apprehended or anticipated.

Danger only to Human Life

Article 342 of the ***EMC*** and Rule A of the **YAR** do not mention that a general average loss's characteristic is the voluntary sacrifice for the general safety of the lives and property involved.[(150)] In American case of ***Shoe v. Low***

date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.
Fuel and stores consumed during the extra period of detention shall be admitted as general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.
Port charges incurred during the extra period of detention shall likewise be admitted as general average except such charges as are incurred solely by reason of repairs not allowable in general average.'

(149) See W. Tetley, Marine Cargo Claims, 3rd ed. 1988, at 729.

(150) Danger to life alone is sufficient in English law. In ***The Gratitudine*** (1801) 3 C.Rob.240, 258 Lord Scott in delivering the judgment of the court, said *inter alia:*

Moor Iron CO.,[151] a ship was dragging her anchor in a gale and was in danger of going ashore. The master slipped the cable, and thus voluntarily stranded her in the same place as she would have been if he had not slipped the cable.

The district court held that the act of the master in slipping the cable was done for the purpose of saving life, and with no other motive, and therefore there was no case of general average. [152]

The denial in including human life in the subjects of general average, is best explained by Dr. Lushington, when he was considering a salvage case :

"The jurisdiction of the [Admiralty] Court ... is founded upon a proceeding against property which has been saved, and I am at a loss to conceive upon what principle the owners can be made answerable for the mere saving of life."[153]

In conclusion, it could be said that under the law of general average life does not represent a component of a common maritime adventure, and therefore if a general average act takes place solely for saving the lives of those on board, such act would not be treated as general average.

2.4. COMMON SAFETY OF THE VOYAGE

Loss is general average only when the act had been done 'for the common safety for the purpose of preserving from peril the property involved in a

"Nothing can be better settled than that the master has a right to exercise this power, (of jettison), in case of imminent danger ... he may determine what quantity; no proportion is limited ... in cases of extreme necessity, when the lives of the crew cannot otherwise be saved, it never can be maintained that he might not throw the whole cargo over board. - The only obligation will be that the ship should contribute its average proportion. It is said, this power of throwing over the whole cannot be, but in cases of extreme danger, which sweeps all ordinary rules before it; and so it is ...."

In ***Montgomery & Co. v. Indemnity Mutual Marine Insurance Co.,*** [1902] I K.B. 734, 740 Vaughan Williams L.J. said *inter alia*:

"It is not, we think, true to say that it is only the danger to the ship, freight or cargo which necessitates and justifies sacrifice by the master of either a portion of the cargo or a portion of the ship. This may be done in fear of death, and if it is done upon a proper occasion all must contribute to the loss".

(151) (1891) 46 Fed. Rep. 125.

(152) The libellant appealed and the Circuit of Appeals. Second Circuit, affirmed the decision on grounds that the master by slipping the cable, stranded the ship "substantially in the same place, under the same conditions, and with the same result to the cargo" 49 Fed.Rep.252, at page 253. *Cf.* the provisions of M.S.A 1894 providing that if a ship, apparel, cargo and lives are salved, a salvage claim may be brought against the property saved, whether or not other claims are brought***; The Willem III*** (1871) L.R. 3 A& E.487.

(153) ***The Zephyrus*** (1842) 1 W.Rob.329, at p.331.

common maritime adventure'.[(154)] The duty to contribute in general average is predicated upon this fundamental idea that loss sustained by one or more parties to the voyage was incurred for the safety and preservation of the property of all.[(155)] Thus, in ***Royal Mail Steam Packet Co. v. English Bank of Rio***,[(156)] A ship, *The Tagus*, on a voyage from Rio de Janeiro to Southampton stranded in a dangerous position near Bahia, having on board specie worth £125,000. The master landed the specie and, after jettisoning part of the cargo, the ship was subsequently refloated with the assistance of tugs. The specie was taken to Bahia and forwarded to the United Kingdom in another ship, but it was agreed that for general average purposes it was to be regarded as though carried forward by The Tagus. In an action brought by the shipowners against the owners of the specie, to recover a contribution in general average to the cost of making good the value of the jettisoned cargo, and of refloating the ship, the Court held that the specie could not be called upon to contribute to the general average expenses. It was also held that the cost of landing the specie was not a general average expense as it was not incurred for the safety of the interests involved, but solely with a view to the safety of the specie itself.

Wills J. laid down the rule as follows:

"If the object of the removal has been the lightening of the ship for the common safety, and the object of effecting the removal in such a fashion as to avoid jettison has been to do to that which must be got overboard something less wasteful than actual jettison, there seems to be no reason whatever for drawing a distinction between such a case and that of actual

(154) See ***EMC***, Article 342/1 and the **YAR**, Rule A

(155) It is submitted that when one party has a pecuniary interest in more than one facet of a marine adventure (e.g. a shipowner may also own the cargo, and it therefore stands to reason that he must also be the party who is interested in the earning of the freight) there cannot be a general average loss as the interested parties to the common adventure are one and the same.
However, the insurance of a general average loss is an entirely different matter. Here, the insurer is not concerned with who owns the property, but only that he has to indemnify the assured. The issue of whether there could be a general average loss when the parties to the common adventure were one and the same was raised in ***Montgomery and Co v. Indemnity Mutual Marine Insurance Co***, [1902]1 KB 734. The plaintiffs were the owners of both the sailing ship Airlie and the cargo of nitrate aboard her. The cargo was insured with the defendants. On the voyage from the west coast of South America to the UK, Airlie ran into difficulties, and, in order to save both the ship and cargo, the mainmast was cut away. The plaintiffs then sought to recover an indemnity from the defendants to cover the cost of the general average contribution which became due to the ship. The question before the court was, whether there could be a general average loss, with respect to a policy of insurance, when the assured was the owner of both the ship and cargo.
The Court of Appeal affirmed the decision of the trial judge, and ruled that there could be a general average loss when the assured was the owner of both the ship and the cargo.

(156) (1887) 19 Q.B.D. 362.

jettison, so far as liability to general average is concerned. But if the lightening of the ship formed no part, or no appreciable part, of the purpose for which the removal was effected, if the object of the removal was not to minimize the cost of jettison but to get out of harm's way the thing removed and to prevent it from being or remaining at risk at all, it seems to me that a different result may very well ensue, and that a portion of cargo landed under such circumstances may well be regarded as separated from the adventure, and no longer liable for contribution. There is authority for saying that the purpose for which an act causing loss is done may determine whether it constitutes general average or not."(157)

In ***Hingston v. Wendt***(158) where the cargo was salved from the sunken wreck of a sailing ship by an agent of the master, the court held that, although the agent held a lien on the cargo, the act of saving the cargo alone, though analogous to general average, was not in fact so. "....The plaintiff," said Blackburn J. "a ship agent at Dartmouth, was put in possession of the wrecked ship and cargo by the captain, with, as we understand the case, authority from the captain to do, as his agent, what was for the benefit of all concerned. The plaintiff did the work, and expended the money sued for in discharging the cargo, and he brought it to a place of safety, where he kept possession of it. The hull remained on shore, and ultimately broke up, and was sold as a wreck. We think we must take it on the statement to be the fact, that this expenditure was not incurred on behalf of the master as agent of the shipowner, performing on his contract to carry on the cargo to its destination and earn freight, but was an extraordinary expenditure for the purpose of saving the property at risk; and had the expenditure been for the purpose of saving the whole venture, ship as well as cargo, it would have constituted a general average, to which the owners of each part of the property saved must have contributed rateably, and the captain, and the plaintiff, as his agent, would have had a lien or right to retain each part of the property saved till the amount of the contribution due in respect of it was paid or secured.(159)

In ***A. Magsaysay, Inc. v. ANASTACIO AGAN***(160) the plaintiff owned a ship, which carried general cargo belonging to different shippers among them the defendant. When the ship was in the port of Aparri, it ran aground at the

(157) (1887) 19 Q.B.D. 362, at p. 372 et seq.
(158) (1876) 1 QBD 367.
(159) (1876) 1 QBD 367, at p. 370.
(160) G.R. No. L-6393 January 31, 1955

mouth of the Cagayan River. Attempts to refloat her under its own power having failed; plaintiff had her refloated by the Luzon Stevedoring Co. at an agreed compensation. After refloating, the ship proceeded to its destination and delivered its cargoes to their respective owners. On the theory that the expenses incurred in floating the ship constituted general average to which both the ship and cargo should contribute, the plaintiff brought this action against the defendant for his contribution.

The Supreme Court held: "It is the deliverance from an immediate, impending peril, by a common sacrifice that constitutes the essence of general average...In the present case, there is no proof that the ship had to be put afloat to save her from an imminent danger. What does appear ... is that the ship had to be salvaged in order to enable her to 'proceed to her port of destination. ... It is the safety of the property and not the voyage, which constitutes the true foundation of general average." Furthermore, "the expenses in question were not incurred for the common safety of ship and cargo, since they, or at least the cargo, were not an imminent peril.

The Court further said:

"The cargo could, without need of expensive salvage operation, have been unloaded by the owners if they had been required to do so ... the salvage operation, it is true, was a success. But as the sacrifice was for the benefit of the ship- to enable her to proceed to her destination - and not for the purpose of saving the cargo, the cargo owners are not in law bound to contribute the expenses."

It follows from these propositions that loss resulting from sacrifice or expenditure will not be admitted in general average if it was incurred after the common voyage has been terminated(161) or the ship has been placed in safety.(162)

(161) In ***Ellerman Lines v. Gibbs, Nathaniel (Canada)*** [1986] 2 F.C. 463 (C.A.), since the cargo owners took delivery of the cargo in Montreal, short of the contracted destination of Toronto, the court held that the connection between the ship and the cargo was permanently severed, and that any subsequent expenses were incurred for the safety of the ship alone.

(162) See ***Dobson v. Wilson*** (1813) 3 Camp 480, where a ship is forced to put into a port to repair damage done to her by a storm, and the master, having no other means of raising money, sells (as he is justified in doing) pan of the cargo to defray the expenses of repairs, the owner of the cargo sold does not thereby sustain a general average loss. See, too, ***Western Assurance Co. v. Ontario Coal Co.*** (1892), 21 S.C.R. 383, where a ship, loaded with coal, became stranded and was abandoned, the cargo owners were not liable to contribute in general average for the expenses incurred in subsequently trying to raise the ship and cargo because they did not face a common peril. The cargo owners were only bound to pay the much lesser cost of salvaging the cargo.

The parties common to the voyage may include several ships and cargoes. One or more tugs towing one or more barges loaded with one or more cargoes is an example. Rule B, added to the **YAR** in 1994 to cope with divergent practice internationally, acknowledges the unity of such a flotilla. The Rules apply to the flotilla as a whole whenever measures are taken to preserve it from a common peril;(163) but, if a ship achieves safety simply by disconnection, it is no longer regarded as being imperilled on a common voyage with the rest of the interests - unless the disconnection itself was a general average act.

2.5. Success

Article 342/1 of the ***EMC*** does not specify that success is a criterion of general average. It refers merely to the extraordinary sacrifice or expenditure being intentionally and reasonably made or incurred "for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure". Nevertheless, no allowance is made in general average for sacrifices or expenditures, unless they actually succeeded in securing the safety of the property involved in the common maritime adventure. If, in making the general average sacrifice or expenditure, no property in the venture is saved, there would be no forthcoming contributions, because nobody has benefited from the general average act. Unless there is a degree of success, there can be no surviving property upon which the value of contributions may be established. The whole idea underlying the doctrine of general average is that it is just that those whose property has been saved should contribute to those whose property has been sacrificed to save theirs. If the sacrifice is not successful, in the sense that no property escapes the dangers from which the sacrifice was intended to save it, this does not apply. Further, under ***EMC*** the fund from which the contribution to the general average act is made is based on the value of the property saved at the end of the adventure.

(163) Rule B of the **YAR** 1994 read as follows:
'There is a common maritime adventure when one or more ships are towing or pushing another ship or ships, provided that they are all involved in commercial activities and not in a salvage operation.
When measures are taken to preserve the ships and their cargoes, if any, from a common peril, these Rules shall apply.
A ship is not in common peril with another ship or ships if by simply disconnecting from the other ship or ships she is in safety; but if the disconnection is itself a general average act the common maritime adventure continues.'
Whether the same is the case under ***EMC*** or English law is undecided.

Whether the success needs to be total or only partial is not entirely clear, but if, it is suggested, some portion of the property survives, there is some element of success, and, thus, something tangible on which contributions may be levied. If this were not the case, the loss would be in particular average, and any such loss would lie where it fell.

It is convenient here to mention a special problem. What happens if the general average act has been successful, but subsequently, owing to new causes, ship and cargo are lost?

Suppose a ship has suffered a general average loss, for instance, in the form of expenses incurred at a port of refuge for repairs, and incidental expenses, and subsequently ship and cargo are totally lost before the destination is reached. The question arises as to whether the interests who have benefited by the general average expenditure must still contribute though subsequently this benefit has been lost. The answer is that no contribution is due.(164)

At first sight this might seem inequitable, but the reason is fairly clear. Every maritime adventure is, to a certain extent, governed by a rule of limited liability; in principle no co-adventurer is supposed to lose directly more than the amount originally staked. In other words, if a party to the adventure, say, a cargo-owner, is called upon to make a payment directly arising from the adventure, such as a general average contribution, he must be able to make the payment from the goods on board, out of the fund that has been saved by the general average act. If after the general average loss, but before the end of the adventure, the cargo originally liable is lost, there is no longer any fund out of which the cargo interest can pay its contribution. Thus, in ***Fletcher v. Alexander***(165) Bovill C.J. said:

> "If however, after the jettison or the matter which is the subject of average has arisen, the remainder of the goods is entirely lost, and so no benefit accrues to the owners of the other goods from the jettison, no contribution can be claimed. The whole law on the subject is founded on the principle that the loss to the individual whose goods are sacrificed for the benefit of the rest is to be compensated according to the loss sustained on the one hand, and the benefit derived on the other."

(164) ***Chellew v. Royal Commission on the Sugar Supply*** [1921] 2 K.B. 627, per Sankey J [I922] I K.B. 12. Lowndes and Rudolf (1975) paras 809, 811.
(165) (1868) L.R. 3 C.P.375.

3. ADJUSTMENT OF GENERAL AVERAGE

3.1. Defining Adjustment

Adjustment of general average is a process in which the parties to a general average claim examine the evidence, ascertain the value of general average, the value of the saved ship and property, and determine the contributions of each concerning party to the general average so agreed by them. If a general average is determined by a court of law, the adjustment of general average is carried out according to instructions of the court. The adjustment should be carried out by an official adjuster whose task is to draw up a statement of adjustment.(166)

Article 351 of the ***EMC*** sets out the general principles for the adjustment of general average. The parties to a general average claim are allowed to determine the use of particular adjustment rules in their contract. In the absence of any agreement, the parties must follow the relevant principles of the ***EMC***, particularly Article 351, in adjusting general average.(167)

3.2. Categories of General Average

General average is usually divided into three categories: sacrifice of ship as general average, sacrifice of cargo as general average and sacrifice of freight as general average. Adjustment rules for each category are different. Article 351 of the ***EMC*** sets out rules for adjusting only the first two types of general average.(168)

(166) ***EMC***, Article 357 provides that:
"(Free translation) *Adjustment of general average shall be made by one or more experts to be appointed by the competent court unless the parties concerned agree upon who shall be appointed."*
(167) ***EMC,*** Article 340/2 provides that:
"(Free Translation) *General Average shall be settled in accordance with the following provisions unless there is a specific agreement to the contrary between the parties concerned*."
(168) ***EMC,*** Article 351 reads as follows:
"(Free translation)*The creditor group shall include losses and expenses which are deemed to be general average estimated as follows:*
(a) The amount of damage sustained by the ship shall be calculated on the basis of reasonable costs in fact expended in repair, and in the event that repairs have not been effected the sum shall be fixed by way of estimate and if the ship is a total loss or if it is a constructive total loss the sum to be included as general average shall be specified on the basis of the sound value of the ship immediately before the incident occurred and after deduction of the estimated cost of repairs which do not have the character of general average and the price obtained from the sale of the wreck if any.
(b) The value of the loss sustained by the goods in the event of loss or destruction shall be calculated on the basis of the commercial value on the last day of discharge of the ship at the port of destination or upon the day of the termination of the voyage if it did not terminate at the said port, and if the goods were sold damaged, the damage which shall be included in the general average shall be fixed on the basis of the difference between the net value arising from the sale and the net value of the goods in a sound condition

i) Sacrifice of Ship

Under ***EMC***, Article 351/a the sacrifice of ship as general average can be further divided into damage to the ship and sacrifice of fuel and equipment on board the ship. The general rules of adjusting the sacrifice of ship are discussed in the following paragraphs.

First, when the damaged ship has been fully repaired, the sum of general average is determined by deducting a reasonable sum, which represents the difference between the value of the replaced parts and the cost for the new parts, from the total cost for the repair. The parties making contributions to a general average are only obliged to restore the damaged ship to its original state. Repair cost includes the cost of the new parts. This means that the value of the repaired ship may be higher than the value of the ship before the general average. The sum of the cost exceeding the original value of the replaced parts should not be paid by the parties sharing the general average. Therefore, it is fair to compare the cost of the new parts and the value of the replaced parts prior to the general average and to deduct the sum exceeding the original value of the replaced part from the sum of general average to be shared by the parties who have benefited from the general average. In other words, no matter what the price of the new parts, the general average allowable on the parts is limited to the value of the replaced parts before the general average. Similarly, the total repair cost allowable as general average must be reasonable. The ship owner is not allowed to use the opportunity to ask the other parties to share the cost for the repair that is unrelated to the maritime peril leading to the occurrence of the general average.

Second, if the damaged ship has not been repaired at the time of adjustment, the general average on the ship should be a reasonable sum of ship's devaluation caused by the general average, but in any event, the sum must not exceed a reasonable estimate of the repair cost. The reasonable devaluation of the ship

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on the last day of discharge of the ship at the port of destination or on the day of termination of the voyage if the voyage did not terminate at the said port."

تدرج في المجموعة الدائنة الأضرار والنفقات التي تعتبر من الخسائر المشتركة مقدرة كما يأتي:
أ- يقدر قيمة الضرر الذي يصيب السفينة بالنفقات المعقولة التي تصرف فعلا في الإصلاح وذلك بعد خصم فرق التجديد وفقا للصرف والثمن المتحصل من بيع الحطام، وفي حالة عدم إجراء الإصلاح يحدد المبلغ بطريقة تقديرية فإذا هلكت السفينة كليا أو هلاكا في حكم الكلي حدد المبلغ الذي يدخل في الخسائر المشتركة على أساس قيمة السفينة سليمة قبل وقوع الحادث مباشرة بعد خصم القيمة التقديرية للإصلاحات التي ليست لها صفة الخسائر المشتركة والثمن المتحصل من بيع الحطام ان وجد.
ب- وتقدر قيمة الضرر الذي يصيب البضائع في حالة الهلاك أو التلف على أساس القيمة التجارية في آخر يوم لتفريغ السفينة في الميناء المقصود أو في يوم انتهاء الرحلة إذا انتهت في غير الميناء المذكور، وإذا بيعت البضائع التالفة حدد الضرر الذي يدخل في الخسائر المشتركة على أساس الفرق بين الثمن الصافي الناتج من البيع والقيمة الصافية للبضائع وهي سليمة في آخر يوم لتفريغ السفينة في الميناء المقصود أو في يوم انتهاء الرحلة إذا انتهت في غير الميناء المذكور.

refers to the difference between the estimated market prices of the ship before and after the general average. The reasonable repair cost limits the sum of general average allowed in the sense that the difference in the market prices of the ship becomes too great due to the existence of volatile market.(169)

The reasonable cost for ship repair excludes the sum of the cost on the new parts which exceeds the estimated value of the replaced parts prior to the general average.

Third, when a ship has sustained a total loss or the repair cost exceeds the estimated market value of the ship after the repair, general average should be determined by referring to the market value of the ship, deducting from it the estimated cost for repairing the damage falling outside the general average and the remaining value of the damaged ship. The deduction of the cost for repairing a damage that is not regarded as general average is applicable when the ship has sustained a particular average during the same event when the general average occurred. The deduction of the particular average and remaining value of the ship reflects the principle that only the sacrifice or loss sustained for the common interest of the parties concerned should be allowed as general average.

ii) Sacrifice of Cargo

(169) Under **YAR**, in cases of sacrifice of a part of the ship or its equipment that is subsequently repaired or replaced, Rule XVII sets the amount recoverable in general average as "the actual reasonable cost" incurred. This amount will be reduced by one-third when old materials or parts are replaced by new if the ship is more than fifteen years old (Rule XIII). When the sacrifice is not made good, the reasonable depreciation in the value of the ship is calculated and admitted, so long as it does not exceed the estimated cost of repairs. If the ship is an actual or constructive total loss, the value of its sacrifice is calculated by estimating its sound value and deducting the estimated repair costs for any damage outside general average and its sale value, if any, as a casualty.
Rule XVIII reads:
'**Damage to ship.**
The amount to be allowed as general average for damage or loss to the ship, her machinery and/or gear caused by a general average act shall be as follows:
(a) When repaired or replaced,
The actual reasonable cost of repairing or replacing such damage or loss subject to deduction in accordance with Rule XIII;
(b) When not repaired or replaced,
The reasonable depreciation arising from such damage or loss, but not exceeding the estimated cost of repairs. But where the ship is an actual total loss or when the cost of repairs of the damage would exceed the value of the ship when repaired, the amount to be allowed as general average shall be the difference between the estimated sound value of the ship after deducting therefrom the estimated cost of repairing damage which is not general average and the value of the ship in her damaged state which may be measured by the net proceeds of sale, if any'.

General average of cargo can be classified as either a total loss or a partial loss (or damage to cargo). The different adjustment rules apply to the different types of loss. These rules are to be examined in the following paragraphs.

First, when the cargo has sustained a total loss, the general average on the cargo should be calculated on the basis of the price of the cargo at the time of discharge, adding to it the cost of insurance and freight but deducting from it the part of the freight saved because of the loss of the cargo. The deduction is applicable when the contract of carriage permits the cargo to claim a partial refund of the freight in case the cargo is lost before reaching the scheduled destination. The loss of profit on the cargo sacrificed as general average is not allowed as general average.

Second, in case of partial loss or damage to the cargo, the parties should reach an agreement on the extent of the loss and lost value. Such agreement is the ground for determining the general average on damage to the cargo. If the damaged cargo was sold before the parties reach any agreement, the general average is based on the value of the cargo at the time of discharge, adding to it the cost of insurance and freight, but deducting from it the net income received from the sale of the cargo. The cargo owner has an obligation to mitigate the loss. Even if the ship owner exercises the right of lien over the saved cargo, he also has an obligation to mitigate the loss. Therefore, it is not uncommon for the damaged cargo to be sold before any agreement on the extent of the loss can be reached by the parties. It can thus be assumed that if the parties cannot agree on the extent of the damage to the cargo, the cargo owner can always sell the cargo in a reasonable manner and claim general average. The price of the damaged cargo so sold must be reasonable in the circumstance concerned.(170)

iii) Sacrifice of Freight

Article 351 of the ***EMC*** does not expressly deal with freight. However,

(170) Under **YAR**, when cargo is sacrificed, the amount to be made good in general average, according to Rule XVI, is its net sound value calculated from its commercial invoice, if available. When the cargo is merely damaged and sold, the proceeds f sale are subtracted from the net sound value (unless there is agreement as to the cargo's depreciation).
Rule XVI reads as follows:'Amount to be made good for cargo lost or damaged by sacrifice.
The amount to be made good as general average for damage to or loss of cargo sacrificed shall be the loss which has been sustained thereby based on the value at the time of discharge, ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped value The value at the time of discharge shall include the cost of insurance and freight except insofar as such freight is at the risk of interests other than the cargo.
When cargo so damaged is sold and the amount of the damage has not been otherwise agreed, the loss to be made good in general average shall be the difference between the net proceeds of sale and the net sound value as computed in the first paragraph of this Rule.'

freight is an independent category of general average. It refers to the loss of the carrier, who is the ship owner in most cases. The loss of freight occurs when the cargo for which the freight is payable has been sacrificed as general average. The carrier will suffer a loss of freight if the contract of carriage stipulates that the carrier undertakes the risk for such a loss.

The freight allowable as general average is based on the total loss of the freight on the sacrificed cargo, deducting from it the operational cost spent for the earning of the freight.(171) However, there is no need to deduct the operational cost saved on the sacrificed cargo from the loss of freight. If the cargo owner bears the risk for the loss of freight, the ship owner would not suffer any loss if the cargo concerned is lost before arriving at the port of destination. In such case, the cargo owner whose cargo has been sacrificed as the general average is entitled to claim the loss of freight as general average.

3.3. Contribution to General Average

Contribution to general average means that parties who have benefited from the general average make contributions to the party who has made special sacrifice or incurred special expenditure allowable as general average to compensate the loss. A party may be a contributor to general average or a recipient of contribution. In such case, he bears the loss of general average correspondent to the value of property saved by the general average.

Contributions in general average depend upon an appropriate valuation of the losses sustained and the property saved. This is a highly technical matter for which average adjusters rely on a body of professional practice in addition to the guidance of a number of the ***EMC*** Articles. As a general proposition, Article 353/a states: *'The ship shall be included at her true net value at the port in which the voyage ends ....*'(172) Thus, if the general average claim is for expenses incurred in an intermediate port during repairs and the ship complete its intended voyage, valuation of the contributing interests will be made at the port of destination; but if the voyage is abandoned at some mid-point, perhaps because the ship is wrecked or the cargo is separated or lost, contributing property will be valued at that place.(173) As a legal consequence of

(171) Under **YAR**, when lost freight is admissible in general average, only the net loss, after deduction of the charges that would have been incurred to earn the freight, is allowed.
(172) See **YAR**, Rule G which states:
'General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the adventure ends.'
(173) In ***Fletcher v. Alexander*** (1868) 18 L.T.432, Bovilll, C.J. said at p. 434 that:

this rule, and in the absence of any contractual provision, the law of the place where the common voyage ends, and value are assessed, will ordinarily govern the process of general average adjustment.(174)

Contribution to general average is related to the value saved by the general average. Along with the value of the ship and cargo so saved, the payment to be received by the party making sacrifice and incurring expenditures need also be taken into account. The international shipping practice normally calculates the ship, cargo and freight separately. Article 353 of the ***EMC*** sets out general principles for calculating the contribution in each of these circumstances. Article 353 reads as follows:

"(Free Translation) *There shall be included in the debtor group the ship, freight and goods loaded on the ship in the following:*

a) The ship shall be included at its true net value at the port in which the voyage ends in addition if appropriate to the amount of the sacrifices which it has borne.

b) The ship's total freight shall include the fares of passengers at the rate of two thirds with the exception of ship's freight which is agreed to be earned in any event.

c) There shall be included goods salvaged and goods sacrificed according to their actual or estimated commercial value at the port of discharge." *(175)*

"... it has now been the adopted and settled law of this country; and I believe most other countries...that the adjustment must take place according to the law of the place where the adjustment is to be settled. If a ship reaches her ultimate port of destination the adjustment must take place according to the law of the port where she so arrives. If the adventure comes to an end, and the voyage is 'broken up' ... at some other port, the adjustment must take place at that place, and according to the law of that place."(173)

In the American case of ***Loring v. The Neptune Inc Co***. (1938) 20 Pick.411, Shaw C.J. said at p. 413:

"The general average in the present case was made up and adjusted at Hamburgh, the port of destination, at which the several interests liable to contribute, were necessarily to be separated from each other. Hamburgh therefore was the proper place for the adjustment and payment of this general average. Such general average must necessarily be adjusted according to the laws and usages of the place where the adjustment was made."

(174) In English law assessment of general average contribution must be made when and where the voyage is completed by the delivery of the cargo at the port of discharge, unless the voyage is terminated short of the intended destination, in which case the time and place of the termination govern the assessment. The voyage may be terminated by. agreement, frustration, or transhipment, provided transhipment does not amount to substitution of the carrying ship for another. It follows that if, after a general average sacrifice is made or an expenditure incurred, the ship and cargo are lost before the conclusion of the voyage, no general average contribution can be c1aimed (see ***Simonds v. Wh***ite (1824) 2 B.& C.805. Also see ***Dalglish v. Davidson*** (1824) 5 Dowl.& Ry1.6.

i) Contribution by Ship

Contribution by a ship should be calculated by a reasonable and feasible method to determine the saved value of the ship. Under Article 353/a the saved value of the ship is based on the net real price of the undamaged ship (as if it were a seaworthy ship) at the end of the voyage in which the general average takes place plus the sum of general average on the ship.(176) The damage to the ship falling outside the general average must be deducted from the net real price of the ship. The net real price of the undamaged ship can be determined by referring to the age of the ship, the cost of accessories added later on and a reasonable rate of depreciation.

ii)Contribution by Cargo

Cargo will be valued according to its market value at the port of discharge. If cargo is discharged damaged, its value in damaged condition will be the relevant value for assessing its share of general average. From this value, there must be deducted any expenses that would have been saved had the adventure been totally lost, such as freight payable on delivery, import duty, or salvage charges.(177)

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(175) ***EMC***, Article 353 reads in Arabic as follows:
" تدرج في المجموعة المدينة كل من السفينة وأجرة النقل والبضائع المشحونة في السفينة، على النحو الآتي:
أ- تدرج السفينة بقيمتها الحقيقية الصافية في الميناء الذي تنتهي فيه الرحلة مضافا إليها عند الاقتضاء قيمة التضحيات التي تحملتها.
ب- تدرج أجرة السفينة الإجمالية وأجرة نقل المسافرين بمقدار الثلثين فيما عدا أجرة السفينة التي يشترط استحقاقها في جميع الأحوال .
ج- تدرج البضائع المنقذة والبضائع المضحى بها بحسب قيمتها التجارية الحقيقية أو المقدرة في ميناء التفريغ. "

(176) Under **YAR**, Rule XVII, the ship is assessed for its market value without regard to any demise or time charter commitments. If damage that gave rise to the general average act has been repaired, then the cost of repairs must be deducted from its market value to determine its actual net value at the termination of the voyage. Rule XVII reads :
'The contribution to a general average shall be made upon the actual net value of the property at the termination of the adventure... The value of the ship shall be assessed without taking into account the beneficial or detrimental effect of any demise or time charter-party to which the ship may be committed.
To these values shall be added the amount made good as general average for property sacrificed, if not already included, deduction being made from the freight and passage money at risk of such charges and crew's wages as would not have been incurred in earning the freight had the ship... been totally lost at the date of the general average act and have not been allowed as general average; deduction being also made from the value of the property of all extra charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average...'

(177) Under **YAR**, Rule XVII, the value of saved cargo is calculated, as for cargo loss, from it commercial invoice. To this amount is added insurance and freight, if at the cargo owner's risk; but from it is deducted any particular charges, such as discharging costs perhaps, incurred after and not in relation to the general average act. However, if the goods are sold short of the destination, their sale price will be utilized instead. Rule XVII reads as follows:

General Average and Falsely Declared Cargo

In shipping practice, cargo owners or shippers often fail to disclose the true value and nature of the cargo on customs declaration forms. Cargo owners or shippers may have deliberately declared a price of cargo to the customs lower than its real value. Such cargo may be involved in a general average claim. Article 348/2 of the ***EMC*** specifically deals with the situation in which a falsely declared cargo or an undeclared cargo has been involved in a general average claim.(178) A falsely declared cargo refers to a cargo given a wrong description by the cargo owner or shipping in the relevant customs document. Under this provision, a falsely declared cargo or an undeclared cargo that has benefited from a general average must make contributions to the general average. However, the provision does not permit the owner of a falsely declared or undeclared cargo to claim a special sacrifice of the cargo. This means that Article 348/2 purports to punish the owner of a falsely declared or undeclared cargo by disallowing the cargo to be listed as general average even if the cargo has been sacrificed for the common safety of the ship and other cargo on board. The punishment is reasonable in the sense that after the loss of the cargo it would be difficult to prove the real value and nature of the cargo because the owner has failed to declare it truthfully.

Article 348/2 also regulates situations in which a cargo owner or shipper has

'The contribution to a general average shall be made upon the ... value of cargo ... at the time of discharge, ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped value. The value of the cargo shall include the cost of insurance and freight unless and insofar as such freight is at the risk of interests other than the cargo, deducting therefrom any loss or damage suffered by the cargo prior to or at the time of discharge... To these values shall be added the amount made good as general average for property sacrificed, if not already included, deduction being made from the freight and passage money at risk of such charges and crew's wages as would not have been incurred in earning the freight had the... cargo been totally lost at the date of the general average act and have not been allowed as general average; deduction being also made from the value of the property of all extra charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Where cargo is sold short of destination, however, it shall contribute upon the actual net proceeds of sale, with the addition of any amount made good as general average.

Passenger's luggage and personal effects not shipped under bill of lading shall not contribute in general average.'

(178) ***EMC***, Article 348/2 reads as follows:

'(Free translation) *Goods which have been stated to have a lower value than their real value shall not be accepted as general average if they are lost or damaged, except on the basis of the declared value but if they are salvaged they should contribute upon their actual value.'*

"البضائع التي قدم عنها بيان بأقل من قيمتها الحقيقية لا تقبل في الخسائر المشتركة إذا هي هلكت أو تلفت إلا على أساس القيمة التي وردت في البيان فإذا أنقذت فإنها تسهم في الخسائر المشتركة على أساس قيمتها الحقيقية."

deliberately declared a lower value for the cargo involving in a general average claim. In such cases, the contribution by such a cargo to general average should be calculated by referring to the actual value of the cargo. On the other hand, if such a cargo has been sacrificed as general average, the value of the general average should be calculated by referring to the value of cargo declared in the relevant customs forms.(179) This also appears to be a penalty to the owner declaring the lower value. Article 348/2 does not apply to a situation where the cargo owner or shipper has made an innocent mistake in declaring a wrong value for the cargo.

iii) Contribution by Freight

Contribution of the saved freight to the general average is determined by referring to the ship's total freight which shall include the fares of passengers at the rate of two thirds with the exception of ship's freight which is agreed to be earned in any event.(180)

These are the basic methods of calculating contributions to general average adopted by the ***EMC***. The purpose of making contributions to general average is let the beneficiaries of general average to compensate the party suffering the loss of general average. If two or more separate general averages have taken place during the same voyage and parties to each general average act are different, each general average must be calculated individually. On the other hand, if the parties are the same, the separate incidents of general average may be calculated together.

4. COCLUSION:

General average is a maritime principle about sharing loss among the parties interested in the voyage on which the loss was incurred. It is an ancient regime recognised and applied by all maritime nations. The underlying purpose of the principle is to compensate a party for loss deliberately incurred to save the

(179) Under **YAR**, Rule XIX, sacrifice of cargo that is misdescribed by the shipper will not be admitted in general average, and damage or loss of cargo that is undervalued on shipment will be made good only up to its declared value. Rule XIX reads: 'Undeclared or wrongfully declared cargo**.**
Damage or loss caused to goods loaded without the knowledge of the shipowner or his agent or to goods wilfully misdescribed at time of shipment shall not be allowed as general average but such goods shall remain liable to contribute, if saved.
Damage or loss caused to goods which have been wrongfully declared on shipment at a value which is lower than their real value shall be contributed for at the declared value, but such goods shall contribute upon their actual value'.
(180) Under **YAR**, Rule XVII, net freight earned contributes separately in general average when at the risk of the shipowner and is valued at the rate due from the cargo owners.

voyage. Compensation is made by levying a proportionate contribution on all the parties to the voyage. Typically nowadays general average is governed by the York-Antwerp Rules through their incorporation into the contract of carriage, whether evidenced by a charterparty or by a bill of lading. *Emirati Maritime Code* has adopted the York-Antwerp Rules in Articles 340-365. But Emirati courts have not yet had the opportunity to deal with general average matters. Therefore, and in order to understand how the rules operate and have been applied and construed a reference has been made to English decisions which are considered the main source in this respect.

A study of English law and that of *Emirati Maritime Code*, reveals a close similarity between them. The definition and requirements of general average are the same under both jurisdictions. To give rise to a claim for general average contribution:

(a) The loss must be extraordinary. Loss sustained by reason of the ordinary incidents of the voyage cannot therefore amount to general a average. Property that is sacrificed may consist of the ship, the cargo, or the freight or any combination of them.

The expenditure must also be extraordinary. The cost of salvaging ship and cargo or expenditure incidental to repairing the ship in a port of refuge are common examples. Expenses made in anticipation of greater general average expenditure - known as "substituted expenses" - and costs incurred to protect the environment may also be recovered in general average.

(b) The extraordinary sacrifice or expenditure must be intentionally and reasonably made. If the loss is involuntary it is particular average, to which the ordinary rules of legal liability apply. Or, if the loss is caused by the fault of an interest, that interest loses its rights to claim in general average.

General average situations sometimes occur as a result of fault or negligence of the shipowner or employees that is excusable in law. Under Emirati and English law the shipowner is fully entitled to participate in the general average settlement.

Further, in order to uphold a claim for general average, there must be a casual connection between the loss and the general average act.

(c) The extraordinary sacrifice or expenditure must be made or incurred in a time of peril. If the master is mistaken as to the existence of a peril, losses sustained in consequence of his actions cannot amount to general average. The act must be made for the purpose of preserving from peril the property involved

in the voyage, and the peril must be a danger which threatened the whole adventure and not part of it only. However, also the danger must be imminent; though it need not be actually pressing at the moment, or such that there is no chance of relief from it.

(d) The extraordinary sacrifice or expenditure must be made or incurred for the specific purpose of preserving the property imperilled in the common adventure. Two consequences follow from this. Firstly, expenses incurred after an interest has been brought to safety cannot be claimed in general average against that interest. Secondly, general average depends on the ultimate success of the adventure.

When general average is declared by the shipowner, a professional average adjuster is appointed whose task is to draw up a statement of adjustment.

Contributions in general average depend upon an appropriate valuation of the losses sustained and the property saved. This is a highly technical matter for which average adjusters rely on a body of professional practice in addition to the guidance of a number of the Article 351 of the *Emirati Maritime Code*.

At English and Emirati law, the basic rule is that the relevant interests are valued at the termination of the adventure with discharge at the port of destination. This is the case both for valuing sacrifices and for establishing each interest's share of general average. Where the voyage is abandoned at a port of refuge, either by agreement or because the underlying contracts of carriage have become frustrated, the relevant values are those pertaining at the time and place of abandonment.

ملخص

بحث الخسارة المشتركة

دراسة في القانون الاماراتي وقواعد يورك–انتويرب والقانون الانجليزي

د.عبد الله حسن محمد

أستاذ القانون التجاري والبحري المشارك– كلية القانون – جامعة الإمارات

تعتبر القواعد لخاصة بالخسارة المشتركة من أقدم قواعد القانون البحري. وترجع تلك القواعد الى حقيقة أنه اثناء الرحلة البحرية تكون لجميع المشاركين فيها مصلحة مشتركة تتمثل في وصول السفينة سالمة. ولكن إذا تعرضت هذه المصلحة المشتركة الى خطر وكان من الواجب القيام بتضحية غير اعتيادية أو تحمل نفقات طارئة لتجاوز هذا الخطر فأن هذه التضحية أو النفقات تقسم على جميع المشاركين في الرحلة كل بحسب الفائدة التي عادت عليه من التضحية.

وقد تطورت قواعد الخسارة المشتركة عبر السنين وعقدت عدة اتفاقيات دولية أهمها اتفاقية يورك –انتويرب تنضم توزيع الخسارة المشتركة .وقد تبنى القانون البحري الاماراتي قواعد يورك –أنتويرب .

والغرض من هذا البحث هو مناقشة مبدأ الخسارة المشتركة وكيف فسر القضاء قواعد الخسارة المشتركة.