

General Average Is a Necessity

Marcos Aurelio de Arruda

Arruda Consulting, Vitória, ES, Brazil

Email: m3a5a5@gmail.com

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Abstract

This article aims to expose how the general average has historically evolved in different countries, subject to the principles of mutual security and common benefit, and the requirements for an act to be considered general average under the York-Antwerp Rules. Through the literature review and jurisprudence on the subject, we seek to ratify that the general average is, so far, the best option for equitable distribution of unforeseen losses and damages that arise during a maritime adventure. However, one can criticize it for its cost, delay in solution, and lack of uniformity.

Keywords

General Average, York-Antwerp Rules, Common Benefit, Common Security

1. Introduction

The general average is a three-thousand-year-old maritime relic that provides the apportionment of sacrifices and expenses that occur voluntarily to avoid a common danger in a maritime adventure (Fujimoto, 1954). What, at first, only dealt with the allotment of the loss with the cargo jettison, evolved in a non-uniform way in different countries, and started to deal with the common danger and mutual benefit, including other losses and expenses.

The lack of uniformity of the definition and the calculation method of the general average led to elaborating the York-Antwerp Rules (RYA) of 1877 (Mussolino, 2015). These rules have been updated over the years. In 1924, they included Rule “A”¹, which stated that an act of general average must be intentional, extraordinary, and reasonable to minimize a common danger; and other situations that aimed the common benefit, not meeting all the criteria imposed by Rule “A”.

The general average is the best solution to equitably share the risk of a mari-

¹The york-antwerp rules 1924.

time adventure facing the danger, applied and accepted in several countries. Its extinction would cause a significant impact on the price of the merchandise. However, some argue that the current system is time-consuming, expensive, not uniform and that the insurance market can provide a better solution to the problem (Mukherjee, 2005).

This article aims to expose how the general average has evolved historically, presenting the requirements of the RYA for an act to be general average and evaluating the pertinence or not of the extinction of the general average.

2. Mutual Security and Common Benefit

The idea of general average goes back to the ninth century B.C. where cargo owners used to travel onboard ships. At that time, when ships needed to jettison part of the cargo to get rid of any danger or accident, these merchants only authorized the dump of their load if there was a commitment that his loss would be paid by those who would profit from his sacrifice (Fujimoto, 1954).

The general average started dealing only with the voluntary sacrifice of cargo and continued to improve over the centuries. This development did not linearly occur. Neither did the several legal systems² that were adopted or replaced over the years, incorporating new types of losses (cutting the mast, Pardessus, 1828, and jettisoning the anchor). The common characteristic of these “codes” was that they did not define the general average. They were only a list of the expenses or losses that the ship and cargo owners should share (Fujimoto, 1954).

The first definition of the general average can be found in the *Guidón de la Mer*³. Although the provisions of the *Guidón de la Mer* had no legal authority, its definition of the general average inspired the *Ordonnance of Louis XIV*, promulgated in 1681. This definition of the general average was used as an example for several maritime laws⁴ in Europe at that time and as a model to the *Commercial Code of France of 1807*, in which Art. 400 (Desenne, 1819), after listing several situations that were general average, established that:

“[...] reasonable expenses and losses incurred for the common good and safety of the ship and cargo, from the shipment of the goods on board until unloading at the port of destination, are also general average⁵.”

This code was the reference for other regulations in different countries (Tetley, 2021).

In England, the situation was different: as England did not have a code of laws, the customs and precedents ruled the general average. The first definition

¹The York-Antwerp Rules 1924.

²Custom of the sea, *regras de wisbui*, *regras de oleron*, *consolato del mare*, *regras de genoa e de catalonia*, *regras da liga hanseática*.

³*Guidón de la Mer*—a compendium of maritime customs and uses edited in France in XVI century.

⁴*Ordinance of Rotterdam (1712)*, *Ordinance of Königsberg (1730)*, *Ordinance of Hamburg (1731)*, *Ordinance of Stockholm (1750)*.

⁵“Et en général, les dommages soufferts volontairement et les dépenses faites d’après délibérations motivées pour le bien et le salut commun du navire et des marchandises, depuis leur chargement et départ jusqu’à leur retour et déchargement.”

(Rose, 2017) of general average given by an English court is from 1799⁶. But it was improved two years later, in 1801, in the *Birkley v. Presgrave*⁷. In this case, the general average was defined as:

“All losses that arise in consequence of its extraordinary sacrifices made or expenses incurred to preserve the ship and cargo come within general average. It must be borne proportionably by all who are interested.”

Although the French and English definitions of general average were similar, they had two distinct aspects: one favored mutual security while the other, common benefit (Fujimoto, 1954):

- mutual security—it is a reminiscence of Roman law and defended by England. The general average contribution was only due when the sacrifice took place to avoid the common danger to the cargo and the ship, even if the threat was not imminent. If a vessel sought a port of refuge for reasons of particular average, the costs of entry into the harbor and unloading would be considered general average. However, the expenses of loading, crew salary, and provisions would not be⁸; and
- common benefit—it is defended by civil law countries and the U.S. According to this principle, any expenses or sacrifices that occurred for the benefit of the ship and the cargo would be considered general average. When the boat was in a port of refuge, the expenses necessary for the voyage to proceed safely (e.g., port fees and crew salary during repair) would be general average.

3. The York-Antwerp Rules

In the second half of the 19th century, the regulation of the general average was not standardized in different countries; the losses and expenses and the methods for calculating the contributions were not uniform. The need to aggregate the two aspects (mutual benefit and common security) and standardizing calculations and procedures led to the emergence of the York-Antwerp Rules (RYA) in 1877.

As soon as they were created, the RYA did not define general average but exemplified losses and expenses. One of the main reasons was the divergence between the English (common security) and French (mutual benefit) schools (Musolino, 2015).

3.1. The Definition of General Average

Although the RYA were created in 1877, the definition of the general average only appeared in the 1924 revision, as Rule “A”, and it is the same today:

There is a general average act when, and only when, any extraordinary sa-

⁶*The Copenhagen* (1799) 1 C. Rob. 289.—General average for a loss incurred, towards which the whole concern is bound to contribute pro rata, because it was undergone for the general benefit and preservation of the whole.

⁷*Birkley v Presgrave* (1801) 1 East 220.

⁸*Atwood v. Sellar* [1880].

crifice or expenditure is intentionally and reasonably made or incurred for the common safety to preserve from peril the property involved in a common maritime adventure⁹.

When scrutinizing the definition of general average, we can identify the following aspects: the deliberation, the extraordinariness and reasonableness of the act, the common adventure, the common danger, and the reality and imminence of the threat.

3.1.1. The Deliberation of the Act

Inevitable losses (e.g., force majeure and fortune of the sea) are not general average (Fujimoto, 1954). The general average implies action. The action does not need to be determined by the ship's Master or another crew member, it may be determined by someone outside the maritime adventure, such as the local port authority, but it must be necessary for common security and endorsed by the ship's Master (Tetley, 2021).

3.1.2. The Reasonableness of the Act

In *Anderson v Ocean S.S.*¹⁰, the cargo owners on board the MV "Achilles" refused to pay their full breakdown contribution for salvage expenses, claiming that the contract values were exorbitant. They only agreed to pay a reasonable amount. The U.K. Supreme Court has decided the amount considered excessive to a reasonable payment was not a general average. Although reasonableness was included along with the definition of general average in 1924, there were still doubts in its application. In *The Alpha*¹¹, this issue was discussed for the last time. MV "Alpha" was a bulk carrier that, on a trip from Côte d'Ivoire to a port on the Zaire River, ran aground in an area of shallow water called the Mona Mazea Bank. The captain tried to refloat the ship six times, using the vessel's machinery and causing them significant damage, which led the ship to be a constructive total loss and declare general average. The cargo owners argued that the use of the machinery was unreasonable. The judge agreed with the unreasonableness but held that Rule VII¹² of the 1974 RYA (in effect at the time of the trial) did not require reasonableness of the act. Thus, although it was unreasonable, the action was considered general average. After this case, the Paramount Rule¹³ was included in the 1994 version of RYA.

3.1.3. The Act or Expense Must Be Extraordinary

In *Société Nouvelle d'Armement v Spillers & Bakers Ltd*¹⁴ a tugboat carried a

⁹The York-Antwerp rules 1924.

¹⁰(1884) 10 AC 107, HL.

¹¹*Corfu Navigation and Steamship Co v Mobile Shipping Co and Ors (The Alpha)* [1991] 2 Lloyd's Rep 515.

¹²Damage to machinery and boilers. Damage caused to any machinery and boilers of a ship which is ashore and in a position of peril, in endeavoring 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 [...].

¹³RYA 2016—Rule Paramount—In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred.

¹⁴[1917] 1 KB 865.

French sailing ship from Ireland to England during World War I to minimize the risks of a submarine attack. The additional costs of this operation were not considered extraordinary because the risk of a submarine attack was common at that time. In addition, any other measures that are not extraordinary have already been priced by the shipowner and already comprise the freight value, as in *Wilson v. Bank of Victoria*.¹⁵ In this case, the MV “ROYAL STANDARD” unmoored from Australia bound for England with a cargo of gold. When colliding with an iceberg, she damaged its mast and sails, causing her to demand the port of Rio de Janeiro using its engine. As the cargo repair and storage would cost much more time and money in the Brazilian port than in England, the ship carried out a temporary repair, bought more coal, and continued the voyage using the engine to its destination. The English court did not consider the extraordinary expenses with coal as the engine is a natural alternative for the ship.

3.1.4. The Danger Must Be Common to the Cargo and the Ship

If the danger is only to the cargo or the ship, there is no general average, and this is a rule that comes from the beginning of the considerations on general average: Justiniano’s Digest (Watson, 1998) regulated that:

“Servius, Ofilius, and Labeo say that everyone must contribute if the ship is ransomed from pirates. However, the owners must bear the loss of any property stolen by the robbers, and a person who ransoms his goods has no claim for contribution.”

A similar decision was made in *Nesbitt v. Lushington*¹⁶. Here, the ship was boarded by pirates, who demanded the delivery of the corn cargo to release her. It was decided that this was not a general average as the only threat was the corn load.

3.1.5. The Imminence of Danger

There is no need for the danger to be imminent, but this one must be real. There must be a situation where if nothing is done, sooner or later, cargo and ship may be lost. At *Vlassopoulos v The British & Foreign Marine Insurance Co Ltd*¹⁷, the NM Maki’s propeller was damaged, and the ship was forced to put into Cherbourg for repairs. It was decided that the ship and cargo, due to the accident, were in danger.

In France, however, the requirement of urgency¹⁸ was included to restrict the scope of the general average (Tetley, 2021).

¹⁵ *Wilson v Bank of Victoria* [1867] L.R. 2 QB 203.

¹⁶ *Nesbitt v. Lushington* [1792] 4 T. R. 793.

¹⁷ *Vlassopoulos v The British & Foreign Marine Insurance Co Ltd* [1929] 1 KB 187—“It is not necessary that the ship should be actually in the grip or even nearly in the grip of the disaster that may arise from a danger. It would be a very bad thing if shipmasters had to wait until that state of things arose in order to justify them doing an act which would be a general average act.”

¹⁸ Lei N. 67-545 de 07 de julho de 1967, art. 24 “*pour le salut commun et pressant des interest engagés dans une expédition maritime*”.

3.1.6. The Danger Must Be Real

The danger cannot be imaginary. A sacrifice made for a mistaken assessment of the existence of a hazard is not considered a general average.¹⁹ However, any sacrifice is general average if made because of an error in evaluating the nature or size of an existing hazard, as held in *The Wordsworth*²⁰. In this case, the ship was caught by a storm, and the Master mistakenly concluded that a forward flood resulted from a hole in the hull below the waterline. Afraid of the collapse of the forward bulkhead and the consequent sinking of the ship, the Master ordered the opening of some floodgates to reduce the water pressure, which damaged the cargo. With the reduction of the water level, it was found that the rupture of the port horn caused the flooding. Thus, the cargo damage was considered general average because the water ingress on board was a real danger, and there was only an error in assessing the degree of danger.

3.1.7. The Common Adventure

There is no common adventure if the ship is in ballast or has no cargo on board, so there can be no general average. In *The Brigella*²¹, the ship was in ballast on its way to the port. As the only interest was that of the ship's owner, the expenses in the port of refuge could not be considered general average.

3.1.8. The Act of General Average Must Be Successful

Although not defined in Rule "A", the general average is a sacrifice for a benefit (Tetley, 2021). In *Columbian Insurance Co. v Ashby and Stribling*²² and in *Ocean Steamship Co. v Anderson*²³, the judges have held the need for success in sacrifice and expense to justify general average and that nothing would be either due or paid if the ship and cargo were lost before arriving at her destination (Tetley, 2021).

Success at the end of the voyage is necessary. However, there are differences in some points: whether there is a need for a causal relationship between the act of significant damage and the rescue of the ship and cargo; and the minimum amount of property saved by acts of general average for the contribution to be claimed (Fujimoto, 1954).

3.2. The Artificial General Average

An artificial general average occurs when any of the requirements foreseen in Rule "A" is not present in the situation of general average declaration. Artificial general average mainly benefits shipowners.

¹⁹*Joseph Watson & Son Ltd v Firemen's Fund Insurance Co of San Francisco* [1922] 2 KB 355; 38 TLR 752; 12 Ll L Rep 133—the Master erroneously thought the steam coming from the cargo hole was smoke. The measures taken to fight the supposed fire damaged the cargo. The judge held that it was not general average as there was no danger.

²⁰*The Wordsworth* (1898) 88 Fed Rep 313.

²¹*The Brigella* [1893] P 189.

²²(13 Pet.) 331 at p. 338 (1839)—“That by that sacrifice the safety of the other property should be presently and successfully attained.”

²³(1883) 13 Q.B.D. 651 at p. 662 (C.A. per Brett M.R.)—“...by the expenditure of which both ship and cargo are saved... whose property has been saved by the voluntary sacrifice...”

Over the years, rules were included that had common security or the safety of the journey as requirements, as in 1890, Rule X, which dealt with the expenses for entry and exit at the port of arrival or unloading of cargo; and in 1950, Rule XI, which dealt with the payment of crew salary expenses during periods of detention in a port of refuge (Tetley, 2021).

The interpretation rule, incorporated in 1950, gives precedence to numbered rules over lettered rules. There can be a general average without the requirements established by Rule “A” if the situation is foreseen in a numbered rule. The only Rule “A”’s requirement that remained was the reasonableness under the Paramount Rule in 1994.

3.3. The Application of RYA

The RYA are not an international treaty or convention and must be voluntarily incorporated into maritime contracts to be valid.

As new problems or questions arise, the RYA evolve: the definition of general average and its general principles (lettered rules) were only incorporated in the 1924 version; the interpretation rule, which defined the priority between numbered and lettered rules, in 1950²⁴; and the Paramount rule, which resolved the reasonableness issue in 1994²⁵ Version.

4. The Obsolescence of the General Average

During the formulation of the York-Antwerp Rules in 1877, opinions aimed at the abolition of the general average (Musolino, 2015) due to different interpretations in different countries and the complexity, costs, and delay of its regulation.

Questions about the validity of the general average are still present as the existence of a system that expands like a snowball where the admission of a general average situation serves as a reason for the inclusion of a new situation, creating new contributions (Mukherjee, 2005) as the rules do not embrace every angle of general average and are in constant development (it’s not unusual that the admission of an artificial general average is going to led a new agreement in the next review; the time and money spent on regulating them; and the lack of uniformity in its procedures and the coexistence between the various editions of the RYA (the rules have been developed and deal with matters of detail and principle and its content is subject to revision. Moreover, it is fact that more than one edition of the rules is used in practice, Johansson, 2011).

Critics also reason that the adjustment must be initiated before the court decision on the contribution; the cargo owner must provide a guarantee during the adjustment to have access to his goods; and the adjustment has become increasingly difficult due to the increase of ship’s cargo capacity, especially container

²⁴Rule of interpretation (RYA 1950)—In adjusting the general average, the following rules shall apply to exclude any law and practice inconsistent in addition to that. Except as provided by the numbered rules, general average shall be adjusted according to the lettered rules.

²⁵Rule Paramount: In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred.

ships.

Furthermore, changes in maritime insurance, which made the equitable distribution of expenses and expenses unnecessary, also contribute to justify the extinction of general average (Selmer, 1958).

5. The General Average Is Still Necessary

General average is an equitable way to share the risk of a maritime adventure older than marine insurance (Tetley, 2021). Moreover, it is applied and accepted in several countries. Although neither an international convention nor an international treaty, the RYA were included in 1994 in the maritime codes of some countries such as Denmark, Sweden, Finland, and Norway.

The extinction of the general average would have an impact on cargo owners and insurance companies that would face the risk of covering a more significant loss, as the masters would have no restriction to their actions (Selmer, 1958). As each one would be responsible for their loss, there would be no right to recourse (Musolino, 2015).

General average is a system that solves problems in times of crisis. It is essential where the Master must take the necessary steps to safeguard the ship and cargo in a dangerous situation. Measures that the Master may not take if there is no general average (Tetley, 2021). If it is abolished, there will be conflicts of interpretation, the need for negotiations, and even litigation in a situation where time is essential to avoid further damage and expense.

This new system will also have to deal with the complexity of ships with thousands of containers and bills of lading. It is unpredictable how long this new system will take to receive the international recognition and acceptance that the general average already has. Creating a new system for sharing damages and expenses may take decades to understand, causing, at least initially, several lawsuits—precisely the opposite of what one wants to avoid extinguishing the general average.

The cargo forwarding to the port of destination, which ship owners currently provide, will have to be carried out by the cargo owners, making the goods more expensive (Hebditch et al., 1996).

The general average absorption clauses could solve the problem, but they generally have a low coverage value. Its primary function is to avoid the declaration of general average when the loss or expense is monetarily slight. The creation of general average absorption clauses without a ceiling is unlikely, as it is not possible to predict how much the general average will absorb the costs and expenses in a maritime adventure (Musolino, 2015).

6. Findings and Analysis

In an attempt to standardize the definition and the regulation of the general average, the York-Antwerp Rules (RYA) were created in 1877.

The definition of the general average was included as Rule “A” in the 1924

version of the RYA. The definition established the following requirements: the deliberation, the extraordinary and reasonableness of the act, and the common adventure and danger. Other situations that focused more on the common benefit known as an artificial general average for not meeting all the Rule “A” requirements were also included.

There have always been opinions favorable to abolishing the general average due to the differences in interpretations in different countries and its regulation’s complexity, costs, and delay. Even after the creation of RYA, questions continued, as RYA are taken as a system that expands like a snowball, creating new contributions. It is argued that the evolution of marine insurance would dismiss the equitable distribution of losses and expenses.

7. Conclusion

The general average has been existing for millennia and has evolved in a non-linear way over the centuries. At first, the authorized sacrifice was the cargo jettisoning that incorporated the cutting of the mast. Besides, the existing rules only listed losses and expenses that constituted general average.

The first legal definition was found in the Ordonnance of Louis XIV in 1681 and included the terms reasonableness, common benefit, and ship and cargo safety. This definition was an example of several laws in Europe and inspired *Birkley v. Presgrave* in 1801 and the French Civil Code of 1807. The English definition favored mutual security, which stated that the contribution of the general average was only due when the sacrifice occurred to avoid the common danger of the cargo and the ship. The French definition was based on mutual benefit, which provided that any expenses or sacrifices that may have occurred for the benefit of the ship and the cargo would be general average.

General average is an ancient way of equitably sharing the risk of a maritime adventure. It is older than marine insurance, and it is applied and accepted in several countries. The extinction of the general average would cause a significant impact on cargo owners and insurers. They would face the risk of covering a more significant loss, as ship’s masters would have nothing to refrain from their actions, as each party would be responsible for its loss. There would not be a right to recourse. General average solves problems in times of crisis, giving the Master, coolness to take the necessary steps to safeguard his vessel and cargo in a dangerous situation.

If a new system is created, it is unpredictable how long this system will need to mature and receive the worldwide recognition and acceptance that the general average already has. That lack of recognition will lead to delays, costs, and lawsuits—precisely the opposite of what they want to avoid with the extinction of the general average.

General Average Absorption clauses are an unlikely option, because they have a low coverage limit. A clause like that has a top, as it is impossible to predict how much costs and expenses will be absorbed.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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