



How have general average concepts developed across maritime countries and jurisdictions ?

Prof. Dr. Didem A. Light

İstanbul Commerce University ,

Faculty of Law

Dear President and the distinguished guests of CMI,

First of all, as a member of the Board of Directors of the Maritime Law Association of Turkey and a member in charge of the Istanbul Organization Committee, I am very happy to see and host you here in this beautiful city.

I hope you will have the chance to enjoy Istanbul and the Bosphorus during this Colloquium that will last 2 days, which will have a fully schedule.

Today, before the distinguished speakers talk, in the first part, about at which stage the general average revision efforts are, I will give you brief explanation about the general definition and components of the general average institution, as well as its implementation in the international arena and in Turkish law.

General average is one of the oldest mechanisms of maritime law, and has been handled, since the middle ages, as a separate subject independent from contracts for carriage of goods by sea and maritime insurance law.

General average means sharing the damages and expenses assumed for the common safety of the vessel and cargo during a voyage in a proportionate manner among the relevant parties of the journey.

General average is based on Rhodian Law, however no written records exist from this era. The first written legal instrument was created with Section II of «De Lege Rhodia de Jactu» of Digesta, Book XIV, dated 533 AD. This document refers to the principle that (Lowndess/Rudolf, p.4)

«the loss to arise from the jettison of cargo for the common safety will be covered by all parties»

This principle today mainly relates to the general average rule which is called “jettison of cargo”.

- These rules started to be implemented by Roman Law in a unique manner starting with the settlement of Rhodes in the Eastern Mediterranean basin. With the decline of the Roman Empire, the regulations governing general average were shaped by the common law of the maritime area.
- The most important compilations related to general average have been, since the 11 th century, «*The Rules of Oleron*».

- **The Rules of Oleron** contains three articles governing average .(Lowndess/ Rudolf, p.4)

1- Components of general average for jettison of cargo

(article 8)

2- Cutting away the masts, the mooring cable and anchor for saving cargo (article 9)

3- Adjustment of general average for jettison of cargo among merchants (article 35)

- In the 1270's, **«Farmannalog»**, which was a condification of Norse Sea Law, various codes of the Italian Sea Republics, **«The Laws of Visby»** which were prevailing in Northern Europe , and the **«Garagos Law Book»** in Iceland contained provisions related to general average. (Lowndess/ Rudolf, p.5)
- The **«Consulado del Mare»**, which codified the customary law of seafarers in the Western Mediterranean starting from the 14th century, contains similar provisions.

- **Ship and cargo owners seem to have preferred to insure themselves against sea risks, which emerged starting from the 14th century.**
- **The major maritime discoveries that started in the 15th century brought the vessel and cargo partnership encountered in the middle ages to an end.**
- **In the 16th century, «*Guidon de La Mer*» which is a book on private law, included the definition of general average. This book was considered a guideline, and also handled other issues of maritime law (e.g., freight, maritime loans, etc.)**

The «*Ordonnance de la Marine*», dated 1681, defines general average in Article 7/2 as it is defined today.

These provisions were then incorporated into Napoleon's Commercial Code. From then on, countries began to issue their maritime laws which included provisions governing general average.

In the UK and the US, unlike Continental Europe, no legal regulations existed governing general average. As the English law and practice, used since the early days, the Rules of Practice of the Association of Average Adjusters were taken into consideration. On the other hand, the Marine Insurance Act of 1906 included the definition of general average in its Article 66/2.

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

- The implementation of various national laws governing the rules of general average caused differences between English case law and Continental Europe after the second half of the 19th century.
- These differences have become an important concern, and initiatives began for integrating the rules of general average in order to resolve the issue in the international arena.
- In 1860, the first 11 rules which were determined in relation to general average, were named **“Glasgow Rules”** and studies started in 1864 for a project of general average code, but these efforts have not been successful. The rules were revised in 1877 and 1890.

- **In 1924, Lettered Rules from A to G which had a nature of general provisions were added, and the rules numbered in roman numerals were amended and expanded in accordance with commercial and technical requirements.**
- **The York-Antwerp Rules, which have been long established , underwent revisions in 1950, 1974, 1990, 1994 and 2004 in line with the changes and developments in the maritime and insurance industries. Revision efforts are still ongoing for the York-Antwerp Rules, which will be discussed in detail today by distinguished lecturers.**

II. Implementation of General Average

1. General :

- **York-Antwerp Rules do not have an agreement nature.**
- **The Rules can only be recommended to be incorporated to contracts of carriage and bills of lading of the relevant parties.**

- **In the international area, York-Antwerp Rules are either incorporated into the national laws;**
- **by means of non-mandatory rules (e.g., French law, Italian law, German law, US and English law, Dutch law, Egyptian law)**

Or

- **by means of reference to these rules with an internal provision.**

(e.g., Sweden, Belgium, Norway, Denmark, China, Turkey)

The national laws of the US and Canada include scattered provisions on general average and there are no direct enforceable regulations. Thus, the “Rules of practice of average adjusters” introduced aimed to ensure unity.”

-Rules of Practice of the Association of Average Adjusters of the United Kingdom

-Rules of Practice of the Association of Average Adjusters of United States of America

Rules of Practice of the Association of Average Adjusters of Canada

-Rules of Practice other than the Great Lakes

-Rhine Rules

2. In Turkish Law and Practice

For the first time in Turkish law, general average was governed by the Commercial Maritime Law dated 1864, which was drawn on the basis of the French Commercial Code of 1807.

The Commercial Maritime Law dated 1929, which was produced during the Republican era by the translation of the second book of the German Commercial Code, which deals exclusively with maritime law, contains provisions governing general average.

The Turkish Commercial Code which took effect in 1957 also contains provisions on general average. All these provisions were drafted on the basis of the York-Antwerp Rules dated 1950.

The New Turkish Commercial Code No. 6102 governs general average in its Articles 1272 to 1285, and provides that the York-Antwerp Rules must be referred to for the purposes of implementation of general average. This can be explained as follows:

- **Article 1273/1 provides that, unless agreed otherwise by the parties, pro-rata sharing of general average is subject to the most recent York-Antwerp Rules, which was issued by the CMI and which was translated into Turkish on the basis hereof.**
- **The translation of York-Antwerp Rules is prepared by an expert committee to be founded by the General Directorate of Insurance and Maritime Undersecretariat, and the translation of the original text is announced and published in the Official Gazette.**

The amendments to be made to the York-Antwerp Rules by the CMI are also translated into Turkish through the same means, and are published upon *sua sponte* application by the relevant Undersecretariats or real person and legal entities.

Because of regulation by way of reference, the Turkish Commercial Code does not govern the issue of general average exhaustively.

- **In general, Turkish Commercial Code regulates;**
 - **the definition and components of general average / Rule A**
 - **the damages and losses attributable to general average / Rule C**
 - **substitution costs / Rule F**

- **In addition, the Code also contains provisions governing general average adjustment and its procedure.**
- **It is accepted that shipowner is responsible for having the general average adjustment performed.**

- **If the shipowner fails to fulfill this obligation, any of the concerned parties including the insurer is authorized to request such an adjustment and have it performed.**
- **If no consensus is reached between the concerned parties, the adjusters are appointed by the court of jurisdiction where the adjustment will be made.**

- **The adjustment is made at the port of destination, and if the vessel could not arrive at that port, at the port where the journey ended, by one or more than one adjusters to be appointed by the concerned parties unanimously.**
- **The general average adjustment report needs to be certified by the court. This is because the adjustment can be implemented only upon a certification decision of the Court.**

- **The concerned parties including insurers may request the general average adjustment to be approved, and may also file an objection against the type of general average or calculations.**
- **TCC Art .1279- 1280**

- **The creditors indicated in the general average adjustment report have rights**
 - **maritime liens of the ship,**
 - **right of detention on the goods to be included in the pro-rata sharing of general average,**
 - **right of pledge on the freight against their receivables**

TCC Art. 1275

- **Now, I would like to sum up the issue by addressing another important aspect;**

We face the question of which complementary provisions related to general average will be applied in cases where only York-Antwerp Rules have been agreed upon.

As, York-Antwerp Rules do not contain any regulation governing the performance and implementation of general average adjustment. These are governed by national laws.

In the current practice, it is clearly stated where the adjustment will be made, which law will apply, and the date of the applicable York-Antwerp Rules which will be referred to.

- **For example, a clause "G A in London / York-Antwerp Rules 1994".**

In this case, the place where the adjustment will be made will determine the governing law, unless specified otherwise. Thus, the mentioned clause indicates that the general average will be implemented in London, that the adjustment will be subject to the English law and to the 1994 text.

III. Interpretation

- The first paragraph of the **“Rule of Interpretation”** which is the first Rule of the York-Antwerp Rules, needs to be examined first in order to determine how general average is adjusted.

- **“Rule of Interpretation”**

In the adjustment of general average the following Rules shall apply to the exclusion of any Law and Practice inconsistent therewith.

- **The purpose of the first paragraph of the Rules of Interpretation is to ensure a unity in the implementation of York-Antwerp Rules in the international arena. York-Antwerp Rules, which were incorporated into the agreement as a condition, prevail over national non-mandatory rules and practice, also known as general average adjustment reports.**

- **Therefore, unity will be ensured in the international arena only if York-Antwerp Rules are implemented regardless of the national rules of law and/or practices in the jurisdiction where the general average is adjusted.**

Except as provided by the Rule of Paramount and the numbered Rules, general average shall be adjusted according to the lettered Rules.

With the introduction of the Rule of Paramount into York-Antwerp Rules in 1994, the order of priority for implementation of the York-Antwerp Rules is as follows :

Rule of Interpretation – Rule Paramount

Numbered Rules

Lettered Rules

- **Therefore, in case of inconsistency between a Numbered Rule and a Lettered Rule, Numbered Rules shall prevail over Lettered Rules pursuant to the Rule of Interpretation.**
- **As a matter of fact, this conclusion may be based on the fact that principles of general average apply to particular special cases in order to ensure unity in practice, with the Numbered Rules not affected by the inconsistencies among the national law systems and practices.**
- **The Numbered Rules provide general average losses, damages and expenditures, such as :**

- **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 VI : Salvage**
- **Rule VII: Machinery and boiler damage**

- **Rule VIII: Expenses lightening A ship when A shore and consequential damage**
- **Rule IX : Use of cargo, ship's materials and stores for fuel**
- **Rule X : Expenses at port of refuge**
- **Rule XI : Wages and maintenance of crew and other port of refuge expenses**
- **Rule XII : Damage to cargo in discharging**
- **Rule XIII : Deductions from cost of repairs**
- **Rule XIV : Temporary repairs**

Rule XV- Rule XXI are regarding general average adjustments

- **Rule XV : Lost of freight**
- **Rule XVI : Amount to be made good for cargo lost or damaged by sacrifice**
- **Rule XVII : Contributory values**
- **Rule XVIII : Damage to ship**
- **Rule XIX : Undeclared or wrongfully declared cargo**
- **Rule XX : Provision of funds**
- **Rule XXI : Interest on losses made good in general average**

Rule XXII: Treatment of cash deposits

● IV. Elements of General Average

Rule A includes a definition of general average which also sets forth its elements .

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.

General average sacrifices and expenditures shall be borne by the different contributing interests on the basis hereinafter provided.

- According to this definition, the components of general average are:

1. *Extraordinary sacrifice or expenditure:*

For the presence of general average act, it is not sufficient that the sacrifice is made for the purpose of preserving from peril the property involved in a common maritime adventure, but also the loss or expenditure that has arisen must have an extraordinary nature.

The term ***“extraordinary sacrifice”*** referred to in the text must mean sacrificing the property.

For example, jettison of cargo, or the loss incurred by the machines during the attempts to refloat the ship which is ashore, is an extraordinary sacrifice.

- ***“Extraordinary expenditure”*** is the expenditure incurred for avoiding common peril. The losses and damages which are the natural burden of voyage may not be accepted as general average.

For example, costs of hiring a trailer for towing a vessel when ashore or costs of refuge are extraordinary expenditure.

2. Common Safety:

Another condition sought for accepting expenditure or losses as general average is that extraordinary sacrifice should have been made for the purpose of preserving from a common peril the property involved **in a common maritime adventure.**

In other words, sacrifice should have been **made for the common safety.** This is the key factor which differentiates general average from particular average.

- **With the concept of common safety, the rule requires only the physical salvation of the property for the purpose of preserving the property from peril, and does not require the voyage to be successfully completed.**
- **In the case of total loss of the vessel and cargo before the voyage is over, no contributory value for general average shall be paid.**

3) Peril:

The peril doesn't have to be of a severity level which will have an impact immediately or which will cause the total loss of the vessel or cargo. It is sufficient that the peril be actual and of a nature which may cause severe damage to the vessel and cargo.

An example for this concept is the ***“The American Farmer” (1947), 80 LIL. Rep. 672.*** case where the captain of the vessel, which was damaged in the middle of the Atlantic Ocean as a result of collision, asked for help from the coast guard to be delivered by air.

When aid was delivered, it was seen that the vessel had been saved by two other vessels. The court decided that not only the Coast Guard but also the other two vessels were entitled to receive salvage remuneration for their salvage effort.

In the US, when identifying the severity level of a peril for determining whether there is a general average act, the existence of peril such as ;

- **threatening peril**
- **threatening and seemingly unavoidable peril**
- **an imminent peril**
- **threatening imminent peril**
- **a peril close to physical damage**
- **an imminent peril threatening the whole**

are sought in practice. (Buglass, p.206)

However, regardless of the severity of the peril, Rule A requires only the physical salvation of the property for the purpose of preserving the property from peril and does not require the voyage to be successfully completed.

The conditions of peril and common safety should co-exist. If the act was committed specifically for the purpose of common safety while encountering peril, then there is a general average act.

The peril must be of a common nature threatening the vessel and the cargo. In other words, sacrifice or expenditure made for avoiding the peril threatening only the vessel or the cargo is not accepted as general average.

However, there are some exceptions to this in practice. For example, there are some cases from US courts which stipulate that general average rules may apply also when the insured ship is in ballast condition or without any contract of affreightment.

Potter v. Ocean Ins. Co (3 Summer 27) , “Dollar v. La. Fonciere Compagnie (162 Fed. Rep. 563) ,

(Buglass, p.206)

SAFE PROSECUTION - PERIL ...

Also, in Rule X(b) and XI(b), where there is no “peril” requirement for the claims which are made for general average expenses at the port of discharge conditions, safe prosecution has replaced “peril”.

As Buglass and Tetley expressed, this is general average “by agreement” or “artificial general average”. (Buglass, p. 198; Tetley, p. 25)

(Eagle Terminal Tankers v . Insurance Co. of U.S.S.R (Eagle Courier) 637 F.2^d 890, 1981, AMC 137 (2nd. Cir. 1981)

4) Voluntary – Intentional and reasonable:

The general average act must be intentionally and reasonably committed for the common safety for the purpose of preserving the property from peril.

At this point, the captain must make a decision about taking measures at his/her own discretion, the consequences of which may be anticipated by the captain, in order to save the vessel and cargo from the peril involved. The captain may consult either the ship owner or the insurer before making such a decision. This decision is still accepted to be captain's own decision on behalf of the cargo and vessel's joint interests.

Thus, the decision of the captain for a general average act will be binding also for the owners of the cargo. (e.g., intentional jettison of cargo for the purpose of preserving from peril).

This act, which is committed intentionally, must not only cause sacrifice, but must also preserve the property from an existing peril. *(Athel Line Ltd. V. Liverpool and London War Risks Ins. Assn. Ltd (1944) ; The Seapoll (1934) P. 53 , (Lowndes/Rudolf, p.120)*

The sacrifice made intentionally must also be reasonable.

What is meant by “REASONABLE” is that a taken measure must be the most appropriate measure to be taken for saving the vessel and cargo from peril, in other words for avoiding the damage in full or in part.

Reasonableness of the general average act preferred and implemented is measured according to the particular facts of each case.

- **The condition of being reasonable is governed not only by Rule A, but also by the Rule Paramount.**
- **Thus, the sacrifice and expenditure made, which are not reasonable, may not be allowed as general average pursuant to the Numbered Rules.**
- **In this case, the Rule Paramount provides that the condition of being reasonable must be sought in all cases for the decision made for the general average act.**

The most recent version is the York-Antwerp Rules 2004, adopted by the 38th CMI Conference in Vancouver in 2004.

Revisions of the Rules are still in progress on the basis of the texts of 1994 and 2004 which will be examined today by the distinguished lecturers.

Therefore it is time for me to end my speech

Thank you.

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