

TALLINN UNIVERSITY OF TECHNOLOGY

Estonian Maritime Academy

Centre for Maritime Studies

Margarita Kirpitsenko

**PRACTICAL SETTLEMENT AND EXAMINATION OF
GENERAL AVERAGE CASES**

Bachelor's Thesis

Supervisor: Lecturer Yrjö Saarinen

Tallinn 2015

I declare I have written the diploma thesis independently.

All works and major viewpoints of the other authors, data from other sources of literature and elsewhere used for writing this paper have been referenced.

Margarita Kirpitsenko

.....

(signature, date)

Student's code: 141075VDSR

Student's e-mail address: margo15@windowslive.com

Supervisor Yrjö Saarinen:

The thesis conforms to the requirements set for the diploma thesis.

.....

(signature, date)

Chairman of defence committee:

Permitted to defence.

.....

(Title, name, signature, date)

TABLE OF CONTENTS

ABSTRAKT	4
INTRODUCTION	5
1. LEGAL REGULATION FOR GENERAL AVERAGE.....	8
1.1. General average development and York-Antwerp Rules	8
1.1.1 Main principles and features of General Average	9
1.2. York-Antwerp Rules.....	12
1.2.1. York-Antwerp Rules 1994	12
1.2.2. York-Antwerp Rules 1994 in comparison to 2004.....	18
2. PROCESS OF SETTLEMENT AND ADJUSTMENT OF GENERAL AVERAGE	21
2.1. General Average declaration	21
2.1.1. Documentation for settlement of the general average claim	23
2.2. Process of adjustment	25
2.2.1. Calculation of contributory value	27
3. GENERAL AVERAGE CASE STUDY.....	31
3.1. Vessel “Maria” case study	31
3.2. Vessel “Viljany” case study	35
3.3. Conclusion	38
4.ARGUMENTS TO RETAIN AND SUBSTANTIALLY AMEND THE GENERAL AVERAGE	40
SUMMARY	44
RESÜMEE	46
BIBLIOGRAPHY	48

TABLES	28
Table 1.Expenses and losses.....	28
Table 2.Contributory value.....	28
Table 3.Pilotage charge	34
Table 4.Apportionment of General Average for vessel “Maria”	35
Table 5.Assessment of expenditures and loss	37
Table 6.Apportionment of General Average for vessel “Viljany”	48
APPENDIXES.....	50
Appendix 1. BIMCO Special Circular	50
Appendix 2. BIMCO Average Bond Clause	52

ABSTRAKT

The purpose of this thesis is to analyze the most important alterations to the York-Antwerp Rules that were made in 2004, which are not favorable to the shipowners and provide the conclusion of the arguments to retain and to substantially amend the York-Antwerp Rules.

In the thesis the author observes two general average cases in order to present the calculations of contributory value and prove the importance of such calculations. Noteworthy of the case study is to show how the average adjuster draws up the average statement and what documents need to be collected.

The most important part of the thesis is the explanation of the most important rules of York-Antwerp Rules 1994 with the examples in order to show the use of some of the rules in practice. In the last chapter the author provides reasons of the amendments to York-Antwerp Rules in 2004.

Keywords: York-Antwerp Rules, Average Bond, BIMCO Special Circular, contribution value, average adjuster, average statement.

INTRODUCTION

Not only nowadays but also hundreds years ago the marine transportation of the goods have been subject to all kinds of dangers such as piracy, casualties, heavy weather, etc., the solution to this problem was the introduction of general and particular average.

The main difference between particular and general average is that during the particular average the losses are accidental (collisions, fire, grounding) and in case of general average extraordinary expenditures and sacrifices are intentionally and reasonably made.

General average is an ancient practice that was first put in writing by the Greek Rhodians in the Digest of Justinian. Their basis for this primitive law was common benefit: “that which has been given for all should be replaced by the contribution of all” (Law Firm of Maloof Browne & Eagan LLC, 2013, 2).

As the growth of international trade developed it became necessary to also develop general average. Therefore, there was need for international uniformity since general average varied in its development in different countries, so that substantial differences existed in the law and practice. Thus in the end of 19th century the York-Antwerp Rules were created. These Rules were revised many times. The latest changes were made at Vancouver in 2004 where the York-Antwerp Rules 2004 were approved by the Comité Maritime International (CMI). Unfortunately, the revised Rules are less favorable to shipowners and is not frequently used in practice.

“In the recent years the whole concept of general average has come under scrutiny primarily by cargo insurance underwriters, some of who would like to see the system abolished or substantially amended” (BIMCO Special Circular, 2002).

The definition of the general average is clearly indicated in Rule A of the York-Antwerp Rules either the 1974, 1994 or 2004 as following:

"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 main principle of general average is when the casualty occurred and extraordinary expenditures or sacrifices were intentionally and reasonable made, all the parties involved in adventure shall proportionally contribute.

"General average is an intentionally accepted principle of equity relating to the apportionment of loss due to losses sustained for the common safety during a marine adventure" (BIMCO Special Circular, 2002).

The aim of this thesis is to show the necessity of existence of General Average in maritime law and analyze the most import alterations to the York-Antwerp Rules that were made in 2004, which are not favorable to the shipowners. Moreover, the author will specify the arguments to retain and to abolish general average. It is also aimed to observe general average cases presenting methods of calculations of contributory value and prove the importance of the calculations.

The process of settlement and adjustment of general average is quite complicated and time consuming task. Moreover, nowadays, the volume of the cargo transported and the number of cargo owners is growing. For example, container vessels taking thousands of shipments on board imply that there could be also hundreds and thousands of cargo owners.

When a casualty occurs the shipowner is the party which usually claims in general average. A shipowner's responsibility is to make sure that all necessary steps are taken when declaring the general average claim. The shipowner should provide all necessary documents to an average adjuster who will prepare the average adjustment and will make calculations of the contributory value.

In the first part of the thesis will be given explanations to the legal regulation of general average. This includes the development of general average and York-Antwerp Rules.

Also great importance is given to the explanation of four main features of general average as well as supporting patterns of sacrifices and expenditures that may occur during common adventure.

The most noteworthy is considered explication of some most important rules of York-Antwerp Rules 1994 with the accompanying pattern cases helping to better understand each

rule. Since the revised York-Antwerp Rules were created in 2004 the comparison of the Rules 1994 and 2004 will be made with the comments.

The next part of the thesis offers the view at the process of settlement and adjustment of general average cases. The party which is claiming in general average should provide the average adjuster with certain documents, for instance, Average Bond, Guarantee, Sea Protest, copies of appropriate pages in the log book in order to enable the average adjuster to make calculations of contributory values. The author gives special attention to importance of presenting the designated documents and offers his explanations to the methods the calculations of contributory values are made.

In order to understand the process of drawing up the average statement the two patterns of the general average cases are considered. The first one is 1994 case has been kindly provided by Estonian insurance company "Kominsur". The casualty occurred when the vessel was leaving the port of Tallinn in 1994 on 23rd of October. The vessel "Maria" (the name of the vessel has been replaced due to confidentiality) grounded and sustained damage to her keel, port and starboard side bottom plating. She had to sail back to Tallinn where she was drydocked and all necessary permanent repairs were carried out. The author will scrutinize in details the casualty and provide the calculations that were made by the average adjuster. Thereafter are following extracts from the calculations for the average adjustment. In order to compare the average adjustments thought years the author has installed the 1970 adjustment with calculations and to disclose the methods the adjustments were made 45 years ago.

The last part of the thesis stipulates the arguments to retain and arguments to substantially amend the York-Antwerp Rules. The author provides the example of the 2006 general average case which shows that the reason why nowadays the settlement of general average is time-consuming. Also the author will mention that the York-Antwerp Rules will be amended in 2016.

The thesis will include qualitative method of research meaning tha the author will analyze the articals, guides, documents and literature. Also the cases will be examined and the author will provide the case studies with the detailes.

1. Legal Regulation for General Average

1.1 General average development and York-Antwerp Rules

General Average dates back for more than 3 000 years before shipowners and merchants conceived the idea of protecting themselves from financial risks by means of insurance. This historical events reveal the important fact that general average exists and must be considered independently of marine insurance. General average was recognized and put in writing by the Greek Rhodians in the Digest of Justinian. Since no record of Rhodian law exists it can be found in Roman law. The Rhodian Law reads as follows:

„If in order to lighten a ship, merchandise is thrown overboard, that has been given for all shall be replaced by the contribution for all.“

The ancient Greeks formed the principle “which has been sacrificed for all shall be made good by the contribution for all.”

As the growth of international trade developed it became essential to also develop general average. Thus, it was important to arrange for international uniformity as general average varied in its development in different countries resulting in substantial differences existing in the law and practice.

Therefore, in the end of 19th century the York-Antwerp Rules were created. Firstly, the York Rules were established in York in 1864 at International conference and that were revised in Antwerp in 1877 and became York-Antwerp Rules. Since 1924 the changes to the Rules have been made by the Comité Maritime International. CMI is non-governmental international organization that was formally established in 1897. The Comité was founded to deal with unification of maritime law and commercial practices.

The York-Antwerp Rules have been revised several times over the years. The latest amendments were agreed at general assemblies of the Comité Maritime International (CMI) at Hamburg in 1974, at Paris in 1990 and at Sydney in 1994.

One of the latest changes was made at Vancouver in 2004 where the York-Antwerp Rules 2004 were approved by the Comité Maritime International (CMI). However, the new Rules is less favorable to shipowners and is not frequently used in practice.

It must be clearly understood that York-Antwerp Rules have no international convention status as for example Hague Rules and Hague-Visby Rules have. Nevertheless, these rules are imposed by special clause in standard form contracts such as Bill of Lading and Charter Parties. The clause usually stipulates the place where a general average should be adjusted. It might read as follows:

„General Average shall be adjusted, stated and settled according to York-Antwerp Rules 1994, or any subsequent modification thereof, in London unless another place is agreed in the Charter Party“.

It is utterly important to make sure that both the Bill of Lading and the Charter Party have the same clause and the same York-Antwerp Rules are mentioned. General Average clause in Time Charter reads as follows:

“General Average shall be adjusted and settled at a port or place in the option of the Carrier according to York-Antwerp Rules 1994 or any subsequent amendment thereto.”

1.1.1 Main Principles and Features of General Average

The main principle of general average is when the casualty occurred and extraordinary expenditures or sacrifices were intentionally and reasonable made, all the parties involved in adventure shall proportionally contribute. The party who has suffered these losses to save the property (a vessel, cargo, freight) involved in maritime adventure has to receive the compensation from other parties.

The definition of the general average is clearly stated in Rule A of the York-Antwerp Rules either the 1974, 1994 or 2004 as following:

"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."

According to this rule there are five essential features:

1. The sacrifice or expenditure is considered to be extraordinary provided that incurred expenses shall not be expected under contract of affreightment. For example, when a vessel is aground the vessel's machinery is used to refloat the vessel, if in this case damage to the machinery has occurred and it has to be made good as general average since the loss is considered extraordinary.
2. The general average act should be intentionally made and should not be accidental. This means the actions were taken intentionally and there was no accidental loss. For example, the losses incurred due to intentional stranding of a vessel shall be allowable in general average. However, if a vessel ran on shore accidentally the losses shall not be made good as general average.
3. There must be peril to the common maritime adventure. Such peril must be real and not imagined. For example, a vessel is adrift without steering since there is no motive power of a vessel, and the weather is calm at that moment meaning that there is no peril. However, the captain decides to enter the port of refuge since as per the weather forecast the storm is approaching. In this situation, the expenses shall not be made good as general average.
4. The action must be for the common safety and not merely for the safety of part of the property involved. For example, a vessel is carrying refrigerated cargo, but the refrigerating machinery breaks down. In this case the machinery must be repaired and all the loss and damage to the cargo shall not be allowable in general average since the vessel can safely continue the common adventure.

It is necessary to make difference between sacrifices and expenditures. The sacrifices imply the following:

- The damage to vessels machinery, winches, gear when refloating
- The damage to a vessel and cargo when extinguishing the fire
- Jettison of cargo from underdeck and from deck
- Discharge the cargo in order to refloat a stranded vessel

The expenditure cases include:

- Port of refuge expenses (entering a port of refuge)

- Salvage expenses
- Expenses incurred during floating a stranding vessel
- Expenses of discharging a cargo at a port of refuge

These all sacrifices and expenditures can be found in York-Antwerp Rules.

Sacrifices:

- Rule I - Jettison of Cargo
- Rule II - Loss or Damage by Sacrifices for the Common Safety
- Rule III - Extinguishing Fire on Shipboard
- Rule IV - Cutting away Wreck
- Rule V - Voluntary Stranding
- Rule VII - Damage to Machinery and Boilers
- Rule IX - Cargo, Ship's Materials and Stores Used for Fuel
- Rule XII - Damage to Cargo in Discharging, etc.
- Rule XV - Loss of Freight

Expenditures:

- Rule VI - Salvage Remuneration
- Rule VIII - Expenses lightening a Ship when Ashore, and Consequent Damage
- Rule X - Expenses of 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 XIV - Temporary Repairs

Noteworthy is to understand the difference between general and particular average. The particular average is accidental loss caused to cargo, vessel or other property. Such loss would be borne by the damaged property. For example, damage to the vessel's engine or damage to the cargo by fire, collisions of the vessels.

1.2 York – Antwerp Rules

1.2.1 The York-Antwerp Rules 1994

The York-Antwerp Rules consist of seven lettered rules from A to G and numbered rules from I to XXII. Lettered rules stipulate general principals and the numbered rules specify circumstances and subjects and provide guidance regarding allowances, for example provide specific definitions of general average losses, damages and expenditures. Further, the author offers explanations for some of the most important rules of York-Antwerp Rules 1994 and gives the examples in order to show the use of some of the rules in practice.

Rule A

The Rule A consists of definition of general average.

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

This definition of the rule points out that there should be four essential features:

1. The sacrifice or expenditure must be extraordinary
2. The act must be intentional or voluntary
3. There must be peril.
4. The action must be for the common safety

Rule C

This rule specifies that indirect losses for example demurrage, loss of market and losses incurred by delay cannot be allowed as general average. Also the other part of Rule C stipulates that there shall be no allowance in general average for damages, losses or expenses arising from damage to the environment or from the release of pollutant substances from the property involved in the common adventure. However, it is important to remember that there are numbered rules in which the above mentioned circumstances can be allowed as general average.

Rule D

There can be the situations during common maritime adventure when the event that gives rise to general average is caused by one of the party. In this case the rights to contribution shall not be effected. On the other hand, it also does not prejudice the possible remedies against or in favour of the party.

Rule E

The party claiming that general average arouse must provide all necessary documents and other evidence to average adjuster. The notice in writing to the average adjuster should be given within 12 month of the date of the termination of the common adventure. If any of the party fails to provide supporting documents the adjuster has the right to estimate the contributory value using the information available to himself.

Rule I - Jettison of Cargo

The cargo can be stowed only in the holds of the vessel. It would not be allowed on general average if the cargo on a deck should not have been stowed there, but is jettisoned. However, there can be circumstances when the cargo stowed on deck (for example, container ship) needs to be jettisoned in order to lighten the vessel, for example to refloat.

Rule II - Loss or Damage by Sacrifices for the Common Safety

Rule II makes it clear that the sacrificed property shall be made good in general average in circumstances when the sacrifice was made in order to save the common maritime adventure. It is also important to notice that damage or loss caused by water from the vessel's hatches in order to make sacrifice for the common safety shall be also made good as general average.

Example:

During the average the hatches were opened in order to jettison the part of the cargo. Due to this seawater or rainwater penetrated in the hold of the ship and damaged the other part of the cargo in the hold. In this situation the damaged cargo by seawater will be recognized in general average.

Rule III - Extinguishing Fire on Shipboard

Fire on board of the ship which caused damage or loss to the cargo and the vessel itself shall not be made good in general average. However, it is important to notice that the fire is a peril for common maritime adventure. Hence, all the damages caused by extinguishing the fire on board of a ship will be made good as general average since this action is made intentionally. However, damages caused by smoke or heat from the fire is not allowed as general average as are unintentionally made.

Rule VII - Damage to Machinery and Boilers

Rule VII specifies that the damage of vessels machinery and boilers shall be allowed in general average only in situation when ships engine is used to refloat the vessel. However, damages of engine cannot be allowed in general average if it is not used for the ordinary exploitation.

Rule VIII - Expenses Lightening a Ship when Ashore, and Consequent Damage

The Rule VIII specifies that when a vessel is aground and the cargo or fuel are intentionally discharged to lighten the vessel, all the costs of lightening the vessel and discharging of the cargo shall be allowed as general average.

Rule IX - Cargo, Ship's Materials and Stores Used for Fuel

Rule IX stipulates that in the circumstance of the common peril cargo, ships materials or stores can be used as a fuel for the common safety of the maritime adventure that shall be made good as general average. The estimated cost of such materials and stores shall be credited with the estimated cost of the fuel that would have been consumed during the intended maritime adventure.

Rule X - Expenses of Port of Refuge, etc.

There can be many different situations when the vessel needs to enter the port of refuge. The port of refuge can be also the port of loading or any other port on the expected route of the adventure.

A vessel enters the port of refuge on the following reasons:

- Damages or problems with ships engine
- Damages to a vessel due to collision or running aground
- Need to shift the cargo for the common safety
- Fire on board of a ship

The Rule X specifies the expenses which can be allowed as general average:

- The expenses of entering the port of refuge
- Correspondence expenses of leaving the port of refuge after the vessel has sailed
- The expenses of removing the vessel from port of refuge to another place of refuge in order to make repairs which cannot be carried out in the first place of refuge
- The cost of discharging cargo, fuel or stores only if such actions were necessary for the common safety and to enable the damage to be repaired
- The cost of storage, reloading and stowing of the cargo, fuel and stores discharged for the common safety
- When the vessel is condemned or cannot proceed on her original voyage, the storage expenses incurred up to the date of completion of discharge of the cargo and up to the date of the vessel's condemnation or abandonment of the voyage.

Rule XI - Wages and Maintenance of Crew and other expenses bearing up for and in a port of refuge, etc.

This Rule stipulates that the wages and maintenance of the crew, fuel and stores consumed during the stay at the port of refuge are treated as general average. The Rule specifies the circumstances when the maintenance of the crew and stores are allowable in general average.

The following expenses shall be allowable in general average in the following circumstances:

- The wages and maintenance of the crew are allowable when the vessel has entered the port of refuge in consequence of extraordinary circumstances that render the necessity of the common safety.
- These costs are also allowable if there is a need to enable damage to the vessel to be repaired that are necessary for the common safety.
- Fuel and stores consumed during the extra period of detention, except fuel and stores consumed during repairs not allowable in general average.
- Port charges incurred during the extra period of detention, except port charges incurred by the reason of repairs not allowable in general average

However, it is important to notice that the wages and maintenance of the crew, fuel and stores consumed and port charges shall not be allowable in general average if the damage to the vessel was discovered at a port of loading or call without any accident or extraordinary circumstances connected with such damage during the voyage.

Another part of Rule XI stipulates that the wages and maintenance of the crew and fuel and stores consumed and port charges shall be made good as general average when the vessel is condemned or does not proceed on original voyage. These expenses are allowable:

- only up to the date of the vessels condemnation or of the abandonment of the voyage
- up to the date of completion of discharge of the cargo if such discharging took place after the condemnation or abandonment.

Rule XI also defines the certain circumstances when the cost of measures undertaken to prevent or minimize damage to the environment are allowed as general average.

Rule XII - Damage to Cargo in Discharging, etc.

The Rule XII stipulates that damage caused to the cargo, fuel or stores shall be made good as general average only if the expenses of handling, discharging, reloading, restowing and storing of the cargo are allowable as general average. In any other circumstances these charges shall be allowable as particular average.

Rule XIV - Temporary Repairs

The temporary repairs are allowable as general average in the circumstances when these repairs were made at a port of refuge due to accidental damage to a vessel in order to complete the common adventure. However, no deductions “new for old” shall be made allowable as general average.

Rule XV - Loss of Freight

During the calculation of the freight the deduction shall be made from the amount of gross freight lost of the expenses that would have been incurred.

Rule XVI - Amount to be made good for Cargo Lost or Damaged by Sacrifice

The Rule XVI defines that the value of the damage, loss or sacrifice of the cargo should be based on the value of the cargo at the time of discharge which is based on commercial invoice rendered to the receiver of the cargo. If there is no such invoice the value shall be based on shipper’s value. In the rule it is also mentioned that the value of the cargo at the time of discharge should include the cost of insurance and the freight. In the circumstances when the damaged cargo is sold and the value of the damage was not agreed the value of such cargo would be the difference between the net proceeds and the net sound value.

Rule XVIII - Damage to Ship

The Rule stipulates that if the damage or loss to the vessel, machinery and gear was caused by the general average act the following expenses shall be allowable:

- when such damage or loss was repaired or replaced the actual reasonable cost of such repairs are allowable
- when such damage cannot be repaired or replaced the reasonable depreciation which does not exceed the estimated cost of repairs shall be allowable
- when there is the actual total loss of the vessel or the cost of the repairs exceed the value of the vessel when repaired the allowable value shall be the difference between the sound value of the vessel after deducting therefrom the estimated

cost of repairing damage and the value of the ship in the damaged state which may be measured by the net proceeds of sale.

Non-separation agreement

There can be situations where cargo is forwarded from the port of refuge to the original port of destination aboard substitute vessel or by other means of transport. The situation like this can take place when a vessel arrives to the port of refuge under general average to undergo some repairs to continue the common adventure safely. In some cases cargo should be discharged and stored leading to the costs of reloading. To avoid these expenses it can benefit the general average and all the parties if the cargo would be forwarded by other means of transport to the port of destination.

However, this would mean that the common maritime adventure has come to an end as the vessel and cargo are separated from each other. Also this would mean that expenses incurred after the separation of the vessel and cargo could not be allowable as general average. Therefore, to resolve this problem, it was agreed to incorporate Non-Separation Agreement (NSA) which can be also signed separately. When signing this agreement the cargo owner agrees that the cargo would be forwarded on another vessel and agrees to contribute in general average as if the cargo would not have been delivered to destination by other vessel.

1.2.2 York-Antwerp Rules 1994 in comparison to 2004

The general average is more than 3000 years old and is incorporated into the contracts of affreightment. As it was already mentioned York-Antwerp Rules are imposed by special clause in standard form contracts such as Bill of Lading and charter parties. The clause usually stipulates the place where general average should be adjusted. It might read as follows:

„General Average shall be adjusted, stated and settled according to York-Antwerp Rules 1994, or any subsequent modification thereof, in London unless another place is agreed in the Charter Party“

General Average clause in Time Charter reads as follows:

“General Average shall be adjusted and settled at a port or place in the option of the Carrier according to York-Antwerp Rules 1994 or any subsequent amendment thereto.”

The clause is usually imposed by the shipowner, who decides what terms and conditions should be applied in their Bill of Lading.

It is understood that the shipowner will impose the rules that are more favorable for himself. “The 2004 Rules were introduced after sustained pressure from marine property insurers and others and the present confusing situation creates contract uncertainty which is anathema to the shipping industry and its insurers” (Brown, 2012). Unfortunately, the new York-Antwerp Rules 2004 are not favorable for a shipowner.

In 2005 Baltic and International Maritime Council (BIMCO) issued and published BIMCO Special Circular according the revision of York-Antwerp Rules 2004. The circular gives the recommendations regarding YAR 2004. “BIMCO Charter Parties currently contain General Average Clauses that refer either to the York-Antwerp Rules 1974 or to the York Antwerp Rules 1994” (BIMCO Circular, 2005). However, from 1st January 2005 the new revised York-Antwerp Rules 2004 were available to use for adjustment of general average claims. “For the reasons set out below BIMCO is of the view that the new set of Rules is less favorable to shipowners than the 1994 or 1974 Rules” (BIMCO Circular 2005). Of course it is necessary to notice that it is only up to the parties to make the choice of which YAR should be used and applied, however BIMCO stipulate the reasons why the revised rules are not favorable for shipowners. It is also mentioned in the circular that the revised BIMCO Charter Parties will refer to YAR 1994 and the text “or any subsequent modification thereto” will be removed. “In particular, BIMCO strongly recommends that its members remove references to “any subsequent amendments thereto” (or similar wording) after “York-Antwerp Rules 1994” in any charter parties they conclude” (BIMCO Circular 2005). The above mentioned circular will be shown in Appendix 1.

These Rules contain the following changes and amendments:

- Amendment to the Rule VI – Salvage Remuneration

The amendment to the Rule VI is one of the most important. The new Rule stipulates that in the situation when one party, usually a shipowner, has paid all salvage expenses or any

proportion on behalf of other party, the salvage payments from the parties that have not paid these payments would be credited to the party that has paid for salvage. Usually, these salvage expenses are paid by shipowner in order to continue and complete the common adventure.

- Rule XI - Cargo, Ship's Materials and Stores Used for Fuel

This rule is less favorable for the shipowner. As per new Rule XI the wages and maintenance of the crew during the vessels stay at port of refuge are no longer allowable in general average. However, the fuel and stores shall be still made good as general average.

- Rule XIV - Temporary Repairs

The amendment of the Rule XIV stipulates that the savings to the shipowner achieved when the temporary repairs of accidental damage to a vessel are done at a port of refuge shall be counted for first, before any allowances are considered in general average.

- Rule XX – Provision of Funds

The first part of this rule was removed meaning that the 2% commission will not be allowable in general average under the Rule 2004.

- Rule XXI - Interest on Losses Made Good in General Average

The Rule specifies that the rate of interests added to general average allowances will be published each year by the Assembly of the Committee Maritime International. Under the Rule 1994 this rate was 7% per annum.

- Rule XXIII - Time Bar for Contributions to General Average

This is the new rule added to York–Antwerp Rules 2004. The rule stipulates that a general average claim will be time barred if such claim was not made within one year. Moreover, a claim shall not be made after six years after the date of the termination of the common adventure. Nevertheless, the parties can make an agreement and extend the time bar.

2. Process of settlement and adjustment of General Average

The process of settlement and adjustment of general average is rather complicated and time consuming. Nowadays, the volume of the cargo transported is growing and therefore, the number of cargo owners. For example, container vessels which can take thousands of shipments on board meaning that there could be also hundreds and thousands of cargo owners.

Undoubtedly, every general average case and claim shall be settled as a unique. However, the process of adjusting and calculating the general average claim could be relatively easy task in the circumstances when the general average expenditures are made, for example expenses at the port of refuge, salvage costs, expenses of discharging. The amount of such costs and expenditures are usually determined on the basis of the documents provided by the parties, for example invoices and confirmations of the payments. However, difficulties may occur in the cases, when the sacrifices were made, for example jettison of a cargo vessels grounding.

2.1 General Average Declaration

In the circumstances when the casualty occurs the shipowners responsibility is to make sure that all necessary steps are made when declaring the general average claim. More important in the case of casualty is to bring the common maritime adventure to an end meaning that the voyage should be brought to a conclusion.

Usually, the shipowner is the party claiming the general average. Under the York-Antwerp Rules the Rule E stipulates the following:

“The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average.”

First of all, it is the master's responsibility to inform a shipowner of the casualty and steps that were taken. Soon after the shipowner or the party claiming general average must notify all the parties which can be affected by the casualty and make an appointment of average adjuster who is an expert in the maritime law and marine insurance. Average adjuster has a duty to make necessary calculations of contributory value and prepare an average adjustment or statement.

Under Rule E it is also specified that the party claiming in general average shall give notice in writing to the average adjuster within 12 month of the termination of the voyage. Moreover, the party shall provide the average adjuster with evidence or particulars of value to support the notified claim.

In the circumstances when the sacrifices were made, for example jettison of cargo, damage to the cargo and the vessel when extinguishing the fire, damage to a vessel when refloating, it is necessary to appoint a surveyor. The surveyor shall be appointed by the shipowner who will be responsible for the payments made to the surveyor. However, in some cases the surveyor may be appointed by the average adjuster but this would be made on behalf of the shipowner. The surveyor in his report must determine what sort of damage occurred due to accidental casualty and which has occurred from general average act. In the cases when a surveyor is appointed at the port of refuge his duty is to supervise the process of reloading, storing and discharging of the cargo and also to determine damages to cargo caused by these acts.

The surveyor's role and duties are the following:

- To advise and control the parties when declaring the general average
- To advise the average adjuster whether the expenses and expenditures are reasonable and decent.
- To examine and analyze the damages to a vessel and cargo
- If needed the invoices of expenses shall be approved by the ship and cargo surveyor as being reasonable and fair.

It is not less important to the shipowner to notify the agent at the port of discharge. Agent's responsibility is to inform cargo owners or receivers of the delay of the delivery and to advise that the casualty occurred.

2.1.1 Documentation for Settlement of the General Average Claim

During and after the casualty has occurred the certain documents must be provided by a shipowner and by cargo receivers. These documents will be used and added by the average adjuster when making the average adjustment. The required documents are as follows:

Sea protest

Sea protest is a written statement issued by the vessel's captain in order to provide the evidence in the cases when during the maritime adventure the casualty occurred which can lead to a claim against the shipowner. The sea protest is usually issued in order to prove that damage to a vessel and cargo occurred due to such consequences of which the shipowner is not responsible, for example bad weather. This document contains a description of the circumstances and measures taken by the captain in order to save the property.

Average bond

Average Bond is stipulating that the cargo owner has an obligation to contribute in general average. The information provided in the average bond should be appropriate. For example, Lloyd's Average Bond contains description of the goods and quantity, port of shipment, port of discharge and the full name of the consignee. Most important is the signature of the consignee since by signing average bond the party agrees to provide particulars of the value of the cargo. In order to save time and costs the Average Bond Clause could be inserted in the contract of carriage. "The aim of the Average Bond Clause is to reduce, as far as possible, the time it takes to obtain such security and, thereby, speed up the delivery of the cargo following a GA event. This will be achieved by inserting in the contract of carriage the terms of an Average Bond, thus eliminating the need to obtain the Consignee's or the Shipper's signature to such a document after the event which gives rise to the GA claim" (BIMCO Average Bond Clause, 2007). BIMCO Special Circular regarding Average Bond Clause was firstly published in 2005 and afterwards revised in 2007. The Circular stipulates the reason why the Clause shall be inserted in the contract of carriage and also provides the wording of the Clause. The BIMCO Special Circular regarding Average Bond is added in the Appendix 2.

Average guarantee form

Average guarantee is provided by the underwriters of the cargo which is an alternative of the cash deposit, however is not an alternative of an average bond. The average guarantee and the average bond must be provided to the shipowner and signed before the cargo can be released by the shipowner. Average guarantee must contain bill of lading number, quantity of the cargo and its value. This guarantee must be signed by the underwriters of the cargo to avoid the collection of deposits.

Deposit

Deposit is provided to the shipowner in the case when the cargo has not been insured or if the shipowner does not accept the guarantee from the cargo insurer. Lloyd's deposit receipt should be used where the nature and date of the accident and the sum of the deposit must be written, also the description of the goods and provisional contributory value. In the cases of entering the port of refuge, fire on board of a vessel or grounding, the certain documents are required. It should be noticed by the owner that all the accounts and commercial invoice which are provided to average adjuster must specify the date they were paid.

The below mentioned documents are usually required in order to examine the general average case and make settlement under adjustment. However, there are documents which are required in certain cases. The Members of the Association of Average Adjusters, George Hughes and Richard Cornah, have specified such documents as the following.

Documents required in the cases when a ship has entered the port of refuge:

- Copy of the log book and other reports from the master of the vessel or from agent which specifies the dates and times of the vessel's arrival and departure from the port of refuge
- Surveyor's reports stipulating the details of the repairs made at the port of refuge and specifying if the repairs were permanent or temporary
- Accounts showing the costs of such surveys
- The details of discharging, reloading and storing of the cargo in order to proceed the repairs or for common safety and also the invoice covering expenses occurred.

- Portage bill which is a statement of wages and allowances of the members of the crew
 - The details of the consumed fuel and stores during the stay at the port of refuge
- In the cases of the fire on shipboard:
- Invoices for fire-fighting equipment used to extinguish fire, for example fire-fighting costs, extinguishers
 - The reports specifying the damage to the cargo and to the vessel caused by a fire and by the attempts to extinguish a fire
 - Invoices for repairs to the vessel

In the cases when the vessel grounded:

- The survey reports showing the damage caused by grounding and caused by refloating the vessel and the invoices for repairs of such damages
- The copy of the salvage contract in the cases when the refloating of the vessel was done with tugs
- The invoice for expenses occurred when lightening the vessel.

It is noteworthy to mention that all the documents and accounts provided to the average adjuster are needed in order to support the general average claim. The average adjuster will use the documents to calculate the contributory value and apportion the total general average.

2.2 The Process of Adjustment

The general average act is adjusted at the place stipulated in the contract of affreightment as the place of adjustment also it is mentioned the Bill of Lading. The Charter Party also provides that the adjustment shall be settled according to York-Antwerp Rules. General Average clause in Time Charter could read as follows:

“General Average shall be adjusted and settled at a port or place in the option of the Carrier according to York-Antwerp Rules 1994 or any subsequent amendment thereto.”

Or it may also specify the place of adjustment:

“General average to be adjusted according to the York-Antwerp Rules 1994 in London.”

The aim of the average adjuster is to calculate the contributory value and issue an average adjustment in order to advise the parties of the contribution they should make. It is important to remember that the proportional contribution must be made by all the parties involved in common maritime adventure.

In order to make such calculations it is necessary to determine the value of the property. According to Rule XVII of the York-Antwerp Rules 1994 the contribution value of the property is the value at the termination of the adventure. The Rule XVII states:

“The contribution to a general average shall be made upon the actual net values of the property at the termination of the adventure except that the value of cargo shall be 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.”

Since the contribution must be made usually by three parties – ship, cargo and freight, the author will explain below in what way the value of the property should be determined.

Ship value

The value of the vessel in damaged condition is determined at the termination of the common adventure. The shipowner shall provide the average adjuster with certificate from the vessel sale and purchase broker where the market value of the vessel is settled.

Cargo value

According to Rule XVI of the York-Antwerp Rules 1994 the cargo value is based on the value at the time of discharge. This value should be confirmed by the commercial invoice or ascertained from the shipped value and also include the insurance cost and freight if at the risk of the cargo interest. In other words, the invoice should be the CIF invoice – cost, insurance and freight. It is also noteworthy to mention that if the damaged cargo is sold shortly after the arrival to the place of destination the commercial invoice will be still required as if this cargo would have been delivered to the destination.

Freight value

The freight value will not contribute as a separate party in the cases when the freight is included in the value of the cargo. However, if the freight should be paid at the place of destination it is liable to contribute on its value since on the carrier's risk.

2.2.1 Calculations of Contributory Value

In order to calculate the contributory value and to apportion general average amount not only the average adjuster should know the value of the property but also the contributory dividend.

The contributory dividend shall be calculated by dividing all general average expenses by the total sum of contributory values of the vessel, the cargo and freight. Afterwards, the proportion that must be paid by the parties is calculated multiplying separately the value of the vessel, the cargo and freight by the contributory dividend.

It is noteworthy to understand the process of calculating, therefore the author is giving the example of calculations. The below example stipulates the refloating expenses that occurred when the vessel grounded and the refloating operation was needed. All possible expenses and losses that may occur when refloating a vessel are shown in Table 1.

Table 1. Expenses and losses

Expenses	Expenses value in US Dollar
Cost of refloating damage repairs	500 000
Jettisoned cargo	600 000
Discharge cargo	90 000
Owner's superintendent	1500
Dry-docks dues	40 000
Storage of cargo	30 000
Reloading cargo	90 000
Salvage	700 000
Crews wages and maintenance	50 000
Total	1 201 500

Contributory dividend will be calculated by dividing the total value of expenses and total contributory value. In this example the contributory dividend will be 0,128 % meaning that the vessel owner pays in proportion \$704 000, cargo pays \$486 400 and freight \$12 800. The contributory value of the vessel, cargo and freight are shown in Table 2 below.

Table 2. Contributory value

Contributory value	In US Dollar
Vessel value	5 500 000
Cargo value	3 800 000
Freight	100 000
Total	9 400 000

After all the necessary calculations and apportionment are made, average adjuster will sent the copies of the average adjustment to all the parties. In some situations average adjuster will also supervise the collection of general average contributions from the parties after average statement is issued. This simple example clearly shows the calculations that are made by average adjuster. However, in practice such calculations are much more complicated.

Therefore, in the next part of this work the author will show and explain on the case that occurred in 1994 in what way the contributory values are calculated and how the adjustment is written.

Small general averages

There can be the circumstances when general average expenditures and sacrifices are insignificant or when there are a few cargo receivers meaning that the average adjustment would take time while the amount of contribution is small. In these cases the shipowner can resolve the issue in several ways. One of them and the main way to resolve the issue like this is to insert in the shipowner's Hull and Machinery Policy a small general average clause, or general average absorption clause, that allows Hull and Machinery underwriters to avoid the costs of adjusting general average claims and time if the expenses were relatively small.

“Insurance underwriters and average adjusters have acknowledged that the development of an acceptable standard absorption clause would help promote a broad move away from declaring general average for small and uneconomic claims in all sectors of the industry.” (BIMCO, 2002)

This clause states that the Hull and Machinery Insurers is to pay general average expenses up to the agreed amount. The Clause can be used and inserted in policies by bulk carriers, tankers and also cruise vessels. The general average absorption clause is widely used by container ship owners in order to resolve general average cases with several contributing parties.

The clause reads as following:

"General average expenditure and/or sacrifice up to (US\$100,000) to be paid in full at Owner's option according to York-Antwerp Rules 1994 excluding Rules XX and XXI without recourse to cargo and/or other contributors. Adjusters' charges not deemed to be part of the

(US\$100,000) referred to above. Claims under this clause are subject to the policy deductible". (Taylor, 2003)

BIMCO Standard General Average Absorption Clause can be also used in the policies. Both parties, the shipowner and insurer, are to decide the amount which would be paid in full by the insurer. This limit is determined by the size and type of a vessel. Therefore, for example the container vessel would have higher limit than bulk carrier or tanker since the number of Bill of Lading is higher and collection of security would take more time.

The use of General Average Absorption Clause has reduces the number of general average claims. It has also benefited to container shipowners since the long process of collecting the securities and contributions from the cargo owners is avoided.

3. Case Study

It is noteworthy to understand the whole process of calculating the contributory value of a vessel and a cargo. The theory part of the thesis gives the overall picture the general average, however it is necessary to see how the above information is used in practice. Therefore, the author will provide patterns of general average cases that clearly show the information provided to the average adjuster and the process of calculation.

3.1 Vessel “Maria” Case Study

In the case study the author will explain the casualty which occurred in 1994 and provide the information that was used in order to make an average adjustment for this case. Since the case is provided by the insurance company some of the details, including vessel’s name, will be replaced due to confidentiality. The average adjuster for this particular case was the adjuster from the company “Richard Hogg Limited” in London.

The adjustment of this case provides the summary of material facts; adjusters’ explanatory notes; the copy of the documents provided to the average adjuster; apportionment of the general average; application of the claim to the policies of insurance on the vessel; balance explanatory of the cash position under adjustment.

The documents provided to the adjuster were the following:

- Extract form Log-Book
- Master’s, chief engineer’s and senior navigator’s reports
- Statements of facts form the agent
- Surveyor’s report
- Accounts from the surveyor
- Invoice for divers inspection costs
- Ship valuation certificate from ship sale and purchase broker

The facts of the casualty

The vessel “Maria” is a single screw motor general cargo vessel of 6 876 gross register tonnage which was built in 1975. It was transporting used secondary rail tracks from Wismar, Germany via Tallinn, Estonia to Karachi, Pakistan.

The casualty occurred when the vessel was leaving the port of Tallinn. The vessel grounded and sustained damage to her keel, port and starboard side bottom plating. In order to proceed repairs the vessel returned to Tallinn where she was drydocked. On board the vessel “Maria” the cargo of 4 995, 440 mt of used secondary rail tracks was loaded at Wismar, Germany in October 1994. The vessel proceeded to the port of Tallinn, Estonia in order to carry out repairs to her cargo equipment before sailing to Karachi, Pakistan the port of destination. After all necessary repair work of the cargo equipment was carried out the vessel proceeded outwards with assistance of a pilot and two tugs. The same day on 23rd of October it was found that the vessel had no headway and had grounded. In order to refloat the vessel two tugs were pulling her at their full speed, however she could not be moved. The vessel was able to move and refloat only with the assistance of four tugs and by pumping the ballast water out from the tanks in order to reduce the draft.

The vessel proceeded back to the port of Tallinn where she was pending examination. After underwater inspection by the divers it revealed that the bottom plating was damaged. It was decided to drydock the vessel in order to proceed further examination and repairs. Due to some limitations of the drydock it was needed to discharge 2 700 m.t. of cargo.

The survey in drydock was attended by Classification Society Surveyor who was acting on behalf of the vessel’s underwriters which has shown that there was damage to keel, port and starboard side bottom plating.

After the repair was completed on 12th of November the vessel was undocked and was awaiting to berth for reloading of the discharged cargo. On 19th of November the cargo was reloaded and the vessel sailed on 20th of November to Karachi.

Adjuster's explanatory notes

After the summary of material facts the adjuster gives some explanatory notes. Firstly, that the refloating operation was necessary for the common safety and the repairs to the damage bottom were needed for safe prosecution of the voyage. The adjuster explains that the general average expenses include refloating operations, the shifting, forced discharge, storage and reloading of the cargo, and the detention expenses. Secondly, it is mentioned that the vessel "Maria" was operating under Voyage Charter Party which provided that the general average should be adjusted in the terms of the York-Antwerp Rules 1974 and stipulated London as the place of adjustment. Moreover, the adjuster states that Lloyd's Average Bond and Average Guarantee were received. The important note was made regarding the freight which is saying that freight does not form a separate contributory interest, however is included in the value of the cargo.

Calculations of contributory value and apportionment

The average adjustment contains the table with all the expenses and charges which occurred in order to make the repairs to the vessel. Under each charge it is specified the number of invoice and the value of the charge. "Table 3" is an exact example of how the charges are written in the average adjustment.

Table 3. Pilotage charges

U.S. \$ 1,179.00	<p>PILOTAGE CHARGES. (4 Invoices.)</p> <p>23rd October 1994. Pilotage from berth to roads of Tallinn (1 mile). No charge (grounded).</p> <p>2nd November 1994. Pilotage from N.15 to Dock No.3</p> <p>18th November 1994. Pilotage from roads of Tallinn to Berth No. 7 (2250/0020 hrs)</p> <p>20th November 1994. Pilotage from Berth No. 7 to roads of Tallinn. (1800/1920 hrs).</p>	<p>U.S. \$</p> <p>196.65</p> <p>393.30</p> <p>589.95</p> <p>U.S. \$ 1,179.90</p>
---------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------

Apportionment of the general average is calculated on the separate page. In the case of the vessel “Maria” the total value of the expenses is \$136 660.92. The vessel’s contribution value is \$1 442 017 and the cargo value is \$1 004 777. In order to make apportionment it is necessary to calculate the contributory dividend which in this case is \$5,585%. This percentage is also written in the adjustment as “The General Average equals U.S\$5,585% on the Contributory Values.” The following is the extract from the adjustment for the vessel “Maria”. “Table 4” stipulates the apportionment of general average.

Table 4. Apportionment of General Average for vessel “Maria”

<u>SHIP:</u>	U.S.\$	proportion	U.S.\$
Valued to contribute in damaged condition based on the advice of London Ship Yard Valuers including U.S. \$4,976 made good in General Average.	1,442,017		80,541.05
<u>CARGO:</u>	1,004,777		56,119.87
4,995.44 m.t. Steel rail track. Calculated CIF value.			
<u>FREIGHT AT RISK.</u>	Nil		-
	U.S.\$		U.S.\$
	2,446,794	proportion	136,660.92
(The General Average equals <u>U.S.\$5.585%</u> on the Contributory Values.)			

Afterwards, the average adjuster would prepare the application of the claim to the policies on the vessel which specifies the amount paid by the underwriters of the vessel.

The last part of average statement would be “balance explanatory of the cash position under adjustment” where adjuster states the amount of credit required by the shipowner for disbursements and allowances and fees required by adjuster.

3.2 Vessel “Viljany” Case Study

However, the process of adjusting and calculating the general average claim is not changing through years, the author feels that the year 1970 general average case should be shown and explained. Also there still are some differences in general average statement which will be mentioned.

The average adjustment contains average adjuster’s resolution on the nature of average, rates of exchange, contributory value of the property taking part in making good general average losses, general average expenditures and losses to be made good by

contributing interests, apportionment of General Average losses between ship, cargo and freight, general account, settlement between the parties.

The documents provided to the average adjuster are the following:

- Assessment of market value of the vessel
- Average bond
- Sea protest
- Copy of the Log book pages

The facts of the casualty

The m.v. “Viljany” proceeded from Novorossiysk on 21st of April 1970 with 106 m/tons of general cargo to Dakar and 3450 m/tons of cement to Lagos. The casualty happened near Sicilia Island when the vessel started rapidly vibrate with her whole hull. It was presumed that the heavy vibration was caused by either a blade being damaged or totally lost. In order to save the common maritime adventure it was decided to put the vessel in a port of refuge for repairs which was Gibraltar. After the completion of the repairs the vessel sailed on 2nd of May 1970 from Gibraltar to port of destination – Dakar and Lagos. On 7th of May she arrived to Dakar and Lagos without any adventure.

Adjuster’s comments

After the explanation of the casualty the average adjuster states that as per clause 25 of the Bills of Lading the general average shall be settled in accordance with York-Antwerp Rules 1950. Moreover, it was mentioned that according to Rule X and Rule of Interpretation this case can be defined as general average. In general average statement average adjuster specified the rates of exchange since the soviet roubles are used in the adjustment.

Calculations of contributory value and apportionment

The contributory value of the vessel was stated in accordance with assessment of expert engineer and cargo value is stated according to average bond. The freight and

insurance is included in cargo value. Therefore, the freight does not contribute separately. The losses and expenditures are given in “Table 5” as per below.

Table 5. Assessment of expenditures and losses

Nos	Total amount roubles	Denomination of expenditures	Amount to be made good
1	578,30	Port dues and charges at Gibraltar (made good under Rule Xa of York-Antwerp Rules,1950)	578,30
2	1116,36	Crew’s wages from 23/4/70 till 2/5/70 (Rule XI a,b)	1116,36

The “Table 5” contains the nature of expenditure, total amount in roubles and amount which shall be made good.

The contributory percentage is mentioned in the adjustment and is calculated in the same way as in the previous case study – the total value of expenses is divided by total contributory value. The below “Table 6” is showing the apportionment and also the calculation of contributory percentage.

Table 6. Apportionment of General Average for vessel “Viljany”

Seeing General Average contributory percentage is equal to –			
$\frac{4059,17}{837245,89} = 0,4848241\%$			
The ship on value in roubles	722259,78	Pays roubles	3501,69
The cargo on value in roubles of cement	90942,11		440,91
The cargo on value in roubles of general merchandise	24044,00		116,57
	837245,89		4059,17

The apportionment of general average in this case not only stipulates the proportion but also the calculation of the contributory percentage,

The last part of the average adjustment will be the summary from the average adjuster stating the date of completion of adjustment and the rights to dispute.

3.3 Conclusion

All the calculations that are made in average adjustment are not complicated, however the most important part of the adjustment is to examine all provided documents and take in consideration the clauses written in the contract of carriage and Bill of Lading. The extracts from the average adjustment show that the information should be written accessibly and clearly.

Having compared two general average cases the author has found a few differences in the average adjustments. Firstly, in the 1970 case the adjuster separately states and calculates the contributory percentage while in the 1994 case the percentage was only mentioned in apportionment. Secondly, the losses and expenses are written more precisely in 1994 case.

Noteworthy to mention that it is 24 years difference between these two cases and some parts of the adjustment could be changed. However, the process of drawing up the adjustment and making calculations does not change.

4. Arguments to retain and substantially amend the general average

In this chapter of the thesis the author stipulates the conclusion which was made after the examination of the theory of general average. The aim was to investigate the reasons why the York-Antwerp Rules 2004 are less favorable than 1994 Rules and make a comparison of these rules.

In order to make a conclusion it was necessary to study BIMCO Special Circular regarding the revision of the York – Antwerp Rules which was firstly published in 2005 and then revised in 2007.

“Ever since the 1994 revision of the York-Antwerp Rules (YAR), cargo underwriters, through the International Union of Marine Insurance (IUMI), have been pressing their case for further reductions in the scope of allowable recoveries. At a meeting in Vancouver in 2004 a new set of York-Antwerp Rules were published, mainly with the support of insurance interests.” (BIMCO, 2007)

Matthew Marshall, who is Technical Director, Institute of London Underwriters, has analyzed over 1700 general average cases and adjustments in 1990s and published the report which stipulates the following:

- The annual cost of General Average claims to insurers was approximately US\$300 million. 10% (US\$30m.) was made up of adjusters’ fees and a further 12% was comprised of interest and commission;
- Almost two-thirds of adjustments were published in the first two years after a casualty but these accounted for only one third of the money apportioned in General Average. Even after seven years only 95% of General Average adjustments had been published; and

- 80% of General Average cases were acknowledged to have been caused or were likely to have been caused by the fault of the shipowner or his crew. Nevertheless 60–65% of the total cost of General Average claims is charged to innocent cargo interests

The author stipulates below the arguments to retain and to abolish or amend the general average.

Arguments to abolish or substantially amend the general average

Nowadays, the amount of container vessels has increased. Most of them have the capacity of more than 8000 TEU and some can load over 18 000 containers. Therefore, when such vessel declares general average the average adjuster would require the documents (Average Bond, Guarantee, Bill of Lading, Deposit) from each cargo party meaning that there could be hundreds of cargo owners. It is not only time consuming but also could lead to high general average costs. In this case numerous insurance settlements would occur. The above mentioned can be explained by providing the following general average case which occurred in 2006.

The 5,551 TEU vessel “Hyundai Fortune” proceeded from Asia to Europe on 21st of March 2006 with 3173 containers on board. In the Gulf of Aden the vessel suffered the explosion and fire occurred in aft on deck. The fire on board the Hyundai Fortune have started in a container stowed close to the ship's engine room. Numerous containers were thrown overboard. The vessel was severely damaged by a fire which also caused cargo loss and damage. After the fire was extinguished the vessel was towed to Salalah, Oman. The vessel was insured for \$70 000 000 by Hyundai Marine & Fire Insurance of South Korea. Underwriters received enormous cargo claims as the vessel was sailing from the Far East to Europe and was carrying high value cargo. In order to draw up the average adjustment the adjuster has received 1808 Bills of Lading from 4436 cargo interests. The value of the cargo on board was \$145 million.

Hyundai Fortune case shows that when such casualty occurs the settlement of general average can take years.

Another disadvantage is that the shipowner would not discharge the cargo until the guarantees are received by the average adjuster. This means that if there are hundreds cargo

parties it will take time to them to provide the documents to the adjuster and therefore the expenses would occur at the discharge port. However, BIMCO published the General Average Absorption Clause which can be inserted in the vessel's Hull and Machinery policies. The clause allows to save time and avoid the costs of adjusting the general average.

Also the majority of the casualties occurred due to negligence in maintenance of the vessel or machinery which lead to damage of engine meaning that the shipowner did not provide the seaworthy vessel for a maritime adventure. In the situation when the machinery is damaged as a result of lack of maintenance, the expenses of refloating or staying at the port of refuge can occur.

Arguments to retain general average

The main argument to retain the general average is that the even though the vessels became more safe and modern the risks remain during the voyages. These risks are not only for the shipowners, but also for cargo.

Also the shipowners are claiming that sacrifice of a cargo is made in order to save the common adventure and the York-Antwerp Rules are the protection of this action.

Moreover, during the casualty the Master of a vessel can concentrate only on the safety of a vessel and make necessary decisions in order to save the voyage.

Another argument is that if the general average is abolished another way of resolving such issues should exist. Otherwise, this will lead to uncertainty. There is an opinion that in this case the party suffered the loss or expenses can seek recovery from the party at fault under the contract of affreightment. However, this would also mean that such recovery is time consuming and some expenses may occur.

In conclusion of the above the general average cases should be retained, however both the shipowners and cargo owners arguments should be taken into account when making amendments to York-Antwerp Rules. Unfortunately, York-Antwerp Rules 2004 were developed and adopted by the request of the International Union of Marine Insurance (IUMI). This was the adoption of the new Rules without taking into account the interests of shipowners and other parties, for example Baltic and International Maritime Council (BIMCO). However, the working group was formed in 2012 by CMI in order to make

revision of the York-Antwerp Rules in 2016. This group involves not only CMI delegates but also representatives of shipowners, underwriters and other parties.

SUMMARY

The main purpose of this thesis is to provide enough information regarding the general average and provide the examples of the general average cases which should help to understand the process of calculating the values and apportionment of general average.

The noteworthy aim of this thesis is to specify most important amendments that were made to York-Antwerp Rules in 2004. These revised rules are less favorable to shipowners compared to 1994 and 1974 rules, therefore they are rarely used and implemented in Bill of Lading and Charter Party. In order to make the conclusion author has also examined BIMCO Special Circulars.

The author specifies the documents required for the adjustment and also explains the calculation of the values and apportionment. Moreover, the author brings simple example of how the values and contributory dividend should be calculated. Since it is usually not enough to read only the theory, the author brings the examples of the general average cases. The author explains in details the casualty and provides the calculations that were made by the average adjuster. Also the noteworthy would be the extracts of the calculations from the average adjustment of the 1970 and 1994 cases.

The author brings the arguments showing why the general average should be retained in practice and why the significant amendments should be made in future. The general average should be abolished or amended since the process of settlement of general average cases is time-consuming and expensive. Since modern vessels, for example container ships, have the capacity of more than 17 000 containers it can take years for average adjuster to collect all necessary documents and make calculations. However, if the general average is abolished the parties suffered the loss will seek the recovery from the party at fault which will also lead to time-consuming settlements and high costs. Noteworthy, is the fact that the even though the vessels are nowadays more safe the risks are still remain. The cases studied by the author can also show that the losses and expenses may occur in different situations. However,

most of the expenses made by the shipowner are made in order to save common maritime adventure.

The amendments to York-Antwerp Rules 1994 were made mainly because the cargo underwriters would like to abolish or amend the general average. Therefore, in order to amend the system which would be favorable not only to the cargo owners but also to the shipowners the arguments of both parties should be taken into the account. Noteworthy to mention that the working group was formed in 2012 in order to make amendments to York-Antwerp Rules in 2016 which involves not only CMI delegates but also representatives of shipowners, underwriters and other parties.

RESÜMEE

ÜLDAVARII JUHTUMITE LAHENDUSTE PRAKTIKA JA ANALÜÜS

Margarita Kirpitsenko

Antud lõputöö eesmärk on käsitleda muudetud York-Antverpeni reegleid aastal 2004 ning analüüsida muudatuste iseloomu. Eesmärgiks on ka argumenteerida miks reegleid peavad olema muudetud või isegi ära võtud ja miks on vaja tulevikus neid kasutada ning lisada üldavarii klauselid sisestada konossementidess ja tšarterisse.

Käesolevas töös autor kirjeldab üldavarii juhtumeid erinevatel aegadel ja teeb ülevaate juhtumite praktilistest lahendustest ning näitab kuidas jagatakse üldavarii kulud. Näideteks on toodud kaks erinevat üldavarii juhtumid ning nende dispaššid. Autor toob välja nende juhtumite võrdluse ning teeb järeldusi, milles seisnevad aasta 1994 ja 1970 dispašši vormistamise erinevused. Ka töös on toodud aasta 2008 kontainer laeva üldavarii juhtum, kus eriseisus on see, et tegemine oli tuhandete kauba omanikutega ning dispašöör vormistas tuhandeid dokumente. Selle juhtumi näitel oli näidetud, et „Standard General Average Absorption Clause“ on vajalik et vähendada aja ja finants kulud üldavarii juhtumite vormistamisel.

Et paremini aru saada kontributsiooni väärtuse arvutuste protsessi ning üldavarii kulude jagamise kalkulatsioon autor sisestas mõlema juhtumi lahendusprotsessi tabelite näol.

On oluline täpsustada miks York-Antverpeni reeglid muudatused mis oli tehtud aastal 2004 on laevaomanikutele mitte kõige kasulikumad, isegi ebasoodsad.

Kahjuks, need muudatused olid tehtud International Union of Marine Insurance (IUMI) palvel ning vastu võetud arvestamata laevaomaniku ning teiste osapoolete huvidele, näiteks Baltic and International Maritime Council (BIMCO).

Töös teeb autor teeb järeldusi, mis aitavad mõista, et YAR on ka edaspidi tähtis instrument mereveonduses esinevate suurte riskide maandamisel. Üldavarii juhtumite lahendamine on tähtis aspekt laevaomanike seisukohast lähtudes ka tulevikus ning üldavarii klausel peab eksisteerima nii konossementis kui ka tšarteris. Selle poolt töötab eriti intensiivselt BIMCO, väljastades vastavate klauslitega üldtunnustatud mereveodokumente.

BIBLIOGRAPHY

Brodie P. (2013) *Dictionary of Shipping Terms*. Sixth edition. Oxon: Informa Law from Routledge

Cargo Claims and Recoveries. s.a. Lloyd's Agency. s.l.

Eidast A. (2009) *Inglise-Eesti Meretranspordi Kommertsterminite Leksikon*. Tallinn

Eidast A. (2007) *Meretranspordi Kommertsekspluatatsioon*. Tallinn

Ефимов С.Л. (2001) *Морское страхование. Теория и практика*. Москва: РосКонсулт

Hughes, G.S., Cornah R.R. (1989) *A Guide to General Average*. s.l.

General Average in 21st Century: What are the Arguments (2013) / The Law Firm of Maloof Browne & Eagan LLC. s.l.

Marshall M. (1996) *General Average- Statistics Update*. Oslo: IUMI

Principles of General Average. Chapter 15. s.a. Lloyd's List Intelligence. s.l.

Standard General Average Absorption Clause.(2002) BIMCO Special Circular. s.l.

Sullivan E. (1980) *The Marine Encyclopaedic Dictionary*. Malta: Gulf Publishing Ltd

Tetley W. s.a. *General Average Now and in the Future*. s.l.

The place of General Average in Marine Insurance Today (1994) / UNCTAD Secretariat. s.l.

Wilson J., Barstow C. s.a. *Lecture №3 General Average*. s.l.

BIMCO Average Bong Clause. (2005) BIMCO Special Circular.

https://www.bimco.org/~media/Chartering/Special_Circulars/SC2005_06_15_06.ashx
(05.04.2015)

BIMCO Average Bond Clause (2007) BIMCO Special Circular.

https://www.bimco.org/en/Chartering/Clauses_and_Documents/Clauses/Average%20Bond%20Clause%202007.aspx (05.04.2015)

BIMCO Special Circular №2. General average: revision of York-Antwerp rules. BIMCO Special Circular

https://www.bimco.org/~media/Chartering/Special_Circulars/SC2005_02.ashx (05.04.2015)

BIMCO Special Circular №1. General average: revision of York-Antwerp rules. BIMCO Special Circular

https://www.bimco.org/~media/Chartering/Special_Circulars/SC2007_01.ashx (05.04.2015)

Appendixes

Appendix 1. BIMCO Special Circular



BIMCO

SPECIAL CIRCULAR

NO. 1 – July 2007

161 Bøgsøvej
DK - 2880 Bøgsø
Tel: +45 4436 6800
Fax: +45 4436 6868
Email: mailbox@bimco.org
www.bimco.org

GENERAL AVERAGE: REVISION OF YORK-ANTWERP RULES

This Special Circular, originally published 24 February 2005, is being reissued with an important new recommendation.

BIMCO Charter Parties currently contain General Average Clauses that refer either to the York-Antwerp Rules 1974 or to the York Antwerp Rules 1994. While general average is still adjusted, in a number of cases, in accordance with the 1974 Rules, BIMCO's recommendation in respect of new and revised charter parties is that general average should be adjusted in accordance with the 1994 Rules.

On the 31st of December 2004 a new set of York-Antwerp Rules were published. The revised provisions are known as the York-Antwerp Rules 2004 and became available for the adjustment of claims in general average from 1 January 2005. For the reasons set out below BIMCO is of the view that the new set of Rules is less favourable to shipowners than the 1994 or 1974 Rules. While BIMCO acknowledges that the choice of which set of York-Antwerp Rules should be applied to the adjustment of general average is a matter for the parties to agree, we recommend that Members give careful consideration to the following comments before agreeing to be bound by the most recent edition of the Rules.

BIMCO's Documentary Committee agreed at the November 2004 meeting that all new and revised BIMCO Charter Parties will be published with a reference to adjustment in accordance with the York-Antwerp Rules 1994.

Following a request by the authors of the YAR 2004 for BIMCO to reconsider its position, the Documentary Committee has reviewed the rules and concluded that its position remains unchanged.

Ever since the 1994 revision of the York-Antwerp Rules (YAR), cargo underwriters, through the International Union of Marine Insurance (IUMI), have been pressing their case for further reductions in the scope of allowable recoveries. A radical change restricting general average allowances to common safety and thereby excluding recovery in relation to common benefit was promoted. BIMCO has opposed the suggested changes in principle and, also, because of insufficient practical experience of the latest rules which, in any event, have not been universally accepted with many contracts of affreightment still requiring settlement under the YAR 1974. At a meeting in Vancouver in 2004 a new set of York-Antwerp Rules were published, mainly with the support of insurance interests.

The most potentially contentious change to the Rules is to Rule VI (Salvage Remuneration). Under English law, salvage is not recoverable in general average although it is in civil law countries. In order to ensure

uniformity of law, a rule was introduced in 1974 (and updated in 1994 to reflect provisions in the Salvage Convention) expressly providing for recovery in cases of salvage. Cargo underwriters supported removing the allowance arguing that salvage adjustments can result in an unnecessary, and expensive, duplication of apportionment and should be excluded. The case in favour of retention, put forward by the shipping industry and some delegations, is a fairer settlement, the avoidance of serious injustices if salvage is allowed to lie where it falls, the need to refine tentative assessments based on rough figures and addressing the balance where one party achieves a favourable settlement with salvors on behalf of other parties. One side effect of this amendment to the Rule is that the change reverses the position for civil law countries where, when applying the YAR, salvage will now no longer be considered a general average expense.

The following is a summary of the other changes to the YAR 1994:

- Rule XI Wages and Maintenance of Crew and Other Expenses Putting into a Port of Refuge etc: the costs of wages and maintenance of the Master, officers and crew will no longer be allowed during the period a vessel is in a port or place of refuge undergoing repairs recoverable in general average. Fuel and stores consumed will continue to be allowable expenses;
- Rule XIV(b) Temporary Repairs: after considerable discussion, it was agreed to add a so-called "Bailey Clause" to restrict the advantage to the owner (in practice his hull insurer) where temporary repairs make it possible to effect permanent repairs at a place where such repairs can be made more cheaply than at or near the place of refuge;
- Rule XXIII: despite reservations, and to the extent permitted by domestic law, a time-bar provision was inserted extinguishing rights to claim general average contributions one year after an adjustment has been issued or six years after the termination of the "common maritime adventure";

However, BIMCO remains unconvinced about the need for change and the changes produced will no doubt result to some extent in a transfer of costs between insurers. There is also likely to be uncertainty, and resulting questions of interpretation, about the new provisions. Many operators today use absorption clauses, particularly in trades involving numerous cargo receivers and/or for smaller claims. This is a helpful means of keeping down administrative costs and has seen a reduction in the number of general average declarations.

The 2004 York-Antwerp Rules are not mandatory and will only apply on a contractual basis. Owners continuing to incorporate general average arrangements into their contracts of affreightment may wish to review the new provisions, probably guided by whether existing more comprehensive cover can be maintained at no additional cost, before taking a decision as to whether or not to apply the new rules or stay with the YAR 1994, or even YAR 1974.

BIMCO has decided all new and revised BIMCO charter parties will refer only to "York-Antwerp Rules 1994". The previously used additional text to the effect of "or any subsequent modification thereto" will no longer be used. Although BIMCO considers the YAR 2004 to be a new set of Rules and not in anyway a modification or amendment of the 1994 Rules (a view shared by the authors of the new Rules), it is felt that the clarification of the text will help avoid any possible misinterpretation of BIMCO's position.

BIMCO recommends that, in view of the above, all members give careful consideration to the wording referring to the York-Antwerp Rules contained in their charter parties and bills of lading and satisfy themselves that the wording reflects the set of Rules that they wish to be bound by. **In particular, BIMCO strongly recommends that its members remove references to "any subsequent amendments thereto" (or similar wording) after "York-Antwerp Rules 1994" in any charter parties they conclude.**

Issued by the Documentary Department of BIMCO, e-mail: documentary@bimco.org.

Appendix 2. BIMCO Average Bond Clause



BIMCO

SPECIAL CIRCULAR

No. 3 – October 2007

161 Bagsvaerdvej
DK - 2880 Bagsvaerd
Tel: +45 4436 6800
Fax: +45 4436 6868
Email: mailbox@bimco.org
www.bimco.org

BIMCO Average Bond Clause 2007

Introduction

In cases of General Average ("GA"), considerable quantities of time and cost can often be incurred in obtaining GA security from individual cargo interests and their insurers. The aim of the Average Bond Clause is to reduce, as far as possible, the time it takes to obtain such security and, thereby, speed up the delivery of the cargo following a GA event. This will be achieved by inserting in the contract of carriage the terms of an Average Bond, thus eliminating the need to obtain the Consignee's or the Shipper's signature to such a document after the event which gives rise to the GA claim.

It is anticipated that the incorporation of the Average Bond Clause will:

- a) reduce delay in the delivery of cargo; and
- b) reduce the costs of the average adjustment.

The BIMCO Average Bond Clause was first published in June 2005. In 2007 the Clause was revised following the conclusions of a study into the effect of the Clause in practice, performed by a Working Group from the Average Adjusters' Association (AAA) in London.

Among the AAA's proposals was that the obligation found in sub-clause (c)(i) of the original Clause to provide the identity and contact details of the insurer along with policy details should be deleted. The AAA believed that it would be difficult in practice for the receiver to supply the required documents at the same time he presents the bill of lading. In addition it could also create difficulties in respect of the cargo underwriters providing a guarantee after the cargo has been released against the bill of lading.

To resolve this concern a new wording was incorporated into the preamble of the Clause, requiring the presenter of the bill of lading to provide satisfactory security to cover general average, salvage and special charges in addition to the payment of any freight. The report of the study was submitted to the Documentary Committee in May 2007 for their consideration, and the Committee fully endorsed the amendments.

The Secretariat is grateful to the AAA for their careful study of the Average Bond Clause and for the practical comments submitted.

Details of the Clause

Sub-Clause (a) identifies the party presenting the bill of lading as the party liable to pay, among others, the General Average contribution.

Sub-Clause (b) incorporates a form of non-separation wording (identical to that forming part of the York Antwerp Rules 1994). This is expected to result, in appropriate cases, in considerable savings of time in the obtaining of security.

Sub-Clause (c)(i) provides that the party presenting the bill of lading must promptly furnish details of the value of the cargo, to expedite any GA proceedings.

Sub-Clause (c)(ii) places the burden of providing details of any loss or damage to cargo, giving rise to either a claim in GA or a reduction in the contributory value of the cargo, on the party presenting the bill of lading or his assigns.

Sub-Clause (d) obliges the presenter of the bill of lading or his assigns to make a payment on account of their contribution when this is certified by the average adjuster, but only when there is no defence to such a claim under the contract of carriage, or otherwise.

The final paragraph of the Clause provides that the time limit for claiming a contribution under it (except where the adjustment is prepared under the York Antwerp Rules 2004, which incorporate their own limitation period) is to be the same as that presently obtained under English law i.e., six years from the date of the average adjustment.

The Clause can be downloaded free of charge from the BIMCO website, www.bimco.org

Contact person:

Grant Hunter
Chief Officer Legal and Contractual Affairs
BIMCO
E-mail: documentary@bimco.org

BIMCO Average Bond Clause 2007

On presentation of this bill of lading and

- (i) payment of any freight due; and
- (ii) provision of a satisfactory security in respect of General Average, Salvage and Special Charges,

it is agreed that, in consideration of the delivery of the cargo described on the face of this bill of lading ("the cargo") to the presenter of the bill of lading, or to order, without providing an average bond, the party or parties which present(s) this bill of lading, or their assigns, shall:

- a) pay the proper proportion of any salvage and/or general average and/or special charges which may be ascertained to be properly due from the cargo or the shippers or owners thereof,
- b) where appropriate, contribute to salvage and/or general average and/or special charges in accordance with an adjustment prepared pursuant to the non-separation wording contained in Rules G and XVII of the York-Antwerp Rules 1994,
- c)
 - (i) at the time of presentation of the bill of lading, furnish a copy of the commercial cargo invoice rendered to the receiver, and;
 - (ii) as soon as is reasonably practicable following delivery of the cargo, notify the Carrier, their Agent or appointed average adjusters of the nature and value of any damage to or loss of the cargo.
- d) following delivery of the cargo make a payment on account of such sum as is certified by the average adjusters to be properly due from the cargo and is payable in respect of such cargo by the shippers or owners thereof.

Except when the adjustment is made in accordance with the York-Antwerp Rules 2004, rights to claim under this Clause shall be extinguished, unless an action is brought by the party claiming within a period of six years from the date of issue of the general average adjustment.