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Gauci, Gotthard

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Of Piracy and General Average: Contribution in

General Average for Ransom Payment occasioned by

Piratical Activity

Gotthard Mark Gauci*

A. Introduction.

This article examines the interplay between two ancient legal areas encountered in admiralty law, i.e. general average and piracy; the first is a unique indemnification system, to an extent similar to insurance, described as providing in ancient law ‘security against a certain aspect of the maritime risk, namely that which consists in deliberate sacrifice for the common safety’¹, whilst the second displays the idiosyncratic approach of admiralty law in providing a marine insurance definition of piracy which is to a substantial extent y at odds with that in public international law. The recent United Kingdom Supreme Court judgment in *The Longchamp*² as well as other judgments on general average are examined within the broad context of the perennial debate as to whether or not that institution should be retained.

Gotthard Gauci LLD (Malta) LLM (Southampton) PhD (Wales), Lecturer, Plymouth University, UK; Adjunct Professor World Maritime University, Sweden (gotthard.gauci@plymouth.ac.uk).

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¹ Selmer K.S., *The Survival of General Average*, 1958, Pitman, London 1958, p. 27

² [2018] 1 Lloyd’s Rep. 1.

(i) **General Average.**

General Average has a very long history, and Selmer describes it as ‘a venerable institution’³. It can be traced to Roman law and the *lex rhodia de iactu*, although there is no definitive proof of the island of Rhodes being the origin of the institution⁴. The origin of the word ‘average’ is also very interesting; the use of the word average came about a long time after the creation of the institution itself, and the authors of the tenth edition of *Lowndes and Rudolf*⁵ state that ‘there are to be found in the *Constitutum Usus* of the City of Pisa, a code dating from about A.D. 1160, some faint traces of the growth of a technical term out of the common Italian word *avere*, the having of property.’ Another possibility is that the source is the Arabic word ‘awar’ meaning ‘damage’⁶ and hence the shipping distinction between particular average and general average.

For the purposes of English law, general average has been absorbed ‘from without’⁷ and has been described as an ‘equity of foreign origin, which runs somewhat against the grain of English commercial legislation’⁸. It has been stated that general average arises as a result of an implied contract but Brett M.R. in the Court of Appeal in *Burton & Co v English & Co.*⁹ did not accept this view:

³ Selmer K.S., *The Survival of General Average*, 1958, Pitman, London 1958, p. 288.

⁴ Selmer K.S., *The Survival of General Average*, 1958, Pitman, London 1958, p. 20. See also Sanborn, F.R., *Origins of the Early English Maritime and Commercial Law*, Professional Books Ltd, Oxford, Reprint 1989. p. 14, where Goldschmidt, L., *Handbuch des Handelsrechts*, 3rd Edition, is cited.

⁵ Donaldson J., Staughton C.S., Wilson, D.J., *The Law of General Average and the York-Antwerp Rules*, Tenth Edition, 1975. §12.

⁶ See Zingarelli, N., *Vocabolario della Lingua Italiana, Dodicesima Edizione*, Zanichelli, 1995, p. 177

⁷ Lowndes, R., *The Law of General Average - English and Foreign*, Stevens and Sons, 1873, p. v. In *Pirie v Middle Dock Co* [(1881) 4 Asp. M.C. 388], Watkin Williams J. described general average law as :
“It is a law founded upon justice, public policy, and convenience, and rests . . . upon reasons which are so obvious that it is not surprising to find that it is older than any other law or rule in force . . . This principle of law must, in my judgment, be regarded as incorporated in and forming part of the unwritten common law of England.”

⁸ Lowndes, R., *The Law of General Average – English and Foreign*, Stevens and Sons, London, 1873, p. v.

⁹ 1883 12 QBD 218.

"By what law does the right arise to general average contribution? Lord Bramwell in his judgment in *Wright v. Marwood* considers it to arise from an implied contract, but although I always have great doubt when I differ from Lord Bramwell, I do not think that it 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 as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved."¹⁰

In *Birkley v. Presgrave*¹¹, Lawrence, J., made the famous statement that 'all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionably by all who are interested.' The Marine Insurance Act 1906¹² provides an English statutory definition in section 66(2) which states that 'there is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.'¹³ The idea behind general average as a legal norm is consistent with principles of fairness, and 'makes obligatory that which would have been a fair bargain if entered into beforehand'¹⁴. The same idea of peril to the common adventure is contained in Rule A of the York-Antwerp Rules 1974 which provides that 'there is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.'¹⁵ In the recent case of *The Cape Bonny*¹⁶, it was stated by Teare, J., that the onus of proving the reasonableness of the expenditure was on the shipowners claiming the general average contribution¹⁷, but 'the owners and managers

¹⁰ *id.*, at 220-221. See also *The Evje* (1973) 1 Lloyd's Rep. 509, per Denning M.R. at p. 513.

¹¹ 1 East 220, 1801.

¹² 6 EDW.7.c.41.

¹³ The York-Antwerp Rules 2016 provides the following definition of general average: "Rule A 1. 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."

¹⁴ Lowndes, R., *The Law of General Average - English and Foreign*, Stevens and Sons, London, 1873, p. iv.

¹⁵ See also York-Antwerp Rules 1994, 2004, 2016.

¹⁶ [2017] EWHC 3036; [2018] 1 Lloyd's Rep. 356.

¹⁷ *id.*, paragraph 163.

when taking such decisions are also entitled to the benefit of the doubt if the circumstances are such that a prompt decision to obtain towage assistance is required.¹⁸

General average has been referred to as an early form of insurance, i.e. one where risk is spread between various interests all mutually protecting one another¹⁹. Selmer remarks that 'the justice and equity of this idea strikes one immediately' and that 'it is hardly possible to attack general average on points of principle.'²⁰ Others have referred to general average as an 'unmitigated nuisance'²¹. As the application of the rules on general average can be excessively complicated, insurers may not have the time and necessary expertise to check claims for indemnification of general average contributions.

Although there are substantial variations in national laws relating to general average, in practice this part of maritime law is an area where there is widespread uniformity in its application as a result of the pervasive incorporation of one of the York-Antwerp Rules variants in carriage contracts²². As Lord Neuberger stated in the Supreme Court decision in *The Longchamp*²³, 'the Rules are not the subject of English legislation or international convention, and they derive legal force only through contractual incorporation'²⁴. There have been various calls for the abolition of general average²⁵, although the institution is not

¹⁸ *ibid.*

¹⁹ See Lowndes, R., *The Law of General Average*, 1873, p. 313.

²⁰ Selmer K.S., *The Survival of General Average*, 1958, Pitman, London 1958, p. 122.

²¹ See Buglass L.J., *General Average and the York-Antwerp Rules 1974*, p. 1 as cited in UNCTAD, *General Average, A Preliminary Review*, 19 January 1991 (TD/B/C.4/ISL/58), paragraph 172.

²² See The York-Antwerp Rules, 1974, 1994, 2004, 2016. These Rules can be historically traced back to the eleven Rules contained in the York Rules of 1864.

²³ [2018] 1 Lloyd's Rep.1.

²⁴ *id.*, §3. See also, §41, per Lord Sumption.

²⁵ Selmer K.S., *The Survival of General Average*, 1958, Pitman, London 1958, p. 294.

without supporters²⁶ and there has been a recent call for the creation of a general average international convention²⁷. There is no doubt however that general average is a cause of delays, and despite good intentions, the calculation of general average contributions can take a very long time, frequently a matter of years rather than months²⁸.

(b) Piracy.

English law throws up a substantial difficulty when dealing with the requirements for a definition of piracy in the national private law regime of marine insurance. The international law requirement, now enshrined in Article 101 of the United Nations Convention on the Law of the Sea 1982²⁹ that pirates by definition must operate outside the jurisdiction of any state, is dispensed with for the purposes of the Marine Insurance Act 1906³⁰; so is the requirement in international law that there must be a pirate ship and a victim ship.

In the current shipping climate, piracy is unlikely to give rise to an actual or constructive total loss; the requirements specified in section 57 and section 60 of the Marine Insurance Act 1906 will probably not be satisfied as the pirates are usually willing to release ship and cargo on payment of a 'reasonable' ransom³¹. When a ransom paid by one interest for the release of a vessel with cargo seized by pirates, the expense is a subject of general average

²⁶ See Kruit J., *General Average, Legal Basis and Applicable Law*, 2017 Paris Legal Publishers, 262.

²⁷ *id.*, 263.

²⁸ See Marshall, M., *General Average – the figures and their relation to the debate on reform*, IUMI Conference, Singapore, 132-16 September 2004, Legal and Liability Open Forum, 14 September 2004, p. 9.

²⁹ UNCLOS 1982, Article 101 provides:

"Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."

³⁰ See: Marine Insurance Act 1906, Schedule 1, Rule for the Construction of Policy number 8 which provides that 'the term 'pirates' includes passengers who mutiny and rioters who attack the ship from ashore'. ; *The Andreas Lemos* [1982] 2 Lloyd's Rep. 483, where an unduly restrictive application in the requirement of violence was probably applied (Gauci, G., *Piracy and its Legal Problems: With Specific Reference to the English Law of Marine Insurance*, 2010, Vol. 41, Journal of Maritime Law and Commerce, 541) .

³¹ See *Masefield v Amlin (The Bunga Melati Dua)* [2010] EWHC 280 (Comm); (2011) Lloyd's Rep. I.R. 338 (CA).

contribution by other interest/s. The legal principle is traceable to *Hicks v. Palington*³² which is used as the authority for the statement that ‘where cargo is voluntarily given up by pirates by way of composition, the sacrifice is a subject for contribution’³³. If there is no room for contribution because only one interest is involved, the matter is likely to be treated as a ‘suing and labouring’ expense in the context of marine insurance law³⁴. The latter concept is addressed in section 78 of the Marine Insurance Act 1906 and a typical suing and laboring clause provides for the supplementary indemnification of expenses incurred in the taking of reasonable measures to avert or minimise a loss covered by a peril insured against³⁵.

B. The *Longchamp* decision by the Supreme Court³⁶.

The *Longchamp* decision addressed the issue comprised within the so-called ‘Hudson conundrum’³⁷ and clearly set forth in paragraph 1 of the Supreme Court judgment, i.e. : ‘whether the daily vessel-operating expenses of shipowners incurred while they were negotiating to reduce the ransom demands of pirates should be allowed in general average – i.e. whether those expenses should be shared proportionately between all those whose property and entitlements were imperilled as a result of that seizure – or whether they must be borne by the shipowner alone.’³⁸ In this case, the claim related to crew wages, high risk bonus payments, food and supplies to crews and bunkers³⁹. In practice, average adjusters had previously deemed such expenditure as not being a matter requiring a general average

³² (1590) Moore 297.

³³ Donaldson, J., et al., *Lowndes and Rudolf, The Law of General Average and the York-Antwerp Rules*, Tenth Edition, Stevens and Sons, London, 1975, p. 89, paragraph 159, footnote 23.

³⁴ See *Masefield v. Amlin (The Bunga Melati Dua)* (2011) Lloyd’s Reports IR 338 at paragraph 64 (per Rix LJ).

³⁵ See Institute Time Clauses (Hulls) (1/10/83), Clause 13.

³⁶ *The Longchamp* [2017] UKSC 68, 25th October 2017; [2018] 1 Lloyd’s Rep. 1.

³⁷ [2018] 1 Lloyd’s Rep. 1, paragraph 18, Per Lord Neuberger PSC.

³⁸ [2018] 1 Lloyd’s Rep. 1, paragraph 1, per Lord Neuberger PSC.

³⁹ [2018] 1 Lloyd’s Rep. 1, paragraph 11 per Lord Neuberger PSC.

contribution⁴⁰. It was agreed that the final negotiated-down ransom itself was allowable in general average⁴¹.

An earlier issue about the allowability of related media expenses was no longer subject to contention by cargo interests⁴²; this matter did not make it to the Supreme Court level, but the Court of Appeal had to make the decision on the issue of admissibility. The defendants were arguing that the media response was not embarked on solely or predominantly for the purpose of saving the common adventure. The Court of Appeal agreed with the decision of the court of first instance. According to Lord Justice Hamblen:

“The judge found that the owners had established that the purpose of preserving the property from peril was one of the reasons why it engaged the media response costs and that that suffices. I agree. I would add that in fact that was the only reason in evidence. The two other possible reasons put forward by the cargo interests were not supported by any evidence but were assumed by the judge to be further reasons for the purpose of considering the argument.”⁴³

The appeal at the Supreme Court level obviously had to address the issue of the application of Rule F of the 1974 York-Antwerp Rules which states that: ‘[a]ny extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided.’ The extra expense amounted to \$160,000 which had been incurred during the process of negotiation which led to a saving of \$4.15 million from the initial ransom demanded by the pirates. But was this saving of \$4.15 million another expense which would have been allowable as general average in terms of Rules A and C of the York-Antwerp Rules 1974⁴⁴? The cargo

⁴⁰ [2018] 1 Lloyd’s Rep. 1, paragraph 42, per Lord Sumption JSC.

⁴¹ *loc. cit.*, paragraph 10.

⁴² *ibid.*

⁴³ [2016] 2 Lloyd’s Rep. 375, at paragraph 94.

⁴⁴ Rule A provides: “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.”

owners' argument was that paying the initial \$6 million demanded by the pirates would not have been reasonable and therefore the saving would not have fallen within the requirements of Rule A on which the application of Rule F depended. The view of Lord Neuberger PSC for the majority⁴⁵ was that 'the reference to an "expense which would have been allowable" is an expense of a nature which would have been allowable"⁴⁶. Lord Mance's interpretation was different and was a literal application of the said provision: "Viewing Rule F as a whole, it is clear that the owners must show that, had they incurred the other expense, the costs it would have involved could validly have been treated as general average..."⁴⁷ Both courts below had decided that the owners would have been reasonable 'to capitulate to the first demand'⁴⁸ of the pirates. Lord Mance went on to state in paragraph 67 of the judgment that this action by the owners would have been unreasonable.

Following the Supreme Court decision, it is strongly arguable that other operating costs including insurance premiums over the relevant period of negotiation with pirates should be admissible in general average. Indeed such an insurance expense is necessary where flag or even coastal states, in whose waters the vessel is operating, impose a system of compulsory insurance. It is interesting to note that the 1994 and subsequent version of the York-Antwerp Rules contain a Rule Paramount which states that:

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

It is submitted that the Clause Paramount would have made no difference to the outcome of *The Longchamp* decision. More interesting is the fact that a 1994 proposal made (and later withdrawn) by the United States Maritime Law Association for an amendment to amend Rule F "whereby a substituted expense would qualify for contribution as general

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

⁴⁵ Lord Mance JSC dissented.

⁴⁶ *loc. cit.*, paragraph 19 (emphasis added).

⁴⁷ *loc. cit.*, paragraph 55.

⁴⁸ *loc. cit.*, paragraph 67.

average only when the expense of the alternative course of action ‘would have been reasonably incurred and allowable as general average’⁴⁹ If this proposal had been approved rather than withdrawn, it would very probably have strengthened Lord Mance’s view. It is the author’s view that its absence strengthens the majority decision of the Supreme Court.

C. Human Life and General Average in the context of Piracy for Ransom.

Piracy for ransom frequently involves the seizure of ship and cargo together with the crew; this approach seems advantageous for pirates, who benefit from the consequences of pressure being put on the shipowners by family members clamouring for the speedy release of the crew. The importance of human life has had a chequered existence in maritime history. There is substantial evidence in eighteenth century English court judgments where adjudication was requested in relation to recoverability of indemnity for a loss of a human cargo of slaves⁵⁰. When it came to salvage, it has been the law for a very long time that there is no award for the sole saving of life, although the legal position would have been different at the time when slavery was not illegal.

Lord Stowell in the Admiralty Court in *The Aid* stated that:

“The mere preservation of life, it is true, this Court has no power of remunerating; it must be left to the bounty of the individuals; but if it can be connected with the preservation of property, whether by accident or not, then the Court can take notice of it, and it is always willing to join that to the *animus* displayed in the first instance. Here is a property of considerable value, which has received the assistance of four boats and twenty-two salvors. I think I shall act within bounds of moderation, if I allow them one-tenth of the value, and their expenses.”⁵¹

This position is broadly retained in Article 9 of the Brussels Convention on Salvage 1910 and Article 16 of the London Salvage Convention 1989. It is notable however that this has not always been the case. *Lowndes R.* makes reference to the Merchant Shipping Act 1854 sections 458 and 459 providing that ‘any one who has rendered assistance, when a ship is in

⁴⁹ Cornah, R.R., *Lowndes and Rudolph, The Law of General Average and the York-Antwerp Rules*, 14th Edition, Sweet and Maxwell, paragraph F.29.

⁵⁰ See for instance: *Gregson v. Gilbert* (1783) 3 Douglas 232; 99 E.R. 629; *Tatham v Hodgson* (1796) 6 Term Reports 756; 101 E.R. 756.

⁵¹(1822) 1 Hagg. 83; (1822) 166 E.R. 30.

distress, on the coasts of Great Britain, for saving the lives of the persons belonging to the ship, is entitled to a reasonable amount of salvage, *whether he has also saved property or not.*'⁵²

With reference to the saving of life, a similar approach to the current law of salvage has been taken in relation to general average. The tenth Edition of *Lowndes & Rudolph – The Law of General Average and The York-Antwerp Rules*⁵³ states that 'it is accepted that the value of the lives saved is not brought into account.'⁵⁴ The fourteenth edition of the same work states that 'the lives which are preserved by the general average act are not brought in to contribution; by reason, it has been said, of the impossibility of assessing them at a pecuniary value'.⁵⁵ However, when a court 'takes notice' of the salvage of life and augments the salvage award against the cargo and shipowner, this approach in itself could be still be considered as a form of general average where shipowner and cargo owner are contributing. This point is made by in a footnote in the first edition of Lowndes where it is stated that 'thus, indirectly, or rather in a disguised manner, the salvage of life was always really treated as general average.'⁵⁶

Piracy and the Salvage/General Average interface

A salvage issue can arise in the context of a piratical scenario as the necessary 'danger' requirement is likely to be present; indeed, the prevention of 'piratical looting' has been listed as an example of a salvage service in a leading work on salvage law⁵⁷. Where in terms of a salvage agreement, the master or owner of a vessel signs on behalf of the ship, cargo and other interests, any salvage award cannot *prima facie* be characterised as giving rise to

⁵² Lowndes R., *The Law of General Average*, 1873, at p. 84. (emphasis added)

⁵³ 1975 by the Hon. Sir John Donaldson *et al.*

⁵⁴ *op. cit.*, at §439.

⁵⁵ *op. cit.*, at §17.77, where the 8th Edition of *Park on Insurance* is cited.

⁵⁶ Lowndes R., *The Law of General Average*, 1873, at p. 84.

⁵⁷ See Reeder, J. (ed.) *Brice on Maritime Law of Salvage*, 4th Edition, Sweet and Maxwell, London, 2003 at paragraph 1-342.

general average since all the financial interests involved in the adventure will be separately attached with liability unless the salvage agreement provides differently; the same principle can be applied to the scenario of non-contractual salvage which can be described as a form of *negotiorum gestio*⁵⁸. Reference can here be made to *The Raisby*⁵⁹ where, after an action by salvors against the shipowner in respect of ship and freight, a further action was commenced by the said salvors against the shipowner in respect of the salvage of the cargo belonging to third parties; the action of the claimants failed. Sir James Hannen in the judgment stated that it seemed clear that 'no primary liability rests on the ship or its owners to pay for the salvage of the cargo'⁶⁰. Furthermore reference is made in the same judgment⁶¹ to *Abbott on Shipping*, where it is stated that 'with respect to the parties liable to pay salvage, and the interest in respect of which it is payable, the rule is that the property actually benefited is alone chargeable with the salvage recovered.' Obviously the position would be different if one interest had paid salvage for the benefit of two or more interests, and this situation may well give rise to a general average contribution. In the House of Lords' decision in *Anderson, Tritton & Co. v. Ocean Steamship Co.*⁶² (also referred to in *The Raisby*), it had been held that where, in pursuance of a binding agreement between the owners of the salvaged vessel, the shipowner had agreed to pay and had paid salvage in respect of both ship and cargo, the shipowner may have a claim for contribution in general average. However, in 1942, a legal opinion provided to the Association of Average Adjusters stated that 'the interests salvaged are, of course, bound to discharge their several liabilities to the salvors on the basis of contract of salvage... i.e. on the basis of their respective values at the termination of the services', but that 'it does not follow that *as between themselves* they are not bound to adjust their rights and liabilities under the York-Antwerp Rules'⁶³,

⁵⁸ See Birks, P., *Unjust Enrichment*, 21st Edition, Oxford University Press, p. 22.

⁵⁹ [1885] 10 P.D. 114.

⁶⁰ *id.*, at 116.

⁶¹ *id.*, at 117.

⁶² 10 App. Cas. 107.

⁶³ The wording of this opinion is reproduced from Hudson, N.G. and Harvey, M.D., *The York Antwerp Rules*, Fourth Edition, 2017, Informa, London, paragraph 18.45.

Excessive delay is evident in the practice of recalculating separate salvage awards arising from the same incident in terms of the rules of general average. This was avoided by a change the York-Antwerp Rules in 2004⁶⁴ and reinstated albeit with substantial modifications in the York-Antwerp Rules 2016⁶⁵. This problematic interface between general average and salvage is of ancient pedigree and is dealt with extensively in the first edition of *General Average* by Richard Lowndes⁶⁶. The ‘expenses of a complex salvage operation: when property saved piecemeal’ would all constitute general average ‘if the ship is got off and continues her voyage’ in terms of Norwegian law, but for the purpose of English law, the law is not defined and the practice unsettled⁶⁷. The 1994 York-Antwerp Rules in particular provide that separate elements of a salvage award calculation are to be re-

⁶⁴ YAR 2004 RULE VI. “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 salvaged 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...”

⁶⁵ YAR 2016: Rule VI – “Salvage Remuneration

(a) Expenditure incurred by the parties to the common maritime 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 and subject to the provisions of paragraphs (b), (c) and (d)

(b) Notwithstanding (a) above, where the parties to the common maritime adventure have separate contractual or legal liability to salvors, salvage shall only be allowed should any of the following arise:

(i) there is a subsequent accident or other circumstances resulting in loss or damage to property during the voyage that results in significant differences between salvaged and contributory values,

(ii) there are significant general average sacrifices,

(iii) salvaged values are manifestly incorrect and there is a significantly incorrect apportionment of salvage expenses,

(iv) any of the parties to the salvage has paid a significant proportion of salvage due from another party,

(v) a significant proportion of the parties have satisfied the salvage claim on substantially different terms, no regard being had to interest, currency correction or legal costs of either the salvor or the contributing interest...”

⁶⁶ London, 1873.

⁶⁷ *loc. cit.*, pp. xxxii-xxxiii.

examined by assessors in terms of general average law⁶⁸. The 1994 Rules allow for the admission of salvage expenses, whether under contract or otherwise, in general average⁶⁹. The end result will be two possibly complex calculations, one in salvage based on values at the time and place of termination of salvage services, and one in general average based on values when and where the common adventure terminates⁷⁰.

D. The Effect of an Abolition of General Average; the use of Unjust Enrichment/Restitution⁷¹ as an Alternative Remedy.

A UNCTAD Preliminary Report recommended ‘the setting up and organizing investigations and discussions between the insurance interests concerned, in order to ascertain whether new insurance arrangements could be brought into being which would allow the abolition of the existing general average system’⁷². Another view which appears to be more mainstream is that there is still a place for general average in the modern legal system and that a better solution would be the simplification, rather than the abolition, of general average⁷³. This approach would avoid the daunting requirement of the amendment of national laws worldwide⁷⁴. However, the abolition of general average can be achieved contractually by parties to contracts of carriage in a similar way to the substantial achievement of uniformity through the contractual incorporation of the York-Antwerp Rules.

⁶⁸ Rule VI (Salvage Remuneration) of the 1994 Rules specifically provides that: “*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 undertaken for the purpose of preserving from peril the property involved in the common maritime adventure...*”

⁶⁹ *Brice on Maritime Law of Salvage*, Fourth Edition, §1-107.

⁷⁰ *Brice on Maritime Law of Salvage*, Fourth Edition, §1-107.

⁷¹ As to the distinction between Unjust Enrichment and Restitution, see Birks, P., *Unjust Enrichment*, 2nd Edition, Oxford University press, p. 278 *et seq.*

⁷² UNCTAD, *General Average, A Preliminary Review – Report by the UNCTAD Secretariat*, (TD/B/C.4/ISL/58, 19 August 1991), paragraph 175.

⁷³ Buglass, L.J., *Marine Insurance and General Average in the United States*, Third Edition, 1991, Cornell Maritime Press, p. 328; UNCTAD, *The Place of General Average in Marine Insurance Today – Report by the UNCTAD Secretariat* (UNCTAD/SDD/LEG/1, 8 March 1994), paragraph 172.

⁷⁴ *ibid.*

It is the author's view that general average is a remnant of a bygone era and should be consigned to maritime history, even though it has been rightly suggested that general average can survive the widespread use of autonomous vessels⁷⁵. The regime of general average is highly incongruous in a modern legal system; it did have a purpose, i.e. the spreading of risks, at the time of the Rhodian Sea Law, at the time of the Institutes of Justinian, the *Guidon de la Mer* in the sixteenth century, and the Ordinance of Rotterdam in the eighteenth century. With the widespread use of marine insurance contracts, general average has outlived its usefulness⁷⁶ to the point of becoming a nuisance as an institution causing widespread delay. As a result, the industry has utilised the General Average Absorption clause (also referred to as Small General Average clauses) or a variant thereof for use in hull insurance contracts⁷⁷.

⁷⁵ See Van Hooydonk, E. *The Law of Unmanned Merchant Shipping – an exploration*, (2014) 20 JIML 403 at 422.

⁷⁶ See Gooding, N., *General Average – Time for a Change* (20th January 2004) available at www.aimuedu.org/aimupapers/Gooding.pdf, accessed 18th December 2016.

⁷⁷ The *BIMCO Standard General Average Absorption* clause provides as follows:

“1. If the Assured does not claim general average, salvage or special charges from cargo, freight, bunkers, containers or any property not owned by the Assured on board the vessel (hereinafter called "Property Interests"), the Insurers shall pay in full the general average, salvage and special charges up to % of the insured value of the vessel or US\$...., whichever is the higher. The % of the insured value of the vessel or the US\$ sum agreed under this clause shall not be less than US\$150,000.

1.1 The Insurers shall also pay the reasonable fees and expenses of the average adjuster for calculating claims under this clause in addition to any payment made under 1. above.

1.2 If the Assured claims under this clause he shall not make any claim for general average, salvage or special charges against the Property Interests.

1.3 Claims under this clause shall be adjusted in accordance with the York-Antwerp Rules 1994, excluding the first paragraph of Rule XX and Rule XXI, relating to commission and interest.

1.4 Claims under this clause shall be payable without application of the deductible.

1.5 Without prejudice to any defences they may have under the terms of the policy the Insurers waive any defences to payment under this clause which would have been available to the Property Interests.

1.6 In respect of payment made under this clause the Insurers waive any rights of subrogation they may have against the Property Interests. This waiver shall not apply where the incident giving rise to such payment is attributable to fault on the part of Property Interests.

1.7 For claims under this clause the vessel shall be deemed to be insured for its full contributory value.” (retrieved from Gard, *Insight*, 01 May 2003).

See further, Anon., *Mega-containerships: impact on cargo underwriters*, HFW Marine Insurance Bulletin, January 2014, pp. 5-6, in relation to a suggested new insurance policy ‘to replace the traditional approach to general average for large containerships’ obliging ‘the shipowner to assume cargo interests’ liability for their proportion to general average/salvage guarantees’ (*id.*, p. 6)

Nevertheless, whereas one can find substantial discussion about the need of abolition of general average in academic quarters⁷⁸, it is less likely to find any such discussion in judgments⁷⁹. Whilst cumbersome and a cause of delay, general average is intended to avoid an advantage for one party at the expense of another; indeed there is a strong argument that a general average contribution to a general average sacrifice can be justified as an operation of the gain-based principle that a legal remedy should be available for unjustified enrichment⁸⁰, and that a general average sacrifice or expenditure in the event of an abolition of the institution of general average will be accompanied by a right to utilise a remedy akin to restitution or unjust enrichment to rectify the injustice occasioned, although, given the infancy of the development of this area in the English law of obligations, the application of this regime to shipping law may constitute an uphill struggle⁸¹. It has been stated that general average itself can be viewed as part of the law of restitution⁸², and it can be viewed also possibly as falling within the terms of compensability as *negotiorum gestio*⁸³ which in Roman law arose *quasi ex contractu*⁸⁴; others have viewed general average as *sui*

⁷⁸ See, in particular: Selmer K.S., *The Survival of General Average*, Pitman, 1958; Mukherjee, P.K., *The Anachronism in Maritime Law that is General Average*, WMU Journal of Maritime Affairs, 2005, Vol. 4, No. 2, 195-209.

⁷⁹ Lowndes does mention 'a certain repugnance' of a minority of judges when it comes to the development 'of this equity of foreign origin'. Lowndes, R., *The Law of General Average*, 1873, p. v.

⁸⁰ See Birks, P., *Unjust Enrichment*, 2nd Edition, Oxford University Press, 2004, p. 3 where it is stated that 'even at the beginning of the 21st century unjust enrichment is still unfamiliar to most common lawyers'.

⁸¹ See, *The Kos* (2012) 2 Lloyd's Rep. 292, where, in relation to the use of unjustified enrichment as a cause of action to enable a shipowner to recover expenses incurred after the withdrawal of the vessel from a time charterer, Lord Sumption stated: "It may well be that in the light of recent developments in this area of law, the owners might be entitled to succeed on this basis also, although the measure of recovery would not necessarily be the same. This, however, raises larger issues which would be better decided in a case where they arise, and possibly in a less specialised context than a dispute about carriage by sea." (paragraph 31).

⁸² F.D. Rose, *General Average as Restitution* (1997) 113 L.Q.R. 569-574.

⁸³ See Hunter W.A., *A Systematic and Historical Exposition of Roman Law*, Fourth Edition, Sweet and Maxwell, MDCCCIII, 661 *et seq.*, where the *negotiorum gestor* is described as 'one who has done something for another without being asked'. See, further, *id.*, at 616, where it is stated that the action *de in rem verso* is the equivalent of the action *negotiorum gestorum*.

⁸⁴ *id.*, at 655.

*generis*⁸⁵. If general average is considered as part of the law of restitution/unjust enrichment, there is no reason why similar principles should not be extended to non-marine transportation law. Similarly the remedy of unjust enrichment/restitution or *negotiorum gestio* could be developed to perform all the functions of general average law in the event of the latter's abolition. Although still in its infancy, English law of unjustified enrichment/restitution has moved on from the earlier situation described by Bowen LJ by the following well-known statement:

"I am of the same opinion. The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will. There is an exception to this proposition in the maritime law. I mention it because the word "salvage" has been used from time to time throughout the argument, and some analogy is sought to be established between salvage and the right claimed by the Respondents. With regard to salvage, general average, and contribution, the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea."⁸⁶

It is now the case that the exceptions may now have 'overwhelmed the supposed rule'.⁸⁷

An argument in favour of general average has been that the abolition of general average would result in one party, e.g. cargo owner unjustly enriching itself at the expense of others, e.g. the shipowner⁸⁸. This could arguably be the case where a shipowner incurs damage to machinery in an endeavour to refloat cargo carrying vessel for the common safety. An avoidance of both general average and the law of unjustified enrichment/restitution can be

⁸⁵ See: *Hain v. Tate & Lyle* (1936) 41 Com. Cas. 350 at 372.

⁸⁶ *Falcke v Scottish Imperial Insurance Co.* (1886) 34 Ch D 234, 248.

⁸⁷ Birks, P., *Unjust Enrichment*, Oxford University Press, 2nd Edition, at p. 23.

⁸⁸ See Kruit, J., *General Average, Legal Basis and Applicable Law*, Paris Legal Publishers 2017, §6.5.3.2.2.

achieved by making the carrier *absolutely responsible* for the carriage of the goods and without recourse to claims in general average or an equivalent remedy. Such an initiative would necessitate also the amendment of current regimes of carriage of goods by sea embodied in the Hague, Hague-Visby, Hamburg and Rotterdam Rules. Another solution is that recommended by Selmer⁸⁹, i.e.:

‘to leave it to each single party to insure his own disbursements as well as his physical losses... This would require some innovations in marine insurance, but the difficulties would hardly be insurmountable.’

G. General Average and Marine Insurance.

An abolition of general average could have a substantial impact on marine insurance. Marine insurance law treats general average as one of three types of saving acts, the other two being salvage expenses and suing and laboring expenses⁹⁰. The interface between the three institutions can be problematic, and there is certainly overlap, or at least potential thereof, between general average and salvage; this is in part a result of the use of the wording in section 65(2) restricting salvage charges to meaning ‘the charges recoverable under maritime law by a salvor *independently of contract*’⁹¹. The abolition of general average would involve the potential, at least, of avoidance of such duplication. The abolition of general average could have potentially more serious implications for the insurer if some general average expenses, e.g. payment of a ransom to pirates, could end up being treated as a sue and labour expense, consequent upon an appropriate amendment to section 78(2) of the Marine Insurance Act 1906 which at present provides that ‘general average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the

⁸⁹*op. cit.*, pp. 292-3.

⁹⁰ See sections 65, 66 and 78 of the Marine Insurance Act 1906.

⁹¹ Emphasis added. See different approaches at Lambeth R.J., *Templeman on Marine Insurance*, Sixth Edition, p. 371, and Rose, F., *Marine Insurance, Law and Practice*, 2nd Edition, 2012, §20.16. A solution would be an interpretation taking into account that ‘independently of contract’ in section 65(2) of the Marine Insurance Act 1906 is a reference to requirement of voluntariness under the general law of salvage, in the sense that the Marine Insurance Act 1906 is excluding from the definition of ‘salvage charges’ the services rendered by ‘the assured or their agents’ in terms of the next sentence within section 65(2). In terms of the general law of salvage members of crew can only claim salvage when the ship has been properly abandoned and they return to save the ship in circumstances similar to those in *The San Demetrio* (1941) 69 LL. L. Rep. 5.

suing and labouring clause'. Whereas general average expenses are treated as subject to the limits of the main part of the policy, the suing and laboring clause is 'supplementary to the contract of insurance'⁹² and an insured could be better off with a suing and labour-type remedy where the claim for minimisation expenses is accompanied by a claim for a total loss. This is an advantage currently available for a claimant under the suing and labouring clause as distinct from claiming under a marine insurance contract for an indemnity relating to a contribution in general average.

H. General Average and Negligence.

A general average situation in the context of piracy may well be preceded and to an extent or other caused by shipowner's negligence; an example may be in that of a ship carrying high value cargo which is sent to sea in an unseaworthy state in that it is not sufficiently equipped to encounter a foreseeable piracy threat, for instance without crew which has been adequately trained in anti-piracy procedures.

There is a view that the abolition of general average will remove a cheat's charter in that it has been a well-known 'secret' in seafaring communities that some unscrupulous shipowners abuse the general average system to claim contributions for repairs potentially traceable to initial unseaworthiness and negligence⁹³. General average has been described as a 'nest of fraud and abuses, a lurking place for peculation and waste'⁹⁴. The legal position of unscrupulous shipowners is, at least to an extent, aided by the wording of Rule D of the York-Antwerp Rules, which was originally adopted in Antwerp in 1903 and states in the 2016

⁹² Marine Insurance Act 1906, section 78(1).

⁹³ See also Gooding, N., *General Average – Time for a Change, General Average Presentation*, IUMI Conference, 1996, who states in his concluding paragraph, that '[g]eneral Average in the modern world only benefits the poor quality shipowner'.

⁹⁴ See Gooding, N., *General Average – Time for a Change* (20th January 2004) available at www.aimuedu.org/aimupapers/Gooding.pdf, accessed 18th December 2016, where this statement is attributed to a Mr Joseph Hillman, in a letter published in the Times of London on the 24th of December 1877.

version: “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 common maritime adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault.” This provision effectively leads to the conclusion that every sacrifice or expenditure even if caused by the fault of one of the parties to the adventure, including the shipowner, can give rise to a claim for a general average contribution, relegating the issue of liability for breach of contract to the settlement stage⁹⁵. Teare, J., in *The Cape Bonny*,⁹⁶ stated that ‘[t]he object of Rule D is to keep all questions of alleged fault out of the adjustment and to preserve unimpaired the legal position at the stage of enforcement.’ Paragraph D gives the benefit of the doubt to the shipowner who thence gets the benefit of a possessory lien enforceable against the consignee of cargo⁹⁷ with all attendant legal benefits. *Cosco Bulk Carrier v Tianjin*⁹⁸ is a recent case where cargo insurers were claiming unseaworthiness as a defence to a claim under a general average guarantee; it was held that the pleaded defence was one without foundation. However the specific details of the judgment would not indicate that this judgment can be used to back up the view that negligence or unseaworthiness are difficult to use as a defence. Furthermore, in the recent case of *The Cape Bonny*⁹⁹, a claim for general average contribution by the shipowners against guarantors on behalf of cargo interest failed on the grounds that ‘the general average incurred by the Owners was due to an actionable fault’¹⁰⁰. The actionable fault in this case was a failure to exercise the due diligence requirement to make the vessel seaworthy and the claims for general average contribution were not successful.

⁹⁵ See Selmer K.S., *The Survival of General Average*, 1958, Pitman, London 1958, pp. 82-83.

⁹⁶ [2017] EWHC 3036 (Comm) 4th December 2017, paragraph 4.

⁹⁷ See *Castle Insurance v. Hong Kong Island Shipping* (1984) AC 226 (HL).

⁹⁸ [2017] EWHC 2509 (Comm) 27th July 2017; (2018) 1 Lloyd’s Rep. 396.

⁹⁹ [2017] EWHC 3036 (Comm) 4th December 2017; (2018) 1 Lloyd’s Rep. 356.

¹⁰⁰ *id.*, at paragraph 155.

It is of interest to note that some national legal systems have historically not applied this rule, i.e. the equivalent of Rule D. The first edition of Lowndes' General Average¹⁰¹, in answer to the question '*Can there be general average when the danger has resulted from unseaworthiness, or fault of the master, or vice propre of the cargo?*' lists a number of legal systems where the answer is a clear 'no': the Dutch, the Portuguese and the Italian. On the other hand, in such cases, the German and Swedish systems would have allowed general average as between the parties not at fault¹⁰².

H. Conclusion

Piracy and general average have both been around for an extremely long time. This paper leads to the probably inevitable suggestion that, for the sake of avoidance of confusion, in those legal systems where there is a discrepancy the definition of piracy for national marine insurance law purposes should correspond to that in international law. Secondly it is proposed that states should embark upon the task of exploring the possible procedure for the abolition of the law of general average from their national commercial or maritime legislation; this task should however take into account the possible implications of leaving the door ajar to permit a similar remedy under another name, i.e. unjust enrichment.

¹⁰¹ Lowndes, R., *The Law of General Average (English & Foreign)* Stevens and Sons, London, 1873, xxviii.

¹⁰² *loc. cit.*, pp. xxviii-xxix.