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THE ESSENTIALS OF GENERAL AVERAGE

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I

The system of General Average is based on ancient historical records. According to historians of maritime law, the idea of General Average dates back to the ninth Century, B. C. James Allen Park, author of "*System of the Law of Marine Insurance*, London, 1787" which contains judicial precedents by Lord Mansfield, states that the present law of General Average originated from fragmentary statutes of ancient Greek legislation which later constituted the text for a chapter in the Digest of Justinian, reading: "The Rhodian law provides that if, in order to lighten a ship, merchandise is thrown overboard, that which has been given for all shall be replaced by the contribution of all."¹

Thus, in those days, masters were granted authority to dispose of ship and cargo at their own discretion in time of common danger. It is, however, correct to assume that this authority and the right to contributions for loss occurred thereby is based on contract. A shipping contract cannot be understood as authorizing a master to damage cargo entrusted to him deliberately, and also cannot confer authority to threaten the ownership of the shipowner

¹ *Lege Rhodia cavetur ut si levandae navis Gtatis jactus mercium factus est, omnium contributione, sarciatur quod omnibus datum est.*
(in German)

Wenn zwecks Leichterung des Schiffes Güter geworfen worden sind, so soll von allen ersetzt werden, was für alle hingegeben worden ist.

in order to save the cargo based on the shipping contract. Moreover, there was no legal liability to contribute toward the loss of the cargoowner because of the shipping contract. Therefore, the present General Average system is said to be based on developed customs of ancient sea transportation. C. J. Abbott, an authority of maritime commercial law stated in his work that General Average is based on general principles of maritime law and not on a written contract, which is very true.² A similar opinion is shown by Carver, in his "*Carriage of Goods by Sea*. 9th ed. London, 1952."

"It is simpler and perhaps more reasonable, to say that each shipper by shipping his goods subjects himself to the established rules of law on the subject, which in certain events, give rights of contribution to himself, or to his co-adventurers, as the case may be." (p. 587)

For the first time, as stated above, it was codified in a Digest XIX 2, 1, headed "*Lex Rhoda de Jactu*", in the Roman Empire. Rhodians not only possessed a powerful navy in those days, but they were also well known as most advanced in maritime commercial law. In those days, even the Romans paid the greatest deference and respect to such Rhodian laws and used them as a guide in nautical affairs.³

This superior legislation was not only a standard among ancient countries engaged in sea commerce, but also when a comparative study is made, it will be understood that most laws concerning carriage by sea and commerce in modern countries originated in ancient maritime commercial law. It is not known when these laws were edited, though it is presumed to be in 916, B. C., when the Rhodians had suzerainty of the sea. According to Selden (Selden, *Mare Clausum*. Lib. 1. Cap. 10. f. 5.) these laws were edited when Jebosaphat was King of Juda and the Rhodians had dominated the sea for twenty-three years. This opinion agrees with the previous counting, because the reign of King Jebosaphat was around 914 B. C. We must constantly remember that in olden times, merchants or owners of cargo, almost as a matter of course, used to sail with their wares from port to port like peddlers. In these small vessels, navigating the Mediterranean or Aegean sea where storms suddenly spring up and subside, occasions would be frequent where shipwreck could only be averted by lightening the ship or portions of her cargo, a measure which, however beneficial to the rest, might mean ruin to one man on board. His consent to such a sacrifice could only be bought by a promise—first expressed, then customary and taken for

² Abbott, C. J., in *Simmonds v. White* (1881).

³ "From this short history it appears that the Rhodians were very famous for their naval power and strength: but however respectable they might be on that account, they were much more illustrious, and obtained a much higher praise among the nations of antiquity, for being the first legislators of the sea, and for promulgating a system of marine jurisprudence, or which even the Romans themselves paid the greatest deference and respect, and which they adopted as the guide of their conduct in naval affairs." (Park, *System*. P. V.).

granted—that when, or if, the ship came safe to shore, all who had profited by his loss would pay their share to make it good.⁴

The Romans, the great improvers of other people's inventions, have given us a good specimen of their work in the chapter of the Digest headed *De Lege Rhodia de Jactu*. The sentence above quoted, takes the place of honour, as a sort of text, and is followed by a fragmentary collection of short judgments or opinions, some of them named as the dicta of Servius, Ofilius, Labeo, or other eminent jurisconsults of the time. However, according to the laws of those days, General Average was limited to sea-losses arising from a voluntary sacrifice, and other losses were particular average. After the fall of the Roman Empire, its laws, fell into almost absolute oblivion and were no longer operative. The language they were written in became more and more strange in Europe as the continent was overrun by barbarians. What had once been the code of law for the whole civilized world was eventually neglected. In later years, Pardessus said that at the time when the Pisans, 1135 A. D., accidentally discovered a single copy of it at the conquest of Amalfi, cultural conditions were so desolate that it was surprising to scholars that even a single copy could be discovered in Europe.⁵

However, in the recollection and tradition of seafaring men, or on account of its utility, the outline of a chapter of jettison (*de jactu*) was reproduced in a simpler and ruder form among Europeans as a laudable rule, whilst later maritime laws were collected. The more elaborate provisions of the Digest disappeared, but after a long interval reassumed their authority under another name.

Of these codes and collections of customs, the one which had the most extended authority, was called the Rolls or Judgments of Oleron. According to Marshall, a docket of Oleron which is called "*Roole des Jugemens d'Oleron*" was being said by the scholars of France as edited by the order of Eleanor, the Queen of Henry I, the King of England, and later revised by their prince, King Richard I. Selden, however, denied this and said that it was edited and promulgated by King Richard I of England.⁶ These laws were titled "*Us et Coutumes de la Mer*" (Custom of the Sea), with excellent comments inserted in each paragraph by Cleirac.

The collection of sea codes which followed was the Law of Wisbuy, discovered in a small island of Northern Europe, called Gothland. In those days, trading in Wisbuy city prospered. According to Malyne, the Law of Wisbuy was translated into Dutch by the islanders and was said to be practised in the coastal areas of Holland. But Marshall presumed that Holland must have meant to be Germany. The rules included in the Law

⁴ Lowndes and Rudolf, *Law of General Average*. 7th ed. London, 1948. p. 2.

⁵ Gibbon, the historian, stated that many editions and manuscripts were derived from this single copy in the West Europe. (Gibbon, *Decline and Fall*, Ch. 44) & cf. Lowndes and Rudolf, *Ibid.* p. 3.

⁶ Cleirac, S. 2. Selden, *De Dominio Maris*, C. 24. cf. Marshall, *Ibid.* p. 11.

of Wisbuy were not different from the Laws of Oleron. Scholars of Northern Europe assert that the Law of Wisbuy was used in the old days before the Laws of Oleron and the "*Consolato del Mare*." In contrast to this, Cleirac considered this an error, for although the promulgation of the Laws of Oleron was in 1266 A. D., they had been compiled long before this. Moreover, Wisbuy of those days was not even worth to be called a city. At all events the Law of Wisbuy had an authority in the countries of Northern Europe for some period and still remains in effect until today.⁷

Besides those stated, there were the law of Amsterdam, the law of the Hanseatic League, the law of Flanders, the law of Genoa and of Catalonia, etc., but these are translations or reproductions of the above two codes. That is, ordinarily jettison, cutting away the mast and casting away the anchor were examples of general contribution. In later codes, extraordinary expenditures for the common safety, such as the expense incurred in lightening a stranded ship were considered General Average.

The above were the main codes which appeared in the fourteenth and fifteenth centuries in Europe. In the sixteenth century, between the years 1556 and 1584 A. D., the famous "*Guidon de la Mer*"⁸ came out, and for the first time, by this, a definition related to General Average was given. Guidon was only a Digest of insurance law to be used at the newly constituted Consular Court of Rouen, but had no public authority. However, besides insurance it included some rules regarding transportation, bottomry and respondentia and General Average. In contrast to this, the definition of General Average in "*Ordonnance of Louis XIV*", promulgated in 1681, had the force of law, but was evidently modelled upon the Guidon.⁹

As a result, the Ordonnance set an example of maritime commercial laws throughout Europe, and the Ordinance of Rotterdam (1712) and the Ordinance of Bilbao which were published have given a similar definition. Moreover, the Ordinance of Stockholm (1750), the Ordinance of Königsberg (1730), and the Ordinance of Hamburg (1731) also gave similar definitions. It is natural that definitions regarding General Average in the existing Commercial Code of France (1807) was copied from the Ordonnance of Louis XIV. Furthermore, the Commercial Code of France had an extraordinary influence not only on the Latin countries, but also on many other countries.

Hitherto, England was different from other countries in Europe, being the only maritime country which had no code of sea laws for a long time. Therefore, commercial legislation in England had to be regulated by the

⁷ Marshall, *Ibid.* p. 1. cf. Grotius, *de Jur. Bel. lit.* 2, c. 3.

⁸ Cleirac, *Les Us et Coutumes de la Mer*, Rouen, 1671.

⁹ The following is the important part of the definition of General Average in "*Ordonnance of Louis XIV*." (Lowndes and Rudolf, *Ibid.* p. 12).

"Extraordinary expenses incurred, and damage suffered, for the common good and safety of the merchandise and the vessel, are gross and common average and shall be equalized over the whole (Ship and Merchandise) at the shilling in the pound" (au sol la livre). Ordonnance, tit. 7, Arts. 2, 3; 4 Pard. 380.

merchants themselves. The name of "Lombard Street" in policies of marine insurance indicated the tradition of settlers from Italy. According to Lowndes, it was believed that the name was due to branch offices managed by immigrants from Lombardy in the early stage of their arrival in London at the time of the Medici.¹⁰

Although statutes regarding jettison have been quoted by Pardessus, as promulgated at the time of William I, they are not found in the statute book in England, and cannot be safely treated as authentic. Later, as known from books written by W. Beawes (*Lex Mercatoria rediviva or merchant's directory*, 6th ed. by J. Chitty, London, 1813), N. Magens (*Essay on Insurances, Illustrated by Cases*. London, 1755) and other mercantile men, customs and rules which had been used among themselves were nothing but rambling extracts from many codes and maritime laws which were practised in various countries in those days. In London, Lloyd's coffee-house became the headquarters of the business of marine insurance and eventually the principal place of these customs, which was generally known as "Customs of Lloyd's." In the Court of Admiralty, in the year 1799, Lord Stowell judged the case of the "Copenhagen" as "General Average for a loss incurred, towards which the whole concern is bound to contribute pro ratâ, because it was undergone for the general benefit and preservation of the whole." This definition was superseded by one laid down two years later in the Court of King's Bench by Justice Lawrence, in the case of *Birkley v. Presgrave*.¹¹

Thus, the principle of General Average originated in the Rhodian Law which was adopted by many seafaring countries and which was generally recognized and the commonest affair practised by sea traders, when danger occurred at sea, the loss due to the sacrifice of one being borne by all concerned and not by one party. However, kinds of loss, method of calculation or principle of contribution, etc., are different and are not similar in each country, and there are differences on minute points in over twenty ex-

¹⁰ "And it is agreed by us, the insurers, that this writing or policy of insurance shall be of as much force and effect as the surest writing or policy of insurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London.

¹¹ In England, the existence of judicial precedent which means average or General Average is quite old. According to the note in Lowndes and Rudolf, *Law of General Average*, 7th ed. 1948, p. 14, besides the case of *Hick v. Palington* (1590); *Marshall v. Dutrey* (1719); *Sheppard v. Wright* (1698), Mackinnon, L. J., in his presidential address to the Association of Average Adjusters on May 10, 1935, reported that there are also *The Jesus* (1562); *The Trinity James* (1540); *Arbitration Award in 575 for contribution and average (The Elizabeth)*.

Definition given by Lawrence, J., on General Average is as quoted below. This definition shows a little improvement in form, on the Ordinance which has always been treated as of the highest authority, has been cited repeatedly in English Courts and has become a sort of axiom. This definition is used as a text for judging *Covington v. Robert* (1806); *Job v. Langton* (1857).

"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 proportionately by all who are interested."

isting commercial codes. Furthermore, most of these have great differences even between England and the United States of America, the two greatest commercial nations in the world, which can only be ascertained by careful study of the numerous decisions given in courts. Thus, on this important subject which affects, and constantly affects, those engaged in overseas commerce and transportation, it is unsafe to hazard an opinion, even as to what sacrifice and expenditure constitutes General Average. Therefore, legislation is desirable which will replace the existing laws of the various countries by applying proper method. With this object, a movement to attain international uniformity regarding General Average was started from 1860. In conferences held in 1862, 1864 and 1877, twelve rules of the York Antwerp Rules were adopted. England took the initiative by which General Average must be adjusted by Y. A. R. of 1877 in bills of lading, and in this way international unification started. In 1890, after thirteen years of practical test,¹² a conference was held at Liverpool attended by representatives from the United States of America, France, Germany, Belgium and Denmark, besides England (lawyers, underwriters, representative from Lloyd, shipowners, and many average adjusters), and eighteen new rules of York-Antwerp were resolved and since that time they were adopted almost universally throughout the world. Over thirty years later, in 1924 they were revised at the Stockholm Conference, and in 1950, the existing new Y. A. R. was established at a conference at Amsterdam, the crowning success of international unification movement.¹³

¹² In 1879, at a conference held at Guilhall, London, it was reported that the owners of more than two-fifths of the entire registered tonnage of Great Britain had applied Y. A. R. to B/L and C/P. Many mutual insurance associations had adopted them and underwriters generally, despite the continued opposition of Lloyd's, agreed to the inclusion of the new Foreign General Average Clause without additional premium. Furthermore, two years later, in 1881, the rules were almost universally adopted.

¹³ The Antwerp Rule was established in 1903 at Antwerp. The countries governed by laws similar to those of France were differed from those of Japan, England, United States of America, Germany and other countries, and this rule unified General Average to the effect that though the danger which gave rise to the sacrifice or expenditure, may have been due to default of one of the parties to the adventure. A similar content is found in Japanese Commercial Law paragraph II, art. 788. and Rule D in the York Antwerp Rules of 1950 was one of the laws adopted at this time. Besides those stated above, an article in 1895 appeared in the January issue of the "Law Quarterly Review" by Judge Dowdall, K. C. regarding suggestions related to a code for international general average, which was later brought into further consideration and agreement of the draft code which had been anticipated before the outbreak of World War I. Furthermore, at the conferences of 1900 and 1906, it was resolved that each country should report upon case of divergence in handling General Average. During the years 1910 to 1912 and 1913, the Dowdall plan was finally adopted and at the Madrid Conference held in 1913, an *Avant projet* was completed to be discussed as a draft if an International Code relating to General Average at the Conference to be held at the Hague in September 1914. However, the "Draft of the International Code relating to General Average" was not favourably supported and there was a tendency of considering the old rules more convenient among the mercantile community. In the meantime, the project was suspended by the outbreak of the World War. After the war, in 1922, the matter was reviewed by the International Law Association in a letter to the Association of Average Adjusters inviting them to consider the provisions of the draft code but at the Extraordinary General Meeting held in October 1923, it was revealed that many members were opposed to the idea of Codification and preferred a reconsideration of Y. A. R. 1890. A

II

As stated above, the system of General Average originated from customary law, "*Lex Rhodia de Jactu*," which was later transmitted to Rome, through the Middle Age and the Renaissance to the early stage of the recent age. It has gradually not only restored its original meaning but from the Ordinance of Louis XIV (1681 A. D.) has become a law whose authority has set an example to all countries of the world. It has been taken over by the Commercial Law of France (1807), and has affected the codes of every country. It is especially significant in commercial law particularly maritime law of commerce, as a cultural phenomena, and as a true reflection of our innate morality as well as of our view of humanity.¹⁴

The above may be said to reach the soul of this system.

We shall analyse the essentials of General Average, commenting each of them. Rule A of Y. A. R. 1950 with other main articles of each country will be used as references.

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

Japan.—General average includes all damage and expense arising from

meeting of the International Steamship Owners' Association held in London in late May 1924 under the chairmanship of Sir Norman Hill, then affirmed the necessity of the establishment of uniformity in General Average. It was clarified that Y. A. R. should be amended to meet the present requirements. Also the General Average Committee of the International Law Association held in London on the 16th of June 1924 under the chairmanship of Lord Phillimore passed a resolution for the adoption of the following: (1) Revision of Y. A. R. (2) A declaration of general principles applicable to General Average. In preparing No. (1), England, France, Holland, Germany, Sweden, Norway and Belgium participated, whilst No. (2) was prepared by Dowdall (England) and Dor (France). Thus on the 8th of September, 1924, the International Law Association opened at Stockholm and 24 rules of Y. A. R., 1924, were established in the presence of delegates from the United States of America, Great Britain (including Lloyd's), France, Germany, Holland, Belgium, Norway, Sweden, Denmark and Japan. A peculiarity of this conference was that, in contrast to the previous opposition, definitions were in substance those of the British Marine Insurance Act, Paragraph 2 Art. 66. Y. A. R. was consequently approved by all countries except the United States. About twenty years later, revision was required and was defined in September 1950, at the International Maritime Committee in Amsterdam. The new rule is the "Rule in Interpretation." Presumably in 1924, it resulted misinterpretation between the lettered rules and the numbered rules. The case of *Makis* was one. The United States this time approved the rule. Thus Y. A. R. finally attained its purpose exactly ninety years from 1860, and the 100th anniversary is not very distant.

¹⁴ Lowndes, an authority on General Average in England not only denied "Suggested Abolition of General Average," but also praised the universality and permanency of this system as follows:

"The rule of a general contribution, on the other hand, by rendering it material whose property is taken in the first instance, and material only that should be taken which will most surely and effectually, and at least cost, save the whole, does away with this conflict in the captain's mind between interest and duty, leaves them alone with purely nautical considerations, and thus, no doubt, does more than any statesman or philanthropist can effect for the preservation of life and property at sea. The utility of the rule of General Average thus no doubt explains its universality and permanence."

any disposition made by the master in regard to the ship or cargo to save both from a common danger. (Commercial law, Art. 788)

England.—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. (Marine Ins. Law, paragraph II Art. 66)

France.—In general, damage voluntarily sustained and expenses incurred after express deliberation, for the common good and safety of the ship and cargo, from their loading and departure to their arrival and discharge. (Commercial Law, Art. 400)

Germany.—All damage intentionally done to ship or cargo, or both, by the master or by his orders, for the purpose of rescuing both from a common danger, together with any further damage caused by such measures, and also expenses incurred for the same purpose, are general average. (Commercial Law, Art. 700)

United States.—The requirements to justify general average contribution are:—

1. That the ship and cargo should be placed in a common imminent peril.

2. That there should be a voluntary sacrifice of property to avert that peril.

3. That by that sacrifice the safety of the other property should be presently and successfully attained. (Opinion of Story, in *Columbian Ins. Co. v. Ashby* (1839) Supreme Court)

Thus, the definitions of General Average in each country is not always identical, but their fundamental ideas which are basic essentials agree with each other on the main issue. When summarizing the important points, they will be as follows:

- I. Necessity of existence of imminent common peril for ship and cargo.

If the ship has no cargo or ballast, there is no common corporation. Therefore there can be no General Average. And its peril must menace both ship and cargo. Common peril in commercial law of our country (Art. 788) actually means this, and also the term "*Gemeinsame Gefahr*" in German Commercial Law (Art. 700).¹⁵ In other words, in this case "*Gemeinsamkeit von Schiff und Fracht*" is not recognized. Also, in many countries other than Japan, Germany, and England, whether expressly or impliedly, the object of keeping ship and cargo away from common risk is one of the most important essentialities of General Average. But not only is nothing prescribed by law as to what is judged as a danger, there is no trustworthy basis shown in the preceeding records of when the draft was made. There were also suggestions of revising of *meré* risk into "*Erhebliche Gefahr*" and

¹⁵ Ulrich, *Grosse Haverei*, Erster Bd. S. 16.

to prevent the interpretation of common danger as general average, but these suggestions were rejected. The above was the history in Germany but the laws in other countries also eliminated the word "extraordinary" in Rule A of new Y. A. R., 1950, and used "preserving from peril." As a result, peril is a condition which contains possibilities to create loss ("*Eine die Wahrscheinlichkeit eines Verlustes in sich schliessende Situation.*" Ulrich, *Grosse Haverei*, Bd. 1. S. 10.) and not necessarily always interest into fear of total loss. In other words, it means a condition where the ship and cargo cannot be saved from sinking when the voyage is continued in the same condition. However, in regard to the degree of imminence, a result obtained in Germany is *nahe, unmittelbare, imminente, bereits eingetretene, also eine gegenwärtige*, and not merely future, menace (*zukünftige, drohende*), but requires to be contiguous, imminent, or past which is yet current. (However, according to the proceeding record, No. 2687, of German commercial Law Discussion Conference, the word "menacing" was considered as better to be deleted). And from the feeling of the Stockholm Conference in 1924, regarding peril, many agreed that it is better not to restrict the act of General Average to such cases where the danger was immediate and imminent. This was emphasized by several representatives and the definition was intended to imply that although the danger must be such as to threaten the common safety, it is not necessary that it is immediately pending. Since this was not revised in the new Y. A. R., 1950 one should be permitted to interpret as same. However, this interpretation is based on the view which is held in all countries, and furthermore, there is not such unanimity when a sacrifice is made to avoid what is believed to be a threatening peril, but the belief is in fact erroneous. In the United States, "the Wordsworth," in 1898, Brown, D. J. held that sacrifice must be treated as General Average as long as there were reasonable grounds for believing that the joint interests were threatened by a peril, and a sacrifice made to avoid such peril was found subsequently to be groundless.¹⁶ In contrast to this, in England, the conclusion was different as in the case of *Joseph Watson v. Fireman's Fund Ins.*, in 1924, which held that although well intentioned sacrifice for common safety, it could not be treated as General Average unless safety was really endangered. In other words, it defined as losses incurred owing to mistaken, though reasonable, belief as to a peril, is not to be taken into consideration.¹⁷ Thus, according to Rudolf and Lowndes (2nd ed. 1948, p. 349), it is said "In fact wording by its reference to the "Common Safety" in Rule A, Y. A. R., and to the intention of preserving the property "from peril" would

¹⁶ According to Carver (*Ibid.* 9th ed. p. 596, note 46), in the case of Wordsworth, it has been held by an American judge that there was an actual peril to cargo—the master merely being mistaken as to degree.

¹⁷ Arnould, *Ibid.* S. 913 p. 843 f. n. 23.

seem to imply the existence of a real danger and not an imaginary one."¹⁸

II. Above perils should menace both ship and cargo

It is one of the common principles recognized generally ever since the Rhodian Law came to effect, that General Average arises only when peril menaces both ship and cargo, because it has established the common custom that loss by General Average should be borne by ship, freight and cargo. German Commercial Law, paragraph II, art. 700, expresses especially that "General Average ought to be borne commonly by ship, freight and cargo." The Commercial Law of our country also provides in art. 789, that "General Average must be borne by those concerned based on the value of ship and cargo, and half of freight which could be preserved, and loss due to General Average." And also in Rule B of Y. A. R., 1950, it is provided that "general Average sacrifices and expenses shall be borne by the different contributing interests on a basis hereinafter provided." And it is not restricted to the above three kinds, but in numbered rule 17, it is provided for in rather broad sense as "The contribution to General Average shall be made upon the actual net values of the property at the termination of the adventure," and it should be recognized as a liability not merely for both ship and cargo. Property has a broad meaning and in its strict interpretation,

¹⁸ However, many representatives who attended this conference suggested that it should be treated as General Average and as a real danger, although an imaginary one, if the sacrifice might have been reasonably bona fide. It was not illogical to claim General Average although there was a mistake when the sacrifice was made in the belief of facing real danger in the meaning of General Average in Rule A. This rule was adopted by agreement of the drafting committee chosen from the forementioned conference. When Rudolf published his first edition in 1926, he believed so. However, in 1929 it was clarified by the case of "Vlassopoulos v. British & Foreign, & Co., (1925) (cf. The Seapool, 1934) that contrary to his expectation it must be the actual danger. And it was decided that it does not necessarily need to be similar. Therefore, it may be said that when the master's decisions were mistaken, they cannot be treated as General Average because of their imaginary action. Thus at least in England, it cannot be treated as General Average when it was only master's own subjective decision. This was explained by Ulrich (1st ed. p. 11), a danger must be present but does not necessarily need to become actual (as in cases where disadvantageous results have already followed on ship and cargo), or the condition does not necessarily need to be an extraordinary one. In discussing this at large, although the danger is not a big one and may only be an actual menace, its category and degree may be decided subjectively by the master. Consequently, it cannot be said later that the master's decision was *Überschätzt* (over estimated) and is not to be recognized. It does not seem to agree with British judicial precedent, and according to Ulrich on this point, it is not necessary for the master to wait for the danger to reach a critical condition because of fear of losing opportunity of prevention which would bring an unfortunate result in next moment, such as high tide. Therefore, the decision of degree of danger does not rely on objective elements but on responsibilities of the master as being "ordinary master" with awareness as to its real danger. In Germany, the action taken by the master does not need to be of objective validity, according to her Interwaterways Law. This is why the word "from Common Danger" is used in place of "extraordinary danger," for many arguments have been anticipated such a request. This point also seems to be contradictory with forementioned Rudolf's 2nd edition. In Japanese Commercial Law, Art. 788, the words "common danger" is used, and among the lawyers, this has been asserted as the danger must be objective since General Average system of our country is based on principle of causality. It is a question whether there should be such theoretical necessity between principle of causality and danger, but at least, British judicial precedent is as above. And the reason of the tolerate opinion taken by Ulrich such as elimination of a few lines from the mentioned work by Rudolf, is also understandable.

mails, passengers' luggage, jewels and clothing etc. are also properties. Therefore, the argument that unless these properties are shipped based on bottomry bond, according to paragraph 2 of this rule, liability to contribution should be extended to such, is not theoretically wrong. But actually if such luggage (carried in the luggage compartment) is subjected to liability of contribution,¹⁹ it would have to be calculated on an opposite basis and General Average of such luggage will also have to be shared which would result in confusion. Thus paragraph 2, Rule B, agrees with custom generally practised throughout the world.

As mentioned above, if there be no menace to common safety of ship and cargo, although loss has occurred to ensure the safety of a part of the property, such case cannot be claimed as General Average. As an example, according to Arnould, a mob in Ireland boarded a ship partly laden with corn, and would not leave her till they had compelled the captain to sell them the corn at a certain low rate. It was contended, on the part of the assured, that, as the captain was thus obliged to let the people take the corn in order to induce them to spare the rest of the cargo, this was a General Average loss; but Lord Kenyon held that this was not so, because the other interests never were in jeopardy: for the persons who took the corn intended no injury to the ship, or other part of the cargo, but the corn. (*Nesbitt v. Lushington* (1792) 4 T. R. 793). Upon the same principle, Benecke maintained that if the master of a neutral ship, who had secretly taken enemy goods on board, should, from fear of having those goods, confiscated, slip his anchor or throw those particular goods overboard, neither he nor the owners of these goods would have any claim to contribution upon the other parties to the adventure, because such sacrifice was made not to save the whole, but only a part. The above refers to sacrifice but the same thing could be said of expenditures.

However, the problem arises at this point as to what items should be allowed as the time factor (*Zeitpunkt*) of General Average. An example in England, is the case of *Svendsen v. Wallace*, 1883, when it was clarified that when the ship was taken into a port of refuge due to particular average, it can be based on common safety principle, and expenses treated as General Average are limited to the expenses of entering the port and unloading, and the expenses of warehousing, re-loading, crew's wages and provisions are a

¹⁹ In the United States, in the case *Heye v. North German Lloyd*, 1887, it has been held that so far as passengers' luggage carried in the luggage compartment is concerned, there is no exception from liability to contribute. As to the mails, in the case of the *Goeben* in the German Hamburg Court, 1912, it has been held that mail matter was not liable to contribute on the grounds that (1) the secrecy of the post was inviolate, and (2) because of the practical difficulty of enforcing a lien by the master. Thus the above two considered as property and though theoretically there is no reason why liability to contribution should not extend to mails, these are classified as special properties of which it is difficult to determine the value and the custom of excluding them adopted. (York Antwerp Rules of 1924, by Rudolf translated by Messrs. Asai and Ichikawa, p. 191—192).

particular charge on the cargo and freight, and when the ship was taken into the port of refuge due to General Average, the above expenses except those of the crew's wages and provisions while in port are treated as General Average as seen in the case of *Atwood v. Sellar* (1880). In England, there can be no act of General Average unless it has been done with the object of attaining the physical safety of ship and cargo. In other words, "benefit of the adventure" had nothing to do with General Average and benefit here means physical safety and adventure means ship, freight and cargo. Therefore, when a ship puts into a port of refuge there is no difference in principle whether it was occasioned by General Average act or a peril of the sea, but in the former case it may be easier to make out a causal connection between the General Average act and the expenses subsequently incurred than in the latter.²⁰ And the above must apply to every case.

In contrast to the above Common Safety Principle (*Rettungsprinzip*), a principle to be applied in the laws of Latin countries such as French Commercial Law, is called Common Benefit Principle (*Gemeinschaftsprinzip*). According to this principle, expenses and sacrifice which have been expended for the common benefit or expenses for loss are to be treated as General Average, thus, expenses of entering and leaving port, repair and demurrage etc. are chargeable to General Average because from all points of view, all of these expenses which are caused by common peril are also necessary to continue the voyage.

German Commercial Law, art. 700, lies between the forementioned two principles.²¹ German Commercial Law does not treat all losses and damages caused by common peril as General Average, but excepts expenses caused by disposal, thus, expenses for repair in the case of the above mentioned Common Benefit cannot be treated as General Average because repair is not the result of General Average act when entering the port of refuge, but is caused by the previous maritime accident.²² In contrast to the aforementioned two principles this is called Sacrifice Principle (*Opfersystem*) by German scholars. Rule C of Y. A. R. is a prescription regarding this and states as follows:

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

Loss or damage sustained by the ship or cargo through delay, whether on voyage or subsequently, such as demurrage, and any indirect loss whatsoever, such as loss of market, shall not be admitted as general average.

This rule deals with one of the most difficult points on the subject of

²⁰ Arnould, *Ibid.* 13th ed. p. 880 S. 957.

²¹ Sieveking, A. D.: *Das deutsche Seerecht.* Hamburg 1907. S. 202.

²² Sieveking, a. a. O. S. 202.

General Average. This was limited to the result of the General Average act i. e., the loss, damage or expense which are the direct result of the General Average act. Thus, it can be said that this is the strictest Common Safety Principle among the above three principles. In England, this point was clarified by the case *McCall v. Houlder Bros.* (1897) and *Anglo Argentine Live Stock Agency v. Temperley S. S. Co.* (1899), in the latter part of the last century. In the twentieth century, the case of *Austin Friars S. S. Co. v. Spillers and Bakers*, clarified the problem regarding the application of this principle to the expenses of docking. It clarified that demurrage is not allowable in General Average even though the delay has been brought about in consequence of a General Average act in *The Leitrim* (1902). But in such cases, loss of time may be considered proportionate to the interests. Comparing these points with codes or judicial precedents of France and other continental countries there are many differences which is unavoidable, but Y. A. R. as unified international rule, is in accord with the Common Safety Principle and the range of its limited admission is very clear.

III. General Average act resorted to by master or crew must be extraordinary.

When the master executes the contract for the carriage of goods, the action of the master will be in accordance with the contract, even in the case of extraordinary measures which become necessary. What is ordinary and extraordinary? This is difficult to describe but from the nature of the General Average act, it has been recognized by all countries that an extraordinary measure is one of the important premises. This has been clarified in commercial law in England, France, Belgium, Italy and Spain.²³

Ulrich stated as an interpretation of German Commercial Law art. 700, that although the General Average act was for the common best (*Zum gemeinsamen Besten*), its measure of salvage should be extraordinary ("*ausserordentliche*" oder "*ungewöhnliche*"), in other words, it ought to be a measure which was not anticipated before the voyage,²⁴ because shipowners usually include all expenses incurred and all ordinary manoeuvres rendered necessary for the purpose of transporting when fixing the freight. German Commercial Law art. 700, does not use the word "extraordinary," but the two words "all losses," (*Alle Schäden*) should be interpreted as Ulrich, i. e., expenses and damage other than ordinary damage and expenses.²⁵

As a judicial precedent regarding "What is extraordinary" can be con-

²³ Examples of the usage of the word "extraordinary" in the codes of the various countries are as follows:

French Commercial Law art. 400 (*depenses faites d'apres deliberations motives*), Belgian Commercial Law art. 147 (*Depenses extraordinaires*), Italian Commercial Law art. 643 (*Spese Extraordinarie*), Spanish art. 811, Argentine art. 1316, Chile art. 1089, Brazilian art. 764, Dutch art. 699 and Rule A of Y. A. R., 1924 & 1950 (Extraordinary Sacrifice or expenditure).

²⁴ Ulrich, a. a. O. S. 24.

²⁵ Ulrich, a. a. O. S. 25.

sidered the cases *Wilson v. Bank of Victoria* (1867); *Harrison v. Bank of Australasia* (1872), in England. But undoubtedly, it is very difficult to classify by any standard ordinary and extraordinary. A judicial precedent by Émérigon of France is quoted in the book of Arnould, i. e., a French ship which had been chased all day by an enemy which was rapidly gaining on her, at nightfall deliberately launched her long boat, fitted her with a mast and sail, fixed a lantern in her masthead, and set her adrift; at the same time she hauled down the ship's lights and altered her course. The long boat, followed by the enemy, drifted away before the wind and was lost; the ship, by means of the manoeuvre, escaped. The loss of the boat, under these circumstances, was held to be a General Average loss, having been an extraordinary sacrifice, intentionally made for the sake of saving the ship and cargo.²⁶

In June, 1915, the master of a sailing ship, fearing attack by submarines, engaged a tug boat to tow her from Queenstown to Sharpness, so as to accelerate the voyage and thus minimize the danger. Sankey J. held that the expense of the towage was not an extraordinary expenditure, because the risk of being attacked by enemies was not an extraordinary and abnormal peril upon a voyage of this kind in time of war.²⁷

IV. General Average act must be successful.

The question has been much discussed whether the claim to liability of contribution must be for a successful act or not. As a premise, sacrifice must be reasonably made and the properties of others concerned must eventually be saved. On this point, the laws and customs of the various countries are almost the same. In other words, even after the General Average act, if the remainder of goods including the ship are sunken, i. e., totally lost, and no benefit accrues to the owners of the other goods from jettison, there will be no problem as to contribution.

The Commercial Law of our country, art. 791, provides "contribution to General Average shall be limited to the actual value of the property at the termination of the adventure or at its delivery," and as in other countries, it requires the ship or at least the remainder of the cargo to be saved after the General Average act. However, the problem which arises here is first liable to contribution, for General Average is action *in rem* and not action *in personam*. However, in England, for a long time, the legal liabilities of the parties were personal at the time when the expenditure is incurred. Each scholar has agreed to this.²⁸

²⁶ Arnould, *Ibid.* Vol. II. S. 917 p. 846. Emerigon, c. 12, 41, p. 606.

²⁷ *Société Nouvelle d'Armement v. Spiellers & Bakers, Ltd.* (1917) 1 K. B. 865.

²⁸ Recent example of difference between the two judicial precedent is the case of *Chellew v. Royal Commission on the Sugar Supply* (1922), but Carver and McArthur (Carver, *Carriage By Sea*, s. 428, 8th ed.; McArthur, *Insurance*, p. 205, 2nd ed.) are different from this and has claimed that expenditures of General Average ought to be adjusted at the termination of the

Thus it has been recognized by the various countries as well as by Y. A. R. that as a result of the General Average act, success is necessary but on other points no agreement exists. According to the commercial law of France and that of our country, the existence of a causal relation between the General Average act and/or cargo saved by such act is necessary. In England, however, when sacrifice was made reasonably, although the success obviously is not due to this sacrifice but to some other cause, and the sacrifice itself has caused no good result and could not be called a success, there also is the right to contribution. The German Commercial law art. 703, and Y. A. R. Rule I also have the same purport. Generally, scholars call the former (France, Japan) Causal Principle (*Durch-Theorie*) and the latter Survival Principle (*Nach-Theorie*).²⁹

When considered by pure reason, the proper way can be said to be that the responsibility is a result from the General Average Act, but it is usually not only very difficult to prove the existence of a causal relationship if it is said that there is General Average when causal relation exists, the actual application of General Average will be very rare. Therefore, it must be said that it is quite just to reject the proposal to insert the words caused by disposal act" (*Durch die angeordneten Massregeln*) at German Commercial Law Drafting Committee. In other words, General Average is merely (*einzig und allein*) the existence of a fact of saving (*Die Tatsache der Rettung*), whether from the sacrifice of others or other reason (for instance by accidental occurrence).

Therefore, it will be understood that regardless of the traditional history of the causal principle in France (French Commercial Law art. 423-5) since the Ordonnance of Louis XIV, it was not accepted by other countries and both the International Commercial Law Conferences at Antwerp in 1885 and at Brussel in 1888, accepted the Non-causal Principle (Survival Principle). In regard to the quantity and kind that remains, there are big differences in the existing laws and customs of individual countries such as (I) in Germany (art. 424) the minimum requirements are the remaining of vessel and whole or the cargo. (II) in France (art. 424) condition of at least the remaining of the vessel (Spain Portugal, Italy and Holland are the same), and in our Commercial Law (art. 789), is that the whole or part of the ship or cargo

adventure. Lord Chorley, an author of Arnould also stated that the problem has, however, ceased to have much practical importance, because there is a tendency of the matter dealing with in the Y. A. R. among each countries, which are incorporated as a clause in the bill of lading in contract of affreightment. (Arnould, *ibid.* 13th ed. by Chorley. s. 977. p. 898. f. n. (88); Lowndes and Rudolf, *Ibid.* p. 241).

²⁹ Ulrich states in his book "*Law of General Average*" (Ulrich, a. a. O. S. 48), General Commercial Law, art. 703, means that the existence of causal relationship between salvage and General Average act is not necessary:

"*Die Rettung braucht aber nach deutschen Recht nicht durch das Havariegrösse-Opfer erfolgt zu sein.*" and also "*Ein Kausalzusammenhang zwischen Havariegrösse-Massregel und Rettung also nicht erforderlich*" (Hans-OLG. HGZ. 1905. 66).

remains. In the United States, for some time, either judicial precedent existed but since the case of *Columbian Ins. Co. v. Ashby* in 1893, it was held that when a part of the ship or cargo remained, those concerned were liable to contribute for General Average.³⁰

Scholars' opinions on this were: Marshall (1865 5th ed.), Stevens (*On Average*) and Kent (Com, Vol. 3.) agreed with the rules of French Commercial Code art. 424, but contrary to this, Weijtsen (*Traite des Avaries*, art. 33), respectable scholar of earlier days, held quite a different opinion, namely, that if the jettisoned goods had not been sacrificed, their owners might have saved or recovered them all or in part, as the other owners had Benecke (*System der Assecuranz, Principles of Indem.*) and Philips (*Ins.* Vol. II. s. 1318), both agreed with the view of Weijtsen. Carver (*Carriage by Sea*, s. 372.) and Lowndes (*Ibid.* 6th ed. p. 741), also supported this and stated that loss of the ship even by an accident which led to the sacrifice, made no difference to the liability of contribution.³¹

As stated above, the quantity of cargo to be saved by the General Average act is not always the same in the codes of the various countries. Regarding the question whether the cargo once saved ought to stay saved until the termination of the voyage, there are two different principles, namely, the Temporary Saving Principle and the Final Saving Principle. France (Commercial Law art. 424) and Germany (German Commercial Law art. 704), both have definite statements in regard to this but in our country there is nothing as such. However, in Commercial Law, art 790, it is defined as "For contribution to General Average, the value of the ship is that at the termination of the adventure and the value of the property is that at its landing," and the law of our country can also be interpreted as anticipating further peril resulting in loss of what has been saved once, and the cargo saved by the General Average act does not necessarily need to be saved permanently (*endgültig*), but only temporarily (*zeitweilig*). Consequently the Commercial Law of our country has adopted the causal principle but regarding the remaining cargo it has ignored the principle of the ship, kind of cargo and quantity, whilst regarding the term of saving the Temporary Saving principle has been applied. As for the Y. A. R., 1950, it has adopted the remaining principle, ignoring the principles of kind and quantity and the Temporary Saving principle, that is "*die zeitweilige teilweise Rettung von Schiff und Ladung nach dem Opfer*," as the proper principle.³²

V. The General Average act must be intentional.

³⁰ Arnould, *Ibid.* S. 940. p. 867. In *Iredale v. China Traders, Ins. Co.* (1899) Bigham, J. said that he believed the English law to be the same as that laid down in this case by Story, J. (that is, *Columbian Ins. Co. v. Ashby*, 1893).

³¹ Arnould 13th ed. s. 979.

³² Comparative Law Study regarding the above is made in "*Comparative Study of Essentials of General Average*" by Dr. Masaharu Kato in *Study of Maritime Law*. Vol. I. p. 145-230.

As can be seen from our commercial law (art 788), General Average is an action taken on ship and cargo by the master to avoid a common risk, and since it is left to the master's free discretion, it is characteristically different from loss incurred by inevitability (*force majeure, act of God and King's Enemies*) in particular average of marine insurance. As to this, there exists no difference in the various countries. "Extraordinary sacrifice or expenditure intentionally and reasonably made or incurred" in new Y. A. R., 1950, Lettered Rule, Rule A, means this. German Commercial Law, art. 700, uses the word "Intentionally" i. e. *vorsätzlich* as corresponding to this. "Intentionally" is different from civil law and criminal law as being conscious of direct results ("*Gewolltsein des unmittelbaren Erfolges*") due to its historical basis and as an important premise of this system, the act of sacrifice must be intentional. It is a fact that the suggestion of using the word "voluntary" by the German Commercial Law Drafting Committee was rejected. The reason was that if the word "voluntary" was used, the master would have to take responsibility for all General Average acts taken as the master of the ship, and at last it was decided to use intentionally i. e., "*vorsätzlich*." When considering the equivalent terms in other countries, terms that correspond to "*freiwillig*" in France (art. 400) and Belgium (art. 147) is *volontairement*; in Italy (art. 643) *volontariamente*; in Portugal (art. 653) *voluntariamente*; and the word that corresponds to "*absichtlich*" in England (Marine Insurance Act, art. 66-2, 1906); in Holland (art. 99) *okzetelyk*; in Scandinavia (art. 187) *med afsigt*; and the words that correspond to "*mit Überlegung*" in Spain (art. 811) *deliberadamente*, the word "*intentionally*" is used in Rule A of Y. A. R., 1950 (same in 1924).³³

Among the present commercial codes there are not many which, as in France, require consultation between master and crew or inter-ship conference, before the general average act is taken. But such rules are based upon historical reasons practised since the Middle Ages. According to recent laws and customs, authorization of decision is entrusted to the master's care and action taken by his own free will. In England, this was recognized by Lawrence, J. in the case of *Birkley v. Presgrave*, and in the United States, it was clarified in the case of *Papayani v. Grampian S. S. Co.* (1896). Also in the Japanese and German Commercial Laws, it has been entrusted to the master's free will. In Y. A. R., 1924, and 1950, a further amendment was made, as the general average act can also be decided by passengers provided that it was the most suitable action to be taken not necessarily by the master or his representative.³⁴

³³ Cf. Ulrich, a. a. O. S. 19.

³⁴ At the Stockholm Conference, 1924, an amendment was, in fact, moved to add the words "by the master or his representative," but was withdrawn. It may be assumed, therefore, that the intention of the conference was that provided the act otherwise possesses the necessary qualifications required by Rule A, the fact that it was not specifically ordered by the master will not bar a claim to allowance in General Average. (Lowndes and Rudolf's 2nd ed. p. 349).

Thus, the General Average act made by the master must be of his free will without anyone's pressure. And the question of free will has been a difficult problem of the scholastic philosophy. For instance, in the case of jettison, this is also interpreted as an act of free volition, although the deliberation and selection of casting goods is confined to urgent circumstances, namely, in case of forced volition ("*volontat violenta del accidente del pericolo*"), the party making the sacrifice is allowed right to contribution though in this case, it has only co-operated with the violence of the elements.³⁵

The subject argued about until now was that of voluntary stranding. When a ship is voluntarily run ashore for safety to avoid capture or storm, by the master's own decision, it is doubtful whether this may be recognized as the master's free will. Therefore, opposition among scholars and in judicial precedents existed as it was doubted whether a human act could be above the violence of the elements. The scholastic philosophy designated this as mixed, i. e., rather voluntary than involuntary, though partaking of the nature of both. Aristotle, in treating the question of free will, expressly instances jettisons, i. e., *ἐκβολαί* as actions voluntary rather than involuntary, because, although no one would resort to them unless forced by circumstances, yet they are objects of choice at the time they are resolved on, and the necessary steps taken towards carrying them into effect are acts of free volition (*Ethics*, Lib. iii, Chap. 1.). However in England, since 1876, it was prescribed that all damage to ship and cargo resulting from voluntary stranding is to be excluded from General Average by Rule 12 of the Association of Average Adjuster's regulation.³⁶

Previously, England was using "Custom of Lloyd" but due to strong suggestions by Stevens (*On Average*, 5th ed. 1835. 31-33) and Benecke (*Pr. of Indem.* 1824. p. 149), this was completely reversed in present existing rules. Their methods could not be said to be same but they have agreed in the conclusion, which is, that when the situation of a ship leaves no choice but voluntary stranding, there is no time for deliberation and selection in jettison (jettison is the typical case of general average).

The situation of the vessel at the time of the loss being so desperate as to leave no alternative, they claimed the loss was not in the same condition as jettison. Thus at last, the traditional custom was changed. Since 1890, Y. A. R. has been applied to both British handling rules of article 12 and the custom of other countries, as two basical rules. This is very natural, being uniform international rules.

³⁵ Arnould, *Mar. Ins. and Average*, 2nd ed. 1857. p. 916. & 13th ed. *Ibid*, vol. II. s. 937. f. n. (45).

³⁶ Voluntary stranding (Custom of Lloyd's. 1876). The Custom of Lloyd's excludes from general average all damage to ship and cargo resulting from a voluntary stranding.

This rule does not necessarily exclude such damage as is done by beaching or scuttling a burning vessel to extinguish the fire.

The above are some explanations of the essentials of General Average. In addition, according to France and the countries following French law, when the peril is due to negligence (*fault, Verschulden, la negligence du capitaine au l'équipage*) of the shipowner, the cargo-owners or the master (including third party,), damage occurred or expenditure is not recognized as General Average and is treated as particular average (*besondere Haverei*). French Commercial Law, art. 405, Dutch Commercial Law, art. 700, Belgian Commercial Law, art. 148, and Italian Commercial Law, art. 643, concur in this. However, in opposition to this in German Commercial Law, 702, it is stated that even if the damage occurred due to negligence of those concerned and the third party, it will not affect General Average. The commercial law of our country has also a similar statement which is "When the aforementioned peril has occurred due to negligence, those concerned will have the right to contribution to the person who caused the peril." Thus, according to the commercial law of our country, although a peril occurred due to negligence of the cargo owners, shipowners, master or others concerned, the General Average act is not disturbed. Furthermore, the German commercial Law added the third party to this. In England, this was applied from early days when the general average act was carried out by those concerned, such as when jettison is made by the master negligently after stranding, the person who caused the peril will have no right to contribution but the well-intentioned loser of the cargo will have the right to contribution.³⁷ In addition, if a negligence clause (*Nachlässigkeitsklausel*) is inserted in the contract of affreightment, the responsibility of the shipowner for the negligence of the master and crew will not be affected by the shipowner's right to contribution for General Average. The above principle was defined from the cases of *Strang v. Scott*, 1889, and the *Carron Park*, 1890, and was reconfirmed at the Supreme Court in the case of *Milburn v. Jamaica Fruit, etc., Co.* (1900)³⁸.

In England, in the aforementioned case *Strang v. Scott*, 1889, in delivering the judgment of the Privy Council, Lord Watson said. "The Rhodian law, which in that respect is the law of England, bases the right to contribution not upon the causes of danger to the ship, but upon its actual presence." However it must be noted that the party responsible for having brought about the peril to avert which the sacrifice is made is not entitled to contribution towards his loss. But this is not always so, in spite of exceptions in the contract of affreightment. The aforementioned case of *Carron Park* in 1890 elucidated this point in earlier days. (Cf. *Milburn v. Jamaica Fruit Importing Co.* (1900)). However, in the United States,

³⁷ In such case, in England, it has been said that it is necessary that the negligence form actionable fault i. e. tort or breach etc. of contract.

³⁸ On this point, the view of France and Holland differ. *The Mary Thomas*, 1894 (Holland); *Hick v. London Ass. Co.*, 1895 (France).

the Harter Act was promulgated in 1893, according to which if the ship-owners shall have exercised due care to make the ship seaworthy, neither he, the vessel, her agent nor her charterer shall be liable for damage. The *Irraawaddy* (1897), and the *Strathdon* (1900), were such cases.

Here, an additional clause was to be used in bills of lading made by shipowners, and when General Average was due to negligence, both the shipowner and the cargo-owners are liable to contribution. There was a problem as to the legality of efficiency of this clause, but later it was judged invalid in the case of the *Yucatan* (*Ansonia Clock Co. v. New York and Cuba Mail Steamship Co.*), because of its being a negligence clause, which is against the declared policy of the United States of America. However, later the matter was brought up again in the case of *Jason*, which was judged valid in the United States Supreme Court. And thus at last, the difference between England and the United States, was finally abolished. Moreover, this Harter Act only remains applicable before loading and after discharging cargo in the United States Carriage of Goods by Sea Act, 1936, and the United States has extended the utmost assistance to the Y. A. R., 1950. Therefore, it may be regarded as almost useless to argue the relationship between General Average and the Harter Act. Regarding this subject, I will not enter into details here since it has already been discussed in my previous essays.³⁹

Thus, the principles of each country are different but since this causes confusion in international transportation, the York Antwerp Rule was adopted in 1903 at the conference of the International Law Association, and incorporated in Y. A. R. 1890. Lettered Rule D of York Antwerp Rule, 1924 and 1950 is only incorporated rule of Antwerp Rule, 1903.

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