General Average, Legal Basis and Applicable Law

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The Overrated Significance of the York-Antwerp Rules

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Averij-grosse,
juridische basis en toepasselijk recht
de overschatte betekenis van de York-Antwerp Rules

Thesis

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'(...) *the goal of uniformity, or at least greater uniformity, is a noble one, and it should be pursued*'
Hetherington (2014, p. 182)

*'***Een oplossing** *vinden* **is één ding; haar** *rechtvaardigen* **is vers twee***'*
(*Finding* a solution is one, *justifying* it is verse two; author's translation)
Nieuwenhuis (1976, p. 498)

'*Books are not meant to be believed, but to be subjected to inquiry.'*
Umberto Eco — *The Name of the Rose*

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List of abbreviations

AAA	The Association of Average Adjusters
A.D.	Anno Domini; labelling of years after Christ's birth
All E.R.	All England Law Reports (English case law)
AMC	American Maritime Cases
AMD	Association Mondiale de Dispacheurs
App. Cas.	Appeal Cases
Approx.	Approximately
Argentine Navigation Act	Argentine Navigation Act, Law 20,094 of 1973
Arrest Convention	International Convention for the unification of certain rules relating to Arrest of Sea-going Ships
Art.	Article
B&C	Barnewall & Cresswell's (English case law)
B.C.	Before Christ; labelling of years before Christ's birth
Belgian Maritime Code	Belgian Commercial Code of 1807 resp. draft new Belgian Maritime Code (the latter set out in Van Hooydonck 2012) (www.zeerecht.be/documenten.aspx)
BGHZ	Amtliche Sammlung der Entscheidungen des Bundesgerichtshof in Zivilsachen (cases of the German Federal Court of Justice)
B/I	Bill of lading
Bos. & Pul.	Bosanquet & Puller's Common Pleas Reports (English case law)
Brussels Convention	Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968
Brussels I instruments	Brussels Convention, Brussels I Regulation and Brussels I Recast
Brussels I Regulation	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Brussels I Recast	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)
Bunker Convention	International Convention on Civil Liability for Bunker Oil Pollution Damage 2001
C	Case
Cl.	Clause
C.P.	Cooper's Chancery Practice

Chinese Maritime Code	Maritime Code of the People's Republic of China, Adopted at the 28th Meeting of the Standing Committee of the Seventh National People's Congress on November 7, 1992, promulgated by Order No. 64 of the President of the People's Republic of China on November 7, 1992, and effective as of July 1, 1993
CMI	Comité Maritime International
CMR	Convention Relative au Contrat de Transport International de Marchandises par Route (convention on the contract for the international carriage of goods by road)
DCFR	Draft Common Frame of Reference; Principles, Definitions and Model Rules of European Private Law
D.Md.	Case law of the District of Maryland
DTV-ADS 2009	German General Rules of Marine Insurance 2009 (in German: Allgemeine Deutsche Seeversicherungsbedingungen) of the German Transport Insurance Association (in German: Deutscher Transport-Versicherungsverband)
DTV-Güter 2008	German Rules on cargo insurance 2008 (in German: DTV-Güterversicherungsbedingungen 2000, in der Fassung 2008)
ECJ	European Court of Justice
ECR	European Court Reports
F.3d	Federal Reporter (US case law)
Fam FG	German Code on the proceedings in Family matters and in matters of voluntary jurisdiction of 17 December 2008 (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit vom 17. Dezember 2008 (BGBl. I S. 2586, 2587)
F.C.	Federal Court (Canadian case law)
f.nt.	footnote
F.Supp.	Federal Supplement (US case law reporter)
French Code of transport	French Code des transports (www.legifrance.gouv.fr/affichCode.do;jsessionid=1B689C4537D948A1A3085382-64B779CA.tpdila07v_3?cidTexte=LEGITEXT000023086-525&dateTexte=20150823)
GE	Germany
German Civil Code	German Civil Code; 'Bürgerliches Gesetzbuch' (www.gesetze-im-internet.de/englisch_bgb/)
German Code of Civil Procedure	German Code of Civil Procedure; 'Zivilprozessordnung' (www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html)
German Commercial Code	German Commercial Code; 'Handelsgesetzbuch' (www.gesetze-im-internet.de/english_hgb/)
Hamburg Rules	United Nations Convention on the Carriage of Goods by Sea (The Hamburg Rules) Hamburg, 30 March 1978
H&M	Hull & Machinery
ICS	International Chamber of Shipping
Int.Com.L.R.	International Commercial Law Reports

IUMI	International Union of Marine Insurance
IVR	International Association for the representation of the mutual interests of the inland shipping and the insurance and for keeping the register of inland vessels in Europe
IWG	International Working Group
Lloyd's Rep	Lloyd's Law Report
LLMC	London Convention on Limitation of Liability for Maritime Claims
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
L.M.L.N.	Lloyd's Maritime Law Newsletter (Singapore case law)
L.R.	Law Reports (English case law)
L.T.	Law Times
M&S	Maule and Selwyn's King's Bench Reports
Maltese Commercial Code	Commercial Code to amend and consolidate the Laws relating to Trade (www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8578)
Maritime Code of Luxembourg	Loi du 9 novembre 1990 ayant pour objet la création d'un registre public maritime (http://eli.legilux.public.lu/eli/etat/leg/loi/1990/11/09/n1)
MIA	Marine Insurance Act
mv.	Motor vessel
NIPR	Nederlands Internationaal Privaatrecht (Dutch Journal on Private International law)
NJ	Nederlandse Jurisprudentie (Dutch case law)
NJB	Nederlands Juristenblad (Dutch legal journal)
NL	Netherlands, the
Norwegian Maritime Code	Norwegian Maritime Code 24 June 1994 no. 39 with amendments including Act 7 June 2013 no. 30
Nr.	Number
NSA	Non-Separation Agreement
NVV	Nederlandse Vereniging voor Vervoerrecht (Dutch Transport Law Association)
p.	Page
para.	Paragraph
P&I	Protection & Idemnity
Polish Maritime Code	Act of 18 September 2001, Journal of Laws 2913 No. o item 758 as amended
Polish Regulation on adjustments	Regulation of the Minister of Infrastructure of 14 April 2004 regarding the appointment and average adjustment proceedings of 14 April 2004, Journal of Laws No. 109, item 1158
Q.B.	Queens Bench
Q.B.D.	Queens Bench Division
RdTW	Recht der Transportwirtschaft — Zeitschrift für Transportrecht und Schifffahrtsrecht mit dem Recht des Überseekaufs sowie Versicherungsrecht, Zollrecht und Außenwirtschaftsrecht (German Transport law journal)

Rome I	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations ('Rome I Regulation'), *OJ* 2008, L 177/6
Rome II	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual obligations ('Rome II Regulation'), *OJ* 2007, L 199/40
Rotterdam Rules	United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the 'Rotterdam Rules')
Russian Merchant Shipping Act	The Merchant Shipping Code of the Russian Federation dated 30 April 1999
S.	Section
S&S	Schip & Schade (Dutch transport law case law)
Ss.	Steamship
Salvage Convention	Brussels Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea 1989
Slovenian Maritime Code	Maritime Code adopted by the National Assembly of the Republic of Slovenia at its session of 23 March 2001, published in the Official Gazette of the Republic of Slovenia No 26 of 12 April 2001, p. 2677 et seq.
SLR	Singapore Law Reports
Spanish Maritime Code	Act 14/2014, dated 24th July, on Maritime Navigation
Swedish Maritime Code	Swedish Maritime Code 1994, Juristförlaget 1994
Swiss Maritime Code 1953	Loi fédérale sur la navigation maritime sous pavillon suisse du 23 septembre 1953
TEU	Treaty on the European Union
TFEU	Treaty of the Functioning of the European Union
Tul.Mar.L.J.	Tulane Maritime Law Journal
Turkish Commercial Code	Turkish Commercial Code No. 6102, effective since 1 July 2012
UCP	Uniform Customs and Practice for Documentary Credits
UK	United Kingdom
Unidroit Principles	Unidroit Principles of International Commercial Contracts 2010
UNCTAD	United Nations Conference on Trade and Development
US	United States
Vienna Convention on treaties	Vienna Convention on the law of treaties, concluded at Vienna on 23 May 1969
Vietnamese Maritime Code	The Vietnam Maritime Code, which was passed on June 14, 2005 by the XIth National Assembly of the Socialist Republic of Vietnam at its 7th session (No. 40/2005/QH11), in force since 1 January 2006
YAR	York-Antwerp Rules

Chapter 1

Introduction

1.1 Unravelling general average's uniformity myth[1]

General average[2] is surrounded by perceptions. The most advocated probably is that it is a uniformly regulated concept.[3] Thanks to the universally applied standard conditions on general average, the York-Antwerp Rules ('YAR'), the main issues would have allegedly been solved in a satisfactory manner. This study considers that this perception of a uniform general average regulation is flawed, if only because the YAR's scope is limited, whereas the national and contractual regulations vary. In the absence of a uniform regulation, the legal basis of the general average concept and of a claim for a general average contribution are highly relevant. The recent introduction of a new version of the YAR[4] seems an auspicious time to consider the YAR's legal position, as well as the wider framework of general average, including its applicable law.

1.2 The maritime particularism general average

Extraordinary situations call for extraordinary remedies. A maritime voyage is an adventure, or at least it certainly was until quite recent times. When a ship laden with cargo left the port of loading, she was in many ways outlawed. There was little to no shore contact at all, and whether she was able to deliver her cargo often only became clear when she made it back safely. Probably as a result, particularisms developed in maritime law. The most peculiar probably is the concept of general average.[5] During a voyage overseas the need could arise to take extraordinary emergency measures to save the vessel as well as the property and people carried on board. For at least 2,000 years, but probably much longer, maritime practitioners have accepted that it would be unfair to let the financial consequences of such intentional responses for protection from peril of all lie where they fall. The concept

1. In popular usage, a myth is a collectively held belief that has no basis in fact or is unproven.
2. The origin of the word general average and the development of the concept as well as its current practical application are considered in more detail in Chapter 2 below.
3. Inter alia Tetley 1994, pp. 107, 128; Selmer 1958, p. 58; Lopuski 2008, p. 331; Hudson & Harvey 2010, p. 9; Taylor 1994, p. 2: '*The York/Antwerp Rules represent perhaps the best example of successful worldwide voluntary unification of Maritime Law*.'
   Another commonly held perception is that general average is boring. That lawyers tend to stay away from general average was already recognised by the Swedish average adjuster Pineus in 1973 (Pineus 1973, p. 619). That general average does not score high on the list of interesting topics was also mentioned by the average adjuster Pannell, who wrote in 1998: *'For I am mindful of the fact that, whilst general average has a constant fascination for the practising, or even the non-practising average adjuster, nonetheless it can prove a dreary and sleep-inducing subject for those whose contact with it is of no more than a passing interest.'* (Pannell 1998, p. 3). Also IUMI Report 1994.
4. The YAR 2016 were adopted during the CMI Conference in New York on 6 May 2016.
5. Other examples of particularisms of maritime law are the concepts of global limitation of liability and maritime liens. See also: Lopuski 2008, p. 14.

of general average provides for a distribution of these losses and costs amongst the parties interested in the properties involved in the maritime adventure. As such it can be regarded as a maritime burden-sharing mechanism.
The apportionment system currently known as general average has developed over the years, both in the various historic regulations and national law regimes, but mainly in practice.[6] During its existence, the principle that losses should be divided was applied differently in various geographic areas and in various time periods. Today's maritime business is completely different from 50 to 60 years ago when containerisation truly started,[7] not to mention the period before that time. Vessels were much smaller and less well equipped. Moreover, there were no lengthy chains of maritime contracts and/or negotiable documents which were traded various times during a voyage. In addition, the properties involved in the maritime adventure until a few centuries ago were generally represented on board, as merchants accompanied their cargoes.[8] The parties were perfectly aware of the circumstances under which losses were suffered or costs incurred. They had faced the danger with their own eyes and had often been consulted on the measures taken.[9] Settlement of the distribution took place between the various parties at the end of the common maritime adventure when the parties physically separated. Contracts of carriage did not contain (m)any provisions on general average.[10] In consequence, the application of the principle that in certain circumstances a contribution had to be made by parties interested in a maritime adventure to cover sacrifices and costs incurred intentionally for the common benefit of the parties involved was much easier than today.[11] Notwithstanding the developments that have taken place in the shipping business, maritime law and marine insurance, the general average concept has survived and is regularly applied today.

Even though the specifics of the general average concept have evolved over time and still vary per jurisdiction and applicable rules, its use often goes unchallenged. This does not mean, however, that it is universally supported. In the last centuries it has been submitted by different parties at various moments in time that the general average system would have or should soon become extinct. It would be an 'anachronism' that would have outlived its longevity substantially and that should be abolished.[12] In the CMI Questionnaire which was sent out in preparation of the

6. Cleveringa 1961, p. 900; Kruit 2015.
7. See on the development of containerisation also Van Ham & Rijsenbrij 2012.
8. Lowndes 1844, p. 5.
9. Many regulations obliged the master to consult the merchants and/or crew before actions were taken that would give rise to a contribution. See also para. 2.2.1, f.nt. 78 below.
10. Although contractual provisions can already be found in contracts of affreightment in the Middle Ages (Rochester 2008, p. 12 with reference to Fayle, E. *A Short History of the World's Shipping Industry* (1933) Dial Press, New York), contractual general average provisions were not yet widely applied at the beginning of the 19th century. Pursuant to average adjuster Lowndes, in 1844, bills of lading did not yet contain provisions on general average (Lowndes 1844, p. 5). Even approximately 50-60 years ago, there were only few provisions on general average in contracts of affreightment, most notably references were included to a version of the YAR (Selmer 1958, p. 59). In comparison, today, many contracts of affreightment contain specific provisions which impact on the settlement of general average. This will be further discussed below.
11. Also Buglass 1981, p. 2.
12. The discussion whether general average should be abolished, as well as arguments for and against abolition have been set out inter alia by Molengraaff 1880, pp. 97-107; Rudolf 1926, p. 32-37; Selmer 1958, p. 136-295; Tetley 2003, p. 444; Cornah 2004, p. 155; Cleveringa 1961, p. 900, f.nt. 3; UNCTAD 1991; Pannell 1998, p. 6-11; Smeele 2004, p. 20; Lowndes & Rudolf 2013, p. 16-18; Schadee 1949,

YAR 2016,[13] the first question was whether general average should be abolished. Out of the 26 replies, none of the national law associations and other interested parties supported abolition.[14] It therefore seems to follow that there still is a general or at least enough support for the general average concept's application. But which concept are we talking about exactly?
In practice, when it has been ascertained that there may be a general average situation, more or less standard actions are taken in accordance with a more or less fixed protocol. An adjuster is appointed, a lien on cargo is exercised by ship interested parties, security is collected from the parties interested in the property involved in the maritime adventure and an adjustment is prepared. All these actions are taken in order to be able to collect general average contributions in due course and to arrange a compensation for losses suffered and/or expenses incurred by the parties who have benefitted from these losses and sacrifices. In order to be able to actually take these actions and to obtain a compensation, there has to be a legal justification. Given its respectable history and continuous application in practice, one would expect that the general average concept is firmly rooted in the legal order, both at national and international level. A closer examination of the subject, however, reveals that the opposite is the case.

Even though there is a common understanding of what the general average distribution principle entails, the national laws and contractual regulations contain varying definitions of the concept and set varying requirements. In this respect a comparison can be made with the concept of tort (in Dutch: 'onrechtmatige daad'; in German: 'unerlaubte Handlung').[15] The basic idea of the concept is the same everywhere, i.e. if one unlawfully infringes rights of others, damage thereby caused has to be compensated. All systems require wrongfulness, damage and a causal connection.[16] However, the specific requirements set by the national laws are not identical. German law, for example, does not contain an open norm, whereas Dutch law does.[17] Hence the mere qualification of a claim as 'tort' is insufficient. In order to duly apply the concept and to bring a claim successfully, the applicable law to and the specific requirements of this national 'tort' equivalent have to be determined.[18] The same is true for general average. The basic idea of apportionment of

p. 12. See also Pannell 1998 (pp. 3-5), Billah 2014 and Gooding 2004 for overviews of various parties who claimed that general average should be abolished. See also Harrison (1915, p. 2), who deemed the completion of the Panama Canal '*an auspicious moment to propose the abolishment of general average*.' Recently the view that general average should be abolished was defended by inter alia Mukherjee 2005, Gooding 2004, Tetley 2003. Their point of view has been followed by the European Shippers Council, the organisation of European shippers, in their reply to the CMI questionnaire in July 2013, www.europeanshippers.eu/news/esc/esc-calls-for-an-open-debate-on-the-abolition-of-the-general-average.

13. Since 1950, the CMI (Comité Maritime International) is the YAR's 'custodian' (Hetherington 2014, pp. 163, 175). See also para. 2.2.2 below.
14. CMI Report Dublin 2013, pp. 3-6.
15. § 823-853 German Civil Code.
16. Asser/Hartkamp & Sieburgh 6-IV 2015, p. 15.
17. § 823-853 German Civil Code *cf.* s. 6:162 Dutch Civil Code.
18. Such distinction between the concept as such and a specific application in a national legal regime is also made in Rome II regarding the non-contractual concepts of negotiorum gestio, unjust enrichment and culpa in contrahendo. See, for example, Recital 30: '*Culpa in contrahendo for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law*.' The conceptual indications are used to serve as an umbrella and need a further specification by the applicable national regime.

loss is generally accepted, but the specifics vary per regulation. For example, whereas the master's approval for measures is required in order to qualify measures as general average under inter alia German, Italian and French law, this requirement is not included in inter alia the Dutch, English and Norwegian general average rules.[19] Distinctions can also be observed regarding the issues which parties are to be regarded as the parties interested in the property involved in the maritime adventure, time bars, measures to safeguard a contribution, the relevance of the influence of fault, etc. In addition, contractual general average provisions may play a role. It will also have to be considered on the basis of the applicable law whether contractual arrangements are allowed, and if so, to what extent. This begs the question of general average's legal basis and its applicable law. In general average matters, however, this step is often ignored. In practice, the question of a claim for a general average contribution's legal basis is hardly ever asked. The adjustment and/or a contract of affreightment/carriage is generally taken as starting position without further explanation. Admittedly, this may work in practice, but from a legal point of view this usage cannot be justified, or at least not in all situations.

In current maritime practice, a reference to the YAR can be found in almost every contract of affreightment worldwide. The YAR's application has become so well established in practice that it often goes without any discussion. In fact, the applicability of the YAR has become so commonly accepted that the YAR are sometimes regarded as a synonym for general average or at least as a set of rules which gives a comprehensive general average regime. The YAR, however, in essence merely deal with the adjustment. In most cases they apply by contractual reference only. Although their scope has been widened in the last 20 years in various updated versions, they still leave many aspects unregulated. The YAR as a result have to be applied pursuant to and in conjunction with other provisions. But which other provisions? Contractual stipulations and/or statutory provisions? And how are the relevant terms to be established?

In the last 50 years, many international conflict of law rules have been developed. Conventions now include rules on jurisdiction[20] and, in the European sphere, international conflict of law rules have been created to obtain more legal certainty and uniformity. At European level, the Rome I and Rome II Regulations set out rules to determine the applicable law to contractual and non-contractual obligations arising out of various legal concepts. The concept of general average is not regulated separately in these regulations. Another question is whether, and if so how, general average can be fitted into these private international law rules.[21]

1.3 Order and scope of the study

The aim of this study is to scrutinise the various legal bases of a claim for a general average contribution and to examine the applicable law to obligations arising out of the general average concept. To this effect, to begin with and by way of back-

19. See in more detail para. 4.2 below.
20. For example, Art. 31 CMR, Art. 7 Arrest Convention 1952, Art. 21 Hamburg Rules and Art. 66 Rotterdam Rules.
21. This is discussed in Chapter 5 and 6 below.

ground, the development of the currently applied general average apportionment principle as well as its contemporary application in practice are outlined in Chapter 2. In Chapter 3, the place of general average in the legal order is considered. More specifically, it is discussed on which grounds a claim for a contribution can be based and what the YAR's position is in this respect. The central question is how should the YAR be regarded from a legal perspective? In Chapter 4, the application of several aspects to effectuate a claim for a general average contribution as set out in the various sources on which a claim can be based is considered. Questions that are discussed inter alia concern the position of the average adjuster (how is he appointed and what is his position?); which parties may be involved in a general average; what is the influence of (actionable) fault of one of the parties to the maritime adventure, if any; and which measures can be taken to safeguard payment of a general average contribution. The intermediate conclusion set out in para. 4.9 is that the contents of the various general average sources, and in particular several aspects to effectuate a claim differ and that their interaction is not well regulated. It is also argued that as a result of these substantive and procedural differences, there is a need to establish the applicable law to (obligations arising out of) general average. After it has been shown in Chapter 5 that there is no internationally uniform conflict of law rule on general average, it is discussed in Chapter 6 how the applicable law to general average is to be determined pursuant to the European Union's conflict of law provisions. When it has been set out that the Rome I and Rome II Regulations in principle apply to general average obligations, it is considered how they are to be applied and whether they regulate general average in a satisfactory manner. It is argued that the Rome I and Rome II Regulations do not give a suitable regime. It is also submitted that the 'general average problem' should not be solved with specific private international law rules for general average, but rather by means of creating more substantive uniformity.

An analysis is made of the general average concept through a desk-based study of legislation, literature and case law pre-dating 10 May 2016. In view of the general average apportionment principle's long history and its in essence unchanged application, older literature and case law remain relevant in addition to more recent sources. Empirical work has not been performed, although the author's experience with the legal and practical aspects of general average cases has contributed to the study. The purpose of this study is not to provide a complete overview of the legal concept of general average and/or the YAR. Extensive discussions of inter alia the various general average disbursements, the relationship between an insured and its underwriter, as well as jurisdiction issues cannot be found below.[22] The study does not include an overview of the general average regulations in the various countries either. The main focus is on the Dutch, English and German rules on general average as well as their application and interpretation.[23] The national le-

22. This is beyond the scope of this study.
23. English law is the law that governs many, if not most contracts for the carriage of goods by sea. A substantial number of adjustments are also prepared by adjusters based in London under English law. Dutch law is interesting because the codified rules which are applicable since 1991 were written by the Dutch average adjuster Schadee and incorporate the YAR. The German general average rules, which were amended recently (in 2013) by introduction of the new German Civil Code, do not include a reference to the YAR. It will be observed that there are some quite important differences between the general average rules of these three legal systems.

gislations of various other States, including but not limited to the maritime codes of Norway, France, Spain, Argentina, the People's Republic of China and Russia, are referred to randomly and serve as examples for the various manners in which the relevant aspects to effectuate a general average contribution can be regulated. The comparison of the provisions set out in the national legal regimes clearly shows that a uniform regulation is all but present. The conflict of law rules have been considered mainly from a European perspective.

Chapter 2

A modern concept with ancient roots; general average's historical development and current practice

2.1 Distribution of losses and costs

The concept of general average has a somewhat mysterious connotation. This concerns both the term 'general average'[1] (in Dutch: 'averij-grosse';[2] in German: 'Große Haverei' or 'Havarie-grosse';[3] in French: 'avarie commune')[4] and its practical application.[5] In essence, however, the principle of general average is rather straightforward. Briefly summarized, general average is a particular manner to distribute specific losses and costs.[6] When measures are taken during an overseas or inland waterway voyage, or in general average terms 'a maritime adventure', to save the vessel and everything on board from a peril that threatens the vessel, its load and the adventure in general, the concept of general average provides that the costs of these measures are to be born by parties interested in the property saved as a result thereof.[7] This concerns both costs and losses intentionally incurred

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1. The origin of the term 'general average' is obscure. Different theories have been advanced regarding the origin of the word 'average' ('(h)avarij(e)', '(h)avarie'). The 16th century Dutch Supreme Court Judge Weytsen argued that the word 'avarije' stems from the Greek word for load/cargo (Weytsen para. 1, Verwer 1711, p. 191). Others are of the opinion that the word 'havarije' would have been derived from the French word 'havre', port, where the average was to be paid. The word 'havre' would have a Persian origin in the word 'aban', an occupied and build-area (Boxhornius, published in Verwer 1711, p. 189). Furthermore, the word is said to have an Arabic ancestor, i.e. the word 'áwâr', damage (Ulrich 1903, p. 1; Prüssmann/Rabe 2000, p. 884; Puttfarken 1999, p. 319). It has also been argued that average is derived from 'aversio', as denoting a means of escape from danger, from 'avere', the having of property (Lowndes 1922, pp. 11-12). See also Hopkins and Molengraaff for overviews of different theories regarding the word's origin (Hopkins 1859, pp. 1-3 respectively Molengraaff 1880, pp. 14-16). Average has also been said to have its origin in 'averare', i.e. to carry (Smith Homans 1859, pp. 79-80, where reference is made to Cowell's Interpreter of 1607). As the 18th century French author Emérigon indicated, the true etymology may never be discovered (Emérigon 1783, p. 601; in the same sense Holtius 1861, p. 263). It has been suggested that the words 'general' and/or 'gross' relate(s) to the fact that the contribution falls upon the gross amount of ship, cargo and freight (Kent 1828, p. 185). Alternatively, it has been argued that the word general or gross is/was used merely to distinguish general average from 'particular' or 'common average'. Whereas general average was borne in principle by all or certain parties to the maritime adventure, particular average fell exclusively upon one of the parties; either the master and shipowners or upon the merchants whose goods had become damaged. (Dowdall 1895, pp. 33-34). Abbott deems general average '*a very incorrect expression*.' (Abbott 1802, p. 273). The linguistic origin of the term general average is also discussed in some detail by Thoo (2003, pp. 7-8).
2. The Dutch Civil Code still applies the word 'avarij-grosse'. The correct spelling appears to have changed to 'averij-grosse', since the Code's introduction in 1991. The spelling 'averij-grosse' is also used by Dutch Courts in recent case law.
3. § 588 German Commercial Code.
4. S. L5133(3) French Code of transport.
5. The draftsman of the Dutch Civil Code on Transport, Schadee, used to describe general average as 'Geheimwissenschaft', in English 'secret science'.
6. General average has been described as '*a peculiar kind of communism to which seafaring men are brought in extremities*'. (Lowndes 1888/1922, p. 1.)
7. Schadee 1952, p. 197.

respectively suffered.[8] This cost sharing mechanism creates the possibility that at the time of the danger, the solution is chosen which is most beneficial for all parties, regardless of the answer to the question who will ultimately have to bear the costs thereof.[9] As such it prevents conflicts of interest as it provides for time and cost efficient solutions.[10] General average can be said to have been the solution for the 'prisoners' dilemma' of the maritime parties long before anyone had ever heard of the dilemma or it had academically been proven.[11] In theory it provides the financial incentive to make the parties of the common maritime adventure cooperate in order to keep the overall damage to a minimum and to complete the maritime voyage.[12] It is therefore also regarded as risk spreading or burden sharing mechanism.[13] One could even say that it is a kind of mutual insurance for the parties interested in the maritime adventure, which already existed before the insurance concept as we know it today was introduced.[14] In spite of the development of marine insurance products, general average has remained.[15] The concept cannot be brought under the insurance heading either.[16] Where insurance provides for an external risk bearer, general average keeps the division within the inner circle of the parties to the maritime adventure.[17] It is also to be distinguished from salvage. Where salvage in principle requires an external salvor who gets a substantial remuneration if successful,[18] general average measures are taken by or on behalf of one of the party's involved in the adventure and only allow for a partial compensation of costs incurred.[19] The party who took the measures does not receive any remuneration for his efforts, at least not within the general average framework.

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8. The distinction was made in the American case *The Star of Hope*, 76 U.S. 203 (1869 WL 11539).
9. General average was also regarded as a threshold for the master to opt for cargo sacrifice too quickly. The fact that the shipowners would have to contribute to a cargo sacrifice would make him think twice before throwing cargo over board (Selmer 1958, p. 209. Also Sulewska 2014, p. 6).
10. Smeele 2005, p. 20; IUMI Response 2013, pp. 3-4.
11. The prisoner's dilemma is the theory that two individuals would both be better off if they would cooperate, but that the individuals nevertheless rationally chose not to cooperate. The theory is proven with the example of two prisoners who have the option to betray each other. See inter alia Axelrod 1984, *The Evolution of Cooperation*.
12. IUMI Response 2013; Hare 1999, p. 769. Different: Billah who argues that general average may reduce a shipowner's liability and hence prevent future negligence. (Billah 2014, p. 2, f.nt. 7). It is doubtful that this is correct because shipowners themselves contribute to general average (if they are insured this may lead to an increase of premium) and under many systems cannot successfully claim contributions from other parties if the incident necessitating the measures was the result of their actionable fault (see para. 4.7 below).
13. Tetley 2003, p. 420; Loyens 2011, p. 649; Schoenbaum 2011, p. 254.
14. Anderson 2009, p, 186, 205-209; Billah 2014, p. 2; Cole 1924, p. 9; Selmer, p. 110, 190; Lopuski 2008, p. 336.
15. What has changed is that in case of historical apportionment, there was a division of risks, losses and costs amongst the parties to the common maritime adventure's own interest, whereas nowadays losses and costs in most cases are settled by the parties' underwriters. See also para. 4.5.2.6 below.
16. Arnould 2013, p. 1306; Hare 1999, p. 770; Puttfarken 1997, p. 322; Van Empel 1938, p. 6 and 149; Njokiktjien 1927. Lowndes even indicates that '*general average has nothing to do with insurance*'. (Lowndes 1844, p. 6).
17. The respective contributions can be and often are insured though. However, before one considers insurance relationships, the internal contribution obligations between the parties to the maritime adventure have to be established. Also Arnould 2013, pp. 1306-1307.
18. This would only be different where the salving vessel is owned by one of the parties interested in the maritime adventure that is saved.
19. It is commonly accepted that salvage can be apportioned in general average. However, the criteria in which such apportionment is to take place vary per regulation. See, for example, the newly introduced Rule VI YAR 2016, which differs both from the YAR 1994 and the YAR 2004.

The classic example of general average is the jettison of cargo.[20] When in earlier times cargo was thrown overboard to lighten the vessel, the parties interested in the vessel and other property carried on board had to pay a compensation to the party whose cargo had been sacrificed.[21] The rule that if cargo was jettisoned to lighten the vessel '*what has been lost for the benefit of all must be made up by the contribution of all*' was codified in the Digest of the Corpus Iuris Civilis, published in 534 A.D.[22] This rule has become known as the 'Lex Rhodia de Iactu',[23] due to the rule's reported Rhodian origin.[24] It is not clear whether its origin was Rhodian indeed and/or possibly even Phoenician or Babylonian.[25] It is commonly accepted that in ancient times the whole sector of maritime law was almost exclusively ruled by the customary law of the sea. It is likely that the law of the sea used in the Mediterranean was a mixture of legal systems. These rules had probably been existing for centuries and would have developed gradually around the Eastern Mediterranean coast. It is likely that at least some of these rules date back to the period of Phoenician supremacy, i.e. between 1200-800 B.C.[26] Possibly (some of) the rules were already applied at the time of the Babylonians, i.e. around 2000 B.C., or even before.[27] It is uncertain whether the contribution principle underlying the currently applied general average concept was already applied in any of these early periods. Opinions differ regarding the century in which the principle that apportionment of losses

20. Jettison of cargo appears to have been a commonly applied measure in time of danger. Reference is made, for example, to the biblical books Jonah I:5 and Acts 27:18,19.
21. Jettison of cargo gave rise to a distribution of losses in practically all historic maritime regulations. See inter alia Digest 14.2.1; Art. VIII Roles d'Oléron; Art. 20 and 38 Wisby Sea Laws; s. 4, Chapter on Shipwreck, jettison and average Philip II's Ordinance of 1563; s. 1, Du Jet, Ordinance of Marine 1681; s. 84 Rotterdam Ordinance 1721; s. 699 under 2 Dutch Commercial Code of 1838.
22. Where reference is made to Roman law below, the Digest of the Corpus Iuris Civilis is referred to. The term 'Roman law' may be somewhat misleading as the Corpus Iuris Civilis was only published in 534 A.D., whereas Rome, according to tradition, would have been founded in 753 B.C. See Lobingier 1935, p. 10.
23. Digest 14.2.2.1: '*Lege Rhodia cavetur, ut, si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur, quod pro omnibus impensum est*' (It is provided by the Rhodian Law that where merchandise is thrown overboard for the purpose of lightening a ship, what has been lost for the benefit of all must be made up by the contribution of all – Translation by Scott, 1932).
24. The prevailing opinion of legal writers during the centuries seems to have been that Roman maritime law, including the Lex Rhodia de Iactu, derives at least to a certain extent from and has been based on the maritime laws of Rhodes. These laws are assumed to include provisions of various predating systems. It is assumed that at Rhodes, which was a centre of international banking and trading and was famous for its schools of rhetoric, the Romans became acquainted with these customary rules. Lowndes (with reference to Cicero) 1888, p. 2; Kreller 1921, p. 269, 346; Philipson 1911, p. 379; Lobingier 1935. The Rhodian law has to be distinguished from the Rhodian Sea Laws. See, inter alia, Benedict 1905; Lobingier 1935; Delebecque 2014, p. 713; Kruit 2015.
25. See also Kruit 2015, p. 193.
26. Scott 2006 (1932), p. 271; Gofas 1994, p. 30; Reddie 1841, p. 36; Lobingier 1929; Gormley 1961, p. 321; Mukerjee, p. 4.
27. Lobingier 1929; Bogojevic 2005, p. 21; Gold 1981, p. 4; Delebecque 2014, p. 713.

suffered to save property from a common peril, was first applied in practice. The 10th,[28] 9th,[29] 8th,[30] 7th,[31] 4th[32] and 3th[33] century B.C. have all been suggested.[34]

Nowadays, jettison of cargo has become a more exceptional occurrence.[35] As vividly described by IUMI in 1994: '(…) *the traditional image of general average, with a crew beleaguered by the elements and desperately jettisoning cargo to prevent their ship from sinking, is a thing of the past*'.[36] The main situation of jettison currently still applied is when there are firefighting operations on board vessels. Containers are then occasionally set over board. However, these days, the concept of general average is generally used when a maritime casualty has occurred and measures are taken to minimise the total overall damage, which results in expenses being incurred.[37] Fires on board are extinguished, 'dead' vessels are towed to ports of refuge where motor problems are solved and stranded vessels are refloated.[38] All these measures may be taken for the benefit of the vessel and the property involved in the maritime adventure on board the vessel. Costs incurred with salvage activities may be incurred for the common interest.[39] If they were not be made, the vessel and everybody and everything on board thereof might be lost or at least suffer further damage. The same applies when an explosion has caused a fire on board and cargo is thrown

28. Gormley 1961, p. 320; Parsons 1868, p. 202. Goff & Jones 1998, p. 427.
29. Stevens 1817, p. 4; Lowndes 1844, p. 4. According to Reddie, several writers (Selden, Fournier and De Pastoret) would all have defended that the Lex Rhodia de Iactu dated back from the 9th century B.C. Reddie adds that they were '*apparently influenced by the desire of showing the high antiquity of the object of their admiration, rather than guided by historical evidence.*' (Reddie 1841, p. 63).
30. Tetley 1994, p. 107.
31. Rudolf 1926, p. 1; Schadee 1949, p. 10.
32. Tsimplis & Shaw in: Baatz a.o. 2014, p. 246. It seems to follow from the speech of Demosthenes against Lacritum that the laws of Athens already provided for a principle of contribution for jettisoned cargo and payment of ransom in the 4th century B.C. (Van der Mersch 1868, pp. 1-2; Holtius 1861, p. 258. Sanborn 1930, p. 6). However, Van Empel submits that the speech concerned a maritime loan. The fact that jettison is mentioned in the speech would not have to imply that a contribution had to be made. In his view, the fact that there are no known Greek cases regarding a general average contribution means that the Greek laws did not recognise or would have had a general average principle (Van Empel 1938, p. 105).
33. Sanborn 1930, p. 5; Hare 1999, p. 770.
34. Buglass (1973, p. 115) even claims that '*general average is as old as the oldest comercial sea voyages.*'
35. This is also recognised inter alia by Tsimplis & Shaw in: Baatz a.o. 2014, p. 246; Schoenbaum 2011, p. 254 and Puttfarken 1997, p. 320.
36. IUMI Report 1994, p. 12.
37. That expenses in practice more often resulted in general average than jettison was already the situation in 1866. Morrison 1866, p. 39: '*Although in most works on average much attention has been devoted to the subject of jettison, and sacrifices generally, as being the most ancient sources of contribution, undoubtedly the more important act is comprehended in the term expenses. It is by far the most common, considering the many general average acts which take place.*' In 1994, the IUMI General Average Working Party distributed the conclusions of its study on general average's impact on marine insurance. Over thousand general average incidents were considered. The conclusion was that the main causes of general average, both by number of claims and by value of claims were grounding, collision, engine failure or fire on board. Even though the study is over 20 years old, it still gives an interesting insight. IUMI Report 1994, pp. 6-9.
38. For examples of contemporary general average incidents and disbursements, see also Enge & Schwampe 2012, pp. 74-75.
39. Salvage costs are in particular incurred for the benefit of all parties to the maritime adventure when the parties interested in the salved property do not each pay the salvage remuneration due in respect of their property, but the full amount of salvage remuneration is settled by the shipowners on behalf of all saved properties instead. This is, for example, the situation under Dutch law (s. 8:563(3) Dutch Civil Code).

overboard or is intentionally damaged in the fire extinguishing activities.[40] If no action is taken after these casualties, the vessel, including her cargoes, may well perish or may in any event not arrive at the place of destination. It is commonly accepted that in such circumstances a division of damage intentionally incurred for the benefit of all has to take place. Costs incurred and cargo sacrifices suffered are shared by the maritime parties by the mechanism of general average.

2.2 Development of the general average concept

2.2.1 From jettison to more general rules

Even though jettison is no longer a common occurrence, both from a more theoretical and from an historical point of view, its value is difficult to exaggerate. In spite of the time elapsed since the codification of the Lex Rhodia de Iactu in 534 A.D., it is generally acknowledged that the general average concept is founded on the Digest's Lex Rhodia de Iactu.[41] From Roman times onwards, in principle all important maritime regulations contain provisions which provide in which specific circumstances a distribution of specific losses and costs has to take place. The development of the principle to the currently applied general average concept, however, is not linear. Practically all regulations provided that in situations where cargo was jettisoned[42] or masts or cables were cut for the common benefit,[43] the loss was to be shared by the parties who had benefitted thereof.[44] In addition, some regulations also stipulated that a contribution was to be made in other specifically indicated situations. Examples of such specific 'general average situations' are ransoms paid to pirates,[45] costs resulting from crew's injuries sustained during

40. Holds in which cargo is carried may be flooded, resulting in damage to the cargo carried therein or contents of containers stowed in the vicinity of burning containers may be damaged by water. As examples of such casualties where fires have broken out on board and general average measures were taken can be mentioned the mv. 'Hyundai Fortune' in March 2006, the mv. 'MSC Napoli' in January 2007 and the mv. 'MSC Flaminia' in July 2012.
41. Worst submits that the Lex Rhodia de Iactu would be the origin of general average for all sea going nations. (Worst 1929, p. 3). Flanders even states that the Lex Rhodia de Iactu would be '*the germ of the whole doctrine of average.*' (Flanders, 1952, p. 232). See also Anderson 2009, p. 207; the English case law: Lord Blackburn in *Anderson v. Ocean S.S. Co* (1884) 10 App. Cas. 107 at. p. 114; Vaughan Williams L.J. in *Milburn v. Jamaica Fruit Importing Co.* [1900] 2 Q.B. 540, at 550; Sanborn, 1930, p. 5 and recently Sir Rix in *The Lehmann Timber* (*Metal Market OOO* v. *Vitorio Shipping*) [2013] 2 Lloyd's Rep. 541, para. 130. Also the US case: *Cia Atlantica Pacifica, S.A. v. Humble Oil & Refining Co.* 274 F.Supp 884 (1967).
42. Digest 14.2.1; Art. VIII Roles d'Oléron; Art. 20 and 38 Wisby Sea Laws; s. 4, Chapter on Shipwreck, jettison and average Philip II's Ordinance of 1563; s. 1, Du Jet, Ordinance of Marine 1681; s. 84 Rotterdam Ordinance 1721; s. 699 under 2 Dutch Commercial Code of 1838.
43. Digest 14.2.5. 1; Art. IX Roles d'Oléron; Art. 12, 21 and 39 Wisby Sea Laws; s. 4, Chapter on Shipwreck, jettison and average, Philip II's Ordinance of 1563; s. 85 Rotterdam Ordinance 1721; s. 1 and 2, Du Jet, Ordinance of Marine 1681; s. 699 under 3 Dutch Commercial Code of 1838.
44. For a more extensive discussion of the historic general average regulations, see Kruit 2015.
45. Digest 14.2.2.3; Rhodian Sea Laws (Ashburner 1909, p. 272); s. 6, Des Avaries, Ordinance of Marine 1681; s. 100 Rotterdam Ordinance 1721; s. 699 under 1 Dutch Commercial Code of 1838. Park 1787, p. 140. In piracy cases, traditionally only ransoms paid to pirates and not to enemies of the State could be apportioned in general average, as the latter were prohibited by statute and thus illegal (Abbott 1802, p. 279). At the beginning of the 21st century the discussion whether ransoms paid to pirates could be apportioned in general average received much attention as a result of the increased piracy off the coast of Somalia. Neither the YAR, nor most national regimes do specifically answer the question whether and if so, which, expenditures incurred as a result of a hijack can be brought in general average. Although the question has not yet been answered definitively in the case law, it seems to have been accepted that some of the costs related to releasing a vessel from a hijack,

fights with pirates and foreign vessels,[46] jettison of the vessel's equipment,[47] damage caused by intentional stranding,[48] costs incurred to lighten a vessel after she was stranded[49] or in order to get her into port,[50] and (wetting) damage as a result of a jettison.[51]

The specifics of the various systems in which the distribution principle was applied, differed considerably.[52] None of the historic laws provided for a general right of apportionment in all the situations where certain requirements had been met. Nevertheless, some basic prerequisites for a division of damage can be deducted from the events which gave rise to a division of losses and costs as listed in the historic regulations.[53] There had to be a loss of property that was intentionally incurred in order to save other property from danger[54] and was thus made in the interest of common safety.[55] These requirements can still be found in most contemporary general average regulations. In addition, the measures taken in some cases were required to have been successful in order to give rise to a contribution.[56] Many

like ransoms paid to pirates, can in principle be recovered in general average. English law: Lowndes & Rudolf 2013, pp. 108-110; Hazelwood/Semark 2010, p. 177; Arnould 2013, pp. 1356-1357. *Mitsui & Co Ltd & others v. Beteiligungsgesellschaft LPG Tankerflotte MBH & Co KG (The Longchamp)* [2014] EWHC 3445 (Comm). For Dutch law see The Hague Court of Appeal 1 December 2009, *S&S* 2010, 62; ECLI:NL:GHSGR: 2009:BL2811 ('Lehmann Timber').

46. S. 28 Charles V's Ordinance of 1551; s. 2, Chapter on Shipwreck, jettison and average, Phillip II's Ordinance of 1563; s. 11, Des Loyens des Matelots, Ordinance of Marine 1681, s. 99 Rotterdam Ordinance 1721; s. 699 under 7 Dutch Commercial Code of 1838.
47. Digest 14.2.3; Art. IX Roles d'Oléron; s. 15, Du Jet, Ordinance of Marine 1681; s. 90 Rotterdam Ordinance 1721; s. 699 under 4 Dutch Commercial Code of 1838.
48. S. 4, Chapter on Shipwreck, jettison and average, Philip II's Ordinance of 1563; s. 699 under 15 Dutch Commercial Code of 1838. Such damage was excluded from general average under the Practical Rules applied in England in the 19th century. (Baily 1856, p. 41.)
49. Art. 59 of the Wisby Sea Laws; s. 10, Chapter on Shipwreck, jettison and average, Philip II's Ordinance of 1563; s. 19 and 20; Du Jet, Ordinance of Marine 1681; s. 699 under 16 Dutch Commercial Code of 1838.
50. Expenses incurred in the port of refuge did not automatically give a right to a contribution. Under Roman law, these were excluded from apportionment. (Digest 14.2.6.)
51. Digest 14.2.4.2; s. 85 Rotterdam Ordinance of 1721; s. 699 under 5 Dutch Commercial Code of 1838; Park 1787, p. 141.
52. Also Kruit 2015, p. 200.
53. Also Kruit 2015, p. 200-201. These requirements are still applied in some of the contemporary general average regulations. See para. 4.2 below.
54. The required degree of danger always had and still has an element of uncertainty as it cannot be defined exactly (Benecke 1824, p. 171). It depends on the facts of the specific matter, the general average loss or expense involved and the applicable national law, which degree of danger is required (Selmer 1958, pp. 69-71; Lowndes & Rudolf 2013, pp. 86-101; Hudson & Harvey 2008, pp. 32-33). Molengraaff lists the Dutch case law on the required degree of danger available in 1912 and concludes that different decisions have been taken (Molengraaff 1912, pp. 546-547). It follows from more recent case law that the courts consider all facts of the matter in order to determine whether danger was present. See, for example, the decision of the Court of Appeal of Amsterdam of 5 February 2004, *S&S* 2004, 85, ECLI:NL:GHAMS:2004:AQ7100 ('Federal Schelde'/'Ararat'). When Rule A YAR was drafted in 1924, the required degree of danger, as well as the question whether danger had to be imminent were deliberately left open (Rudolf 1926, pp. 42-43).
55. Verwer 1700, p. 116; Molengraaff 1912, p. 546; Ashburner 1909, pp. 253-256; Kreller 1921, p. 288; Beawes 1754, p. 148; Park 1809, p. 173.
56. Digest 14.2.4.1 and 14.2.5. Ashburner 1909, p. 253; Reddie 1841, p. 99; Van der Linden 1806, p. 499. Pothier 1821, p. 61; Park 1787, p. 139; Weskett 1781, p. 252; Holtius 1861, p. 328. S. 15, Du Jet, Ordinance of Marine of 1681 explicitly stated the requirement of success. According to Selmer, success was not required for a loss or disbursement to qualify as general average (Selmer 1952, pp. 24-25). Pursuant to Benecke, a requirement of success was not '*compatible with the nature of the subject*'. It would be difficult to determine whether preservation was the result of a particular measure, whereas costs incurred in an attempt should not be borne by one of the parties (Benecke

regulations also set additional requirements that had to be met in order for measures to give rise to a contribution. Some regulations, for example, required the merchants' or the crew's approval of actions taken before the costs could subsequently be apportioned;[57] others provided that the heaviest goods were to be thrown overboard first.[58]

As the distribution principle underlying the specifically indicated cases lent itself to generalisation, the Gloss of Accursius (approx. 1230 A.D.) extended the principle by construing it in a general manner.[59] It provided that: '*For it is perfectly equitable that the damage be borne jointly by those who, thanks to the fact that the property of others has been lost, have found themselves in a situation whereby their own goods have been saved*.'[60] This general rule was not included in the shipping regulations that were widely applied at the time, i.e. the Roles d'Oléron or in the Wisby Sea Laws.[61] The all-encompassing term 'general average' was codified only in the Ordinance ('Placcaat') of emperor Charles V on shipping in 1551.[62] Possibly, this is not only the first definition of general average in the Netherlands, but also the first of (Northern) Europe and maybe worldwide, as Lowndes and Selmer indicate that the first express defi-

1824, p. 172). In the last century, success did not seem required any longer (Dowdall 1895, pp. 36-37). See on the requirement of success also Seeliger 1894.

57. The requirement that the merchants' approval was to be obtained not only served justice, but also prevented evidentiary problems. Under most regulations the vessel did not have to contribute for her full value, whereas the cargo value was taken into account in full. As merchants accompanied their cargoes on board, such approval could easily be obtained (Lowndes 1844, p. 5). In respect of damage to a vessel the Digest provide that in order to be made good, the damage must have occurred with the consent of the passengers or on account of their fear (Digest 14.2.2.1). The requirement of approval therefore seems limited to the situation where damage was caused to the vessel and does not seem required in other situations, like jettison of cargo. The Rhodian Sea Law (Ashburner 1909, p. 258), Roles d'Oléron (Arts. VIII and IX), Wisby Sea Laws (Arts. 20, 21, 38, 39), Philip II's Ordinance of 1563 (s. 4, Chapter on Shipwreck, jettison and average), the Rotterdam Ordinance of 1721 (s. 96 *cf*. 144, 145) and the Dutch Commercial Code of 1838 (s. 699 under 23 Dutch Commercial Code of 1838) all obliged the master to consult the merchants and/or crew before actions were taken that would give rise to a contribution. Regarding the specific general average situations set out in s. 699 under 1-22 Dutch Commercial Code of 1838 it was not explicitly provided that the master had to consult the crew and or cargo interested parties. Nevertheless, consultation was probably required after all, as s. 367 Dutch Commercial Code of 1838 required the master in all important matters to consult the shipowners, shippers or their representatives, if present on board, and in all situations consultation of the officers and the main crew members had to take place (Molster 1856, pp. 6, 128-129; also Loder, a judge of the Dutch Supreme Court cited in Rudolf 1926, p. 254). In case approval had not been obtained, some regulations required the master and/or crew to swear that the jettison had been necessary (Art. VIII of the Roles d'Oléron; Art. 38 Wisby Sea Laws). According to Van der Linden, this was also required under Dutch law at the beginning of the 19th century (Van der Linden 1806, pp. 498-499). Pursuant to 19th century English law, approval does not appear to have been strictly required. It was held in Birkley v. Presgrave [1801] 1 East 220, 102 ER 86 that '*The rule of consulting the crew upon expediency of such sacrifices is rather founded in prudence in order to avoid dispute than in necessity: it may often happen that the danger is too urgent to submit of any such deliberation*.' A consultation requirement is still included in s. 452 of the Maltese Commercial Code in respect of jettison.

58. S. 5, Chapter on Shipwreck, jettison and average, Philip II's Ordinance of 1563; s. 3, Du Jet, Ordinance of Marine of 1681. This requirement can still be found in s. 453 of the Maltese Commercial Code.

59. Zimmermann 1992, pp. 409-410.

60. Brandsma 2006, p. 10; Lokin 2003, p. 260.

61. Both sets of rules merely provided for specific situations in which apportionment was to take place.

62. Reportedly Charles V's Ordinance of 1551 was issued upon request of his 'Dutch citizens' and with assistance of trade and maritime experts (Le Clercq 1757, p. 189; Van Glins 1695, pp. 6-7). Charles V's Ordinance probably was based on the Judgments of Damme and the Ordinance of Amsterdam (i.e. two of the three regulations that formed the Wisby Sea Laws), with additions of local laws (Verwer 1711, p. 62. Goudsmit 1882, p. 9; Kruit 2015, p. 198).

nition of general average is to be found in the 'Guidon de la Mer', published between 1556 and 1584, so after Charles V's Ordinance.[63] It was provided in Charles V's Ordinance that in as far as costs were incurred or losses were suffered for the common benefit of vessel and cargo, all these costs and losses would be apportioned in general average between vessel and cargo, in accordance with ancient custom of the sea.[64] As also pointed out by Verwer, the term 'general average' is used in Charles V's Ordinance as if it was commonly applied already.[65] However, it was not set out in any of the most influential laws at the time, like the Wisby Sea Laws or the Consolato del mare. The general rule was not immediately commonly accepted in legal regulations either. Charles V's 1551 Ordinance on shipping was succeeded 12 years later by the 1563 Ordinance of his son Philip II. The broad general average rule introduced in 1551 was not taken over.[66] In fact, it took approximately 130 years before it was recodified in a continental national shipping regulation.[67] In England, the concept of general average was not applied in a more general manner until 1799, when Mr Justice Stowell gave the first definition.[68] Two years later, another definition was given by Mr Justice Lawrence, which, even though it was qualified in subsequent cases,[69] appears to be the foundation of the English law of general average.[70] He stated that general average is '*all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo*'.[71] A definition in similar wording was later codified in the English Marine Insurance Act of 1906.[72]

63. Lowndes 1888/1922, p. 15; Selmer 1958, p. 47; Lowndes & Rudolf 2013, p. 7.
64. S. 41 Charles V's Ordinance of 1551. In Dutch: *'soo verrre eenige provisie gedaen, ofte oock eenige schade geleden worden, tot gemeyne beneficie van de schepe ende goeden doende de solemniteyt, vermaningen ende andere diligentien van oudts geploghen: sal al het selve den beschadighden ende geinteresseerden goet gedaen worden, in groote avarije gedeeligh onder schip ende goet na ouder gewoonte van der Zee'* (Verwer 1711, p. 66; Olivier 1839, p. 209; Le Clercq 1757, p. 206; Kroock 1664, p. 37). Also Kruit 2015, p. 199.
65. Verwer 1711, p. 217.
66. The term 'general average' was used to qualify specific costs. It was provided, for example, that injured crew members were to be paid 'as general average' (s. 2, Chapter on Shipwreck, jettison and average, Philip II's Ordinance 1563).
67. S. 2, 3, Des Avaries, Ordinance of Marine of 1681: '*Every extraordinary expense which is made for the ship and merchandise conjointly or separately, and every damage that shall occur to them from their loading and departure until their return and discharge, shall be reputed average. Extraordinary expenses for the ship alone, or for the merchandise alone, and damage which occurs to them in particular, are simple and particular average; and extraordinary expenses incurred, and damage suffered for the common good and safety of the merchandise and the vessel are gross and common average. Simple averages are borne and paid by the thing which shall have suffered the damage or caused the expense, and the gross and common shall fall as well upon the vessel as upon the merchandise, and shall be equalized over the whole at the shilling in the pound*.' Translation by Lowndes (Lowndes 1888, p. 16).
68. *The Copenhagen* (1799), 1 Chr. Rob. 289: '*General average is for a loss incurred, towards which the whole concern is bound to contribute pro rata, because it was undergone for the general benefit and preservation of the whole*'. According to Lowndes, this definition was taken over from the Ordinance of Marine of 1681, albeit with slight improvements in form (Lowndes 1888, p. 22).
69. Inter alia in *The Leitrim* [1902] P. 256, 266, where it was held that only losses as a result of accidental circumstances could qualify as general average.
70. Lowndes 1888, p. 18; Goff & Jones 1998, p. 428.
71. *Birkley v. Presgrave* (1801), I East 220 at p. 228. The definition has been adopted inter alia by Lord Mansfield in *Covington v. Roberts* (1806) 2 Bos & P. N.R. 378.
72. S. 66 MIA 1906: '*(1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice. (2) 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*.' See also para. 4.2 below.

For a long time, these more general rules and definitions of the concept referred to as general average were based on and interpreted in light of the Lex Rhodia de Iactu's contribution principle. In the absence of commonly accepted general rules, this principle was taken as a guideline in considering other causes in legal literature and in case law;[73] not only in the maritime sphere, but even in 'dry' land law cases.[74] For example, in 1611, the Court of Frisia considered the principle in a case in which damages were claimed from the local government by a man whose house had been destroyed by Dutch soldiers in order to prevent the Spaniards from using the house as an operating base for an attack on the city.[75] The Court, applying the Lex Rhodia de Iactu in an analogous manner, ordered that the man was to be compensated for the damage he had suffered.[76] The Court argued that if a private person suffered damage for the benefit of the common interest, this damage should be paid by the parties that had benefitted therefrom. Reportedly, the Court determined comparable matters in a similar way.[77] The Lex Rhodia de Iactu may thus be considered as the ancestor both of the current concept of general average and of the current concept of the 'egalité devant les charges publiques' (in Dutch: 'rechtmatige overheidsdaad').[78] Such extension of the general average principle to other areas of the law was not an exclusively Dutch phenomenon.[79] An extended application was, for example, explicitly set out in the 18th century's Austrian Codex Theresianus[80] and was given in the English case law, where an analogy was drawn with general average in respect of a surety.[81] Moreover, in the 20th century the general average principle was also applied in the field of air law[82] and, reportedly,

73. English courts even regarded jettison as the ultimate general average cause. It was held in *Dobson v. Wilson* (1813), 3 Campb. 480 that: '*A jettison to lighten the ship is not the only foundation of general average: but it must arise from that, or something analogous*.' See also Lord Blackburn in *Anderson Tritton & Co. v. The Ocean Steamship Company* (1884) 10 App. Cas. 107: '*General average (…) is founded on the Rhodian law, which however in terms did not extend further than to cases of jettison, but its principle applies and it has been applied to all other cases of voluntarily sacrifice for the benefit of all, that is, if properly made*.' Stevens and Arnould also submitted that the foundation of all general average claims lies in jettison (Stevens 1817, p. 32; Arnould 1848, p. 877).
74. Zimmermann 1992, pp. 409-410.
75. The decision is discussed by Hartog 1971, p. 3, 68-69; De Jongh 2013, p. 393; Brandsma 2006, p. 9; Lokin 2003, pp. 254-263. Frisia was, and still is, a Dutch province.
76. Reportedly a similar decision was given by the *Reichskammergericht*, the Court of the Holy Roman Empire ('Heiliges Römisches Reich'). Lokin 2003, p. 261; Brandsma 2006, p. 10.
77. Lokin 2003, p. 268. However, no compensation was awarded in a case before the Frisian Court where an orchard was destroyed as a security measure. In its decision of 20 December 1623, the Court held that the construction of a house, or orchard for that matter, too close to the city was prohibited. As the owner had breached this rule, the damage was due to his own fault. For that reason, he was not entitled to receive a compensation. (Brandsma 2006, p. 10. Lokin 2003, pp. 265-266.) See on the influence of fault para. 4.7 below.
78. De Jongh 2013.
79. In England, it was held that the general average principle of apportionment of losses and costs was only applied to maritime matters, more specifically damage on ships and not in their transit in a railway (*Crooks v. Allan* (1879) 5 Q.B.D. 38). Pursuant to the French Supreme Court, general average could also concern maritime transportation only (French Supreme Court 4 March 1863, *DP* 1863.1.399). In the Netherlands, the application of the general average principle was restricted in the later 17th century and following centuries and extended in the 19th century in respect of inland water ways, See also para. 2.2.4 below.
80. S. 67 Austrian Codex Theresianus. Wesener 1975, p. 46. The Codex Theresianus was in place in Austria from 1766 until 1787.
81. *Deering v. The Earl of Winchelsea* (1787) 2 Bos. & Pul. 270. Also *Stirling v. Forrester* (1821) 3 Bl. 575.
82. S. 11 Italian Code of Navigation of 1948 stipulates that the applicable law to general average is the law of the ship or plane (Manca 1958, p. 10). In the Netherlands, it was also suggested that general average was included in the air law regulation of the Dutch Commercial Code, more specifically

even by tribes of the Sahara to distribute losses suffered by caravans on their desert crossings.[83]

The codification and establishment of broad general average definitions was not the end of the discussion, but in some ways merely the beginning. Even after general average definitions were introduced in national and international sets of rules, provisions regarding specific general average losses and costs were not removed, nor did they lose their relevance. In fact, the listed events were considered more important than the general rule. The definitions only seem to have served as a 'catch-all provision' for 'new' general average costs that could not be brought under one of the specifically mentioned situations.[84] Moreover, since the Roles d'Oléron, the Wisby Sea Laws and the Consolato del Mare, there had not been a more or less universally applied shipping regulation. From the 16th and 17th century onwards, nationalism emerged and thereby provisions of national law.[85] The nation states each provided for their own regulations, also in the field of general average. By the 19th century, all maritime legal systems contained some rules for general average, which differed substantially from each other.[86] General rules extended the concept's application. The manner in which the rules were to be applied was heavily discussed, in particular in the 19th century. Many books were published which were completely dedicated to general average or dedicated an important place,[87] and contents of new books on general average were discussed in depth.[88] In various general newspapers, cases were analysed[89] and letters from people with an opinion

in s. 573 Dutch Commercial Code of 1838. (Travaux Préparatoires 1955-1956, 4134. See also Schadee 1952 and 1955; Van Empel 1938, pp. 242-245; Knauth 1947 CLR, p. 1203, f.nt. 6; and Diederiks-Verschoor 2006, p. 283.)

83. Scott 2006 (1932), p. 271.

84. This clearly follows, for example, from the Dutch Commercial Code of 1838. See also the Ordinance of Marine of 1681, the Ordinance of Rotterdam of 1721, the French Code of Commerce of 1807, and s. 444 Maltese Commercial Code. Also the former German Maritime Code (§ 706 German Commercial Code (old)). The (new) German Maritime Code merely gives a general definition in § 588 German Commercial Code. Interestingly, the specific examples have not been left out of the statutory regulation with reference to the YAR (like in the Netherlands), but because this would be in line with the code's aim to only provide general principles (Gesetzesbegründung 2012, p. 125). The system of specific examples which are extended with a general rule is maintained to the present day in the York-Antwerp Rules. Rule A YAR gives a general definition of general average, whereas Rules I-XIV list specific general average costs and losses. See also para. 2.2.2 below.

85. Paulsen 1983, pp. 1072-1073.

86. Jitta 1882, p. 64. This development of varying national legislation in the 18th and 19th century appears to have been a more general development in the maritime field (Yiannopoulos 1965, p. 370).

87. In particular in the 19th and beginning of the 20th century, many books were published on general average. After the success of the YAR 1890 and 1924, the interest in general average seems to have disappeared or at least considerably diminished.

88. See, for example, the discussion of Molengraaff's dissertation (Molengraaff 1880) by Jitta in 1882 (Jitta 1882).

89. See inter alia the discussion of the late settlement of general average regarding the 'Sorata' as discussed in the Australian newspaper *The Argus* on Saturday 12 August 1882 (http://trove.nla.gov.au/ndp/del/article/11549672). As another example, the general average regarding the 'Banca' can be mentioned. In *The Straits Times* (Singapore) of 11 July 1913, the disputes regarding the collection of the general average security, and in particular the percentage, after a fire on board the 'Banca' were set out in some detail (http://newspapers.nl.sg/Digitised/Article/straitstimes-19130711.2.3.aspx). Reference is also made to the recommendation to passengers to insure property of any value after the fire aboard the ss. 'Mongolia', as given in the New Zealand newspaper *Auckland Star* in 1910 (http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=AS19101220.2.20.7).

on certain aspects of general average were published.[90] The general average definitions, situations in which a contribution was due, the required degree of danger, the provisions on contributing interests, contributory values and settlement of claims were not uniformly accepted or applied in the same fashion.[91] There was no uniformity nationally, as customs varied per port.[92] International uniformity was even less present.[93] The amounts due in general average could differ depending on the place where the adjustment was drawn up.[94] For example, and as illustration, reference is made to 'Abbot on Shipping', where it is indicated in respect of general average that '*The principle of the rule has been adopted by all commercial nations, but there is no principle of maritime law that has been followed by more variations in practice*'.[95]

90. As examples can be mentioned the discussions in the *Melbourne Daily Telegraph* and the Melbourne *Argus* in 1874 on general average security (http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a-=d&d=WI18740622.2.24; http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=WI1874063-0.2.5.1), as well as the discussion in the London Times in 1877 regarding the question of whether or not general average should be abolished (inter alia referred to by Gooding 2004, p. 1). The abolishment of general average was also mentioned in the *Utrechts Nieuwsblad* of 10 August 1929 and 16 February 1937 (www.hetutrechtsarchief.nl/collectie/kranten/un/1929/0810 respectively www.hetutrechtsarchief.nl/collectie/kranten/un/1937/0216).

91. Weskett 1781, p. 255; Baldasseroni 1808, p. 144; Molengraaff 1880, p. 17, 115-117. As indicated by Park: '*In no respect whatever do the ordinances of foreign states differ so much as in the matter of settling the contribution of the ship and freight. In some places, the ship contributes for the whole of her value and freight; in others, for the half of her value and freight; and again, in others both ship and cargo are to contribute for one-half. (…) The sea laws of different countries vary no less than upon the former question, in fixing at what prices goods thrown overboard shall be estimated, and for what value those saved are to contribute.*' Atkinson/Park/Abbott 1854, p. 4 and p. 225, as well as Annesley 1808, pp. 92-93.

92. For example, the provisions of the 18th century Amsterdam and Rotterdam Ordinances were not the same (Goudsmit 1882). Different practices were still applied in Amsterdam and Rotterdam in 1938. (Van Empel 1938, pp. 193, 210, '*Wat in Rotterdam pleegt te geschieden, kan voor Amsterdam niet beslissend zijn*'; in English: What happens in Rotterdam cannot be binding for Amsterdam). Also Cleveringa 1961, p. 958, as well as Selmer 1958, p. 63. Van Os indicates that the differences are the result of varying insurance systems (Van Os 1860, p. 38). According to Hopkins, practices also differed between London and Liverpool (Hopkins 1859, p. vii). See also the invitation letter to the Glasgow conference of 1860. This letter is published in Rudolf 1926, pp. 3-5, whereas a Dutch translation of this letter has been inserted in Rahusen 1860, p. 133. (Rahusen was a Dutch lawyer, average adjuster and politician from the 19th century. He attended the international general average conferences of 1860, 1862, 1865, 1877 and 1890 on behalf of various Dutch interested parties. He reported extensively on these conferences.) See also Smith Homans 1859, p. 80.

93. Baldasseroni, for example, cites various authors and legislations that give varying definitions of general average. He refers inter alia to Paulus, Park, Weskett and Azuni as well as to the maritime laws of Antwerp, Pruisen, Hamburg, Sweden, Bilbao and France (Baldasseroni 1808, pp. 1-10, 19-22).

94. As will be discussed in more detail below (para. 5.2), traditionally, the adjustment was prepared at the place where the common maritime adventure ended. The laws of that place were automatically applicable to the adjustment of the general average. As different general average rules were applied in the various countries, the adjustments were based on different rules as well. The discrepancy mainly arose due to the fact that in England the port of refuge costs were not automatically included in the adjustment or at least not in full because in some ports the physical safety theory was applied, whereas these costs were included in the apportionment on the European continent pursuant to the common benefit theory (inter alia Rahusen 1860, pp. 130-132). See for the distinction between the common benefit and physical safety theory also para. 3.2.2.2.2 below.

95. Atkinson/Park/Abbott 1854, p. 225. Reference is also made to the decision in the English case *Taylor v. Curtis* Holt's (1816) N.R. 193 and 6 Taunt. 608, cited by Holt (1824 at p. 491). It was held that the doctrine of general average had its origin in Roman law, but the different States of Europe had all made separate regulations, which differed inter se. See also Lowndes 1888, p. 19.

2.2.2 York-Antwerp Rules; history and evolvement

With the increase of shipping and trade in the 19th century, variations in general average rules and practices became even more problematic. As poetically indicated by Lowndes in 1844 with regard to the general average principles that were being applied: '*Taking their rise from the same fountain of common justice, they all flow for some distance in one unbroken body, till at last they diverge into separate branches, running in different and sometimes opposite directions one to another*.'[96]
In order to prevent confusion and injustice, it was deemed desirable at the second half of the 19th century that the most important shipping nations, i.e. some European States and the United States, recognised the same general average principles.[97] Therefore, a number of initiatives was undertaken to create a uniform regulation.[98] One of the first concrete moves in respect of international cooperation in the field of general average was probably the international conference of the National Association for the Promotion of Social Science (the International Law Association's predecessor) that was held in Glasgow in the autumn of 1860.[99] The invitational letter to the Glasgow Conference made it clear that the aim of the conference was to find a uniform solution; the manner and form in which this objective was reached seem to have been less important than that uniform rules were agreed. It was indicated that in the end it would come down to '*merely matters of account between one set of underwriters and another*'.[100]
The topics that were discussed during the Glasgow conference mainly had a substantive, rather than formal nature.[101] It was indicated that if no agreement could be reached on the substantive provisions, there was no need for more specific rules either. At the conference, 11 resolutions were accepted.[102] These 'Glasgow Resolutions' provided which specifically mentioned losses and expenditures were included

96. Lowndes 1844, p. 12.
97. Schadee 1949, p. 10. This was expressly provided in the invitation letter to the Glasgow conference of 1860 (Rahusen 1860, p. 133). At least from the 17th century onwards, European courts and legislators paid attention to laws and practices applied in other countries. Opinions of foreign academics were also taken into account. In the preparation of the Ordinance of Marine, the laws of other jurisdictions were evaluated (Pothier/Cushing 1821, pp. 157-158). See also the 18th and 19th century maritime legal literature. In many handbooks, reference was made to laws and writers of foreign jurisdictions. See, for example, Ulrich 1905 and 1906; Lowndes 1888, pp. 351-663; and Baldasseroni 1808.
98. The initiatives that have resulted in the YAR are often and extensively described, inter alia in Cornah 2004 (I); Hudson & Harvey 2010, pp. 9-14; and Lowndes & Rudolf 2013, pp. 43-64.
99. In the invitation letter to the conference, the need to create uniform rules was stressed: '*The system of General Average is one which, to prevent confusion and injustice, pre-eminently requires that the same principles should be acknowledged amongst the chief maritime nations. So far is this from being the case, however, that some of the most important rules vary not only in the same country, but in the same port. Uncertainty in law is always an evil; and, in regard to General Average, the evil is peculiarly felt*.' The invitation letter to the 1860 conference is printed in Rudolf 1926, pp. 3-5 as well as in Molengraaff 1880, pp. 315-318.
100. Invitation letter to the 1860 conference; printed in Rudolf 1926, pp. 3-5 as well as in Molengraaff 1880, pp. 315-318. The statement does not appear to be completely correct as not all parties to the maritime adventure had (or have) sufficient insurance.
101. These topics were set out in a memorandum that was circulated shortly before the conference was to take place. The memorandum is printed in Rudolf 1926, p. 5.
102. Rahusen and Molengraaff describe the contents of the Glasgow Resolutions in depth (Rahusen 1860, pp. 136-139 respectively Molengraaff 1880, pp. 122-135). The Glasgow Resolutions are included as appendix in Lowndes & Rudolf 2013, pp. 689-692.

in general average[103] and which specific kind of damage was not.[104] In addition, rules were given on the calculation of contributory values.[105] The Glasgow Resolutions were circulated, but did not have any binding force. They were intended to be incorporated in the laws of the nation states.[106] The underlying idea was that if all nations would adopt the resolutions in their national law, uniform legislation would be obtained in the various countries.[107] This idea did not materialise. Nevertheless, the Glasgow Resolutions can be regarded as an important first step in the creation of uniform general average rules.[108]

To take the matter even further, attempts were made to establish a general average code, including a regulation of the concept's formal aspects.[109] This step appeared to be too ambitious, in particular, as no agreement had yet been reached on the main underlying principles of the general average concept.[110] However, with the abolishment of the pursuit to create a general average code, the project of creating internationally applicable uniform general average provisions did not come to an end. The National Association for the Promotion of Social Science put the subject on the agenda again in its conferences in 1864, 1876 and 1877, which took place in York, Bremen, and Antwerp, respectively.[111] These conferences resulted in the introduction of the York Rules in 1864 and the amended and extended 'York and Antwerp Rules' in 1877.[112] After the 1890 revision, the name of the rules was changed to 'York-Antwerp Rules' ('YAR'). The York and Antwerp Rules 1877 and the YAR 1890 were not ordered in any particular sequence and did not contain a general average definition. They merely set out some provisions.[113] Only in 1924 and subsequent versions of the YAR, the mere examples of specific general average

103. Damage caused during firefighting operations (Resolution II) and costs incurred in a port of refuge were to be regarded as general average (Resolution VI and VIII). Interestingly, jettison of cargo was not mentioned. According to Worst, the practice to include jettison in general average may have been so well established that it was deemed unnecessary to expressly state this (Worst 1929, p. 22).
104. No general average compensation was to be paid for damage due to voluntary stranding (except for exceptional circumstances) (Resolution I), damage to cargo due to breakage resulting from a jettison of part of the remainder of the cargo (Resolution III), damage to cargo during discharge in a port of refuge when the vessel was not in distress (Resolution IV), loss sustained by cutting away masts that were accidentally broken (Resolution V) as well as damage due to carrying a press of sail (Resolution VII).
105. Resolutions IX, X and XI Glasgow Resolutions.
106. Preamble to the Glasgow Resolutions, set out in Rudolf 1926, p. 7.
107. Rudolf 1926, p. 9. Molengraaff deems it a 'nonsensical' idea that all countries would amend their national legislations. In his opinion uniformity should be created by an international general average code (Molengraaff 1880, p. 252). See also para. 3.2.2.2.1 below.
108. Rahusen 1860, p. 137 respectively Rahusen 1862, p. 98. Rahusen recommends the Dutch market to support the initiatives to reach international agreement in the field of general average (Rahusen 1860, p. 140; Rahusen 1862, pp. 105-107).
109. It was agreed at the 1860 conference that in the code the essence of general average was to be set out, as well as an overview of the situations in which general average had to be allowed. The draft code should also include the determination of the contributory values of the interests involved (concluding remarks of the Glasgow Resolutions; Worst 1929, p. 6). A draft general average code was prepared by the Irishman O'Hava. The 126 articles were discussed in depth at the days before the 1862 Conference of the National Association for the promotion of social science at London. It became clear that as long as the main principles were not agreed upon, it would be impossible to create a code (Rudolf 1926, p. 11; Rahusen 1862, p. 99).
110. Molengraaff 1880, p. 147.
111. See the reports of Rahusen on these conferences (Rahusen 1864, 1876 and 1877).
112. Lowndes & Rudolf 2013, pp. 47-50.
113. Rahusen 1890, p. 5. He indicates that the YAR 1890 were intended to change the English law more than anything else (p. 7).

situations were extended with a general definition as well as with specific rules regarding inter alia the determination of contributory values, the burden of proof, interest and cash deposits.

The International Law Association was not the only body working on a uniform general average regulation at the end of the 19th century. Less well known is that other initiatives were also undertaken to create uniform rules. In 1871, for example, the Italian government suggested that a conference was to take place in Naples to discuss the practicability of a uniform code on general average for all nations.[114] In addition, general average was one of the topics discussed during the International Congresses of Commercial Law of Antwerp of the 'Institut de Droit International' in 1885 and Brussels in 1887.[115] A general average regulation, including both substantive general average rules and rules of private international law was developed which was to be included in an international maritime convention.[116] The draft Convention created in 1888, however, was never formalised.[117] Over 25 years later, in 1914, a draft general average code was circulated.[118] This code consisted of 11 sections, including a general average definition, a rule regarding loss due to negligence, a rule to determine the place of the adjustment, rules on validation and rules on the enforcement of a general average contribution.[119] The 1914 draft-code never received general acceptance and received in fact strong opposition after the First World War.[120] A new draft-code was prepared in 1924. The commercial interests, however, did not like to divert too much from the YAR 1890 wording.[121] A compromise was reached in the YAR 1924, in which the YAR 1890 were basically maintained, but extended with some general principles of the draft 1924 code and rules of practice.[122] In view of the additions that had been made, the layout of the

114. Lowndes/Hart/Rudolf 1912, p. 794.
115. See inter alia Report 1885 Conference, pp. 419-421; Report 1888 Conference, pp. 407-408; Korthals Altes 1891, pp. 4-8 respectively pp. 118-120; Ulrich 1906, pp. 234-236 respectively pp. 236-241. On the development of conflict of law rules for general average in some detail Chapter 5 below.
116. Report 1885 Conference.
117. The results of the 1885 Antwerp Conference and the text of the 1888 Draft Convention are set out in the Report 1885 Conference (pp. 419-421), Report 1888 Conference, pp. 407-408 respectively 418-422 and in Ulrich 1906, pp. 234-236 respectively pp. 236-241. On the private international law aspects see also Chapter 5 and 6 below.
118. Hudson & Harvey 2010, p. 11; Lowndes & Rudolf 1922, pp. 819-826. In 1895, a suggestion for a 'Code of English Law Relating to General Average' was made by Dowdall (Dowdall 1895). This suggestion did not lead to any enactment in the field of general average in England. Fifteen years later, Dowdall insisted that an international codification should be created (Rudolf 1926, p. 20). This international codification was never established either.
119. The 1914 draft code is set out in Lowndes & Rudolf 1922, pp. 819-826.
120. That the 1914 draft-code never received the status of code was probably related to some extent to the First World War, but possibly more to the fact that the idea of a codification was not welcomed warmly in the maritime business, at least not anymore in the 1920's (Hudson & Harvey 2010, p. 11; Lowndes & Rudolf 1922, p. 819; Rudolf 1926, p. 22; Cole 1924, p. 16).
121. Worst 1929, p. 20.
122. In detail on the 1924 revision: Cole 1924; Schaub 1933. Also: Selmer 1958, pp. 55-56; UNCTAD 1991, p. 5. At the beginning of the 19th century, Committees were appointed by the Average Adjusters Association respectively the International Law Association to investigate the revision of the YAR 1890. According to Rudolf, both committees reached the same conclusion, even though they had worked independently (Rudolf 1926, pp. 23-26). Rudolf also indicates that the YAR would have been widely supported. The revisions would not have met much criticism after their introduction (Rudolf 1926, pp. 28-31). Different: Buglass (1973, p. 118) who indicates that the rules were severely criticised in the USA and were applied only reluctantly and with amendments.

YAR was changed in 1924 to lettered and numbered rules. The lettered rules contain general provisions regarding general average adjustments, derived from previous draft general average codes,[123] including a general definition.[124] The numbered rules include specific examples of costs and losses which are to be apportioned in general average as well as provisions regarding contributory values. The lettered and numbered rules, in the meantime, are preceded by a Rule of Interpretation and a Rule Paramount, which were added to the rules in 1950 respectively in 1994.[125] The Rule Paramount makes it clear beyond doubt that only costs and sacrifices that have reasonably been made or incurred can be included in the apportionment. The Rule Paramount was added to the YAR in order to clarify that the requirement of reasonableness as set out in Rule A also applied to the general average situations set out in the numbered rules. The clarification was deemed necessary after the English decision in '*The Alpha*' in which it was held that it was not required that costs or sacrifices mentioned in the numbered rules had *reasonably* been made or incurred in order to be apportioned in general average.[126] The YAR's Rule of Interpretation provides that when the YAR are applicable they set aside any law and/or practice which provides otherwise and that the numbered rules take precedence over the lettered rules. In respect of these specifically indicated costs and losses, the requirements of the general definition of Rule A YAR do not have to be met in order for a loss or disbursement to be apportioned in general average. The Rule of Interpretation was inserted in 1950 upon request of the English delegation to counter the decision in the English case *The Makis*.[127] In the YAR 1924, the relationship between the lettered and the numbered rules was not yet regulated. It was held by the Court in *The Makis* that expenditures could not be regarded as general average if they did not meet the requirements of Rule A YAR. The fact that the expenditures did fall under Rule X and XI YAR was deemed insufficient by the court to allow the costs in the apportionment. To prevent this undesired outcome, the so-called 'Makis-agreement' was developed, which made it clear beyond doubt that when the requirements of the numbered rules had been met, apportionment in general average could be claimed. The Makis-Agreement was included in contracts of affreightment often and subsequently taken over in the YAR's Rule of Interpretation.

Throughout the years, the YAR have been revised many times.[128] These revisions have resulted in different versions of the rules, i.e. the YAR 1890, YAR 1924, YAR

123. Worst 1929, p. 18.
124. Rule A YAR provides that '*There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure*.' As indicated by Rudolf, the wording is rather similar to the definition of the English Marine Insurance Act 1906 (Rudolf 1926, p. 41). Rule A YAR 1924 has been taken over in unmodified form in the YAR 1950 as well as in the YAR 1974 and, with an additional paragraph, in the YAR 1994, 2004 and 2016. It was added to Rule A in the YAR 1994, 2004 and 2016 that: *'General average sacrifices and expenditures shall be borne by the different contributing interests on the basis hereinafter provided'*. This added wording was included in Rule B YAR 1950 and 1974.
125. Schadee 1949, p. 15; Lowndes & Rudolf 2013, pp. 67-68; Hudson & Harvey 2010, pp. 23-25.
126. *The Alpha* [1991] 2 Lloyd's Rep. 515.
127. *The Makis* [1929] 1 KB 187.
128. The changes were necessary to keep up with the changing conditions of commerce and shipping. See also Rudolf who indicates that constant revision and increase of the numbers cannot be recommended (Rudolf 1926, p. 19). However, this is exactly what has happened with the rules throughout

1950, YAR 1974, YAR 1974 as amended in 1990, YAR 1994, YAR 2004 and recently YAR 2016.[129] Since the very first version of the rules, their contents were drafted by maritime practitioners.[130] The changes made to the international general average rules in the last 125 years reflect the developments in the process of adjusting throughout the years as well as the input of various groups of interested parties.[131] Starting with the revision of the YAR 1950, the revisions have been coordinated and executed by the Comité Maritime International ('CMI').[132] The versions published under its auspices are the result of discussions on national and international level. Input is given by the national maritime law associations[133] and other stakeholders,[134] inter alia by answering questionnaires and by attending discussions.[135] In the run up to the YAR 1994, the average adjusters, for example, played an important role. The Association Mondiale de Dispacheurs ('AMD')[136] made various recommendations for amendments to the rules, inter alia with the aim to simplify the system.[137] The YAR 2004 were influenced considerably by the International Union of Marine Insurers ('IUMI') after lobbies to downsize the situations in which apportionment could be requested.[138] In respect of the 2016 revision, input was given by the International Chamber of Shipping ('ICS'), BIMCO ('Baltic and International Maritime Council'), IUMI, the International Group of P&I Clubs, adjusters and the national Maritime Law Associations.[139]

2.2.3 CMI Guidelines on General Average

During the CMI Conference in New York in May 2016, in addition to a new YAR version, the CMI adopted the 'CMI Guidelines on General Average'. These guidelines contain a very basic explanation of the general average concept for those parties

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their existence. Probably also as a result of the fact they have been updated regularly, they are still widely applied.

129. For a detailed overview of the developments of the YAR throughout the decades and the contents of the various YAR versions, reference is made to Hudson & Harvey 2010; Lowndes & Rudolf 2013 as well as to Cornah 2004 (I).
130. Schadee 1949, p. 16; Cole 1924, p. 11.
131. The amendments that were made in the last century can be classified roughly as amendments which are the direct result of case law that was deemed undesirable, amendments with the object of covering new developments and amendments in order to simplify the adjusting process.
132. Maurer 2012, 74-76; Shaw 2001, p. 330; UNCTAD 1991, p. 2; Lilar/Van den Bosch 1972, pp. 16-18; Herber 2016, p. 406. At that moment, the CMI had already been involved in the preparation of maritime conventions for over 50 years (Berlingieri 2014, p. xx; Maurer 2012, 74-76). The CMI's history and present activities are discussed in some detail in Hetherington 2014.
133. In the Netherlands, the NVV (Dutch Association for Transport Law) installs a general average committee when input is requested by the CMI from the national law associations. Such committee consists of representatives of the stakeholders, including underwriters (P&I, H&M and cargo), shipowners and adjusters. The author of this study is a member of the Dutch General Average Committee.
134. CMI Report Dublin 2013; Yiannopoulos 1965, p. 373. Sweeney argues that it would be a problem if cargo shippers themselves would not be represented and that representation of their interests by underwriters would be insufficient (Sweeney 1989, p. 499).
135. Hetherington 2014, pp. 165-166, who discusses the process of CMI involvement in some detail. Also Sweeney 1989, p. 495; Yiannopoulos 1965, p. 373; Hudson 1996, p. 470; Myburgh 2000, p. 364.
136. The AMD is the successor of the Association International de Dispacheurs Européens ('AIDE') www.amdadjusters.org.
137. Hudson & Harvey 2010, pp. 17-18; Hudson 1996.
138. Smeele 2004, p. 19.
139. CMI Report Dublin 2013; CMI Report Istanbul (II) 2015, in particular pp. 148-149.

that do not frequently deal with general average.[140] In the preparatory discussions in New York, it was indicated by several adjusters that they deemed it useful to have a 'neutral' overview of the process to which they could refer parties with questions on the process.[141] The guidelines are not binding and do not have any official status.[142] It follows that their effect is even more doubtful than the YAR's effect.[143] During the subcommittee meetings in Istanbul it was pointed out by adjuster Cornah that '*The Guidelines would perhaps not have teeth, but would still be useful*'.[144] Even though the reference to the YAR was deleted from the Guidelines' title after protests of the French delegation at the very last minute,[145] the Guidelines were written with the YAR in mind.

The CMI Guidelines on General Average currently give an overview of the adjustment process,[146] discuss the required security and claim documentation, and explain the role of the average adjuster[147] and the general interest surveyor. In addition, a clarification is given regarding the amendments on salvage and the treatment of cash deposits as introduced in the YAR 2016. In an earlier draft of the CMI Guidelines on General Average, standard security wording was also included.[148] The suggested forms were deleted in the version presented to the CMI Assembly for approval, as further discussion was deemed necessary.[149] The Guidelines can be amended by the CMI Assembly, upon advice of a special Standing Committee.[150] It is expected that the Standing Committee will further consider whether suggested wording for security forms should be incorporated in the Guidelines.[151]

2.2.4 Inland waterway shipping rules

Following the success of the YAR, rules were developed to regulate general average for inland waterway shipping. The Rhine Rules (in Dutch: 'Rijnregels'), which aimed to regulate general average on the Rhine, were published in 1956 by the 'IVR'.[152]

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140. As set out in their introduction, the guidelines are intended to provide guidance on the general average concept and to give 'general background information', 'guidance as to recognised best practice' and 'an outline of procedures'. CMI Guidelines on General Average, p. 2 (para. A(1)).
141. The French delegation objected to the qualification of 'neutral' as the wording was negotiated by the various stakeholders.
142. CMI Guidelines on General Average, p. 2 (para. A(2)).
143. The status of the YAR is discussed in para. 3.2.2 below.
144. CMI Report Istanbul (II) 2015, p. 162.
145. The title was changed during the CMI's Plenary Session on 6 May 2016 just before the Guidelines were accepted.
146. The overview is based on the English perspective. In para. B(4) at pp. 5-6, for example, reference is made to 'cargo owner', rather than the general term cargo interested party. See on the parties interested in the cargo for general average purposes para. 4.5.2.4 below.
147. See also para. 4.3.3.5 below.
148. Draft CMI Guidelines on General Average set out in the CMI Yearbook 2015, pp. 268-269. For standard security forms, see also para. 3.3.5 below.
149. See also para. 3.3.5.2 below.
150. CMI Guidelines on General Average, p. 2 (para. A(3)). As a result, an official CMI Conference is not necessary to amend the Guidelines which means that their contents can be amended more easily and more often.
151. The security wording is further discussed below, inter alia in para. 3.3.5 below.
152. The IVR is the International Association for the Representation of the Mutual Interests of the inland shipping and the insurance and for keeping the register of inland vessels in Europe. See also www.ivr.nl.

Around the same period of time, the Bratislava Agreement ('Danube Rules') was concluded, which aimed to regulate general average cases on the Danube.[153] In the following decades, both the Rhine Rules and the Danube Rules were regularly updated.[154] The Rhine Rules' scope was extended to apply to inland waterway shipping in general. Their name changed to 'IVR-Rules'. They are incorporated in many contracts for carriage by inland waterway[155] and have to be applied by all IVR members.[156] Interestingly though, the Dutch Civil Code still incorporates the 1979 Rhine Rules.[157] It should also be noted that the general average principle has not always been applied in respect of inland waterway carriage. The position appears to have changed over time.[158] The rules which regulate general average on inland waterways will not be further discussed in this study.

2.3 Apportionment in practice

2.3.1 Process

The apportionment of general average in practice may be regarded as a complicated and non-transparent process, at least for those who do not have much experience with general average.[159] For this reason, and to have an idea of the background of the adjustment process and the current practice, a very basic general explanation of the process is set out below.

153. The Bratislava Agreements ('Bratislava Abkommen 1956') were agreed at a Director's Conference. For a comparison between the Bratislava Agreement and the CMNI see Kovács 2009.
154. See inter alia de Danube Rules on General Average 1990.
155. F.J. de Vries, T&C Burgerlijk Wetboek, Art. 8:1022 BW, in: J.H. Nieuwenhuis a.o. 2013, p. 5236. In the last 20 years, the IVR-Rules have become much more commonly applied. It was still indicated by Cleton in 1994 that there was less uniformity in inland waterway shipping (Cleton 1994, p. 281).
156. Enge & Schwampe 2012, p. 345.
157. S. 8:1022 Dutch Civil Code *cf.* Royal Decree of 5 February 2000 for the implementation of rules on general average pursuant to s. 1022 of Book 8 of the Dutch Civil Code, *Stb.* 112.
158. See also f.nt. 79 above. The 17th century Dutch scholar and Supreme Court Judge Bynkershoek supported the view that the general average provisions applied to inland waterways, but this does not have seem to have been commonly accepted (Van Niekerk 1998, p. 62). In the Dutch Commercial Code of 1838, the apportionment of losses in cases of inland water way shipping was limited to situations of jettison and to situations in which goods had been loaded in a lighter to preserve vessel and cargo (s. 760 and 761 Dutch Commercial Code of 1838). Some of the Code's provisions applicable to (general and particular) average during carriage of goods by sea were also held to apply to general average arisen during carriage on inland water ways (s. 759 Dutch Commercial Code of 1838 declares that the provisions of s. 708-710, 712-719 and 721 Dutch Commercial Code of 1838 also apply to inland waterway shipping). Interestingly, freight was not mentioned as contributory interest in case of inland waterway shipping. It is not clear whether freight was excluded intentionally or by mistake. Schütz indicates that under German law freight was intentionally excluded as contributory value in inland water way general average law. As a result, the same may have been the case in the Netherlands (Schütz 1896, p. 84). Only in 1952, an extended general average regime for inland waterway shipping was introduced in the Dutch Commercial Code (Verhoeve 1954, pp. 303-307).
159. This was also recognised by the CMI and was one of the reasons to create guidelines. See also para. 2.2.3 above.

2.3.2 Adjustment[160]

The costs and sacrifices incurred or suffered and which qualify as general average have to be split between the parties interested in the properties that were involved in the maritime adventure. The contributing interests have to be determined, just as the disbursements that shall be shared. The amounts of the latter have to be assessed upon the interests which are required to contribute and apportioned among the interests which are entitled to a contribution.[161] This whole process is called the adjustment of general average.[162] The statement which sets out the apportionment (confusingly) is also-called 'adjustment' (in Dutch and German: 'Dispache').[163]

The adjustment generally consists of a brief description of the incident, the measures taken, the sacrifices suffered and/or the expenditures incurred, as well as an overview of the contributing interests and their values.[164]

2.3.3 Adjuster[165]

In most contemporary cases, the adjustment is prepared by a specialised person,[166] the average adjuster (in Dutch: 'dispacheur').[167] During the whole adjustment process, the average adjuster plays a central, if not the most important role. In most cases, he is instructed right after the general average incident occurred and stays involved during the various stages. Amongst others, he collects security, gathers evidence, decides which disbursements/sacrifices are allowed in the appor-

160. The apportionment rules and the effect of the adjustment are discussed in some detail in para. 4.4 below.
161. Also Delebecque 2014, p. 731.
162. Parsons 1868, p. 294; Arnould 1848, p. 881; Benecke 1824, p. 286; Arnould 2013, p. 1365.
163. As a matter of Dutch 18th century practice, the master was obliged to register all general average losses and expenditures in the logbook. In addition, he was to inform the shipowners, the charterers and the local court at the first place after the general average incident had taken place. Moreover, the master was to confirm the correctness of the logbook under oath. On the basis of the logbook, the adjustment was subsequently prepared by a sworn committee. The adjustment thus prepared was called 'dispache'. (Van der Linden 1806, pp. 502-503; Van der Linden 1828, p. 637.)
164. See inter alia the CMI Guidelines on General Average 2016; Rule B1 of the AAA's Rules of Practice 2015; Enge & Schwampe 2012, p. 75; Bemm 1997, p. 98. This was already the practice over 50 years ago. (Cleveringa 1961, p. 959.) Examples of some adjustments of approx. 175 years old have been set out in Tecklenborg 1858, pp. 301-327.
165. The average adjuster's legal position (including his appointment and his duties) is discussed in more detail in para. 4.3 below.
166. It is not clear who arranged the adjustment in Roman times. According to Holt, it can be assumed that this was done by the master, probably in concert with the merchants. (Holt 1824, p. 495.) This may also have been the case in the following centuries. Charles V's Ordinance of 1551 merely mentioned that general average was to be dealt with in accordance with ancient maritime custom. Which custom this was is not specified (s. 41 Charles V's Ordinance of 1551). In Philip II's Ordinance of 1563 it was provided that the calculation was to be made by '*qualified and neutral mariners and merchants*' (s. 6, Chapter on Shipwreck, jettison and average, Philip II's Ordinance of 1563). By 1711, it had been decreed by the Dutch government that an adjustment had to be drawn up by the 'Kamer van Asseurantie en Avarien' (in English: Chamber of Insurances and Averages; author's translation) of a Dutch Court. This institute reportedly also published standard forms to claim a contribution (Verwer 1711, p. 112).
167. The word dispacheur would have its origin in the Spanish work dispachare, i.e. to settle (Holtius 1861, p. 306). It is indicated in the English case *Simonds v. White* (1824) 2 B & C 805 that the name dispacheur was also used in Russia. Cole described adjusters in 1924 (p. 8) as '*members of a profession numerically somewhat small, and inclined to regard itself as a close corporation of mystery men. Really the adjusters are very acute, capable and useful members of the business community*'.

tionment, which the contributing values of the property are involved in the maritime adventure, and prepares the adjustment.[168] In addition, he generally holds cash deposits in his own name and collects the contributions on behalf of the parties with a claim for a contribution in general average.[169]
The average adjuster's role is not limited to general average cases.[170] Briefly summarised, an average adjuster adjusts marine claims, more specifically insurance, general average and liability. He assists shipowners in the process of bringing claims under the marine insurance policy.[171]

2.3.4 Security[172]

The mere right or even title to a general average contribution does not automatically mean that payment can be obtained eventually. There have to be assets against which a title to a contribution can be enforced. In Roman and medieval times, general average contributions were probably settled directly after the vessel's arrival at the discharge port.[173] The merchants interested in the cargo travelled with their cargoes on-board. They were most likely required to settle their contributions before they left the vessel. With the increase of shipping at the second half of the second millennium, the adjusting process became substantially more complex and time consuming than in ancient times. The adjustment could often not be finalised before the vessel was to leave.[174] Nowadays, it is extremely rare in case of general average for an adjustment to be prepared directly upon the vessel's arrival at the discharge port. Calculations are invariably made at a later stage.[175] Moreover, the adjustment under most legal systems is not binding and may be challenged in court or arbitration.[176] Collection of an actual contribution generally takes place long after the general average act. If an adjustment had to be drawn up and settlement of all contributions needed to take place before the properties involved in the maritime adventure separate, considerable losses would be suffered. The vessel would be

168. Under some regimes, the adjuster is obliged to determine whether there was a situation of general average. As a matter of Polish law, for example, the adjuster has to refuse to draw up an adjustment if he is of the opinion that it was not a case of general average (Sulewska 2014, pp. 10-11).
169. See inter alia Spencer 2005, p. 1; Cornah-RHL; Wong 2010, p. 1. The adjusters' practice of holding cash deposits on bank accounts in their own name has been formalised in Rule XXII YAR 2016.
170. In 1935 it was pointed out by an American judge in respect of average adjusters that '*the vast majority of your fellow-citizens have not the remotest idea what your duties are*.' The position does not appear to have changed since. (Spencer 2005, p. 1. Also Wong 2010, p. 1.)
171. Wong 2010, p. 1; Spencer 2005. All adjusters mention these tasks on their website. See inter alia www.ctplc.com/adjusting-services/richards-hogg-lindley/; www.medav.co.uk/role%20of%20average%20adjuster.html; www.groninger-welke.de/index.php/service.html; www.adjuster.de/services.html. See also the CMI Guidelines on General Average, pp. 10-11.
172. The legal position of a security form, its actual contents and the measures that can be taken to obtain security are discussed in more detail below, in particular in para. 3.3.5 and Chapter 4. See also the CMI Guidelines on General Average, p. 9 (para. C(1)).
173. Goldschmidt 1882, p. 49; Beawes 1754, p. 121.
174. Kent 1828, p. 196; Benecke 1824, p. 325. Interestingly, Benecke remarks that it would not be '*customary to retain the goods of respectable merchants till security be given*.' (Benecke 1824, p. 327 also Stevens 1822, p. 54.) It is not clear when merchants were deemed respectable. It seems logical that if the merchants turned out to be less respectable or creditworthy than expected, shipowners were liable as against the other interested parties after all.
175. This was recognised in the American case *Cia. Atlantica Pacifica, S.A. v. Humble Oil & Refining Co.*, 274 F.Supp. 884 (1967).
176. See para. 4.4.4 below.

unable to sail, whereas cargo carried on board may deteriorate, either physically or economically. At the same time, releasing cargo without payment of the contribution has the risk that no payment can be obtained at a later stage when the amounts due have been established. For this reason, it became common practice in the 19th and 20th century to safeguard payment of the contribution by obtaining security at the end of the voyage, before delivery of the property carried on board the vessel takes place and the assets involved in the maritime adventure physically separate.[177] The collection of security should, in principle, serve all the parties interested in the maritime adventure. It prevents delay in delivery of the cargo and in the vessel's schedule as well as storage costs.[178] At the same time, the interests of the general average creditors are safeguarded, because payments can be collected when the calculations of the shares of the various parties involved have been made.[179]

Where security traditionally was arranged by the master,[180] security is now generally collected by the average adjuster. In the majority of cases, the requested (and provided) general average security is twofold. It generally exists of an average bond issued by the intended general average contributor,[181] which is supported by financial security.[182]

The average bond, in essence, is a confirmation given by a specific party that it will pay a general average contribution due in respect of indicated property if and when due. The exact wording may vary per case and issuer of the average bond.

The financial security in most cases consists of security from a reputable underwriter or bank (an 'average guarantee'). Alternatively, a cash deposit may be provided.[183] As most (contributory) interests involved in the common maritime adventure are insured, the financial general average security is generally provided by the underwriters.[184] If sufficient security is not provided, security may be obtained by a sale

177. Hudson 1987, p. 443.
178. The costs of the security collection are included in the adjustment and have to be paid by all parties to the adventure.
179. A downside of the security collection is that there is no real pressure to finalise the adjustment any time soon. In practice, Rule XXI of the currently most applied versions of the YAR (1974 and 1994) provides for an interest rate of 7%. A shipowner with a claim in general average may like to enjoy the benefits of the interest rate and may not be inclined to have the adjustment published as soon as possible.
180. *Wellmann v. Morse*, 76 F. 573 (1896) quoted in the American case *Cia. Atlantica Pacifica, S.A. v. Humble Oil & Refining Co.*, 274 F.Supp. 884 (1967).
181. Lowndes & Rudolf 2013, p. 593; Enge & Schwampe 2012, p. 76.
182. Also Lowndes & Rudolf 2013, pp. 593-594; Enge & Schwampe 2012, p. 76. This practice that both an average bond and an average guarantee are provided is recognised by the English and Dutch Courts. See para. 3.3.5 below.
183. A cash deposit may be provided in situations in which there is no reputable insurance in place, if a guarantee issued by underwriters is not regarded as due security under local laws (this is for example the case in Turkey and Greece) or when underwriters are unwilling to issue an average guarantee, for example, because there is insufficient insurance coverage or because they do not want to have a guarantee outstanding (Lowndes & Rudolf 2013, pp. 591-592; UNCTAD 1991, pp. 19-20). Disadvantages of a cash deposit are the extra costs for all parties involved, the difficulty in estimating the correct amount of the deposit and the risk of currency depreciation. These disadvantages were already recognised in an article in the Register in 1923 and have not disappeared since. See on cash deposits also Crump 1985, p. 28 and Pineus 1973.
184. The essential role of underwriters in the settlement of a general average case was already set out in the invitation letter to the 1860 conference during which the Glasgow Regulations were developed. See also para. 2.2.2.

of the relevant property involved.[185] Whether this is possible and, if so, under which conditions, will depend on the applicable national law and contractual arrangements.[186]

In the 19th century it had become common practice for security to be put up in the form of a bond.[187] Before long, a bond was not deemed to give sufficient security.[188] As indicated by Stevens, the bond in itself did not have much added value. The consignees would '*only bind themselves to pay what they are bound by law to pay without it*'.[189] It gradually became common practice that a general average deposit was requested by the adjuster in addition to a bond in order to safeguard the payment from financial perspective.[190] At the beginning of the 20th, century underwriters' guarantees were sometimes accepted instead of a deposit. Soon financial security in the form of a guarantee issued by the underwriters of the contributory interest became a well-established practice.[191] However, the practice of issuing a bond remained. A mere average bond will normally not suffice. This may be different when the party issuing the average bond is a big company with a reputable reputation and a very good credit rating, whereas no insurance is in place.[192] Alternatively, a mere financial security has also been held insufficient security in case law.[193]

In the Netherlands, it was common practice in the 19th and the first half of the 20th century that a general average compromise was concluded by the parties interested in the property involved in the maritime adventure.[194] As the Code Napoleon, which was introduced in 1807, did not provide for rules on the settlement of general average, a 'compromise' (in Dutch: 'compromis') was drafted by practitioners.[195] This compromise contained inter alia the name of the adjuster, as well as a reference to the Regulation (in Dutch: 'Reglement'),[196] provisions on the adjustment and

185. Also para. 4.6 below.
186. Under Dutch law the cargo can be sold when no adequate security is provided, after the court's permission has been obtained. This follows from s. 8:489 *cf.* s. 8:490 *cf.* s. 8:491 Dutch Civil Code.
187. Parsons 1868, p. 372; Abbott 1802, p. 296; *Hallett v. Bousfield* (1811) 18 Ves Jr 187. An example of a bond used in the US in the 19th century is set out in Homans Smith 1859, p. 82. Such bond given by the consignees or cargo owners initially was also referred to as average guarantee (see, for example, Brooke 1839, p. 179). When an average guarantee is referred to below, the guarantee provided by underwriters is meant.
188. This was also pointed out in the Wellington Independent of 30 June 1874. http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=WI18740630.2.5.1
189. According to Stevens, such bond would only have added value if the names of the arbitrators had been inserted. (Stevens 1822, p. 54.)
190. Dover 1922, p. 93; Dover 1929, p. 280. These deposits were administered as trust funds.
191. Pinéus 1953.
192. A security issued by the company itself might be regarded sufficient financial security. However, courts appear hesitant to allow the same. See, for example, the decision of the District Court of Rotterdam dated 12 May 2010, *S&S* 2011, 37; ECLI:NL:RBROT:2010:BM5636 (MSP Singapore Company LLC/Safmarine Container Lines).
193. This is discussed in further detail in para. 3.3.5 below.
194. Van Empel 1938, p. 194; Van Rossem 1934, p. 489.
195. Asser 1879, p. 3; District Court of Middelburg 7 December 1990, *S&S* 1992, 83 ('Gur Mariner').
196. In Amsterdam and Rotterdam, different regulations were applied. See the Rotterdam Reglement 1923 as well as Asser 1879.

settlement of a contribution. The adjuster basically was given the role of an arbitrator.[197] It was also provided in the compromise that disputes were to be referred to the 'Average Committee' (in Dutch: 'Averij Commissie').[198] The average bond seems to have gradually replaced the compromise in the second half of the 20th century.[199]

2.3.5 Contribution[200]

2.3.5.1 *Contributing interests*

Nowadays invariably all adjustments of general average incidents during carriage of goods by sea are prepared in accordance with one of the versions of the YAR.[201] In the adjustment, a contribution is attributed per property.[202]
The YAR specify in respect of which property a general average contribution is due.[203] As a rule, a contribution is to be made in respect of all property in which interest it was that sacrifices were made or costs were incurred. Traditionally, the main interests taken into account in the apportionment were the ship, cargo carried on board and freight.[204] In addition, a contribution often was to be made as well in respect of clothing, jewellery and money.[205] This changed as time passed. At the beginning of the 19th century, a contribution seems to no longer due in respect of clothes, jewels or passengers' baggage, as these assets were considered to be accessory

197. Clavareau 1947, p. 134.
198. Cleveringa 1961, p. 958.
199. Cleveringa indicated in 1961 that the average bond would have become common practice '*in the last years*'. (Cleveringa 1961, p. 958.)
200. Several aspects of the contribution, including the moment on which a right to claim same becomes due and limitations on the amount, if any, are discussed in some detail in para. 4.4.3 below.
201. The YAR's historical development is briefly set out in para. 2.2.2 above. The legal position of the YAR is considered in para. 3.2.2 below. It should be mentioned that adjustment in the People's Republic of China would reportedly take place on the basis of the Beijing Rules of General Average Adjustment by the Chinese Council for the Promotion of International Trade, General Average Adjustment Office. (Chen 2001, p. 136; Sulewska 2014, pp. 6-8.) The Beijing Rules of General Average Adjustment are influenced by the YAR 1974 (Sulewska 2014, p. 8). They are inter alia referred to in Rule 5 section 3(B) 2014 Rules for H&M cover provided by China P&I. On the Beijing Rules of General Average Adjustment also Hudson 1976 (I).
202. As further discussed below in Chapter 4 (in particular in para. 4.9), the practice whereby a net value is calculated per property may not be legally justified in all situations. Which parties are interested in the contributory properties is discussed in some detail in para. 4.5 below.
203. The YAR 1974, 1994, 2004 and 2016 discuss the contribution in Rule A, G and XVII. In YAR 1994, 2004 and 2016, it is added to the general average definition of Rule A that the general average sacrifices and expenditures shall be borne by the different contributing interests on the basis provided in the rules. In earlier versions of the Rules this provision was set out in Rule B. Schadee deemed the provision superfluous (Schadee 1949, p. 19).
204. In historic laws, reference was sometimes merely made to ship and cargo. See, for example, the Digest where there is no reference to freight. See also s. 28 of Charles V's Ordinance of 1551.
205. Digest 14.2.2.2; s. 17, 'Du jet' Ordinance of Marine; s. 110 Rotterdam Ordinance 1721. However, s. 7, Chapter on Shipwreck, jettison and average of Philip II's Ordinance of 1563 excluded from apportionment the clothes that people were wearing. Pursuant to Art. 38 of the Wisby Sea Laws, monies 'carried on the body' were excluded from contribution. It was provided in Philip II's Ordinance (s. 7 Chapter on Shipwreck, jettison and average) that money was to be valued pursuant to its intrinsic value. Apparently, serious debates took place in the 16th century on the question whether money should be apportioned as well. See Weytsen para. 23-26 in: Verwer 1711, pp. 198-201.

to the person.[206] The ship, cargo and freight are still considered to be the main contributory interests,[207] although in more recent times the bunkers as well as other property on board with substantial value have been added to this list.[208] Low value property is often excluded from apportionment.[209] In the YAR, as well as in the current Dutch Civil Code, luggage and personal belongings of people on board are excluded from apportionment in general average.[210] Under Rule XVII YAR 1994-2016 accompanied private motor vehicles are also excluded from contribution in general average. In the Dutch Civil Code, however, motor vehicles or vessels which are carried on board pursuant to a contract for the carriage of passengers[211] are considered as contributory interests for general average purposes.[212] It was indicated in the explanatory notes to the draft statutory general average provisions that it would be unacceptable if cars would not have to contribute. In particular as the carriage of cars had apparently increased to a substantial level and both cars and vessels carried on board would be of considerable value. The Dutch Civil Code, however, incorporates the YAR 1994 by Royal decree. As the exclusion of private motor vehicles set out in the YAR 1994 has not been excluded in the Code, there is a discrepancy within the Dutch Civil legislation.[213] When the current Dutch

206. Kent 1828, p. 193. Nevertheless, pursuant to s. 731 Dutch Commercial Code of 1838, only the daily clothing of passengers was excluded from contribution. This might be related to the fact that when the Dutch Commercial Code of 1838 was created and entered into force, it was customary for people to wear old clothes while travelling. (Flaubert, *Sentimental Education,* pp. 4-5. Although the book was published in 1869, it was situated in 1840). Schütz indicates that baggage would in practice not be taken into account in the apportionment. (Schütz 1896, p. 61.) That clothes, jewels and baggage in more recent times were left out of the apportionment may be related to the fact that vessels had become bigger and the value of clothes, jewels and baggage had become too small in relation to the value of other property on board to justify their inclusion in the apportionment. Weskett indicates that mid-18th century, the rule was commonly applied in London that '*what pays no freight, pays no average*'. (Weskett 1781, p. 2571; also Stevens 1822, p. 47.) In line with this rule, albeit not pursuant to this rule, stocks and ammunition were excluded from contribution, just like state owned vessels and goods. The exclusion of stocks was already applied in Roman times and was quite common in later regulations as well. See, for example, Digest 14.2.2.2; s. 11, 'Du Jet', Ordinance of Marine 1681; s. 731 Dutch Commercial Code of 1838; *Brown v. Stapyleton* (1827) 4 Bing. 119. Explanations for the exclusion of stocks are that hardly anything is generally left at the end of the voyage and that it would be difficult to make a distinction between stocks bought before the beginning of the voyage and stocks taken on board during the voyage after the general average event (Schütz 1896, p. 59).
207. For example, s. 8:612 Dutch Civil Code. In the French Code of transport (s. L5133-7) the ship, cargo and freight are the only indicated contributory interests. That this overview is not intended to be exclusive can be derived from s. L5133-14 which provides that the crew's personal effects and passengers' luggage are excluded from apportionment when they have been saved.
208. In the new German Commercial Code, which entered into force on 25 April 2013, bunkers are mentioned explicitly as contributory interest (§ 588(1) German Commercial Code).
209. In the YAR 2016, it has been added in Rule XVII(a)(ii), in accordance with existing practice (CMI Report Istanbul 2015, p. 155), that the adjuster can exclude low value cargo from apportionment if the costs of their inclusion would be disproportionate to the amount of contribution.
210. Rule XVII YAR/s. 8:612(1) Dutch Civil Code. The Italian Code of Navigation (s. 475) excludes only the personal effects from crew members and unregistered luggage.
211. S. 8:612(2) Dutch Civil Code. This is an exception to the rule of s. 8:612(1) Dutch Civil Code that luggage and other personal belongings of persons on board are excluded from apportionment in general average.
212. S. 8:612(2) Dutch Civil Code. The legislator decided to specifically deal with carriage of passengers as it would be uncommon that contracts for the carriage of passengers would include a reference to the YAR. Explanatory notes to the draft general average regulation of the Dutch Civil Code, House of representatives, hearing 1975-1976, 14 049, nrs. 3-4; Travaux Préparatoires Book 8 Dutch Civil Code, p. 620.
213. Also Asser/Japikse 2004, p. 210.

statutory general average regime was introduced in 1991, the Royal decree incorporated the YAR 1974 as amended 1990.[214] In this version of the Rules, no reference was made to motor vehicles and vessels carried on board pursuant to a contract for the carriage of passengers. They were therefore included as contributory value. On 1 May 2000, the YAR 1974 as amended 1990 were replaced by the YAR 1994 by the above Decree. The discrepancy between s. 8:612(2) Dutch Civil Code and Rule XVII YAR 1994 does not appear to have been noticed by the legislator.[215] As the statutory provisions have no mandatory applicability, the contractually applicable YAR may supersede the Dutch statutory provisions.[216]

Most notably, no contribution in general average is due in respect of passengers and crew.[217] The rule that human beings are excluded from apportionment in general average is commonly accepted.[218] At no point in history an appraisement appears to have been made of 'free men'.[219] However, for slaves a contribution was required, with the exception of those who died at sea or had thrown themselves overboard.[220] Another question was whether slaves could be jettisoned. Even though they were regarded as 'merchandise', the majority view throughout history appears to have been that they could not be thrown overboard for general average purposes.[221] Nevertheless, the claim for a contribution in general average regarding

214. Royal Decree of 22 March 1991 for the implementation of rules on general average pursuant to s. 613 of Book 8 of the Dutch Civil Code.
215. The explanatory notes do not deal with these provisions at all. They merely mention the main changes between the YAR 1974 as amended 1990 and the YAR 1994, i.e. the exclusion of environmental damage caused by the general average act, determination of the period in which interest accrues and within which information has to be provided to the average adjuster, as well as the stipulation that a special remuneration for the benefit of the salvor cannot be deducted from the ship's value. Moreover, it is indicated that the rules would be supported in the industry and that it would thus be logical to implement the most recent version of the YAR. Explanatory memorandum (Nota van toelichting), *Stb.* 2000, 111.
216. This also seems to follow from the YAR's Rule of Interpretation incorporated in YAR 1994, 2004 and 2016. Different: Japikse, who expects that s. 8:612(2) Dutch Civil Code takes precedence as lex specialis (Asser/Japikse 2004, p. 210).
217. Even though this is not specifically mentioned in any of the YAR versions or in (most contemporary) national legislations. The rule that no contribution has to be paid for human beings was questioned by various authors after the rise in hijacks of vessels off the Somalian coast. It was argued that the ransom paid to have the vessel released related for the biggest part to the humans on board the vessel and should thus be paid by the P&I Clubs, at least partially. Although there definitely is some truth in the argument, the rule was not changed (Lowndes & Rudolf 2013, pp. 108-110; Newsletter 2009, p. 3; Mody 2010, p. 5; Hazelwood/Semark 2010, p. 177; Arnould 2013, pp. 1356-1357).
218. Lowndes & Rudolf 2013, p. 498; Van Empel 1938, p. 38; Schütz 1896, 65-66.
219. Digest 14.2.2.2. That lives of free men could not be valued does not appear to have ever been questioned seriously. (Abbott 1810, p. 39; also Ashburner 1909, p. 254.)
220. Digest 14.2.2.5.
221. The Roman authors were reportedly hesitant to support jettison of slaves (Pothier 1821, p. 147; Studer 1911, p. lxviii). It was argued by Cujas, cited by Baldasseroni (1808, p. 186), that slaves can be jettisoned and that their value has to be compensated in general average, '*if jettisoned or damaged for the common benefit*'. Baldasseroni submitted at the end of the 18th century, that it was no longer allowed to throw humans over board, even if they were 'black people' (Baldasseroni 1808, p. 157). ('*Insgelijks is het niet geoorloofd om menschen over boord te werpen, het mogen vrijen of slaven zijn; derhalven mogen de Negers, welke heden eenen tak van Koophandel uitmaken, niet geworpen worden, en men moet eerder alle goederen van een schip, zelfs de allerkostbaarste, aantasten, dan den gemeensten slaaf werpen, deze toch, ofschoon zij lieden minder in de burgerlijke regten deelen, zijn echter, volgens het regt der natuur, menschen gelijk de anderen, en hun aanwezen is even kostbaar*'). No distinction was made by Baldasseroni between free men and slaves. He agrees with Emérigon that the persons who threw slaves over board could be accused of murder (Baldasseroni 1808, pp. 55-56).

slaves that had been jettisoned from the 'Zong' was brought by the shipowners against their underwriters successfully.[222]

It should be kept in mind that the YAR, as well as most national general average regulations, are based on the underlying assessment principle that there should not be any financial difference for a party to the maritime adventure whether the general average losses or expenses are suffered or incurred by him or by one of the other parties.[223] This inter alia means that sacrificed property is also included in the calculation.[224] If not, the party whose assets were sacrificed would be in a better position than the parties whose properties arrived in sound condition, but were to pay a general average contribution.[225] For example, if a container is thrown over board during salvage activities, the party interested in the container does not get compensation for the full cargo value, but only for the cargo value after deduction of the cargo's general average share. Similarly, ship interested parties can claim expenditures incurred, but will also have to contribute for the vessel's contributing value, if any.

2.3.5.2 *Contributory values*

The YAR contain an extensive regulation for the determination of the contributory value of the respective property involved.[226] The national legal regimes may contain specific provisions as well.[227] Under the YAR, the actual net values of the property at the termination of the adventure are guiding, albeit with some exceptions.[228] Since the YAR 1974, the contributory value of cargo, both sacrificed and saved, for practical reasons is based on the commercial invoice.[229] It includes insurance and freight,[230] unless freight is not at risk of cargo interested parties. Deductions are

222. In 1783, a British jury allowed a claim from the owners of the British slave ship 'Zong' against their underwriters for compensation in respect of 132 Africans bound for slavery who had been jettisoned during the voyage. (Walvin 2011; www.oldsaltblog.com/2013/11/the-zong-massacre-general-average-and-abolition/.)
223. Rule G YAR; § 592(2) German Commercial Code. Arnould calls this '*the leading principle of general average contribution*'. Arnould 1848, p. 920. Also Lowndes & Rudolf 2013, pp. 468-469. See also Chapter 4 below.
224. This has not always been the case. Pursuant to Roman law only the goods saved were to be included in the apportionment; the sacrificed goods were not (Digest 14.2.2.4). Only in the Middle Ages, more specifically in the Consolato del Mare, it was introduced that the sacrificed property was to be taken into account as contributory value as well. The underlying idea was that all parties should be brought in the same position and that it should be irrelevant from a financial point of view which cargo was sacrificed (Arnould 1848, p. 918; Pardessus 1831, pp. 102-103).
225. Also Lowndes & Rudolf 2013, pp. 197-198.
226. The valuation of the property in respect of which a contribution is due or can be claimed is dealt with in Rule G *cf.* Rules XVI, XVII and XVIII YAR 1994-2016. For a detailed overview of the calculation of the contributory values, reference is made to Lowndes & Rudolf 2013, pp. 461-507 as well as to Hudson & Harvey 2010, pp. 193-210.
227. This is further discussed in para. 4.4.4 below.
228. Rule XVII YAR 1994-2016.
229. In order to simplify the general average system, Rule XVII YAR was amended in 1974 so that the cargo's value henceforward was to be determined on the basis of the invoice value and no longer on the market value. (Hudson & Harvey 2010, p. 200.)
230. Rule XVII YAR 1974-2016. In previous versions of the YAR, the calculation of the cargo's contributory was based on the cargo's market value at the place and time the adventure was terminated. (See also Schadee 1949, p. 46.)

applied for damage suffered prior to the adventure's termination.[231] The contributory value of the vessel has to be determined without taking into account the (dis)advantages of a demise or time charterparty to which the ship may be committed.[232] The YAR do not contain specific rules to determine the contributory value of other property on board at the time of the incident, like bunkers and containers.[233]

Freight is an independent contributory value only when it is still at risk of the carrier at the time that the general average measures were taken.[234] In principle, freight is earned and payable upon delivery of the cargo.[235] Until that moment, however, it will be at risk of the carrier. Contractual arrangements to the contrary can and are invariably made.[236] When the freight has already been paid at the moment of the general average act, it is included in the value of the cargo.
It is common practice that only the freight due under the bills of lading and/or voyage charters is taken into account as contributory value for general average purposes, whereas bareboat charter and time charter hire is not.[237] As explained in Lowndes & Rudolf 2013, time charter hire '*accrues continuously while the ship is on hire,* it (author's addition) *is never at risk in the same way as voyage freight (…)*'.[238]

The relative uniformity in the manner of valuation of the property involved in the maritime adventure for the adjustment on the basis of a YAR version is a relatively recent development. The same applies to the inclusion of all contributing interests in the equation for their full value. Throughout the centuries, there was a wide variety in methods to establish the vessel's, freight's and cargo's contributory value. In order to establish the cargo's contributory value, some laws took into account

231. An exception is made for wrongful or undeclared cargo. This cargo is to contribute on the basis of its actual value. Rule XIX YAR 1924-2016.
232. Rule XVII YAR 1994-2016.
233. See also para. 4.5.2.5 below.
234. Rule XVII YAR 1994-2016. Also Lowndes & Rudolf 2013, pp. 486, 494; Hudson & Harvey 2008, p. 209. Interestingly, only the party interested in freight at risk of the carrier is to contribute is not codified or even mentioned in the Travaux préparatoires of Book 8 Dutch Civil Code, p. 618.
235. NL: S. 8:484(1) Dutch Civil Code. It has to be paid by the carrier's contractual counter party. Travaux préparatoires Book 8 Dutch Civil Code, p. 502. English law: *Asfar v. Blundell* [1896] 1 Q.B. 123. Scrutton 2015, p. 403; Lowndes & Rudolf 2013, p. 487.
236. In practice, many different stipulations regarding the payment of freight are used. (Inter alia Scrutton 2011, p. 325.)
237. See also para. 4.5.2.3.
238. Lowndes & Rudolf 2013, p. 435. When the YAR 1950 were drafted, a proposal was put forward by the Dutch delegation to add time charter hire to the property excluded from general average liability in Rule XVII YAR. The proposal was not accepted. (Lowndes & Rudolf 2013, p. 465). Nevertheless, time charter hire in practice is hardly ever included in the apportionment. That time charter hire is not to contribute in general average is often stipulated in charter parties as well. See, for example, clause 25 of the NYPE 93: '*Time charter hire shall not contribute to general average.*' Such a contractual provision in principle, and failing incorporation of the charter parties' provisions in the bill of lading, only binds the parties to the charterparty. It thus transfers the liability for the contribution from the shipowner to the time charterer. (Hudson & Harvey 2010, p. 210.) The Travaux préparatoires of Book 8 Dutch Civil Code (p. 620) set out the practice that time charter hire is not to contribute, but do not codify it. It is merely provided that the Dutch Code does not deal with this issue. That general average is not an issue that is considered to affect time charters follows from the fact that it is not discussed in the 2014 edition of *Time Charters* (T. Coghlin a.o). At p. 617, reference is merely made to *Voyage Charters* (i.e. *Voyage Charters* 2014).

the purchase price,[239] whereas under other the sales price was relevant.[240] It was also possible that either of the methods was applied depending on the moment that the general average act took place.[241] The vessel and the freight were not regarded as contributing interests in any of the ancient laws, at least, not in full.[242] The Digest do not mention that freight at risk needed to contribute. Some more recent laws, for example, in some versions of the Roles d'Oléron,[243] the Wisby Sea Laws,[244] the Ordinance of Philip II[245] and in the Rotterdam Ordinance of 1721,[246] either the ship or the freight had to contribute.[247] In many manuscripts of the Rhodian Sea Laws, one-third was deducted from the value of the ship.[248] Such deduction from the ship's contributory value was common practice and may have been related to the fact that the vessel's value diminished during the voyage due to ordinary wear and tear.[249] The same reasoning seems to have been applied to the choice between ship and freight.[250] Freight was considered to be a replacement for the loss of the ship's value during the voyage.[251] It was regarded a double burden for the owners of the vessel if they would have to contribute for the ship and the freight.[252]

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239. Digest 14.2.2.2.
240. Rhodian Sea Laws (Ashburner 1909, p. 278); s. 6 (Chapter of Shipwreck jettison and average) of Phillips II's Ordinance of 1563; s. 8-10 Du Jet, Ordinance of Marine (for jettison); s. 20 Du fret, Ordinance of Marine (for ransoms); pursuant to the Dutch Commercial Code of 1838, the cargo's value was to be estimated at the place of their discharge after deduction of freight and import duties (s. 728 Dutch Commercial Code of 1838). The bill of lading was generally taken as starting point to determine values. However, some exceptions were made. If the voyage came to an end within the Netherlands whereas the voyage had also started in the Netherlands, the cargo's value was to be determined on the basis of the value at the port of loading (s. 728 subsection 2 and 3 *cf.* s. 723 Dutch Commercial Code of 1838).
241. Arts. 69 and 70 Wisby Sea Laws; s. 112 and 117 Rotterdam Ordinance 1721. If goods were jettisoned before half of the voyage had been performed, the value at the port of loading was taken into account. In case of jettison at the second half of the voyage, the value was determined on the basis of the sales price.
242. Van Empel 1938, p. 157.
243. Ashburner 1909, p. 271. Studer mentions that it was provided by the royal letter of 1285 A.D. that the master contributed for the value of his own goods only, the ship being exempted. In later versions of the Roles, a contribution was requested from the master for his ship as well (Studer 1911, p. lxix). In most versions of the Roles, the master was to choose whether ship or freight was to contribute (Frankot 2012, p. 39). However, Ashburner mentions that pursuant to one of the versions of the Roles d'Oléron, the merchants had to make a choice between ship and freight (Ashburner 1909, p. 276).
244. Art. 38(2) Wisby Sea Laws. It follows from this provision that the choice was to be made by the merchants (Frankot 2012, pp. 42-43).
245. S. 6, Chapter on Shipwreck, jettison and average Philip II's Ordinance of 1563.
246. S. 114-116 Rotterdam Ordinance 1721. Weytsen has defended that both vessel and freight were to contribute in general average (Verwer 1711, p. 209, para. 44). Although the Rotterdam Ordinance of 1721 was based to a large extent on Weytsen's Tractaet van Avarijen, it did not follow Weytsen in this respect. In the 17th and 18th century, it seems to have been common practice in the Netherlands that half the freight and half the value of the vessel were taken into account (Weytsen, para. 43 in: Verwer 1711, p. 209; Goudsmit 1882, p. 433).
247. This rule was criticised inter alia by Weytsen, para. 44 (Verwer 1711, p. 209) and Verwer (1711, pp. 110-111).
248. Ashburner 1909, p. 276.
249. Baldasseroni 1808, p. 143; Weskett 1781, p. 256. Another explanation for the deduction to the vessel's value is that the master as representative of the shipowners should be encouraged to take action and should also be rewarded for actions taken. (Schütz 1896, p. 89.)
250. Stevens 1822, p. 55.
251. Molster 1856, p. 92.
252. Pothier 1821, p. 68.

In order to be able to make his calculations, the average adjuster has to collect the necessary information and documentation from the parties involved. Pursuant to Rule E of YAR, all parties claiming in general average shall give notice in writing to the average adjuster of the loss or expense in respect of which they claim a contribution within 12 months after the termination of the common maritime adventure. In fact, it is in the interest of parties who would like to receive a general average payment to provide evidence in support of their notified claim as the onus of proof to show that the loss or expense claimed is properly allowable as general average, is upon the party claiming in general average (Rule E YAR 1924-2016). If no notification has been made or if insufficient evidence is provided, the average adjuster is allowed to estimate the extent of the allowance or the contributory value on the basis of the information available to him. Under the YAR, this estimate may only be challenged on the ground that it is manifestly incorrect.[253]
The Dutch and German Codes contain a similar provision which obliges the parties with an interest in the general average to provide the average adjuster with all information and documentation that the average adjuster needs in order to be able to prepare the adjustment.[254] As a matter of Dutch law, the estimates of the average adjuster are presumed to be correct, although it is possible to provide counter evidence.[255]

2.4 Evaluation

It follows from the overview above that the principle underlying the contemporary general average concept has ancient roots. However, over the centuries the events giving rise to an apportionment, the costs and damage which are apportioned, as well as the methods applied to ascertain their values have all changed considerably. Maritime business was completely different from today, both at the time when the distribution principle was first applied and in the centuries that followed. Just like the current shipping industry can be said to derive from shipping in the previous centuries, the same applies to general average. However, in view of the serious differences, one should be careful not to take too much guidance from the historic regulations and historic examples, when applying the concept of general average in a contemporary setting, at least as a matter of civil law regimes.[256]

253. In the YAR 2016, Rule E has been put into more stringent wording.
254. S. 639(1) Dutch Code of Civil Procedure respectively §595(3) German Commercial Code.
255. S. 639(2) Dutch Code of Civil Procedure.
256. That the value of individual historical cases for contemporary Dutch legal practice is limited, was also pointed out by Scholten. A specific rule can only be understood in connection with the relationships for which it was written. (Asser/Scholten 1974, pp. 79, 85.)

Chapter 3

Positioning general average in the legal order

3.1 Legal justification of the right to claim a general average contribution

3.1.1 Underlying principles

The purpose of apportionment of losses and costs in general average is that risks and disbursements incurred to prevent damage are shared. This way, the total overall damage can be mitigated.[1] A party who intentionally caused damage or incurred costs may be compensated (to some extent) by the parties who have benefitted from these losses and/or costs.[2] Such apportionment is a clear exception to the general principles underlying the law of compensation of damage that everyone should bear its own damage[3] and that one should not cause damage.[4] This poses the question of what the legal justification is for the damage transferring mechanism applied in general average.

It is generally accepted that the origin of the distribution system underlying the general average concept lies in natural justice (in Dutch: 'billijkheid').[5] When measures are taken to safeguard all property involved in a common maritime adventure and costs are incurred and/or losses are suffered thereby, it would be unjust to let these costs and/or losses lie where they fall. The common understanding is

1. It is universally accepted that damage should be mitigated as much as possible, both by the party who caused and the party who suffered the damage. See, for example, s. 8:23 Dutch Civil Code respectively 6:101 Dutch Civil Code as well as § 254(2) German Civil Code. See in detail inter alia Keirse 2003. Also Dutch Supreme Court 5 December 2014, ECLI:NL:HR:2014:3532; *NJB* 2014, 2274.
2. As set out in para. 2.3.5.1 above, sacrificed cargo is also included in the apportionment as contributing interest.
3. Also Smeele 2005, p. 18 and Cleveringa 1961, p. 898. This principle is considered in detail in Van Maanen 2012, p. 2 and Engelhard & Van Maanen 2008, pp. 1-5.
4. These principles and their relationship are discussed inter alia in Asser/Hartkamp & Sieburgh 6-IV, 2015, p. 21-22; Keirse 2003 and Sieburgh 2001. Regarding general average, see Force 2004, p. 195. The general average contribution illustrates that causing damage in itself is not automatically wrongful. (Sieburgh 2001, p. 580.)
5. Various English case law: *Deering v. The Earl of Winchelsea* (1787) 2 Bos. & Pul. 270; *Birkley v. Presgrave* (1801) 1 East 220; *Schloss v. Walter Heriot* (1863) 14 C.B.N.S. 59; *Burton v. English* (1883) 12 Q.B.D. 218; *The Hibernia, Taylor and Others v. Curtis* (1816) 128 ER 1172; *Strang, Steel & Co v. A. Scott & Co* (1889) 14 App. Cas 601: '*But, in any aspect of it, the rule of contribution has its foundation in the plainest equity.*' See also the South-African case *Wiley v. Russel* (1857) Watermeyer 21, cited in Hare 1999, p. 768. Also inter alia the following authors: Molengraaff 1880, p. 7-8, 78; Frignet 1859 (cited by Molengraaff 1880, p. 5); Baldasseroni 1808, p. 159; Lowndes 1844, p. 12; Lowndes 1922, pp. 27-32; Arnould 1848, p. 878; Dover 1929, p. 269; Kent 1828, p. 186; Bogojevic 2005, p. 25; Mukerjee 2005; Loyens 2011, p. 648; Goff & Jones 1998, p. 428; Rodière 1972, p. 354. Different: Rathbone and Rahusen. Rather than natural justice, they regard the necessity of commerce and sea faring men as justification of the concept's application (Rahusen 1865, p. 9). Jitta regards necessity of commerce and fairness as underlying principles of costs incurred. When sacrifices are made, he sees the justification in the negotiorum gestio (Jitta 1882, pp. 88-89).

that it is fair to distribute these over the beneficiaries. This was already the case in ancient times and has not changed since.[6] The general average concept that we know today can be regarded as a transformation or elaboration of the underlying legal grounds of solidarity[7] and non-justified inequality.[8]

3.1.2 Necessity of legal basis

In general and in the absence of voluntary compliance, rights and obligations can only be effectuated when they are acknowledged by and grounded in a legal system.[9] This can be done directly, for example in a convention, code or case law, but also indirectly, because the law allows the source of an obligation, like a contractual agreement.[10] It follows that in today's legal order a claim for a contribution in general average can only be brought successfully if there is a legal relationship that grants one party the right to claim a contribution and obliges another party to pay this contribution.[11] Natural justice, solidarity and unjustifiable inequality are rather vague concepts. They form the foundation for many distinct legal concepts.[12] None of them provides a sufficient legal basis to regulate the concept of general average and/or grant a right to claim a general average contribution.[13] As

6. That the general average concept is regarded to be based upon natural justice may be related to the general assumption that the current general average system is founded on the Digest's Lex Rhodia de Iactu (see also para. 2.2 above). It is generally accepted that the underlying principle of the Digest's apportionment provisions can be found in natural justice. This is probably derived from the Roman jurist Paulus' quote in the Digest that '*it is perfectly <u>just</u>* [author's underlining] *that the loss should be partially borne by those who, by the destruction of the property of others, have secured the preservation of their own merchandise*' (Digest 14.2.2). Hermogeniamus, another Roman jurist quoted in the Digest, also refers to the 'equity' as the concept's underlying principle (Digest 14.2.2). Also Zimmermann 1992, pp. 407-408.
7. Loyens 2011, p. 648. The principle of solidarity is one of the six principles set out in the Charter of Fundamental Rights of the EU. The Charter was published in 2000 and was given a legal status when the Treaty of Lisbon entered into force on 1 December 2009.
8. Cour de Cassation 2011. Non-justified inequality is acknowledged by Engelhard & Van Maanen as one of the five grounds on the basis of which damage can be transferred to other parties (Engelhard & Van Maanen 2008, p. 8).
9. Sieburgh 2012, p. 301.
10. Scholten 1983, pp. 43-44. It should be noted, however, that it has been submitted that the binding force of a contractual obligation would not derive from the Code, but would follow from the promise given by one party to the other (Asser/Scholten 1974, p. 19). The manner in which exceptions can be made to the in principle limited overview of sources of obligations in codifications as well as the scope of such exceptions vary per system. The Dutch Civil Code starts Book 6 on the law of obligations in s. 1 with the provision that obligations can only arise when this derives from the Code. The obligation in question does not have to be mentioned in the Code itself, but must be allowed by the Code. The Dutch Civil Code intentionally does not give a definition of the term 'obligation'. (Travaux préparatoires Book 6 Dutch Civil Code, pp. 37, 41-42. Also Asser/Hartkamp & Sieburgh 6-I* 2012, pp. 40-41.)
11. In Dutch: a 'verbintenis', i.e. a legal relationship between one or more persons pursuant to which one party is entitled to a specific performance, which the other party is obliged to perform. The relationship must be both accepted and regulated by the law (Asser/Hartkamp & Sieburgh 6-I* 2012, pp. 2, 4).
12. Inter alia the concepts of negotiorum gestio and unjust enrichment (Vriesendorp 2012, p. 371; Asser/Hartkamp & Sieburgh 6-IV 2015, pp. 389; 407). In addition, natural justice can provide for exceptions to a general rule, the application of which would lead to an unjust result and thus serve as a corrective mechanism (Oleck 1951, pp. 24-25; Mullan 1982; Sieburgh 2012, 301). According to Hondius, legal principles may have a legitimating, additional or limiting role. Only the Italian Code would accept them as a separate source of obligations (Hondius 2009, p. 198).
13. Van Empel 1938, pp. 19-20. The Dutch Civil Code makes it clear that obligations arise only when this is provided by the code (s. 6:1 Dutch Civil Code). It follows that obligations cannot be grounded

pointed out by Sieburgh: '*Whereas broadly drafted principles might have given direction for the solution of cases 2,000 years ago, nowadays the rules that govern a case are to be found in codes and/or rulings of judges*'.
For this reason, the observation that the current general average concept derives from the principle of natural justice (and/or solidarity and/or non-justified inequality) seems a correct, but also an insufficient observation.[14]

In practice, the right to claim a general average contribution and the corresponding obligation to pay the same are generally presumed to exist. Their legal basis may only be considered in situations when a contribution is not settled amicably.[15] In legal literature the main focus has been and still is on the history of the general average concept, the participating objects and the quantification of the amounts due.[16] In the 20th century, several authors considered general average's nature on a more abstract level. Not so much to determine the basis of a claim, but rather to be able to deal with issues which had not yet been covered in the statutory general average provisions,[17] to determine whether the concept should also be applied in other areas of law, like air law,[18] and whether it should be abolished completely.[19] The questions on which ground or grounds a claim for a contribution can be brought were, and still are, often disregarded.[20] The same is true for the qualification of certain events as general average. The questions of which definition of general average is applied and on which ground this definition applies, are hardly ever asked. Unfortunately, these questions are not passed over because the answers are obvious. In fact, and as will be considered below, the opposite appears to be the case.[21]

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on mere arguments of fairness. Also Engelhard/Van Maanen 2008, p. 24; Asser/Hartkamp & Sieburgh 6-IV 2015, pp. 28, 30-31.

14. This is clearly shown with the fact that even though there was common agreement in the 19th century that the general average concept is based on natural justice, the actual provisions and possibilities to claim compensation differed enormously. The invitation letter to the 1860 conference at Glasgow during which the first steps were taken to come to international uniform general average rules can serve as example. The invitation letter to the 1860 conference is printed in Rudolf 1926, pp. 3-5 and Molengraaff 1880, pp. 315-318. See also para. 2.2.2 above.
15. In practice, many contributions are settled amicably, including when the party claiming such contribution may not legally be entitled to do so. (Also Crump 1985, p. 25).
16. This is also recognised by Manca 1958, p. 216. The handbooks on general average, like Lowndes & Rudolf 2013 and Hudson & Harvey 2010, dedicate considerably more words to the actual apportionment than the right to an apportionment and the basis of claim for a contribution.
17. Van Empel 1938, pp. 8-9.
18. Van Empel 1938, p. 9. In the 20th century, it was argued by various persons that general average should also be applied in the field of air law. Inter alia by Schadee (Schadee 1952 and 1955), De Rode-Verschoor (referred to by Schadee 1952, p. 197) and by Groeneveld Meyer in 1927 (referred to by Van Empel 1938, p. 242). The question was also discussed by Van Empel (Van Empel 1938, pp. 242-245), by Knauth in 1946 (1947 CLR, p. 1203, f.nt. 6) and in Diederiks-Verschoor 2006, p. 283. So far, general average has not been introduced in the air law and it seems highly unlikely that it will be, at least in the near future. In the questionnaire sent out by the CMI's International Working group in 2013, the question was included whether there were '*new areas where the general average approach could usefully be applied*' (question 1(2)(b)). The replies were generally dismissive. Switzerland suggested application to other means of transport, but did not refer to air law. CMI Report Dublin 2013, pp. 11-14.
19. Van Empel 1938, p. 9.
20. Van Empel 1938, pp. 8-9.
21. See in particular para. 4.2 below.

3.2 Absence of internationally uniform regulation and insufficiency of YAR as legal basis

3.2.1 'Supranational' regimes

It is not only its equitable character that makes general average a particularism. It is also peculiar because the concept provides for liabilities between various parties, whereby debtors can be creditors simultaneously and vice versa, whereas the quantification of the amounts due is subject to the principle of 'communicating vessels'. The amounts of the contribution directly influence each other as a result of the pro rata apportionment. One would expect that such extraordinary concept which provides for multiple obligations in an often international setting would have been regulated at international level in a binding manner. Oddly enough, this is not the case.

A separate general average convention does not exist.[22] Countries cannot subscribe to (a version of) the YAR. Conventions which regulate 'wet shipping' subjects traditionally do not provide substantive general average rules and/or a general average definition. They exclude general average from their respective scopes,[23] or merely acknowledge that claims can arise out of 'general average' without giving any actual rules.[24] The conventions which govern the carriage of goods by sea allow 'lawful provisions on general average'[25] or allow 'provisions (…) regarding the adjustment',[26] but do not give a legal basis for a claim.[27] The European legislator has not created rules for general average either.[28]

The concept's application seems so well accepted in practice that the notion of customary law may spring to one's mind,[29] whether or not in relationship with the YAR.[30] Customary private law, however, does not have a commonly accepted international status.[31] The question whether, and if so how, customary private law is to be fitted in a legal order in essence needs to be determined at national level. In order to be given effect, customary law must be accepted within a national sys-

22. As also pointed out inter alia by Ramming 2016, p. 81; Sulewska (2014, p. 7), Smeele (2005, p. 18) and Hardenberg (1973, p. 182), the YAR do not have the status of an international convention.
23. See, for example, Art. 3 LLMC 1976/1996: '*The rules of this Convention shall not apply to: (a) claims for salvage or contribution in general average*'.
24. Art. 1(1)(g) Arrest Convention 1952 and Art. 1(1)(i) Arrest Convention 1999 mention the general average contribution as one of the maritime claims for which a vessel may be arrested.
25. Art. V Hague (Visby) Rules.
26. Art. 24(1) Hamburg Rules; Art. 84 Rotterdam Rules.
27. The relationship between general average and these conventions is discussed in more detail in para. 4.7.3 below.
28. Also Van Hooydonk 2012, p. 237. The law of the European Union takes precedence over provisions of mere national origin. ECJ 15 July 1964, C-6/64 (*Costa/Enel*).
29. Hardenberg 1973, pp. 183-184. The English case *Simonds v. White* (1824) 2 B & C 805 lends support for the position that general average can be regarded as customary law. It was held that '*a shipper of goods assents to general average as a known maritime usage*'.
30. Rose points out in respect of the YAR that there is '*insufficient uniformity to constitute a current custom*'. (Rose 2005, p. 9, f.nt. 94.)
31. A distinction has to be made between private law and public law. In the public law, the notion of customary international law is often applied and even described in the Statute of the International Court of Justice (Art. 38(1)(b)). Private international customary law does influence hard law and often precedes same. See also, inter alia, DiMatteo 2013, p. 12.

tem, either by legislators or by courts.[32] The same is true in respect of the YAR.[33] In view of the fact that the YAR are often considered as *the* general average regulation, their legal position is discussed in some detail.

3.2.2 Legal position of the YAR

3.2.2.1 *Background*

The YAR are a private instrument created by maritime practitioners to regulate the adjustment of a general average.[34] This is the result of their historical development. When the international general average rules were first drafted in 1860, there were no private maritime conventions yet. International cooperation in the legal maritime field only truly started at the second part of the 19th century, albeit on a small scale. The first international instruments were created by non-governmental organisations. Governmental bodies took over only at a later moment,[35] albeit not in the field of general average.
The YAR are referred to in practically all contracts of affreightment for seagoing voyages and marine insurance policies worldwide.[36] In addition, several countries have incorporated (one of the versions of) the YAR in their national legislations.[37] The YAR are so commonly applied in practice that instead of a code, common law or contract, the YAR are often regarded as the starting position in general average situations during seagoing voyages.[38] It appears commonly accepted that the YAR can form the basis of a claim for a general average contribution. It is respectfully submitted that this view is based on a wrongful idea of the YAR's status and contents. In order to be able to serve as a basis for a claim, the YAR must be applicable to the relationship in which a claim is brought and actually provide for a right to claim. As will be discussed below, the YAR will not be applicable in all situations

32. As a matter of Dutch private law, a custom can only become customary law if there has been a repetition of facts in similar situations and the rule has been regarded as binding by the persons involved (Asser/Altes & Groen 2015, pp. 181-185).
33. This is discussed in some detail in para. 3.2.2.2 below.
34. Schadee 1949, p. 16. See on the YAR's historical development also para. 2.2.2 above.
35. Sweeney 1989, p. 493.
36. In the commentary to the Nordic Marine Insurance Plan of 2013, it is recognised that in practice hardly ever other settlement rules are agreed than the YAR (Commentary to Nordic Marine Insurance Plan 2013 part I, Chapter 4, section 2). Also inter alia *Voyage Charters* 2014, p. 594; Tsimplis & Shaw in: Baatz a.o. 2014, p. 246; Cremean 2008, p. 89; Hare 1999, p. 773; Van Hooydonk 2012, p. 9; Schoenbaum 2011, p. 257; Hudson & Harvey 2010, p. 9; Rabel/Bernstein 1964, p. 389: '*These "York-Antwerp Rules" have obtained almost universal force by insertion or reference in bills of lading and contracts of affreightment.*'
37. See para. 4.4.1.1 below.
38. The view that in general average situations one should start (and possibly also end) with the YAR is widespread. See inter alia Force (2004, p. 196) who writes: '*The rules on general average have been 'codified' in the form of various versions of the York-Antwerp Rules.*' It is even mentioned in the Dutch Civil Code's Travaux préparatoires that in practice, questions of private international law hardly ever arise due to the general applicability of the YAR (Travaux préparatoires Book 8 Dutch Civil Code, pp. 614-615; Travaux préparatoires Book 10 Dutch Civil Code, p. 363).

and to all relationships arising in general average,[39] and do not contain a comprehensive regulation and/or a right to claim.[40]

3.2.2.2 *Status of the YAR*

3.2.2.2.1 No internationally accepted status

In legal literature and case law, the YAR are generally regarded as standard conditions[41] or model rules.[42] With reference to the YAR's frequent application it has also been argued that the YAR would be a part of[43] or should be given the special status of 'lex maritima'.[44] The concept 'lex maritima', however, is not well defined.[45] It seems to cover presumed internationally accepted rules which would have been and would still be applied in a more or less uniform manner in various times and places. General average is generally mentioned as one of the examples, if not *the* example of the lex maritima. An analysis of the general average principle's application throughout the centuries reveals that all maritime regulations contained a principle that provided for an apportionment of specific costs and losses between parties that benefitted from costs being made or losses incurred, but that the specifics of these distribution systems varied substantially.[46] The circumstances giving rise to apportionment, the parties who have to contribute and the damage to be apportioned have never been and still are not identical.[47]

The concepts of standard conditions, model rules and lex maritima have in common that they lack an acknowledged international status. Internationally, the only legal instruments which may have an accepted overriding legal status are international conventions and, within the EU, Regulations and Directives. There is no such thing as an overall accepted and identically applied 'international customary law'. Law must be based on tradition,[48] but mere tradition does not create a legal status in itself, or at least not an internationally accepted status.[49] The status of a private

39. This was already pointed out by Cole in 1924 (Cole 1924, p. 10) and has not changed since, in spite of the YAR's substantive extension.
40. As indicated in *Voyage Charters* 2014 (p. 594): '*the Rules do not form a fully comprehensible code*'. Also Macdonald 2001.
41. In the Netherlands, the YAR are traditionally regarded as standard conditions or 'bestendig gebruikelijk beding' (customary stipulation). Travaux préparatoires Book 8 Dutch Civil Code, p. 614; also Cleveringa 1961, pp. 901-903; Cleton 1994, p. 279; Dorhout Mees 1964, p. 10. Also inter alia Maurer 2012, p. 56; Lord Hoffmann in the English case *The Bijela* [1993] 1 Lloyd's Rep. 411 (at 421).
42. Hetherington 2014, p. 163; Tetley 2000, p. 788. As pointed out by Buglass, the YAR do not have legal effect in themselves (Buglass 1973, p. 117).
43. Tetley 1994, p. 107.
44. Maurer 2012, pp. 76-77. Maurer deems the YAR comparable with the UCP and Incoterms as these conditions are also invariably contractually agreed in practice in their specific areas. On the legal status of the UCP inter alia Van Maanen (2007, p. 187), who regards the UCP as private regulation (in Dutch: 'clausulerecht').
45. Van Hooydonk 2014, pp. 179-180, 182; Myburgh 2000, p. 357. See also Kruit 2015.
46. Kruit 2015, p. 202.
47. For an evaluation of the historic regulations see Kruit 2015. The currently applied regimes are discussed in Chapter 4 below.
48. Brandsma 2006, p. 1.
49. Customs need a reference in conventions and national laws in order to become a 'supplementary source of law'. See, for example, Art. 4.2(b)(ii) Hamburg Rules as well as Art. 25.1(c), 43 and 44 Rotterdam Rules. Also Van Hooydonk 2014, pp. 171, 173.

regulation like the YAR depends on the qualification given by the applicable national law, regardless of its international nature and the frequency of its application.[50] For this reason, whether, and if so to what extent, the YAR are applicable to a general average adjustment and/or a claim for a general average contribution will depend on the applicable national law.

In most cases, the YAR are applicable because their applicability has contractually been agreed in a manner that is deemed acceptable under the applicable law or because they have been incorporated in the applicable national law. This is the result of their historical development. Their predecessors (i.e. the 1860 Glasgow Regulations, the 1864 York Rules and the York and Antwerp Rules 1877) were aimed to be taken over in the national legislations of the various nation states.[51] The underlying idea was that if all nations were to incorporate the resolutions in their national law, uniform legislation would be obtained in the various countries.[52] To bridge the time until the legislation was in place, the rules were intended to be applied in practice by other means, most notably their incorporation in contracts of affreightment.[53] Apparently the efforts to ensure the contractual applicability of the rules were immediately rather successful. It is probably due to this success that the original thought of incorporating the rules into national laws has not been advocated since the introduction of the YAR 1890.[54] Curiously enough, the successful application of the YAR in practice eventually resulted in laws being amended to incorporate (a version of) the rules.[55] In the last decades, it has been recognised by legislators that the YAR are applied almost without exception. In order not to disturb this practice and in view of the fact that the YAR have proven to be effective, national legislators have chosen to include the YAR in their national legal regimes. However, as discussed below, this has not resulted in complete uniformity. In fact, the YAR's contractual applicability appears to be one of the reasons why there is no international uniform general average regulation.[56]

3.2.2.2.2 Consequences of contractual applicability

In most cases, the YAR's application is purely contractual by reference in contracts of affreightment and/or marine insurance policies.[57] They often override the non-

50. Maurer argues that it would not do justice to the YAR to merely regard them as general terms and conditions. He suggests that a new international status is created for some international rules like the YAR, the UPC and the Incoterms (Maurer 2012, pp. 76-77). He makes suggestions for national legislators to deal with private instruments that are widely applied (Maurer 2012, pp. 91-110). The YAR probably cannot be considered as a body of law in respect of which a choice of law can be made under Art. 3 Rome I. See also para. 6.3.2 below.
51. As pointed out in Wigmore a.o. 1918, p. 442: '*As a matter of fact, nothing was farther from the minds of promoters of uniformity in general average law than a desire to get along permanently without governmental aid*'. See also para. 2.2.2 above.
52. Preamble to the Glasgow Resolutions, set out in Rudolf 1926, p. 7. See also Rudolf 1926, p. 9.
53. Rahusen 1877, p. 34; Worst 1929, pp. 7-8.
54. Probably because the YAR were and are referred to in so many contracts of carriage, apparently no need was felt anymore to change their status from contractual provisions to a convention either.
55. See para. 4.2 and 4.4 below.
56. That uniformity would not be created by mere contractual application of the YAR was already pointed out by Franck and Molengraaff (Molengraaff 1880, pp. 262-262). Also Rose 2005, p. 12.
57. Hudson & Harvey 2010, p. 9. The current authors of Lowndes & Rudolf even indicate that the YAR would apply only when their applicability has been agreed contractually (Lowndes & Rudolf 2013, p. 65). This statement appears to overlook that the YAR may be applicable as a matter of national

mandatorily applicable statutory provisions of the applicable national law on the regulated issues,[58] either because the statutory regime gives preference to a contractual regulation, or because the YAR's Rule of Interpretation provides that the Rules apply to the exclusion of any inconsistent law or practice.[59] A contractual applicability has some important consequences.

i. Agreement required

In the absence of a national regime which provides for the YAR's application, the YAR will only be applicable when their application has actually been agreed upon. It has to be determined on the basis of the law applicable to the contract in which the YAR are said to have been incorporated, whether their applicability has been agreed indeed.[60] Criteria of national law will thus determine whether a contract has been concluded and whether a clause in a contract which refers to the YAR is sufficient for their applicability. A qualification of the YAR as standard conditions may have the result that additional requirements have to be met. The Dutch Civil Code, for example, contains an extensive section on the applicability of general terms and conditions,[61] which may have to be complied with as well. As a matter of German law, after the 2013 revision of its maritime law provisions, mere reference in bills of lading to standard conditions is insufficient for incorporation of such provisions.[62] Arguably, a mere reference to the YAR may not result in incorporation and hence not in applicability. As German law does not incorporate the YAR, the YAR may not be applicable when the contractual reference is insufficient.[63]

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law as well. See also para. 4.2 and 4.4.2 below. That the YAR mainly apply because their applicability has been agreed contractually was also recognised by the Dutch legislator. In spite of the YAR's general application, the Dutch legislator deemed it useful to include a definition of general average in the code. First of all, because at the time that the provisions were drafted the commonly applied incorporation clause in contracts of carriage was: '*General average, if any, to be settled according to York-Antwerp Rules*'. It could be argued that the question whether there was a general average situation was to be determined on the basis of the national law. Secondly, the Dutch legislator recognised that even though the YAR were incorporated in all contracts of affreightment, they could not be applied automatically when there was no contract of carriage in place between parties to the maritime adventure. Travaux Préparatoires Book 8 Dutch Civil Code 1992, pp. 614-615.

58. The (binding/regulatory) nature of statutory general average provisions is discussed in para. 3.2.3.3 below.

59. In 1880, Molengraaff suggested that the relationship between the York and Antwerp Rules on the one hand and the national legislation on the other was to be duly clarified in the incorporation clauses in contracts of affreightment. He deemed the wording '*General average, if any, payable according to York and Antwerp Rules*' insufficient as it would be unclear which rules applied in situations not provided for in the York and Antwerp Rules. To prevent confusion he suggested the following incorporation clause: '*General average to be regulated in accordance with the code, taking into account the York and Antwerp Rules, to the extent that these derogate therefrom*' (author's translation). In Dutch: '*Avarijgrosse te regelen naar de wet, met inachtneming der York-Antwerp regels voor zooverre deze daaraan derogeeren*'. (Molengraaff 1880, pp. 264-265.)

60. Art. 10 Rome I. See on the Rome Regulations in more detail Chapter 6 below.

61. s. 6:233-247 Dutch Civil Code.

62. § 522 German Commercial Code.

63. It is doubtful whether such was the German legislator's intention. In particular as the YAR do not appear to have been expressly considered. They have not been referred to in the legislator's explanatory comments to the provision, whereas the legislator has acknowledged in its comments on the general average provisions that the YAR are invariably applicable (Gesetzesbegründung 2012, pp. 96-98 respectively p. 124). The YAR are not mentioned by Herber 2014 (in his comments to § 522 German Commercial Code), nor by Jessen 2013.

In addition, the YAR's applicability will only be accepted to the extent allowed by national law. Mandatory rules of national law may prevent the incorporation of contractually agreed provisions or limit their impact.[64]

ii. Limited scope

Secondly, a contractual applicability of the YAR means that only the parties to the specific contract in which the YAR's application was stipulated are bound by their terms.[65] Not all relationships arising out of a general average event are necessarily regulated contractually.[66] In situations where there are only two parties to a maritime adventure (for example one cargo interested party and the shipowner) and the YAR are incorporated in the contract of carriage, the YAR should apply, apart from the applicability issues described above, and regulate the adjustment.[67] In the majority of the general average cases, however, there are more parties involved, which may not all be contractually related. If the YAR's application is merely contractual, they should apply in the relationship between the parties to the relevant contract only, and not to relationships in which their applicability has not been agreed, like in relationships between two cargo interested parties inter se.[68]

This may only be different when the YAR's contractual scope is extended. Such extensions to the privity of contract rule could be created, for example, by concepts like 'Himalaya clauses' and 'bailment on terms'[69] or a specific provision.[70] In addition, an extended interpretation could be given to the provision incorporating the

64. French law does not allow a deviation from its statutory general average provisions in bills of lading (s. L5133-1 French Code of Transport). As a matter of Dutch law, contractual provisions which are unacceptable in view of the principles of reasonableness and fairness will not apply (s. 6:248 Dutch Civil Code).
65. Also expressly Van Hooydonk 2012, p. 265.
66. A contractual regulation in a contract of affreightment probably cannot extend the YAR's application beyond the relationship between the parties to the relevant contract. The carrier's counter party to the contract of carriage (the cargo interested party) cannot agree to have the YAR applied in its relationship(s) with other parties to the common maritime adventure as these relationships will normally be non-contractual.
67. However, even then issues may arise due to the fact that the party interested in the cargo may change during a voyage. The parties interested in the cargo are further discussed in para. 4.5.2.4 below.
68. This is recognised by the legislators of the new (draft) Belgian Maritime Code. S. 8.41 draft Belgian Maritime Code provides that contractual stipulations only set aside the national regulation if and when agreed between all interested parties (Van Hooydonk 2012, p. 273). The cargo interested party will generally not arrange security itself either and can thus not itself stipulate the applicability of the YAR in such security. It is uncertain whether a security form arranged by the carrier for the benefit of all parties to the adventure can be said to establish a contractual relationship between two cargo interested parties.
69. A Himalaya clause is a clause which provides that other parties, like agents and servants, are also allowed to rely on contractual provisions that the carrier under the contract of affreightment can rely upon. See inter alia Spanjaart 2006; Scrutton 2015, pp. 71-72. There is a situation of bailment when property is in the possession of someone who is not the owner. The possessor may be able to rely on terms concluded by a third party in respect of the property. See inter alia Scrutton 2015, pp. 76-77. Whether any of these or other concepts can be applied to extend a provision's contractual scope depends on the contractual provisions and the applicable national regime.
70. In practice, a specific provision trying to extend the YAR's scope beyond the contractual relationship in which they are agreed is highly uncommon, if applied at all.

YAR by the national courts.[71] From a practical point of view, such extension may obviously be desirable. The underlying principle of general average entails that all parties contribute on the basis of the proportion of their respective interest in the whole maritime adventure established on the basis of the same rules. When not all the parties to the maritime adventure are bound to the (same version of the) YAR, it is difficult to calculate the amounts due. From a more theoretic or legal perspective, however, an extension of the YAR's scope in that respect that they also apply to relationships in which they have not been agreed, is difficult to justify.

iii. Various versions

Thirdly, since the YAR do not have an internationally accepted mandatory status, only the agreed version of the YAR will be applicable, and only to the extent that its application has been agreed upon.[72] Throughout the years, the YAR have been revised many times. The changes to the YAR were necessary to keep up with the changing conditions of commerce and shipping. Rudolf indicated in 1926 that constant revision of the YAR and increase of their numbers cannot be recommended.[73] However, this is exactly what happened with the rules throughout their existence. The fact they have been updated regularly probably explains why they are still widely applied. The acceptance of a new version of the YAR does not mean that a previous edition immediately loses its relevance. Unlike, for example, the INCO terms 2010,[74] none of the YAR versions contains a provision which invalidates earlier versions of the same.[75] On the contrary, standard contract forms used for the carriage of goods by sea are generally not amended directly after a new version of the rules has been adopted, or at least not intentionally, to stipulate the applicability of a new YAR version. Moreover, carriers may have a preference for, or alternatively have objections to, a specific version of the rules. Currently, the YAR 1974 (as amended in 1990) and the YAR 1994 are most commonly used in practice.[76]

71. It has been submitted in English case law that when the YAR are incorporated in a contract of carriage they are not only applicable to the specific relationship. Their scope should be extended to all relationships arising out of the general average event (*Sameon Co. S.A. v. N.V. Petrofina (The World Hitachi Zosen)* [1997] Int.Com.L.R. 04/30.
72. Also Rose 2005, p. 12 and the English Court in *Goulandris Brothers Ltd. v. B. Goldman & Sons Ltd.* [1958] 1 Q.B. 74; [1957] 2 Lloyd's Rep. 207: '*But the parties have freedom of contract; they could agree not to adopt the York Antwerp Rules or agree to adopt them with express modifications or agree to adopt them with implied modifications.*'
73. Rudolf 1926, p. 19.
74. Other examples of general terms and conditions superseding previous versions are the General Conditions and Rules for Dutch Shipbrokers and Agents 2009 (clause 9) and the Rotterdam Stevedoring conditions (Art. 9.1).
75. In the preparation of the YAR 2016, it was asked in the CMI questionnaire whether a Rule of Application should be inserted in the YAR in order to clarify that the YAR 2016 apply unless parties have made it clear that a previous YAR version applies. The proposal did not receive general support (IUMI did support a rule to this effect; IUMI Response 2013, p. 18) and was not accepted.
76. Herber 2016, p. 406; Ramming 2016, p. 82; Hetherington 2014, p. 175. Most standard charterparties and bills of lading refer to these versions. Reference is made, for example, to the NYPE 1993, GENCON 1994, Synacomex form, as well as to the CONGEN bill and Liner bill of lading. The bill of lading terms and conditions of the main shipping lines also show a preference for the YAR 1994. For example, cl. 17 Maersk b/l terms; cl. 14.1 CMA CGM b/l terms; cl. 24 APL b/l terms; cl. 22 MSC b/l terms, with the exception of Rule XXII YAR; cl. 27 Evergreen Line b/l terms, with the exception of the YAR's Rule Paramount; cl. 26 MOL b/l terms, which provides that the carrier can also opt for the YAR 1974 as amended in 1990 or the YAR 2004. The Hanjin and Hapag Lloyd terms (cl. 17 respectively 22) are ambiguous; they refer to the YAR 1974 '*as amended in 1990 and 1994*'. The YAR 1994

They are applied in spite of the fact that a new version of the YAR was accepted in 2004. The 2004 revision of the YAR, however, has never obtained general support in practice and for this reason the YAR 2004 are hardly ever referred to in contracts of affreightment.[77] An updated set of rules has recently been accepted at the 2016 CMI Conference at New York.[78] Their wording was prepared in close cooperation between representatives of ship interested parties and marine underwriters. As BIMCO has already indicated to support this version,[79] the YAR 2016 may well become the new standard.

The lack of acceptance of the YAR 2004 in the industry may be the result of the fact that for the first time in the Rules' history, the YAR were published without a consensus among the ship interested parties and other interested parties.[80] Carriers deemed the rules too 'cargo friendly', at least in comparison with the 1974 and 1994 versions, and refused to include the rules in their contracts of affreightment.[81] The carriers' main problem with the YAR 2004 appears to be the limitation of the apportionment of costs incurred in the port of refuge (Rule X and XI).[82] The debate on whether or not to include these costs in the general average apportionment is not new. In the 19th century, two general theories were advanced on which kind of expenses should be included in general average, i.e. the common benefit and the physical safety theory.[83] The main idea underlying the common benefit theory was that if all parties would have been helped by measures taken, they should all contribute to the costs thereof. A contribution should not only be paid in respect of the measures to bring the vessel and cargo out of the perilous situation, but also to the costs incurred to finalise the voyage and bring the cargo to its place of dis-

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are considered to be a separate revision and not an amendment of the YAR 1974 or 1974 as amended in 1990.

77. Lowndes & Rudolf 2013, p. 64; Enge & Schwampe 2012, p. 77; Falkanger 2011, p. 493; *Voyage Charters* 2014, p. 595; Herber 2016, pp. 406, 413. In its Special Circulars of 24 February 2005 and July 2007, BIMCO has recommended that general average should be adjusted in accordance with the YAR 1994. (BIMCO Special Circular 2005 (I) and BIMCO Special Circular 2007 (II).) The prediction in Scrutton 2011 that the YAR 2004 '*will today be found to have been incorporated in the majority of the shipping documents*' does not appear to reflect the current situation (Scrutton 2011, p. 478). In fact, it was not taken over in the 2015 edition. Only some major cargo interested parties refer to the YAR 2004 in their skeleton agreements. Shell, for example, refers to the YAR 2004 in its skeleton agreements for inland waterway carriage. The Shell Voy 6 on the other hand contains the ambiguous reference to the '*York/Antwerp Rules 1994, as amended from time to time*'. The fact that Marine Underwriters have a preference for the YAR 2004 has not resulted in their application in practice. See also CMI Report Dublin 2013, p. 2.
78. At the 2012 CMI Conference at Beijing, it was recommended that a new International Working Group ('IWG') on general average was appointed. The new IWG was entrusted with a mandate '*to carry out a general review of the York-Antwerp Rules on general average, and, noting that the York-Antwerp Rules 2004 had not found acceptance in the ship-owning community, to draft a new set of York-Antwerp Rules which need the requirements of the ship and cargo Owners and their respective insurers, with a view to their adoption at the 2016 CMI Conference.*' This recommendation was followed and a new IWG was established to prepare a new version of the YAR. Their efforts resulted in the YAR 2016, which are based on the YAR 1994. The development of the YAR 2016 follows from the reports uploaded on the CMI website: www.comitemaritime.org/Review-of-the-Rules-on-General-Average/0,27140,11-4032,00.html.
79. www.bimco.org/News/2016/05/11_York_Antwerp_Rules.aspx.
80. This reason was suggested by the authors of Lowndes & Rudolf 2013 at p. 63.
81. Inter alia Schoenbaum 2011, p. 257; Tsimplis & Shaw in: Baatz a.o. 2014, p. 248; Hudson & Harvey 2010, p. 281.
82. BIMCO Special Circular 2007 (I); Hetherington 2014, p. 175.
83. See on the common benefit/physical (common) safety discussion inter alia Hudson 2000; Macdonald 2003; Cornah 2004 (I), p. 156; Cornah 2004 (II), pp. 403-405; Smeele 2005.

charge.[84] As a result, costs incurred in a port of refuge were apportioned in general average under the common benefit theory.[85] The physical safety theory, on the other hand, was based on the idea that the common interest between vessel, cargo and freight ceases to exist as soon as the vessel and cargo on board had been brought in safety.[86] When the vessel has entered the port of refuge and has discharged the cargo, the common interest and thereby the general average are considered to cease.[87] It follows that under the physical safety theory, the crew wages incurred at a port of refuge, storage costs and port fees, are not automatically included in the apportionment.[88] The 'port of refuge costs' are generally incurred by shipowners. It follows that it is in their interest that these are included in the apportionment and thus shared with the other parties to the maritime adventure. It goes without saying that the cargo underwriters, who at the end of the day generally pay the cargo's general average contribution, had (and still have) a strong preference for the physical safety theory as leading apportionment principle.[89] If the physical safety theory is applied, their exposure is reduced substantially. After the YAR 1994, cargo underwriters have tried to gain support to have the physical safety theory 're-established' as the underlying principle of the YAR.[90] The physical safety theory, however, never appears to have been the sole underlying principle of the rules.[91] The underlying principle of the York and Antwerp Rules 1877, as well as

84. Hudson 2000; Cornah 2004 (I); Smeele 2005.
85. *Atwood v. Sellar* (1880) 5 Q.B.D. 286.
86. Smeele 2004; Janssen 1899, pp. 47-53; Cornah 2004 (I); Molengraaff 1880, pp. 46-47; Rahusen 1865, pp. 3-4.
87. Rahusen 1877, p. 19. The maritime adventure was held to come to an end only at the end of the voyage, i.e. when all goods had been discharged. Also the English case *Whitecross Wire Co. v. Savill* (1882) 8 Q.B.D. 653.
88. That crew wages were not to be regarded as general average expenditures was held by the English House of Lords in *Power v. Whitmore* (1815) 4 M & S 141 and in *Plummer v. Wildman* (1815) 3 M & S 482. Also *Anglo-Argentine, & Co. v. Temperley Shipping Co.* (1899) 2 Q.B. 403. Molengraaff extensively describes the discussion on the several heads of costs and whether or not they are to be included in the calculation. (Molengraaff 1880, pp. 47-77).
89. When the first attempts were made to establish international rules for general average, Lloyds cargo underwriters were happy to support the initiative until it became clear that the narrow physical safety theory would be replaced by the wider common benefit theory (Rahusen 1877, p. 2). At the 1877 conference in Antwerp, Lloyds even suggested that it was to be considered to abolish the concept of general average altogether. It was argued by Lloyds that it would be cheaper to make all costs particular average as all costs would be insured anyway. Moreover, it was argued that particular average would have a smaller risk of fraud. (See Rahusen1877, pp. 4-7, who does not find the arguments convincing). The suggestion was not accepted.
90. Magee 2000, p. 295.
91. At the time of the establishment of the York and Antwerp Rules in 1877, the common benefit theory was applied as basis for the apportionment in the United States of America and on the European continent, possibly with the exception of Belgium. According to Molengraaff, the physical safety theory would have been used in Belgium in practice as well, even though the legal system was based on the common benefit theory (Molengraaff 1880, p. 60). In England, the physical safety theory seems to have been applied in practice in some ports as well (Rahusen 1865, pp. 3-6; Rahusen 1862, pp. 102-104; Selmer 1958, pp. 50-52). Interestingly, at the 1864 conference which resulted in the York Rules, the application of the common benefit theory was also defended by all but one of the English attendants. According to Rahusen, only Lowndes would have argued that the physical safety theory should form the basis of the international rules (Rahusen 1865, pp. 6-9; also Molengraaff 1880, p. 127). The physical safety theory was not commonly accepted and/or undisputed in England either. The common benefit theory was applied by the English Court in *Plummer v. Wildman* (1815) 3 M & S 482. However, in *Atwood v. Sellar* (1880) 5 Q.B.D. 286 and *Svendsen v. Wallace* (1885) 10 App. Cas. 404 the Court of Appeal respectively House of Lords did not confirm the common benefit theory unqualifiedly. (See also Benecke 1824, pp. 196-199; Stevens 1822, pp. 41-44; Dover 1929, pp. 261-263.) As the common benefit theory was used basically worldwide with the doubtful exceptions of England and Belgium, it is not surprising that the international rules were originally

of its successor the York Antwerp Rules 1890, is the common benefit theory.[92] Admittedly, the definition included in Rule A of the YAR 1924 and subsequent versions specifically refers to 'common safety'. This rule, however, was only introduced at a later date, when the port of refuge costs were already to be included in the apportionment pursuant to a specific (numbered) rule.[93] The Rule of Interpretation makes it clear beyond doubt that the criteria listed in Rule A YAR do not apply to the general average events set out in the numbered rules.[94]

Not only can parties agree on the applicability of various versions of the YAR, they are also free to stipulate that a particular YAR version does not apply in full. This is not merely a theoretical possibility. In practice, some specific provisions of the rules are excluded. Cl. 22 of the MSC bill of lading terms, for example, stipulates that '*General average shall be adjusted, stated and settled (…) according to York-Antwerp Rules 1994, except Rule XXII*'. Another example is clause 27 of the Evergreen bill of lading terms and conditions, which excludes the YAR's Rule Paramount.[95]

The fact that different versions of the YAR are used in practice and the YAR are not always incorporated in full means that there is no complete uniformity in the applicable provisions. There is no uniform concept of the YAR at an abstract level. Moreover, it happens that various contracts of affreightment in a chain of contracts concluded in respect of the voyage which resulted in the incident which necessitated the general average measures, refer to different versions of the YAR.
This may be the case, for example, if the charter party provides for applicability of the YAR 1974, whereas the bill of lading issued in respect of a particular voyage incorporates the YAR 1994. In order to prevent this situation, shipowners could stipulate in their charter party that all following contracts in the chain provide for a specific version of the YAR. Such provision is included for example in clause 25 of the NYPE 1993: '*The Charterers shall procure that all bills of lading issued during the currency of the Charter Party will contain a provision to the effect that general average shall be adjusted according to York-Antwerp Rules 1974, as amended 1990, or any subsequent modification thereof and will include the 'New Jason Clause' as per Clause 31*.'[96]
This wording, however, may give rise to discussion after all. Like several other clauses which incorporate the YAR in contracts of affreightment, it is not clearly drafted. There may be confusion as to which version of the rules is applicable.

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founded on the common benefit theory. Jitta even submits that the main purpose of the international cooperation was to make England apply the common benefit system (Jitta 1882, pp. 98-99).

92. Rahusen 1877, p. 3.
93. Rule X and XI YAR deal with port of refuge costs. These costs were already included in the YAR since 1890. That (at least some) port of refuge were to be apportioned was also set out in the Glasgow Resolutions (Resolution 6), the York Rules (Rule VII) as well as in the York and Antwerp Rules (Rule VII). See Lowndes & Rudolf 2013, pp. 690, 706-711.
94. See also para. 2.2.2 above.
95. Reference is also made to the facts underlying the English case *Goulandris Bros v. B. Goldman & Sons* [1957] 2 Lloyd's Rep. 207, as well as to clause 19 of the NYPE (1946). See also UNCTAD 1991, p. 6.
96. Even when it is agreed that a specific version of the rules would be inserted in bills of lading issued under the (head) charter, different versions of the rules may be agreed upon in the bills of lading. This will be the case when an NVOCC uses its house bills of lading with standard prints. The NVOCC will be unlikely to change its bill of lading wording if the difference in versions would have been noted to begin with. Overall agreement on the application of a specific version of the YAR may then be obtained between some of the parties after all by stipulating the desired version in the security form.

When the contract of affreightment contains a reference incorporating the YAR of a specific year 'with subsequent modification' (as included in cl. 25 of the NYPE form) or 'as amended',[97] it is often uncertain which version of the YAR should be applicable. It is not clear whether such clauses intend to incorporate amendments to the specific rules only, like the YAR 1974 'as amended in 1990' or whether they would like to incorporate the most recent version of the YAR.[98]

iv. Interpretation

Interpretation of contractual terms is subject to the applicable national law.[99] As the YAR do not have the status of an international convention, the Vienna Convention on the Law of Treaties, including its rule on contract interpretation, is not applicable.[100] The Unidroit Principles of International Commercial Contracts 2010 and the Principles of European Contract Law 2002 contain an extensive regulation for contract interpretation.[101] However, they are not often applicable to contracts of affreightment as their applicability is not generally agreed. Their rules on contract interpretation may therefore only have an indirect use, if any.[102] National courts apply different rules when interpreting the contractual terms based on varying principles.[103] Whereas, for example, the parties' interpretation is objectively ascertained under English law,[104] in France, the parties' subjective intention has to be established.[105] The different terms may thus be interpreted differently in the various countries.[106] Moreover, even when courts or judges whether or not based in the same jurisdiction, apply the same criterion for contract interpretation, a different outcome may result as well.[107]

3.2.2.3 *Contents of the YAR*

The YAR's contractual application limits the YAR's influence and prevents that the rules can serve as a basis for a claim in all cases. Another important limitation

97. Reference is made, for example, to the Gencon 1994, cl. 12; the Congen bill 1994, cl. 3; cl. 22 Hapag Lloyd b/; cl. 23.1 CSCL b/l; Shell Voy 6 cl. 36.
98. Also Lowndes & Rudolf 2013, p. 575. In particular, the clause of the Hanjin bill of lading (cl. 17a) is not clear. It provides '*General average to be adjusted (…) according to the York-Antwerp Rules 1974 as amended 1994 (or as amended 1990 at the discretion of the carrier)*'.
99. Art. 12(1)(a) Rome I.
100. Art. 31(1)(a) Vienna Convention on treaties provides that terms have to be interpreted '*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*'.
101. Art. 4.1-4.8 Unidroit Principles respectively Art. 5:101-107 Principles of European Contract Law.
102. Art. 5:101-107 Principles of European Contract Law.
103. Inter alia Tjittes 2009, p. 71 et seq.
104. Inter alia *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, 912; *Kookmin Bank v. Rainy Sky SA* [2010] EWCA Civ. 582. Also *Fortis Bank and Stemcor UK Ltd. v. Indian Overseas Bank* [2011] EWCA Civ. 58 on the UCP 600, in which case the Court of Appeal looked at the rules' aim and purpose to reflect international banking practice and the expectation of bankers and traders.
105. S. 1156 French Civil Code.
106. Buglass (1973, p. 120) shows that varying interpretations are given to some provisions. Also Macdonald 2001.
107. See, for example, the judgment of the English House of Lords in *Kookmin Bank v. Rainy Sky SA* [2010] EWCA Civ. 582; [2010] 1 CLC 829. Even though the Lords applied the same criterion, they reached different conclusions. Also McLauchlan 2015, pp. 437-438.

which applies also when the YAR's application has been agreed correctly in the relevant relationship, is that the YAR do not provide and never have provided a full general average regime.[108] Even though the YAR's contents have been extended considerably over the years, they still, and contrary to the general perception,[109] do not give a regulation of all general average aspects. The YAR mainly give rules for the preparation of the adjustment[110] and contain only a few provisions that regulate other issues.

> The following provisions do not directly relate to the preparation of the adjustment. First of all, Rule D establishes that even though a right to a contribution shall not be affected by the fact that the event that gave rise to the general average act was due to the fault of one of the parties, this shall not prejudice any remedies or defences which may be open against or to against or to that party in respect of such fault.[111] Then, Rule G (since 1994) contains a non-separation agreement and a Bigham clause.[112] Furthermore, Rule XXI YAR provides until which moment interest is allowed on the general average expenditures, sacrifices and allowances.[113] Then, there is Rule XXII which deals with the treatment of cash deposits. Finally, Rule XXIII (introduced in the YAR 2004 and 2016) includes a time bar.[114]

In essence, the YAR merely indicate under which circumstances an apportionment of losses and costs is to take place and determine which properties involved in the maritime adventure are to be included in the apportionment and how the values

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108. Also Hare 1999, p. 773; Hardenberg 1973, p. 184; Rabel/Bernstein 1964, p. 389; Rahusen 1890, pp. 5-6, Insinger & Rahusen 1878, p. 19; Molengraaff 1880, pp. 240-241.
109. According to Molengraaff, the initial general view at the time of the 1877 York and Antwerp Rules was that these rules created a sufficient regulation of the general average concept. Molengraaff firmly objects to this view. He even called this a '*chimerical idea if not foolishness*' (Molengraaff 1880, p. 245). He indicates that by merely reading the rules one cannot reasonably argue that they contain a sufficient international regulation. There would not be any coherence, leading thought or plan behind. Even when it was recognised that the York and Antwerp Rules contained an insufficient regulation, the idea that codes should be amended in order to include these provisions, was still advocated (Molengraaff 1880, pp. 240-241; pp. 246-247). The view that the YAR contained a sufficient regime has come up regularly since then (inter alia Rudolf 1926, p. 61; District Court of Rotterdam 5 August 1983, *S&S* 1986, 135 ('Condor'); District Court of Rotterdam 10 January 1986, *S&S* 1987, 41 ('Breehoek')).
110. The Dutch legislator recognised that the YAR do not give a full regime, but mainly deal with the calculation of the contribution and contributory values. For this reason, the legislator gave some substantive provisions on general average and provided that the contributions in general average and the contributory values of the contributing interests '*moreover are to be determined with due observance of the provisions of the YAR, further set out in governmental decree*' (s. 8:613 Dutch Civil Code). In view of this wording, it may be argued that only the YAR's provisions which relate to the adjustment are incorporated in the Dutch legal system and not the YAR's provisions which regulate other aspects. See also para. 4.4.2.1 below.
111. Rule D YAR 1924-2016 and the influence of actionable fault are discussed in para. 4.7 below.
112. The non-separation agreement and the Bigham clause are further discussed in para. 4.4.2.3.2 below.
113. Under the YAR 1950 and 1974, interest accrued until the date of the general average adjustment. In the YAR 1994, this period was extended to three months after publication of the adjustment. Interestingly, Rule XXI of none of the YAR versions provides when interest starts to run. Neither does it provide for what happens when contributions have not been settled within the three-month period after the date of the adjustment. In practice, when legal action is taken to claim payment of the general average contribution, statutory interest pursuant to the applicable national law will be claimed.
114. See on the time bar also para. 4.8 below.

of these properties are to be calculated. The YAR do not deal with the parties involved in the general average. They do not regulate the position of the adjuster or provide which parties interested in the respective properties can claim or have to pay a general average contribution.[115] The question which party is to be regarded as the party involved in the property is a vital but inchoate aspect of the whole claim process. Only a party legally entitled to a contribution can claim the same and, likewise, only the party obliged to contribute can be required to pay a contribution. As will be further discussed below, many parties will have some kind of interest in the property involved in the maritime adventure, whereas their respective interest may vary during the voyage.[116] Moreover, the YAR do not grant a lien or other measures to safeguard a claim for a general average contribution either. In personam liability has to be derived from another ground. Finally, the YAR do not duly regulate their position vis-à-vis the applicable law. The Rule of Interpretation provides that when the YAR are applicable they '*shall apply to the exclusion of any Law and Practice inconsistent therewith*'.[117] The question whether and, if so, to what extent there is an inconsistency, is a matter of contract interpretation, subject to the applicable law.[118]

3.2.2.4 *YAR do not provide a basis for a claim*

In summary, the YAR are not automatically applicable to all relationships arising out of a general average act and do not give a full general average regime. The aspects which are not regulated by the YAR, either because the YAR are not applicable or because they do not regulate these aspects, are governed by national law,[119] unless and to the extent that these aspects are regulated contractually in a manner which is accepted by the applicable national regime.[120] The YAR need to be accepted

115. This is probably due to the fact that the YAR traditionally only gave rules about the adjustment. During the conference leading up to the YAR 1924, it was suggested that such a provision dealing with the parties interested in the properties was included in the rules. The proposal was not accepted. (Van Empel 1938, pp. 7; 214-216.) These issues and the regulations thereon are discussed in some detail in Chapter 4 below.
116. At first sight it may seem logical to burden the owner of the property at the time that the general average measures were taken. Risk in the property may, however, already have passed to a third party. The question, therefore, arises whether it may not make more sense to burden the party at risk in this case. The national legal systems answer this question in various ways. It follows that the relevant party for general average purposes cannot merely be assumed. Failing a regulation in the YAR, this aspect will have to be determined by the applicable national law. See para. 4.5 below in more detail.
117. Rule of Interpretation, YAR 1974-2016. The question whether and if so to what extent there is an inconsistency is a matter of contract interpretation.
118. Art. 12(1)(a) Rome I.
119. This was also recognised by the Dutch legislator of Book 8 Dutch Civil Code (Travaux préparatoires Book 8 Dutch Civil Code, p. 614), but not by the District Court of Rotterdam. It was held both in the 'Breehoek' and in the 'Condor' that the applicability of the YAR would exclude the general average provisions of the Dutch law (District Court of Rotterdam 5 August 1983, *S&S* 1986, 135 ('Condor'); District Court of Rotterdam 10 January 1986, *S&S* 1987, 41 ('Breehoek'). It is respectfully submitted that this is a little too enthusiastic and that only in situations in which there are contradictory provisions the statutory provisions should be set aside. Support for this view can be found in s. 8:613 Dutch Civil Code which recognises that the YAR mainly contain rules regarding the adjustment.
120. The Dutch legislator's comment that general average provisions of all countries worldwide have been set aside by the YAR's general application (Travaux préparatoires Book 8 Dutch Civil Code, pp. 613-614) is an incorrect exaggeration.

by and applied in conjunction with the applicable national law and the contractual provisions, if any, and cannot be regarded on their own as a topic which is completely separated from other contractual and/or legal general average provisions. As held by the English High Court (Mr. Justice Pearson) in *Goulandris Brothers Ltd. v. B. Goldman & Sons Ltd.*: '(…) *on examining the provisions of the York-Antwerp Rules, you find that they do not constitute a complete or self-contained code, and need to be supplemented by bringing into the gaps provisions of the general law which are applicable to the contract*.'[121] The fact that the YAR do not determine the contributors and the claimants means that they cannot be regarded as the legal basis for a claim for a general average contribution, in particular as most national and contractual regimes provide for in personam liability, whereas they answer the question which are the persons interested in the property involved in the maritime adventure in different ways.[122] To cite Hare, '*the York-Antwerp Rules do not create the right to general average: that is a relationship created by implication of law*'.[123]

3.3 Legal bases of general average claim in national law

3.3.1 Several bases

It follows that there is no overall applicable, overriding international regime that provides what should be considered as general average, and that uniformly regulates the concept. In the absence of a uniform regime, the obvious conclusion is that the general average concept and obligations arising thereof, must be governed by national law.[124] Either because the applicable national regime contains specific substantive rules, or because it allows and accepts a contractual regulation within its legal order.
Within this context, the main basis of a claim for a general average contribution can roughly be found in (substantive) general average rules included in (1) national legal systems; (2) contracts of affreightment; and (3) security forms, most notably in average bonds. These various bases will be discussed below.

3.3.2 Substantive general average rules of national law

3.3.2.1 *Obligations arising by operation of law*

General average regulations can be found in legal systems all over the world.[125] As discussed in Chapter 2 above, codified general average rules are not a modern phenomenon. They can be found in various maritime regulations applied in the

121. *Goulandris Brothers Ltd. V. B. Goldman & Sons Ltd.* [1958] 1 Q.B. 74; [1957] 2 Lloyd's Rep. 207. The passage was cited with approval in the English case *The Astraea* [1971] 2 Lloyd's Rep. 494. This was also recognised by Molengraaff in 1880 (p. 308) and by the English judge Mr Justice Roche, as he then was, in 1926 in *Anglo-Grecian v. Beynon* (1926) 24 Ll. L. Rep. 122: '(…) *although the agreement between the parties was that general average should be assessed in accordance with York-Antwerp rules, yet the general law of this country applies and is expressed so far as material to the present case in s. 66(2) of the Marine Insurance Act, 1906* (…)'. Also Schoenbaum 2011, p. 261; Hare 1999, p. 773.
122. See para. 4.5 below.
123. Hare 1999, p. 768.
124. Also Ramming 2016, p. 81.
125. This is also recognised by Tetley 2003, p. 424; Tsimplis & Shaw in: Baatz a.o. 2014, p. 246; Loyens 2011, p. 650; and Buglass 1973, p. 116.

last 1500 years; both at national and international level.[126] Most if not all European States have regulated the general average concept in their national legal order.[127] In addition, regulations can be found inter alia in Asian legal systems,[128] the Russian Merchant Shipping Act,[129] in South America,[130] in the American case law,[131] and in the Islamic maritime law.[132]
National regulations generally at least include a general average definition, provisions on the preparation of the adjustment, the general average contributors and creditors as well as provisions on how to safeguard a general average contribution. In addition, the national regimes may provide rules on the enforcement of a contribution, including time bars, provisions for the execution of the adjustment and the rank of a general average claim in an execution.[133]

The right to apportionment in general average arises as a matter of law or 'by implication of law'.[134] The 'Code' (in civil law countries) or case law (in common law countries) prescribes which requirements have to be met in order to qualify an event as general average and to apply the national general average rules. As the case may be, the concept can benefit both the ship interested parties, and parties interested in other property which was on board the vessel at the time that measures were taken. General average is not an optional right granted to shipowners, such

126. See inter alia para. 2.1 and 2.2 above, as well as Kruit 2015. Also Ulrich 1905 and Lowndes 1922, which both contain an overview of national general average regimes existing at that time.
127. For example, in the Netherlands the general average provisions are set out in the sections 8:610-613 Dutch Civil Code (since 1 April 1991), whereas the German regulation is included in the § 588-595 German Commercial Code (amended in 2013). In Belgium, general average is currently regulated in s. 144-164 of the Belgian Maritime Code, but a new maritime code, including rules on general average, will likely be implemented in the not too distant future (the draft provisions are to be included in the new Belgian Maritime Code in s. 8.1, 8.40-8.50; Van Hooydonk 2012, pp. 219-235 and 270-299). France's general average rules can be found in s. L5133-1 until L5133-19 of the *Code des transports* ('French Code of transport'). The French Code of transport is in place since 1 December 2010 and has replaced (inter alia) the 'Loi no 67-545 du 7 Juillet 1967 relative aux évènements de mer'. The Norwegian general average rules are included in s. 461-467 of the Norwegian Maritime Code. For Sweden, it is Chapter 17 (s. 1-9.) of the Swedish Maritime Code. Spain has regulated general average in s. 347-356 in the Act 14/2014, dated 24th July on Maritime Navigation. Italy has included the general average provisions in s. 469-481 of the Italian Code of Navigation and Slovenia has provided for an extensive regulation in s. 788-823 of its Maritime Code. General average is also acknowledged as a legal concept in the English (common) law. Inter alia in: *Burton v. English* (1883) 12 Q.B.D. 218; *Tate & Lyle v. Hain Steamship Company* [1936] 55 Lloyd's Law Rep. 159; *Strang, Steel & Co. v. A. Scott & Co.* (1889) 14 App. Cas. 601. A regulation is also included in s. 66 English Marine Insurance Act 1906.
128. For example, s. 193-202 Chinese Maritime Code, s. 788-796 Japanese Commercial Code 1899 (Japan is currently in the process of revising its maritime law; a general average regulation is also included in the draft for the new Japanese Maritime Code), and in s. 213-218 Vietnamese Maritime Code. See also s. 3(1)(p) Singapore Admiralty Jurisdiction Act and case law, inter alia the Singapore Court of Appeal case *Sunlight Mercantile Pte Ltd v. Ever Lucky Shipping Co Ltd.* [2004] 1 SLR 171.
129. Merchant Shipping Code of the Russian Federation of April 30, 1999 of No. 81-FZ.
130. For example, Brazilian Commercial Code, Federal Law 556/1850 (s. 932 *cf.* 936 draft Brazilian Commercial Code) and s. 403-407 of the Argentine Navigation Act.
131. Inter alia *Cia. Atlantica Pacifica, S.A. v. Humble Oil & Refining Co.*, 274 F.Supp. 884 (1967), where it is indicated that '*The right to general average contribution, in modern times, is a principle of general maritime law recognized by 'all the principal maritime nations*.' See in general on the American application of the general average concept Buglass 1973 as well as Schoenbaum 2011, pp. 253-266.
132. Khalilieh 1998, pp. 100-105.
133. The contents of the various national legal systems, including these indicated aspects, are discussed in more detail in Chapter 4 below.
134. Inter alia Hardenberg 1973, p. 181; Grotius 1631, book 3, p. 29; Jervis 2013, pp. 130-131; Hare 1999, p. 768.

as the right of global limitation of liability.[135] A shipowner can chose not to pursue a general average case, but other parties may then either oblige him to take further action or can take further action themselves. Some regimes even require that the shipowner takes apportionment measures in certain specific circumstances.[136]

General average will normally arise during carriage of goods pursuant to one or more contract(s) of affreightment/contracts of carriage.[137] Such contract in most cases as a matter of fact will be a condicio sine qua non.[138] However, from a legal point of view, a contractual relationship between the parties to the maritime adventure is not required for a situation to qualify as general average and to trigger the application of general average provisions.[139] In fact, the legal provisions on general average in many codifications are set out in the chapter 'Incidents' and not in the chapter on contracts of affreightment.[140] The Roman-Dutch general average definition applied in South Africa even explicitly mentions that general average is a '*legal relationship created by implication of law*'.[141] That a contractual relationship is not required in order to apply a general average regulation has also been recognised in the English case law. In 1787, it was held by Lord C.B. Eyre in *Deering v. The Earl of Winchelsea*[142] that: '*If a view is taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract. (…) In the case of average there is no contract express or implied, nor any privity in an ordinary sense. This shows that contribution is founded on equality, and established by the laws of all nations*'.[143] More recently, the English House of Lords confirmed that the basis of the general average concept is found in the law rather than in the contract of carriage. Lord Atkin held in *Tate & Lyle v. Hain Steamship Company* that the obligation to contribute: '*is independent of the bill of lading* (…)' and '*No doubt the claim does not arise as a term of the contract.*'[144]

135. See, for example, Art. 1(1) LLMC 1976/1996: '*Shipowners (…) may limit their liability (…)*'. That a request to limit liability is a voluntary choice rather than an obligation was confirmed by the District Court of Rotterdam in its decision in the case 'Happy Rover' (District Court of Rotterdam 20 May 2014, *S&S* 2015, 20).
136. For example, § 595 German Commercial Code, which provides that apportionment measures have to be taken by the shipowner when cargo has been sacrificed. See also para. 4.3.2 below.
137. The terms contract of affreightment and contract of carriage are applied interchangeably below. They both refer to contracts for the transport of goods.
138. The common maritime adventure is generally the result of a contract of affreightment. Korthals Altes deems general average and the contract of affreightment so closely connected that he jointly discusses them. (Korthals Altes 1891, p. 111.)
139. Inter alia Hardenberg 1967, p. 460. As further discussed below, the legal right to claim a general average contribution may lie with a party who is not a party to a contract of affreightment at all.
140. The general average provisions have been included in the chapters on maritime incidents inter alia in the Dutch Civil Code (s. 8:610-613), Norwegian Maritime Code (s. 461-467), German Commercial Code (§ 588- 595), French Code of transport (Chapter III of title III 'Reparation des accidents de navigation'; s. L1533-1 up to and including L1533-19) and the Spanish Maritime Code (s. 347-356).
141. Bamford 1983, p. 349; Hare 1999, p. 771. Hare indicates that the definition remains relevant in view of s. 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983. (Hare 1999, p. 772.)
142. *Deering v. The Earl of Winchelsea* (1787) 2 Bos. & Pul. 270.
143. The position was confirmed inter alia by Brett L.J. in *Burton v. English* (1883) 12 Q.B.D. 218: '*I do not think that it* [the right to contribution, author's addition] *forms any part of the contract to carry, and that it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify the loss of property which is sacrificed by one in order that the whole adventure may be saved.*'
144. *Tate & Lyle v. Hain Steamship Company* [1936] 55 Lloyd's Law Rep. 159. Also: *The Potoi Chau* (*Castle Insurance Co. Ltd. v. Hong Kong Islands Shipping Co. Ltd.*) [1983] 2 Lloyd's Rep. 376; *The Cheldale* (1945) 1 All E.R. 177: '*The common law of the sea in regard to general average imposes the duty to disburse on the master of the*

Legal authors also accept that the foundation of general average can be found in the law rather than in a contract.[145]

A precondition of a contractual relationship for application of the general average concept would contradict general average's purpose of apportionment between the parties interested in property involved in a common maritime adventure. Obligations to contribute in general average also arise in relationships between parties that have not regulated their relationship by contract. All contemporary legal systems seem to accept that, within the limits of the law, in a situation where there are several properties involved in a maritime adventure, parties interested in these properties potentially can all be liable towards each other for contributions in general average, regardless of whether there is a contractual link between (all) these parties.[146] For example, when goods are carried on board a vessel without any contract having been concluded for their carriage, they may also be taken into account for general average purposes as contributory value.[147] Moreover, when cargo is sacrificed during salvage operations,[148] the party interested in the sacrificed cargo may have a claim for a contribution in general average against parties interested in other cargo carried on board at the time of the sacrifices and which was safeguarded. Clearly, there is no direct contractual relationship covering the general average aspects between the cargo interested party whose cargo was sacrificed and the party interested in cargo that was saved as a result of the jettison.[149] Where a contribution is requested by a shipowner from a party interested in cargo carried under an NVOCC house bill of lading, which was not signed by or for and on behalf

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ship, and equally imposes the duty to contribute on the other parties to the adventure, whenever an event causes danger of loss to the whole adventure.'; and *Milburn v. Jamaica Fruit Importing Co.* [1900] 2 Q.B. 540, at 550: *'The foundation of a general average claim is ordinarily not that of contract, but is founded upon a loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of ship and cargo in the time of peril, and which must be borne proportionately by all who are interested.*' In similar fashion Abbot Justice in *Simonds v. White* (1824) 2 B & C 805; *Crooks v. Allan* (1879) 5 Q.B.D. 38; *Price v. Middledock* Co. (1881) 44 L.T. 426. Also Arnould 1848, p. 878.

145. Inter alia Tsimplis & Shaw in: Baatz a.o. 2014, p. 246, 248; Shaw 2001, p. 333; Hardenberg 1973, p. 181; Grotius 1631, book 3, p. 29; Jervis 2013, pp. 130-131; Van Empel 1938, p. 87 et seq; Molengraaff 1882, p. 8; Buglass 1973, p. 116; Hare 1999, p. 768; *Voyage Charters* 2014, p. 593-594; Scrutton 2015, p. 300. As indicated by the English average adjuster Crump (1985, p. 19): '*General average has, in essence, nothing whatever to do with the contract of affreightment*.' Most legal authors discuss general average apart from the contract of affreightment. For example, Rabel/Bernstein 1964, pp. 388-392; Cleveringa 1961; Cleton 1994; Schoenbaum 2011; Falkanger 2011. See, however, Korthals Altes 1891, pp. 111-122; Diena 1969, p. 467; Hudson & Harvey 2010, p. 269.

146. As a matter of Dutch law this is provided in s. 8:612 Dutch Civil Code. In the German Commercial Code this is set out in § 588(2). For English law, the Privy Council's decision in the case *Strang, Steel & Co. v. A. Scott & Co* (1889) 14 App. Cas. 601 is relevant. It was held that: '*Each owner of jettisoned goods becomes a creditor of ship and cargo saved, and has a direct claim against each of the owners of ship and cargo, for a pro rata contribution towards his indemnity, which he can enforce by a direct action.*' Also Delebecque 2014, p. 736 on French law.

147. See, for example, s. L5133-12 French Code of transport, which stipulates that no contribution can be claimed when unregistered goods have been sacrificed but that they are included in the apportionment when saved. In similar fashion s. 215 Vietnamese Maritime Code and s. 795 Maritime Code of Slovenia. Rule XIX YAR also states that no contribution can be claimed in respect of undeclared goods on board at the time of the general average act which were sacrificed at the time of the incident. See also Lowndes & Rudolf 2013, p. 472.

148. Such intentional destruction could consist, for example, of throwing over board of containers or flooding one or more cargo holds. See also para. 2.1 above.

149. Such relationship did not exist when the measures were taken. It may be created at a later point in time by the provision of security.

of the master and/or is binding for the shipowner in another way,[150] there is no contractual link between the party claiming a contribution in general average and the party settling such contribution. Nevertheless, it is generally accepted that the shipowner has a direct right to claim a general average contribution against a cargo interested party (and vice versa). It may be argued that the obligations to contribute in general average are based on other contracts of carriage that the involved parties have concluded in respect of the property involved in the maritime adventure with other parties. However, whether obligations can be derived from such contracts indeed should then be established in the particular relationship, on the basis of concepts of Himalaya clauses or bailment on terms, subject to the applicable law.[151]

That the general average concept has its foundation in a Code or in common law seems obvious if it is accepted that relationships are created between parties who have not regulated their relationship contractually.[152] At least, if one wishes to limit the extent of a possible infringement on the principle of a privity of contract. Nevertheless, there has been some support for the theory that the obligation to contribute in general average would derive from an implied term of the contract of carriage.[153] What this term would entail exactly, for example, whether it includes a reference to the YAR, and if so, to which version, and which parties should be regarded as general average claimants and contributors, remains uncertain. The theory that the obligation to contribute in general average would derive from an implied term of the contract of carriage has not found general approval in case law and legal literature, in the author's opinion correctly so.[154] When there is no contractual relationship between a general average claimant and a contributor, it is difficult to imagine how a claim can have a contractual nature. Staughton L.J., however, has commented in *The World Hitachi Zosen*: *'there is room for argument whether an obligation to contribute in general average is by its nature contractual.'*[155] This statement, with respect, either appears incorrect or may have to be given a rather narrow interpretation. It could be argued that it has to be interpreted that in a situation where there is a contractual relationship between the relevant parties, a claim for a general average contribution arises from this contract, regardless of whether the contract in fact contains general average provisions. Alternatively, it could be given the interpretation that the scope of another contract in which a general average interested party is involved has to be extended to cover relationships between the general average claimant and the debtor. However, even such restricted

150. For example, by inclusion of an 'identity of carrier clause'. See in detail on such clauses: Smeele 1998.
151. See also para. 3.2.2.2 under ii.
152. When looking at general average's history, the basis seems to have been in the various regulations throughout. See Kruit 2015, as well as para. 2.1-2.2 above.
153. *Wright v. Marwood and Others* (1881) 7 Q.B.D. 62; *Anderson v. Ocean S.S. Co* (1884) 10 A.C. 107. Also Manca 1958, pp. 216-217; and more recently: Loyens 2011, p. 650, f.nt. 2914.
154. The preference of some English judges to regard general average as a contractual concept may be related to the fact that in English law claims were traditionally regarded either as contractual or as tort claims. English law has accepted only relatively recently in *Fibrosa Spolka Akcynja v. Fairbarn Lawson Combe Barbour Ltd.* [1942] 2 All ER 122 that obligations can also arise from a third source, i.e. restitution. Also Rose 1997, p. 569. The authors of Goff & Jones 1998 blame the '*prevailing intellectual climate*' at the end of the 19th century for the implied term qualification. They deem the suggestion that general average has a contractual nature '*unfortunate*' (Goff & Jones 1998, p. 428).
155. *Sameon Co. S.A. v. NV Petrofina (The World Hitachi Zosen)* [1997] Int.Com.L.R. 04/30.

interpretation may already constitute an unjustifiable and unnecessary extension of a contract's scope. The possibility of extending the contractual scope will need to be determined under the applicable national law.[156] When the law actually contains a general average regulation, there does not appear to be a need either to further complicate the concept's application by implying terms of uncertain contents or applying difficult legal constructions which infringe the privity of contract.

3.3.2.2 *Comparison with restitution concepts*

The prevailing opinion in case law and legal literature is that the general average concept and obligations to contribute in general average arise by operation of law. As such, general average is similar to the legal concepts of tort, the 'restitution concepts' [157] of unjust enrichment, unjust payment and negotiorum gestio, and in a maritime context, to the concepts of salvage and collision.[158] These concepts all have in common that under certain specific circumstances, the law provides for a compensation of damage and/or costs. The obligations arising out of these concepts are 'involuntary obligations' as they have not been freely assumed by those involved but arise by operation of law (in Dutch: 'verbintenis uit de wet').

In the last centuries, comparisons between general average and other 'restitution concepts' have regularly been made. Legal scholars have had difficulties to position the general average concept within the general civil law framework.[159] In Roman times, a claim for compensation could only be brought against the master on the basis of the contract of carriage.[160] Subsequently, the master was to take recourse against the other parties involved in the maritime adventure during which measures were taken. The other contributors were not directly liable to the party whose cargo had been sacrificed and the latter could not bring a claim against them directly.[161] It was not until the 13th century that it was argued by Accursius in his 'Glossa Ordinaria' that cargo interested parties should be able to bring a claim against each

156. For the purposes of the Rome Regulations, an implied obligation may not be sufficient to give an obligation to contribute in general average a contractual nature. See para. 6.5.2.3 below in more detail.
157. General average is regarded to fall within the restitution category in Rose 1997; Goff & Jones 1998, p. 5, 394; Emiri 2012, p. 332; and Chitty on Contracts (I) 2012, p. 2115.
158. Unlike obligations arising out of a tort or a collision, general average obligations do not arise out of wrongful behaviour. They are created by rightful actions. Damage is created or costs are incurred but with the intention to minimise the total overall damage.
159. Rodière has argued that general average should not be brought under the general civil law concepts (Rodière 1972, p. 352).
160. The action for contribution was basically a claim for breach of the contract of carriage, i.e. an 'actio locati' (Lokin 1999, p. 273; Delebecque 2014, p. 714). At the time that the Roman law of the Corpus Iuris Civilis was applied, there was no special Roman admiralty or maritime court. As a result, the standard Roman procedural rules were used. (Gormley 1961, p. 321; Azuni 1806, pp. 328-329). Roman law was a 'law of actions' rather than rights. Claims had to be presented in a specific form (an action) with the appropriate magistrate. After the action had been brought, the magistrate was in charge of the proceedings up to the moment of the execution of the judgment. In such proceedings an obligation created by the parties, could be enforced (Thomas 1976, pp. 71-72, 214; Jolowicz and Nicholas 1972, pp. 439-450). Reference is also made to Digest 14.2.2. para. 7, where it was provided that in case monies had been paid in respect of a jettison and the jettisoned goods were recovered, an action should be brought by those who had paid against the master under the contract of carriage.
161. There was no direct right of action which allowed such a claim (Lokin 1999, p. 273; Zimmermann 1992, p. 408).

other for their contribution directly.[162] The argument did not immediately find general support. Inter alia, Cuja, a famous French jurist of the 16th century, objected to the suggested extension of the claimants' rights against the owners of the saved property.[163] In the Netherlands, the theory that claims could be made between cargo interested parties inter se was defended by Weytsen in his 'Tractaet van Averyen'[164] and by Grotius.[165] However, it is clear from Van Leeuwen's remark to Weytsen's publication in 1699, that at that moment, this had not yet become common practice or at least that this theory was not undisputed in legal literature.[166] The possibility given to cargo interested parties to bring claims against each other caused theoretical difficulties. Justifications for allowing such claims and the concept of general average were sought in other legal concepts. Comparisons were made inter alia with the concepts of unjust enrichment[167] and negotiorum gestio.[168] It should be kept in mind that when these comparisons between general average and other legal concepts were first made in the 17th and 18th century, there was no general overall applicable general average system. Apportionment of losses was allowed in the specific situations prescribed in the applicable legislation only. Definitions and general rules were still being developed.[169] In order to be able to apply a division of loss also in other than the expressly regulated situations, the underlying principle needed to be determined. That the legal basis of an appointment of losses and costs in general average was to be found in the Code and that obligations to contribute arose by operation of law, was no matter of discussion.[170]

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162. Accursius, Glossa Ordinaria to Digest 14.2.2; Wesener 1975, p. 36. Zimmermann 1992, p. 410; Lokin 2003, p. 261.
163. *Opera Omnia* (Napoli 1758) Vol. III, p. 57; Vol V p. 530, cited in Wesener 1975, p. 38. It should be noted, however, that Cujas was a humanist scholar, looking for the '*true law of Rome*'. His objections may have had a more formal than substantive character (Thomas 1976, p. 11).
164. Published in Verwer 1711, p. 191-222.
165. Van Empel 1938, pp. 133-134 respectively Grotius 1631, book 3, p. 29.
166. Van Leeuwen's remark to Weytsen's para. 57 (Verwer 1711, p. 214). At the beginning of the 20th century, the situation had changed. In answering the questions on the law of general average submitted by the committee appointed by the International Law Association in 1910, the Dutch Supreme Court judge Loder indicated that all parties with a right to contribute could bring an action against all parties that were held to contribute. (His answers have been published in Rudolf 1926, pp. 253-259).
167. Inter alia in the English case *Fletcher v. Alexander* (1868) L.R., 3 C.P. 375; Rose 2007; Goff & Jones 1998, pp. 427 et seq.; Van Leeuwen 1664, p. 404; Scholten 1899, p. 109; Stevens 1817, p. 6; the authors mentioned by Van Empel 1938, p. 54, f.nt. 1, including inter alia Pothier, Lyon-Caen and Renault, Frignet, Smeesters, and Pöhls. See also Voet 1993, p. 273; Bokalli 1996, pp. 358-359.
168. Comparisons with the negotiorum gestio have been made inter alia by Schadee 1953, pp. 359-360; Molengraaff 1880, p. 12; Jitta 1882, pp. 88-89; Van der Tuuk 1882, p. 16; District Court of Amsterdam 26 February 1964, *S&S* 1964, 48 ('Nooit Gedacht'). Just like general average, the concept of negotiorum gestio is also deemed to have its basis in natural justice (Asser/Hartkamp & Sieburgh 6-IV 2015, p. 389).
169. See para. 2.2 above.
170. It was already argued in the 17th century by Grotius and Van Leeuwen that general average was an 'obligation ex lege' (Grotius 1631, book 3, part 29, p. 85; Van Leeuwen 1664, p. 404). That general average's basis lies in the law also followed from s. 160 Rotterdam Ordinance of 1721 (also Goudsmit 1882, p. 431). See, however, Hardenberg 1973, pp. 179-180. He indicates in respect of general average's nature: '*Who searches its basis in the law and the legal concepts searches in vain in a mire of own findings (…). The basis of general average is a factual (…). The factual basis of the general average is the common maritime adventure, the marriage between vessel and cargo*.' (author's translation). A mere factual basis, however, is insufficient. As already indicated by Van Empel in 1938, legal implications should be given to a factual situation (Van Empel 1938, pp. 139, 149).

Regardless of the similarities between general average and other restitution concepts, general average is a concept in its own right. Unlike the other restitution concepts, general average does not provide for a full compensation of loss. A 'mere' contribution can be collected, which amount is based on a pro rata division of losses and costs.[171] Another fundamental difference between general average and other restitution concepts is that general average may create obligations between multiple parties rather than just two. Different parties may be entitled to claim contributions from many distinct parties who may, but do not necessarily have to be debtor and creditor at the same time.[172] The obligations to contribute as such are independent.[173] However, the financial quantifications of these payment obligations are interdependent.[174]

3.3.2.3 *Regulatory nature of national general average regimes*

The fact that general average obligations arise by operation of (national) law does not mean that contractual arrangements cannot be agreed upon. In practice, many contractual arrangements are made to modify or make additions to provisions of national law.[175] Traditionally, national general average regulations are considered to have a regulatory nature. Nowadays some codes make it clear beyond doubt that contractual arrangements are allowed, whereas other codes do not give their substantive general average provisions a binding status.[176] A statutory regime may also be mandatorily applicable regarding specific aspects or in respect of specific persons or documents only. For example, the Spanish Maritime Code explicitly provides that parties interested in the maritime adventure are allowed to agree upon the applicable rules on apportionment, in the absence of which the YAR shall apply.[177] The French, Russian and Slovenian codes also take contractual arrangements as their starting position. The statutory rules will apply in the absence of contractual arrangements between the interested parties only.[178] However, the freedom of

171. See also para. 2.3.5.1 above.
172. See in detail on the general average claimants and creditors para. 4.5 below.
173. There is no joint liability between parties interested in various properties involved in the maritime adventure.
174. General average disbursements are apportioned pro rata over the contributing interests. As a matter of Dutch law, this is an exception to the general rule that in case of several creditors respectively debtors, division takes place on an equal basis (s. 6:6(1) respectively s. 6:15(1) *cf.* s. 8:613 Dutch Civil Code).
175. *Voyage Charters* 2014, p. 593; Herber 2016, p. 407. As recognised in the report of the French Supreme Court, even when there may not seem to be a contractual element at the beginning, it will not be absent completely. Cour de Cassation 2011, section 1.
176. The Dutch Commercial Code of 1838 (s. 697) explicitly provided that the Code's general average provisions had a non-binding nature. Although such a clear provision was not repeated in Book 8 Dutch Civil Code (s. 8:382(2)(a) Dutch Civil Code merely provides that *acceptable* general average provisions in bills of lading are allowed), there is no discussion that the provisions of the Dutch general average legislation are of regulatory nature (Travaux préparatoires Book 8 Dutch Civil Code, pp. 614-615; Hardenberg 1973, p. 188). The Swiss Maritime Code (s. 117(4)) expressly allows contractual general average provisions in bills of lading.
177. S. 356(1) Spanish Maritime Code. In addition, parties are allowed to agree to pay the contribution as established by the adjuster appointed by the shipowner (s. 356(2) Spanish Maritime Code).
178. S. L5133-1 French Code of transport; s. 285(1) Russian Merchant Shipping Act; s. 788 Slovenian Maritime Code. Also s. 8.41 draft Belgian Maritime Code, although it is specifically provided that contractual regulations only take precedence when agreed between *all* interested parties (also Van Hooydonk 2012, p. 273).

contract is not unlimited. The French Code of transport, for example, does not allow contractual general average terms which deviate from the code in bills of lading,[179] whereas the Russian Merchant Shipping Act gives both the general average definition and the provisions on the publication and enforcement of the adjustment a binding status.[180] Other codifications provide in respect of certain provisions that they are applicable, unless otherwise agreed.[181] The principles of reasonableness and fairness ('equity') may also have a limiting impact.[182] It is doubtful that an apportionment in general average can be contracted out of completely. However, it seems acceptable that parties agree in their contract of affreightment that a general average below an indicated amount will not be pursued, or that specific disbursements will not be included in the apportionment.[183] The answer to the questions of what is and is not acceptable will depend on the applicable regime and the wording of the specific contractual provision(s).

3.3.3 Legal bases of general average claim in contract

Even though it is generally accepted that most substantive national general average rules are of regulatory nature only and that contractual general average provisions can be agreed upon, it is submitted that contractual general average stipulations should not automatically change the concept's nature from legal to contractual. This was clearly described by Carver[184] over a hundred years ago: '*The rules as to general average are rules of positive law; and though it may be said (if it seems worthwhile) that they are adopted by the parties in their contract, impliedly, still the rules are not creatures of the contract; they are creations of law, of old standing, universally applicable, without regard to whether any contract of carriage has or has not been made. The contract of carriage may, no doubt, modify those rules as between the parties. Whether it does so in any case is a separate question. But the rules themselves are independent of the contract and their meaning must be sought in the law and not in the contract.*'

Whether a contractual provision is sufficient to provide a legal basis for a claim has to be ascertained in respect of each and every provision. It is doubtful whether the mere provision where the adjustment has to be drawn up and which version of the YAR applies can be considered to give a contractual right to claim a general average contribution. The mere remark in a contract of affreightment that contractual and legal exceptions from liability may also be invoked if a claim is brought in tort, does not automatically give a tort claim a contractual basis. By analogy it is doubtful that a mere reference to the YAR in a contract of carriage or security form is sufficient to serve as a basis for a claim for a general average contribution.

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179. S. L5133-1 French Code of transport.
180. S. 285(1) *cf.* s. 284(1) respectively s. 305-309 Russian Merchant Shipping Act.
181. See, for example, s. 791 of the Maritime Code of Slovenia, which provides that only losses and costs which are the direct result of the general average shall be included in general average.
182. For example, s. 6:248(2) Dutch Civil Code. The reasonableness requirement may also play a role in the interpretation of contractual general average terms in general (for example, as a matter of Dutch law s. 6:2 and 6:248(2) Dutch Civil Code and inter alia Dutch Supreme Court 13 March 1981, *NJ* 1981, 635 ('Haviltex')). Also § 242 German Civil Code.
183. See also para. 4.4.3.5 respectively para. 4.4.2.2 below.
184. Carver 1900, p. 518.

Especially as the YAR do not grant a right to claim a contribution.[185] The reference to the YAR should thus be interpreted as an implied claim right, which would be a rather, and probably too, extensive interpretation. As a matter of English law, however, there appears to be a tendency to set a rather low threshold to consider a claim as based in a contract. Whereas it was held in in *Crooks v. Allan*[186] that the scope of contractual provisions should not be extended too far as '*the office of the bill of lading is to provide for the rights and liabilities of the parties in reference to the contract to carry and is not concerned with liabilities to contribution in general average*', more recently English Courts have been willing to accept that contracts, including bills of lading, regulate the liability to contribute in general average, even when these contracts do not contain an extensive general average regulation. Lord Diplock's comment in *The Potoi Chau* that general average clauses in contracts of carriage between the shipowner and the owner of the cargo '*bring the claim in the field of contract law*', may serve as an example.[187] Some English courts have even indicated that the basis of a claim for a general average contribution can be found in an 'implied contract'.[188] This position, however, has not generally been followed.[189]

In practice, many claims for a general average contribution are brought on the basis of a contract of affreightment or security form.[190] It will depend on the specific wording of the particular agreement, the relationship between the parties and the interpretation pursuant to the applicable law whether the provision is sufficient to regulate the general average relationship, whether it can serve as a basis for a claim, and if so how, or whether it (merely) amends an existing right to claim.[191]

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185. See para. 3.2.2.4 above.
186. *Crooks v. Allan* (1879) 5 Q.B.D. 38.
187. *The Potoi Chau (Castle Insurance Co. Ltd. v. Hong Kong Islands Shipping Co. Ltd.)* [1983] 2 Lloyd's Rep. 376. Similarly: *The Evje (Union of India v. E.B. Aaby's Rederi A/S)* [1974] 2 Lloyd's Rep. 57. It was also held in *The Astraea* [1971] 2 Lloyd's Rep. 494 that a claim for a general average contribution was a dispute under the charter party, inter alia because the charter party incorporated a version of the YAR.
188. *Wright v. Marwood and Others* (1881) 7 Q.B.D. 62. It is argued in Lowndes/Hart/Rudolf 1912, pp. 27-28 that: '*It might be supposed, for instance, that, at the time of shipping or entering into the contract for shipping the goods, each shipper impliedly contracts with the shipowner and with each other, that the master shall have authority in case of danger to make all needful sacrifices, to the expense of which he, the shipper, will contribute his share; or it may be supposed that a similar engagement is made between the parties, at the moment of danger, treating them as if on the spot, as they originally were; or again, if an implied agency is preferred, the master may be supposed to have, in virtue of his office, an authority to do for each cargo owner, as well as for the shipowner, whatever any one of those parties would have had the duty or the power to do had he been on the spot; so that the master's act should on each occasion be taken to be, and treated as if it were, the act of his appropriate principal*.'
189. The theory was explicitly rejected in *Burton v. English* (1883) 12 Q.B.D. 218. See also the case law in which it was accepted that general average arises by operation of law, referred to in para. 3.3.2.1 above.
190. For example, *The Potoi Chau (Castle Insurance Co. Ltd. v. Hong Kong Islands Shipping Co. Ltd.)* [1983] 2 Lloyd's Rep. 376. In this matter, a claim for a contribution in general average was brought by the owners of the mv. 'Potoi Chau' against the consignees and underwriters of cargo carried on board this vessel. In the decision it was specifically mentioned that the claims against the consignees were based on the bills of lading and were not made at common law.
191. The way the applicable law should be determined is discussed below in Chapters 5 and 6. The District Court of Rotterdam doubted whether the obligation to contribute in general average was an obligation arising out of contract. District Court of Rotterdam 4 June 2003, *S&S* 2004, 32 ('Coral'). In general on contractual obligations as a matter of Dutch law: Dutch Supreme Court 9 September 1994, *NJ* 1995, 285 (Trouwborst/Tollenaar); Dutch Supreme Court 21 March 1997, *NJ* 1998, 219.

3.3.4 Legal basis in contracts of affreightment

Most, if not all contracts of affreightment will incorporate one or more provisions on general average.[192] Contractual general average stipulations can be found in charter parties, bills of lading and sea waybills, as well as in skeleton agreements. Such provisions can be tailor-made, but in practice they will usually be standardised, at least to some extent. This is probably the result of the fact that many contracts of affreightment are concluded on standard form contracts, or contracts based on standard wording, in which general average provisions traditionally are incorporated.[193] Provisions on general average will normally not be the provisions which are debated or even considered during contract negotiations, as they lack immediate commercial significance at the time of entering in the contract of affreightment.[194] Most charter party general average clauses will be neutral and will not favour any of the parties in particular. The situation is different when it comes to bill of lading and sea waybill terms. These contracts will hardly ever be specifically negotiated between the interested parties. The carrier will generally use his preferred form in which he will protect and improve his legal position as much as possible.

The most commonly applied contractual general average provision probably is a reference to one of the versions of the YAR.[195] In addition, contracts of affreightment may stipulate a specific place where the adjustment has to take place,[196] may contain a choice for the applicable law to general average,[197] may give a currency for the adjustment,[198] may provide a lien to obtain security for a general average contribution[199] and often incorporate a so-called 'New Jason Clause'.[200] In addition, time charterparties regularly provide that time charter hire shall not contribute in general average.[201] Sometimes it is also stipulated that general average will not be declared for losses and costs which do not exceed a certain amount.[202]

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192. Several common contractual general average provisions are discussed in Chapter 4 below.
193. Many standard form contracts are produced by BIMCO. In these contracts, just as in the standard terms and conditions of the main shipping lines, general average clauses are standardly incorporated. The general average provisions included in the standard forms will in most cases not be amended. When modifications are made these will generally merely concern a different version of the YAR or a stipulation that general average is subject to a specific law or has to be adjusted in a specific place.
194. Also Williams 1999, p. 133.
195. The incorporation of the YAR in contracts of carriage is discussed in para. 3.2.2.2.2 above and in para. 4.4.2.2 below.
196. See para. 4.4.2.2 below.
197. See also para. 6.3.2 below.
198. For example, cl. 14(2) CMA CGM b/l terms. In an earlier draft of the CMI Guidelines on General Average it was suggested to include a currency clause in proposed standard general average security forms. www.comitemaritime.org/Uploads/Work%20In%20Progress/Rules%20of%20General%20-Average/YORK-ANTWERP%20RULES%20PROPOSALS%20FOR%202016%20-%20CMI%20GUIDELINES%20(V4).pdf.
199. See para. 4.6 below in more detail.
200. For example, NYPE 1993, cl. 25; Gencon 94, cl. 12 and 31(c); ShellVoy 6 cl. 36; Tankervoy 87, cl. M. See also inter alia Williams 1999, p. 49; Herber 2016, p. 407. The (new) Jason clause is further discussed in para. 4.7.3 below.
201. For example, Baltime 1939 (as revised in 2001), cl. 24 and NYPE 1993, cl. 25. See also para. 2.3.4.2 above and para. 4.5.2.3 below.
202. See on these provisions also para. 4.4.3.5 below.

Bills of lading and sea waybills by contrast may also specify the parties who have to contribute,[203] try to give an adjustment a binding status[204] and/or provide that the carrier is not obliged to exercise a lien for the benefit of cargo interested parties.[205] It may not always be clear whether and if so which charter party provisions can be incorporated in bills of lading via general incorporation clauses.[206]

3.3.5 Legal basis in security forms

3.3.5.1 *Average bond and average guarantee*

Nowadays it is common practice that general average security is provided before cargo is released.[207] Some legal systems and contracts of affreightment even specifically provide that general average security has to be put up[208] and/or specify which kind[209] and/or when security is to be issued.[210] In many cases the general average security requested by the adjuster will consist of two forms, i.e. an average bond signed by a cargo interested party and an average guarantee issued by a reputable bank or underwriter.[211] Both an average bond and an average guarantee may serve

203. See para. 4.5 below.
204. For example, cl. 14(6) CMA CGM b/l terms; cl. 22 MSC b/l terms. See also para. 4.4.4.3 below.
205. See also Chapter 4.6.2.2 below.
206. It is doubtful whether a provision that time charter hire is not to contribute in general average is automatically incorporated in a bill of lading by means of a general incorporation clause.
207. See on general average security also para. 2.3.4 above. See also para. 4.6 below on how pressure may be put by/on parties to obtain/provide security.
208. For example, s. 352 Spanish Maritime Code, which provides that a 'sufficient guarantee' has to be put up by the parties interested in property on board and that they also have to '*sign a commitment to compensate the damage, in which the relevant goods and their value are detailed*'. Also s. 160(1) *cf.* 273 Russian Merchant Shipping Act; s. 202 Chinese Maritime Code; s. 936 draft Brazilian Commercial Code.
209. S. 404 Argentine Navigation Act provides that an average bond has to be signed and a cash deposit has to be made or a guarantee to the satisfaction of the transporter has to be provided. S. 852(4) of the draft Brazilian Commercial Code provides that cargo must be released when a 'suitable bond' is provided by the cargo consignee/addressee. The Maersk bill of lading terms, for example, require that 'sufficient security' is put up (Maersk b/l conditions, cl. 24.2.), whereas it is added in the CMA CGM, MOL and the CSCL bill of lading terms that it is up to the carrier to decide whether a cash deposit or other security is sufficient (CMA CGM b/l conditions, cl. 14.2; CSCL b/l conditions, cl. 23.1; MOL b/l conditions, cl. 26.1). Other carriers have inserted in their terms that an average bond and/or guarantee and/or cash deposit has to be provided. Pursuant to cl 22. of the MSC bill of lading and cl. 27 of the Evergreen bill of lading conditions, an '*average agreement or bond and such cash deposit (payable at the Carrier's option in the United States currency) as the carrier may require as additional security for the contribution of the Goods*' has to be put up. In the APL terms it is mentioned that the merchant has to provide such cash deposit or other security as the carrier shall reasonably require (APL b/l conditions, cl. 24, ii). The Hanjin bill of lading provides that an average agreement, non-separation agreement, deposit or bond shall be furnished Hanjin b/l conditions, cl. 17 b). It is not clear whether the indicated bond is an average bond or a financial bond, which is commonly used in the United States. As the average bond and guarantee/cash deposit have different functions, it is remarkable that the bill of lading terms and conditions of some shipping lines which transport most volume often stipulate that either of them has to be provided.
210. It is often stipulated in bills of lading that security has to be provided before delivery of the cargo takes place. See, for example, Maersk b/l conditions, cl. 24.2; Evergreen b/l terms, cl. 27; Hanjin b/l terms, cl. 17 b; CSCL b/l terms, cl. 23.1; MOL b/l terms 26.1. The CMA CGM terms stipulate that the security has to be provided before delivery or within three months of such delivery (CMA CGM b/l terms, cl. 14.2).
211. This practice is also set out in the CMI Guidelines on General Average, p. 9 (para. C(1)). The provision of both an average bond and a guarantee appears to have historic reasons (see also para. 2.3.4 above). The practice that an average bond is provided has been recognised in case law of various countries several times in the last 130 years. See inter alia Court of Appeal of The Hague 1 December 2009, *NJ* 2012, 69; *S&S* 2010, 62; ECLI:NL:GHSGR:2009:BL2811 ('Lehmann Timber');

as a separate and additional basis for a claim for a general average contribution. Whether they do, depends on the specific circumstances of the case, more specifically the wording of the forms, the parties involved and existing relationships between the parties, if any. The forms may also merely secure an existing payment obligation. In general, an average bond is more likely to contain substantive provisions than an average guarantee. For this reason, the emphasis of this study will be on the average bond rather than on the average guarantee.

3.3.5.2 *Absence of a standard wording*

Whereas a contract of affreightment is concluded before the voyage and thus also before the incident requiring the measures taken to preserve ship and cargo took place,[212] general average security is arranged after an incident has occurred and general average measures were in fact taken.[213] It follows that the average bond and average guarantee create the possibility to further regulate the general average relationship between the parties, taking into account the specifics of the matter. This will be useful in particular in situations where there is no contractual regime that (sufficiently) regulates the general average relationship between the party and/or parties entitled to claim a general average contribution and the party/parties obliged to contribute.

The wording of average bond and average guarantee forms is generally provided by the average adjuster and may vary per adjuster and/or per general average incident. There is no internationally accepted, standard security wording that is used in all situations.[214] This has been recognised both in the Dutch and English case law. It was held, for example, by the Dutch Courts in the cases 'Borussia' and 'Lehmann Timber' that there is no custom for the use of specific forms.[215] In *St. Maximus Shipping Co. Ltd. v. A.P. Moller-Maersk A/S,*[216] the English judge Hamblen J. considered that security wording could be negotiated, whereas Lord Diplock indicated in respect of the average bond in *The Potoi Chau:*[217] '*This is a fresh agreement which stands on its own independently of the bill of lading and is for fresh consideration on either side*'. In particular in situations where no previous contractual relationship

District Court of Leeuwarden 26 February 2003, *S&S* 2003, 138 ('Baltiyskiy 56'); as well as in the English cases *Svendsen v. Wallace* (1885) 10 App. Cas. 404; *Tate & Lyle v. Hain Steamship Company* [1936] 55 Lloyd's Law Rep. 159; *The Potoi Chau* (*Castle Insurance Co. Ltd. v. Hong Kong Islands Shipping Co. Ltd.*) [1983] 2 Lloyd's Rep. 376. It was held in the American case law that it would have been '*universal practice*' that an average bond was taken by the cargo owners. *Wellmann v. Morse*, 76 F. 573 (1896) quoted in *Cia. Atlantica Pacifica, S.A. v. Humble Oil & Refining Co.*, 274 F.Supp. 884 (1967).

212. The receiver of cargo carried under a bill of lading may only become a party to the contract of carriage as set out in the bill of lading contract at a later stage, but the terms of the contract in that situation have already been agreed at an earlier moment.

213. The idea of some French adjusters that a guarantee should be provided before the voyage started (Pierron 1977, p. 375) has never found general approval.

214. Lowndes & Rudolf 2013, p. 594; Pineus 1973, p. 621.

215. District Court of Amsterdam 27 July 1989, *S&S* 1990, 137 ('Borussia') respectively District Court of Rotterdam 26 May 2009, *S&S* 2009, 134 ('Lehmann Timber'). See, however, District Court of Rotterdam published in *S&S* 1990, 135 ('Sils').

216. *The Maersk Neuchatel (St. Maximus Shipping Co. Ltd. v. A.P. Moller-Maersk A/S)* [2014] EWHC 1643 (Comm.). Hamblen J. held: '*The main advantage to Owners of the LOU was that they now had a single security instrument from a substantial concern with agreed terms (including jurisdiction) rather than a series of separate securities from various individual cargo interests on such terms as might be negotiated.*'

217. *The Potoi Chau (Castle Insurance Co. Ltd. v. Hong Kong Islands Shipping Co. Ltd.)* [1983] 2 Lloyd's Rep. 376.

exists between (some of the) relevant parties to the maritime adventure or where the existing contractual general average arrangement is limited, this purpose of an average bond has become ever more important. It may, but does not necessarily have to, serve as identification of a general average contributor,[218] when the general average contributor is not clear straight away. The national legal systems and contracts of affreightment do not all contain the same provisions regarding the party that will have to contribute. The contributor could be the consignee or factual receiver, but also the cargo owner.[219] In addition, general average is generally not extensively regulated in contracts of affreightment. It does not always follow from the terms of the contracts of affreightment involved which party is the cargo owner and/or receiver. An average bond may then clarify the situation or at least provide a general average debtor. In addition, an average bond may stipulate the currency of the adjustment,[220] contain an applicable law clause[221] and may provide for an interruption of applicable time bars.[222]

In proposed wording for average bonds and guarantees it is often indicated that the forms will only be accepted provided that no amendments have been made to them.[223] This is understandable from the average adjuster's (and also the shipowner's) point of view. Especially in general average cases where there are many potential contributors, it can be extremely time consuming to negotiate specific wording with each of the contributing interests involved. Moreover, varying security wording could make the preparation of an adjustment, as well as the enforcement thereof increasingly difficult. However, from a legal point of view, amendments to the suggested wording cannot be rejected upfront, without taking the suggested wording and the merits of the specific relationship into account. The security contract may well be the only (direct) contract between the party claiming a contribution in general average and the party who is (potentially) liable to contribute.[224] It would then be harsh, and possibly even unjust, to force a standard wording on the assumed debtors, in particular when the wording deviates from the existing legal situation and/or the specifics of the matter are not properly dealt with and have not been discussed. A party cannot be obliged to prejudice his position for practical reasons only.[225] In some legislations, it is even expressly provided that an average bond may contain reservations.[226] If damage is caused by a party and security is requested from him, it goes without saying that this party cannot

218. Also Ramming 2016, p. 91.
219. This issue is discussed in more detail below in para. 4.5.
220. See, for example, the security forms requested by adjusting company Richards Hogg Lindley in respect of the general average measures taken regarding the fire on board the mv. 'Hanjin Green Earth' in May 2015.
221. See also para. 6.3.2 and para. 6.5.2.4 below.
222. This was considered by the English Court of Appeal in *The Lehmann Timber* (*Metal Market OOO v. Vitorio Shipping*) [2013] 2 Lloyd's Rep. 541. The suggested standard security form included in an earlier draft of the CMI Guidelines on general average (draft CMI Guidelines on GA 2015, p. 12), as well as the IVR security form which is commonly used in case of general averages in inland waterway shipping (the so-called 'revers') provide that all time bars are interrupted until an adjustment has been published.
223. See, for example, the average guarantee of RHL, printed in Cornah (RHL), p. 67.
224. For example, when cargo is carried under a house bill of lading not signed by the master.
225. Also District Court of Rotterdam published in *S&S* 1990, 135 ('Sils').
226. For example, s. 404 Argentine Navigation Act.

be obliged to provide security on a form which prejudices its rights. There is no discussion that this party cannot be forced to accept a jurisdiction or applicable law clause which deviates from the legal position for practical reasons. However, in respect of general average this is exactly what happens.
Standard wording would be acceptable if it was without prejudice to the parties' legal position[227] or its contents were reduced to the bare minimum. It appears difficult to accept that the security contract does not prejudice the existing legal position when its wording clearly provides otherwise. In absence of a uniform general average regime, the added value of such trimmed standard wording would probably be too limited to have positive added value, as the implementation of binding standard wording may make it impossible to further and extensively regulate the relationship between the parties to the maritime adventure in the security wording. It follows that the adjusters' suggestion that a standard form of security wording should be attached to the YAR,[228] although understandable, is difficult to defend from a legal perspective.[229] Nevertheless, it was suggested that a 'non-binding but recommended GA security document' was included in the CMI guidelines for information purposes during the CMI IWG subcommittee meeting in preparation of the YAR 2016 at Istanbul in June 2015.[230] A draft wording was included in the CMI 2016 New York conference papers,[231] but was not deemed sufficiently finalised to include in the CMI Guidelines.

Under several national legal systems, the party who arranges general average security, in addition to financial security, can insist that an average bond is issued before cargo is released.[232] However, only exceptionally it is specified which provisions

227. The decision of the District Court of Rotterdam published in *S&S* 1990, 135 ('Sils').
228. Inter alia during the preparation of the YAR 1994 and the discussions of the subcommittee in preparation of the YAR 2016 (CMI IWG Report 2014; AMD Response 2013, p. 3). ICS/BIMCO cautiously indicated that the development of standard forms for average guarantees and average bonds 'merits consideration' (ICS Response 2013).
229. As indicated by IUMI in the preparation of the YAR 2016, '*this idea should be approached with caution and will very much depend on the precise wording*' (IUMI Response 2013, p. 6).
230. CMI Report Istanbul (II) 2015, p. 13. The CMI Guidelines are discussed in para. 2.2.3 above.
231. CMI Yearbook 2015, pp. 268-269.
232. Court of Appeal of The Hague 1 December 2009, *S&S* 2010, 62 ('Lehmann Timber') respectively English Court of Appeal *The Lehmann Timber* (*Metal Market OOO* v. *Vitorio Shipping*) [2013] 2 Lloyd's Rep. 541. The decision of the Court of Appeal of The Hague in the 'Lehmann Timber' seems to set aside the admittedly correct decision of the President of the District Court of Amsterdam in the 'Borussia' (27 July 1989, *S&S* 1990, 137). In the 'Borussia', carrier Hapag Lloyd had requested the merchant under its bill of lading to provide security by means of an average bond, an average guarantee and a non-separation agreement. The merchant was only willing to provide an average guarantee. The Court held that it did not follow from the wording of the bill of lading, nor from the purpose of this provision considered in conjunction with all the bill of lading conditions and the YAR that the merchant could reasonably be required to provide security in a different form than by putting up a cash deposit or a guarantee for the amount of the estimated general average contribution due from it in due course. Even if it would have been common practice that security would be provided by means of an average bond and guarantee, such practice would in the court's opinion not exist between Hapag Lloyd and the merchant involved and would thus be irrelevant. In the 'Sils', the District Court of Rotterdam held that the Lloyd's Average Bond and Guarantee had to be provided, but that this security could not prejudice the legal position which followed from the law and the bills of lading. These decisions do not appear to have been considered by the Court of Appeal in the 'Lehmann Timber' (Court of Appeal of The Hague 1 December 2009, *S&S* 2010, 62 ('Lehmann Timber')).

are required.[233] In view of the fact that the average bond's contents may vary from one form to another it is often uncertain which provisions can be insisted upon to be included in the form.
The debate on whether there is an obligation to provide security has so far focussed on the question whether a cargo interested party can be obliged to provide the same. Another question is whether a ship interested party can also be obliged to provide an average bond and/or guarantee.[234] This question has not yet clearly been answered. Unless it is obvious from the start that the ship interested party will be a net receiver rather than a contributor, there does not seem a legitimate reason not to oblige this party to provide security as well.

In order to reduce the costs of collecting security, BIMCO has developed the so-called 'BIMCO average bond clause'.[235] The clause is drafted to be included in contracts of affreightment in order to prevent the need to collect average bonds.[236] Provisions which are often included in an average bond have been set out in the clause. Although the responses to the clause's introduction were positive,[237] in practical terms, the clause has not become a success. It is hardly or even not all applied.

3.3.5.3 *On-demand security*

The general average security wordings used in practice are similar to some extent but not the same. Some security forms merely support and confirm an already existing obligation to contribute, without prejudice to the underlying legal relationship(s). This may be the case, for example, when it is provided that a contribution will be paid when the party issuing the security is properly and legally, either by code, common law or contract, obliged to contribute. In such a situation, the security form does not grant a separate right of claim. However, it is also possible for it to create a separate and possibly additional payment obligation. This may be the case when the party issuing the security was not bound to contribute under the applicable law or contract of affreightment. With the issuing of an average bond that provides that the party issuing the security will settle a contribution due in respect of specifically indicated property and/or as determined by the average adjuster, a right to claim a contribution is thereby created.[238] Whether the underlying legal relationship has become irrelevant by issuance of the security form has to be

233. The Spanish Maritime Code obliges the cargo interested parties to provide '*a commitment to compensate the damage, in which the relevant goods and their value are detailed*' (s. 352 Spanish Maritime Code). Also s. 404 Argentine Navigation Act; s. 937 draft Brazilian Commercial Code.
234. See also para. 4.5.2.2.2 below.
235. BIMCO Special Circular 2005 (II) and BIMCO Special Circular 2007 (II).
236. The 2007 average bond clause was created in concert with the Association of Average Adjusters. BIMCO Special Circular 2007 (II).
237. English Court of Appeal *The Lehmann Timber* (*Metal Market 000* v. *Vitorio Shipping*) [2013] 2 Lloyd's Rep. 541, para. 8; High Court of Justice London [2012] EWHC 844 (Comm), para. 9. ICS also supports inclusion of the clause in contracts of affreightment. In its reply to the 2013 CMI questionnaire it is indicated that the use of the clause should be promoted (ICS's reply to the 2013 CMI questionnaire, p. 4).
238. As liability to contribute in general average generally has an in personam nature only (see para. 4.5.2.1 below), it may be argued that a security form which covers a contribution due *from the goods* does not create liability.

determined in respect of every single form on the basis of the legal relationship between the parties and the form's wording.

The security wording may provide that payment has to be made regardless of the question whether liability to contribute exists on other grounds, as soon as a payment request is made by the shipowner and/or adjuster. In case of such 'on-demand security', the parties bound by the form do not have the possibility to raise any defences, even if the general average would be the result of an actionable fault of the party claiming a contribution.[239] Courts seem hesitant to accept that an on-demand wording has been incorporated in general average security forms. For example, the Dutch and English courts have not been willing to accept that the wording '*a general average contribution will be paid which will be ascertained to be due from the cargo or the shipper or the owners thereof under an adjustment prepared by the adjuster*' qualifies as on-demand security.[240]
The available case law on whether specific provisions have to be accepted, is limited. This may be the result of the fact that most security forms are signed without any specific attention having been paid to the wording. When the non-separation agreement is opposed, average adjusters will generally not regard the provided security to be acceptable security and cargo will not be released. Those interested in cargo will not be inclined to take the matter legal in view of the time that such action would take and in view of the costs that will be incurred. It will depend on the applicable regime and jurisdiction whether a party can be required to provide on demand security.[241] Several courts have held that the security that can be required from envisaged contributions in general average has to be reasonable.[242] On demand security probably is not reasonable as it disregards the existing legal relationships between the parties. As a result, it may be argued that a party cannot be required to provide the same.

> The forms that come closest to a commonly accepted wording are the Lloyd's average bond and average guarantee.[243] However, in practice, these forms are hardly ever used without amendments. The Lloyd's average bond provides: '*In consideration of the delivery to us or to our order, on payment of the freight due, of the goods noted above we agree to pay the proper proportion of any salvage and/or general and/or special charge which may hereafter be ascertained to be due from the goods or shippers or owners thereof* (…)'.[244]

239. The influence of fault of one of the parties to the maritime adventure is discussed in para. 4.7 below.
240. President of the District Court of Rotterdam 5 September 1997, *S&S* 1998, 2 ('Kvarner'); the English cases *The Jute Express* [1991] 2 Lloyd's Rep. 55; *The Maersk Neuchatel (St. Maximus Shipping Co. Ltd. v. A.P. Moller-Maersk A/S)* [2014] EWHC 1643 (Comm.). Similarly US: *Cia. Atlantica Pacifica, S.A. v. Humble Oil & Refining Co.*, 274 F.Supp. 884 (1967) and reportedly also the German Federal Court regarding a general average bond used in inland waterway shipping, *BGHZ* 80, 16, referred to by Bemm 1997, p. 134.
241. It was held specifically by the District Court of Rotterdam in the case 'Oostzee' that potential general average contributors cannot be required to provide on demand security. District Court of Rotterdam 3 November 1989, *S&S* 1990, 65 ('Oostzee').
242. That only reasonable security can be required has been held both in the Dutch and in the English case law. Court of Appeal of The Hague 1 December 2009, *S&S* 2010, 62 ('Lehmann Timber'); respectively *The Jute Express* [1991] 2 Lloyd's Rep. 55. Also *Huth v. Lamport* (1885) 16 Q.B.D. 735.
243. Hudson & Harvey 2010, p. 273; Pineus 1973, p. 621.
244. In previous versions of the Lloyd's average bond it was stated expressly in the wording of the bond itself that the adjuster did not have the means to bind the parties: '*And nothing herein contained shall*

It is not specified who should ascertain that a payment is due. It has been argued that this decision should be taken by the average adjuster and that payment should thus be made at the adjuster's first request. Acceptance of the argument would mean that the security in fact has as an on-demand nature. The argument has been accepted neither in Dutch case law nor in English case law. In the Dutch case 'Kvarner', President Boot of the District Court of Rotterdam presiding in summary proceedings held that it would be unlikely that average adjusters would determine not only which amounts parties would have to pay but also that the parties would already have to pay before a party would have had the possibility to ask the court's opinion. President Boot indicated that the signing of a general average guarantee or bond would be very far-reaching. It would result in the situation of 'pay first, ask questions later', whereas it would not be a viable option to refrain from putting up security as that would have the result that the shipowner would not release the cargo. The President literally said: '*Damned if you do, damned if you don't.*'[245] He subsequently held that the question whether payment was due was to be answered by the Court. The President added that, obviously, parties could agree that payment was to be made at the adjusters' request, but that this required clear wording.[246] The same conclusion was reached by the District Court of Amsterdam.[247] The Court considered that the amounts that the parties are obliged to contribute are not determined by the average adjustment, but by court order or legal compromise. It held that the average adjustment is no more than the average adjuster's opinion as 'professional man' and does not oblige any of the parties to make any payment.[248] The English Court also held that the mere incorporation in a general average bond of the wording '*a contribution which is payable in respect of the goods by the shippers or owners thereof*' meant that the contribution had to be 'legally' payable.[249] The wording could not be thus interpreted as it is that average adjuster who would determine when the contribution was payable. The wording '*a contribution which is payable in respect of the goods*' appears to be essential however. In respect of a letter of undertaking that did not contain in that case that phrasing, it was held by Hamblen Justice in *The Maersk Neuchatel* that it had an on-demand nature.[250] It should be noted though that the

constitute the said Adjuster or Adjusters an arbitrator or arbitrators or render his or their Certificate of Statement binding upon any of the parties.' (Cited in: Court of Appeal of The Hague 20 May 1977, *S&S* 1977, 79 ('Majorca')).

245. President of the District Court of Rotterdam 5 September 1997, *S&S* 1998, 2 ('Kvarner'). It was not clear whether English or Dutch law was applicable. The judge indicated that the outcome would be the same under both legal systems.
246. President of the District Court of Rotterdam 5 September 1997, *S&S* 1998, 2 ('Kvarner').
247. This part of the judgment was not reversed in appeal. District Court of Amsterdam 25 April 2001 referred to in Court of Appeal of Amsterdam 5 February 2004, *S&S* 2004, 85 ('Ararat'/'Federal Schelde').
248. See, however, the decision of the Dutch District Court and Court of Appeal of Leeuwarden in the 'Baltiyskiy 56'. These deviating decisions are unlikely to change the clear line of Dutch case law as in the 'Baltiyskiy 56', the parties interested in the cargo appear to have agreed that they would pay the amount determined by the average adjuster. District Court of Leeuwarden 19 February 1997; Court of Appeal of Leeuwarden 25 March 1998, *S&S* 2001, 87 ('Baltiyskiy 56').
249. *The Jute Express* [1991] 2 Lloyd's Rep. 55.
250. *The Maersk Neuchatel (St. Maximus Shipping Co. Ltd. v. A.P. Moller-Maersk A/S)* [2014] EWHC 1643 (Comm.).

security was not given by a cargo receiver but by the time charterer as intermediary party who did not have an interest in the cargo itself. The letter of undertaking was an independent contractual arrangement between two commercial parties. The decision should therefore be distinguished from the decision on general average security in the 'Jute Express'.[251] Hamblen J.'s decision confirms that when a security form is issued with a stringent wording, it may well be regarded as on-demand security.

3.3.6 Interaction and interference of various legal bases

It follows from the above that a claim for a contribution in general average may be based on substantive provisions of national law, contracts of affreightment and security forms. This means that it will have to be determined in the specific situation on which basis the claim can be brought and in fact is brought. The claim's legal basis will determine, inter alia, which law and other provisions will be applicable. As such, the claim's legal basis is important and cannot be disregarded.[252] The potential presence of various legal bases also begs the question of the various bases' interaction and interference. In particular, as the provisions of the various sources may very well differ.

More concretely, if a party wants to bring a claim for a general average contribution, it should first of all be determined on the basis of which ground or grounds the claim can be brought in that particular situation. Is there only one ground or are there several potential sources? Is a contractual regime, if any, sufficiently extensive and, if so, does the applicable law allow a contractual deviation from its legal regime? When a contractual provision is regarded insufficient to give a right to claim, this does not mean that it is therefore completely irrelevant. It may modify or complement the regulation of the applicable national regime. Alternatively, when there is no obligation pursuant to the applicable law, a right to claim a contribution which derives from a contract, may only be effectuated by relying on provisions of national law. When it is established that a contractual right to claim a contribution exists, the question is whether this means that it thereby becomes a contractual claim which is subject to the applicable law of the contract and/or the contractual provisions, or whether terms of national law remain (additionally) applicable and if so, how the various provisions interact.

As will be further discussed below, national law, the contract of affreightment and the security forms may contain varying provisions regarding one or more general average aspect(s).[253] Their relationship is generally not well regulated, neither in

251. *The Jute Express* [1991] 2 Lloyd's Rep. 55.
252. See, however, the decision of Bowen L.J. in the English Court of Appeal case *Burton v. English* (1883) 12 Q.B.D. 218. The remark that general average's legal basis '*often ends by being a mere question of words*' was also criticised in Lowndes/Hart/Rudolf 1912, p. 30, f.nt. c.
253. Various relevant aspects to effectuate a claim for a general average contribution are discussed and compared in Chapter 4 below. The analysis shows that the provisions set out in the various sources are all but identical. For a practical example reference is made to the English case *The Armar* [1980] 2 Lloyd's Rep. 450.

national legal systems nor in contractual general average regulations.[254] The YAR's Rule of Interpretation provides that the YAR take precedence over other provisions. However, as discussed, the YAR are not automatically applicable and do not regulate all aspects.[255] Other contractual provisions, if any, do not fill all the gaps as they are generally limited in content and may not bind all parties involved. Courts consider the relationship between the various sources of a claim differently. It was held, for example, in the US that in case standard security has been provided by the cargo owner, the adjustment is considered as 'prima facie' evidence of liability.[256] By contrast, a Dutch Court was unwilling to accept that the mere fact that an average bond was provided meant that the average bond had taken the place of the obligations arising out of the bill of lading.[257] What further complicates matters in general average is that many situations not merely involve the relationship between two parties, but that a general average event may give rise to various relationships, both between parties interested in several properties and between parties interested in the same property, which are all somehow interrelated. The fact that the relationship between the various sources is not well regulated may cause legal difficulties and uncertainties in all these relationships. Questions of concurrence in general are difficult to answer.[258] This applies even more in respect of general average, especially taking into account that the various sources for a claim contain deviating provisions and may even be subject to varying laws. The outcome in a specific case will depend on the applicable law and the merits of the specific matter.

3.4 Evaluation

In order to be able to bring a claim for a general average contribution, there has to be a legal basis for the claim. In the absence of an international general average regime with binding legal effect, the legal basis of a claim for a contribution and in respect of other obligations arising out of a general average incident must lie in the national law. Pursuant to the applicable national legal regime it will have to be determined whether the national law's substantive rules apply and/or whether contractual provisions set out in contracts of affreightment or security forms take precedence, and if so which provisions and to what extent. It follows that the applicable national law as a rule plays an important role.

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254. After security has been provided by the consignee, the cargo owner is not off the hook from a legal point of view. When the security proves to be insufficient or does not cover the liability of the party who is obliged to contribute, a claim may still be made against the cargo owner after all, although it may be more difficult to enforce such a claim.
255. See para. 3.2.2 above.
256. *Cia Atlantica Pacifica, S.A. v. Humble Oil & Refining Co.* 274 F.Supp 884 (1967). Admittedly, this gives too much weight to the general average bond, in particular taking into account that the bond is often issued on the basis of the wording provided by the average adjuster, which may have been obtained because cargo was not delivered without a bond issued on this wording.
257. District Court of Rotterdam 14 May 2008, *NIPR* 2008, 185; ECLI:NL:RBROT:2008:BD4110 ('Devo'). The case is discussed in more detail in para. 6.5.3.2.3 below.
258. Bakels 2009 (I) and (II). The starting point under Dutch law is that in case of concurrent provisions, the provisions are to be applied side by side as much as possible. Only when accumulation is impossible, a claimant is entitled to choose on which legal basis he would like to bring his claim (Dutch Supreme Court 14 June 2002, *NJ* 2003, 112 (Bramer c.s./Colpro)). The Dutch Supreme Court does not easily seem to accept that provisions have exclusive effect (Dutch Supreme Court 15 November 2002, *NJ* 2003, 48 (Avo/Petri). See also Janssen who gives an overview of cases in which the Dutch Supreme Court has dismissed exclusivity claims (Janssen 2007, p. 6).

Before the determination of the applicable law is discussed, the contents of the various sources that can provide a legal basis to claim a general average contribution are considered in some detail in Chapter 4.

Chapter 4

Effectuating a right to a general average contribution

4.1 Introduction

A right to claim a general average contribution, either implied by law or based on a contract, is an important first step to eventually obtain compensation in general average. At the same time and in many situations, it will be nothing more than that.[1] In order to actually obtain a compensation, a right to claim a general average contribution has to be effectuated.[2] It will have to be established what amount is due, from which moment there is a right to contribution, from which party or parties payment can be claimed, how financial security can be arranged, what the influence of an 'actionable fault is', if any, how it can be prevented that a right to claim a contribution becomes time barred, etc. From a legal perspective, these essential issues cannot be disregarded. Especially, as there are considerable differences between the various national and contractual regulations,[3] whereas their interaction is not well regulated.[4] This is illustrated in the below discussion of several aspects which play a role in the effectuation of the right to claim a general average contribution and which may be dealt with in distinct manners in national legal regimes, contracts of affreightment and average bonds.[5] The analysis clearly shows that the widespread notion that there is a universal, uniformly regulated general average concept, both historically and internationally may be true in respect of the underlying distribution principle, but it is not on a legislative or contractual level.

The below analysis serves as illustration only and is not meant to fully cover the relevant issues, contents or potential conflicts. Several legally contentious issues and questions are identified and discussed. Various ways in which these issues are dealt with in the distinct sources are set out and evaluated. If one thing is clear, it is that there is much room for further research. In this respect, indications are given in which direction solutions may be found only.

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1. In practice, such right is not even a condicio sine qua non to obtain payment. A lien is generally exercised and cargo interested parties that are not bound to contribute by law or by contract may assume liability for the contribution in an average bond in order to be able to take delivery of the cargo.
2. Having a right is not the same as effectuating or enforcing it. There may be a lot of time, efforts, costs and legal obstacles in between the two.
3. The rules on effectuation of a right to claim a general average contribution, just like the right to claim the same, can be found in national law and/or in contractual provisions. See also Chapter 3 above.
4. See also para. 3.5 below in detail.
5. Admittedly, an average guarantee and a binding adjustment may also serve as sources for a claim for a general average contribution. As they are generally dependent on the other sources, they are not separately discussed. In discussing the contents of the general average sources, the position under the YAR is also considered, in as far as the issue concerned is regulated in the YAR.

4.2 General average definitions

4.2.1 Absence of uniform definition

The disparity between the various general average regulations already starts with the term 'general average'. It is often used as if it describes a singular concept. Maritime conventions, like the Arrest Conventions, the London Limitation of Liability Convention for Maritime Claims ('LLMC') and the Hague (Visby) Rules ('H(V)R') apply the term without giving any clarification in the text or in the Travaux préparatoires on what it is supposed to cover.[6] The term is similarly applied without any explanation in contracts of carriage.[7]
This general use of the term 'general average' may give the impression that there is no discussion whatsoever about what the general average concept entails or which requirements have to be met to qualify a situation or disbursement as general average. However, a closer examination of the term 'general average' as applied in the various regulations shows that even though there appears to be a common understanding of the concept's approximate contents, national laws may set specific requirements that have to be complied with in order to trigger applicability of the general average rules. The reference to the unspecified term 'general average' suggests a uniformity that does not exist. [8]

The closest to an internationally commonly applied definition of general average probably is the definition of a general average *act* set out in the first line of Rule A YAR.[9] It provides that: '*There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure*'.[10] The second line subsequently provides for the actual apportionment: '*General average sacrifices and expenditures shall be borne by the different contributing interest hereinafter provided*'.
Neither the YAR nor any other international regulation provides a definition of general average or a general average contribution. Moreover, the definition of a general average act set out in Rule A YAR, in theory, should only give the relevant test when it has been established that the YAR are applicable[11] and, in addition,

6. In these conventions, reference is merely made to 'general average'. For example, Art. 1(1)(g) Arrest Convention 1952/Art. 1(1)(i) Arrest Convention 1999; Art. 3 LLMC 1976/1996; Art. IV-6 and V H(V)R. None of them actually specifies what exactly is meant by this term. It follows from the Travaux préparatoires to Art. 3 LLMC 1976 (1996) that the provision was accepted without comments (Travaux préparatoires LLMC, pp. 92-93).
7. General average is hardly ever defined in contracts of affreightment. Often mere reference is made to the YAR. See also para. 4.2.3 below.
8. The same general reference is generally made in respect of salvage. However, contrary to general average, salvage is defined and regulated by a convention, i.e. the International Convention on Salvage, London 28 April 1989, which succeeded the 1910 International Convention for the Unification of certain Rules of Law relating to Assistance and Salvage at Sea, adopted in Brussels, Belgium on 23 September 1910. The 1989 Salvage Convention has a high accession rate and is commonly applied.
9. The definition in its current form was introduced in 1924 and has not changed since.
10. Rule A YAR 1924-2016. See in detail on the provision's history and application Lowndes & Rudolf 2013, pp. 77-124 and Hudson & Harvey 2010, pp. 31-34.
11. The applicability of the YAR is described in general in para. 3.2.2 above.

when the loss or expense is not covered by the YAR's numbered rules.[12] In practice, however, it will be used almost without exception to determine whether there was a general average incident or not. The facts that the YAR may not be applicable and that most national regimes have their own definition of the general average concept or a general average act are often completely disregarded.[13]

4.2.2 National definitions

Many contemporary definitions of (a) general average (act) included in national regimes are similar to the definition included in Rule A YAR, and as a result to each other.[14] However, they are not identical. Additional or alternative criteria may be set, regardless of the answer to the question whether a YAR version has been incorporated in the respective national legal regime.
The Dutch Civil Code, for example, incorporates the YAR but also contains a general average definition which is a little more extensive than the YAR's definition.[15] Rule A YAR has been taken over, albeit with the addition that the cause of the incident is irrelevant to determine whether a sacrifice or expenditure should be regarded as general average.[16]
An additional requirement included in several other national legal regimes is that in order to qualify as general average, property must have been sacrificed or expenditures must have been incurred by or pursuant to the decision of a specifically

12. Pursuant to the YAR's Rule of Interpretation, which was inserted in the YAR in 1950, the numbered rules take precedence over the lettered rules. See also para. 2.2.2 above. The requirements under the numbered and lettered rules may vary. As pointed out by Enge & Schwampe (2012, p. 77), Rule X b and XIb YAR 1994, for example, do not require that there was a common danger.
13. See, for example, the CMI Guidelines on general average. For the CMI Guidelines in general, see para. 2.2.3 above.
14. Definitions have been set out inter alia in s. 8:610 Dutch Civil Code; § 588(1) German Commercial Code; s. 8.1 draft Belgian Maritime Code; s. L5133-3 French Code of transport; s. 469 Italian Code of Navigation; s. 347 Spanish Maritime Code; s. 122 Swiss Maritime Code; s. 284 Russian Merchant Shipping Act; s. 444 Maltese Commercial Code; s. 193 Chinese Maritime Code; s. 213 Vietnamese Maritime Code; s. 66 English Marine Insurance Act ('MIA'). Even though the MIA's scope of application officially is limited to the field of insurance, its general average definition may, as statutory definition, have a wider application and may also regulate the relationship between parties to the maritime adventure inter se. *Austin Friars SS. Co.* v. *Spillers & Bakers* [1915] 1 K.B. 833, [1915] 3 K.B. 586; *Anglo-Grecian* v. *Beynon* (1926) 24 Ll. L. Rep. 122. Also Lowndes & Rudolf 2013, p. 79. The Norwegian, Swedish and Argentine Maritime Codes do not contain a separate general average definition. The definition included in the incorporated version of the YAR is probably deemed sufficient. Luxembourg merely incorporates the YAR in its legal system and does not give any other rules (s. 119 Maritime Code of Luxembourg). Before the introduction of the YAR('s predecessors), a wide variety of definitions existed. See, for example, the overview given by Baldasseroni (Baldasseroni 1808, pp. 1-10 and 19-22).
15. S. 8:613 respectively s. 8:610 Dutch Civil Code. The Swiss Maritime Code also contains a general average definition and an incorporation of the YAR (s. 122 Swiss Maritime Code).
16. S. 8:610 Dutch Civil Code. It is indicated in the Travaux préparatoires that in order to take away any possibility of discrepancy, the wording of Rule A and C YAR has been followed (Travaux préparatoires Book 8 Dutch Civil Code, p. 616). The principle underlying Rule D YAR, that it is irrelevant how the danger occurred which led to the general average act, is incorporated in the Dutch statutory definition to make it clear beyond doubt that the fact that one of the parties may be liable for the event which necessitated the general average, does not take away the general average character from such act. Probably the provision was explicitly included as under the former Dutch legal regime there was no general average when the master or shipowner was to blame for the incident (s. 700 Dutch Commercial Code of 1838). For Rule D YAR and the influence of fault on the effectuation of a general average claim, see para. 4.7 below.

indicated person.[17] The German regime, for example, requires a decision taken by the master.[18] The Italian Code of Navigation similarly requires a decision by a designated person, but deems a decision of the 'person who is in charge of or responsible for the maritime adventure' sufficient.[19] This additional criterion of a decision from an indicated person is also included in some of the more recent maritime codes.[20] As such, it cannot simply be dismissed as an outdated requirement which has been superseded by modern practice and/or more recent views. It goes without saying that in order to allow expenditures and losses to be apportioned in general average, a certain relationship must exist between the person ordering the measure and the maritime adventure. But it is doubtful that such strict formal criterion that only a person with special authority can give a general average character to measures taken for the common interest, is necessary or even helpful. It follows from the Travaux préparatoires to the new German Commercial Code that the requirement that the master must have ordered the measures aims to prevent that crew members, passengers or other interested parties could arbitrarily create the right to apportionment.[21] The chance that these parties will take measures to safeguard the common maritime adventure without due cause appears limited. The master is normally in charge of the vessel and will generally determine the measures that have to be taken. Other parties may not even know what is going on, and will generally and in the absence of exceptional circumstances, lack authority to bind other parties. In case the master is unable or unwilling to order measures either because he is absent, dead, unwell or he does not have an interest in safeguarding the vessel, and other parties take or order measures, it seems unnecessarily formalistic to withhold a general average qualification to measures which clearly meet the other requirements.[22] The reasonableness requirement and the required intention to safeguard the property involved in the adventure from a common peril, also seem suited to ensure that the concept of general average is not applied

17. Inter alia § 588 German Commercial Code; s. L1533-3 French Code of transport; s. 469 Italian Code of Navigation; s. 789 under 1 Maritime Code of Slovenia; s. 788(1) Japanese Commercial Code 1899. Such requirement is neither included in the YAR (as already pointed out by Cole (1924, p. 38)), nor in the English law (*Australian Coastal Shipping Commission v. Green* [1971] 1 Lloyd's Rep. 16), nor as a matter of Dutch law. However, Dutch law does appear to oblige the master to take measures, if and when necessary (s. 8:261 Dutch Civil Code).
18. In § 588(1) German Commercial Code, general average is defined as the situation in which the ship, the bunkers, the cargo or several of these properties are intentionally damaged or sacrificed or expenses are incurred for this purpose, pursuant to the master's decision. In German: '*Werden das Schiff, der Treibstoff, die Ladung oder mehrere dieser Sachen zur Errettung aus einer gemeinsamen Gefahr auf Anordnung des Kapitäns vorsätzlich beschädigt oder aufgeopfert oder werden zu diesem Zweck auf Anordnung des Kapitäns Aufwendungen gemacht (Große Haverei), so werden die hierdurch entstandenen Schäden und Aufwendungen von den Beteiligten gemeinschaftlich getragen*'. See also s. 788(1) Japanese Commercial Code; and s. L5133-3 French Code of transport.
19. S. 469 Italian Code of Navigation. Similarly, the Roman-Dutch general average definition applied in South Africa provides that the measure must have been committed by '*a person with authority*' (Bamford 1983, p. 349; Hare 1999, p. 771). The Slovenian Maritime Code (s. 789 under 1) also allows measures taken by the master's substitute as general average, provided that the other requirements have been complied with.
20. The German legislation, including the requirement that the measure must have been ordered by the master, for example, was implemented in 2011 and has effect since 25 April 2013.
21. Gesetzesbegründung 2012, p. 125. The requirement was maintained after due consideration.
22. Ramming also doubts the reason behind this requirement of master's approval included in the German Civil Code. He indicates that the provision should not be literally applied. It would, in his opinion, be sufficient that the measures are taken with approval of the persons in command of the vessel (Ramming 2016, p. 83).

wrongly, whereas they do not prevent that measures which should be considered as general average cannot be apportioned for formal reasons only.[23] The reasonableness requirement, however, is not included in all national general average definitions.[24] Interestingly, most regimes that require that a measure is taken by a specific person in order to qualify as general average, do not stipulate that measures must have been taken reasonably.[25]
Some legislations also give specific examples of disbursements which qualify as general average in any event[26] or in respect of which no general contribution can be claimed.[27] A rather common exclusion concerns goods that have not been declared. Several legislations provide that a general average contribution cannot be claimed by the parties interested in these properties, although these properties are considered as contributory interests for general average purposes.[28] In spite of the fact that in practice the question is often asked whether 'general average has been declared', such declaration is not required by the vast majority of the national and contractual regulations or by any of the versions of the YAR.[29]

4.2.3 Contractual arrangements

Contracts of carriage and general average security forms hardly ever contain a separate definition of general average. Most contracts of affreightment merely state that in case of general average a particular version of the YAR is applicable. Which definition of general average applies (YAR or national regimes) or on the basis of which regime it has to be determined whether there is a case of general average is generally not specified.[30] It may then be uncertain which test is to be applied to establish whether there is a case of general average to begin with. The YAR contain a definition of a general average act in Rule A, but in view of the fact that pursuant to the Rule of Interpretation the numbered rules take precedence over the lettered

23. See also, for example, the English cases *Athel Line v. Liverpool & London War Risks Association* (1944) 77 Lloyds Law Rep. 132 and *Australian Coastal Shipping Commission v. Green* [1971] 1 Lloyd's Rep. 16. In the latter case, measures ordered from the shipowners' office were qualified as general average.
24. The reasonableness requirement is included in Rule A YAR since 1924 as well as in the YAR's Rule Paramount since 1994. See in more detail Lowndes & Rudolf 2013, pp. 73-75 and 118-120; Hudson & Harvey 2010, pp. 27-29 and 34.
25. § 588 German Commercial Code; s. L1533-3 French Code of transport; s. 789 under 1 Slovenian Maritime Code. The English translation of the latter provides that the costs and damage must have been 'rational' in order to qualify as general average. This may be the result of the translation.
26. For example, s. 444 Maltese Commercial Code contains an overview of typical general average disbursements which concludes with a more or less general rule. Also s. 934 draft Brazilian Commercial Code. This used to be the more generally applied structure (see also para. 3.2.2 above and 4.4.4 below). The structure of specific examples with a more general rule is still applied in all YAR versions since 1924.
27. The Vietnamese Maritime Code (s. 213(3) and (4)), for example, and briefly summarized, provides that loss, damage and expenditure which relate to environmental damage and demurrage will under no circumstance qualify as general average.
28. For example, s. L5133-12 French Code of transport; s. 301(3) Russian Merchant Shipping Act; s. 460 Maltese Commercial Code; s. 215 Vietnamese Maritime Code; s. 795 under b Slovenian Maritime Code. Also Rule XIX YAR 1924-2016.
29. Tsimplis & Shaw in: Baatz a.o. 2014, p. 248; Hare 1999, p. 780. Nevertheless the impact of a requirement of a general average declaration was considered in the preparation of the YAR 2016 regarding the issue of suggested security wording (CMI Report London 2015, p. 11). A declaration is required by the Vietnamese Maritime Code (s. 217).
30. Some charter party rider clauses contain a specific choice of law provision for general average. Many standard forms do not.

rules, even if Rule A is not complied with, there may be a general average act to which the other YAR provisions apply. It may be argued that it will have to be ascertained whether there is a situation of general average and whether the YAR are applicable on the basis of another regime. Problems may also arise when the incorporation of the YAR under the applicable law is insufficient.[31] It may then be even more questionable whether a contractual right to claim a general average contribution exists.
The average bond in most cases merely provides that the general average contribution ascertained by the average adjuster has to be paid. Often reference is made to the contract of carriage and/or the applicable national law.[32] Most forms do not incorporate a general average definition or a reference to a particular YAR version.[33]

4.2.4 Evaluation

In view of the fact that in essence general average arises by operation of law and the requirements of the national general average definitions vary, the correct and logical approach would be to establish on the basis of the applicable law whether there is a case of general average, and if so, whether the YAR and/or provisions of national law are applicable.[34] However, this is not what generally happens. In practice, the question of which regime determines whether there is a case of general average and whether the YAR, including their definition and/or specific general average disbursements, apply is often disregarded.[35]

4.3 Adjuster

4.3.1 Lack of regulation

When there is a suspicion that there may be, or may have been, a situation of general average, an adjuster will generally be instructed to collect security and to prepare an adjustment.[36] In spite of the adjuster's important role in the whole apportionment process, his position is not uniformly regulated, neither in a convention, nor in an EU regulation, in the YAR, or otherwise.[37] As will be further discussed

31. The new German Commercial Code applies strict requirements for incorporation of general conditions in bills of lading (§ 522 German Commercial Code). Qualification of the YAR as general conditions may also trigger additional requirements that have to be complied with. This is the case, for example, as a matter of Dutch law. See also para. 3.2.2 above.
32. When the contract of carriage and the applicable national law vary, this can cause uncertainty regarding the applicable regime.
33. See, for example, the draft standard security wording set out in the draft of the CMI Guidelines in the CMI Yearbook 2015, pp. 268-269. The suggested wording was deleted from the CMI Guidelines during the International Working Group meeting in New York in 2016. See also para. 3.3.5.2 above.
34. The applicable law to the obligation to contribute in general average is discussed in Chapter 5 and 6 below.
35. See also para. 2.3 and para. 3.1.2 above.
36. These are the most common tasks for the adjuster in general average cases. Pursuant to Norwegian and Russian law, the adjuster is obliged to determine whether the requirements of general average have been met (s. 462 Norwegian Maritime Code; s. 305 Russian Merchant Shipping Act). The adjuster's other tasks have briefly been described in para. 2.3.3 above.
37. Also Sulewska 2014, p. 8. The CMI Guidelines on general average deal with the position of the adjuster, but do not have any official status. See also para. 4.3.3.5 below.

below, the various national legal regimes contain different rules, if any, both regarding his appointment, his duties and his status.

4.3.2 Appointment

With some exceptions, legal systems do not appear to protect the profession of an average adjuster.[38] In the absence of a regulation, any person can call himself an adjuster and perform adjusting tasks.[39] Specific qualifications, for example, that an adjuster has to be 'skilled and experienced in maritime law',[40] are not invariably required.[41]

Generally, an average adjuster will be appointed by the shipowner and/or the master.[42] The shipowner will often have incurred the majority of the costs[43] and will therefore be the party most interested in an apportionment. In addition, the master/and or shipowner may also be obliged to instruct an average adjuster by a national legal regime.[44] The requirements for such instruction, if any, tend to vary.[45] As a matter of Dutch law an adjuster has to be instructed when in the shipowner's opinion, *there was* a case of general average.[46] Vietnamese law requires

38. The Scandinavian requirement that an adjuster is to be officially installed by the government or the king (s. 17:2 Swedish Maritime Code; s. 462 Norwegian Maritime Code), appears to be an exception. Sulewska mentions that average adjusters in former socialist countries perform their tasks from special offices. The Bulgarian adjusters would be a part of the Bulgarian Chamber of Commerce and Industry. (Sulewska 2014, p. 8.)
39. In most cases, the adjustment will be prepared by a specialised average adjuster. The position of the adjuster and his '*vital function*' are also discussed in the American case *Cia. Atlantica Pacifica, S.A. v. Humble Oil & Refining Co.*, 274 F.Supp. 884 (1967).
40. S. 305 Russian Merchant Shipping Act.
41. Pursuant to s. 17:2 Swedish Maritime Code the adjuster must be 'learned in law', whereas the Norwegian Maritime Code (s. 467) provides that '*Only those who hold an exam that documents the requisite knowledge of Norwegian and foreign law and foreign languages can be appointed general average adjusters*'. It is set out in the Slovenian Maritime Code (s. 808) that the adjuster must be qualified and authorised to carry out an adjustment. The Polish Regulation on adjustments requires a law degree or a degree of a sea master (Sulewska 2014, p. 9).
42. Also Tsimplis & Shaw in: Baatz a.o. 2014, p. 249.
43. It was concluded after extensive research carried out by IUMI that '*General average today is mainly a question of expenses*.' Sacrifices, both hull and cargo, form a much smaller proportion of the total general average losses (IUMI Report 1994, p. 12). There are no indications that the situation has changed (considerably) in the meantime.
44. That the shipowner is required to appoint an adjuster is set out inter alia in s. 638(1) Dutch Code of Civil Procedure (in the previous regulation, any party could make a request to the court to appoint an adjuster (s. 317 Dutch Code of Civil Procedure (old); Van Rossem 1934, p. 489); § 595(1) German Commercial Code; s. 463 Norwegian Maritime Code; s. 17:4 Swedish Maritime Code; s. 217 Vietnamese Maritime Code; s. 255 Polish Maritime Code; also the English decision in *Chandris v. Argo Insurance Co Ltd.* [1963] 2 Lloyd's Rep. 65. Under Swiss and American law, the master is obliged to arrange an adjustment. He can do so himself, but will generally appoint an adjuster (s. 123 Swiss Maritime Code; US: *Master Shipping Agency v. M.S. Farida* 571 F.2d 131, 1978). By contrast, Spanish law seems to assume that a liquidator is appointed by the ship-operator (s. 356(2) Spanish Maritime Code). Failing an amicable solution on the settlement of a general average case by the parties, a 'liquidator' (adjuster) is instructed by a notary public (s. 506-508 Spanish Maritime Code).
45. Also Thoo 2003, p. 139.
46. S. 638(1) Dutch Code of Civil Procedure. The shipowner is also obliged to inform the parties who will probably have to contribute in general average.
In inland waterway shipping, the adjustment is sometimes drawn up by the shipowner, an insurance broker, a surveyor or a general loss adjuster. Pursuant to IVR Rule XV, when one of the parties requests an adjustment prepared by an official average adjuster, the master is obliged to arrange the same.

the shipowner to appoint an adjuster within 30 days of the general average declaration.[47] Under English law, however, the obligation to appoint an adjuster may arise as soon as it *is expected* that there is a general average event.[48] German law, on the other hand, obliges the shipowner to appoint an adjuster only when cargoes and or bunkers were sacrificed intentionally,[49] thereby aiming to protect the cargo and bunker interested parties as they may not be aware that their property was sacrificed intentionally and that they may be entitled to a contribution.[50] Russian law gives any interested party the possibility to request an adjustment in general.[51] Some national legal systems also provide that the courts may be requested to appoint an adjuster, whether or not after the shipowner's refusal to appoint an adjuster.[52]

Admittedly the national legal provisions on the adjuster's appointment do not have much added value. First of all, their contents do not seem to be in line with the current practice. Many national law provisions are (still) based on the idea that the place where the adjustment is prepared is of great importance and should be provided for by the law. A connection is often made with the place where the voyage ended.[53] Traditionally, an often ventilated perception was that the adjustment was prepared at the place where the voyage ended pursuant to the laws of this place.[54] However, this connection between the place where the adjustment is drawn up and the applicable law in many cases no longer exists.[55] Today, it is common that a provision is inserted in contracts of carriage where the adjustment is to be drawn up.[56] In the study carried out by UNCTAD at the beginning of the 1990s, it was established that there was a clear connection between the country where the vessel's registered owners were based and the adjuster's place of regis-

47. S. 217 Vietnamese Maritime Code.
48. *Chandris v. Argo Insurance Co Ltd.* [1963] 2 Lloyd's Rep. 65. The case was decided under the applicability of the YAR. Probably a shipowner is also obliged to arrange an average adjustment when the YAR do not apply.
49. § 595(1) German Commercial Code. It is provided that if the shipowner fails to comply with this obligation to instruct an adjuster, he is liable for the damage thereby caused.
50. Gesetzesbegründung 2012, p. 130. In situations where no cargoes or bunkers were sacrificed, all parties legally indicated as the parties interested in the general average (the 'Beteiligten' as defined in § 588(2) German Commercial Code) are allowed to arrange an adjustment.
51. S. 305 Russian Merchant Shipping Act. The draft Brazilian Commercial Code (s. 938) similarly indicates that failing a regulation in the charter party, the adjustment shall be drawn up by an adjuster appointed by one of the interested parties.
52. S. 638(2) Dutch Code of Civil Procedure; s. 5 of the French Decree nr. 68-65 of 19 January 1968. See also Sulewska 2014, p. 9; Herber 2016, p. 411.
53. As a matter of Dutch law, unless otherwise agreed between the parties, the appointed average adjuster shall have his office in or close to the place where the voyage ended. When the voyage ended in the Netherlands, the average adjuster must be based in the Netherlands (s. 638(3) Dutch Code of Civil Procedure). German law contains a similar provision, albeit the place where the voyage ended is only relevant when the place of delivery was not reached (§ 595(1) German Commercial Code).
54. See Chapter 5 on this traditional rule.
55. In the 2013 edition of Lowndes & Rudolf, it is even indicated that the place where the adjustment is drawn up is irrelevant. (Lowndes & Rudolf 2013, p. 564.) This seems to be an overstatement. It may be correct as a matter of English law, but pursuant to other legal systems, the place where the adjustment is prepared may play an important role after all. For example, as a matter of German law, jurisdiction is created for the German Court if the place where the adjuster is based is also the place where the voyage ended (District Court of Hamburg 24 March 2014, 33a H 4/12).
56. See para. 4.2.2.2 below.

tration.[57] Apparently, shipowners preferred (and still seem to prefer) to instruct a compatriot to prepare the adjustment, whether or not in conjunction with co-adjusters of other adjusting firms.[58] In this respect, those rules of national law which are based on the end of the common maritime adventure may actually cause confusion. Arguably, a party that is not bound by a provision in a contract of carriage on where the adjustment is to be drawn up could rely on the rules on the appointment of an adjuster as set out in the national legal regime, which may well result in a different adjuster and possibly different adjustment rules.[59]
Secondly, the added value of most national law rules on the appointment of the adjuster also appears to be limited because they are based on the idea that there is a single adjuster who acts on behalf of all parties involved in the common maritime adventure. This idea is not generally accepted.[60] Several adjusters may be instructed side by side, whether or not as co-adjusters instructed by the same party or as counter adjusters instructed by different parties.[61] Thirdly, the national regulations do not seem to take into account that in today's maritime practice many voyages involve chains of contracts of affreightment. When a vessel has been bareboat chartered, it may be better to place the obligation to instruct an adjuster on the bareboat charterer or master rather than merely on the shipowner. It is doubtful in general that 'disponent owners' are obliged to appoint an adjuster in their relationship with cargo interested parties. Whether a (mere) disponent owner will be liable for the shipowner's obligations will depend on the applicable law and contractual arrangements.

Apart from the fact that the national regimes' contents on general average may not (or at least no longer) be suitable, their general average provisions are generally not binding.[62] This may be an advantage, as the most appropriate adjuster and place for the preparation of the adjustment can be chosen, taking into account all relevant circumstances.[63] At the same time, however, the non-binding nature may give shipowners the possibility to ignore their obligation at law to appoint an adjuster. Hardly ever a sanction is placed on non-compliance with this obligation. It is regularly indicated that another party may approach the court to appoint an

57. UNCTAD 1994, p. 31. The Norwegian Maritime Code (s. 462) seems to have been aligned with current practice and expressly provides that the adjustment has to be drawn up in the shipowners' place of registration.
58. That adjusters sometimes instruct co-adjusters is also mentioned inter alia by Van Hooydonk 2012, p. 278 and by the Court of Appeal of The Hague in its decision of 1 December 2009, *S&S* 2010, 62; ECLI:NL:GHSGR:2009:BL2811 ('Lehmann Timber').
59. See also para. 4.4.2 below.
60. See also para. 4.3.3.2 below.
61. Tsimplis & Shaw in: Baatz a.o. 2014, p. 249.
62. See para. 3.3.2 above.
63. The clause commonly incorporated in contracts of affreightment that general average is '*adjusted, stated and settled*' at a particular place is often considered as a choice for an adjuster based in a particular place. It is not uncommon that the adjustment is nevertheless prepared in another place. This does not automatically mean that an adjustment should therefore be ignored. As the Court of Appeal of The Hague considered, the adjustment can be countersigned by a correspondent adjusting firm based in a place stipulated in the contract of affreightment. In addition, a party who argues that the adjustment was drawn up in the wrong place must show which (negative) results he has suffered thereby and that an adjustment drawn up in another place would have had a more favourable outcome. Court of Appeal of The Hague 1 December 2009, *S&S* 2010, 62; ECLI:NL:GHSGR:2009:BL2811 ('Lehmann Timber').

adjuster.[64] The most likely scenario where the shipowner may prefer not to appoint an adjuster but where an apportionment would actually be desired for other parties are cases where the shipowner has not incurred (substantial) costs himself or when his general average contribution to other parties would exceed his costs.[65] When the obligation to appoint an adjuster, if any, is not complied with, cargo interested parties may not be aware that there was a situation of general average.[66] The German legislator has appreciated this risk, but has not placed any sanction on a breach of the shipowner's statutory obligation to appoint an adjuster either. When it is established that there was a general average event, it will be difficult for cargo interested parties with an interest in apportionment to collect all necessary information and to protect their position from a financial point of view. It would be a troublesome exercise for them to obtain security from all potential general average contributors.[67] Other parties than the shipowner generally cannot exercise a lien. They will not know what has happened exactly and will have difficulties to obtain information on the values of all property involved. Cargo interested parties cannot retain the properties carried (either on board or ashore), unless they would make conservatory attachments/arrests on all assets.[68] As they do not have the details of all (potentially many) properties involved and the parties interested in these assets, such conservatory attachment/arrests may be difficult to arrange, if at all possible under the applicable law and in the jurisdiction concerned.[69] Not even to mention that this would be a very costly exercise. A shipowner's refusal to appoint an adjuster at an early stage may effectively frustrate the whole general average process. Another potential problem is that as a result of the fact that the general average definitions vary under the applicable law, a situation may qualify as general average under one regime but not under another. In the absence of an overall legal regime that regulates all aspects of a general average case, uncertainty may arise for all parties. Contractual provisions and rules of national law may not be well regulated and/or adequately interact either. It is doubtful that a shipowner who under the applicable law is obliged to appoint an adjuster, is also obliged to do so in respect of a mere contractual right to claim a general average contribution. It is uncertain whether a shipowner and/or an intermediate carrier can become liable for not instructing an adjuster or for not instructing an adjuster in the place as indicated in the applicable law or as chosen in the contract governing the carriage of the goods.

64. The Dutch Code of Civil Procedure, for example, provides that in case the shipowner fails to appoint an adjuster, each person who believes to be either entitled to a contribution or obliged to pay a contribution can ask the court of the district in which the voyage ended to appoint an adjuster (s. 638(2) Dutch Code of Civil Procedure). It is set out in the Norwegian Maritime Code (s. 463) that when the shipowner fails to instruct an adjuster within two weeks after receipt of a request to have an adjustment requested, all interested parties can ask for an adjustment.
65. Commercial reasons may also play a role in the decision whether or not to pursue a general average case and to appoint an adjuster.
66. As indicated by Marshall, '*in practice cargo is not in a position to get a GA declared*'. (Marshall 2004, p. 4.)
67. This will be the case in particular for cargo interested parties. A time charterer who incurred substantial general average expenses will often have more influence and possibilities, inter alia to exercise a lien on cargo. See also para. 4.6.2 below.
68. For measures that can be taken by cargo interested parties to arrange security, see also para. 4.6.3 below.
69. In the Netherlands, it is relatively easy to make third party attachments and/or arrests. As a matter of German law, this is much more difficult, even though the requirements to arrest a vessel have become less stringent (§ 917 German Code of Civil Procedure). Inter alia Eckardt 2015, pp. 60-61; Gahlen 2015, pp. 69-70.

It also uncertain what the position will be if a contractual carrier instructs an adjuster while the shipowner has already appointed an adjuster and which adjustment would then be relevant in which relationship and which effect each adjustment should be given.
As such, it may be useful to specifically provide for a mandatory obligation to appoint an adjuster and to collect security on behalf of all parties, and for liability in case of non-compliance.[70]

4.3.3 The average adjuster's position

4.3.3.1 *Variety of possibly applicable rules*

The lack of clarity is not limited to the adjuster's appointment. In the absence of mandatory international regulations, the adjuster's status and duties are equally uncertain. These may be subject to the applicable national law, internal regulations and/or standards of private associations[71] when the adjuster is a member of such association,[72] and contractual provisions, if any. As a result, the adjuster's status and duties may vary per regime, per case and probably even per relationship with parties involved in the maritime adventure during which the general average event arose.[73]

4.3.3.2 *National regimes*

The position of the average adjuster varies under the different national regimes.[74] Under many legal systems, the adjuster does not have the position of an arbitrator,[75] at least not unless specifically agreed. An average adjuster could be authorised by the parties to act as arbitrator. As Lord Blackburn put it in the English case *Svendsen v. Wallace* (1885) 10 App. Cas. 404: '(…) *when there is no suspicion of fraud or falsehood, the ship's papers enable an average adjuster of competent skill to approximate to them sufficiently to decide the case as an arbitrator, if the parties choose to give him authority so to act, or, if they do not authorize him, to apply the principles generally acted on by average adjusters, so as to produce a practical result on which the parties can and generally, if the average adjuster*

70. The obligation placed on a shipowner to arrange security, as provided for by several national legal regimes, is discussed in para. 4.6.2.2 below.
71. This can be national associations like the English Association of Average Adjusters (www.average-adjusters.com/) or the German association 'Verein Deutscher Dispacheure' /'Verband Deutscher Schiffahrt-Sachverständiger e.V.'. (www.vdss.org/index.php?option=com_content&view=article&id=35&Itemid=71&lang=de), but also international associations, like the Association Mondial de Dispacheurs (www.amdadjusters.org/).
72. Even then the legal basis for the applicability of 'Rules of Practice' may be questioned.
73. Under the Rome Regulations, the applicable law has to be determined in the specific relationship between two parties regarding each and every obligation. See para. 6.4.2 below.
74. This was also pointed out in one of the discussion papers in respect of the preparations for the YAR 2016, it was indicated that: '(…) *the legal regimes under which adjusters operate vary enormously with regard to the extent of statutory controls and supervision by professional bodies*.' CMI Report Istanbul (I) 2015, p. 33.
75. Van Hooydonk 2012, p. 280. German law: Enge & Schwampe 2012, p. 75; Holzer 2013, p. 358 with reference to VersR 1984, 684. UK: *Svendsen v. Wallace* (1885) 10 App. Cas. 404; *The Potoi Chau* (*Castle Insurance Co. Ltd. v. Hong Kong Islands Shipping Co. Ltd.*) [1983] 2 Lloyd's Rep. 376. As a matter of Dutch law, the adjusters were traditionally regarded to act impartially like arbitrators. Pursuant to Hardenberg, the adjustment would be similar to an arbitral award. (Hardenberg 1980, p. 105 and 110. Also Clavareau 1947, p. 134; Kist 1889, pp. 378-379. See, however, Catz 1932.) US: also Force 2008, p. 430.

is of repute, to act as having the moral weight of an award, though either party may, if they please, question his findings either of fact or of law, for it is not an award.' Some countries have specific statutes on adjusters,[76] whereas in other systems their position is regulated either by statute or in case law. The Scandinavian, Belgian and German system respectively all oblige adjusters to act independently and/or impartially, but do so in varying manners.[77] In Norway, Sweden and Belgium, the adjuster has to be appointed by special authority or has to be sworn in.[78] In the draft for the new Belgian Maritime Code, this requirement is removed. Instead, the adjuster has to state in the adjustment that he has performed his instruction 'honourably and conscientiously'.[79] The German Supreme Court recognised that the agreement whereby the adjuster is instructed by the shipowner does not only operate between these parties but has 'protective effect' or 'benefit' in respect of all parties involved in the general average. Translated in the English language, the German Federal Court held that: *This order does therefore not concern an agency agreement solely affecting the relation between the principal and the general average adjuster (...) but rather a contract for the benefit of all parties with an interest in the ship and the cargo (...). The benefit implies that the adjuster must respect the interests of all parties involved when drawing up the adjustment, which will usually contain an account of the accident, a statement of the general average disbursements, the contributory values, the general average percentage as well as the respective contributions and compensations. (...). On the grounds of his mandate, the adjuster will not only have to draw up the adjustment but pursuant to the YAR 1974 he also has to fulfil further tasks in the interest of the persons entitled to compensation under the general average for who the benefit will also apply.*[80]

However, not all national legal systems contain provisions regarding the adjuster's role and duties.[81] A substantial part does not oblige the average adjuster to act in

76. For example, the Polish Regulation on adjustments (Sulewska 2014, p. 9). The Vietnamese Maritime Code 1990 (old) also referred to a specific statute on the average adjuster (s. 193). In the Vietnamese Maritime Code in force since 1 January 2006, this provision has not been maintained.
77. German Federal Court 23 September 1996, II ZR 157/95; also Enge & Schwampe 2012, p. 75. In Polish legislation it is also provided that the adjuster is to act impartially (Sulewska 2014, p. 10).
78. In Norway and Sweden the adjuster is to be appointed by Royal Decree and is statutorily subjected to the same rules of impartiality as judges (s. 467 Norwegian Maritime Code; s. 17:2 Swedish Maritime Code). The Belgian Maritime Code (s. 163) also seems to require an official appointment by the Court or foreign authority. According to Van Hooydonk, this approach is unnecessarily formalistic. He compares adjusters with court surveyors. In this respect, he deems it sufficient that an adjuster confirms in his report that he has performed its instruction honourably and conscientiously (Van Hooydonk 2012, p. 233).
79. S. 8.46(5) draft Belgian Maritime Code. (Van Hooydonk 2012, p. 279.) The provision is inspired by the statutory rules on the court surveyor, who also advises the court and should provide an objective report. (Van Hooydonk 2012, p. 280.) In Poland and France, an adjuster is also considered to be an independent expert. (Sulewska 2014, p. 9.)
80. German Federal Court 23 September 1996, II ZR 157/95 (Hamburg); author's translation. In German: '*Bei diesem Auftrag handelt es sich mithin nicht um einen allein zwischen dem Auftraggeber und dem Dispacheur wirkenden Geschäftsbesorgungsvertrag (…), sondern um einen Vertrag mit Schutzwirkung zugunsten aller Beteiligten, die Interessen an Schiff und Ladung haben (…). Die Schutzwirkung beinhaltet, daß der Dispacheur bei der Aufmachung der Dispache, die in der Regel die Darstellung des Unfalls, Aufstellung der Passivmasse, der Aktivmasse, den Havarie-Grosse-Prozentsatz sowie die einzelnen Beiträge und Vergütungen enthält, die Interessen aller Beteiligten zu wahren hat (…). Der Dispacheur hat aufgrund des ihm erteilten Auftrags auch nicht nur die Dispache auf zu machen, sondern nach den YAR 1974 weitere Tätigkeiten im Interesse der Havarie-Grosse-Vergütungsberechtigten vorzunehmen, für die die Schutzwirkung ebenfalls besteht.*'
81. It is uncertain which national legal regime applies to the relationships between the adjuster and other parties to the adventure than the party who instructed him. A specific conflict rule that regulates these relationships does not appear to exist. See also para. 6.5.1.3 below on the applicable

a specific way, or at least to act independently and impartially.[82] In fact, it has even been held by the Privy Council that the adjuster is the shipowner's agent.[83] This is also the position taken in English legal literature and practice, where it is indicated that when a cargo interested party has doubts about the shipowner's adjuster, he should appoint an adjuster himself.[84] The status of adjusters in case more than one has been appointed, and the relationship between these adjusters is not clarified. It is doubtful which adjuster will be entitled to collect security in such a situation and whether the costs of both adjusters, or only of one of them (and if so which) can be included in the adjustment partially or in full.[85] The scope of the adjuster's duties in his capacity of the shipowner's agent and his relationship towards other parties is doubtful as well. If the qualification of 'agent' means agent in the legal, rather than merely in a commercial sense,[86] the adjuster probably owes his principal, i.e. the party who instructs him, inter alia the duty of loyalty, including the fiduciary duty to avoid conflicts of interest.[87] Most adjusters, when asked, indicate that they do act independently and impartially.[88] From a legal perspective, this creates problems. No man can serve two masters. As such, it appears to be a *contradictio in terminis*. If an adjuster is the shipowner's agent indeed, it is also rather strange that his costs are included in the adjustment and apportioned over all interested parties, rather than being invoiced to the shipowner only.[89] A solution may be that all parties agree that the adjuster acts on behalf of all parties interested in the maritime adventure.[90] This is not what happens in practice.[91]

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law to the relationship between the average adjuster and a party interested in the maritime adventure.

82. The Dutch Civil Code does not contain any provision on the adjuster, whereas the provisions included in the Dutch Code of Civil Procedure do not regulate his operating procedures or duties when drafting the adjustment. They allow the adjuster to collect information (s. 639 Dutch Code of Civil Procedure) and oblige him to send the adjustment to all interested parties, when he has submitted the adjustment to the District Court of Rotterdam (s. 640 Dutch Code of Civil Procedure). The Code also obliges the adjuster to amend the adjustment if the Court orders him to do so (s. 641b Dutch Code of Civil Procedure). However, the Code does not oblige him to submit the statement to the Court, to act in a specific manner or to adhere to specifically described standards. The Spanish Maritime Code also contains a rather extended section on the appointment of the adjuster (failing a joint appointment by all parties involved, the adjuster is appointed by a notary public; s. 506 Spanish Maritime Code), but does not deal with his services and/or does not place particular duties on him.
83. *The Potoi Chau (Castle Insurance Co. Ltd. v. Hong Kong Islands Shipping Co. Ltd.)* [1983] 2 Lloyd's Rep. 376.
84. Lowndes & Rudolf 2013, p. 583; McDonald in CMI Report Istanbul (II) 2015, p. 160; Tsimplis & Shaw in: Baatz a.o. 2014, p. 249. That the cargo interested parties can appoint their own adjuster also appears to be the position in France: Delebecque 2014, p. 731.
85. It is generally accepted that the adjuster's costs can be included in the apportionment.
86. Peel 2011, p. 753.
87. Chitty on Contracts (II) 2012, p. 76-77.
88. The authors of Lowndes & Rudolf 2013 (at p. 585) indicate that when the YAR 1994 or 2004 apply, '*there appear to be strong grounds*' to argue that the contents of Rule E '*contemplate the employment of an independent professional* (…)'. However, at the same time, it is admitted that adjusters are instructed by the shipowner, assist the shipowner with exercising his lien to obtain security and that not all adjusters act independently and impartially.
89. The principal, under English law, is obliged to remunerate his agent (Chitty on Contracts (II) 2012, p. 86). IUMI has therefore suggested that the adjuster's fees should be settled by the person who instructed him (IUMI Response 2013, p. 9).
90. On consent, also Bowstead & Reynolds 2010, pp. 216-220.
91. During the discussion on the YAR 2016, the suggestion to include a rule to this effect in the YAR did not find general support. See also para. 4.3.3.4 below.

4.3.3.3 *Contractual arrangements*

The various average adjusters associations provide 'rules of practice' that their members have to comply with.[92] Membership of an association of average adjusters, however, is not required in order to practise as average adjuster. As a result, not all adjusters are members of these associations and are subject to their rules. The associations' guidelines do not have the force of law either.[93] Their rules apparently do not have to be followed in all situations[94] and sanctions, if any, do not appear to have great impact. The main sanction on infringement of the AAA rules, for example, is the loss of the association's membership.[95] In addition, the rules' relationship with the national law regime may not always be clear. It is indicated, for example, in the rules of the English Association of Average Adjusters ('AAA') of 13 May 2015 that they, inter alia, aim to '*ensure the independence and impartiality of its Fellows by imposing a strict code of professional conduct*' and that '*Fellows and Associates in their professional practice as Average Adjusters shall at all times observe the aims and conform to the Rules of the Association, shall maintain strict impartiality regardless of the interests of themselves, their employer or principal, or whoever has appointed them and shall avoid conflicts of interest*'.[96] This impartiality seems at odds with the above qualification of the average adjuster's position as the shipowner's agent by the Privy Council.[97]

Another, but related question is whether the party who instructs the adjuster can be regarded to instruct the adjuster also for and on behalf of other parties to the maritime adventure, in that respect that these other parties can also be considered as the adjuster's principal. Whether the instructing party may be deemed to act on behalf of other parties involved in the maritime adventure will depend on the circumstances of the particular matter involved, as well as on the applicable national regime to the specific relationships.[98] If the adjuster's relationship with the party who instructs him or on whose behalf he has been instructed can be regulated contractually, the adjuster may, within the boundaries set by the applicable law, limit his liability and agree indemnifications in respect of claims from third parties.[99] When the adjuster is not regarded as an agent of one of the parties, but rather as a person with a special independent or neutral status, in the absence of

92. For example, the AAA UK's Rules of Association dated 13 May 2015, as well as the rules of practice of the Association Mondiale de Dispacheurs www.amdadjusters.org/assets/Uploads/York-Antwerp-Rules/Tribunal/AMDTribunalNotes.pdf.
93. Goff & Jones 1998, p. 430.
94. Rule 14 AAA UK Rules of Association dated 13 May 2015 provides that the rules of practice have to be complied with, but also allows adjusters to indicate when and why the rules have not been followed.
95. Rule 29 of the AAA UK's Rules of Association dated 13 May 2015. Also Art. III-8 of the new By-Laws of the association of average adjusters of the United States and Canada.
96. Rule 28(b) AAA UK Rules of Association dated 13 May 2015.
97. See para. 4.3.3.2 above.
98. When the relationship between the adjuster and the party who instructs him is regarded as a relationship of agency, it will be difficult to imagine that the adjuster's principal also creates an agency relationship between the adjuster and third parties.
99. Such limitations are commonly included in contracts agreed by maritime services providers. See, for example, the General Terms and Conditions of the Rotterdam Terminal Operator's Association 2009 (Art. 6) as well as the General Conditions and Rules for Dutch Shipbrokers and Agents 2009 (Art. 5).

statutory protection,[100] he probably has to protect his interests towards all these parties separately. This may be difficult, especially because the adjuster will not have direct contact with all potentially interested parties.[101]

Some average adjusters have recently started to include a reference in the general average security forms that their general terms and conditions are applicable.[102] Although it seems a sensible first step from the adjuster's point of view, it is unclear whether it provides sufficient protection. Other parties than those who have provided the security may ultimately be interested in the general average.[103] They will not be bound to the provision when they have not provided security themselves. Similarly, the party providing security is probably entitled to reject the applicability of these terms and conditions. Moreover, the provision must be accepted under the applicable national law. When the adjuster is regarded as the shipowner's agent only, he will not have a contractual relationship with the party providing security. A claim is likely to be brought in tort, which may be subject to a different law than the law applicable to the security form. A court may not be willing to accept that the general conditions referred to in the security form can be relied upon in defence of such claim. Alternatively, the terms and conditions may not be applicable because provisions of national law have not been complied with.

4.3.3.4 *Absence of a regulation in the YAR*

Traditionally, the YAR have not paid much attention to the adjuster. In fact, up to and including the YAR 1994, he is only mentioned indirectly in Rule E as a collector of values and in Rule XXII in respect of his duties regarding payments of account or refunds of cash deposits. In the YAR 2016, however, the average adjuster is given more discretionary powers. He has to determine when the common maritime adventure ends in case of towage (Rule B) and whether small value claims should be left out of the apportionment. In addition, he is to estimate the contributory values if no information is timely provided to him (Rule E); he may have to make a choice for the appropriate currency;[104] whereas he also is to hold cash deposits in his own name (Rule XXII). It is acknowledged that the discretionary powers given to the adjuster in the YAR 2016 may be a mere formalisation of current practice.[105] The difference though is that because these actions are approved in the YAR 2016, the adjuster´s actions taken in this respect cannot be challenged on the basis that he

100. The statutory protection may be limited. As a matter of Dutch law, court appointed experts do not even appear to have been specifically protected (see, for example, the digital brochure for experts in civil cases: 'Leidraad deskundigen in civiele zaken', pp. 21-22), whereas liquidators can be liable in their capacity as representative of the insolvency fund, but also personally (see inter alia Verhoeven 2016).
101. The interested parties are discussed in para. 4.5 below.
102. The security forms provided by adjuster RHL in respect of the fire on board the 'Maersk Seoul' on 19 July 2015 contained the following provision: '*Unless otherwise agreed in writing, the matter is accepted subject to our Standard Terms of Business, which are available at (www.ctplc.com/adjusting). If you would like us to forward to you a copy of these, then please let us know. Our liability in connection with this matter is limited to the lesser of £1m or ten times the value of our fees or such other amount as has been agreed in writing.*'
103. For example, because a general average relationship arises as a matter of law rather than under the security forms. See para. 3.3.2 above.
104. CMI Report Istanbul (I) 2015, p. 28.
105. This was indicated during the YAR 2016's preparation.

would act without authority. This will be important especially in situations in which he is regarded as the shipowner's agent, like under English law.[106] As a matter of Agency law, an agent has to act under his principal's instructions and is obliged to serve his principal's interests.[107] If this rule also applies to the average adjuster, one of the parties to the adventure effectively gets a much stronger position as a result of the adjuster's discretionary powers.

In view of the inclusion of some of the average adjuster's duties in the YAR, the Dutch delegation suggested in the preparatory discussions on the YAR 2016 to add a provision in the YAR which would make it clear that the adjuster has to act impartially and independently or would even have a duty of care towards all parties to the maritime adventure.[108] The proposal, which is similar to the approach of the German Federal Court,[109] was supported and taken over by IUMI.[110] It was argued that it could create an imbalance in the system if an agent of the shipowner would be given substantial powers in the YAR, which he may use to the detriment of the other parties to the maritime adventure. The addition of a rule providing that the adjuster is obliged to take the interests of all parties into account or obliging him to act independently and impartially would give at least a minimum standard for the adjuster's actions. In addition, a rule to this effect was considered to create some uniformity at international level on how the adjuster should act. The inclusion of the rule in the YAR 2016 was also supported with the argument that a general regulation would be useful in view of the decreasing lack of knowledge on general average among the parties involved in the maritime adventure and judges of national courts of law. A specific rule would clarify beyond doubt that the adjuster has an independent status and has duties towards other parties than merely to the party who instructs him.[111] In the run up to the subcommittee meeting at Istanbul on 6 and 7 June 2015, a proposal for insertion of a rule on the adjuster's position in the YAR was circulated by IUMI.[112] It provided that: '*In adjusting the General Average and in all activities associated therewith (such as collecting security, publishing the Adjustment, exercising discretion and all other aspects of the role of an Adjuster) the Adjuster shall act independently and impartially in the interests of all parties to the common maritime adventure. Guidelines shall give examples of best practice for Adjusters*.'

In addition, concrete guidelines for adjusters were proposed by IUMI.[113] During the subcommittee meeting in Istanbul in June 2015, various objections were raised against the proposal to regulate the adjuster's position in the YAR. The representatives of the Japanese and French maritime law associations indicated that the YAR would not be the right place to deal with the adjuster's role and that the CMI is

106. In view of the fact that many adjustments are still published by English adjusters, the position under English law is not just a position that can be taken, but rather important in practice.
107. Chitty on Contracts (II) 2012, p. 81.
108. CMI Report Dublin 2013. The author of this study is one of the members of the Dutch Association for Transport Law's general average committee.
109. German Federal Court 23 September 1996, II ZR 157/95 (Hamburg).
110. CMI Report Hamburg 2014, p. 4; CMI Report Istanbul (I) 2015, pp. ii, 32. In support of its proposal, IUMI submitted a paper written by the author of this study.
111. CMI Report Hamburg 2014, p. 4; CMI Report Istanbul (I) 2015, pp. ii, 32.
112. CMI Istanbul (I) Suppl. 2015.
113. CMI Istanbul (I) Suppl. 2015.

the custodian of the YAR and not the average adjusters.[114] This position was taken over by ICS,[115] also in view of concerns from average adjusters regarding their liability and consequently the premium of their liability insurance.[116] The majority of people attending the subcommittee meeting at Istanbul deemed the inclusion of a rule on the adjuster's position in the YAR unnecessary. In order to accommodate inter alia IUMI, it was agreed that it would be further investigated whether the adjuster's acts, duties and powers should be described in more detail and/or specified in guidelines to the YAR.[117]

4.3.3.5 *CMI Guidelines on General Average*

In the CMI Guidelines on General Average, as accepted during the CMI conference in New York on 6 May 2016,[118] the position of the adjuster is discussed in some detail.[119] Rules of adjusters' universal best practices are set out to give guidance on the adjuster's role. It is indicated that the adjuster is expected to act in an '*impartial and independent manner*', that he has to explain what he is doing (inter alia explain the regulation which is relied upon and set out why the particular currency has been chosen, etc.) and that he should make available information and documentation relied upon when drafting the adjustment on request and when practicable.[120] In spite of the non-binding status of the guidelines, they may be regarded as an important first step in respect of a regulation of the adjuster's position.

4.3.4 **Evaluation**

The average adjuster's legal position appears to be subject to (the limited) national regulation and contractual arrangements, if any. It follows from the above overview that there are not only substantial differences between the various national laws, but also serious inconsistencies where the adjuster is not regarded as an impartial person. Conflicts of interest will arise by definition. These do not only result in undesirable consequences, but may create problems in practice for all parties involved. Suggested security forms may be objected to because the wording favours one of the parties. Moreover, if cargo interested parties are sceptical about the adjuster's independence and impartiality, this does not help in the settlement of the general average contributions either. It seems most in line with the adjuster's actual actions and the general average principle to regard the adjuster as 'agent to the community of interests'. That would mean that he would have to serve all his

114. CMI Report Istanbul (II) 2015, p. 160.
115. Most of the average adjusters at the subcommittee meeting were not in favour of IUMI's suggestion. CMI Report Istanbul (II) 2015, pp. 159-161.
116. CMI Report Istanbul (I) 2015, p. 33; CMI Report Istanbul (II) 2015, pp. 160-161 (Cornah and McDonald). It was also indicated by an English adjuster that he did not really take the interests of all parties into account, for example, when he collects security. He would merely be assisting the shipowner in exercising his lien. This remark clearly shows the friction in the adjuster's position and the usefulness of a regulation for the parties who did not appoint the adjuster.
117. CMI Report Istanbul (II) 2015; CMI Report London 2015, p. 13.
118. See on the CMI Guidelines in general, para. 2.2.3 above.
119. CMI Guidelines on General Average, pp. 10-11.
120. That documents and other evidence should be produced by all parties was already suggested by IUMI before the idea of the Guidelines had come up. Inter alia IUMI Response 2013, p. 4.

principals 'as faithfully and loyally' as if they were his only principal.[121] It goes without saying that this would imply that the adjuster has to act independently and impartially. He may then also be under a duty to disclose information and documentation.[122] In order to protect both the adjuster's interests and the interests of the parties to the maritime adventure, it seems useful to further regulate the adjuster's position, preferably internationally,[123] but at least at national level. There should be no doubt that the adjuster acts independently and serves the interests of all parties to the common maritime adventure. The question which party is obliged to instruct an adjuster could then also be uniformly regulated and the adjuster's position could be better protected. In the meantime, courts should give more attention to the different hats that adjusters may be wearing and, as a result, should not automatically accept adjustments as correct, independent statements.

4.4 Adjustment

4.4.1 Relevance

In settlements of general average, the adjustment plays an important, if not an essential role. The term adjustment, however, is applied in a similarly unequivocal manner as the term adjuster. In practice, the adjustment is an overview of the properties involved in the common maritime adventure during which the incident occurred as well as of the general average disbursements incurred, whereby the latter are apportioned over various parties interested in the first.[124] Such statement is necessary to know which general average disbursements have been incurred and over which properties these disbursements have been apportioned. If nothing else, it is important evidence of these figures. The adjustment may also include an actual overview of the amounts apportioned over the various interests. This raises the question on the basis of which rules it is prepared, how a specific contribution is calculated and what its effect is.

4.4.2 Apportionment rules

4.4.2.1 *National law*

The term adjustment is hardly ever defined in national codifications.[125] Neither the national codifications nor the YAR appear to set specific requirements for the

121. Chitty on Contracts (II) 2012, p. 81.
122. Chitty on Contracts (II) 2012, p. 81. That the adjuster is obliged to make all documents he has used in the preparation of the adjustment available for inspection and provide copies thereof upon request is set out in s. 306(4) Russian Merchant Shipping Act. It is also indicated in the CMI Guidelines on general average (p. 11; para. D. (2)(3) that '*On request, and when practicable, the adjuster should make available copies of reports and invoices relied upon in the preparation of the adjustment*.'
123. Also Sulewska 2014, p. 8. A uniform regulation that provides clarity seems helpful, also in view of the fact that there is no special internationally codified and/or accepted conflict of law rule which regulates the position of the adjuster either. See Chapter 5 below. Under the Rome Regulations the applicable law would depend on the qualification of the adjuster's relationship and the party who brings a claim against him on which ground. The Rome Regulations are further discussed below in Chapter 6.
124. See on the adjustment's contents also para. 2.3.2 above.
125. Also Bemm 1997, p. 97.

contents of an adjustment.[126] No framework is actually provided or prescribed. Traditionally the national legal regimes give rules on the apportionment of general average, i.e. what the contributory interests are and how their values are to be determined.[127] However, since the end of the 19th century when the YAR's predecessors were created and accepted in practice,[128] the main focus regarding the adjustment rules has shifted from the legal regulations to the contractual. First of all, several national codifications are only applicable in the absence of a contractual agreement on apportionment rules. Some regimes expressly provide that they apply failing a contractual regulation,[129] whereas other regimes have not given their provisions a binding status.[130] Secondly, there has been a growing tendency to reduce the national substantive provisions on the apportionment or at least make these compatible with the rules that are contractually agreed. Legislators recognise that in practice the YAR are invariably referred to by parties in their contracts[131] and align their national systems with the YAR.[132] The manner in which differs. Some countries, like Italy and Poland, have modelled their statutory provisions on the YAR,[133] or have implemented the YAR's wording in their national law. The People's Republic of China, for example, has taken over a substantial part of the YAR 1994, albeit with some amendments and additions in its maritime code.[134] Other countries have incorporated a version of the YAR in their respective legal systems, either completely or partially.

The YAR have been included, inter alia, in the codifications of Norway, Sweden, Finland, Argentina, the Netherlands, Turkey, Spain, Switzerland and Luxembourg.[135] The applicable YAR versions vary, just as the requirements that have to be complied with for their application. The Spanish and Turkish Maritime Codes, for example, provide that the most recent version of the YAR as approved by the CMI apply.[136] Norway and the Netherlands apply the YAR 1994;[137] Finland and Sweden incorporate

126. Also Bemm 1997, p. 111; IUMI Response 2013, p. 9.
127. See also para. 2.1 above.
128. See para. 2.2.2 above.
129. For example, s. 203 Chinese Maritime Code; s. 17:1 Swedish Maritime Code; s. 285 Russian Merchant Shipping Act; s. 1273(1) Turkish Commercial Code; s. 356(1) Spanish Maritime Code; s. 214(4) Vietnamese Maritime Code; s. 403 Argentine Navigation Act; s. 932 *cf.* 936 draft Brazilian Commercial Code; s. 442 Maltese Commercial Code.
130. See para. 3.3.2.3 above.
131. The YAR's application is discussed in para. 3.2.2 above.
132. The YAR and their predecessors appear to have served as a model for legislators since the end of the 19th century. The Belgian Code of 1879, the Italian Code of Commerce of 1882 and the Spanish Commercial Code of 1885, for example, reportedly were all, in some aspects, identical to the YAR. (Wigmore a.o. 1918, p. 442.) The French Code of 7 July 1967 was also based on the YAR (Van Hooydonk 2012, p. 245 with reference to Rodière), just like the Turkish Commercial Code of 1956 (Ünan 2011, p. 11).
133. Manca 1958, p. 218 respectively Sulewska 2014.
134. The Rule of Interpretation and the Rule Paramount have not been taken over (s. 193-202 Chinese Maritime Code; Van Hooydonk 2012, p. 261). Nevertheless, adjustments in the People's Republic of China would reportedly still take place on the basis of the Beijing Rules of General Average Adjustment by the Chinese Council for the Promotion of International Trade, General Average Adjustment Office (Chen 2001, p. 136; Sulewska 2014, p. 6-8). On the Beijing Rules of General Average Adjustment also Hudson 1976 (I).
135. Belgium, that is currently revising its maritime code, also intends to give the YAR force of law (Van Hooydonk 2012, p. 274).
136. S. 356(1) Spanish Maritime Code respectively s. 1272-1285 Turkish Commercial Code.
137. S. 461 Norwegian Maritime Code respectively s. 8:613 Dutch Civil Code.

the YAR 1974;[138] whereas Argentina still mentions the YAR 1950.[139] The code of Luxembourg, by contrast, does not specify any YAR version.[140] In the Netherlands, Norway and Switzerland, the applicable YAR version is not mentioned in the Code itself, but is to be determined by the appointed authority separately, for example, by Royal Decree.[141] The Russian Merchant Shipping Act stipulates the applicability of the YAR and other international customs of merchant shipping if contractually agreed, or when the law to be applied in the assessment is incomplete.[142]

The regimes that have not given the YAR a place in their national law[143] often give a specific regulation for the preparation of the adjustment, although the extent and contents may vary.[144] Alternatively, a contractual provision which incorporates the YAR could also be given a wide scope by national courts, for example with reference to international custom.[145]

138. S. 17:1 Finnish Maritime Code respectively s. 17:1 Swedish Maritime Code.
139. S. 403 Argentine Navigation Act.
140. S. 119 Maritime Code of Luxembourg.
141. S. 461 Norwegian Maritime Code; s. 122(2) Swiss Maritime Code; s. 8:613 Dutch Civil Code respectively. The last provision provides that the adjustment has to be drawn up on the basis of the YAR version as specified by royal decree. Pursuant to the Royal Decree of 22 March 1991 for the implementation of s. 613 of Book 8 of the Dutch Civil Code, the currently applicable version is the YAR 1994. The Dutch legislator recognised that even though the YAR were incorporated in all contracts of carriage, they could not be applied automatically in situations in which there was no contractual relationship in place between a party entitled to a general average contribution and a party liable to pay same. In order to have the flexibility, if practice so demanded, to change the applicable YAR version without having to change the Dutch Civil Code, the applicable version of the YAR is determined by Royal Decree. In view of the wording used to incorporate the YAR, only the YAR's provisions which relate to the adjustment are incorporated in the Dutch legal system and not the YAR's provisions which regulate other aspects. (Also Hardenberg 1973, p. 186.)
142. S. 285(2) Russian Merchant Shipping Act). The Russian Code contains a separate, rather extensive regulation on the assessment of damage (s. 286-304 Russian Merchant Shipping Act).
143. France, Russia, Vietnam, Malta and Germany, for example, have not included the YAR in their respective legal systems. The main reason against incorporation of the YAR in the German Commercial Code appears to have been that the YAR are amended regularly. It is indicated in the Travaux préparatoires to the German statutory general average provisions that a floating reference to the YAR was not acceptable for constitutional reasons, whereas inclusion of a specified version would be problematic in view of the application of distinct YAR versions in practice. Moreover, it was considered that the gaps left by the YAR should be provided for (Gesetzesbegründung 2012, p. 125). Nevertheless, the YAR have been taken into account in the drafting process and some issues have been dealt with in the same manner. See, for example, Gesetzesbegründung 2012, p. 125, which provides that contrary to the previous regulation, but in accordance with the YAR, it is no longer required that both ship and cargo are safeguarded for general average.
144. Compare, for example, the rather concise regulation in the French Code of transport (s. L5133-7 up to and including L5133-15) and the German Commercial Code (§ 590 – 592; in some detail Ramming 2016, pp. 86-89) with the extensive regulation of the Russian Merchant Shipping Act (s. 284-304). The Polish Maritime Code provides that in the absence of a contractual agreement, the adjustment is to be prepared on the basis of '*universally accepted principles of international maritime traffic*' (s. 255(2) Polish Maritime Code; Sulewska 2014, pp. 7, 11).
145. For example, the English case *Sameon Co. S.A. v. NV Petrofina* (*The World Hitachi Zosen*) [1997] Int.Com.L.R. 04/30, discussed in para. 3.3.2 above. The Vietnamese Maritime Code provides that parties are to agree the adjusting principles, failing which the adjustment shall be drawn up in accordance with the code's provisions and '*international customs*' (s. 214(4) Vietnamese Maritime Code).

4.4.2.2 *Contracts of affreightment*

Nearly all contracts for the carriage of goods by sea contain a reference to the YAR.[146] The YAR 1994 are still most commonly applied in practice, although the expectation seems justified that the YAR 2016 will become the new standard in the not too distant future.[147] In addition to the incorporation of a YAR version, some contracts of affreightment include specific provisions on disbursements that are to be included in the adjustment[148] or contributory interests which are to be excluded from apportionment.[149]

In the same (standard form) clause in which the YAR are incorporated in contracts for the carriage of goods, it is often indicated in which place and pursuant to which law and practice the adjustment has to be drawn up. Such clause is generally along the following lines: '*General average shall be adjusted, stated and settled in London, according to the York-Antwerp Rules 1994, or any modification thereof* (…)'.[150]

An analysis of the bill of lading provisions of the major shipping lines shows that these shipping companies have a preference not to stipulate a fixed place where the adjustment has to be drawn up.[151] In most terms and conditions, the carrier is given the opportunity to choose an appropriate place to draw up an adjustment.[152] In this way, the merits of the matter and sometimes also contractual arrangements with the shipowner or operators of the carrying vessel, if any, can be taken into account when determining the place where the adjustment is to be drawn up.

4.4.2.3 *Security forms*

4.4.2.3.1 Absence of a choice for a regulation

General average security forms may and arguably should contain a specific regulation for the adjustment. In practice though, they hardly ever do. It is often merely indicated that the adjustment will be prepared '*in accordance with the provisions of the*

146. This is indicated inter alia in the Nordic Marine Insurance Plan 2013 part I, Chapter 4, section 2; and by *Voyage Charters* 2014, p. 594; Hare 1999, p. 773; Van Hooydonk 2012, p. 9; Schoenbaum 2011, p. 25; and Herber 2016, p. 407. As observed in para. 3.2.2 above, the YAR's general applicability is probably to some extent the result of the commonly used standardized forms of contract developed by BIMCO and the main shipping lines.
147. See also para. 3.2.2.2.2 (under iii) above.
148. Cl. 12 Streamlines b/l, for example, provides that all expenses for icebreakers will be regarded as general average.
149. A clause that time charter hire is excluded from apportionment is often inserted in time charter parties. For example, cl. 23 Baltime 1939 (as revised in 2001) and cl. 25 NYPE 1993/2015. Under the YAR 2016 (Rule XVII(a)(ii)), low value cargo may be excluded from apportionment in general average, when in the average adjuster's opinion '*the cost of including it in the adjustment would be likely to be disproportionate to its eventual contribution.*'
150. Cl. 12 Conline bill 2000. Along the same lines cl. 3 Congenbill 1994 ('*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*'); cl. 24 Baltime 1939 (as revised in 2001); cl. 25 NYPE 1993/2015; cl. 12 Gencon 1994; cl. 36 ShellVoy 6.
151. See on the place where the adjustment is drawn up also para. 5.2.1 below.
152. In the bill of lading provisions of the major shipping lines it is often indicated that general average will be adjusted at any port or place at the Carrier's option (for example, cl. 24(1) Maersk Line bill of lading and cl. 14(2) of the CMA CGM bill of lading). The NYPE 93 standard form does not contain a specific place either, but leaves a void space to insert the desired place. Cl. 25 NYPE 1993. This has changed in the 2015 version which provides that the adjustment will be drawn up in the agreed place of arbitration (cl. 25 NYPE 2015).

contract of affreightment governing the carriage of the goods or, failing any such provision, in accordance with the law and practice of the place where the common maritime adventure ended'.[153] It may not always be clear which contract of affreightment is referred to, especially in a chain of contracts of carriage where there may be confusion about *the* contract when the party issuing the average bond is a party to several contracts of affreightment or is not a party to any contract at all.[154] A cargo interested party may, for example, have concluded a voyage charter with his disponent owner and may at the same time be a party to a bill of lading contract with the shipowner because the bill of lading was signed by the master. These contracts are not necessarily subject to the same law and/or general average regulation. The better, or at least a less confusing option may be that a choice is made for the applicability of a specific regulation, like a particular version of the YAR. Such reference to the YAR may be a repetition when the applicability of this YAR version has already been agreed in (one or more of) the contract(s) of affreightment to which the issuer of the bond is a party. Nevertheless, a reference to the YAR in a security form may prove helpful. When there are various cargo interested parties and/or contracts of affreightment involved in the adventure and some or all of the cargo interested parties have suffered general average sacrifices, rights of contribution arise between parties which have not regulated their relationship inter se contractually.[155] In principle, the YAR will not be applicable to their relationships or at least not without some extensive legal reasoning.[156] A stipulation of the YAR's application in a security form may directly bind these parties to the YAR as well. Moreover, if various contracts of affreightment refer to different versions of the YAR, it may be helpful to agree the applicability of the same version of the YAR to all relationships in the security forms. It should then probably also be clarified that the regulation included in the security form overrides regulations which would apply otherwise.

4.4.2.3.2 Non-separation agreement and Bigham clause

In principle, a general average contribution is only due in respect of costs incurred and losses suffered during the existence of the common maritime adventure. After the ship, cargo and other property (if any) have parted physically, a common maritime adventure no longer exists. Whether a common maritime interest remains is a question of fact. It will depend on the circumstances of a particular case, the applicable rules and in some way on the court's discretion. Courts may be willing to extend the duration of the common maritime adventure to the period after ship and cargo have separated. Disbursements incurred after the end of the common

153. This is the wording applied, for example, in the average bond of the Dutch adjuster Schoutens regarding the sinking of the barge 'Maasdijk' in the port of Rotterdam in July 2011 as well as by RHL in the average bond wording requested in respect of the shifting of cargo on board the mv. 'Happy Rover' in February 2012 and the fire on board the mv. 'STX Changxing Rose' in December 2012.
154. As a matter of English law, for example, the owners of the cargo are considered as contributors in general average (see para. 4.5.2.4 below). They may not actually be a party to any contract of affreightment when goods are transferred while they are at sea. A consignee under a sea waybill or straight bill of lading may not have become a party to the sea waybill respectively bill of lading contract either.
155. For example, between various cargo interested parties.
156. See also para. 3.2.2 above.

maritime adventure may no longer be apportioned in general average.[157] In order to make sure that costs incurred for the common interest after the separation of vessel and cargo can still be included in the adjustment, it has become common practice to incorporate a so-called non-separation agreement ('NSA') in security forms. An NSA creates the legal fiction that the common maritime adventure continues for general average purposes even when the properties involved in the adventure have physically parted.[158] Both the shipowner and parties interested in property carried on board the vessel can benefit from an NSA. Cargo may be forwarded to its final destination sooner rather than being stored first, potentially for a considerable period of time, whereas the shipowner can still apportion disbursements incurred after the properties' physical separation. Ship and cargo, for example, part when it is clear that repairs of the vessel will take a considerable amount of time. Parties interested in the cargo may not be pleased if the cargo has to be discharged, stored and reloaded on board the vessel when repairs have been completed. In such circumstances, it may be agreed by the parties that the cargo will be on carried to final destination with another vessel. It is clear that if an NSA is not signed, the parties interested in cargo will not be obliged to contribute in the costs of the shipowner incurred after the properties' physical separation, which costs could have been apportioned in general average if the common maritime adventure had remained in place. In order to give the shipowner the incentive to forward the cargo to final destination rather than storing it during the period of repair, the NSA was developed. A shipowner benefits from the NSA as he can recover expenses in general average which would fall solely on him if cargo interested parties took receipt of their property in the port of refuge. Since 1994, a non-separation agreement is included in Rule G YAR.[159] It provides that: '*When a ship is at any port or place in circumstances which would give rise to an allowance in general average under the provisions of Rules X and XI, and the cargo or part thereof is forwarded to destination by other means, rights and liabilities in general average shall, subject to cargo interests being notified if practicable, remain as nearly as possible the same as they would have been in the absence of such forwarding, as if the adventure had continued in the original ship for so long as justifiable under the contract of affreightment and the applicable law*.'
In practice, even when the YAR 1994 are referred to in contracts of affreightment, a separate NSA is often included in the average bond. Such addition may be useful particularly when the average bond is provided by a party who would not otherwise

157. For example, the English case *Royal Mail S.P. Co. v. English Bank of Rio* (1887) 19 Q.B.D. 362. See, however, the decision of the District Court of Rotterdam regarding the sinking of the push barge 'Maasdijk' during loading operations of a consignment of ferrochrome in the Port of Rotterdam. The ferrochrome was salved by taking it out of the barge and was subsequently transported on a different push barge to the place of its destination. Only thereafter, the hull of the 'Maasdijk' was salved. A non-separation agreement had not been signed by cargo interested parties. It was held by the court that even though vessel and cargo had separated, the costs incurred after the separation should be regarded as costs incurred for the common benefit and could thus be brought in general average (District Court of Rotterdam 5 September 2012, *S&S* 2013, 43 'Maasdijk'). This decision was confirmed by the Court of Appeal of The Hague (Court of Appeal of The Hague 17 December 2013, ECLI:NL:GHDHA:2013:5264; *S&S* 2014, 55 ('Maasdijk')). It should be noted though that in inland waterway shipping non-separation agreements are less common.
158. NSAs appear to have existed for over 100 years. This was indicated in the English case *The Abt Rasha* [2000] 2 Lloyd's Rep. 575. See also Lowndes & Rudolf 2013, pp. 201-202; Hudson & Harvey 2010, pp. 81-86. Critical: Lureau 1963.
159. Lowndes & Rudolf 2013, p. 200; Enge & Schwampe 2012, p. 78.

be bound to the provisions of a contract of affreightment incorporating the YAR 1994.

In order to protect cargo interested parties against unlimited port of refuge and other costs,[160] the potential exposure under the NSA can be capped by a 'Bigham clause'. Pursuant to the Bigham clause, the proportion attaching to cargo interested parties of the allowances made in general average as a result of the non-separation agreement (so the costs incurred after vessel and other properties involved in the maritime adventure have separated) shall not exceed the costs which would have been incurred by the cargo interested parties if the cargo had been forwarded at their own expense.[161] The cap, which appears to have been used in the USA since the 1970s, has been accepted in case law,[162] and was included in Rule G YAR in 1994 together with the NSA. For obvious reasons, shipowners and their underwriters are not very fond of the Bigham clause. During the preparatory discussions for the YAR 2016, ICS suggested that the Bigham clause be taken out of the YAR.[163] This suggestion did not meet general approval.[164] The Bigham clause was maintained in the YAR 2016, albeit with the specification that the cap did not include allowances made under Rule F YAR on substituted expenses.[165] The costs which shipowners cannot recover from other parties as a result of the application of the Bigham clause ('the Bigham excess amount'), under English law in principle can be claimed from Hull and Machinery underwriters under s. 66(4) of the Marine Insurance Act 1906.[166]

It is doubtful whether potential general average contributors are obliged to provide security in which an NSA is included. The question arises both when the YAR 1974 apply, which do not contain a non-separation agreement, and when the YAR 1994 apply, where the NSA is capped by the Bigham clause. When the YAR 1974 are applicable, the parties have chosen a version of the YAR without an NSA. It may be argued that if the shipowners would like to receive security with an NSA, they should have opted for applicability of the YAR 1994 or should have stipulated in the contract of affreightment that security including an NSA should be provided. When the YAR 1994 apply and an NSA is included in a security form without a Bigham clause issued by a party to the contract of carriage, it might also be argued that a new contract was concluded which overrides Rule G YAR 1994 and that the fact that the Bigham clause was not included in the average bond means that rights

160. When a Bigham clause has been agreed, cargo interested parties cannot be obliged to contribute, for example, to the full costs of the vessel's tow to a place of repair after the cargo has been discharged and forwarded to its final destination.
161. A Bigham clause is inter alia included in Rule G YAR 1994-2016. The name of the clause may have been taken from the American lawyers who successfully assisted cargo in the American case *The Domingo de Larrinaga*, 24 F.2d 587 (1927). See also the English case *The Abt Rasha* [2000] 2 Lloyd's Rep. 575, para. 20-21.
162. It was held by the English Court in *The Abt Rasha* [2000] 2 Lloyd's Rep. 575 that a Bigham clause is '*in principle a reasonable agreement*'.
163. Inter alia CMI Report 2015 (I), p. 21. Interestingly, the suggestion to remove the Bigham clause was inserted neither in ICS' nor in the AAA's nor in the AMD's response to the CMI Questionnaire sent out in preparation of the YAR 2016 (CMI report Dublin 2013).
164. Amongst others IUMI was strongly opposed to deleting the Bigham clause and maintaining the NSA. CMI Report Istanbul 2015 (II), p. 170.
165. CMI Report London 2015, p. 4; Rule G YAR 2016.
166. *The Abt Rasha* [2000] 2 Lloyd's Rep. 575.

to rely on this provision have been waived. Since accepting or refusing security wording with a non-separation agreement can have serious financial implications, there is surprisingly little case law covering this question.[167] Important factors appear to be which YAR version was agreed and whether cargo interested parties are allowed to terminate a common maritime adventure under the applicable national law.[168] If the voyage can be terminated by cargo interested parties at the port of refuge, they probably cannot be obliged to provide security with an NSA.[169] In any event, it seems unreasonable if cargo interested parties could be obliged to provide security with an NSA but without a Bigham clause. The argument that it is common practice to include an NSA similarly applies in respect of the insertion of a Bigham clause.

4.4.3 **Contribution**

4.4.3.1 *Aspects not regulated in the YAR*

The apportionment of the disbursements over the various contributions in practice generally takes place pursuant to one of the versions of the YAR, which applies either statutorily or contractually. Apart from the fact that the basis of the YAR's applicability may be doubtful,[170] the YAR do not regulate all aspects regarding the contribution. They do not determine when the obligation to contribute arises, whether a contribution is due in respect of property that was lost during the voyage, whether a single contribution can exceed the maximum value of the property involved in the maritime adventure and what the effect of successful recourse against a third party is. These closely related questions must be answered on the basis of the applicable national law and specific contractual arrangements, if any. It should be noted that express contractual provisions in this respect are rare.

167. In the Netherlands, it was held by the President of the District Court of Amsterdam presiding in summary proceedings in the matter 'Borussia' that the merchant could not be obliged to sign a non-separation agreement as there was no contractual stipulation that he was bound to do so (President of the District Court of Amsterdam 27 July 1989, *S&S* 1990, 137 ('Borussia')). Probably the decision cannot be regarded as the final word on the matter. In particular as the decision was given before the introduction of the YAR 1994.

168. The issue of 'frustration' is discussed in some detail, with a focus on English law, in IUMI's Response to the CMI Questionnaire sent out in preparation of the YAR 2016 (IUMI's Response 2013, pp. 21-25).

169. Under Dutch law, for example, parties can take delivery of their cargo during the voyage, provided that the shipowner can reasonably comply with the request, freight is paid and security is provided for the general average expenses incurred until that moment (s. 8:440 Dutch Civil Code). Also s. 296 Maltese Commercial Code and s. 753 Japanese Commercial Code. The situation appears to be identical under American and Canadian law. US: *The Julia Blake*, 107 U.S. 418 (1883) and *The Domingo de Larrinaga*, 24 F.2d 587 (1927); Canada: *The City of Colombo* [1986] 2 F.C. 463. It was held that parties could not be obliged to contribute in general average for expenses incurred after the cargo was discharged but before the vessel reached her final destination. If an NSA was provided, the factual result would be that parties would have to contribute to such expenses. It is therefore unlikely that an obligation would exist to provide an NSA. Under English law, the question has not been decided yet. However, it appears that the Court of Appeal in *The Abt Rasha* agreed with the position that cargo interested parties would be entitled to take receipt of their property provided that the freight had been paid (*The Abt Rasha* [2000] 2 Lloyd's Rep. 575).

170. The YAR's legal position is discussed in para. 3.2.2 above.

4.4.3.2 *Moment that the obligation to contribute arises*

4.4.3.2.1 Relevance

The determination of the moment when the obligation to contribute arises is not merely of academic interest. Not only can a claim for a contribution be brought from this moment on, but this moment can also be relevant to determine the party against whom a claim can be brought for a general average contribution.[171] Furthermore, from the moment the contribution is due, action can also be taken to safeguard a contribution,[172] whereas it may also be argued that no contribution has to be paid by parties whose property was lost after the general average disbursements were incurred, but before the property's arrival at the discharge port. Finally, a priority right on the vessel may be limited to a specific period of time after the claim became due.[173]

4.4.3.2.2 Varying national law positions

A general average act arises when the requirements of the applicable law and/or contract for the carriage of the goods have been met. Generally this will be at the moment that sacrifices are made and/or the disbursements are incurred.[174] It seems logical that the right to bring a claim for a general average contribution arises at the same time. Under some national laws this is clear beyond doubt,[175] but this is not generally accepted. Under other national legal regimes, a claim for a general average contribution may become due and enforceable when the vessel arrives at the place of destination.[176] Alternatively, a choice for the relevant moment may not have expressly been made or clearly follow from the statutory provisions.

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171. As discussed in para. 4.5 below, when claims for contributions have to be brought against the owner of the property, the relevant owner is the owner of the property at the time the claim became due.
172. Hudson submits that a shipowner is entitled to request security only when '*he is in a position to tender delivery to the cargo interests*'. (Hudson 1988, p. 2.) This is probably related to the fact that the lien can be exercised only in the port of delivery. The contribution is due from the moment that the disbursements are incurred and from that moment on a claim may exist against the party legally or contractually liable to contribute. Pursuant to Hudson, security provided before the cargo's delivery would only become effective after delivery (Hudson 1988, p. 4). If the obligation to contribute in general average is to be qualified as an obligation under resolutive condition, security can be asked from the moment that the disbursements were incurred.
173. See, for example, s. 8:219 Dutch Civil Code, which limits a priority right to one year after the claim became due. Similarly, s. 55 Norwegian Maritime Code.
174. In practice, sacrifices may be made and expenditures may be incurred over a longer period of time.
175. This is the situation, for example, in England and Germany. UK: *Crooks v. Allan* (1879) 5 Q.B.D. 38, confirmed in *Chandris v. Argo Insurance Co Ltd.* [1963] 2 Lloyd's Rep. 65 (even though no reference is made to *Crooks v. Allan* in the latter case). The decision was confirmed by the Court of Appeal in *The Lehmann Timber* (*Metal Market OOO* v. *Vitorio Shipping*) [2013] 2 Lloyd's Rep. 541 para. 31. German law: § 603(2) German Commercial Code *cf.* Gesetzesbegründung 2012, p. 126. The new German Commercial Code seems to regard as relevant moment the moment that the general average has arisen (§ 588(2) *cf.* 603 German Commercial Code). Pursuant to Ramming, this is the moment that the properties involved are facing a common peril (Ramming 2016, p. 83). Under the old German law, the relevant moment to determine which party was liable was the start of the discharge operations at the end of the voyage (§ 725(1) German Commercial Code (old); Rabe 2000, p. 933, under 7).
176. For example, the American case *United States of America v. Atlantic Mutual Insurance Co.* 1936 A.M.C. 993.

As a matter of Dutch law, neither the Dutch Civil Code nor Dutch case law expressly stipulates when the obligation to contribute in general average arises. The general average provisions of the Dutch Civil Code seem to suggest that this obligation only arises at the discharge port or place where the common maritime adventure ends. The Dutch Civil Code provides in s. 8:440(1) that if the delivery of the cargo is claimed before the cargo has arrived at its place of final destination, the party entitled to claim delivery is held to pay a contribution in respect of general average sacrifices suffered and disbursements incurred before the cargo is delivered.[177] This may imply that the contribution is due already before final delivery. However, the change in carriage instructions may also be interpreted as a premature termination of the original voyage, which means that the obligation is brought forward. Support for the position that the obligation to contribute in general average only arises at the discharge port may also be found in the fact that Dutch law defines the 'receiver' as one of the contributing parties.[178] In addition, s. 8:489(2) Dutch Civil Code gives a right of retention to the carrier for claims that have arisen and *may* arise.[179] In the Travaux préparatoires it is indicated that the contribution in general average will only be determined after the average adjustment has been finalised. It is added that without the addition 'may arise', the carrier would not be entitled to use his right of retention.[180] Moreover, the statutory time bar to request apportionment of general average disbursements expires one year after the end of the maritime adventure. The legislator therefore seems to imply that the contribution will only be due from the moment of the adjustment's publication. However, this is not in line with general Dutch civil law, where payment obligations become due and payable immediately, unless it is specifically provided when performance of the obligation has to take place.[181] The position that general average contributions would only become due and payable a potentially considerable period of time after the disbursements were incurred is also contrary to the position taken in respect of obligations arising out of unjust enrichment and negotiorum gestio, which obligations arise at the moment that the unjust enrichment respectively the negotiorum gestio takes place.[182]

177. A similar provision can be found in s. 296 Maltese Commercial Code.
178. The receiver will only be known at the discharge port. If the property does not arrive, it could be argued that there is no receiver at all. See in more detail on the term 'receiver' as applied in the Dutch Civil Code para. 4.5.2.4.1 below.
179. The addition that the right of retention for general average contributions may also be exercised for obligations which *may become* due complements the general Dutch right of retention, which can be exercised for claims that are due only. The general Dutch 'retentierecht' allows the creditor, in the cases specified by law, to suspend performance of an obligation to surrender something to his debtor until the claim has been settled (s. 3:290 Dutch Civil Code). See also para. 4.6.2.1 below.
180. Travaux préparatoires Book 8 Dutch Civil Code, pp. 510-512.
181. S. 6:38 Dutch Civil Code. Immediately means that payment has to be made as soon as it can reasonably be made (Travaux préparatoires Book 6 Dutch Civil Code p. 170). The moment when the obligation has to be performed may be stipulated in an agreement between the parties, but may be derived from the law, custom and the principle of reasonableness and fairness (s. 6:248 Dutch Civil Code; Travaux préparatoires Book 6 Dutch Civil Code, p. 171 *cf.* Dutch Supreme Court 12 November 1999, *NJ* 2000, 67 (Visser/Erven Kroon)).
182. S. 6:212 respectively s. 6:200 Dutch Civil Code. In view of the similarities between general average on the one hand and negotiorum gestio and unjust enrichment on the other (see inter alia para. 3.3.2.2 above), a deviation in respect of the moment when a right to claim compensation arises may be difficult to support.

4.4.3.2.3 Suggestions for a uniform rule

It seems most reasonable and legally correct that the obligation to contribute in general average arises when the general average disbursements are incurred.[183] This is the moment when it is established whether the requirements of general average pursuant to the applicable regulation have been met.[184] It would also be in line with the general average disbursement insurance, which covers shortfalls between the moment that disbursements are incurred and the vessel's arrival.[185] Moreover, when the right to claim a contribution has not yet arisen before the vessel's arrival at the place of discharge, in the absence of a specific provision,[186] it may be difficult to take action to safeguard the right to a contribution by withholding property.[187] The fact that quantification of the amounts due only takes place at a later point in time,[188] should not change the moment when the claim arises either. A separation of the moments of quantification of the financial payment obligation and the moment when the payment obligation becomes due in general is not unusual.[189]

Some qualifications have to be made though. First, arguably, the property's existence at the end of the maritime adventure should be regarded as a condition that has to be fulfilled in order to be able to pursue the claim for a contribution. When the property gets lost between the moment that the disbursements were incurred and the maritime adventure ended, the right to a contribution did exist, but may be lost after all.[190] Alternatively, the problem could be solved by deleting the conditional nature and implementing the obligation to arrange general average disbursement insurance on the shipowner or adjuster.[191] The second qualification is that a strict application of the rule that the obligation to contribute arises when the

183. If this is correct indeed, the addition in s. 8:489(2) Dutch Civil Code may have been superfluous and does not actually provide an extension of the general Dutch right of retention. Logmans considers the right of retention for general average contributions a justified extension of the general right of retention (Logmans 2011, p. 87). It is respectfully submitted that this position may have been taken by Logmans with reference to the legislator's explanation regarding the moment that the obligation to contribute arises, which admittedly is incorrect.
184. If there is a situation of general average, there should also be a right to claim a contribution by the party who incurred the disbursements.
185. See on the general average disbursement insurance in general Hudson 1980 and Hudson 1987.
186. For example, s. 8:489(2) Dutch Civil Code.
187. An obligation to contribute under many systems has an in personam nature and does not attach to the property involved, but binds the party interested in the property. See on the in personam/in rem character of a general average claim also para. 4.5 below.
188. The apportionment generally takes place after the termination of the common maritime adventure, commonly on the basis of the values of the arrived properties. If property does not arrive at the port of discharge, no contribution may be claimed in respect of that property anymore. (See para. 4.4.3.3 below.) Moreover, under the YAR damaged property will only contribute in respect of its value after deduction of the damage (Rule XVII YAR 1994-2016). The question whether the amount of the contribution is limited to the property's value is discussed in para. 4.4.3.4 below.
189. A distinction between these two moments is also made, for example, in general average by Ulrich 1903, pp. 51-52.
190. The property's arrival at the place of discharge would be a resolutive condition (also Herber 2016, p. 411). Conditional obligations are accepted in most legal systems (Asser/Hartkamp & Sieburgh 6-I 2012, p. 127). They are also acknowledged and regulated in the DCFR (Art. III-1:106 DCFR 2010, p. 230). On the history of conditional obligations and the various types: Zimmermann 1992, pp. 716-735.
191. See also para. 4.4.3.3 below.

disbursements are incurred may create practical difficulties because not all disbursements are necessarily incurred at the exact same time. There may be days or even weeks between the moment that the first disbursements are made (for example fire extinguishing operations) and the time that subsequent general average expenses are incurred (for example in a port of refuge).[192] In theory, this may have the consequence that for each and every disbursement the exact moment of occurrence would have to be determined. From a practical point of view, that may lead to unnecessary complications.[193] It seems useful that the moment on which the obligation to contribute arises is set at a specific time, for example, the moment that the first general average disbursement is incurred.
In the absence of a uniform regime, the exact moment that the right to claim a contribution arises, as well as that legal interest starts to count or a time bar starts to run will have to be determined on the basis of the applicable regime and the circumstances of the particular case.

4.4.3.3 *Contribution in case of total loss?*

Traditionally, in those situations where the amount of the contribution was based on the salved values of the property at the port of discharge, the contribution was to be calculated over the goods that had arrived only and not the goods lost in the general average incident.[194] In general, no contribution was required when ship and cargo had subsequently all been lost.[195] When no contribution is due in respect of the goods that do not arrive at the discharge port, the party whose property was lost is no longer at risk for a general average contribution and no security will have to be provided by him. Moreover, the amount of the general average contribution may be higher for the parties whose property has arrived at the discharge port. If some interests are left out of the apportionment, the amounts of the other contributions will automatically increase. The rule that there is no right to apportionment in case of a total loss of property involved in the maritime adventure is still applied in some national regimes.[196] It makes sense if one considers the property's arrival

192. When a non-separation agreement is signed, the period of the common maritime adventure may be stretched even after the interests have physically separated. See para. 4.4.2.3.2 above.
193. Also Schadee 1949, p. 7.
194. Baldasseroni 1808; Lowndes 1888, pp. 304-305; Molengraaff 1912, p. 551; s. 119 Rotterdam Ordinance 1721; s. 738 Dutch Commercial Code of 1838; Molengraaff 1880, p. 88, 92-93.
195. See, inter alia, the English case law: *Fletcher v. Alexander* (1868) L.R., 3 C.P. 375; *Dickenson v. Jardine* (1868) L.R., 3 C.P. 639; *Chellew v. The Royal Commission on the Sugar Supply* [1922] 1 K.B. 12. Also Selmer 1958, p. 68; Benecke 1824, pp. 289-290. This rule was in accordance with the Roman Digest, where a contribution was only due if the vessel had been saved and the measures taken had been successful (Digest 14.2.4.1 and Digest 14.2.5).
196. For example, s. L5133-16 French Code of transport. Under English law, there does not appear to be any discussion that a party whose property has not arrived at the discharge port or other port where the adventure is terminated, cannot be obliged to contribute in general average. *Fletcher v. Alexander* (1868), L.R., 3 C.P. 375; *Chellew v. The Royal Commission on the Sugar Supply* [1922] 1 K.B. 12. The last decision was limited to the situation where the YAR are applicable. However, there are no indications that the position would be different under English common law. Also *Green Star Shipping Co Ltd. v. London Assurance and Others* (1931) 39 Lloyd's Rep 213.

a condition precedent in order to effectuate a claim for a contribution.[197] However, this position is not universally accepted.[198]

The rule that only goods that have arrived are taken into account in the apportionment seems to date back to the time that the vessel was self-reliant in the sense that there was no contact with the shipowner during the voyage. If the vessel got into trouble, the master settled costs that had to be incurred with assets on board the vessel. If the vessel and cargo subsequently failed to arrive, the costs incurred had not benefited anyone, nor had any party suffered a higher loss than his property on board. In that situation, it was reasonable indeed that no contribution was due when there was no arrived value. However, for quite some time, costs are invariably paid by shipowners with money that was not actually on board the vessel at the time that the measures were taken. In those situations, it does not seem unreasonable to impose a payment obligation upon the parties interested in the cargo that benefitted from the general average disbursements when they were incurred, regardless of the question whether the property arrives safely at the discharge port.[199] Furthermore, it may also provide the shipowner with an incentive to incur expenses and try to save the property involved when he does not have to worry that his costs will not be reimbursed when the measures do not have the expected and/or desired effect.[200] The rule that no general average contribution is due if there are no arrived values was also criticised by several authors in the 19th century. A distinction was made between general average *sacrifices* and general average *expenses*.[201] In their opinion, there should not be a right to claim a contribution in respect of general average sacrifices, in situations where all property was lost during the voyage. However, the right to contribution would remain for general average expenditures regardless of the issue whether or not the property reaches the discharge port. Otherwise, the party who had incurred the expenditures would be worse off than the parties on whose behalf the costs had also been incurred when these were incurred.[202] In line with this criticism, the Glasgow Resolutions 1860 provided that when the amount of the expenses was greater than the value of the property saved,

197. See para. 4.4.3.2.3 above.
198. The former Vietnamese Maritime Code of 1990 (s. 188(3)) established that apportionment also took place when the sacrifice concerned the whole vessel and cargo but had not had any success. The provision was not maintained in the Code which is in force since 1 January 2006.
199. In this respect it is also relevant to note that most transported cargoes are insured and that general average contributions may be recovered from underwriters even in addition to the cargo's insured amount. For example, Art. 3 Nederlandse Beurs-Goederenpolis 2006 (Dutch Bourse Cargo policy 2006).
200. Admittedly, this incentive may have limited effect when the shipowner's underwriters pay and/or reimburse such expenses anyhow.
201. Molengraaff 1880, p. 96; Arnould 1848, p. 921; Benecke 1824, p. 298; Carver 1900, p. 437 *cf.* 480; Homans Smith 1859, p. 82.
202. According to Carver (1900, pp. 480-481) the question had not been decided in court. The authors of Arnould 2013 (p. 1367), however, argue that the distinction would have been recognised by the English courts. They refer to the cases *Dickenson v. Jardine* (1868) L.R. 3 C.P. 639 and *The Mary Thomas* [1894] P. 108. It is respectfully submitted that these cases seem to deal with the relationship between the general average creditors and their underwriters rather than the relationship between the general average creditors and debtors. Carver indicated in 1900 that the distinction was codified in the Danish law. He deems it reasonable that the parties interested in the adventure when the expenditures were incurred contributed in proportion to their interests when the expenditures were incurred. (Carver 1900, pp. 480-481.) Interestingly, in a more recent edition of his publication (R. Colinvaux, *Carver's carriage by sea*, Stevens & Sons: London 1971, p. 645), the system is supported that a contribution is only due in respect of a property that has arrived for its arrived value.

the proceeds of the property saved were to be used to make good the expenses, whereas the excess of the expenses over the proceeds of the property saved was to be apportioned as if the whole property had finally reached its destination.[203] The rule was not taken over in the Glasgow Resolutions' successor, the York Rules and did not make a comeback in any of the subsequent versions of the YAR. Rule XVII YAR 1994-2016 states that *'the contributions to a general average adventure shall be made upon the actual net values of the property at the termination of the adventure* (…)'. This wording may imply that if there are no contributing values at the end of the maritime adventure, no general average contribution is due either. However, the wording could also be given a more limited scope to values only. The distinction between general average expenditures and general average sacrifices was neither accepted by average adjusters[204] nor by the English courts.[205]

In practice, the question will hardly ever arise anymore. After a general average incident, a so-called 'general average disbursement insurance' is taken out almost as a rule.[206] This insurance covers short falls in contributory values in situations where one of the contributing interests' value reduces after the general average incident, but before termination of the voyage.[207] In 1880, the Dutch legal scholar Molengraaff already suggested to impose an obligation on shipowners to take out insurance to cover such short falls in contributory values due to incidents incurred after the general average measures had been taken.[208] He argued that the risk would be reduced substantially and the costs of such insurance could be apportioned when it would be statutorily provided that the premium of such insurance was regarded as general average.[209] Even though Molengraaff's suggestion seems rather practical,[210] no statutory obligation appears to have been put on the shipowners or adjuster.[211] Neither do the YAR oblige either of them to arrange general average disbursement insurance.[212]

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203. Resolution X Glasgow Resolutions.
204. Carver 1900, p. 480; Arnould 2013, p. 1367.
205. It was held by the English Court of Appeal in *Chellew v. The Royal Commission on the Sugar Supply* [1922] 1 K.B. 12. that '*The right of a shipowner to contribution in general average is the same whether his claim is for contribution to a general average sacrifice or for contribution to general average expenditure*.' It was also held that no general average contribution was due in respect of property that did not have any value anymore at the port where the adjustment was drawn up. Under English law, there does not appear to be any discussion that a party whose property has not arrived at the discharge port or other port where the adventure is terminated, cannot be obliged to contribute in general average.
206. Lowndes & Rudolf 2013, p. 532.
207. See in more detail on general average disbursement insurance Hudson 1987 and Hudson 1988.
208. Molengraaff deemed the contemporary provision in the Dutch Commercial Code of 1838 (s. 378) insufficient as it would merely allow the shipowner to take out disbursement insurance (Molengraaff 1880, pp. 88-91).
209. S. 699 under 20 Dutch Commercial Code of 1838.
210. Support for this view could be found in the English decision in *Chellew v. The Royal Commission on the Sugar Supply* [1922] 1 K.B. 12 where it was held that a shipowner cannot successfully claim a contribution from parties whose property does not arrive at the discharge port, but that he should take out insurance to cover reimbursement of (part of) his expenditures. Also the English decision in *Briggs v. The Merchant Traders' Ship Loan and Assurance Association* (1849) 13 Q.B. 167.
211. With reference to *Chellew v. The Royal Commission on the Sugar Supply* [1922] 1 K.B. 12 it may be argued that as a matter of English law the shipowner is obliged to take out a general average disbursement insurance.
212. At present, the YAR merely provide that the costs of the general average disbursement insurance have to be admitted in general average; Rule XX YAR 1994-2016.

In 1969, it was indicated by the Swedish average adjuster Pineus that '*while it may be practical and useful for commercial reasons to take out an insurance of average disbursements, there is nevertheless no general obligation to do so*.'[213] 50 years later and in spite of the fact that there is no statutory obligation to take out insurance, it has become established practice that general average disbursement insurance is taken out after an incident. In view of this custom, it may be argued that if the shipowners and/or the adjuster do not take out insurance on behalf of all parties to the adventure and a shortfall occurs, they may be liable for damage suffered due to lack of this insurance, if any. Molengraaff's idea to oblige the shipowner to take out general average disbursement insurance still seems a good idea. Rather than inserting a statutory obligation, the better option may be to include such obligation in the YAR or national regimes.[214] In view of the fact that the YAR are invariably applied, its scope, from practical perspective would then be wider and the application would be more uniform.

4.4.3.4 *Maximum amount of the contribution?*

Another question related to the question whether a contribution is due in case of total loss is whether the amount of the contribution is limited to a particular cap, like the amount to which a shipowner is obliged to globally limit his liability, or the value of the property involved in the common maritime adventure.[215]

It is generally accepted that a shipowner cannot make use of the global limitation of liability of shipowners to limit his liability for general average claims. Art. 3 under a of the LLMC 1976/1996 excludes general average contributions from the Convention's scope of application. This exclusion has been taken over in several national legislations.[216] It will depend on the applicable national regime if, and if so how, other limitations may be relied upon by the shipowner to limit his exposure.[217]

It is less clear whether the amount of the contribution is limited to the value of the property involved in the maritime adventure.[218] Traditionally, the amount of the contribution that fell upon the merchants could never exceed the value of their cargo.[219] The principle that one should not lose more to the sea than one has given

213. Pinéus 1969, p. 616.
214. Molengraaff 1880, p. 91.
215. That these may be separate questions is shown by the fact that the maximum exposure in respect of a specific property may arise both when ship and cargo have not arrived at the discharge port, but also in situations in which they have arrived and where there is little to no physical damage, but substantial costs have been incurred.
216. For example, s. 8:753 under a Dutch Civil Code; s. L5121-4 French Code of transport; s. 221(1) Vietnamese Maritime Code.
217. For the influence of 'unit' limitation of liability on general average contributions, see also para. 4.7.4 below.
218. If such limitation applies, the next question is which is the relevant moment to determine the actual contributory value. This will be influenced by the time when the obligation to contribute arises (see para. 4.4.3.2 above) and national legal and contractual provisions.
219. S. 119 Rotterdam Ordinance 1721; s. 738 Dutch Commercial Code of 1838. Molengraaff 1880, pp. 88, 92-93.

to it was generally accepted.[220] As a result, a merchant could choose to abandon his cargo to settle his general average contribution.[221] Even though it is rather doubtful that the principle that one should not lose more to the sea than one has given to it should still be used as a justification for legislation,[222] several legislations including recently implemented ones still provide that liability to contribute in general average is limited to the contributory property's value.[223] That the contribution is limited to the good's maximum salved value is expressly set out in the French, Spanish and Maltese Codes.[224] The answer to the question whether a contribution can exceed the property's value does not, however, always clearly follow from the national legal systems. The Norwegian and Swedish Maritime Code do not provide for in personam liability. Liability to contribute in general average in respect of cargo has to be created by exercising a lien.[225] This implies that the contribution is limited to the property's value. The question does not appear to have been answered under Dutch and English law.[226] It may depend on when the

220. The principle is accepted as the underlying principle of a shipowner's right to globally limit his liability for maritime claims (for example, Asser/Japikse 7-I 2004, p. 349; Griggs 1997, p. 371; Brans & Langbroek 2014, p. 16, f.nt 7). It is also referred to in the Travaux préparatoires of the new German Commercial Code (Gesetzesbegründung 2012, pp. 128-129), as well as in the Dutch parliamentary document (2008/09, 31 425, nr. 5, p. 3) on the amendment of Book 8 Dutch Civil Code in respect of the implementation of the 1996 LLMC Protocol. The principle was also expressly set out in s. 321 Dutch Commercial Code of 1838. The principle probably derives from the distinction between the 'fortune de mer' and the 'fortune de terre'. See on this distinction inter alia Stevens 2008, p. 6 as well as Werner 1964, p. 241.

221. See also Van der Linden 1806, p. 502 (Van der Linden 1828, p. 637); Van der Keessel 1884, p. 291; Olivier 1839, p. 221. In the Dutch Commercial Code of 1838, the limitation of the obligation to contribute to the amount of the property involved also followed from s. 321 Dutch Commercial Code of 1838, which provided that a party could not lose more to the sea than what it had entrusted thereto. According to Schütz, the limitation could be justified with reference to the fact that the merchant did not have the possibility to interfere in any way in the decisions taken (Schütz 1896, p. 74). Molengraaff pointed out that the application of the rule can cause serious injustice. In his opinion, the party who has incurred costs should not be the only party to bear these, for example, if after a second incident all goods would have been lost. See also para. 4.4.3.3 above.

222. It dates back from a time that the risks were much higher because vessels were not as safe as today. In addition, in those times, the vessel and the property and persons on board were independent and lacked support from the shore. As already indicated, this has changed as well.

223. § 592(2) German Commercial Code. It is indicated in the explanatory comments that this is in contradiction to recommendations of interested persons, but in accordance with Norwegian law and the old idea that one should not lose more to the sea than one has given to it. (Gesetzesbegründung 2012, pp. 128-129.)

224. S. L5133-15(3) French Code of transport respectively s. 349 Spanish Maritime Code respectively s. 468 Maltese Commercial Code.

225. S. 465 Norwegian Maritime Code respectively s. 17:5 Swedish Maritime Code. See also para. 4.5.2.4.1 below.

226. In earlier drafts of the general average provisions of the current Dutch Civil Code, a provision was included which limited the contribution to the value of the respective property (Meijers/Schadee 1972, p. 1366). This provision, which was inserted in a section which dealt with the determination of the contributory values, has not found its way to the Code's final wording (Travaux préparatoires Book 8 Dutch Civil Code, p. 621). The legislator deemed the provision superfluous in view of the fact that the next section of the Code (the current s. 8:613 Dutch Civil Code) provides that the contributory values are to be established on the basis of the YAR. Admittedly, the calculation of a contributory value and the question whether a contribution is actually due are two separate and independent questions. An argument to limit the maximum contribution due in respect of the cargo to its value would be that the Dutch Civil Code stipulates in s. 8:612 Dutch Civil Code that the contribution has to be settled by the 'receiver'. If the receiver does not show up, the carrier is entitled to sell the cargo (s. 8:490(1) Dutch Civil Code). It is clear that in that situation, the contribution as a matter of fact is limited to the cargo's value. The question does not appear to have been dealt with directly in the English case law either. See, however, Rule F21 of the AAA's Rules of Practice. Rudolf indicated in 1926 that under English law there is no direct authority for this statement that the general average contribution cannot be higher than the amount of the goods

general average contribution becomes due, i.e. whether or not it is a condition precedent that the goods arrive in the discharge port.[227]

A distribution of general average expenses in excess of the value of the property involved from a theoretical point of view may not be unreasonable. Unlike salvage, which is based on the 'no cure, no pay principle', neither the national general average definitions nor (Rule A and/or the numbered rules of) the YAR require that the measures taken must have had success in order to qualify as general average.[228] Measures taken without success may still be apportioned in general average as long as they have been taken reasonably.[229] It may be argued that it would not be reasonable to let a party contribute in excess of the property's value. However, it may be equally unreasonable for the party who has incurred general average expenditures to suffer all the losses himself when other parties may have benefitted thereof as well. In particular, if by incurring the expenses other damage and potential liabilities, possibly for a considerably higher amount, could be prevented. Such situation may arise, for example, in case of carriage of dangerous goods in respect of which the interested parties are strictly liable. This concerns both potential liabilities for cargo interested parties (for example, on the basis of Art. IV-6 H(V)R), but also for the party interested in the bunkers on board (pursuant to Art. 3(1) *cf.* 1(3) Bunkers Convention, the operators are strictly liable as well).[230] Moreover, the value of the property to its owner may be higher than the value that is taken into account for general average purposes, which under the YAR 1974-2016 is based on the invoice value.[231] The market price may have gone up or the cargo could have 'emotional' value. Delivery of the cargo could also prevent that penalties are incurred under sales contracts or that damage is caused by business interruption. As a result, it cannot be said that the costs exceeding the property's invoice value have not been incurred for the benefit of the parties interested in the property involved.

In the end, many general average contributions are covered under marine cargo insurance.[232] Nevertheless, the practical consequences of an exposure to a general average contribution which exceeds the property's value at the end of the common

involved. In his view, a justification can be found in the practical difficulties of recovery of a contribution in respect of the monies exceeding the contributory value (Rudolf 1926, p. 106). See also Lowndes & Rudolf 2013, p. 470, f.nt. 7. In the case *Green Star Shipping Co Ltd. v. London Assurance and Others* [1933] 1 K.B. 378 it is stated that the cargo owners only had to contribute up to the full value of their cargo. However, this concerned a payment pursuant to an adjustment prepared in accordance with the law and practice of the port of Philadelphia. Parties agreed that by virtue of that law and practice, the cargo owners were not liable to pay more in general average than the value of their cargo ultimately saved. As such, the decision does not seem to give an indication on the position under English law. Nevertheless the decision is regarded as authority for the position that when the total general average costs exceed the value of the property involved in the maritime adventure, the balance could be claimed by the shipowner under his marine insurance policy under s. 66(4) of the MIA 1906 (Hudson 1988, p. 7).

227. See para. 4.4.3.2 above.
228. Herber concludes from the fact that the contributing value is limited to the saved value that success is required for apportionment in general average. (Herber 2016, p. 408.)
229. See on the reasonableness requirement also para. 2.2.2 and para. 4.2.2 above.
230. Unlike in respect of salvage (see, for example, Art. 13(1)(b) and 14 of the 1989 Salvage Convention), prevented liabilities and/or damage to the environment are generally not taken into account in general average. See for an exception s. 293 Russian Merchant Shipping Act.
231. Rule XVII YAR 1974-2016.
232. This is further discussed in para. 4.5.2.6 below.

maritime adventure or even voyage, do not seem to support a contribution in excess of a property's value. Such exposure could well have the effect that interested parties would refrain from taking delivery of their respective properties and that the shipowner (and/or average adjuster) would have to sell the cargo. Apart from practical hassle, it would probably lead to additional costs and as a result, on balance in a lower value than the original contributory value. There may be situations in which a few parties who take delivery of their property in spite of the fact that the general average contribution exceeds the property's objective value will compensate the loss and costs on the abandoned properties, but these will probably be exceptions. Obviously, failing a stipulation that the contribution is limited to the property's maximum value, it may be argued that excess contributions can be recovered from the liable party in personam, if in personam liability exists at all.[233] Disadvantages of such course of action may be that it can be difficult and expensive to find the relevant party, to obtain a title against this party and subsequently to enforce it. That may only be worthwhile when the excess amount is considerable and/or only few parties are involved. Altogether it seems practically convenient to limit the exposure in general average to the property's invoice value indeed.

4.4.3.5 *Minimum amount of contribution*

In addition to the question whether there is a maximum amount of the general average contribution, the question may also be asked in the opposite direction, i.e. whether there is a minimum amount. Statutory provisions in this respect are rare, if they exist at all.[234]

Charter parties sometimes provide that general average will not be pursued by the shipowners or disponent owners when the total general average costs remain below a specifically indicated amount. These clauses generally relate to a general average absorption clause in the vessel's H&M policy. One of the most heard disadvantages of general average is that the costs incurred in the process would be excessive. This was most strongly felt in smaller general average cases. The absorption clause gives the shipowner the option not to have the general average losses and costs apportioned, but to claim the full amount up to the specifically indicated maximum, from its H&M underwriters.[235] Nowadays almost all hull policies contain general average absorption clauses,[236] although their wording and maximum amount may vary.[237] In 2002, BIMCO also circulated a wording for a standard general average

233. See para. 4.5.2.1 below.
234. The Dutch Commercial Code of 1838 provided that underwriters were not held to pay a general average contribution if the amount was less than 1% of the value of the property involved (s. 719 Dutch Commercial Code of 1838; Holtius 1861, p. 303). The provision was not taken over in the general average regulation implemented in Book 8 Dutch Civil Code in April 1991.
235. Lowndes & Rudolf 2013, pp. 646-648; Rose 2012, p. 347; UNCTAD 1994, p. 10; Van Hooydonk 2012, p. 225. The amounts of the absorption clauses used in practice may vary per insurance policy.
236. See, for example, clause 40 of the International Hull Clauses 2003 and Nordic Plan Part I, Chapter 2, section 4-8 (a). Shaw indicated in 2001 that in the 10 preceding years, the application of absorption clauses not only substantially increased, but also the indicated amounts (Shaw 2001, p. 337). As a result of the absorption clauses, the number of cases in which general average was apportioned has decreased substantially in the last years. It is mentioned by the authors of Lowndes & Rudolf 2013 that the absorption clauses would have removed approximately 50% of the general average cases (Lowndes & Rudolf 2013, p. 63).
237. UNCTAD 1994, pp. 9-12.

absorption clause.[238] The clause is used in practice but is not so commonly applied and cannot be regarded as the international standard wording.[239] Whether an absorption clause is inserted in a hull policy, and if so, whether it is invoked in a specific matter, in principle is the insured ship interested party's discretionary choice.[240] Moreover, due to the rule of privity of contract, in principle, only the insured shipowner can rely upon the absorption clause in his insurance policy. To protect their interests, charterers can oblige shipowners in their charterparties to include an absorption clause in their hull policies and to invoke this clause, if applicable. Such clause could read for example: '*Notwithstanding what is stated above, Owners agree not to declare General Average if the total estimated amount in General Average does not exceed USD 250.000 and Owners shall seek insurance cover for same*.' Or more extensively: '*Owners shall procure that the hull and machinery insurance on this vessel is on terms which enable it to elect in case of any incident where General Average expenses are estimated not to exceed USD 250.000 to claim the whole or the General Average from underwriters. The Owners shall exercise such option whenever General Average expenses are estimated not to exceed USD 250,000 arises on the vessel*.'
Reportedly, it was quite common at the beginning of the 20th century that bills of lading contained a provision that no contribution in general average could be claimed, unless the total expenses or costs exceeded a certain figure.[241] Times have changed. Nowadays such clauses are hardly ever included in bills of lading and sea waybill terms and conditions anymore.

4.4.3.6 *Recoveries from a third party*

Pursuant to a commonly accepted principle of private law, a party should only get compensation for damage suffered and should not financially profit from an incident and receive more than the amount lost.[242] When recourse is taken successfully by a party for damage against a liable party,[243] reimbursement has already taken place and the claim for a general average contribution, in theory, should not be pursued or should be reduced accordingly. Some laws explicitly provide that the person compensated in general average shall return this compensation.[244] Until the YAR 2016, the YAR did not deal with recoveries. In the YAR 2016, a fourth paragraph is added to Rule E which provides that the average adjuster has to be informed of recoveries that are being pursued and that particulars of any actual recoveries have to be supplied to the average adjuster within two months of the

238. BIMCO Special Circular 2002.
239. The BIMCO standard general average absorption clause has had the result that the coverage under the absorption clause included in the International Hull Clauses was widened in 2003. (Hudson a.o. 2012, pp. 175-176.)
240. UNCTAD 1994, pp. 10-11.
241. Rudolf 1926, p. 34.
242. A recovery of a higher amount than the amount of the damage suffered, unless specifically agreed, will not be allowed. See, for example, Art. III-3:702 DCFR (DCFR 2010, p. 250).
243. Recourse could be taken both against a party to the maritime adventure (a cargo interested party against a shipowner or vice versa on a separate basis), but also against a third party (for example, the shipowner of a colliding vessel). The latter course of action was also approved by the English House of Lords in *The Cheldale* [1947] A.C. 265. Also Lowndes & Rudolf 2013, pp. 676-677.
244. S. 796 Japanese Commercial Code; s. 467 Maltese Commercial Code; s. 160 Belgian Maritime Code respectively s. 8.49 draft Belgian Maritime Code. Also s. 739 Dutch Commercial Code of 1838. A provision in this respect is not included in the current Dutch statutory general average legislation.

receipt of the recovery.[245] Although the rule is to be welcomed as a matter of principle, the provision's contents are rather limited. It is not provided when the prescribed notification has to take place (discussion may arise when a claim is pursued), or what will happen after the prescribed notification. Difficulties are to be expected in respect of the provision of evidence on the one hand, and of a practical nature on the other.[246] In particular and for example, when the recovered amount is limited and many parties are involved in the general average. The costs of recalculation of the general average contributions or of distribution of the recovered amount may exceed the amount of the recovery. Moreover, the recovery may take place when the general average has already been finalised. It is uncertain whether a general average should then be reopened and which time bar applies. A solution will likely be found in practice, in which recoveries, when known, are already taken into account by some adjusters.

4.4.4 Effect of the adjustment

4.4.4.1 *National regimes*

The status given to an adjustment by national legislators and courts varies. Under most national legal regimes, the adjustment does not have a binding status in itself.[247] As considered, for example, by the English Court (Mr Justice Megaw, as he then was) in *Chandris v. Argo Insurance*:[248] '(…) *in the absence of express contractual provision, an average adjustment when prepared is in no way conclusive. The insurer or any other party to the adventure is free to say that the adjustment is wrong, on the facts or the manner of computation. Or both. If so, the shipowner must prove his case in the Courts and he does not prove it by merely producing an average adjustment, even one prepared by an independent professional adjuster*.'[249] More recently, it was confirmed by the English Court of Appeal in *The World Hitachi Zosen*: '*Now it is both old and modern law that an average adjustment in the ordinary way is not binding upon those who are parties to it*.'[250] It is also indi-

245. On the background: CMI Report Istanbul 2015 (II), p. 153; CMI Report London 2015, p. 3.
246. Rule B34 of the AAA Rules of Practice may give some guidance.
247. This is inter alia indicated in the CMI Guidelines on General Average, p. 10 (para. D (1)). Also: NL: District Court of Rotterdam 4 June 2003, *S&S* 2004, 32 ('Coral'); Court of Appeal of The Hague 5 June 1959, *S&S* 1959, 64 ('Driade'); District Court of Amsterdam 8 January 2003, *S&S* 2003, 76 ('Hea'). For English law, see inter alia: *Chandris v. Argo Insurance Co Ltd.* [1963] 2 Lloyd's Rep. 65; *The Potoi Chau* (*Castle Insurance Co. Ltd. v. Hong Kong Islands Shipping Co. Ltd.*) [1983] 2 Lloyd's Rep. 376; *Union of India v. E.B. Aaby's Rederi A/S* [1974] 3 W.L.R. 269; *Mora Shipping Inc. v. AXA Corporate Solutions Assurance S.A.* [2005] 2 Lloyd's Rep. 769 with reference to *Sameon Co. S.A. v. NV Petrofina* (*The World Hitachi Zosen*) [1997] Int.Com.L.R. 04/30. As a matter of Chinese law, a party may base a claim on an adjustment when the adjustment is undisputed. Article 89 of the Maritime Procedure Law of the People's Republic of China, 1999: '*The general average statement made by average adjusters may be admissible as the proper basis for contribution if no objection is raised by any of the parties; otherwise, the maritime court shall decide whether to accept the statement or not*'. The Spanish Maritime Code states that an adjustment is not binding, unless the underlying title provides something different (s. 353 *cf.* 356(2) Spanish Maritime Code). That an adjustment is not binding under US law was held in *Corrado Societa Anonima D. v. L. Mundet & Son,* 91 F.2d 726 (1937); *United States v. Atl. Mut. Ins. Co*., 298 U.S. 483 (1936); *Pacific Employers Ins. Co. v. M/V Capt.* W.D. Cargill, 751 F.2d 801, n. 4, 1986 AMC 1058.
248. *Chandris v. Argo Insurance Co Ltd.* [1963] 2 Lloyd's Rep. 65, with reference to *Luckie v. Bushby* (1853) 13 CB 864 and *Wavertree Sailing Ship v. Love* [1897] AC 373.
249. In similar fashion Lord Salmon in the English case *The Evje* [1974] 2 Lloyd's Rep. 57.
250. *Sameon Co. S.A. v. NV Petrofina (The World Hitachi Zosen)* [1997] Int.Com.L.R. 04/30.

cated in this judgment that, at least when there is no average bond, an adjustment is not '*an essential feature*' in order to bring a claim.
This makes perfect sense if one considers the adjuster's doubtful legal status and duties against the parties involved in the general average.[251] When the adjuster is not considered as (independent) arbitrator, how could his report be decisive? In case an adjuster is not instructed by a court, king or other authority and/or for and on behalf of the community of interests, but rather for the shipowner's benefit,[252] the adjustment admittedly should be regarded as a mere proposal of the shipowner of the disbursements and amounts due.[253] When the adjuster has been appointed by the court, his report might be given more weight. The adjustment may then be compared with a report prepared by a liquidator or a court appointed surveyor or expert. The status of such report may vary per jurisdiction and per case.[254] However, even when the adjuster has prepared the adjustment in an independent and impartial manner taking into account the interests of all parties, he may not correctly have established the applicable general average regime(s)[255] and/or the claim's legal basis,[256] and/or the interested parties.[257] In most cases, the adjuster is a practitioner rather than a lawyer.[258] The apportionment, as a result, may have been made without due consideration of the legal positions of the various interested parties inter se and/or the applicable regimes (apart from the YAR). It follows that automatically regarding an adjustment as the final word on the matter for various reasons may be imprudent.

Nevertheless, the above critical approach of adjustments appears to be the exception rather than the rule. In practice, the adjustment is often regarded as evidence, if not binding than at least prima facie, both of liability to contribute in general average and of the amounts due.[259] Some legal regimes regard an adjustment as binding unless appealed against within a certain period of time.[260] Other laws

251. As a matter of English law, the adjuster is regarded as the shipowner's agent. See para. 4.3.3 above on the adjuster's position.
252. See para. 4.3.2 above on the adjuster's appointment.
253. Also Court of Appeal of The Hague 5 June 1959, *S&S* 1959, 64 ('Driade').
254. The position of a Dutch court surveyor for maritime cases, for example, is quite different than the position of the Belgian Nautical Committee (Kruit 2010 respectively Dewulf 2006).
255. As discussed in Chapter 5 and 6 below, the determination of the applicable conflict of law rules to obligations arising out of general average is not an easy task. That average adjusters do not always appreciate the underlying grounds is also pointed out by Bemm 1997, pp. 45-46.
256. As discussed in para. 3.3 above, there are several legal bases on which a for a claim for a general average contribution can be based.
257. As discussed in para. 4.5 below, there can be various parties interested in a single object involved in the maritime adventure.
258. Admittedly some adjusters do have a legal background. CMI Report London 2015, p. 12 respectively para. 4.3.3 above.
259. As held, for example, in the American case law, the adjustment is not an agreement '*to pay a general average contribution, but an agreement upon the sum payable, if any*'. *Corrado Societa Anonima D.* v. *L. Mundet & Son* 91 F.2d 726 (1937). Also *Navigazione Generale Italiana v. Spencer Kellogg & Sons, 1936* A.M.C. 1766. However, in case standard security has been provided by the cargo owner, the adjustment is considered as 'prima facie' evidence of liability (*Cia Atlantica Pacifica, S.A. v. Humble Oil & Refining Co.* 274 F.Supp 884 (1967)). It is respectfully submitted that the latter position does not appreciate that security often is provided by cargo interested parties under pressure as they would like to have their cargo released soonest. As such it does not seem correct to consider the issuance of such security as an indication for liability.
260. S. 21:6 Swedish Maritime Code; s. 354 *cf.* 506-511 Spanish Maritime Code; s. 309 *cf.* 308(2) Russian Merchant Shipping Act. The Finnish Maritime Code provides that the adjustment can be enforced

provide for special proceedings that can be started to have an adjustment amended and/or to have it confirmed by the Court.[261] Confirmed adjustments may even be regarded as enforceable titles,[262] which may as such have to be accepted in other jurisdictions as well.[263] Within Europe, a decision in which a court of an EU Member State has given an adjustment a binding status probably falls within the meaning of the Brussels I instruments on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[264] If so, it will in principle have to be accepted by courts of other EU Member States.[265] Specific enforcement rules of the various nation states may only apply to adjustments drawn up in their own countries pursuant to their own formal regulations[266] or vessels registered in their own country,[267] but may also be applied by or extend to foreign adjustments.[268] A uniform approach is all but present.

4.4.4.2 *Adjustment confirmation proceedings*

The underlying reason for proceedings in which an adjustment can be confirmed appears to be a practical one. The figures mentioned in the adjustment are mutually dependent; they are 'communicating vessels'. If one figure changes, the other figures must change as well. In order to prevent repeated amendments of the adjustment and imbalances in the figures when some of the parties have already made a payment on the basis of an earlier version of the adjustment, some courts have been given the possibility to confirm the figures stated in the adjustment in a binding manner. In addition, it was considered impractical that a party claiming a contri-

thirty days after the court has confirmed the adjustment and has given it an enforceable status, provided that the adjustment was not appealed (s. 21:8 Finnish Maritime Code).

261. Sections 638-641 Dutch Code of Civil Procedure provide that parties interested in the general average can ask the court to confirm the average adjustment and give it a binding status. In Germany the procedure is called 'Dispacheverfahren'. It is regulated in § 403 et seq German FamFG. In more detail: Bemm 1997; Thoo 2003; Holzer 2013; Ramming 2016, pp. 92-93. Also: Herber 2016, p. 411-412. Adjustment confirmation proceedings are also provided for in s. 466 Norwegian Maritime Code; s. 124(2) Swiss Maritime Code; s. 406 Argentine Navigation Act. It follows from the overview given by Ulrich that at the beginning of the 20th century, the main shipping nations all provided for an action in which the adjustment could be confirmed (Ulrich 1906, pp. 279-280; Kuhn 1905, pp. 8-9). In England, relief could be obtained against all parties in one suit as well in a court of equity. *Shepherd & others v. Wright*, Shower's Parl. Cas. 18; Abbott 1802, p. 296, Park 1809, p. 179; Holt 1824, p. 493; Hildyard 1845, p. 527. This is no longer possible.
262. For example, s. 641d Dutch Code of Civil Procedure. As soon as the confirmed adjustment has become final, it can be enforced against the parties indicated in the adjustment as liable to contribute in general average (Kuhn 1905, pp. 8-9). Also s. 406 Argentine Navigation Act.
263. The adjustment confirmation proceedings are further discussed below in para. 4.4.4.2.
264. Art. 2 Brussels I Recast makes it clear beyond doubt that the term judgment should be given an extensive interpretation.
265. Art. 36 Brussels I Recast et seq.
266. It was held by the District Court of Amsterdam that the Dutch statutory regulation to have an adjustment confirmed applied to adjustments drawn up under Dutch law only. District Court of Amsterdam 7 March 2001, *S&S* 2002, 59 ('Pelopidas'). The Maritime Code of Slovenia expressly stipulates in s. 822 that: '*In the general average adjustment procedure, a foreign shipowner may appoint as an adjuster a foreign natural person who, under the regulations of his country of domicile, is authorised for general average adjustment. No revision shall be allowed in the procedure for the adjustment of the general average*.'
267. S. 124(1) Swiss Maritime Code. Proceedings are to be started before the Court of Basel (s. 14(3) Swiss Maritime Code).
268. Adjustments that have obtained a binding status because they have not been appealed, may not only bind judges in the particular country. See, for example, the decision of the Dutch District Court of Leeuwarden of 26 February 2003, *S&S* 2003, 138 ('Baltiyskiy') in which decision the Court considered a Russian adjustment that had not timely been appealed binding for the Dutch court.

bution would have to start legal proceedings against all contributors for their respective share.

The requirements that have to be complied with in order to obtain an adjustment's confirmation from a state court depend on the applicable national regulation. One would expect that a request to have an adjustment confirmed could only be made in those situations where the adjuster's independency is safeguarded.[269] This is not necessarily the case as shown in the decision of the Court of Appeal of The Hague in the 'Maasdijk',[270] in which case the court was willing to confirm an adjustment drawn up by an adjuster appointed by the shipowner.

> The Court of Appeal's decision in the 'Maasdijk' meant a clear breach with previous case law. The Dutch adjustment confirmation proceedings ('homologatieprocedure') are a relict from 19th century Dutch codes. The Dutch Commercial Code of 1838 (s. 724(4)) stipulated that average adjustments were to be confirmed by the court. The 'homologatieprocedure' was written for those situations in which the average adjuster had either been appointed with joint consent of the parties involved in the maritime adventure, or alternatively had been appointed by the Court.[271] The adjustment drawn up by the adjuster appointed accordingly was thus made by an 'independent arbitrator'. Only these adjustments were considered as adjustments in the sense of the Code and could be confirmed by the Court. An adjustment made by an adjuster unilaterally appointed by the shipowner was regarded as 'a proposal from the shipowners' and could not be confirmed.[272] Contrary to this view, and in spite of the tension with Art. 6 of the European Convention on Human Rights, the Court of Appeal confirmed the decision of the District Court of Rotterdam that an adjustment of an adjuster appointed by one of the parties can also be confirmed by the court.[273]

Differences can be observed as well in the approach taken regarding the alleged presence of actionable fault. For example, in the Dutch proceedings in which an enforceable title of the adjustment is requested, substantive grounds why there would not be an obligation to pay the contribution as set out in the adjustment cannot be brought forward.[274] By contrast, in Finnish adjustment confirmation proceedings, such defences can be raised.[275]

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269. Pursuant to Spanish law, for example, only adjustments drawn up by specifically appointed independent adjusters can be regarded as enforceable titles. The official adjustment is binding, unless timely and successfully appealed (s. 354 *cf.* 506-511 Spanish Maritime Code).
270. Court of Appeal of The Hague 17 December 2013, *S&S* 2014, 55 ('Maasdijk').
271. S. 317 Dutch Code of Civil Procedure old; also Molster 1863, p. 263.
272. District Court of Rotterdam 7 November 2012, *S&S* 2013, 43; Court of Appeal of The Hague 5 June 1959, *S&S* 1959, 64 ('Driade'). Also Hardenberg 1980, p. 119.
273. Court of Appeal of The Hague 17 December 2013, *S&S* 2014, 55 ('Maasdijk').
274. District Court of Amsterdam 7 March 2001, *S&S* 2002, 59 ('Pelopidas'); Court of Appeal of The Hague 17 December 2013, *S&S* 2014, 55 ('Maasdijk').
275. Von Weissenberg & Fagervik 2011, p. 97.

It is submitted that even though from a practical perspective a possibility to have an adjustment confirmed makes perfect sense, from a legal point of view it may be difficult to justify. In particular when there is no requirement that the adjustment is to be drawn up by an independent adjuster[276] and when no possibility is given to discuss the applicable law and/or legal relationship(s) between the parties involved in the maritime adventure. It is also uncertain whether an adjustment, and if so which, can be confirmed when several adjustments have been prepared.[277] In addition, adjustment confirmation proceedings may cause friction with private international law rules, both on jurisdiction and applicable law. None of the European Brussels I instruments regulating jurisdiction contains a provision that regulates general average in general or the adjustment confirmation proceedings in particular. It may be difficult to find a forum that will assume jurisdiction as against all interested parties, if jurisdiction is not voluntarily agreed or impliedly accepted.[278] In the Dutch case 'Coral' and in the English case *The World Hitachi Zosen*, the District Court of Rotterdam respectively the English Court of Appeal refused to accept jurisdiction with reference to the Brussels I instruments.[279] That jurisdiction issues could well arise was already recognised a long time before introduction of the Brussels I instruments. As Dr Lushington held in the English case *La Constancia*: '*in all cases of average it is essential that the tribunal which is to adjust it, should have the power to compel all parties interested to come in and pay their quota (…) and if I could not bring all parties interested before the court, I could not adjust a general average which is a proportionate contribution by all*.'[280]

Difficulties may also arise in respect of the applicable law.[281] The applicable adjustment regime depends on the relationships between the various parties involved. When several parties interested in a single property have agreed different adjustment rules, the value of the specific property may differ, as well as the contributory properties that may have to be included in the calculation. The net figure set out in the adjustment, obtained pursuant to a specific regime, as a result may not be the correct figure for all parties interested in the property.[282] Also in this respect, the confirmation of an adjustment may be difficult to justify.

276. It was held by the District Court of Dordrecht in its decision of 23 October 1935, *NJ* 1937, 642 ('Antonia') that a party who would like to have an adjustment confirmed has the burden of proof to show that the adjuster has acted on behalf of all parties involved in the general average. It is uncertain whether this requirement still applies and, if so, what the criteria are to satisfy the requirement.
277. Bemm indicates that only one adjustment can be drawn up (Bemm 1997, p. 102). This may be correct as a matter of principle, but as a matter of English law, multiple adjustments are possible. See para. 4.3.3.2 above.
278. Under the Brussels I Regulation (Recast), parties accept the court's jurisdiction if it is not disputed (Art. 24 Brussels I Regulation respectively Art. 26 Brussels I Recast). See in a general average case, not involving adjustment confirmation proceedings: District Court of Rotterdam 2 April 2014, *S&S* 2015, 19 ('Rochester Castle').
279. District Court of Rotterdam 4 June 2003, *JBPR* 2004, 76; *S&S* 2004, 32 ('Coral'); *The World Hitachi Zosen* (*Sameon Co. S.A. v. NV Petrofina)* [1997] Int.Com.L.R. 04/30.
280. *La Constancia* (1846) 2 W Rob 487.
281. These are discussed in more detail in Chapter 5 and 6 below.
282. See also para. 4.4.5 and 4.9 below in more detail.

4.4.4.3 *Contractual arrangements*

Contractual provisions may give a specific status to an adjustment, for example, that it will be binding.[283] Whether such provision will be allowed will depend on the provision's wording and the applicable legal regime.[284] When the incident was caused by the actionable fault of one of the parties to the maritime adventure, a provision that the adjustment is binding in all aspects and that contributions have to be made regardless of the question of liability,[285] may interfere with the applicable liability regime in an unacceptable manner.[286]

4.4.5 **Evaluation**

It follows from the above analysis that the status of both the adjuster and an adjustment may vary per statutory and/or contractual regulation. Whereas some legal regimes merely regard the adjustment as a proposal for apportionment, under other laws the adjustment may obtain a binding status, either as a matter of law or by the court's confirmation. In addition and contrary to the general perception that there is no discussion on the apportionment (rules) of a general average case as a result of the general application of the YAR, it is clear that many aspects remain open for debate. These include inter alia the important questions when the obligation to contribute arises and how the quantification of the amount due is to be calculated.

In essence, an adjustment is merely a quantification of damage figures with an overview of the contributions due per item of property salved. It is drawn up by an adjuster pursuant to a specific regulation, most often a YAR version, on the basis of information and documentation obtained by him. Why the particular regulation is applied may not always be clear. It may also be uncertain which specific information or documentation was used.[287] Moreover, and more importantly, the applicable adjustment rules are considered to depend on the personal rela-

283. For example, cl. 14(6) of the CMA CGM b/l conditions.

284. Some courts allow parties to agree that the adjustment will be binding. This possibility was explicitly mentioned in *Cia. Atlantica Pacifica, S.A. v. Humble Oil & Refining Co.*, 274 F.Supp. 884 (1967), as well as in District Court of Rotterdam 4 June 2003, *S&S* 2004, 32 ('Coral'). The English decision in *Chandris v. Argo Insurance* that '*(…) in the absence of express contractual provision, an average adjustment when prepared is in no way conclusive*' may be used to support the position that a provision regarding the status of the adjustment may be accepted as a matter of English law. Mr Justice Megaw (as he then was) in *Chandris v. Argo Insurance Co Ltd.* [1963] 2 Lloyd's Rep. 65, with reference to *Luckie v. Bushby* (1853) 13 CB 864 and *Wavertree Sailing Ship v. Love* [1897] AC 373.

285. See for an example of such stipulation clause 22 of the MSC bill of lading: '*In the event of accident, danger, damage or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible by statute, contract, or otherwise, the Goods and the Merchant shall, jointly and severally, contribute with the Carrier in General Average to the payment of any sacrifices, losses, or expenses of a General Average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the Goods, as determined by an independent General Average adjuster duly appointed by the Carrier, and his determination as to liability for General Average contribution and his computation for the same shall be final and binding on all parties to the venture*.'

286. The relationship between general average and the applicable liability regime is discussed in para. 4.7.3 below.

287. The adjuster will not always specify which information and documentation he has relied upon in drawing up the adjustment and/or circulate copies. See also para. 4.3.3.5 above.

tionship between two parties with an interest in a property involved in the maritime adventure. When many properties are involved in a maritime adventure, various regulations may apply between the parties interested in these properties, both as a matter of law (for example, between two cargo interested parties) and contractually (for example, between a shipowner and a cargo interested party). Obviously, this could result in the applicability of conflicting rules. As will be discussed below in para. 4.5, different parties may be considered to have an interest in a single property. They may be subject to different adjusting rules. As a result, the figures included in the adjustment could vary per party interested in a single property and cannot be regarded as *the* value due in respect of the particular property. The amounts of the contributions set out in the adjustment have to be considered with caution and in the relationship with a particular party only. As already indicated by Asser in 1879, the adjustment has to be based on a claim and the claim should not be based on the adjustment.[288]

In view of the fact that both the adjuster and the adjustment are vital for the proper functioning of the general average process, it is recommended that their respective position is uniformly regulated rather sooner than later.[289]

4.5 General average contributors and creditors

4.5.1 Background

The aim of an apportionment in general average is that losses intentionally caused and/or expenditures intentionally incurred for protection of property involved in a common maritime adventure against a common peril are shared by the parties that have benefitted from these measures. In theory, there are numerous parties who benefit from a general average act: the party entitled to harbour dues, the ship's agent at the port of discharge, the crew, etc.[290] Nevertheless, probably for practical reasons, the apportionment takes place on the basis of the property involved in the maritime adventure at the time of the general average act.[291]

Traditionally, general average contributions have a close connection with the property in respect of which they are due. In fact, the obligation to contribute arises because the property was involved in the maritime adventure and measures were taken to save the same.[292] The factual involvement of the property on board the vessel at the time of the general average act is given legal consequences. The parties interested in these properties may not have been bound contractually and may not even have been aware of each other's existence. Cargo that has not yet been loaded or which has already been discharged at the time that general average disbursements

288. Asser 1879, p. 10.
289. See also para. 6.7 and Chapter 7 below.
290. Schadee 1949, p. 7; Van Empel 1938, p. 80, 147.
291. Schadee 1949, p. 7; para. 2.3.5 above.
292. In particular, when under the applicable system the maximum amount of a general average contribution is limited to the value of the property involved in the maritime adventure, the focus in general average is on safeguarding the property and not on preventing other costs and/or liabilities. See para. 4.4.3.4 above.

are incurred, is not included in the apportionment unless specific contractual arrangements have been made.[293] The apportionment generally takes place on the basis of the salved values of the properties involved in the maritime adventure,[294] whereby the property's arrival at the discharge port may be a condition precedent for inclusion in the apportionment.[295] The most important measures which can be taken to safeguard payment of a general average contribution are attached to the property as well.[296] Assets, however, cannot make or receive a contribution themselves. Only parties interested in these properties can. Most legal systems do not provide for in rem liability, or at least not against other property than the vessel.[297] For this reason, it will have to be determined which parties are interested in the contributory assets for general average purposes. This will have to be done taking into account the applicable law and the relevant contractual arrangements, if any.

The obligation to contribute, historically, was placed either on the relevant property involved in the maritime adventure and/or on the parties interested in this property.[298] As the merchants accompanied their cargoes on board,[299] in many situations there was no need to distinguish between the property and the parties interested in the property. The position changed with the increase of trade and shipping. In international trade, instruments were developed allowing goods to be sold, whilst they were in transit.[300] Title to the cargo could change quickly. The owner of the cargo was no longer automatically the party at risk during transportation. For example, under the trade delivery terms FOB, CIF, C&F, which are included in many contracts for the sale of goods carried by sea, risk passes at the port of loading. Ownership, however, may pass at a different moment. It is not unusual that several parties have separate interests in a particular property at the same time. In addition, in the 19th and 20th century, the shipping business changed dramatically. Steamships replaced sailing vessels, wooden vessels were substituted by steel vessels and maritime commerce expanded exponentially. Chains of contracts of carriage gradually became common practice.[301] Time charterers have taken over important

293. An example of such contractual arrangement is a non-separation agreement. See para. 4.4.2.3.2 above.
294. Inter alia Rule XV and XVII YAR 1994-2016.
295. See para. 4.4.3.2.3 above.
296. The property in respect of which a general average contribution is due may be subject to a lien. Cargo may be retained on board, whereas a vessel may be arrested to secure payment of the contribution. See also para. 4.6 below.
297. This is further discussed below in para. 4.5.2.2.1.
298. The Digest and the Ordinance of Marine of 1681 placed the obligation to contribute on the parties interested in the relevant property. Digest 14.2.2.1 as well as Digest 14.2.2.2 '(…) *all those to whose interest it was that the goods should be thrown overboard must contribute, because they owed that contribution on account of the preservation of their property, and therefore even the owner of the ship was liable for his share*.' Art. 2, 3 Des Avaries, Ordinance of Marine of 1681 provided that general average fell upon the vessel and merchandise. Pursuant to Charles V's Ordinance of 1551 (s. 28), the contribution was to be paid by the parties interested in vessel and cargo.
299. Lowndes 1844, p. 5.
300. Miller 1957.
301. These changes were already recognised in the meeting of the Association of Average Adjusters in 1872. It is indicated in their report: '*It was pointed out that many new questions had arisen, in consequence of the modern expansion of maritime commerce, and the substitution, to a large extent, of iron for wooden vessels, and steamers for sailing ships. The larger scale on which commercial undertakings are now conducted had introduced new complications, particularly in the mode of chartering ships, in the carriage of cargo under 'through' bills of lading, and in changes in the form of the bill of lading itself*' (AAA Report 1872, p. 4). The difference

aspects of the vessel's operation.[302] There is no longer a need for a direct contractual relationship between the owners of the vessel on board of which goods are transported and (one of) the cargo interested parties. NVOCCs issue their own house bills of lading, bare boat charterers to some extent take over the shipowner's role and the party who concluded the contract of carriage with the carrier often will not be the party who claims delivery of the cargo at the port of discharge. Even after these changes in shipping and trade, the question of which party or parties interested in the property involved in a maritime adventure is/are liable for a general average contribution and which party or parties can claim a contribution has received only minor attention in the national legislations, case law and legal literature.[303] This may have historic reasons but it could also be the result of the fact that in practice, most of the general average disbursements at the end of the day are born by the underwriters of the parties and/or properties involved in the maritime adventure.[304] It could also be related to the fact that the issue, as most general average aspects, in practice is solved pragmatically.[305]

Some national laws prescribe which parties are obliged to make a contribution and which parties can claim a contribution.[306] Such specification is necessary when the obligations arising out of a general average event arise by operation of law[307] and have been given an in personam nature.[308] It must then be clarified which parties are obliged to contribute and/or are entitled to claim a contribution. It is also relevant because the YAR do not regulate the general average claimants and/or contributors. They focus on the properties involved in the maritime adventure and do not clarify which parties are interested in these properties for general average purposes. This follows inter alia from the second part of Rule A YAR (1994-2016)

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in the level of industrial development between the beginning of the 19th century and the subsequent period is vividly illustrated by costs that were regarded as costs that could be submitted for apportionment in general average at the beginning of the 19th century. Weskett mentions inter alia 'costs of repairs to carpenters or sailmakers', 'charges of carrying the Holy Virgin home, offering thanks and what is to give to the poor' in Roman countries, 'postage for correspondences' as well as the 'horse, cart and wagon hire when goods had to be carried over land' (Weskett 1781, p. 253). It goes without saying that as a result of technical developments, these provisions soon became obsolete.

302. This also has an impact on general average. See also Jagannath 2014 (I).
303. Few legal writers deal with the parties interested in the contributory interests. The authors of the 2015 version of 'Scrutton on charterparties and bills of lading', exceptionally, discuss the interested parties, but in a very concise manner (Scrutton 2015, pp. 308-309).
304. The underwriters' position is discussed in para. 4.5.2.6 below.
305. The party who issues security is often regarded as the relevant interested party for general average purposes.
306. For example, s. 8:612 Dutch Civil Code; § 588(2) German Commercial Code; s. 349 Spanish Maritime Code; s. 789 under 2 Maritime Code of Slovenia. The French Code of transport does not indicate which parties are to be regarded as the relevant parties in the contributory interests. The Italian Code of Navigation in s. 469 refers to '*all those interested in the adventure*'. The creditors are specified in s. 470 as '*damaged parties*' (s. 470 Italian Code of Navigation; Manca 1958, pp. 213-214).
307. See para. 3.3 above.
308. Since ancient times, a claim for a general average contribution in most regimes appears to have had an in personam nature. The claim was to be brought either against the master or, in more recent times, against the respective general average debtor. Nevertheless, some authors, like Pöhls and Emérigon (referred to by Molengraaff), have argued that general average would be an *obligation re* and would stick to the property. Molengraaff explains that their reasoning is flawed, if only because it does not acknowledge the correct basis of general average (Molengraaff 1880, pp. 87-88). The Scandinavian systems, as further discussed below in para. 4.5.2.4.1 provide that in personam liability in respect of property carried on board has to be created by exercising a lien. They do not provide for in personam liability (s. 465 Norwegian Maritime Code; s. 17:5 Swedish Maritime Code).

which provides that '*General average sacrifices and expenditures shall be borne by the different contributing interests on the basis hereinafter provided*.' It could be argued that some rules do indicate the relevant parties. For example, in Rule G YAR (1994-2016), which concerns the forwarding of the cargo to destination after a general average event took place. Reference is made to '*cargo interests*' as well as to '*owners of cargo*'. Normally, however, such forwarding is arranged by the party at whose risk the cargo is carried rather than by the cargo owner. Rule XI(c) YAR (1994-2016) deals with wages of master and crew as imposed upon the shipowner. However, when a vessel is bareboat chartered, these wages will generally be paid by the bareboat charterer. It seems unlikely that the rule would not apply to such payments. It follows that these references do not seem to have a deeper meaning and probably, with respect, are to be considered as mere sloppiness in drafting. They probably cannot be regarded as a justification that the relevant parties for general average purposes necessarily are the owners of the ship respectively cargo.[309] This is supported by the fact that in the discussions on the YAR 2016, suggestions were made to include a specification of the parties to the maritime adventure. The questions were raised whether the wording '*parties to the adventure*' in Rule E YAR should be replaced by '*all those concerned in property involved in the common maritime adventure*',[310] and whether '*cargo owner*' as mentioned in Rule G should be changed to '*cargo interested party*'.[311] Neither of these suggestions was accepted. It was argued, inter alia, that amending the wording could cause confusion in view of the fact that the wording was used for several decades. It was also indicated that the cargo owner as a matter of English law is the relevant party.[312] Substantive arguments were not raised. The YAR 2016 have not been amended in this respect.

Contracts of affreightment sometimes contain provisions on the parties who are to contribute and/or who can claim a general average contribution. In view of the fact that such contractual provisions in principle can only bind the parties to the relevant contract, their scope depends on the relevance of the particular contract in a general average event and the provision's respective scope of application. In a general average which involves many properties and parties, the influence of a single contract may be (relatively) limited.

4.5.2 General average contributors

4.5.2.1 *Introductory remarks*

In order to have any chance of success, a claim (in general) has to be brought against its proper debtor.[313] In maritime cases, it is not always easy to establish which party is liable. Contracts are often not concluded directly between the ultimately interested

309. See, however, the Belgian Maritime Law Committee in Van Hooydonk 2012, p. 253, f.nt. 729.
310. CMI Report Istanbul (I) 2015, p. 3. The suggestion was set aside during the subcommittee meeting in Istanbul without much discussion (CMI Report Istanbul (II) 2015).
311. Subcommittee meeting of the IWG on 4/5 May in New York 2016, which was attended by the author.
312. Subcommittee meeting of the IWG on 4/5 May in New York 2016. The position under English law is discussed in para. 4.5.2.4.1 below.
313. When a claim is brought against the wrong party, it will be dismissed straight away.

parties,[314] whereas aspects of private international law regularly play a role as well. In respect of general average, this may be even more complicated as obligations to contribute and rights to claim a contribution can arise between various parties on the basis of various grounds. Traditionally, the focus has been directed more on the contributing properties than on the parties interested in these properties.[315] The main contributory interests for general average purposes have been and still are the ship, the freight, the cargo and other property carried on board at the time of the general average act.[316] As will be discussed below, the national legal systems consider varying parties as the parties interested in these properties for general average purposes.[317] The Scandinavian systems do not even provide for in personam liability for general average contributions in respect of cargo. Under these systems, liability of the cargo interested party is attached to the goods and not to him personally. Liability is created by exercising a lien against the property involved in the maritime adventure and a subsequent personal undertaking of the cargo interested party.[318]

Most national laws allow the parties involved in a maritime adventure to make contractual arrangements. Contractual liability to contribute in general average can be created before the incident in a contract of affreightment,[319] but also after general average measures have been taken in an average bond or otherwise.[320] Charter party provisions dealing with the general average contributors are rare.[321] Contractual bill of lading provisions on the contributing parties are more commonly used, albeit not to the extent that they are standardly included in all bill of lading

314. Also Smeele 1998, p. 1.
315. It was held, for example, in the English case *Wright v. Marwood and Others* (1881) 7 Q.B.D. 62 that general average was to be borne by '*those interested*'.
316. The ship, cargo and freight are highlighted in the YAR (Rule XVII YAR 1994-2016). Also Scrutton 2015, pp. 308-309). Ship, freight and goods carried by the vessel are also indicated as the relevant property for general average in the Russian Merchant Shipping Act (s. 284(1); 284(3); and 304(1)) as well as in Art. 933 of the draft Brazilian Commercial Code. The emphasis on these assets can be explained with reference to history. They have always been most important. IUMI's research carried out at the beginning of the 1990's showed that 99,7% of the general average contributions were made by hull and cargo, the latter including containers (IUMI Report 1994, p. 12).
317. Varying parties are expressly indicated as the contributing parties, whereas some regimes do not specify the relevant contributors and/or claimants at all. The Japanese Commercial Code (s. 789) merely states that '*general average shall be shared among the interested persons* (…)'. The French regime and the proposal for the new Belgian Maritime Code do not contain any specification of the parties involved in the contributory interests, whereas the Italian Code of Navigation (s. 470) defines creditors as 'damaged parties' only.
318. S. 51(5) *cf.* 465 Norwegian Maritime Code respectively s. 17:5 Swedish Maritime Code.
319. See, for example, *Tate & Lyle v. Hain Steamship Company* [1936] 55 Lloyds's Law Rep. 159; *Walford de Baerdemaecker v. Galindez* (1897) 2 Com. Cas. 137. That the obligation to contribute '*may be passed on to subsequent assignees of the goods by appropriate contractual arrangements*' was confirmed by Lord Atkin in *Tate & Lyle v. Hain Steamship Company* [1936] 55 Lloyd's Law Rep. 159.
320. In the Scandinavian systems this is considered *the* manner to create cargo interested parties' liability. Personal liability is placed on the shipowner. The process of obtaining security by exercising a right of retention/lien is discussed in para. 4.6 below.
321. An exception is the Gencon charter party which provides that the '*proprietors*' have to pay the cargo's share in general average (cl. 12). The provisions of this charter party are incorporated in the Congen bill of lading. It will then have to be determined under the applicable law whether the provision has validly been incorporated in the bill of lading issued under the charter party and which effect, if any, is given to it. See also para. 3.3.4 above.

and sea waybill forms.[322] At first sight this may seem logical in this respect that a contract of affreightment binds the contractual parties. However, in view of the fact that general average may bring together many more parties than just the contractually related parties, a specification of the relevant parties may be practical. Especially when many contracts of affreightment are in place, confusion may arise as not all parties may be bound to the provision.
Security forms may merely confirm an existing obligation to bring a claim for a general average contribution, but may also create additional general average contributors. When security is put up by a party who was not yet legally or contractually obliged to contribute in general average, liability to contribute may be assumed by the party issuing the security form. It follows that additional liability depends on the wording of the provided security and the parties involved.[323]

It is important to keep in mind that general average contributors are, in principle, liable to pay the contribution due in respect of the property in which they have an interest only. Unless otherwise agreed, there is no joint and several liability for payment of the general average contributions due in respect of the various properties involved in the maritime adventure.[324] Joint liability may exist, however, when several parties are liable to pay the contribution due in respect of one and the same property.[325] It should also be kept in mind that in view of the coverage for general average disbursements under the various insurance policies the main actual contributors in general average are, in practice, the underwriters of the parties and/or properties involved in the maritime adventure.[326]

4.5.2.2 *Party interested in the ship*

4.5.2.2.1 National laws

The party interested in the vessel will in most cases have incurred the majority of the general average expenses.[327] As a result, generally a positive net figure will remain, meaning that the party interested in the vessel receives a contribution in general average. It does happen, however, that a contribution is to be paid by the party interested in the ship. This may be the case when (very) valuable cargo was sacrificed and/or the ship's value was relatively limited.[328] In such situations, claims for the general average contribution due in respect of the ship, if any, may be

322. The standard Congen and Liner bill of lading, for example, do not include a specification of the relevant parties.
323. It also depends on the wording of the security whether it provides an independent basis to claim a general average contribution. It may just as well secure an already existing right to claim payment only.
324. This logically follows from the system of general average. Also § 592(2) German Commercial Code; Arnould 1848, p. 950.
325. Whether joint and several liability exists and what this entails exactly depend on the applicable law between the jointly liable parties.
326. The various underwriters and insurance facilities involved are discussed in para. 4.5.2.6 below.
327. Dunt 2012, p. 105; Schoenbaum 2011, p. 264.
328. A container with medicines may have been thrown over board by salvors or a cargo hold filled with valuable cargo may have been flooded during fire fighting operations.

brought either directly against the vessel and/or against one or more parties interested in the ship, depending on whether there is a possibility for an in rem claim.[329] Most civil law systems do not appear to recognise the concept of an 'in rem claim'.[330] As a result, under these systems a claim for a general average contribution due in respect of a vessel cannot be brought against the vessel directly, but has to be brought against the party interested in the ship for general average purposes.[331] This will generally be the registered shipowner.[332] Some laws, however, accept that the bareboat charterer and possibly even the beneficial owner may also be regarded as the ship interested party.[333]

The choice of the Dutch legislator to burden the registered shipowner with the general average contribution, rather than, for example, a main creditor in the vessel, was made for historical and practical reasons. It is indicated in the Travaux préparatoires that the registered shipowner historically was the relevant party. In addition, his interest in the vessel could clearly and easily be established in figures, whereas this would be more difficult for other parties with an interest in the vessel.[334] The choice for the registered shipowner as party interested in the vessel for general average purposes is in line with the general structure of the Dutch Civil Code's maritime legal provisions, in which the registered shipowner is the central party. Several liabilities are channelled to him statutorily.[335] He is liable for the settlement of general average contributions, the payment of salvage remunerations[336] and the damage caused by the vessel in collisions.[337] The underlying reason for this channelled liability is that the registered shipowner may be easier to find

329. The party interested in the ship will in any event contribute in general average for the vessel's proportionate share, as the ship will be a contributory interest.
330. The new German regime deviates from the 1900 Commercial Code: the new Code clarifies that the liability to contribute in general average is in personam (Gesetzesbegründung 2012, p. 126). The common law systems do recognise some form of in rem liability. See in more detail Jackson 2000.
331. In that respect, the reference in s. 8:211 Dutch Civil Code to the '*ship's contribution in general average*' is not completely accurate.
332. S. 8:612 of the Dutch Civil Code *cf.* Travaux préparatoires Book 8 Dutch Civil Code, p. 619. This is in line with the general provisions of the Dutch Maritime Code in which the shipowner (in Dutch: '*reder*') is defined as '*the owner of the seagoing vessel*' (s. 8:10 Dutch Civil Code). Similarly § 588(2) German Commercial Code provides that the shipowner at the moment of the general average act is the relevant party for general average purposes. See also Ramming 2016, p. 84.
333. The Singapore Court of Appeal extended the term owner to cover the beneficial owner. *The OHM Mariana Ex Peony* [1993] L.M.L.N. 361.
334. Travaux préparatoires Book 8 Dutch Civil Code, p. 619.
335. Channelled liability to the registered shipowner is not a mere Dutch concept. It is also applied in several maritime liability conventions like the International Convention on Civil Liability for Oil Pollution Damage ('CLC') and the International Convention on Civil Liability for Bunker Oil Pollution Damage. In these conventions, the registered shipowner is also the sole liable party. See also Travaux préparatoires Book 8 Dutch Civil Code, p. 334.
336. Unlike under English law, for example, as a matter of Dutch law the shipowner is not only liable for the salvage remuneration due in respect of the vessel but he is also obliged to settle the salvage remuneration due in respect of all property on board (s. 8:563(3) Dutch Civil Code). The salvor does not have a direct right of claim against each of the parties interested in the property involved for their respective share. The shipowner must settle with the salvor and subsequently recover contributions from the parties interested in the property on board, for example, in general average or on the basis of s. 8:488 Dutch Civil Code which gives the carrier the right to recover costs incurred for the benefit of cargo interested parties during the voyage.
337. Under Dutch law, the shipowner is liable for collision and allision damage in case the vessel has caused the damage, i.e. when the cause of the damage lies on board the vessel. Dutch Supreme Court 15 June 2007, *NJ* 2007, 621 ('Zwartemeer'); Dutch Supreme Court 30 November 2001, *NJ* 2002, 143; *S&S* 2002, 35 ('De Toekomst'/'Casuele').

than the vessel's operator or bareboat charterer. In addition, the registered shipowner would be more creditworthy since he owns at least the vessel.[338] In view of this ownership, the vessel can also be arrested for claims against the shipowner.[339]

The position under English law is not completely clear. There appears to be conflicting case law. In *The Evpo Agnic*,[340] it was held that the shipowner was limited to 'registered owner', which was confirmed in *Haji Ioannou v. Frangos.*[341] However, in *The Lehmann Timber*,[342] the bareboat charterer was defined by the Court of Appeal as shipowner and relevant party for general average purposes. It thus appears that in addition to the registered shipowner, the bareboat charterer may also be regarded as the party interested in the ship for general average purposes.[343] This seems to be in line with inter alia Norwegian law, where the Norwegian Maritime Code regards the 'reder' as the party liable for the general average contribution due in respect of the ship, i.e. '*the person (or company) that runs the vessel for his or her own account, typically the owner or the demise charterer*'.[344]

Under those national legal systems that recognise the concept of 'in rem' claims against vessels, the claim for a general average contribution due in respect of the ship may also be brought directly against the property itself.[345] When the national law does not provide for in rem liability, it may nevertheless allow that a claim for a general average contribution is enforced against the vessel. A general average claimant may be provided with a priority right (in Dutch: '*voorrecht*') against the proceeds of a vessel after a judicial sale. The actual contents of such priority right may vary per jurisdiction.[346]

338. Travaux préparatoires Book 8 Dutch Civil Code, pp. 333-334. It is doubtful whether the shipowner is indeed more creditworthy, in particular when there is a high mortgage on the vessel.
339. Art. 1(1)(g) Arrest Convention 1952/Art. 1(1)(i) Arrest Convention 1999.
340. *The Evpo Agnic* [1988] 2 Lloyd's Rep. 411.
341. *Haji Ioannou v. Frangos* [1999] 2 Lloyd's Rep. 337.
342. *The Lehmann Timber* (*Metal Market OOO v. Vitorio Shipping)* [2013] 2 Lloyd's Rep. 541.
343. It is also indicated in Scrutton 2015 (p. 308) and Lowndes & Rudolf 2013 (p. 602) that in case there is a demise charter, this charterer will be the relevant person for general average purposes.
344. S. 51 *cf.* the preface to the Norwegian Maritime Code. This is different from claims for a contribution against cargo interested parties where there is no statutory in personam liability (s. 465 Norwegian Maritime Code respectively s. 17:5 Swedish Maritime Code). In respect of the contribution due in respect of the ship, statutory in personam liability does exist (also Falkanger 2011, p. 503).
345. As a matter of English law, an action in rem may be brought in the High Court against (i) that ship (whether or not the claim gives rise to a maritime lien on that ship), if at the time when the action is brought, the relevant person is either the beneficial owner of that ship in that respect that he has all the shares or has chartered her by demise; or any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner in that respect that he has all the shares (s. 21(4) *cf.* 20(2)(q) Supreme Court Act 1981).
346. Under Dutch law, for example, a claim for a general average contribution against the registered shipowner has been given 'droit de suite' (s. 8:211 under c *cf.* s. 8:215 Dutch Civil Code), whereas German law provides the parties with a general average claim against the shipowner with a 'Schiffsgläubigerrecht', i.e. a statutory right of pledge on the vessel (§ 53 *cf.* 596(1)(4) *cf.* § 597 German Commercial Code). Under both legal systems, when a title has been obtained against the shipowner, enforcement can take place against the vessel even after the vessel has changed ownership. In addition, the claim for a general average contribution has been given one of the highest priority rankings against the vessel, as these disbursements prevent loss of the vessel or its value (Travaux préparatoires Book 8 Dutch Civil Code, p. 252; Asser/Japikse 2004, pp. 131-132; § 596 *cf.* 597 *cf.* 603 German Commercial Code). Norwegian and Swedish law provide a maritime lien against the ship for a claim for a general average contribution against the 'reder' (s. 51 under 5 *cf.* 52 Norwegian Maritime Code; s. 3:36 Swedish Maritime Code). Also inter alia s. L5114-8 under 4 and s. L4122-16 under 3 French Code of transport; s. 237 *cf.* 242 Slovenian Maritime Code.

The fact that the claim eventually may be enforced against the vessel is important for financial reasons but it has no impact on the question against which party the claim should be brought. It may happen that the vessel involved in a general average incident is sold during the voyage after a general average accident but before the vessel has reached the final port of discharge.[347] The question may then arise whether the claim for a general average contribution should be made against the shipowner at the time of the incident or against the new shipowner in order to be enforced against the vessel eventually. The answer, inter alia, depends on the moment that the right to claim a general average contribution becomes due.[348]

4.5.2.2.2 Contractual provisions

Provisions in contracts of affreightment which deal with a carrier's obligation to contribute in general average are rare. In standard forms, general average provisions will generally have been included by the carrier in order to strengthen his position. As a result, contractual clauses will only exceptionally burden him with a liability to contribute in general average. Interestingly, the bill of lading conditions of some of the main shipping lines provide that the '*Merchant will contribute with the Carrier* (…).'[349] The carrier defined in these bill of lading conditions will generally not be the shipowner. A contractual general average claim against the carrier may not be enforced against the vessel. Provisions which regulate the relationship between a carrier and/or a cargo interested party under a charterers bill of lading on the one hand and head owners on the other do not appear to exist. Apparently, provisions of national law and/or Himalaya clauses[350] and other concepts which extend the contract's scope must provide for this general average relationship.

Contractual liability to contribute of a ship interested party may also be arranged after the general average measures were taken in the form of an average bond.[351] Unlike for cargo interested parties, it is not common practice that ship interested parties provide an average bond and/or a guarantee. When this was flagged by IUMI in the preparatory sessions for the YAR 2016,[352] it was suggested that hull underwriters might not be willing to provide security.[353] It is respectfully submitted that in situations where a ship interested party is a net debtor rather than a creditor,

347. This is not a mere theoretical possibility. A change of the vessel's ownership during the voyage can lead to problems as shown in the decision of the English Court of Appeal in *The Olympic Galaxy* [2006] 2 Lloyd's Rep. 27.
348. As a matter of Dutch law, obligations which have become due and payable (in Dutch: 'opeisbaar') before the vessel's change of ownership do not pass to the new shipowner (s. 8:375 Dutch Civil Code.) For this reason, the question thus is when a claim for a general average contribution becomes 'due and payable'. As a matter of Dutch law this question has not yet been answered. See also para. 4.4.3.2 above.
349. Cl. 14 CMA CGM b/l; cl. 22 MSC b/l; cl. 27 Evergreen b/l.
350. A so-called Himalaya clause is a clause commonly included in bills of lading which intends to extend the scope of the bill of lading contract in the sense that it provides that other parties than the bill of lading carrier can also rely on and/or invoke the bill of lading terms, in particular the clauses which exclude and/or limit liability. The name derives from the English case *The Himalaya* [1954] 2 Lloyd's Rep 267. See on Himalaya clauses in general inter alia Scrutton 2015, p. 71; Carver 2011, p. 452; Spanjaart 2006; Zwitser 1998.
351. For the average bond, see also para. 2.3.4 and 3.3.5 above.
352. CMI Report Istanbul (I) 2015, p. 30.
353. CMI Report Istanbul (II) 2015, p. 160.

security for payment of this contribution should be provided. Contributions should be secured financially regardless of the identity of the contributing party.[354] In view of the fact that under some laws various parties may be liable for the contribution due in respect of the vessel, it may also be useful that the relevant party provides an average bond in order to clarify at least one debtor. That security is also to be collected from shipowners was initially inserted in the draft guidelines on best practices for average adjusters[355] but has not made it to the CMI Guidelines's final version.[356]

4.5.2.3 *Party interested in the freight*

The party interested in the freight is liable for the general average contribution due in respect of the freight.[357] This is either the shipowner/carrier or the cargo interested party. Freight is a separate contributing interest only if it is still at risk of the carrier at the time that the general average measures were taken.[358] The contribution will then have to be paid by the carrier as he has an interest in earning the same.[359] If the freight has already been paid by the cargo interested party to the carrier, it will be included in the contributory value of the cargo and will have to be paid by the party interested in the cargo for general average purposes.[360] Time charter parties often contain a clause that time charter hire is excluded from apportionment.[361] Such exclusion clause is generally given a wide scope, even when it has not been repeated or incorporated in other contracts in the chain of contracts of carriage.[362]

4.5.2.4 *Party interested in the cargo*

4.5.2.4.1 National laws

The national legal systems contain varying provisions in respect of the party liable to pay the general average contribution due in respect of the cargo. To begin with,

354. For cargo interested parties it is more difficult to get security from a shipowner as they cannot exercise a lien on the ship. See also para. 4.6.3 below.
355. CMI Guidelines on general average 2015, p. 14.
356. CMI Guidelines on general average 2016, pp. 10-11.
357. Some national laws expressly provide this, for example, s. 8:612 Dutch Civil Code; § 588(2) German Commercial Code (in some detail Ramming 2016, pp. 84-85); as well as the English case *Frayes v. Worms* (1865) 19 C.B. (N.S.) 159.
358. Rule XVII YAR. Also Lowndes & Rudolf 2013, pp. 486, 494; Hudson & Harvey 2008, p. 209. Interestingly, the rule that only the party interested in freight at risk of the carrier is to contribute is not codified separately in the Dutch Civil Code or even mentioned in the Travaux préparatoires of Book 8 Dutch Civil Code (Travaux préparatoires of Book 8 Dutch Civil Code, p. 618). This may be the result of the incorporation of the YAR in the Dutch Civil Code (s. 8:613 Dutch Civil Code *cf.* Royal Decree of 22 March 1991 for the implementation of s. 613 of Book 8 of the Dutch Civil Code).
359. In a chain of contracts of carriage it may be difficult to determine the party ultimately interested in the freight.
360. Rule XVII YAR 1994-2016; Lowndes & Rudolf 2013, p. 487; Falkanger 2011, p. 502. Freight will generally be paid by the cargo interested party to his disponent owner. In situations where there is a chain of contracts of carriage, the disponent owner will not be the head owner. The intermediate disponent owner may then be liable for the contribution due in respect of the freight.
361. For example, cl. 23 Baltime 1939 (as revised in 2001) and cl. 25 NYPE 1993/2015. See also para. 2.3.4.2 above.
362. See also para. 2.3.5.2 above.

some systems do not specifically deal with this liability at all.[363] It is debatable whether this means that a kind of in rem liability exists and/or whether in personam liability can be implied or whether in personam liability can only be created by the ship interested party by exercising his lien.
Most national legal systems giving a regulation appear to have opted to attach in personam liability to the general average contribution due in respect of cargo.[364] Liability to contribute is placed on a particular party that has an interest in the property involved in the maritime adventure rather than on the property itself.[365] The Scandinavian systems are an exception in that respect that they expressly provide that no statutory in personam liability attaches to the owner of the property carried on board.[366] Interestingly, the national regimes which provide for in personam liability regard varying parties interested in the cargo as parties liable to pay the general average contribution. The claim for the cargo's general average share may have to be brought either against the cargo receiver/consignee, the owner of the cargo at the moment that the disbursements were incurred, or against the party that bears the risk of loss of the cargo at the time of the general average act. Depending on the circumstances of a particular situation, it may be that the contributor in respect of the cargo is the same person under the varying national laws, but this is not necessarily the case.

Dutch law, to begin with, makes the receiver liable for payment of the general average contribution due in respect of the cargo.[367] It is indicated in the Travaux préparatoires that the cargo receiver deals with the shipowner and other parties as the party interested in the property. It was therefore considered practical to make this party, rather than the cargo owner, liable for payment of a general average

363. For example, the French Code of transport. The draft for the new Belgian Maritime Code does not expressly provide which parties are liable to contribute in general average either. (The draft is set out in Van Hooydonk 2012, pp. 270-285). It follows from the preparatory comments to the draft Belgian Maritime Code that the owner of the property at the time that delivery of the property took place is legally liable to pay a contribution (Van Hooydonk 2012, p. 283). This is also in line with the provision that the lien on the goods can be exercised against the party who owns the goods at the time that the lien is exercised (s. 8.47 draft Belgian Maritime Code). The YAR do not regulate the cargo interested parties for general average purposes either. See also para. 4.5.1 above. The Dutch Commercial Code of 1838 did not specify either which cargo interested party was obliged to contribute. Reference is merely made to 'cargo interested parties'. According to Molster and Nolst Trenite, the cargo owners were to make the general average contribution (Molster 1856, p. 104 respectively Nolst Trenite 1907, p. 812).
364. Statutory in personam liability does not prevent the possibility to create additional in personam liability by exercise of a lien on cargo.
365. The amended and recently introduced German statutory regulation deviates from the original regulation incorporated in 1900 in this respect that it clarifies that the liability to contribute is in personam. (Gesetzesbegründung 2012, p. 126.) See, however, s. 465 Norwegian Maritime Code; s. 17:5 Swedish Maritime Code.
366. S. 465 Norwegian Maritime Code; s. 17:5 Swedish Maritime Code. By contrast, the 'reder' is personally liable as a matter of Norwegian and Swedish law (s. 51 Norwegian Maritime Code; s. 3:36 Swedish Maritime Code; also Falkanger 2011, p. 503). It is expressly provided in both the Norwegian and the Swedish provision that the shipowner is not allowed to deliver property until the cargo owner has provided security. It is doubtful whether the cargo owner has to give security himself indeed or whether other parties interested in the cargo can do so as well, whether or not on the cargo owner's behalf. The exercise of the shipowner's lien is discussed in para. 4.6 below.
367. S. 8:612 Dutch Civil Code (in Dutch: 'de ontvanger').

contribution as well.[368] The criterion thus appears to be a factual rather than legal one. In the Dutch Civil Code, the term receiver is not defined. It is used at the end of section 2 of title 8 of Book 8 contracts of affreightment in four articles only. The legislator has thus applied a term from the section on contracts of carriage to determine the party obliged to contribute in general average. This is remarkable in view of the fact that general average as regulated in the Dutch (and also other national) codifications does not require a contractual relationship and in essence appears to be a non-contractual concept.[369] An analysis of the Dutch Civil Code's provisions shows that the term 'receiver' probably includes both the party who actually receives the goods and the person who is entitled to claim delivery of the goods under the shipping documents covering the carriage of the goods. Other systems regard the consignee as the relevant party.[370]

As a matter of English common law, it was held in *Scaife v. Tobin*[371] that the owner of the goods involved in the maritime adventure is liable to pay a general average contribution and that a consignee, who is not the owner of the goods, in principle and without interference of a lien or a contractual liability, is not. Lord Tenderden considered that there was no general usage that a consignee was to pay a general average contribution. The decision in *Scaife v. Tobin* was confirmed by the Privy Council in *The Potoi Chau* and by the Court of Appeal in *The Lehmann Timber.*[372] The cargo owner is also considered as the relevant party in several other national regulations.[373]

The third option is that the party at risk is the relevant party in respect of the cargo. A provision to this effect is included in the recently introduced German and Spanish legal regimes.[374] The underlying reason is a practical one as well. It is indicated in the Travaux préparatoires to the German statutory provision that it may be more difficult for a shipowner to determine the moment that ownership passes in international relationships than to establish which party bears the risk in respect of these goods.[375]

368. According to the Dutch legislator, shipowners and other parties should not be bothered by the internal relationship between the various parties interested in one asset (Travaux préparatoires Book 8 Dutch Civil Code, p. 620).
369. This mix up of contractual and non-contractual concepts in the Dutch Civil Code also happens regarding the carrier's right of retention for general average contributions. See para. 4.6 below.
370. Inter alia s. 160(1) Russian Merchant Shipping Act (when the contribution supersedes the value of the goods, a carrier may claim the remainder from the shipowner/charterer (s. 160(5) Russian Merchant Shipping Act)); s. 404 Argentine Maritime Act. Similarly s. 753(1) Japanese Commercial Code that provides for liability of the consignee when receipt of the goods is taken by him.
371. *Scaife v. Tobin* [1832] 3 B. & Ad. 523.
372. *The Potoi Chau (Castle Insurance Co. Ltd. v. Hong Kong Islands Shipping Co. Ltd.)* [1983] 2 Lloyd's Rep. 376; *The Lehmann Timber (Metal Market OOO v. Vitorio Shipping)* [2013] 2 Lloyd's Rep. 541.
373. Also expressly s. 149 Belgian Maritime Code. It follows from s. 467-468 of the Maltese Commercial Code that as a matter of Maltese law, the cargo owner also is the party interested in the cargo for general average. Under the Slovenian Maritime Code (s. 790 *cf.* 789(2)), the cargo owner is probably also the relevant party.
374. § 588(2) German Commercial Code; s. 349 Spanish Maritime Code.
375. Gesetzesbegründung 2012, p. 126. Ramming doubts that this is a feasible option in practice (Ramming 2016, p. 84).

In view of a general average contribution's close connection with the property involved in the maritime adventure as well as from a strict legal perspective, the cargo owner appears to be the correct person to contribute in general average indeed.[376] However, arguably, this restriction to the cargo owner has become too narrow in view of commercial reality. The owner of the goods will often not be the party for whose risk the goods are travelling[377] and/or the party who will take receipt of the cargo at the port of discharge. The party bearing the risk in the cargo in most cases may be easier to find as this can generally be established on the basis of the commercial invoice. In sale and purchase agreements for goods, which are hardly ever provided in practice, or at least not to the adjuster, ownership of the goods may be retained until payment of the total sales price, whether or not under a letter of credit, has taken place. If ownership is considered to give the relevant criterion, it has to be determined whether such retention of title provision was agreed by the parties, and if so, when payment takes place exactly.[378] It goes without saying that this could be a time consuming exercise. Difficulties can also arise when a contract is rescinded.[379]

The party who takes receipt of the cargo in the port of discharge can easily be established, at least in situations that the cargo is forwarded to the place of destination and/or the cargo still represents a considerable value. In the absence of an actual consignee or receiver, the contribution due in respect of the cargo may have to be claimed from the shipper and/or from the proceeds of the goods after they have been sold, if at all possible. In view of the commercial reality and for practical reasons, it does not seem to be a bad option to make the party who bears the risk of loss/damage of the cargo and/or the party who can actually claim delivery of the cargo at the discharge port liable for payment of the general average contribution due in respect of the cargo.[380]

376. Also Park 1787, p. 137 and Travaux préparatoires Book 8 Dutch Civil Code, p. 620. It is acknowleged that the cargo owner from a legal point of view should be the party liable to pay the general average contribution. Nevertheless the Dutch legislator has made the cargo receiver rather than the cargo owner liable for payment of the general average contribution. See, however, Van Empel, who argued that the receiver should be liable for payment of the general average contribution. The obligation to pay a general average contribution in his opinion should be regarded as an obligation attached to the capacity of receiver (Van Empel 1938, pp. 17-18. Also: Stevens 1822, p. 54 and Benecke 1824, p. 325).
377. When the goods have been sold CFR, CIF or FOB, risk will pass to the buyer when the goods pass the ship's rail at the port of loading (Incoterms 2010). The seller will often retain ownership of the cargo until he has received payment, which may well be after the cargo's delivery.
378. It was recognised by Lord Diplock in *The Potoi Chau* (*Castle Insurance Co. Ltd. v. Hong Kong Islands Shipping Co. Ltd.*) [1983] 2 Lloyd's Rep. 376 that a shipowner may not be aware of the party who owns the cargo carried on board his vessel.
379. When payment has already taken place, the title may already have passed to the cargo receivers. When the contract is cancelled, the cargo owner at the time that the measures were taken may be a different party.
380. It is doubtful whether this could also be introduced into English law, and if so, whether this would be necessary and desirable, taking into account that the provisions of common law may not be relied upon. Most claims brought under English law are considered to have a contractual basis in the contract of affreightment or a security document (see para. 3.3.3 above). Probably for this reason, the question which parties are liable in respect of the cargo at common law may not have come up recently.

4.5.2.4.2 Contractual provisions

Contracts of affreightment may specifically provide which cargo interested parties have to contribute in general average.[381] In particular house bills of lading of the main shipping lines and NVOCC's generally specify one or more contractual general average contributor(s). Liability to pay a general average contribution is regularly placed on the 'Merchant', as defined in the bill of lading conditions' definition section.[382] A merchant clause intends to enlarge the contract's scope. Obligations are placed on the 'merchant' who is generally defined as to include at least the shipper, the cargo owner and the consignee.
It goes without saying that contractual liability to contribute only arises when the contributor is bound to the terms of the relevant contract, for example, because he has concluded the contract, the contract was concluded on his behalf or he has become a party to the contract at a later point in time. It follows that a merchant clause will not in all circumstances have the effect desired by the shipowner or carrier. It will not always bind all the parties indicated in the clause. In a recent judgment of the District Court of Rotterdam, the Court decided that a consignee who had not yet received the cargo, was not bound to the conditions of the bill of lading merely because the merchant clause provided that the consignee was bound.[383]

4.5.2.5 *Parties interested in other property*

Finally, a residual category of general average debtors can be distinguished. It consists of the parties interested in other property than cargo carried on board at

381. Not all contracts of affreightment contain provisions on the party who is obliged to contribute in general average. Examples of forms which do not provide for a contractual general average contributor include the Congen 1994 and Congen 2007 bill of lading as well as the Heavyliftvoybill.
382. Reference is made, for example, to the MSC bill of lading which provides in clause 22: '(…) *the Goods and the Merchant shall, jointly and severally, contribute with the Carrier in General Average* (…)'. A similar provision is set out in cl. 14(1) of the CMA CGM bill of lading, cl. 27 of the Evergreen bill of lading and cl. 12 of the Conlinebill 2000. It is set out in cl. 1 that the term 'Merchant' includes '*the Shipper, Consignee, holder of this Bill of Lading, the receiver of the Goods and any Person owning, entitled to or claiming the possession of the Goods or of this Bill of Lading or anyone acting on behalf of this Person*.' Another example of a contract of affreightment in which the general average contributor has been specified is the APL bill of lading. Interestingly, the clause only applies to the situation when the carrier delivers the goods without general average security having been arranged. In such situation, '*the Merchant by taking delivery of the goods, the Merchant undertakes personal responsibility to pay such contributions (…) (cl. 24ii)*'. Other contracts of affreightment, mostly bills of lading, may contain a clause which provides that the 'merchant' is liable for all amounts due under the specific contract, for example Maersk bill of lading (cl. 16.7). The Hanjin bill of lading provides that '*Each Merchant shall be responsible for any failure to perform any Merchant's obligations under any of terms of this Bill of Lading*' (cl. 10). The question should then be answered whether the specific contribution is or is not due under the contract. It is submitted that this will have to be established in respect of each and every contract, and will depend on the wording of the relevant contractual provisions and the applicable law. See also para. 6.5 below. On the 'merchant clause' in general also Geense 2011.
383. District Court of Rotterdam 6 August 2014, *S&S* 2015, 51; ECLI:NL:RBROT:2014:7079 ('UAL Antwerp'). Also Van Steenderen 2014. The Court considered that pursuant to the applicable American law a third party could only be bound by the terms of a contract to which he was not a party, if he had either expressly or impliedly agreed to the terms, or when the party who uses the conditions had a justified confidence that the third party would be bound. The Court held that neither had been shown and that, for this reason, the consignee was not bound to the bill of lading conditions.

the time of the general average act.[384] Not all regulations deal with this category of property.[385] The national systems that contain a regulation vary.
The contributory interests in this 'residual' category over time have become rather limited.[386] Most importantly, the parties interested in the bunkers used in the vessel's operation can be regarded to fall within this group.[387] Bunkers carried as cargo are to be treated as cargo for general average purposes.[388] The distinction may seem artificial, but it may in fact be necessary to determine the party liable for the general average contribution due in respect of a specific property. As a matter of Dutch law, the contribution due in respect of cargo is to be settled by the receiver whereas the contribution due in respect of other property the property's owner is liable to contribute.[389] A similar distinction can be observed under German law, where the owner of the bunkers rather than the party at risk, who is liable for the contribution due in respect of the cargo, is liable to pay the general average contribution.[390]

As a matter of Dutch law, it may not always be clear whether an object will have to be regarded as cargo carried on board, as other property or whether it may even be regarded as part of the ship. The main example of ambiguity when Dutch law applies is a container shell.[391] The value of a single container is relatively limited, but where many containers or reefer containers are involved, the financial impact can be considerable.[392] The question of which party is the interested party in a container for general average purposes in particular arises when the party interested in the cargo carried in the containers is not the party interested in the container shells. When the shells have been provided by the shipowners or time charterers, it does not seem to be fair to make the cargo interested party liable for a contribution due in respect of these containers.[393] This is even more so when the containers

384. S. 8:612 Dutch Civil Code expressly distinguishes between cargo and other property.
385. National legal systems may limit the contributory interests to ship, cargo and freight. The party interested in other property is not mentioned as party entitled to sue in Scrutton 2015, p. 308.
386. The rule that private property of persons on board was taken into account for apportionment purposes has been left for quite a while. On application of this rule under historic regimes, also Kruit 2015.
387. Lowndes & Rudolf 2013, p. 484. German law does not recognise this other category but does treat bunkers separately from cargo. In the new German Maritime Code, the bunkers ('Treibstoff') are mentioned separately as property that has to be taken into account for general average purposes. (§ 588(2) German Commercial Code). In the Norwegian Maritime Code (s. 386), the bunkers are mentioned as separate contributory value as well.
388. This distinction between bunkers used in the vessel's operation and bunkers carried as cargo is discussed by the German legislator (Gesetzesbegründung 2012, p. 125).
389. S. 8:612(1) Dutch Civil Code.
390. § 588(2) German Commercial Code. As pointed out by Ramming, when bunkers have been delivered to the vessel by various suppliers under retention of title provisions, different parties may be regarded as relevant parties. (Ramming 2016, p. 84.) Under Spanish law, by contrast, the party at risk for the property will be liable to contribute (s. 349 Spanish Maritime Code).
391. Containers may be provided by the shipowner, the time charterer or slot charterer, but can also be 'shipper owned'. See on containers and general average also Parenthou 1970; Lyons 1970, p. 165; Jagannath 2014 (I).
392. In particular when the vessel's value is rather limited. After a serious collision or grounding, the vessel's value may be reduced to scrap value only. On container values Jagannath 2015 (I) and Lowndes & Rudolf 2013, pp. 483-484.
393. When containers are leased, the lessee will often arrange for security and subsequent settlement of the contribution.

have been insured by the carrier.[394] Noteworthy is also that the Dutch Supreme Court has held that in a situation where the container is provided by a carrier, the carrier's obligation to exercise due diligence to provide a 'cargo worthy vessel'[395] extends to a container provided by the carrier in similar fashion as his obligations in respects of the cargo holds.[396] In that case, the container may be regarded as part of the vessel. This decision, as well as the provision included in the Rotterdam Rules to the same effect,[397] support the argument that a container shell should not, or at least not in all situations, be treated as cargo. Interestingly, in the Travaux préparatoires for the German statutory regulation it is mentioned that a container is to be regarded as cargo.[398] However, this fits in with the German legislator's choice to burden the party at risk for cargo with the obligation to contribute in general average. As underlying reason to consider a container as cargo it is mentioned that when a container is not delivered to the cargo interested party, he will not be able to redeliver the container and may thus be liable against the party who has provided the container to him. It should be noted though that when the container is insured by the time charterer and not by the party at risk of the cargo, it does not seem correct to place liability for general average contributions on the latter.

Contractual liability to contribute in general average can also be agreed in respect of property carried on board which does not fall within the cargo category. The provisions of a contract of affreightment may cover this category of property,[399] whereas separate security may be provided in respect of these assets as well.

4.5.2.6 *Underwriters*

4.5.2.6.1 Various forms of marine insurance cover

Nowadays the vast majority of ships and cargoes, as well as the parties interested in these assets, are insured. In 1994, UNCTAD published a paper to discuss the position of general average in marine insurance. Of all the adjustments taken into account for the study, under 10% of the interests did not have full insurance cover, which represented less than 5% of the total cargo values concerned.[400] In recent years, the figure of uninsured cargo seems to have increased a little. Figures of adjuster Richard Cornah of Richards Hogg Lindley prepared in 2007 and referred to by IUMI in 2013, show that over 12% of the cargo interested parties were uninsured.[401] The vast majority, however, still is insured.

394. It is not unusual that container shells are insured by the carrier. See also para. 4.5.2.6.1 below.
395. This obligation is included inter alia in Art. III-1(c) HVR respectively s. 8:381(1)(c) Dutch Civil Code.
396. Dutch Supreme Court 1 February 2008, *NJ* 2008, 505, with case note Haak ('NDS Provider'). The decision was discussed inter alia in Margetson 2008 (II) and Claringbould 2008 (II).
397. Art. 17(5)(a) Rotterdam Rules.
398. Gesetzesbegründung 2012, p. 125.
399. Bunkers will generally be provided by time charterers and may as a result be subject to the provisions of the time charter party. This may equally apply to containers provided by a time charterer. When containers are provided by the shippers, they will generally be covered by the bill of lading or sea waybill terms, if any.
400. UNCTAD 1994, p. 7; Magee 2000, p. 294.
401. IUMI Response 2013, p. 13.

That general average is invariably included as an insured risk in marine insurance policies[402] is logical as under the general fundamental principle of insurance, an assured in principle and provided that other requirements have been complied with, is indemnified by his underwriters for costs of measures taken to prevent or reduce a casualty.[403] Underwriters may even be obliged as a matter or law to settle general average contributions[404] and reimbursement may even take place in excess of the value of the insured property.[405] Even though general average disbursements are incurred to mitigate the total overall damage, they are generally not considered to fall under the insurance coverage for sue and labour expenses. General average may even be specifically excluded from the sue and labour provisions' scope.[406]
Insurance cover in respect of general average contributions may be provided both under liability and under property insurance facilities.[407] The most common facilities are briefly set out below.[408]
In view of the coverage for general average disbursements under the various insurance policies, in practice, the main actual contributors in general average are the underwriters of the parties and/or properties involved in the maritime adventure.[409] For this reason, IUMI (the International Union of Marine Insurance)[410] has a particular interest in the general average concept.[411] IUMI has carried out important research in respect of general average[412] and plays an active role in the creation of new YAR versions.[413]

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402. Arnould 2013, pp. 1388-1408; Rose 2012, p. 412; Enge & Schwampe 2012, pp. 75-76; Tsimplis & Shaw in: Baatz a.o. 2014, p. 246; Puttfarken 1997, p. 321; Loyens 2011, p. 650; Selmer 1958, pp. 111-112. An extensive discussion of the relationship between the insured and its underwriters is beyond the scope of this study.
403. Commentary to Nordic Plan 2013, Part I, Chapter 4, Section 2.
404. For example, s. 66 of the English Marine Insurance Act 1906; s. 702 under 4 *cf.* 709 Maritime Code of Slovenia; s. 243 Vietnamese Maritime Code. The Russian Merchant Shipping Act (s. 273) and s. 249(1) Vietnamese Maritime Code provide that underwriters are obliged to provide general average security for payment of the contribution.
405. For example, s. 276 Russian Merchant Shipping Act; s. 430(1) Spanish Maritime Code; Art. 3 Nederlandse Beurs-Goederenpolis 2006. Also Loyens 2011, p. 650.
406. For example, s. 78(2) MIA 1906; Art. 9.2 International Hull Clauses 2003; Nordic Plan 2013, Part I, Chapter 4, section 2, cl. 4-12; Rule 5 section 3(C) 2014 Rules for H&M cover provided by China P&I.
407. The various types of marine insurance cover are discussed, inter alia, in Delebecque 2014; Arnould 2013; Dunt 2012; Enge & Schwampe 2012; Anderson 2009, pp. 185-186.
408. The various insurance covers available in respect of general average are also discussed in some detail in Jagannath 2014 (II). Also Lowndes & Rudolf 2013, pp. 661-662.
409. More specifically, the main contributing underwriters are the Hull & Machinery ('H&M') and cargo underwriters (UNCTAD 1994, p. 7; IUMI report 1994, p. 12; Pannell 1998, p. 12). The underwriters obviously take payments into account in discussions on the premium. As such, admittedly, the ultimately interested parties are their insureds.
410. IUMI's mission is '*to represent, safeguard and develop insurers' interests in marine and transport insurance*'. www.iumi.com/about-iumi/general-information/mission-and-vision.
411. As indicated by Magee: '*IUMI is unashamedly interested in the operational aspects of General Average adjustment because as a market, it is the principal if not sole payroler of the product*' (Magee 2000, p. 294).
412. Inter alia IUMI Report 1994.
413. In particular the contents of the YAR 2004 were considerably influenced by IUMI, as they were dissatisfied with the YAR 1994 (Cornah 2004 (II); Hudson & Harvey 2010, pp. 20, 239-244; Smeele 2005, pp. 19-21). In the preparation of the YAR 2016, IUMI was also strongly involved. It gave input by extensively answering the CMI questionnaire (IUMI Response 2013), made specific suggestions (for example, on the average adjuster's position; see para. 4.3.3.4 above) and several sensitive aspects were discussed between representatives of IUMI and ICS directly. See inter alia the letter of CMI General Average Chair Bent Nielsen to CMI members dated 25 March 2016, printed in CMI Yearbook 2015, pp. 223-225.

i. Ship

Net payment obligations in general average in respect of the vessel, are in principle covered under the vessel's/shipowner's H&M policy.[414]
General average contributions claimed by the ship interested party from other parties that cannot be recovered because the shipowner or carrier was liable for the incident which necessitated the general average measures, may be covered under the vessel's/ship interested party's P&I insurance.[415] When the general average was necessitated by faults of the shipowner or carrier or persons for whom he is vicariously liable,[416] there is not much difference between a liability for cargo damage or for a claim for a general average contribution.[417] If the measures had not been taken, liability would exist, possibly for higher amounts as additional damage may have been prevented by the general average measures. In such circumstances, general average may be a mode to redistribute expenditures from the vessel's H&M underwriters to her P&I Club.[418] P&I cover may also play a role in case of under insurance[419] or under the 'omnibus rule',[420] albeit the latter cover is subject to the P&I Club's discretion.

ii. Cargo

The general average contribution due in respect of the cargo carried on board is generally covered under the goods in transit insurance.[421] Although general average is usually included in the coverage, underwriters are probably not bound to pay for contributions in general average which are the result of an excluded peril.[422]

414. Selmer 1958, p. 114; Kruit 2008, p. 2. See, for example, the Nordic Marine Insurance Plan of 2013. Clause 4-8 provides: '*The insurer is liable for any general average contribution apportioned on the interest insured*. (…)'; cl. 8 International Hull Clauses 2003; Ziff. 27 DTV-ADS. The absorption clause, which is often included in H&M insurance policies, is discussed in para. 4.4.3.5 above.
415. Arnould 2013, p. 1390; Harwood/Semark 2010, p. 176-177; UNCTAD 1994, p. 9; Hudson 1976 (II), p. 417; Hudson & Harvey 2010, p. 51. For example, Rule 41 under a GARD Rules 2016; Rule 19(18)(b) North P&I Rules 2015/2016. The shipowner's own contribution in general average in respect of the vessel in principle is not covered under P&I insurance. As a result, there is no obligation to arrange insurance either, as it does not fall within the scope of EU Directive 2009/20 EG, which obliges the EU Member States to create legislation in which shipowners are obliged to arrange insurance for maritime claims. See also Kruit 2012, p. 143.
416. Hudson 1976 (II).
417. As a matter of Dutch law, general average contributions are statutorily treated as diminutions in the value of the cargo and hence as cargo damage (s. 8:389 Dutch Civil Code *cf*. Dutch Supreme Court 11 June 1993, *NJ* 1995, 235 ('Quo Vadis')). This is not the case under German law. Reference is made to the decision of the German Court of Appeal of Düsseldorf 26 February 2014, I-18 U 27/12 ('Margreta'/'Sichem Anne'). See also para. 4.7.3 below.
418. Kruit 2008, p. 2.
419. UNCTAD 1994, p. 9. For example, Rule 41 under B GARD Rules 2016; Rule 19(18)(b) North P&I Rules 2015/2016.
420. The omnibus rule provides for P&I cover in respect of losses, liabilities, costs and expenses incidental to the shipping business which are not covered under other rules which the P&I Club's board of directors nevertheless and in total discretion considers to fall under the P&I cover after all. (Hazelwood/Semark 2010, pp. 191-193.)
421. For example, Art. 9 and 10 Nederlandse Beurs-Goederenpolis 2006; s. 66 MIA 1906; Cl. 2.3.1.1 DTV-Güter 2000; cl. 2 Institute Cargo Clauses ('ICC'). All ICC-clauses cover general average contributions (cl. 2 of the ICC-A respectively ICC-B respectively ICC-C).
422. Dunt 2012, p. 105, f.nt. 445; UNCTAD 1994, p. 8; Arnould 2013, p. 1395. In the International Hull clauses (01/11/02), cl. 600, it is specifically indicated in Art. 8.4 that underwriters are not liable to cover general average disbursements incurred to avoid uninsured perils. Also Art. 3 Nederlandse Beurs-goederenpolis 2006.

In most situations, cargo underwriters will commit themselves directly to parties who are entitled to a general average contribution by providing security in the form of an average guarantee.[423]

iii. Freight

Freight is covered as contributory value either under the cargo policy or the H&M policy, depending at whose risk it is.[424]

iv. Bunkers

In case the vessel is time chartered, the bunkers generally are provided and paid for by the time charterers.[425] In such situations, the general average contribution due in respect of the bunkers often is insured under the time charterers' liability policy.[426] Alternatively or in addition, the general average contribution may be covered under separate bunkers insurance. The general average contribution due in respect of the bunkers can also be covered under the vessel's H&M policy.

v. Carrying equipment

The general average contribution due in respect of the carrying equipment, most notably container shells,[427] may be insured under a variety of marine insurance instruments, including the goods in transit (liability) policy, the H&M insurance facility and/or the charterers liability policy.[428] Alternatively, it may also be covered under a separate 'Container insurance', like the Institute Container Clauses.[429]

4.5.2.6.2 Direct action?

The question may arise whether underwriters are directly liable against a general average creditor in the absence of a guarantee provided by underwriters.[430] Some legal systems give an injured party the right to bring a claim directly against the underwriter,[431] provided that certain (and varying) requirements have been met.

423. The general average security is discussed in general in para. 2.3.3 and 3.3.5 above.
424. See also para. 4.5.2.3 above.
425. See, for example, clause 2 and 3 NYPE 1946/1993: '*That the Charterers shall provide and pay for all the fuel* (…)'. Similarly clause 7 NYPE 2015.
426. Hazelwood/Semark 2010, pp. 375-376.
427. The same applies in respect of other, less frequently used carrying equipment, like MAFI, Roll Trailer, Bolsters, etc.
428. Jagannath 2015 (III).
429. For example, www.gard.no/Content/20734863/Container; www.skuld.com/covers/skuld-pi-covers/additional-covers/additional-covers/container-insurance/; www.chubb.com/international/singapore/marketing/chubb6060.pdf.
430. There is no convention which regulates this issue. (Ulfbeck 2011, pp. 293-294; Fossion 2002, p. 289.) Pursuant to Art. 18 Rome II, a claim can be brought against the underwriter of the liable person directly when either the law applicable to the non-contractual obligation or the law applicable to the insurance contract provides for such right. A similar rule is included neither in Rome I nor in the Rome Convention. Also Boonk 2008, p. 480.
431. Sections 7(6) and 7(8) of the Norwegian Insurance Contracts Act of June 16 1989; s. 9:7 Swedish Insurance Act; § 95(1) Danish Insurance Act; s. 67 of the Finnish Insurance Contracts Act 1995 (see also Ulfbeck 2001, pp. 525-527; Fossion 2002 and Tomljenovic 2006, pp. 141-142). France: s. L124-3 French Insurance Act. It follows from the judgment of the French Supreme Court (Cour de Cassa-

Some systems, for example, require that the debtor is insolvent, whereas other set the precondition that the debtor's liability has been established.[432] Most systems appear to give such right for tortious liability claims only, as the rationale is that the injured party should be protected.[433] Doubtful is whether this reasoning also applies in respect of general average claims. General average contributions may be covered under property policies rather than liability insurance policies. On the other hand, a right of direct action exceptionally exists for cargo claims as well.[434] If a general average contribution can be regarded as a reduction of the cargo's value under the applicable national regime,[435] a right of direct action might also exist for general average contributions.

4.5.2.6.3 General average insurance facilities

In addition to general marine insurance cover, in which general average is included as a rule, several specific general average insurance facilities are available. The most well known probably is the so-called 'general average disbursement insurance'.[436] This insurance covers shortfalls in contributory values when the contributing interests' value diminishes after the general average incident and before termination of the voyage.[437] In addition, in the last years new general average insurance products have been developed. These include inter alia the 'Extended General Average Absorption Insurance'[438] and the 'Landmark Consortium'[439], which both cover general average liabilities that exceed the standard amount indicated in the absorption clause.[440] Another recently developed cover is the so-called 'General Average Fronting', pursuant to which the underwriters are obliged to offer a guarantee for the full amount of the general average.[441] Unlike under the absorp-

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tion) dated 7 November 2000 (R.C.A. 2001, n°29) that the claimant can bring a claim merely against the underwriter and does not have to sue the wrongdoer. The injured party will only have to prove his interest and that the claim falls within the scope of the insurance policy's cover (inter alia Fossion 2002; Tomljenovic 2006, pp. 142-143). Also s. 76 Spanish Insurance Act respectively s. 465 Spanish Maritime Code and s. 1478 Turkish Commercial Code.

432. Ulfbeck 2001, p. 525.
433. As pointed out by Ulfbeck, the focus has recently been directed more to the division of risk rather than to the actual fault (Ulfbeck 2001, p. 522).
434. Ulfbeck 2011, p. 293. Neither Dutch nor English nor German law provides for a right of direct action in respect of general average contributions. In essence Dutch law only grants a right of direct action in respect of death and personal injury claims (s. 7:954 Dutch Civil Code; in some detail Spruit 2005). The English Marine Insurance Act 1906 only provides an assured who either has paid or is liable to pay a general average contribution with the right to recover the same from his underwriters (s. 66(5) *cf.* s. 73 of the Marine Insurance Act 1906). The Third Parties (Rights against Insurers) Act 2010 does not apply. Underwriters are not mentioned in the list of general average interested parties stipulated in § 588(2) German Commercial Code. There is no obligation to arrange insurance. Hence no claim can be based on § 115 German Insurance Act either.
435. See also para. 4.7.3 below.
436. Lowndes & Rudolf 2013, p. 532; Enge & Schwampe 2012, p. 79.
437. See in more detail on general average disbursement insurance Hudson 1980, Hudson 1987 and Hudson 1988. Also para. 4.4.3 above.
438. Such extended absorption cover is offered, for example, by the Norwegian Hull Club (www.norclub.no/blog/benefits-of-general-average-insurance).
439. The Landmark Consortium, developed by Swiss Re, aims at mega vessels. It has not yet become generally accepted, possibly as a result of the difficult economic times in shipping.
440. The absorption clause is discussed in para. 4.4.3.5 above.
441. See, for example, www.norclub.no/products/special-risks.

tion clause, the Fronting cover does not prevent the insurer subsequently collecting contributions from other interested parties.

4.5.3 Parties entitled to a contribution ('creditors')

4.5.3.1 *National legal systems*

Just like the general average contributors vary, the parties who are entitled to claim a contribution do as well. In the national legal systems, the question which parties are entitled to claim has not received much attention. Specific provisions are scarce. Inter alia the Scandinavian, Chinese, Russian, French, Argentinean and Spanish Maritime Codes do not deal with the party who is entitled to claim a contribution.[442] When the general average debtors are discussed at all, it is usually a rather general remark indicating that all interested parties[443] or the parties who incurred a disbursement are entitled to claim a contribution[444] or even that the loss is shared between the parties to the maritime adventure.[445] Few systems give a specific definition of the relevant parties. When indications are given, ownership seems an important factor. The German Commercial Code, for example, specifies as parties that are entitled to claim a contribution the owner of the vessel, the owner of the bunkers used in the vessel's operation and the party who bears the risk that the cargo will be lost.[446] Pursuant to English law, ownership seems the relevant criterion to determine who is entitled to claim a contribution. Both the owners of the vessel in respect of which the general average expenditures were incurred and the owners of other property involved in the maritime adventure can claim a contribution. However, the right of claim does not seem to be restricted to these parties. It follows, for example, from English case law that the term 'shipowners' is not limited to the registered shipowners; the demise chartered owners can also qualify as such.[447]

At first sight it may seem obvious that the same parties that are obliged to contribute are also entitled to claim.[448] However, this is not necessarily the case.[449] A require-

442. The Dutch Commercial Code of 1838 did not contain a specification either. In s. 739 Dutch Commercial Code of 1838 it was provided that the owners of the jettisoned goods, in case they received their property after they have paid a contribution, have to pay these monies to the parties who have made a contribution in respect of this property, i.e. the carrier and parties interested in the cargo. The Dutch Commercial Code of 1838 (s. 735) provides that if a ship was lost after a jettison, the goods saved have to contribute to the jettisoned goods. It can be derived from these provisions that the owners of jettisoned cargo are entitled to be indemnified for their loss of property. Van Empel indicates that in the code's system, apparently there was no need for a further regulation (Van Empel 1838, p. 189).
443. For example, s. 475 Italian Code of Navigation.
444. S. 8:612(1) Dutch Civil Code.
445. S. 790 Slovenian Maritime Code; s. 789 Japanese Maritime Code.
446. § 588(2) German Commercial Code.
447. As held by the English Court of Appeal in *The Lehmann Timber* (*Metal Market OOO* v. *Vitorio Shipping*) [2013] 2 Lloyd's Rep. 541, para. 2: '*The shipowner is Vitorio Shipping Company Limited, the demise chartered owner of the Lehmann Timber (the 'owner')*.'
448. The parties who are obliged to contribute are discussed in para. 4.5.2 above.
449. It is indicated in the Travaux préparatoires to the Dutch provision (Travaux préparatoires Book 8 Dutch Civil Code, p. 620) that any party who incurred a general average disbursement was entitled to claim compensation (s. 8:612(1) Dutch Civil Code), that this stipulation was added '*just to be sure*'. The wording seems to imply that other parties than those who are liable to contribute can bring a claim for a contribution as well, as long as they are parties to the maritime adventure and provided that they have incurred costs or have suffered a loss, which can be apportioned in general average.

ment that the same parties are obliged to contribute and are entitled to claim, as expressly included in the German Commercial Code,[450] is in line with current practice whereby a net credit or debit general average contribution per property is set out in the adjustment. A benefit of limiting the number of parties entitled to claim is also that fewer persons may be involved in the general average process, which may make the apportionment easier. At the same time, it is doubtful that a provision to this effect in a national legal system actually has this effect. A limitation of the parties involved would probably only be realised when the provision would have a binding nature and would prevent that liabilities are created on other grounds than as a matter of law.[451] Moreover, limiting the rights to claim a contribution to specifically indicated parties may have some unreasonable consequences. Other parties than the specifically indicated parties may have incurred general average disbursements as well, but may then be precluded from claiming a contribution. For example, a vessel's time charterer who has paid port of refuge costs in order to ensure that the vessel could be repaired and the cargo could be brought to its destination,[452] under German law does not seem entitled to claim a contribution in respect of these costs, or at least not in his own name.[453] This would have the peculiar result that either these costs cannot be included in the apportionment, or that they are to be claimed by the shipowner for and on behalf of the time charterer, or by the time charterer in the shipowner's name. A time or demise charterer who has incurred disbursements would be dependent on the shipowner's goodwill in order to obtain compensation in general average.[454] The same dependency exists for an owner of cargo who was not at risk at the time that the cargo was sacrificed, but who has retained title in the property and did not receive payment from the party at risk. This party would probably not be allowed to claim either. On the other hand, it is appreciated that allowing all parties who incurred general average expenses to bring a separate claim in their own name could make the settlement of a general average rather difficult. In particular when several expenses have been incurred in respect of the same property.[455] A cargo interested party may potentially face claims from various parties which are potentially subject to different laws.[456] The traditional practice in which a contribution is determined per contributory interest in that respect should be maintained. It may be useful to formalise this practice statutorily. However, a mere limitation of the parties entitled to claim a general average contribution does not appear to be sufficient. A distinction may have to be made between relationships of the parties interested in one

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In respect of the systems that do not deal with the party who is entitled to claim a contribution it is not clear whether the contributors are the same parties as the debtors.

450. § 588(2) German Commercial Code; Gesetzesbegründung 2012, pp. 125-126.
451. In practice, many obligations to contribute are regarded to have a contractual nature. See para. 3.3.3 above.
452. As the master works under the time charterer's instruction, such expenses paid by the time charterers may well qualify as general average in the meaning of § 588(1) German Commercial Code.
453. It is questionable whether the fact that a party is interested in one of the indicated properties means that he is also entitled to claim in respect of other properties, at least in his own name.
454. A complicating factor may be that the shipowner's claim for a contribution will be reduced by the vessel's general average share. A deduction is applied for the contribution due in respect of the vessel, which reduction should be paid by the shipowner to the time charterer. The latter would need a separate basis to claim the same from the shipowners.
455. Expenses may have been incurred by a shipowner and his P&I and/or his H&M insurance.
456. See Chapter 5 and 6 on the determination of the applicable law.

property and the relationship of parties interested in various properties against each other. All parties who have incurred expenses should be entitled to reimbursement in general average and should be able to get a compensation and possibly be allowed to remit all invoices to the adjuster.

4.5.3.2 *Contractual general average creditors*

Contracts of affreightment may expressly provide that the contractual carrier is entitled to claim a general average reimbursement.[457] The validity of such provision depends on the wording and the applicable law. It seems to go too far to imply from the provision that a merchant is liable to compensate all sums due under the contract, that a general average contribution is a claim which derives from the contract and that a contractual right to claim is thereby created.

If cargo interested parties would base a claim for a general average contribution on a bill of lading, either because such right directly or indirectly follows from the contract, they probably will have to be entitled to bring a claim under the particular document. In particular in respect of bills of lading, the person entitled to claim and the requirements that have to be satisfied may be rather strict.[458] The criteria may also vary under the national laws. It may well be that another party than the party who is substantively involved has to bring the claim under the negotiable document.[459] This may not be the party at risk and/or the cargo owner who may be bound to contribute in general average under the provisions of national law either. Moreover, the claim will have to be brought against the proper carrier under the bill of lading. It goes without saying that this party may not necessarily be the ship interested party for general average purposes. In such situations, it may be difficult from a legal perspective to establish a net amount per property.

4.5.3.3 *Position underwriters*

It is not uncommon that at least some of the expenditures incurred in respect of the measures taken to safeguard vessel and cargo, which may be apportioned in general average in due course, are initially paid by underwriters of parties and/or properties involved in the common maritime adventure. General average disbursements may be incurred by the various underwriters.[460] It is doubtful whether underwriters are entitled to claim a compensation for these costs in general average in their own name.

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457. See also para. 4.5.2.2.2 above.
458. See, for example, s. 8:441(1) BW; s. 2 English Carriage of Goods by Sea Act 1992; § 519(1) German Commercial Code.
459. For example, under Dutch law: Dutch Supreme Court 8 November 1991, S&S 1992, 37 ('Brouwersgracht'). Critical Spanjaart 2012. Such position may create difficulties in respect of counter claims and defences. See also para. 4.7.4 below.
460. Whereas H&M underwriters will generally pay costs of repair and/or port of refuge expenses, P&I may incur costs in order to make sure that a vessel is entitled to enter ports of refuge, for example, by proving security. Cargo underwriters will reimburse their insureds for damage suffered as a result of intentional cargo sacrifices.

In the national codifications that set out the parties entitled to claim a general average contribution, underwriters are unlikely to be included.[461] This may mean that they are not allowed to bring a claim for a contribution in their own name in such circumstances and that they will have to use their insureds' rights, either by subrogation or assignment.[462] It is not clear whether the situation is similar under the laws which do not limit the right to claim a contribution to several specifically indicated parties. Even though it sounds rather straightforward that an underwriter can only exercise his insured's claim rights, it follows from the European Court's decision in the *Sequana*[463] that this does not necessarily has to be the case.

The facts underlying the decision in the *Sequana* are nothing extraordinary. During carriage of a consignment of ferrochrome on board the mv. 'Sequana' from Rotterdam, the Netherlands to Garlinghem-Aire-sur-la-Lys, France the mv. 'Sequana' foundered. The vessel was refloated and the cargo was saved at the expense of the vessel's H&M underwriter Drouot. In proceedings before the French Court, Drouot brought a claim against the cargo interested parties for a compensation on the basis of general average. When these French proceedings were initiated, the cargo interested parties had already started proceedings in the Netherlands against the vessel's owner. In the Dutch proceedings, the cargo interested parties had asked the court to hold that they did not have to contribute in general average because the vessel foundered as a result of the fact that it had been overloaded. In the French proceedings, the cargo interested parties contested that the French Court had jurisdiction to deal with Drouot's claim on the basis of *lis alibi pendens*, which was at that time regulated in Art. 21 of the Brussel's Convention.[464] The question that was to be answered, first by the French Court and subsequently by the European Court of Justice, was whether the action brought by underwriter Drouot on the one hand and the action brought by the cargo interested parties on the other, were actions involving the same parties. The Paris Court of Appeal decided that the two sets of proceedings indeed concerned proceedings between the same parties. This decision was reversed by the European Court of Justice. It held:

'*19. It is certainly true that, as regards the subject-matter of two disputes, there may be such a degree of identity between the interests of an insurer and those of its insured that a judgment delivered against one of them would have the force of res judicata as against the other. That would be the case, inter alia, where an insurer, by virtue of its right of subrogation, brings or defends an action in the name of its insured without the latter being in a position to influence the proceedings. In such a situation, insurer and insured must be considered to be one and the same party for the purposes of the application of Article 21 of the Convention.*
20. On the other hand, application of Article 21 cannot have the effect of precluding the insurer and its insured, where their interests diverge, from asserting their respective interests before the courts as against the other parties concerned.
(…)

461. Underwriters are, for example, not mentioned in § 588(2) German Commercial Code.
462. Either on the basis of the applicable law, the contract of carriage, security form or confirmed adjustment. The applicable law to the subrogation, if any, is to be determined pursuant to Art. 15 Rome I respectively Art. 19 Rome II.
463. ECJ 19 May 1998, C-351/96, *NJ* 2000, 155 ('Sequana').
464. The lis pendes provision is currently set out in Art. 29 Brussels I Recast.

25. The answer to the question raised must thus be that Article 21 of the Convention is not applicable in the case of two actions for contribution to general average, one brought by the insurer of the hull of a vessel which has foundered against the owner and the insurer of the cargo which the vessel was carrying when it sank, the other brought by the latter two parties against the owner and the charterer of the vessel, unless it is established that, with regard to the subject-matter of the two disputes, the interests of the insurer of the hull of the vessel are identical to and indissociable from those of its insured, the owner and the charterer of that vessel.' [465]

Although it clearly follows from the European Court of Justice's decision that the interests of a vessel's H&M underwriter in respect of a claim for a contribution in general average and the interests of the shipowner are not identical, the decision probably cannot be regarded as the final authority. The decision is based on the assumption that the underwriters had an own and separate right to claim a contribution in general average and were not exercising the rights of their insured. The European Court of Justice expressly considers in this respect in para. 22: '*It appears, moreover, that, in the French action, Drouot has been acting not in its capacity as the representative of its insured but in its capacity as a direct participant in the refloating of the Sequana*.' Whether such independent right to claim a contribution exists for an underwriter has to be determined on the basis of the applicable national law.[466] As set out above, the German law does not appear to grant the underwriters such a right to claim. It is doubtful that other legal systems do.[467] When a claim for a general average contribution is based on the contract of affreightment, a separate right of the underwriter will not exist either, as the underwriter is not a party to such contracts. If it is correct indeed that an underwriter can only bring a claim with the insured's claim rights, the European Court of Justice's decision in this respect seems to be incorrect, as based on a wrongful assumption.[468] However, that does not mean that the outcome is wrong from the point of view of the underlying interests. As an H&M underwriter will generally not cover the shipowner's liability,[469] the question of the shipowner's liability should not affect the H&M underwriter's claim for a contribution. In practice, the H&M and P&I´s interests are often brought together under the inseparable procedural identity of the shipowner as against the other parties to the maritime adventure. The P&I Club subsequently may have to compensate the H&M underwriter.[470] Proceedings in which these varying insured interests would be separated, from this perspective, may be practical. Even though it does not follow from the decision that this aspect has been taken into account, it might have played a role in the background.

465. ECJ 19 May 1998, C-351/96, *NJ* 2000, 155 ('Sequana').
466. In the European Union the applicable law is to be determined on the basis of Art. 14 and 15 Rome I.
467. In the decision of the District Court of Groningen (NL) in the case 'Qujado' (28 November 2012, *S&S* 2013, 44), it was held that the shipowner's underwriters took recourse on the basis of the rights of their insured in which they had become subrogated.
468. It should be noted that even if underwriters are regarded to exercise their insured's rights to claim a general average contribution, this does not necessarily mean that the claim for a contribution in general average and the claim for a declaration that there is no liability to pay a general average contribution can be identified. It is respectfully submitted that these are separate issues. This is further considered in para. 4.7 below.
469. As set out in para. 4.5.2.6 above, this liability is generally covered under the P&I policy.
470. Also Pinéus a.o. 1978, p. 170 and para. 4.5.2.6.1 under i above.

4.5.4 Evaluation

In the last decades, the focus in respect of general average contributions appears to have shifted from the property involved in the common maritime adventure to the party interested in this property. It has become completely normal that different parties have diverging interests and relationships in respect of property involved in the maritime adventure. National laws and contractual provisions may consider different parties interested in a particular property as relevant general average parties. It follows from the fact that many different relationships are created by a general average incident, that there may be various parties entitled to claim and/or obliged to contribute in respect of a single contributory interest on the basis of varying grounds. In fact, the party entitled to claim a contribution in respect of a particular property may not even be the same as the party who is to contribute in general average in respect of that same property.[471]

A positive result of having various parties involved in the properties may be that a general average creditor may have various debtors to take recourse against on varying legal grounds. The downside obviously is that it may be extremely time consuming and economically inefficient to determine the exact liabilities of the various parties in respect of a single property. Moreover, in the adjustment a net figure is generally attributed to each contributory interest, which is subsequently assigned to a single party.[472] Although it is understandable from a practical perspective, from a legal point of view this seems incorrect. Which parties are the relevant parties for general average purposes depends on the applicable law, contractual arrangements, if any, and the claim for a contribution's legal basis. The same is true in respect of the applicable adjustment regime. Whether a right to claim and/or an obligation to contribute exist should thus be determined in the relationship between a potential claimant and the potential contributor. As a result of the fact that substantively different regimes may apply, the liability figure per interested party in a particular property may vary as well. A net contribution per property or total balance, as currently and practically feasible established in adjustments, may be insufficient, at least to legally justify.

The potential variety of parties interested in a single property involved in the maritime adventure raises several interesting questions.[473] Firstly, could or should one of the parties interested in the property, and if so which party, be regarded as the relevant party towards parties interested in other property involved in the same general average event? In practice, the parties issuing security, i.e. the party who signs the average bond and arranges financial security, will generally be regarded as the parties interested in the respective property for general average purposes.

471. If a right to claim a contribution follows from the contract of affreightment, this is often a right granted to the carrier to claim monies due in general average from a cargo interested party. Such provisions will not be mutual. Those interested in cargo may not be able to bring a claim for a contribution against the carrier on the basis of the contract of carriage.
472. Also Crump 1985, p. 32.
473. Even within a single legal system, the general average claimants and contributors may vary. On the difficulties that may arise regarding the various parties involved, see also Ramming in his case note to the Hamburg Court of Appeal's decision in the 'Margretha'/'Sichem Anne' (Ramming 2014, p. 250).

Arguably this approach is incorrect.[474] Secondly, when obligations to contribute are based on various grounds, does joint and several liability arise at all, for example, when a consignee under a bill of lading is liable to contribute towards his contractual carrier, whereas the cargo owner is liable towards the shipowner and, to complicate matters further, different regimes apply to calculate the contributions in general average?[475] Can security be requested from all of these parties for the various in personam claims? Ramming indicates that a party can bring his claim against various parties interested in the same property for the full amount.[476] This appears to be correct only if all parties are subject to the same national law and adjustment regime. Thirdly, when various parties are interested in one property and one of them satisfies an obligation to contribute in general average in respect of this property, how are the relationships between the various parties inter se to be regarded? Can a party that has paid a contribution claim a compensation from other parties interested in the same property in respect of which the contribution was paid, and if so, on which ground or grounds?

These issues may and should be provided for, either in national legal systems, or in the contracts involved in the maritime adventure. National regimes, however, are of non-mandatory nature and hardly ever dictate the rules. A shipowner/carrier may not want to give up potential rights and debtors in general average by reducing his contractual terms. The Scandinavian choice not to create in personam liability for general average contributions due from cargo involved in the maritime adventure seems practical. It prevents confusion by not adding further interested parties as general average debtors.[477] It should be noted though that as long as liability for payment of a general average contribution may be assumed contractually, it does not appear to give a sufficient solution either. In the absence of a uniform general average regime, some order might be created by means of clearly worded security forms. In view of the fact that security forms which prejudice the position of parties issuing the security may not have to be accepted,[478] whereas shipowners will generally not want to limit their recourse possibilities, it is doubtful whether the solution may be found along these lines.[479]

474. The average bond's wording may not even provide for a right to claim a general average contribution from the bond's issuer. See also para. 3.3.5 above.
475. Although the principle that it should be irrelevant who incurred the general average costs may be true as between the parties interested in different objects involved in the maritime adventure, it definitely is not for several parties with an interest in a single contributing property. If, for example, a cargo is sold CIF, and the consignee also has its own cargo insurance, one of the underwriters may escape liability completely depending on who pays the contribution to the general average creditor(s). Moreover, a party who puts up security may become liable to contribute in addition to the party who is legally or contractually bound to pay a contribution.
476. Ramming 2016, p. 89.
477. Because the shipowner is to exercise his lien for all claims, in personam liability should be created contractually. However, when the shipowner does not exercise his lien for other parties with a claim, these parties may not have the possibility to claim from other parties than the shipowner. See also para. 4.6 below.
478. See para. 3.3.5 above.
479. In view of the fact that security forms which prejudice the position may not have to be accepted and owners will generally not want to limit their recourse possibilities, such forms may not be of true assistance.

4.6 Measures to safeguard payment of a general average contribution

4.6.1 Various measures

After a general average incident has occurred, it is standard practice that security is collected by the adjuster to safeguard payment of the general average contributions in due course.[480] It goes without saying that a party can only be obliged to provide security when the party requesting security has a right to request and to obtain the same. When security is not granted voluntarily, measures may have to be taken in order to prompt security provision. Even though measures to obtain security can result in additional 'in personam rights', for example, when an average bond is provided by a party who was not already legally or contractually bound to pay, a measure to prompt security provision in principle can only be used when there is an initial right to a contribution[481] or when a measure to put pressure is explicitly given. Such a right must exist either in respect of the property and/or against a person interested in the property. Whether a right to security exists and, if so, how it can be enforced if security is not granted voluntarily, is to be determined on the basis of the applicable national law and the relevant contractual arrangements, if any. If a measure to obtain security, like a right of retention or an arrest, is exercised without legal basis, this can result in liability for damage caused.[482]

With the exception of the Arrest Conventions of 1952 and 1999, which both mention the general average contribution as a maritime claims for which a vessel may be arrested,[483] there are no conventions or other international rules that specifically grant a right to secure payment of a general average contribution. The Hague (Visby) Rules and Hamburg Rules do not provide any right to retain cargo. The Rotterdam Rules accept that rights to retain cargo are exercised but do not grant such right either.[484] Interestingly, the Rotterdam Rules' draft wording did include a right to retain cargo for contributions in general average due to the carrier.[485] This proposal has not made it to the final version. The issue would be '*too complex*' and '*too diverse*'

480. See on the collection of security forms and cash deposits in practice inter alia para. 2.3.3 above.
481. The security measure is given to enforce an existing substantive right and thus in principle depends on this right. NL: s. 8:489(2) *cf.* s. 3:290 Dutch Civil Code. Also Asser/Van Mierlo & Van Velten 3-VI 2010, p. 493 (but see p. 504 and 505 for some limitations in respect of transfer of the underlying claim). English law: *The Chrysovalandou Dyo* [1981] 1 Lloyd's Rep. 159. Also *Voyage Charters* 2014, p. 461; Jackson 2000, pp. 431-432.
482. See, for example, on liability for wrongful arrest of ships Smeele 2007; Davies 2013. See in general on wrongful arrest/attachment: Jansen 2014, Art. 6:162 BW, 14; § 945 German Code of Civil Procedure.
483. Art. 1(1)(g) Arrest Convention 1952/Art. 1(1)(i) Arrest Convention 1999. Discussion may arise on which claims are to be considered as general average claims for the purpose of the Arrest Conventions. It was held by the French Supreme Court in its decision of 23 November 1993 (*The Heidberg,* 1994 DMF 38) that a claim brought by a cargo underwriter who paid a general average contribution was not to be regarded as a maritime claim in the meaning of the convention. Berlingieri deems the court's substantiation unconvincing (Berlingieri 2011, p. 90, f.nt. 100).
484. Art. 49 of the Rotterdam Rules provides: '*Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due*.'
485. Art. 9.5(a) of the Preliminary draft instrument on the carriage of goods by sea. Document A/CN.9WG.III/WP.21; 9th session, 15-26 April 2002, New York (www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

and it was deemed best to leave it to the national laws.[486] The YAR do not provide rights to safeguard a general average contribution either. As a result, general average creditors have to rely on the measures provided by the applicable national law and/or contracts of affreightment. The most commonly applied measures to ensure that financial security is provided and payment of the general average contribution is safeguarded are discussed below.[487] A distinction is made between rights to retain property in respect of which a general average contribution is due and other security instruments.
Some national laws attach a priority right to claims for general average contributions due in respect of the vessel[488] or property carried on board.[489] Rather than to obtaining security for the claim, such priority rights relate to the actual enforcement of a claim.[490] As such they will not be further discussed below.

4.6.2 **Rights to retain property**

4.6.2.1 *Statutory and contractual rights*

A property will generally not be released before sufficient security has been put up for the general average contribution due in respect of it. Obviously property may only be retained when there is a legal basis to do so. In theory, it would therefore have to be established before a right to retain property is exercised for a general average contribution what the legal basis of the underlying claim is and on which basis the right to retain property is exercised. In practice, this does not happen. That property can be retained to obtain general average security, is so commonly accepted that a right to this effect is normally simply assumed to exist.

The right to retain goods to secure payment of a general average contribution has ancient roots. Traditionally, legal regulations provide the master with a right to retain cargo until the general average contribution due in respect of the property involved in the maritime adventure has been paid, or sufficient security is provided

486. Document A/CN.9/552; 13th session, 3-14 May 2004, New York. Also Logmans 2011, pp. 70-73.
487. A comprehensive discussion of the right to retain property on board and other measures to secure payment of the general average contribution is beyond the scope of this study.
488. See, for example, in respect of the contributions due in respect of the vessel s. 8:211 under c *cf.* 8:215 Dutch Civil Code; s. 53 *cf.* 596(1)(4) *cf.* s. 597 German Commercial Code; s. 237 *cf.* 242 Slovenian Maritime Code; s. 51 Norwegian Maritime Code; s. L5114-8 under 4 French Code of transport. Neither the Brussels International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages of 1967 nor the International Convention on Maritime Liens and Mortgages of 1993 include general average claims (it should be noted though that these Conventions have not found general international acceptance).
489. See, for example, in respect of the contributions due in respect of property carried on board the vessel s. 8:222 Dutch Civil Code (the source of the obligation may influence the ranking of the priority right; also Asser/Japikse 2004, pp. 209-210); s. 159 Belgian Maritime Code *cf.* 8.47(1) draft Belgian Maritime Code (Van Hooydonk 2012, p. 298); s. L5133-19 French Code of transport; s. 61 Norwegian Maritime Code.
490. See also para. 4.5.2.2 above. As a matter of English law, a priority right can, but does not necessarily have to, follow from a maritime lien. See in detail inter alia Jackson 2000, pp. 436, 533-574.

for the claim.[491] Most current national laws still provide a right to retain cargo.[492] In addition, charter party and bill of lading terms and conditions often stipulate such right as well.[493] Contractual provisions granting a right to retain or lien the cargo may be in general wording or may refer to general average contributions specifically.[494] Under most national laws, contractual rights to retain property seem to be accepted,[495] although a contractual right is not as far reaching as a statutory right to this effect. Dutch law, for example, does not consider a contractual right of retention as a right of retention in the meaning of the law and, as a result, does not give priority to contractual rights of retention.[496] As a matter of English law, a contractual lien cannot be extended to a type of lien which does not exist by law.[497] A contractual right of retention's actual scope will depend on the wording of the provision and the applicable law.[498]

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491. Already in Roman times, the master was entitled to retain the goods saved until the general average contribution due in respect of the property in question had been paid (Digest 14.2.2). In the Netherlands, the carrier's rights to retain the goods goes back at least to the 16th century. It was provided in Philip II's Ordinance of 1563 that the master was entitled to retain the goods as security for his general average contribution (s. 13 *cf.* 19, Chapter on mariners and merchants, Philip II's Ordinance of 1563; Verwer 1711, p. 93 *cf.* 115). In the 18th century, in addition to a right of retention, the master also had a right of pledge on the goods (Van der Keessel 1884, p. 290; Barels 1780, advice 45, p. 237; Van der Linden 1806, p. 501 (Van der Linden 1828, p. 636)). In an article in the Wellington Independent of 30 June 1874 (p. 2), it was indicated that the laws of all maritime states would allow the master to retain the cargo until his general average claim was satisfied. http://paperspast.natlib.govt.nz/cgi-bin/paperspast?a=d&d=WI18740630.2.5.1 See also Ulrich's overview of measures to obtain security for payment of the cargo's general average contribution at the beginning of the 20th century (Ulrich 1906, pp. 282-283).
492. Inter alia: s. 8:489(2) Dutch Civil Code; § 594 German Commercial Code; English law: *The Lehmann Timber* (*Metal Market OOO* v. *Vitorio Shipping*) [2013] 2 Lloyd's Rep. 541; US: *The Agathe* 71 F. 528 (1895) and see also Richards 1973, pp. 585-586; s. 580 Slovenian Maritime Code; s. 61 under 1 *cf.* 270 Norwegian Maritime Code; s. 352 Spanish Maritime Code; s. 13:20 *cf.* s. 14:25 Swedish Maritime Code; s. 305 Maltese Commercial Code; s. 160(2) Russian Merchant Shipping Act; s. 87 Chinese Maritime Code; s. 405 Argentine Navigation Act; s. 852 *cf.* 937 draft Brazilian Maritime Code (currently s. 40 of the Brazilian Federal Revenue's Normative Instruction no. 800, of December 27, 2007 *cf.* Art. 7 of Decree- Law no. 116, of January 25, 1967).
493. See, for example, bill of lading conditions of Maersk (cl. 17), MSC (cl. 17) and APL (cl. 15). Interestingly, the Gencon 1994 voyage charter party does not include a lien for general average contributions. Neither the lien clause (cl. 8) nor the general average clause (cl. 11) stipulates a lien for general average contributions. This may be because a voyage charterer generally does not have a claim for a contribution. However, by not arranging a lien, he may be in breach of his obligations under the charter concluded with his disponent owners. When the national laws give the right of retention to the shipowner, gaps may arise.
494. The bill of lading conditions of Maersk (cl. 17), MSC (cl. 17) and APL (cl. 15) make specific reference to general average in their respective lien provisions. The lien provision inserted in the Hanjin bill of lading (cl. 11) merely refers to '*any sums whatsoever payable by the merchant under this bill of lading*'. It may be argued that a general lien clause for all sums due under the contract of affreightment, like cl. 11 of the Hanjin bill of lading or cl. 42 of the Shell Voy 6, does not cover general average contributions that are not due under the contract of affreightment, but otherwise (for example, on the basis of substantive provisions of national law or an average bond). Also District Court of Rotterdam 28 January 2010, *JOR* 2011, 88; ECLI:NL:RBROT:2010:BL6036 (Amstel Lease/Tank Services).
495. For example, Dutch, English and German law accept contractual rights of retention (Travaux préparatoires Book 3 Dutch Civil Code, p. 882; Logmans 2011, pp. 109-110; Jackson 2000, p. 523).
496. Travaux préparatoires Book 3 Dutch Civil Code, p. 882; Logmans 2011, p. 105; Asser/Kramer-Verhagen 2015, p. 318. It seems to be left to a party's discretion whether he relies upon a statutory or a contractual right of retention. The Dutch legislator clarified that a party is entitled to stipulate and rely on a contractual right of retention, regardless the answer to the question whether there is a legal right of retention (Travaux préparatoires Book 3 Dutch Civil Code, p. 882; Travaux préparatoires Book 8 Dutch Civil Code, pp. 78-79).
497. Jackson 2000, p. 523.
498. Logmans 2011, p. 102.

The various national rules of law and contractual provisions to retain property, although similar to a certain extent, differ regarding the specifics, including contents and requirements for their application. The peculiarities, inter alia, are the result of the fact that these rights under the national laws may derive from varying underlying legal concepts. The Dutch Civil Code, for example, gives a specific 'retentierecht' (right of retention)[499] to secure payment of the general average contribution,[500] whereas the German codification provides a 'Pfandrecht' (right of pledge),[501] while the English common law grants a possessory lien.[502] In order to prevent confusion in terminology, a German Pfandrecht will not be the same as a right of pledge under English law, the security measures are indicated in the language of the legal system from which they arise. The term 'right of retention' is used to indicate all measures that are used to retain property.

4.6.2.2 *Parties exercising the right of retention*

Nowadays, rights to withhold a delivery of cargo and other properties are generally granted to the shipowner[503] and/or to the carrier.[504] Exceptionally the rights of re-

499. S. 8:489(2) Dutch Civil Code. Logmans points out that the right of retention for a general average contribution is not included in s. 8:30 Dutch Civil Code, which provides a right of retention to a carrier to which the provisions of the specifically described modes of transport do not apply. He indicates that as a result of this omission, a multimodal carrier to which the statutory maritime provisions do not apply, does not have a statutory right of retention to obtain security for general average contributions due to him and will have to rely on a contractual right of retention, if any (Logmans 2011, p. 80). It is doubtful that such carrier cannot rely on the provision of s. 8:489(2) Dutch Civil Code. Pursuant to s. 8:41 Dutch Civil Code, the provisions applicable to the relevant part of the transport will apply in case of multimodal carriage, including security rights and the general average rules of s. 8:610-613 Dutch Civil Code. However, in respect of agreements for inter alia pushing and towing, to which these general provisions as well as the general average provisions of s. 8:610-613 Dutch Commercial Code are directly applicable, the omission of the right of retention for the carrier in the general provisions may be relevant. As there does not appear to be a reason why the right of retention included in s. 8:489(2) Dutch Civil Code would not be applied by analogy, in particular as the right of retention for general average contribution in the general provisions does not seem to have been left out for a specific reason, it arguably applies after all.

500. The *retentierecht* as a matter of Dutch law is given in addition to priority rights. These rights do not derive from one and the same underlying concept.

501. § 594 German Commercial Code. The Pfandrecht for general average contributions, which is discussed in some detail by Ramming (2016, pp. 90-91), is subject to the general provisions on Pfandrecht of the German Civil Code, with some exceptions (Gesetzesbegründung 2012, p. 130). It inter alia grants a right to summary execution (see para. 4.6.2.4 below). Interestingly, under Dutch 18th century law, the master also had a right of pledge on the goods carried on board. (Van der Keessel 1884, p. 290; Barels 1780, advice 45, p. 237; Van der Linden 1806, p. 501; Van der Linden 1828, p. 636.)

502. *The Potoi Chau* (*Castle Insurance Co. Ltd. v. Hong Kong Islands Shipping Co. Ltd.*) [1983] 2 Lloyd's Rep. 376.

503. As a matter of English law, the common law lien has been given to the shipowner. *Crooks v. Allan* (1879) 5 Q.B.D. 38; *Huth v. Lamport* (1885) 16 Q.B.D. 442; *The Potoi Chau* (*Castle Insurance Co. Ltd. v. Hong Kong Islands Shipping Co. Ltd.*) [1983] 2 Lloyd's Rep. 376; *The Lehmann Timber* (*Metal Market OOO* v. *Vitorio Shipping*) [2013] 2 Lloyd's Rep. 541. Also s. 8.47(2) draft Belgian Maritime Code.

504. For example, s. 8:489(2) Dutch Civil Code and s. 160(2) Russian Merchant Shipping Act. As a matter of Dutch law, the right to retain property is granted to the contractual carrier, as the right is set out in the chapter on contracts for the carriage of goods by sea. The provision's wording seems to imply that only in situations that the shipowner can be regarded as the carrier as against the party interested in the property that he would like to retain, he can exercise the statutory right of retention as against this cargo interested party. However, in most situations the shipowner will be *a* carrier rather the contractual carrier as he will be a party to a charter party. As such, he will probably be entitled to rely on the provision as against his contractual counterpart after all. This may not be the case, however, when a bareboat charterer is involved and the shipowner is regarded as relevant party for general average. See also para. 4.5.2.2.1 above.

tention may be relied upon by '*all parties with a claim for a general average contribution*'.[505] In practice, the property will be withheld by the master, ship-operator or agent.[506] They may do so on behalf of the shipowner or carrier, but may also have an own, separate obligation not to release the property.[507] Under Norwegian law, for example, a maritime lien is not given to a particular person, but in respect of a particular property.[508] Any person who delivers the cargo without the creditors' or the court's consent, and who is aware or should be aware that a maritime lien attaches to these goods, becomes personally liable for the underlying claim.[509]

Several laws, including English and German law, also require the shipowner to safeguard other parties' rights to a general average contribution and therefore to also exercise the right of retention for the benefit of these other parties.[510] The

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Contractual rights to retain property will generally also be given to the carrier under the contract of carriage. For example, cl. 17 Maersk respectively MSC bill of lading conditions.

505. § 594(1) German Commercial Code. The Pfandrecht has to be exercised by the shipowner. In addition, it is specifically provided that the master is not allowed to deliver the property to which a Pfandrecht attaches and that he is personally liable if he delivers the goods nevertheless.

506. Ramming mentions that a master would not be in the position to withhold cargo (Ramming 2016, p. 90). It is doubtful that this is correct indeed. The master can refuse to open the holds or even to enter a port of discharge and sail to another port (as was the case in the 'Lehman Timber'; English law: *The Lehmann Timber* (*Metal Market OOO* v. *Vitorio Shipping*) [2013] 2 Lloyd's Rep. 541. In those situations, the master does seem to withhold the property.

507. § 594(5) German Commercial Code. The master is also liable against parties with a claim for a contribution when he delivers the goods upon the shipowners' instructions. His personal obligation was deemed necessary as one of the general principles of German law is that a party can only be liable for actions of other parties when he is at fault himself (§ 276 German Civil Code). The French Code of transport entitles the master to refuse delivery until the contribution has been paid or security has been issued (s. L5133-18 French Code of transport). The shipowner ('armateur') also has a priority right on the cargo or their proceeds after sale during 15 days after their delivery, as long as they have not passed to a third party (s. L5133-19 French Code of transport). The Spanish Maritime Code (s. 352) gives the right to withhold the property carried on board to the ship-operator.

508. S. 61 under 1 Norwegian Maritime Code provides for a maritime lien on cargo for general average contributions.

509. S. 63 Norwegian Maritime Code. Questions may arise which party is the creditor. In respect of general average, there may be several. See also para. 4.5.3 above.

510. See para. 4.6.3.1 below. English law: *Crooks v. Allan* (1879) 5 Q.B.D. 38; *Huth v. Lamport* (1885) 16 Q.B.D. 442; *The Potoi Chau* (*Castle Insurance Co. Ltd. v. Hong Kong Islands Shipping Co. Ltd.*) [1983] 2 Lloyd's Rep. 376; *Mora Shipping Inc. v. Axa Corporate Solutions Assurance S.A.* [2005] 2 Lloyd's Rep. 769; *The Lehmann Timber* [2013] 1 Lloyd's Law Rep. 66, para. 31; *The Lehmann Timber* (*Metal Market OOO* v. *Vitorio Shipping*) [2013] 2 Lloyd's Rep. 541, para. 130. These cases overrule the decision in *Hallett v. Bousfield* (1811) 18 Ves Jr 187, where it was held that no injunction could be obtained by interested parties to oblige the master to exercise its lien and collect security on their behalves. *Hallett v. Bousfield* was not considered in *Crooks v. Allan*. In fact, it was indicated that the question would not yet have been answered in court. The right to retain the goods was given a legal basis in s. 494-501 of the Merchant Shipping Act 1894. A rule to this effect was also included in the draft for the Marine Insurance Act 1904 (Ulrich 1906, p. 121), but apparently did not make it to the final wording. US: *Master Shipping Agency v. M.S. Farida* 571 F.2d 131 (1978); *Kohler & Chase v. United American Lines*, 60 F.2d 530 (S.D.N.Y. 1932) cited in *Cia. Atlantica Pacifica, S.A. v. Humble Oil & Refining Co.*, 274 F.Supp. 884 (1967). Also: § 594(4) German Commercial Code; s. 17:5 Swedish Maritime Code; s. 268 Belgian Maritime Code; s. 805 Slovenian Maritime Code. The latter is rather detailed and provides that: '*If the shipowner does not abide by the provision of the preceding paragraph, he shall be obliged to pay part of the contribution which a general average creditor, according to the evidence he has produced, could not collect from the person entitled to dispose of the cargo*'. An obligation for the master to retain the goods as security for other parties' contributions was already inserted in the Ordinance of Marine of 1681 (s. 21, 'Du jet', Ordinance of Marine of 1681).

obligation may even extend to the situation in which the shipowner does not have incurred general average expenses or suffered general average losses himself.[511]

Contractual provisions obviously can be exercised by the party to whom a contractual right is given in the contract. Whether third parties can rely on contractual rights of retention depends on the wording of the particular clause, on the other terms of the contract (does the contract contain a provision which grants rights to third parties, like a 'Himalaya clause'?) and the place where the right of retention is to be exercised.[512]
Contracts of affreightment will generally not oblige a ship interested party to exercise a right of retention on behalf of other parties. In fact, the opposite is often the case. In order to prevent the hazard of collecting security and the liability for not arranging the same (and possibly also for paying a contribution themselves), some of the main shipping lines include clauses in their bills of lading in which they try to contract out of obligations to exercise their right to retain cargo and obtain security for the benefit of other parties with a claim for a general average contribution. The Maersk Line bill of lading terms, for example, provide in cl. 22(2): '(…) *The Carrier shall be under no obligation to exercise any lien for general average contribution due to the Merchant*'.[513]
Such clauses do not appear to have been tested in court yet. Their scope probably does not extend to general average obligations which arise under mandatory provisions of national law. Moreover, even if the obligation to exercise a lien on cargo could be validly excluded, it may be argued that such exclusion does not mean that the master/shipowner/carrier does not have to comply with his obligation, if any, to appoint an adjuster, to procure an adjustment and/or to secure payment of the contribution respectively.

4.6.2.3 *Parties against which the right of retention may be exercised*

The national legal systems also give different answers to the question against which party the right to retain property can be invoked. Under some laws it can be relied upon as against all parties who claim delivery of the property.[514] Other laws are more restrictive in that respect that the right of retention can only be invoked against a particular party. As a matter of English law, for example, the lien may only be exercised against the consignee.[515] It was held by Lord Diplock: *'The lien, being a possessory one and is not a maritime lien, is exercisable only against the consignee, but it is exercisable whether or not the consignee was owner of the consignment at the time of the general average sacrifice or expenditure that gave rise to the lien: a fact of which the shipowner*

511. The German Civil Code obliges the shipowner to appoint an adjuster in these situations in order to make sure that cargo and bunker interested parties are aware of the general average event. § 595(1) German Commercial Code. See also para. 4.3.2 above.
512. It will depend on the conflict of law rules of the place where the right of retention is to be exercised and which law will be applicable to the right of retention. See on the conflict rules for general average Chapter 5 and 6 below, especially para. 6.5.1.4.
513. Similarly the bills of lading of CMA CGM (cl. 14.2); APL (cl. 24.iii); MOL (cl. 26).
514. Pursuant to Logmans, the Dutch right of retention may be exercised against all parties who would like to take receipt of the goods. (Logmans 2011, p. 78.)
515. *Mors-Le Blanch v. Wilson* (1872-73) L.R. 8 C.P. 227.

may well be unaware.'[516] Under German law, a Pfandrecht will only come in place when the claim for a general average contribution is made against the owner of the property involved.[517] In the legislator's opinion, it would go too far to ignore the ownership relation.[518] Even though this makes sense from the property law perspective, it effectively means that it will have to be sorted out after all which party was the owner of the property involved at the time of the incident. The fact that this may be difficult was the reason for the German legislator to opt for the party at risk rather than for the owner as general average creditor.[519] Curiously, where the German Code regards the party at risk as the relevant creditor and allows a security right to be exercised against the property's owner, the situation is exactly the opposite under English law, assuming that the consignee will be the party at risk. Neither of these regimes seems ideal.

The scope of a contractual right of retention in principle is limited to the contractually bound party or parties.[520] An exception can be made when the specific circumstances of the matter justify that the contractual right to retain goods is also invoked against third parties. Such justification may for example lie in acts of the third party from which it follows that the provision can be invoked against the third party, or in the nature of the agreement or the special relationship between the party who intends to rely on the provision and the third party.[521]

4.6.2.4 *Exercising a right of retention*

The party retaining possession of property naturally has to inform the party entitled to delivery that the property will not be delivered. Some regimes require that payment of a specifically indicated amount is requested and/or that supporting documentation is provided.[522] A common requirement is that the party withholding the property must have actual possession of the object in respect of which the right of retention is exercised.[523] Actual control must be exercised as against the person claiming possession.[524] However, the right to retain the cargo is not lost under all

516. *The Potoi Chau* (*Castle Insurance Co. Ltd. v. Hong Kong Islands Shipping Co. Ltd.*) [1983] 2 Lloyd's Rep. 376.
517. § 594 German Commercial Code. The draft for the new Belgian Maritime Code (s. 8.47(2)) also expressly provides that the right of retention can be exercised against the property's owner.
518. Gesetzesbegründung 2012, p. 129.
519. § 588 German Commercial Code *cf.* Gesetzesbegründung 2012, p. 126.
520. For example, District Court of Rotterdam 28 January 2010, *JOR* 2011, 88; ECLI:NL:RBROT:2010:BL6036 (Amstel Lease/Tank Services); District Court of Rotterdam 31 July 2012, ECLI:NL:RBROT:2012:BX3218.
521. See also Logmans 2011, p. 20.
522. As a matter of English law, the shipowner is not required to specify a sum in respect of which the lien is exercised. However, he must provide the cargo owner with all materials necessary to establish which amount must be paid in order to have the lien discharged. If the lien is exercised for a too high amount and insufficient documentation is provided from which the correct amount could be derived, the shipowner is liable for exercising the lien wrongfully. *Albemarle Supply v. Hind* [1928] 1 K.B. 307; *The Norway* (1864) B. & L. 404. Also *Voyage Charters* 2014, pp. 468-469.
523. As long as the object does not come in the custody of the debtor or party entitled to the object, the right of retention remains on the object (s. 3:294 Dutch Civil Code). Also Logmans 2011, pp. 124-130. English law: *Mors-Le Blanch v. Wilson* (1872-73) L.R. 8 C.P. 227. As a matter of English law, a court cannot declare that the lien continues when there is no longer possession of the object; *The Ally* [1952] 2 Lloyd's Rep. 427; Jackson 2000, p. 501; *Voyage Charters* 2014, p. 470. See also s. 63 Norwegian Maritime Code which provides that the maritime lien ceases when delivery takes place.
524. Whether actual control is exercised in a particular matter is a question of fact. NL: Dutch Supreme Court 23 June 1995, *NJ* 1996, 216 (Deen/Van der Drift Beheer). For the position under English law, see Jackson 2000, p. 501.

regimes in all situations when the party exercising its right loses actual control. The right may remain attached to the property, for example, as against parties who are aware of the existence of the security right.[525]
The right to retain property is generally lost when sufficient security has been provided for the underlying claim.[526] It will depend on the circumstances of the matter and the applicable law and jurisdiction whether provided security will be considered sufficient.[527]

The shipowner/carrier/ master is generally not bound or even entitled to retain the cargo on board the vessel,[528] but will be allowed to store the cargo on land.[529] The right of retention has to be exercised in a reasonable manner. Then, the costs incurred whilst exercising the lien often are recoverable, at least to some extent.[530]

In general, a person exercising a legal right of retention on an object has some sort of preference over other creditors to take recourse against the specific good.[531] Some laws even grant the party exercising the right of retention a right of summary execution. As a matter of German law, for example, an object to which a Pfandrecht attaches can be sold without the court's permission.[532] Under many systems, how-

525. As a matter of German law, the object can be reclaimed by the party exercising the Pfandrecht. Only when a bona fide third party rightfully obtains the object to which the Pfandrecht is attached, the Pfandrecht is lost (§ 936 German Civil Code).
526. S. 8:489(2) Dutch Civil Code; English cases: *Morely v. Hay* (1829) 7 L.J.K.B. (O.S.) 104 and *Burston Finance v. Speirway* [1974] 3 All ER 735; s. 8.47(3) draft Belgian Maritime Code.
527. General average security is discussed in general in para. 3.3.5 above. It may not be clear whether a right of retention still exists when cargo carried in a container is secured, but no security has yet been provided for the container shells. The draft Belgian Maritime Code makes it clear beyond doubt that both the cargo and the container have to be secured before the right to retain the property lapses (s. 8.47(4) draft Belgian Maritime Code).
528. S. 305 Maltese Commercial Code expressly provides that the cargo may not be stored on board.
529. NL: s. 8:490 Dutch Civil Code provides that in situations where it is impossible to deliver the cargo to the consignee, for example, because the cargo interested party fails to comply with its delivery obligations, the carrier is entitled to store the goods for risk and account of the cargo interested party. In addition, it is stated in the section that the Court can, upon the carrier's request, order that the goods may be stored on board the vessel. Although it has not been specified that s. 8:490 Dutch Civil Code also applies to situations in which a right of retention is exercised to obtain general average security, this situation probably falls within the scope of the section. In particular as s. 8:491 Dutch Civil Code, which deals with the sale of the stored cargo, does refer to general average contributions. Also on exercise of general average lien: Court of Appeal of The Hague in its decision of 1 December 2009, *S&S* 2010, 62; ECLI:NL:GHSGR:2009:BL2811 ('Lehmann Timber'). English law: *Mors-Le Blanch v. Wilson* (1872-73) L.R. 8 C.P. 227. It seems that the decision codified common shipping practice. In the 19th century, the master was entitled to detain the goods in a warehouse to enforce the lien. Stevens indicates that goods could also be detained on the quay until security was given (Stevens 1822, p. 54). Recently: *The Lehmann Timber* (*Metal Market OOO* v. *Vitorio Shipping*) [2013] 2 Lloyd's Rep. 541, where the Court of Appeal allowed storage in a warehouse in another place than the place of destination. Also s. 160(2) Russian Merchant Shipping Act and s. 352 Spanish Maritime Code.
530. S. 8:490 Dutch Civil Code *cf.* s. 3:293 Dutch Civil Code; § 1216 *cf.* 677 et seq. German Civil Code; English law: *The Lehmann Timber (Metal Market OOO v. Vitorio Shipping)* [2013] 2 Lloyd's Rep. 541 (also *Voyage Charters* 2014, pp. 473-474); s. 160(4) Russian Merchant Shipping Act.
531. NL: s. 3:292 Dutch Civil Code; English law: see Jackson 2000, pp. 558-569; § 594(2) *cf.* § 602-604 German Commercial Code. The right of pledge has been given a high priority. Pursuant to § 594(2) German Commercial Code it ranks higher than all other rights of pledge that may rest on the particular cargo, even when they are older. The moment that the right of pledge has arisen is only relevant to determine the order when there are several general average claims.
532. § 1221 German Civil Code. The sale must take place by an authorised broker or by way of public auction. The party who is entitled to the object has to be given a one week's notice of the intended sale in order to give him the possibility to settle the claim in respect of which the Pfandrecht is

ever, a court order will first have to be obtained before the party exercising the right of retention is allowed to sell the goods in respect of which the right of retention is exercised.[533] Such permission will generally be granted when substantial costs are incurred in storing the goods or when the goods have a perishable nature.[534] A right of sale may also be contractually agreed.[535] Whether a contractual right of sale can be enforced depends on the facts of the matter and the applicable law.[536]

4.6.3 Other rights to secure a general average contribution

4.6.3.1 *In general*

A right of retention on property carried on board cannot be exercised by other parties with a claim for a contribution than the parties interested in the vessel.[537] These other parties cannot exercise actual control over property carried on board. In order to protect these other non-ship interested general average creditors, some national laws oblige the shipowner/carrier/master to exercise this right of retention also for other interested parties. In the absence of such obligation, these non-ship interested general average creditors will have to obtain security for their claim by other means.
The possibilities to enforce a claim for a contribution due to non-ship interested general average creditors vary under the different national laws. In general, measures may be taken both against the property involved in the maritime adventure in respect of which a contribution is due, i.e. most notably ship, cargo and other property on board, and against a person who is liable to pay the contribution due in respect of the property. Contractual provisions will not play an important role. They will generally protect the carrier, rather than providing his contractual parties with rights against him.[538]

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exercised after all (§ 368 *cf*. § 495(4) German Commercial Code). When the party entitled to the object is not known, the notification can also be given to the charterer of the vessel. It is doubtful whether, and if so how, a Pfandrecht can be exercised on property in respect of which a bill of lading was issued. Problems may arise when the party exercising the Pfandrecht wants to sell the property.

533. Under Dutch law, the party exercising a retentierecht is not given the right of summary execution in order to prevent abuse (Travaux préparatoires Book 3 Dutch Civil Code, p. 889 as well as Dutch Supreme Court 12 June 2009, *NJ* 2010, 663 (Heembouw/Fortis)). Pursuant to s. 8:491 Dutch Civil Code, the carrier, the storage keeper and/or the cargo interested party can request that the court orders that the goods be sold. The revenues of the sale will inter alia be used as payment or security for a general average contribution and to settle the costs of the storage, provided that these costs have reasonably been incurred. A title to sell goods can be obtained in summary proceedings. English law: *Thames Iron Works v. Patent Derrick Co.* (1860) 2 L.T. 208.
534. For example, s. 6:90 Dutch Civil Code; English law: *The Lehmann Timber* (*Metal Market OOO* v. *Vitorio Shipping*) [2013] 2 Lloyd's Rep. 541.
535. *Voyage Charters* 2014, p. 470. The MSC and APL conditions stipulate that the carrier is entitled to sell the cargo liened by him.
536. It can be derived from the case law of the European Court of Justice on the question whether contractual rights of sale included in consumer contracts regarding immovable property can be exercised, that a provision for sale of goods is not invalid by definition. Inter alia ECJ 10 September 2014, C-34/13 (Kusionova/SMART Capital).
537. The shipowner and master (and as a result possibly the time charterer as well) can actually exercise a right to retain property as the property is in their actual custody.
538. See also para. 4.6.2.2 above.

4.6.3.2 *Arrest/conservatory attachment*

A party with a claim for a general average contribution may ask the court's permission to make arrests and/or attachments on assets of the parties who are liable to contribute in general average, if the applicable law provides for this possibility.[539] A request for an arrest or attachment may also be made by the shipowner/carrier on property carried on board,[540] but this will probably only happen in exceptional cases. The right of retention will generally suffice.[541]
It is explicitly provided in the Arrest Conventions of 1952 and 1999 that claims for a general average contribution are regarded as maritime claims for which a vessel may be arrested.[542] Whether a vessel, either the vessel in respect of which the claim arose or a sister ship, can be arrested will depend on the applicable national law.[543] Requirements vary.[544] Under some laws it will be relatively easy to arrest property or make conservatory attachments,[545] whereas other regimes only allow such attachments in exceptional circumstances and/or after provision of (substantial) security.[546] Varying criteria may apply to arrest a vessel and to make conservatory attachments on other property.[547]

Apart from legal difficulties to obtain permission to make an arrest or a conservatory attachment, practical problems may also prevent that such actions are successfully taken. When there are many properties involved in the maritime adventure, it would obviously be difficult if not impossible, and in any event an expensive task, to take action against all assets and/or the parties interested in them.[548] The details

539. Within the EU and in view of the Brussels I Recast, such permission may be granted either by the court where the properties are and/or by the court with jurisdiction on the merits. See Barten & Van het Kaar 2015.
540. This is expressly provided in s. 404 Argentine Navigation Act.
541. When no security is provided, an arrest may be necessary to actually enforce a right to payment in respect of these properties.
542. Art. 1(1)(g) Arrest Convention 1952 and Art. 1(1)(i) Arrest Convention 1999.
543. For example, US law: *The Emilia S. De Perez* 22 F.2d 585 (D.Md. 1927). Also s. 92 under g Norwegian Maritime Code respectively s. 41(7) Vietnamese Maritime Code. It is explicitly provided in the Maritime Code of Slovenia that a general average creditor that does not receive security can stop the vessel (s. 806 Slovenian Maritime Code).
544. As a matter of Dutch law, a vessel can only be validly arrested if the claim can be enforced against the vessel. Dutch Supreme Court 9 December 2011, ECLI:NL:HR:2011:BT2708, *S&S* 2012, 24 ('Stromboli M'; 'Costanza M'). It should be noted though, that under Dutch rules of private international law, a claim is only enforceable against a vessel if it is enforceable both under the lex registrationis and the lex causae (s. 10:160 (4) Dutch Civil Code, which provision codifies the decisions of the Dutch Supreme Court of 12 September 1997, *NJ* 1998, 687 and 688 ('Hanjin Oakland' respectively 'Micoperi 7000')).
545. Under Dutch law, one of the basic principles is that a creditor is allowed to take recourse against all assets of its debtor. In order to make sure that a (later) judgment can be enforced, the creditor is also allowed to make (conservatory) attachments/arrests on the assets of its debtor (s. 700 Dutch Code of Civil Procedure).
546. Under the new German Commercial Code, the criterion that a 'specific need' or 'concern' was required, was deleted (inter alia Eckardt 2015, p. 61; Gahlen 2015, pp. 69-70). In practice, however, it remains difficult to arrest a vessel in view of the requirement that security is provided for damage caused by a wrongful arrest. (Gahlen 2015, p. 70.)
547. This follows in respect of ship arrests from Berlingieri 2011 and in respect of conservatory attachments inter alia from the comparison made by Westerhof of various European systems' rules on arrest and conservatory attachment (Westerhof 2013 and 2015).
548. As Dutch law does not recognise in rem liability for general average, the assets involved in the maritime adventure may not be attached when in personam liability cannot be established. It will

of all interested parties may have to be obtained, whereas liability may have to be established on the basis of the applicable law to these various relationships.[549] Unlike the costs incurred in the security collection by the adjuster, the costs incurred by individual parties to safeguard payment of their claims are generally not included in the apportionment. The more practical option seems to be that security is collected by a single party on behalf of all general average creditors, as specifically provided in some national laws. In practice, this is what usually happens, at least when the shipowner has incurred general average expenses himself.

4.6.4 Evaluation

The above analysis shows that the possibilities to secure payment of a general average contribution may not only vary per legal system, but also per party with a claim for a contribution. A shipowner may have other options than a cargo interested party. In the absence of a statutory obligation placed upon the shipowner and/or carrier to exercise a lien on behalf of the all parties with a right to a contribution, there seem few feasible options for non-ship interested general average creditors to safeguard payment of their right to a contribution, at least not when many potential debtors are involved. Therefore it does not appear to be unreasonable to oblige the shipowner and/or carrier to exercise his/their lien for the benefit of all parties with a right to a general average contribution.

4.7 Influence of (actionable) fault

4.7.1 Introduction

Another aspect that is dealt with differently in the various national legal regimes and contractual provisions is the impact of one of the parties to the maritime adventure's actionable fault in respect of the cause of the incident necessitating the general average measures. The obvious example of such actionable fault is the carrier's fault to exercise due diligence before and at the beginning of the voyage, which has led to a stranding, explosion, etc.[550] The main question is whether general average on the one hand and liability for the damage caused by the incident which would have arisen if the general average measures had not been taken on the other,[551] are to be kept completely separate or whether they are, somehow, interrelated and should be discussed jointly. When general average and liability do influence each other, the next question is how they interact.

4.7.2 Fault free general average concept?

Traditionally, it was generally accepted that in case measures to save ship and cargo were necessary as a result of negligence of the master or crew, the disbursements

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have to be ascertained which parties are liable to pay the contribution and which assets they have that can be arrested or attached.

549. As will be discussed in Chapter 6 below, the applicable law may not always be clear.
550. On causes of general average events in general: Marshall 2004, pp. 10-12.
551. The test is a hypothetical one as the general average measures will generally have prevented or at least mitigated the loss or damage. Also Lowndes & Rudolf 2013, pp. 158-159.

thereby incurred could not be apportioned. The absence of an actionable fault or liability appears to have been one of the conditions for apportionment in general average for a considerable period of time.[552] Arguably, the background was that such disbursements have not been incurred for the common benefit when the incident was caused by one of the parties. They may then have to be regarded as measures to limit the damage of the party liable for the incident.[553] By the beginning of the 20th century, the position had changed. In 1926, Rudolf alleged that the principle that general average still existed even when it was caused by one of the parties' actionable fault, was universally accepted.[554] Although it is a telling statement, it also appears to have been an overstatement. Inter alia the Dutch Commercial Code of 1838, which was still in force at that time, explicitly provided that if latent defects of the vessel, its inferior state or fault and negligence of the master or crew caused damage or costs, these costs could not be regarded as general average, even if costs had been made voluntarily for the benefit of vessel and cargo and after the required consultation.[555] A similar provision could and can still be found in Art. 148 of Part II of the Belgian Commercial Code.[556]

It goes without saying that when expenditures and/or losses are not considered as general average disbursements, they cannot be apportioned. For obvious reasons, shipowners did not like this. To prevent such provisions' application, specific clauses were developed and incorporated in bills of lading. The so-called 'General Average for Dutch Ports Clause', for example, provided: '*Fault of master or crew in the navigation or management of the ship will not free the consignees from contributing their proportion in general average, and shippers and consignees by accepting this bill of lading renounce s. 700 of the Dutch Commercial Code.*'[557]

552. The codification of the rule that no contribution was due when losses or expenditures had been caused as the result of the shipowner's fault goes back at least until the 16th century. It was stipulated in Philip II's Ordinance of 1563 that damage caused as a result of the fact that the ship was overloaded or wrongfully stowed could not be brought in general average (s. 8, Chapter on Shipwreck, jettison and average of Philip II's Ordinance of 1563). In addition, it was provided that the master was to indemnify any damage caused due to his or the crew's fault or negligence (Art. 1 of the same regulation). This latter provision can already be found in s. 43 of Charles V's Ordinance of 1551. See also Van Leeuwen's comments to para. 11, 14 and 19 of Weytsen's Tractaet (Verwer 1711, pp. 194 and 196). The rule that no contribution was due when losses or expenditures had been caused as the result of the shipowners' fault is also included in s. 4, Des Avaries, Ordinance of Marine of 1681; s. 106 Rotterdam Ordinance of 1721 and s. 700 Dutch Commercial Code of 1838.
553. Inter alia Holtius 1861, pp. 282-283; also English law: *Tempus Shipping Co v. Louis Dreyfus & Co* [1931] 1 K.B. 195.
554. Rudolf 1926, p. 49.
555. S. 700 *cf.* 707 Dutch Commercial Code of 1838. It is not clear whether general average did exist in other situations not specifically mentioned in the Dutch Commercial Code, where the incident necessitating the general average was caused by the master and/or the shipowner's actionable fault. See also on s. 700 Dutch Commercial Code of 1838 and the influence of fault Kruit 2004, pp. 36-38. Interestingly, when goods had been lost as a result of fault of the shipper or consignee such losses, pursuant to s. 737 Dutch Commercial Code of 1838 were regarded as general average and included in the apportionment. See, however, the Arbitral Award of the Dutch Average Committee in *The Catharina* (3 May 1888, *MvH* 1889, p. 13), in which case it was held in respect of the carriage of a consignment of coils, which became heated during the voyage, that the principle of s. 700 Dutch Commercial Code of 1838 was also applicable to faults of cargo interested parties.
556. It provides that the port of refuge costs are to be included in general average unless caused by an inherent vice of the vessel which is due to master or crew, or an inherent vice of the cargo.
557. Hazelwood/Semark 2010, p. 433. In order to prevent the article's application, the Congenbill (cl. 3) provides that the charterers, shippers and consignees explicitly renounce this article. In the decision of the District Court of Rotterdam of 11 December 1925, *NJ* 1926, p. 758 ('Volumnia'), the court held that the provision should be disregarded. It is not clear whether this was the result of inconsistency with other provisions or whether it conflicted with the applicable national regime.

Even though the provision of s. 700 Dutch Commercial Code of 1838 was deleted with the introduction of Book 8 Dutch Civil Code in 1991,[558] similar provisions which exclude losses caused by actionable fault can still be found in contemporary legislations.[559] However, they have now become the exception rather than the rule. Many regulations make it clear beyond doubt that the question what caused the necessity for the general average measures to be taken is irrelevant for the question whether measures are to be regarded as general average.[560] As mentioned by the English adjuster Crump: '*It is the nature of the act of volition, of the general average act itself, that counts, not the antecedent circumstances*'.[561] This is also expressly set out in Rule D YAR, which since 1974 provides: '*Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault*'.[562] The provision is incorporated in several national legal systems and contracts of affreightment, either directly or via an incorporation of one of the versions of the YAR.[563]

The question whether an actionable fault or liability for the underlying cause of a general average act prevents a qualification of disbursements as general average may not only impact the recourse possibilities of the party at fault, but also those from 'innocent' general average debtors. When disbursements, most notably sacrifices, are not considered as general average, they will not be apportioned, regardless of the question who suffered the damage or loss. A qualification as general average means that innocent parties, like the parties interested in sacrificed cargo, can still claim general average contributions from other parties, rather than just damages from the party who was actionably at fault. When a shipowner or carrier can invoke a limitation of liability in respect of damage caused by his actionable fault, such innocent parties would be burdened disproportionally.[564] Moreover, a fault free general average concept has the benefit that the answer to the question whether a person can be blamed for the cause of the incident may depend on the specific

558. Nevertheless some older bill of lading forms still contain a clause to negate s. 700 Dutch Commercial Code's effects. For example, Congenbill 1994, Art. 3.
559. S. 148 Belgian Maritime Code; s. 449(1) Maltese Commercial Code, which considers damage caused by negligence of the master or crew as particular average; Brazilian Commercial Code, Federal Law 556/1850, s. 765. In the draft for the new Brazilian Commercial Code (s. 935), the position has not been changed.
560. For example, s. 8:610 Dutch Civil Code; § 589(1) German Commercial Code; s. 562 Slovenian Maritime Code; s. 285(3) Russian Merchant Shipping Act; s. 214(2) Vietnamese Maritime Code. At the 1885 Conference held in Antwerp, a rule which disregarded the cause of the incident was agreed (decision 32, set out in Ulrich 1906, p. 234) and in the 1888 Conference in Brussel included in the Draft Convention (Art. 7; Ulrich 1906, p. 241). The draft Convention never materialised. See also para. 5.1 below.
561. Crump 1985, p. 19.
562. Rule D YAR in essence was developed at the 1903 International Law Association's conference in Antwerp (Worst 1929, p. 11; Schaub 1933, p. 70; Cole 1924, p. 39). Reportedly, the rule has never been generally incorporated in contracts of affreightment before it was included in the YAR in 1924 (Rudolf 1926, p. 17; Hudson & Harvey 2010, p. 49). Initially, Rule D YAR just provided that 'remedies' would not be prejudiced. In the revision that resulted in the YAR 1974, the word '*defences*' was added to clarify the position.
563. The provision has been taken over, for example, in s. 197 Chinese Maritime Code and partially in s. 8:610 Dutch Civil Code. The incorporation of the YAR in national legal systems in general is discussed in para. 4.4.2.1 above.
564. The impact of a limitation of liability is considered in para. 4.4.3.4 above and para. 4.7.4 below.

relationship between two parties. When more than two parties are involved in the general average, the rule could have the result that the disbursement would not have a general average character in one relationship, but would give rise to apportionment in another relationship. It goes without saying that this would make the apportionment much more difficult at least.

4.7.3 Relationship between general average and mandatory liability rules

The mere qualification of disbursements as general average does not mean that contributions can indeed be obtained and/or that the actionable fault is disregarded. The discussion whether, and if so how, liability (provisions) influence(s) general average is merely postponed. What complicates matters is that liability and/or damage may well have been prevented by the general average act. For this reason, 'liability' from a strict point of view is an insufficient qualification. The better qualification appears to be 'actionable fault', i.e. a fault which would have resulted in liability of the party claiming a contribution for the damage caused by the incident or peril, which damage was prevented by the general average measures.[565] A party can be actionably at fault for the incident necessitating the general average measures against one or more other parties on the basis of conventions, national law and/or contractual provisions. Although in most cases the question will be whether the shipowner or carrier was actionably at fault or liable for the incident which necessitated the general average measures to be taken, a cargo interested party may have been just as well.

In practice, many contracts for the carriage of goods by sea are subject to a Hague (Visby) Rules type of liability regime.[566] In essence this regime provides that the carrier is obliged to exercise due diligence to provide a seaworthy vessel and that he has to care for the goods during his period of responsibility.[567] This liability regime may apply either as a result of the regime's direct applicability, but also by way of an incorporation in the applicable national law or as a result of contractual references.
Unlike the Hamburg Rules which in respect of general average expressly provide that contractual arrangements can be made between the parties regarding the adjustment, but that liability for general average contributions is to be determined pursuant to the rules of the Convention,[568] the Hague (Visby) Rules leave room for

565. Also Lowndes & Rudolf 2013, pp. 158-159.
566. The Hague Rules and the Hague Visby Rules contain in essence the same liability regime. The Hague Visby Rules are un updated version of the Hague Rules, which came into force with the Visby Protocol to the Hague Rules in 1968, and the SDR Protocol in 1979.
567. The liability regime is discussed in detail, inter alia, in Margetson 2008 (I); *Voyage Charters* 2014, pp. 1023-1146; Debattista in: Baatz 2014, pp. 178-208. See also Lowndes & Rudolf 2013, pp. 27-33 and Kruit 2004, pp. 49-54.
568. Art. 24 Hamburg Rules. An exception is made for Art. 20 Hamburg Rules regarding time bars (Pineus a.o. 1979). On the relationship between general average and the Hamburg Rules also Pinéus & Sandström 1978. A similar provision is included in s. 289 Norwegian Maritime Code. In the discussions on the Rotterdam Rules it initially was suggested to insert a similar provision on liability as in the Hamburg Rules. The provision, however, was deleted in the drafting process (Rotterdam Rules Report 2003, pp. 50-51; Rotterdam Rules Report 2008, p. 49; Van Hooydonk 2012, pp. 235-236). Art. 84 Rotterdam Rules now merely provides that arrangements can be made on the adjustment.

discussion. In respect of general average, the Hague (Visby) Rules merely stipulate that '*lawful provisions*' on general average are allowed.[569] However, they also and more generally, provide in Art. III-8 that clauses in *contracts of carriage* which intend to lessen the carrier's liability for loss or damage in another manner than provided for in the rules are null and void.[570] The actual significance of these provisions for general average purposes should probably not be overestimated. Arguably, in view of Art. III-8 Hague (Visby) Rules' wording, it can only have an impact on *contractual* general average provisions and not on *statutory* provisions. As such, the Hague (Visby) Rules may not give any guidance on the relationship with claims for general average contributions which arise as a matter of law. Moreover, it could be argued that in order to be able to apply Art. III-8 Hague (Visby) Rules at all, it will first of all have to be established that general average contributions can be regarded as '*loss or damage to, or in connection with goods*' in the provision's meaning. As a matter of Dutch and Norwegian law, for example, it is expressly provided in the Code that a contribution in general average in respect of goods is to be treated as a reduction of the property's value.[571] It is clarified in the Dutch Travaux préparatoires that a similar liability regime has to apply for loss of cargo or cargo damage and for measures taken to prevent such loss or damage.[572] However, it is not generally accepted that a general average contribution is to be regarded, whether or not by analogy, as '*loss or damage to the goods*'. The English Court, for example, has held in respect of the Hague Rules that they do not concern general average,[573] whereas the German Court of Appeal also had difficulties to accept that a recourse claim for general average contributions paid was to be regarded as cargo damage.[574]

The uncertainty regarding the relationship between general average and liability provisions not only arises when a liability regime is mandatorily applicable, but also when it merely has regulatory force.[575] In both situations the impact of Art. III-8 Hague (Visby) Rules or another rule which prevents limitations of liability, if any, has to be determined. The difference may be that in situations where the liability regime is not mandatorily applicable, contractual clauses which provide a certain order, for example, that a general average contribution has to be paid in

569. Art. V Hague (Visby) Rules: '*Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding average*'. The provision on general average was added to Art. V Hague Rules at the request of the English delegation in order to make it clear that the article did not prohibit provisions regarding general average. It was also indicated that failing this provision the Hague Rules would only contain one reference to general average, i.e. in the current article IV-6 H(V)R (Travaux préparatoires H(V)R, p. 641).

570. Art. III-8 Hague (Visby) Rules: '*Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.*' A provision to the same effect is codified in several national legislations as well. For example, s. 8:382(2)(a) Dutch Civil Code.

571. S. 8:389 Dutch Civil Code (*cf.* Dutch Supreme Court 11 June 1993, *NJ* 1995, 235 ('Quo Vadis')) respectively s. 289 Norwegian Maritime Code. The same applies in respect of a salvage remuneration.

572. Travaux préparatoires Book 8 Dutch Civil Code, p. 406.

573. See, for example, *Goulandris Bros Ltd v. B. Goldman & Sons Ltd* [1957] 2 Lloyd's Rep. 207 (at the time that the decision was rendered, the Hague Visby Rules did not exist yet). Nevertheless it has been argued that provisions which try to circumvent the liability regime by providing that general average contributions can be claimed in case of actionable fault would not be 'neutralised' by Art. III-8 Hague (Visby) Rules (Tsimplis & Shaw in: Baatz a.o. 2014, p. 248).

574. Court of Appeal of Düsseldorf 26 February 2014, I-18 U 27/12 ('Margreta'/'Sichem Anne').

575. That uncertainty is also pointed out in Lowndes & Rudolf 2013, p. 29.

all situations, regardless the cause of the general average incident and even if the incident was the result of an actionable fault,[576] may give helpful guidance. As a matter of contract interpretation, they may well be regarded to take precedence over a Hague (Visby) Rules liability regime which is incorporated by means of a general paramount clause only.[577] However, such clause may be found to be unacceptable when mandatory liability rules apply.[578] The validity of a contractual clause has to be determined on the basis of the circumstances of the specific case, including the relevant provisions' wording, the document in which the provision is included and the applicable regime. This concerns provisions on general average and liability in general.

The case which resulted in the decision of the Singapore Court of Appeal in *Sunlight Mercantile Pte Ltd and Another v. Ever Lucky Shipping Co Ltd*[579] may serve as an example. The question was whether the shipowners were actionably at fault for the incident which necessitated the general average due to their lack of due diligence to provide a seaworthy vessel. Interestingly, the case fell outside the scope of the Hague Visby Rules as it concerned deck carriage and the bill of lading had been claused accordingly. The Court held that the shipowner could not rely on the deck cargo clause as it had not complied with its seaworthiness obligations at common law, was actionably liable and could thus not claim a general average contribution.[580]

A clause that is commonly inserted in contracts of affreightment and deals with the influence of fault is the so-called '(New) Jason clause'.[581] At the end of the 19th century, it was held in American case law that the statutory exception clauses of the American Harter Act on carriage of goods had the result that the shipowner was not entitled to claim a general average contribution if the incident was due to his fault, even in situations where he was not liable for damage caused, for example,

576. For example, cl. 22 MSC bill of lading conditions. Similarly cl. 14 CMA CGM bill of lading conditions, which provides: '*In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, due to negligence or not, for which, or for the consequences of which, the Carrier is not responsible, by statute, contract or otherwise, the Merchant shall contribute with the Carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the Goods*.'

577. A general paramount clause is a clause which incorporates a liability regime, most notably that of the Hague (Visby) Rules in a contract of affreightment. See inter alia *Voyage Charters* 2014, pp. 995-997; Baatz in: Baatz a.o. 2014, pp. 125-126; Herber 2016, p. 319.

578. It was held, for example, by the Dutch Supreme Court in the 'Quo Vadis' that a clause which intends to bring in general average expenses caused as a result of breach of the carrier's obligation to exercise due diligence to provide a sea worthy vessel, is unacceptable. Dutch Supreme Court 11 June 1993, *NJ* 1995, 235 ('Quo Vadis'). This approach is supported by Bemm 1997, pp. 92-93 and Herber 2008, p. 409 (both regarding the position under the former German law). Also Singapore Court of Appeal in *Sunlight Mercantile Pte Ltd and Another v. Ever Lucky Shipping Co Ltd* [2004] 1 SLR 171.

579. *Sunlight Mercantile Pte Ltd and Another v. Ever Lucky Shipping Co Ltd.* [2004] 1 SLR 171.

580. Similarly the American 5th Circuit Court in *Louis Dreyfus Corp. v. 27,946 Long Tons of Corn,* 830 F.2d 1321, regarding the impact of a 'New Jason Clause'. It was held that the shipowner could not bring a claim for a general average contribution when the damage resulted from a failure to exercise due diligence. See also the decision of the Dutch District Court of Dordrecht 27 March 1985, *S&S* 1986, 88 ('Dordrecht 27') regarding the impact of a general exception clause.

581. For example, Congenbill 1994 (cl. 4); Evergreen b/l (cl. 27); CMA CGM b/l (cl. 14.1); MSC (cl. 22); APL b/l (cl. 24(i)(a)). The 'Jason clause' was amended to the 'New Jason clause' after the US COGSA 1936 was accepted. See also Schoenbaum 2011, p. 263.

because he was entitled to rely on an exclusion clause.[582] Shipowners contractually reversed this position by inserting clauses in their bills of lading, which as explained by Schoenbaum, intend *'to ensure that the vessel interests can recover general average even though there is fault as long as they are immune from liability under COGSA or any other statute'*.[583] Such clauses are generally accepted by US courts.[584]
More doubtful is whether provisions on the effect of the adjustment are also acceptable under an Hague (Visby) Rules liability regime. In general, provisions regarding the adjustment's effect or stipulations that a general average contribution is to be paid regardless of the cause of the incident necessitating the measures are more likely to be accepted when they are agreed after the general average incident took place, for example, in security forms.[585] Art. III-8 Hague (Visby) Rules by its wording is restricted to contracts of carriage, whereas on-demand security is an accepted, albeit not prescribed or generally applied, form of security.[586]

After the YAR 1994 had been accepted, IUMI tried to gain support for their suggestion to considerably amend the YAR.[587] One of their proposals related to the influence of fault. Research had shown that poor maintenance of the vessel would be one of the main causes for general average.[588] In order to address this, it was suggested to insert a provision in the YAR which precluded the right to a contribution in situations where the ISM code, the STCW Convention and/or rules of the vessel's classification society had been breached.[589] The proposal was not completely new. Several average adjusters had advocated the idea of excluding general average where the cause of the incident could be attributed to the vessel's unseaworthiness in the preceding 25 years.[590] None of these suggestions was accepted. In the preparations for the YAR 2016, it was not brought up by IUMI[591] nor was it discussed otherwise.[592]

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582. *The Irrawaddy* [1897] 82 Fed. 472; *The Strathdon* (1899) 94 Fed. 206. See also Lowndes & Rudolf 2013, p. 31. The position in the Netherlands under s. 700 Dutch Commercial Code of 1838 appears to have been the same as in the US (District Court of Rotterdam 24 June 1891, confirmed in The Hague Court of Appeal 21 March 1892, *W.* 6191; General Average Committee 26 January 1894, *M.v.H.* 1894, p. 180).
583. Schoenbaum 2011, p. 263. Also on the (New) Jason clause: Rudolf 1926, pp. 49-52; Lowndes & Rudolf 2013, pp. 31-32; Hudson & Harvey 2010, pp. 52-53; Kruit 2004, pp. 71-73.
584. The clause was accepted by the US Supreme Court in: *The Jason*, 225 U.S. 32 (1912). Also District Court of Rotterdam 31 March 1989, *S&S* 1990, 14 ('Agios Ioannis'). See, however, *The Kamsan Voyager* [2002] 2 Lloyd's Rep. 57 for the application under English law.
585. For example, the American case: *Rebora v. British & Foreign Marine Ins. Co* 258 N.Y. 379, 180 N.E. at 91.
586. See regarding on-demand security also para. 3.3.5.3 above.
587. Cornah 2004 (II); Magee 2000; Hudson 2000; Smeele 2005, p. 19. See also para. 3.2.2.2.2 (iii) above.
588. UNCTAD 1994, p. 24.
589. Magee 2000, p. 296.
590. Crump 1985, pp. 28-30; Hudson 1976 (II). The issue is also addressed by Taylor. He does not deem it appropriate to include the examination of fault in the general average process (Taylor 1996, p. 6). Another suggested solution was to install a 'review board' (Hudson 1976 (II), p. 420). It is respectfully submitted that the incorporation of an overall seaworthiness criterion may be an important first step, but it probably would not solve all issues. Seaworthiness is not a test which is universally applied (the Hamburg Rules, for example, contain a different liability regime), neither is seaworthiness given the exact same interpretation by national courts or in legal literature (see the overview of the various interpretations set out in Margetson 2008 (I), pp. 52-55).
591. IUMI Response 2013, p. 20 *cf.* p. 4.
592. CMI Report Dublin 2013, p. 10.

4.7.4 Varying 'procedural' approaches to an actionable fault

Whether a claim for a general average contribution can be brought successfully in spite of the claimant's actionable fault is approached differently in the various jurisdictions. The same applies regarding the question whether defences can be raised and, if so, when. The YAR do not prescribe a uniform approach regarding the way fault should be considered. The second part of Rule D YAR (1924-2016) is open to a number of different interpretations to be chosen by national legislators and courts.

i. No liability to contribute for innocent parties

One approach is that the party actionably at fault may have to bear all the damage and expenditures caused by the incident in full. The measures taken are qualified as general average,[593] but innocent parties may not be under any obligation to contribute.[594] When several parties are involved in the general average, it is doubtful in which relationship the relevant liability has to exist and what the position is if a fault is not regarded as actionable in all relationships arising from the general average. When on-demand security is provided, the fact that liability to contribute initially did not exist, may become irrelevant after all.[595]

ii. Pay first, sue later/counter claim

A second approach is that the existence of fault, if any, is completely disregarded in respect of the general average settlement and/or may give rise to a counter claim only.[596] Contributions have to be settled upon the adjuster's and/or creditor's request, provided that the adjuster's calculation and/or the requested amount of the contribution is not disputed. Only after the general average contribution has been paid in full or liability has been established, it is considered whether recourse can be taken for these amounts.[597] The underlying idea of this 'pay first, sue later' theory was that the factual common maritime adventure was turned into a legal community. The community provided the missing link between the parties, in particular in situations where there was no contractual relationship.[598] The appli-

593. This may be relevant in view of other obligations arising out of general average, like the obligation to appoint an adjuster (see also para. 4.3.2), if any, or in order to be able to claim a compensation under an insurance policy.
594. S. 351 Spanish Maritime Code: '*When one of the interested parties is liable for the danger that necessitated the general average acts, the damage and costs are to be paid by the liable party and innocent parties are not obliged to contribute*'.
595. See in respect of on-demand security para. 3.3.5 above.
596. That a counter or indemnity claim may be brought by innocent parties seems to apply, inter alia, under Russian, Japanese, Norwegian and Belgian law (s. 285(3) Russian Merchant Shipping Act; s. 788(2) Japanese Commercial Code; s. 289 Norwegian Maritime Code). See for the position under Belgian law Van Hooydonk 2012, p. 236.
597. This theory was defended inter alia by Molster 1856, p. 3; Van Empel 1938, p. 257 (albeit he recognised that it could only be accepted in purely national cases; p. 193); Hardenberg 1973, pp. 179-180; Cleton 1994, p. 282; Bokalli 1996.
598. In spite if the fact that there was no legal basis for this theory (as already set out by Van Empel 1938, pp. 97-98, 100), some Dutch Courts nevertheless appear to have supported it. See, for example, District Court of Rotterdam 5 December 1994, *S&S* 1995, 33 ('Delta Bulk II'). The general average regulation as set out in the French Code of transport is still considered to lie in the community (Montas 2015, p. 144).

cation of the 'pay first, sue later' approach may follow from the applicable national law,[599] but may also be applied by courts in their discretionary powers.[600] In addition, the approach may result from a contractual provision to this effect, for example, from on-demand security[601] or a provision in a contract of affreightment that the adjustment has a binding status.[602] Even though the application of this approach would obviously make the settlement of a general average much easier, it was expressly rejected in legal literature,[603] as well as during the preparatory discussions for the YAR 2016.[604] The approach might even be regarded as an unacceptable deviation from the mandatory applicable liability regime. The actual consequence of this approach would be that a carrier, who was clearly at fault for the incident which required measures to be taken would be entitled to a contribution in general average whereas he would have been liable for damage caused if the general average measures had not been taken. The fact that a recourse claim may be brought against him at a later point in time,[605] and sometimes even in the same set of proceedings,[606] may well be insufficient to allow such course of action to begin with.[607] Especially when it is uncertain whether a recourse claim can be brought successfully, if only from financial point of view. Whereas a party claiming

599. For example, s. L5133-5 French Code of transport (also Montas 2015, p. 144).
600. For example, Dutch District Court of Groningen 28 November 2012, *S&S* 2013, 44 ('Qujado'). The Court indicated that the 'pay first, sue later' system was the system intended by the Dutch legislator. Arguably this is not correct. The leading view in the Dutch case law is that defences can be raised against a claim for a contribution in general average and that there is no obligation to first settle the contribution and subsequently reclaim the same. District Court of Rotterdam 5 September 1997, *S&S* 1998, 2 ('Kvarner'); District Court of Rotterdam 10 June 1999, *S&S* 2000, 51 ('Condor'); Court of Appeal of The Hague 27 April 1999, *S&S* 2000, 130 ('Linquenda II'); District Court of Rotterdam 14 March 2007, *S&S* 2008, 72 ('Enigma'); Court of Appeal of The Hague 23 March 2010, *S&S* 2015, 113 ('Enigma'/Saarcoal').
The 'pay first, sue later' rule seems to be applied in s. 562 Slovenian Maritime Code, which provides that the Code's provisions on the shipowner's liability shall not interfere with the Code's provisions on general average.
601. On-demand security is discussed in para. 3.3.5.3 above.
602. See also para. 4.7.3 above.
603. Inter alia Loeff 1981, p. 270; Cleveringa 1961, p. 935; Molengraaff 1966, p. 1280; Janssen 1899, p. 131; Worst 1929, p. 28 et seq.; Crump 1985, p. 28 (albeit not wholeheartedly); Kruit 2004, p. 48. The ideas of the various Dutch 19th and 20th century legal scholars have been set out in some detail in Kruit 2004, pp. 36-38. Grotius was also unwilling to accept that a contribution was to be made in all situations where a general average situation arose. The shipowners were not entitled to a contribution when the danger had been caused by the master because the ship was overloaded or loaded improperly (Grotius 1631, Book 3, pp. 8, 6).
604. CMI Report Dublin 2013, p. 10. In the preparations for the YAR 2016, AMD initially had argued for inclusion of the 'pay first, such later' principle in the YAR (AMD Response 2013, p. 7).
605. This argument was used in order to defend the Dutch confirmation proceedings by the Court of Appeal of The Hague in the 'Maasdijk' (17 December 2013, ECLI:NL:GHDHA:2013:5264; *S&S* 2014, 55).
606. It was held by the Norwegian Court that, in a situation where the shipowner was liable for the incident necessitating the general average because the vessel was unseaworthy, cargo interested parties could raise a counter claim which was set off against the shipowner's claim for a contribution in general average. Norwegian Supreme Court ND 1993.163 NSC 'Faste Jarl'; Falkanger 2011, p. 501.
607. The difference between the 'pay first, sue later' approach and the approach in which a fault can be raised as a counter claim inter alia concerns the moment that fault may be brought forward. When the latter approach is applied, a claim can be raised in the same proceedings in which a request for payment of a contribution is made. Moreover, when various parties are interested in the general average, it may also impact on the actual division of the contribution. Innocent parties will be compensated by general average debtors under the 'pay first sue later', whereas they may have to claim the full amount of damage from the liable party under the latter system when the party at fault is collecting contributions on behalf of all general average creditors.

a general average contribution in most cases will have financial security for his claim in the form of an average bond and average guarantee,[608] a party with a recourse claim for a paid general average contribution may not have such security.[609] Moreover, difficulties could arise in respect of the basis of such claim, for example, when a law applies to the recourse claim which does not consider a general average contribution as a 'loss or damage to cargo'.[610] It may be uncertain on which basis the claim should then be brought. A claim might be brought on the basis of the contract of carriage or should possibly be based on the concept of unjust enrichment, which might be subject to a different conflict of law rule.[611]Alternatively, the claim could be brought on the basis of a specific provision of national law, if any. In order to prevent any discussion and to safeguard the recourse action, the German legislator has provided a legal claim right for such claim.[612]

iii. Defence

A third approach to deal with actionable fault of one of the parties to the common maritime adventure is the option which does not allow the party who actionably caused the incident which necessitated the general average measures to recover a compensation for damage caused by him, or at least not in full.[613] This approach, that the fault or liability can be raised by the innocent party as a defence to a claim for a contribution, is firmly established in the English case law. It has repeatedly been indicated that no one should be allowed to profit from his own actionable wrong and that circuity of action should be prevented.[614] The German Commercial Code also clearly provides that the person who is to blame for the danger cannot claim a contribution.[615] This approach has the consequence that general average creditors with a claim for contribution who cannot be blamed for the incident ('innocent creditors') are still entitled to claim a contribution due to them, if any,

608. See para. 2.3.4 and 3.3.5 above.
609. This was also recognized in the English case *The Jute Express* [1991] 2 Lloyd's Rep. 55. In some jurisdictions, a request can be made to the Court to obtain security for a potential recourse claim. See, for example, District Court of Rotterdam 4 April 2013, *S&S* 2013, 97 ('Maasdijk').
610. See para. 4.7.3 above.
611. See Chapter 6 below.
612. § 589(2) German Commercial Code *cf.* Gesetzesbegründung 2012, p. 126.
613. English law: inter alia *Schloss v. Heriot* (1863) 14 C.B. 59; *Goulandris Bros Ltd v. B. Goldman & Sons Ltd* [1957] 2 Lloyd's Rep. 207; *The Evje* [1974] 2 Lloyd's Rep. 57. Cargo interested parties who had been at fault, for example, because they had wrongfully shipped cargo in dangerous condition, are not entitled to claim a general average contribution either. *The Ettrick* (1881) 6 P.D. 127; *Pirie v. Middle Dock Co.* (1881) 44 L. T. 426. This approach also appears to have been the intention of Mr Schadee, the draftsman of the general average provisions currently set out in the Dutch Civil Code. In his explanatory comments to the provision, he indicated that in case the carrier was at fault, the general average contribution adjusted to be due to the carrier should not be paid (Travaux préparatoires Book 8 Dutch Civil Code, p. 616; also Kruit 2004, p. 41). Also District Court of Rotterdam 10 June 1999, *S&S* 2000, 51 ('Condor'). Similarly s. 793 Maritime Code of Slovenia. See also Frisian Court 20 December 1623, as discussed in f.nt. 99 above.
614. *Goulandris Bros Ltd v. B. Goldman & Sons Ltd* [1957] 2 Lloyd's Rep. 207; *Greenshields, Cowie and Co v. Stephens & Sons Ltd* [1908] A.C. 431; *Schmidt v. The Royal Mail Steamship Co*. (1876) 45 L.J.Q.B. 646; *Milburn & Co. v. Jamaica Fruit Importing and Trading Company of London* [1900] 2 Q.B. 540, cited with approval in *The Astraea* [1971] 2 Lloyd's Rep. 494. The same approach was taken by the Singapore Court of Appeal in *Sunlight Mercantile Pte Ltd and Another v. Ever Lucky Shipping Co Ltd* [2004] 1 SLR 171. See also Crump 1985, p. 20; Lowndes & Rudolf 2013 pp. 158-166; Hudson & Harvey 2010, pp. 50-52.
615. § 589(1) German Commercial Code. See also Herber 2016, p. 408-409.

from the other parties to the maritime adventure.[616] The parties who have made a contribution in general average to innocent creditors may subsequently have to take recourse against the liable party on the basis of their relationship with the party at fault.[617] When various parties are interested in one property, it is debatable whether a fault of one of these parties is attributed to all parties interested in the particular property, in that respect that it prevents a successful recovery and/or alternatively whether a defence that can be invoked by the party liable to contribute under the contract of carriage may also be relied upon by the person liable to contribute as a matter of law or vice versa. For example, when salvage assistance was rendered and port of refuge costs were incurred after a fire on board the vessel which spontaneously ignited in the cargo, these measures are qualified as general average under most legal systems. The same applies when during the salvage activities some of the cargo holds filled with cargo of the same party as the ignited cargo was placed under water to extinguish the fire. Questions may then arise whether the consignees of the cargo are liable for the fire and are precluded from claiming a contribution in general average.[618]

iv. Defence or counterclaim

When a general average contribution is claimed by a party whose actionable fault caused the incident, it may not always be clear whether such actionable fault may be raised by the party against whom this request for a contribution was made as a defence or whether the actionable fault could give rise to a counterclaim. In particularly not when the claim and the counterclaim/defence are discussed in the same set of legal proceedings.
The qualification of counterclaim or defence is relevant, inter alia, in respect of time bars that may be invoked, most notably by a carrier when a counterclaim is made against him under the contract of carriage, and the question whether a carrier can limit his liability to a certain amount. These issues may not play a role when fault is qualified as a defence,[619] but do become relevant when liability gives rise to a counterclaim only.

616. For example, the English case *Strang, Steel & Co v. A. Scott & Co* (1889) 14 App. Cas 601 as well as *The Carron Park* (1890) 15 P.D. 203: '*The claim for contribution as general average cannot be maintained where it arises out of any negligence for which the shipowner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered by it. The loss would not have fallen on the shipowner and the expenditures or sacrifice made by him is not made to avert loss from himself alone, but from the cargo owner.*' Also Crump 1985, p. 20.
617. § 589(2) German Commercial Code provides that the party who actionably caused the event is liable to reimburse these parties. The Code thus expressly provides for a right to claim compensation of the contribution paid. The impact of an existing contractual relationship, if any, is not clear.
618. For example, District Court of Rotterdam 6 August 2014, *S&S* 2015, 51; ECLI:NL:RBROT:2014:7079 ('UAL Antwerp'); discussed in Van Steenderen 2014.
619. Provisions that limit the liability of the person at fault do not play a role when fault can be raised as a defence as no recovery can be made in general average by the liable party to begin with. See also Lowndes & Rudolf 2013, p. 161. This may be different when a recourse claim is brought against a third party. For example, when a general average contribution was paid to a shipowner and subsequently recourse is taken under the bill of lading against the time charterer who was actionably at fault.

> The following example may clarify the difference. A vessel may have stranded as a result of the fact that the charts used for the voyage planning were outdated.[620] A shipowner who has paid the full amount of salvage remuneration to the salvor may subsequently like to claim a contribution from cargo interested parties. Assuming that the stranding is regarded to be caused by the vessel's unseaworthiness and hence by the shipowner's actionable fault, the cargo interested party may either invoke such actionable fault as a defence or as a counterclaim. In the first situation, the shipowner is not entitled to any contribution from the cargo interested party. As a result, the time bar of the HVR does not apply either. This is different in the latter situation when the actionable fault gives rise to a counterclaim only. The counterclaim will then have to be brought either on the basis of the contract of carriage, in tort or unjust enrichment. The party with the counterclaim may then be confronted with defences that can be raised by a carrier against any other cargo claim, including title to sue issues, time bars and package/kilo limitation of liability.[621] In practice, it may take some years before a general average adjustment is published and claims for contributions are made. If liability under the contract of carriage only gives a right to a counterclaim, the time bar for such claim may have been expired long before the general average contribution was claimed.[622]

Under several legal systems it may not always be clear whether liability of the party at fault should be raised as a defence or whether such liability is considered to give rise to a counterclaim against the party who was liable for the incident.[623] Varying positions seem to be applied by legislators, in the case law and by legal scholars, sometimes even within the same legal system.[624] The national courts also apply

620. See, for example, the facts underlying the decisions of the Dutch District Court of Noord-Nederland 19 December 2012, *S&S* 2013, 96 and 25 June 2014, ECLI:NL:RBNNE:2014:3145 ('Harns').
621. Also Kruit 2004, pp. 55-58.
622. For example, District Court of Rotterdam 10 June 1999, *S&S* 2000, 51 ('Condor').
623. Smeele 2005, p. 21, f.nt. 41.
624. For example, District Court of Rotterdam 2 April 2014, *S&S* 2015, 19 ('Rochester Castle'). It was merely held by the court that when the ship interested parties were actionable at fault for the incident necessitating the general average measures, this would bar the obligation to contribute for other parties. See also, for example, *The Olympic Galaxy* [2006] 2 Lloyd's Rep. 27, where the claim for a general average contribution was based on the average bond in the absence of a contract of carriage between the parties. It was argued that the law which applied to the average bond did not deal with the rights and wrongs of the parties and potential cross claims. In legal literature, no clear distinction appears to be made between a defence and a counterclaim either. For example, Kruit 2004, pp. 46-48; Loyens 2011, pp. 652-653; Hudson & Harvey 2010, p. 50.

the terms 'defence' and 'counterclaim' interchangeably, apparently both unintentionally[625] and on purpose in order to come to a fair result.[626]

Confusion may arise which regime is to be applied to determine whether a defence can be raised to the claim for a general average contribution or whether there merely is a counterclaim. It is doubtful that the laws of the contract of carriage are automatically applicable to this question when the claim for a contribution is based on the contract of carriage, as held by the English House of Lords in *The Evje*.[627] This case law, however, dates back from the period before the Rome I and II Regulations were introduced. Under these regulations, this question may be regarded as a procedural issue which is subject to the lex fori.[628]

4.7.5 Evaluation

There are several different ways in which the presence of an actionable fault influences general average cases. The lack of a uniform approach towards the influence of actionable fault is caused, at least to some extent, by the fact that it is often uncertain whether mandatory and/or contractual liability provisions actually deal with general average and prevent that a claim is brought successfully. Difficulties most notably arise where the Hague (Visby) Rules or a similar regime regulate the carrier's liability.
How actionable fault plays a role in a specific matter depends on the applicable liability regime, the legal basis of and the applicable law to the claim for a general average contribution, the presence and, if so, the contents of contractual provisions and the procedural possibilities provided in the relevant jurisdiction to invoke an actionable fault. None of the above described procedural approaches establishes a smooth interaction between general average and the liability regime in general. Tension exists between the principle of a fault free general average concept and the principle that a party who actionably caused damage should not be able to take

625. In the 'Sequana', the European Court of Justice did not seem to appreciate the distinction in the question whether a defence or counter claim could be raised (ECJ 19 May 1998, C-351/96, *NJ* 2000, 155 ('Sequana'); see for the factual background para. 4.5.3 above). The Court indicated that the claim for a contribution should be distinguished from the claim for a declaration that the carrier is liable for the incident which necessitated the measures if these were brought by different parties. The European Court of Justice, arguably incorrectly, held that the parties were not the same because the underwriters did not exercise their insured's rights. However, when the parties would be considered to be the same (because the underwriters are exercising their insured's rights to claim a general average contribution), the claims may well concern the same subject. It goes without saying that from a practical and cost efficiency perspective, it would be useful to have these claims considered by the same court in the same set of proceedings.

626. Various Dutch courts have held that defences can be raised to a claim for a general average contribution. A carrier is not allowed to rely on a time bar in defence of such counterclaim. (Inter alia District Court of Rotterdam 10 June 1999, *S&S* 2000, 51 ('Condor').) However, at the same time courts make a connection with an underlying contractual relationship between the parties and seem hesitant to prevent liable parties from relying on (contractual and/or statutory) limitations of liability, which would imply that rather than a defence, a counter claim is made. See, for example, District Court of Rotterdam 14 March 2007, *S&S* 2008, 72 ('Enigma'); Court of Appeal of The Hague 23 March 2010, *S&S* 2015, 113 ('Enigma'/Saarcoal).

627. *The Evje* [1974] 2 Lloyd's Rep. 57. Also *Goulandris Bros Ltd v. B. Goldman & Sons Ltd*. [1957] 2 Lloyd's Rep. 207 in which case it was held by the English High Court that: '*To ascertain what the remedies are you must go to the general law covering the contract* (…)'.

628. Art. 1(3) Rome I respectively Rome II. The Rome I and II Regulations and their application to general average obligations are further discussed in Chapter 6 below.

recourse for expenditures incurred or sacrifices made to minimise damage resulting therefrom. Considering the influence of fault in every relationship may be extremely time consuming and inefficient, in particular when many parties are involved. At the same time, practicalities and economic reasons seem insufficient justifications to ignore the specifics of the particular relationship, even temporarily, and to support an application of the 'pay first, sue later' theory. In particular not in view of the fact that the adjustment is generally prepared by the adjuster instructed by one of the parties.[629]

The impact of an actionable fault may not be limited to the relationship between two parties. When several parties are involved in the maritime adventure, various national regimes may be applicable in respect of different obligations arising out of a general average incident. In such situations, the different approaches regarding the impact of an actionable fault may create serious difficulties. When the presence of actionable fault prevents that specific costs are qualified as general average and as a result cannot be claimed by innocent general average creditors because innocent parties are under no liability to pay any contribution at all, the total amount of contributory values may change. When various national legal regimes are involved, this would make the adjustment of a general average case (nearly) impossible as the amounts influence each other. Moreover, varying degrees of fault may be applied when different courts are asked to consider claims for a contribution.[630] Further complications arise when it is taken into account that various parties may be interested in a single property and that their relationships with the general average creditor may vary as well. A requested contribution is generally regarded as a single payment obligation, but in fact may consist of several separate payment obligations as against various parties which can be brought on different legal bases. Questions may then also arise whether fault of one of the parties interested in a particular property has to be attributed to other parties with a claim in respect of the same property. This is not generally regulated in national codifications.[631]

The above analysis shows that it would be helpful if a universal approach is adopted in respect or the presence of an actionable fault in general average situations. The approaches whereby the influence of fault is either disregarded completely or an actionable fault prevents any recovery full stop can both be criticised for lack of nuance. In this respect, the better option appears to be to provide the party who would have been liable for the damage which is prevented by the general average act with a right to claim a contribution and to allow the debtor to bring a counterclaim, which can be set off against the claim for a general average contribution. This solution would, inter alia, prevent the outcome that a shipowner who successfully mitigated damage would not be allowed to rely on a limitation of liability which he probably would have been able to invoke if he would not have taken any general average measures. At the same time, it would prevent that a general average

629. See on the adjuster's position para. 4.3 above.
630. Also Berlingieri in: Berlingieri a.o. 1994, p. 96.
631. The German legislator expressly indicates in the Travaux préparatoires that fault of third parties can be attributed to the 'Beteiligten', i.e. the parties interested in the contributory property for general average purposes (Gesetzesbegründung 2012, p. 126). However, it has not included a provision to this effect in the Code.

contributor is unable to take recourse successfully anymore after the contribution has been paid. The potential problem that the recourse claim may have lapsed when the general average claim is brought a considerable period of time after the incident arguably should be solved; for example, by allowing the recourse claim even when the claim would already have expired, whether as a matter of equity or otherwise.[632]

4.8 Time bars

4.8.1 Various types, durations and starting moments

Most contemporary national legal systems restrict the period for taking action to obtain or safeguard payment of a general average contribution in due course to a certain period of time after the general average event took place.[633] In maritime law, short time bar periods are nothing extraordinary. The problem for general average is that several different time bars may exist side by side in different relationships for varying but also for the same actions. In the absence of a uniform rule, time bars with varying durations and starting points may apply to the appointment of an adjuster; to the obligation to provide the adjuster with documentation;[634] to the production of an average adjustment; to the request to the court to have an adjustment confirmed (if such right exists under the national law); and to the start of legal proceedings to claim payment of a general average contribution.

Many national regimes stipulate that a one-year time bar applies to bring a claim for a general average contribution.[635] The prescribed starting points, however, are all but identical. Time may start to count at the end of the year in which the claim has arisen;[636] at the date of the average adjustment's publication;[637] on the date of

632. This solution appears to have been chosen by the District Court of Rotterdam in the 'Condor' (District Court of Rotterdam 10 June 1999, *S&S* 2000, 51 ('Condor')). The addition of an extra period to take recourse would not be a complete novelty. Compare, for example, the additional period granted in Art. III-6bis HVR.

633. For example, s. 8:1830-1832 Dutch Civil Code; § 605-607 German Commercial Code; s. 8.50 draft Belgian Maritime Code; s. 501-502 Norwegian Maritime Code; s. 481 Japanese Commercial Code; s. 481 Italian Code of Navigation; s. 407 Argentine Navigation Act. The specific time bars for claims arising out of general average appear to be of relatively recent date. In history, time bars of the civil law probably had to be applied under most regulations. Van der Keessel 1884, Thes. 795, p. 291 respectively Olivier 1839, p. 223. Different: Van der Zurck 1758, p. 138 (with reference to the Ordonnance of 20 January 1570). He indicates that actions regarding average in Europe in the 18th century had to be instituted within one and a half year after the vessel had arrived in port.

634. Inter alia Rule E YAR 1994-2016.

635. The Dutch, German, Italian, Norwegian and Slovenian statutes all provide that the time bar of a claim for a contribution in general average is one year (s. 8:1832(1) Dutch Civil Code; § 605 under 3 German Commercial Code; s. 481 Italian Code of Navigation; s. 501 under 10 Norwegian Maritime Code; s. 823 Slovenian Maritime Code). As a matter of Dutch law, the requests to apportion claims in general average and to appoint an average adjuster have to be made within one year from the date following the day of the end of the common maritime adventure as well (s. 8:1830(1) and 8:1830(2) Dutch Civil Code *cf.* District Court of Amsterdam 26 February 1964, *S&S* 1964, 48 ('Nooit Gedacht')).

636. § 607(4) German Commercial Code. This provision is based on the general rule set out in § 903(1) German Commercial Code (old). (Gesetzesbegründung 2012, p. 134.)

637. S. 501 under 10 Norwegian Maritime Code; s. 798 Japanese Commercial Code and s. 263 Chinese Maritime Code. Also s. 8:1832(2) Dutch Civil Code, but in case the court has been requested to confirm the adjustment, the time bar starts to run on the day that such confirmation by the court

the average adjuster's appointment;[638] on the date that the average adjustment became enforceable;[639] or at the end of the voyage, which may itself include different moments of time.[640]

Time bars longer than one year may apply as a matter of law as well, for example two years from the date[641] or end of the incident,[642] five years from the date of the common maritime adventure's termination[643] or six years from the date that the cause of action accrued.[644]

It may not always be clear which time bar is applicable. The time bar provisions of national law in principle relate to claims for a contribution based on the applicable national law regime only. When a request is made for a confirmation of the adjustment or when a claim for a contribution is based on a contract of carriage or on a security form, deviating time bars may apply.[645] Time bars of contractual claims may have been specifically contractually agreed but they may also derive from the law which governs the contract of carriage.[646] Whether a general contractual time bar that does not specifically relate to general average is supposed to also govern general average claims will depend inter alia on the wording of the provision and on the basis of the claim, i.e. whether it is considered to lie in the particular contract or in the national law.[647]

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has taken place. It seems to follow that the claim can be extended by requesting the court to confirm the average adjustment.

638. S. 823 Slovenian Maritime Code.

639. For example, s. 21:8 Finnish Maritime Code which provides that, unless appealed, the adjustment will become enforceable thirty days after publication. See also para. 4.4.4.1.

640. S. 481 Italian Code of Navigation. In s. 8:1830(2) Dutch Civil Code 'end of the voyage' means 'end of the common maritime adventure', which according to the Travaux préparatoires (Book 8 Dutch Civil Code, p. 1206) is the moment that all cargo has been delivered. The time bar of the Argentine Navigation Act (s. 407) starts to run at the place of discharge where the adventure ended. Turkey has opted for the vessel's arrival at destination, or from the end of the adventure when the adventure ends before the vessel's arrival (s. 1285 Turkish Maritime Code).

641. S. 218 Vietnamese Maritime Code.

642. S. 8.50 draft Belgian Maritime Code.

643. S. L5133-17 French Code of transport; s. 119 Maritime Code of Luxembourg.

644. England has never had and still does not have specific statutory time bars regarding general average. This means that the general rules of the Limitation Act 1980 will be applicable, at least to contractual general average claims. Pursuant to s. 5 of this act, the time bar to such claim is six years from the date that the cause of action accrues. This will either be the date on which the sacrifices have been made or the expenditures have been incurred (*Schothorst and Schuitema v. Franz Dauter GmbH* [1973] 2 Lloyd's Rep. 91 *cf. Chandris v. Argo Insurance Co Ltd.* [1963] 2 Lloyd's Rep. 65;), or alternatively, when a claim is based on the general average security, on the date that the general average security was issued (Lowndes & Rudolf 2013, pp. 555-556, 558; Hudson & Harvey 2010, p. 269).

645. As a matter of Dutch law, a request can be made to the Dutch Court to confirm an adjustment within six years after the average adjustment or a summary thereof has been provided to the parties interested in the general average (s. 8:1831 Dutch Civil Code). The six-year period intentionally corresponds to the time bar pursuant to common law (Travaux préparatoires Book 8 Dutch Civil Code, p. 1206). A separate time bar may also apply in respect of cash deposits (in some detail: Pinéus 1973, pp. 628-629).

646. See, for example, District Court of Rotterdam 14 May 2008, *NIPR* 2008, 185; ECLI:NL:RBROT:2008:BD4110 ('Devo').

647. It was held by the English Court in *The Astraea* [1971] 2 Lloyd's Rep. 494 that a claim for a general average contribution in that case was a claim under the charter party to which the contractual time bar clause applied. The position was probably nuanced in the subsequent case *The Evje* [1974] 2 Lloyd's Rep. 57, in which it was held by some of the Lords that the contractual arbitration clause did not apply to general average claims. See also para. 3.3.3 above.

Further confusion may arise when a claim is based on an average bond.[648] When the average bond can be regarded to create a direct payment obligation between two parties, it seems reasonable to apply the general contractual time bar of the applicable law to the average bond to such claim. However, when the average bond merely confirms an existing payment obligation, either under the applicable national law or a contract of carriage, and does not create a separate obligation, arguably the time bar of the underlying claim may remain applicable.[649] When the average bond is provided by a party other than the originally liable parties, an average bond may not affect the existing relationships at all. The same may be true when the claim is brought on the basis of the contract of carriage, when the average bond does not in any way expressly extend or interrupt applicable time bars.

In 2004, a time bar was newly introduced in the YAR.[650] Rule XXIII YAR 2004, which was mentioned in the YAR 2016, provides that any right to a general average contribution shall be extinguished within one year after the date that the average adjustment was issued. In addition, a general overall cap is included which aims to prevent that claims are brought after six years after the termination of the common maritime adventure took place. It is expressly provided that the rule is subject to applicable mandatory law and is not applicable to claims between parties to the general average and their underwriters.[651] During the preparation of the Rotterdam Rules it was discussed whether this time bar of the YAR 2004 should be taken over in the Rotterdam Rules. A draft to this effect had even been prepared, but was deleted in the drafting process.[652] In view of the fact that the YAR 2004 are hardly ever applied in practice,[653] questions of concurrence between Rule XXIII YAR and time bar provisions of national law do not yet appear to have arisen. The YAR 2016, which have been prepared in close cooperation between representatives of both ship and cargo interested parties, may well be given a wider application. When they are also inserted in national codifications, interesting questions of concurrence may arise between other time bars of national law and the incorporated Rule XXIII YAR 2016 when this is not specifically provided for.

When the applicable time bar has expired, provided guarantees and excess cash deposits which have not yet been distributed have to be returned,[654] as no claim for a contribution may be brought anymore. A distinction should be made, however,

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648. In respect of Italian law, Mordiglia & Manica 2011, p. 198. See, however, s. 407 Argentine Navigation Act, in which it is clarified that when an average bond has been issued, a time bar of 4 years from the date of signing same applies (rather than the general time bar of one year).
649. It will then become a matter of contract interpretation by the applicable tribunal pursuant to the applicable law. That a time bar under the contract of carriage could not be relied upon in defence to a claim under a bond was held by the English House of Lords in *The Evje* [1974] 2 Lloyd's Rep. 57. In this case, the undertaking to contribute in general average was issued by the cargo owner and the claim was founded upon this undertaking.
650. The inclusion of the time bar was advocated by IUMI as underwriters prefer to close their cases as soon as possible (IUMI Response 2013, pp. 37-38; Hudson & Harvey 2010, p. 271; Browne 2004, p. 16).
651. Rule XXIII YAR 2004-2016.
652. The rule was to be taken over in Art. 88(2) draft Rotterdam Rules, but was deleted from the draft in Vienna in 2006. Rotterdam Rules report 2006, pp. 56-57.
653. See para. 3.2.2.2.2 above.
654. Pinéus 1973, pp. 628-629.

between the action to bring a claim for a general average contribution on the one hand and to raise a defence against a claim for a contribution on the other. Case law shows that defences against a claim for a general average contribution may still be raised even after the mandatory and/or contractually applicable time bars have lapsed.[655] There is more doubt whether a counterclaim may still be brought to recover general average contributions paid, after expiry of the time bar to raise such claim.[656]

4.8.2 Interruption

Time bars can generally be interrupted by starting legal proceedings.[657] In respect of general average, different proceedings can be started, depending on the applicable jurisdiction. Legal proceedings may concern a claim for a general average contribution against a specific party or parties, but may also involve a request to have an adjustment confirmed[658] or, alternatively, an appeal to prevent that an adjustment gets a binding status by raising objections against the adjustment.[659] In addition, time bars may be interrupted by agreeing time extensions between general average contributors and creditors, both of statutory and contractually applicable time bars.[660] Most legal systems allow contractually agreed extensions of time, but not all do.[661] Some national legislations provide for specific instruments to interrupt a time bar, for example, by sending a registered claim letter.[662]

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655. District Court of Rotterdam 10 June 1999, *S&S* 2000, 51 ('Condor'); *Goulandris Bros Ltd v. B. Goldman & Sons Ltd* [1957] 2 Lloyd's Rep. 207. It was held in the latter decision that Art. III-6 Hague Rules does not include loss or damage that arises by payment of a general average contribution. Art. 24(2) Hamburg Rules expressly excludes the time bar set our in Art. 20 from the determination whether a defence can be raised or counter claim can be brought. See also para. 4.7.4 and 4.7.5 above.
656. This will depend on the applicable national law. As a matter of Dutch law, an extra period of 3 months might apply for recovery actions (s. 8:1712(2); s. 8:1720 Dutch Civil Code). Also Manca 1957, p. 227.
657. For example, s. 3:316 Dutch Civil Code.
658. See para. 4.4.4.2 above. According to Ramming, such proceedings interrupt time as a matter of German law (by analogy with § 204 German Civil Code). (Ramming 2016, p. 91.)
659. Some national laws provide that an adjustment becomes binding as a matter of law after a certain period of time, unless successfully appealed. See also para. 4.4.2 and 4.4.4.1 above.
660. That the time bar may contractually be extended or shortened as a matter of English law was held in *The Astraea* [1971] 2 Lloyd's Rep. 494. As a matter of general Dutch civil law, a distinction has to be made between the situation where a claim becomes time barred and where a claim lapses. The expiration of a time bar can be interrupted by sending an official claim letter where a brief description of the matter is given and all rights are reserved. In addition, it is possible to agree time extensions (Asser/Hartkamp 6-II 2009, p. 431 et seq). Statutory time bars which provide that claims expire are considered to be rules of mandatory law, which cannot be contracted out of (Asser/Hartkamp & Sieburgh 6-II 2013, p. 383). It follows that their duration cannot be extended by prior agreement, unless the code specifically allows contractual extensions. In order to protect time, legal proceedings will thus have to be started. When the YAR 2004 are contractually applicable only, they will not have a mandatory status. However, if the YAR 2004 or 2016 were to be incorporated in the Dutch Civil Code, it may specifically have to be provided that time extensions can be agreed. It could be argued that the time bar provision would not be incorporated in Dutch law anyway as it does not deal with the adjustment, whereas probably only those provisions are incorporated. See para. 4.4.1.1 above.
661. In Brazil, the People's Republic of China and Poland, for example, contractual time extensions may not be given legal effect, or at least not under all circumstances.
662. For example, s. 3:317 Dutch Civil Code.

In general average cases where many parties are involved, it may first of all be difficult to identify all the relevant parties interested in the contributory properties, and secondly, to obtain time extensions from all these parties.[663] From a practical perspective, it would be helpful if the time bar could be interrupted in an easy, uniform manner against all parties involved at once, for example by sending notice to the adjuster. Such a solution is included, for example, in the Norwegian Maritime Code. It provides in respect of adjustments that have to be drawn up in Norway, that a time bar can be interrupted by sending notice to the instructed average adjuster. When no adjuster has been instructed yet, the notice can be sent to any of the Norwegian adjusters [664] Another option to interrupt the time bar against all parties at once may be found in adjustment confirmation proceedings.[665] However, not all countries provide for such proceedings and even in the jurisdictions which do provide for such proceedings, a court may not be willing and/or able to accept jurisdiction as against all parties,[666] even apart from other difficulties caused by such proceedings.[667]
A provision is often included in average bonds to the effect that the prescription of time bars is interrupted until the average adjustment has been published. Such provisions will only bind the parties to the average bond. It is doubtful whether it can be regarded to interrupt time bars between other parties. Moreover, after the adjustment has been published it may take a considerable period of time to obtain payment of contributions.

4.8.3 Evaluation

The time bar provisions regarding general average may vary per statutory and contractual regime. The duration of the time bar and the starting moment may differ, just as the way in which a time bar may be interrupted. It is respectfully submitted that a time limit of one year is rather short in the context of general average, where many parties are involved and it may be difficult to obtain payment. In particular, it may be difficult to safeguard the time bar when various parties are involved. A cargo interested party with a claim against other cargo interested parties potentially would have to safeguard its rights against many parties.
Varying time bars may apply in different relationships, both concerning claims between parties interested in different properties as well as between a party interested in a property as against several creditors. More specifically, when a contribution is due in respect of a specific property, a claim may be based on national law, a contract of affreightment and/or a security form. Different time bars may apply to these potential claims which may be brought against various parties. Moreover, different time bars may also apply to the relationships between two cargo interested

663. This will especially be the case for cargo interested parties, who may not have any relationship with other contractual parties. The shipowner and average adjuster may have information and documentation from most parties. When cargo is not taken receipt of, they may not have information on the interested parties either.
664. S. 502 Norwegian Maritime Code.
665. The adjustment confirmation proceedings are discussed in para. 4.4.4.2 above.
666. See, for example, the decision of the District Court of Rotterdam in the 'Coral' where the court was unwilling to confirm the adjustment because it did not have jurisdiction as against all parties. District Court of Rotterdam 4 June 2003, *S&S* 2004, 32 ('Coral').
667. See para. 4.4.4.2 above.

parties as opposed to the relationship between a ship and a cargo interested party. It goes without saying that in situations which involve many parties, it may be difficult to ascertain the correct time bars, not even to mention to safeguard all of them. Nevertheless, and in view of IUMI's support for inclusion of a time bar in the YAR, cargo underwriters seem to prefer clarity on the position rather than prolonged possibilities to take recourse.[668]

4.9 Evaluation

The above analysis of the various aspects which are important to effectuate a right to claim a general average contribution reveals that considerable differences exist between the various national laws and contractual provisions in respect of the regulation of basically all relevant aspects to effectuate a claim for a general average contribution.[669] The analysis of these various aspects also illustrates that none of the regimes gives an adequate, sufficient regulation of these aspects. Different legal regimes cover various aspects and leave other issues unregulated.[670] National codifications may also be outdated, for example, because they incorporate a YAR version which is no longer applied in practice,[671] or because they do not provide for bunkers and/or other properties to be included in the apportionment.[672] Moreover, none of the regimes appears to duly regulate the relationship between the various sources on which a claim for a contribution can be made and the relationship between the different parties interested in a single property inter se. Such a regulation is duly missed in those situations where the provisions set out in the various legal sources in respect of which a claim for a contribution regarding a single property may be based, differ. This concerns both the situation in which a single party is obliged to pay a contribution for a particular property on varying

668. This makes sense from the perspective that the financial year has to be closed preferably sooner rather than later. However, from a practical perspective, a one year time bar to have an adjustment prepared seems quite ambitious, especially when many parties are involved and have to provide documentation and/or when salvage aspects have to be settled first.
669. The national legal regimes inter alia apply distinct general average definitions; they incorporate varying rules on the adjustment, including varying contributing properties and different versions of the YAR; they have different rules on the appointment and position of the adjuster; they regard different parties as the party who is allowed to bring a claim and/or is obliged to contribute; they give varying remedies to safeguard a claim; they deal with the influence of fault in distinct manners; and they contain deviating time bars. In addition, the applicable national laws differ in respect of currency issues (which currency is applied; what is the result of currency differences, etc.) and the obligations of the parties to the adventure (whether there is an obligation to appoint an adjuster, whether the master/shipowner has to exercise a lien of cargo on behalf of other parties to the common maritime adventure etc.?). That the general average provisions of various national law regimes differ is also recognised in *Voyage Charters* 2014, pp. 593-594 and follows from the replies to the CMI Questionnaire sent out in preparation of the YAR 2016, set out in CMI Report Dublin 2013.
670. The French Code of transport, for example, provides that the amount of the contribution is limited to the contributory property's value (s. L5133-15(3)) but does not attribute personal liability for the contribution. In the Dutch Civil Code, this is completely the opposite. In personam liability to contribute is provided for (s. 8:612 Dutch Civil Code) but it does not stipulate a maximum amount for the contribution. The general average regulation of the Maritime Code of Luxembourg (s. 119) consists of an incorporation of the YAR only.
671. Argentina and Finland, for example, still include respectively the YAR 1950 and the YAR 1974 in their national legal regimes (s. 403 Argentine Navigation Act respectively s. 17:1 Finnish Maritime Code).
672. For example, s. 284 Russian Maritime Shipping Act; s. L5133-7 French Code of transport.

grounds (liabilities may exist as a matter of law and on the basis of a contract of affreightment), but also when different parties are liable regarding the same property on the basis of distinct regimes (the party liable as a matter of law may differ from the party who assumed liability to contribute in a security form). A security form will not automatically override or annul obligations based on other sources.[673] In many cases, a security form will expressly refer to the contract of carriage and/or applicable law. Questions of interaction may well arise as the legal bases' interaction may not be clearly regulated. For example, when liability can be based on a contract of carriage which incorporates the YAR 1994, does such a contract also bind other parties liable for a contribution in respect of the same property when such liability is based on national law?[674] Can defences against a claim for a contribution in general average, which can be raised against one of the debtors, also be raised against other parties interested in the property claiming a contribution? If a time bar applies to a claim between a shipowner and a consignee under a bill of lading, can the shipowner circumvent this time bar defence by claiming a contribution from the cargo owner as a matter of national law? Can a party who settled a general average contribution take recourse against other parties interested in the same property who were liable to pay against the party claiming a contribution or against other parties interested in the same property? Does payment by a debtor on the basis of one of these sources, like the average bond, release the debtors in respect of the same property on the basis of the other sources (the bill of lading and at national law) and/or can a creditor whose damage has not yet been settled in full claim additional reimbursement from another party (for example, because in that relationship maximum contributory value applies and in the relationship with another party it does not), and if so for which amount?[675] Further complications arise when claims are subject to different laws and may be brought in varying jurisdictions with their own procedural rules and instruments.

In practice, the provisions of the various sources are applied interchangeably, often in an inconsistent manner. This happens both in the relationship between parties interested in different properties involved in the maritime adventure and in relationships regarding a single object. The obligations arising out of a general average incident in respect of the properties involved in the common maritime adventure are interrelated. The amounts of the contributions due are interdependent in that respect that apportionment essentially takes place on the basis of a pro rata division of disbursements over the properties involved in the adventure. In many cases, no clear distinction is made between the properties involved in the maritime adventure and the parties interested in the same. The general perception still is that liability to contribute in general average concerns the amount due in respect of a particular

673. This should apply in the absence of a specifically indicated order. In practice, however, the average bonds are often given much weight. It is, for example, generally determined on the basis of these forms which are the relevant parties for general average purposes.

674. When the YAR are applicable by contractual reference only, they can only bind the parties to the particular contract (see para. 3.2.2 above). If the applicable law provides for a general average creditor or debtor that is not a party to the contract in which the particular YAR version was agreed, the person liable as a matter of law may not be bound to the YAR version and the calculation based thereon, or at least not directly.

675. The indicated potential problems serve as illustration. The overview is not considered to be exhaustive.

property ascertained in an objective manner. A net figure is established per property, which either has to be paid or is to be received. The property, and hence the contribution due in respect of the property, is regarded as an objective, almost an absolute notion. Claims for a general average contribution, however, are considered to have an in personam nature.[676] In the absence of an overall applicable adjustment regime, the contribution per property is calculated on the basis of a regime which applies in a particular relationship between a specifically singled out party interested in the property and another party interested in other property. As a result, the contribution may vary per party interested in the same property, depending on the applicable provisions. It follows that the calculated amounts set out in the adjustment may only be relevant in some specific relationships and consequently may be rather subjective.

It goes without saying that the above uncertainties create legal difficulties.[677] In view of the fact that the contents and application of the various regimes differ, some clarity may be created if one national legal system could be singled out that would regulate the various aspects necessary to effectuate a right to claim.[678] In order to be able to determine the applicable law, first of all, the appropriate conflict of law regime and the applicable conflict of law rules have to be determined. These questions are considered in Chapters 5 and 6 below. Whereas the focus in Chapter 5 is on the specific conflict of law rules for general average, Chapter 6 discusses whether general, overriding European conflict of law rules are to be applied to general average, and, if so, how.
Admittedly clarity on the applicable law will not solve all the above described and other problems.[679] However, it may at least give some important guidance, in particular in situations where few parties are involved. The real solution for the various problems appears to lie in further substantive uniformity, more specifically in the universal adoption of a general average convention.[680]

676. Even the Scandinavian regimes that do not provide for statutory in personam liability are based on the assumption that in personam liability is created and provide means to establish the same.
677. Practical issues should arise as well, but often seem to be handled pragmatically, without considering the applicable regime.
678. In view of these divergences, the 'non-selection rule' whereby the court does not make a choice for the applicable law as the various potentially applicable substantive laws lead to the same result (see on this rule in detail Jessurun d'Oliveira 1971) does not seem to be of much relevance. Only when it has been established that the potentially applicable laws do regulate certain aspects in the same manner, this rule may be of value.
679. The relationship between general average and other concepts of maritime law can also raise interesting questions. General average questions are closely related to and dependent on other provisions of maritime law. This was already observed at the end of the 19th century by Rahusen (1890, p. 6) and has not changed since. They are linked, for example, with provisions on limitation of liability, as illustrated by the decision of the German Court of Appeal of Düsseldorf 26 February 2014, I-18 U 27/12 ('Margreta'/'Sichem Anne'), but also with salvage (for example, the interpretation of the concept of danger).
680. See also para. 6.7 and Chapter 7 below.

Chapter 5

Absence of a universal conflict of law rule for general average

5.1 Background

The interaction of the currently applied general average regimes may not be well regulated,[1] the diversity between the various regulations seems to have been much worse in the 19th century. Such a wide variety of general average regulations was applied in practice that it was generally agreed that a uniform regulation was indispensable.[2] This was even in spite of the fact that hardly any internationally uniform regulations existed at all at the time. The YAR are the direct result of one of the 19th century attempts to create a uniform general average regulation.[3] Substantive uniformity, however, was not the only manner by which an attempt was made to improve this impractical situation. Efforts were also undertaken to create uniform provisions of private international law.[4] During the international conferences of 1885 in Antwerp and 1888 in Brussels, conflict of law rules on various maritime law subjects, including general average were discussed and set out in a draft convention.[5] Discussions on the law applicable to general average were not limited to Europe and/or the Western Hemisphere either. A private international law rule on general average was accepted and codified in the Montevideo Convention of 1889.[6] In practice, these sets of rules were less successful than the YAR's predecessors. The draft Convention established in 1888 in Brussels never materialised,[7] whereas the Montevideo Convention's material scope was limited to some South-American countries.[8]

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1. See also para. 3.3.5 above.
2. See also para. 2.2.1 above.
3. The YAR are standard conditions which regulate the adjustment of general average. They are referred to in most contracts for carriage of goods by sea. The various aspects of the YAR and their background are discussed in Chapters 2-4 above.
4. The 'Institut de Droit International', for example, not only aimed to harmonise the various laws by developing substantive provisions, but also focused on rules of private international law (Korthals Altes 1891, p. 2). The results of the 1885 Antwerp Conference and the text of the 1888 Draft Convention are also set out in Ulrich 1906, pp. 234-236 respectively pp. 236-241.
5. Report 1885 Conference, pp. 419-421; Report 1888 Conference, pp. 407-408. Also Korthals Altes 1891, pp. 4-8. See also para. 2.2.2 above.
6. Art. 21 of the 1889 Montevideo Convention on international commercial law. This Convention was considered to be the first real South American convention on private international law. See for a background of the Montevideo convention and its contents inter alia Irizarry y Puente 1943 and Schulz a.o. 2005.
7. Van Hooydonk 2011, p. 187. According to Ulrich, Scandinavian countries would have used the draft Convention as a model (Ulrich 1906, p. 241).
8. Irizarry y Puente 1943.

5.2 Uncodified universal private international law rule on general average?

5.2.1 Alleged universal private international law rule

One would expect that these 19th century attempts to establish a private international law rule on general average would have been followed up in later years. Especially as the laws of the various States on various aspects differed, whereas the harmonisation of private international law developed exponentially. Many national and international conflict of law rules were created,[9] but, surprisingly, hardly any in the field of general average.[10] In the 20th century, conflict of law rules for general average were no longer (much) debated.[11] The success of the YAR seems to have created the admittedly incorrect impression that it would not matter which national law was to be applied, because the same substantive rules applied anyway.[12] This argument was used, for example, by the Dutch legislator to defend its decision not to include a conflict of law rule on general average in the Dutch conflict of law legislation.[13] The fact that it was suggested during the 1885 Conference in Antwerp that rather than a conflict of law rule to ascertain the applicable substantive law, a choice for the YAR could be made, also speaks volumes.[14] In addition, the common

9. Until its revision in 1924, the Dutch Commercial Code of 1838 only contained one provision on the applicable law to contracts for the carriage of goods by sea (s. 498 Dutch Commercial Code 1838; Van Slooten 1936, p. 15). After the revision, more rules were inserted but there was no general overall system (yet). By the end of the 20th century, several statutes on varying legal concepts had been created, like the the Statute of 18 March 1993 codifying some provisions of private international law in respect of maritime law, inland waterways law and air law. These statutes were replaced on 1 May 2012 when Book 10 Dutch Civil Code was introduced.
10. In Europe, the conflict rule included in the 1888 draft convention appears to be rather exceptional. Some nation states created national conflict of law rules, or even bilateral agreements (for example the consular convention between Spain and the Netherlands of 18 November 1871, *Stb*. 1873, No 30; see also para. 5.2.2. below), but this does not appear to have been general practice.
11. The most in depth studies into the applicable law to general average appear to have been made by Korthals Altes in 1891 (pp. 111-122), Ulrich in 1903 (pp. 7-8) Darmon in 1908, by Von Laun in 1953 and Rabel/Bernstein in 1964. The conflict of law rule included in the Montevideo Convention of 1940, the 1889 Convention's successor, may be regarded as an exception. See Irizarry y Puente 1943, p. 98.
12. The underlying idea behind the first substantive general average rules was that they would be taken over in all national legislations and would thereby create international uniformity (Rudolf 1926, p. 9). Even though this has not happened, the YAR have created some international uniformity because of the incorporation in contracts of affreightment and marine insurance policies. As set out in more detail in para. 3.2.2 above, the YAR do not deal with all issues that arise out of a general average act. Moreover, they will not apply in all cases and/or relationships arising out of a general average event. For this reason the YAR cannot be regarded to have uniformly regulated the general average concept.
13. Some provisions of private international law in respect of maritime matters were inserted in the Dutch law by the Statute of 18 March 1993 codifying some provisions of private international law in respect of the maritime law, the inland waterways law and the air law (in Dutch: 'Wet van 18 maart 1993, houdende enige bepalingen van internationaal privaatrecht met betrekking tot het zeerecht, het binnenvaartrecht en het luchtrecht'). The law applicable to general average was not regulated in this code. It was considered in the travaux préparatoires to the Statute that there did not appear to be a need for such rule as in practice there would be hardly any problems of private international law (Explanatory Memorandum, proceedings of the House of Representatives, 1988-1989, 21 054, no. 3, p. 3). The same reasoning was applied with the introduction of Book 10 Dutch Civil Code. Also Prisse 1995, p. 57 and Loyens 2011, p. 651. The latter, admittedly incorrectly, indicates that the YAR would prevent problems of private international law.
14. Report of 1885 Conference, p. 123.

perception in Europe and the US appears to have been, and still appears to be,[15] that there was universal consensus on an uncodified conflict of law rule for general average and therefore no necessity for a codified rule. The generally accepted view was that the adjustment should be drawn up at the place of the vessel's final destination pursuant to local rules.[16] Illustrative is the decision of the English Court in *Simonds v. White* where it was held: '*There are, however, many variations in the laws and usages of different nations as to the losses that are considered to fall within this principle. But in one point all agree; namely, the place at which the average shall be adjusted, which is the place of the ship's destination or delivery of her cargo*'.[17]

There are several reasons why the adjustment traditionally took place at the end of the voyage. To begin with, no other damage could occur once the voyage had been completed. The statement was thus a final statement. Furthermore, the damage would at that moment only just have been suffered so evidence would still be available.[18] Moreover, the property's value would be best known at this place, whereas the shipowner would only be able to enforce payment of the contribution due there.[19] Another practical reason was that in earlier times, the person who was to pay the contribution was generally present at the port of discharge.[20] Nevertheless, the adjustment could take place somewhere else as well if the circumstances or the parties to the maritime adventure so demanded.[21]

The laws of the place where the adjustment was drawn up were generally applied both to the adjustment and to the subsequent settlement of the claim.[22] This is

15. Arnould 2013, p. 1381; Hudson & Harvey 2010, p. 7.
16. Inter alia Lowndes 1844, p. 8; Rahusen 1890, p. 35; Korthals Altes 1891, p. 118; Hudson & Harvey 2010, p. 7; Rabel/Bernstein 1964, p. 389 (in f.nt. 74 an overview is given of national regimes that would have incorporated this private international law principle). The English case law: *Simonds v. White* (1824) 2 B & C 805; *Dalgleish v. Davidson* 5 D&R 6. Also: Darmon 1908, p. 44; Ulrich 1903, p. 7, 120; Lowndes/Hart/Rudolf 1912, p. 290; s. 722 Dutch Commercial Code *cf.* 1374 Dutch Civil Code old. It is even indicated in Wigmore a.o. (1918, p. 435) that the question of which law applies to general average would not come up when the ship and cargo were insured. Regarding the relationship between underwriters and their assureds see inter alia the English case *Power v. Whitmore* (1815) 4 M & S 141; Von Savigny (Guthrie) 1869, p. 216 and Wharton 1872, p. 367. That the adjustment has to be drawn up at the place of discharge is still provided in s. 455 Maltese Commercial Code.
17. *Simonds v. White* (1824) 2. B. & C. 805. Also *Mavro v. Ocean Marine Ins. Co.* (1874) L. R. 1 Q.B. 115; *Whitecross Wire Co v. Savill* (1882) 8 Q.B.D. 653; *Atwood v. Sellar* (1880) 10 App. Cas. 414. Park 1809, p. 178; Lowndes 1844, p. 7; Parsons 1868, p. 360; Benecke 1824, p. 325. It is indicated in Rabel/Bernstein (1964, p. 391-392) that this was also the position under German law. Also s. 722 cf. 711 Dutch Commercial Code 1838. Dover indicates that this would be the 'cardinal principle governing the making up of a statement of general average' (Dover 1922, p. 80). The principle was also laid down in Resolution IX of the Glasgow Resolutions, in Rule X of the York Rules and in Rule X YAR 1877 and 1890, and is set out in Rule G of the YAR 1924 and subsequent versions. Also noteworthy is Ulrich's overview of countries with rules where the adjustment is to be drawn up. There appears to have been a strong preference for the place of discharge and the place of the end of the voyage (Ulrich 1906, p. 278).
18. Molster 1856, p. 102.
19. Lowndes 1844, p. 7.
20. Holtius 1861, p. 307.
21. In Charles V's Ordinance of 1551 (s. 28), it is indicated, for example, that if someone gets hurt or dies in a fight with pirates, the damage of this person including wages and as the case may be funeral costs, shall be paid as general average. It is added that it should be settled at the first place where the vessel comes within the jurisdiction.
22. Koster/Dubbink 1962, p. 67; Worst 1929, p. 3; Lipman 1839, p. 282. Also the English case law: *Simonds v. White* (1824) 2 B & C 805: '*The shipper (…) must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made*.'; *The Copenhagen* (1799), 1 Chr. Rob.

clearly described in the Canadian case *Moran v. Taylor*: *'for it is obvious that the captain, the agent of all, could only claim average by the law of the place of discharge, and if that did not bind all, it would lead to great confusion'*.[23]
The use of this reportedly universally applied 'conflict of law rule' was defended inter alia with the argument that all obligations arising out of the voyage should be subject to the same law. It was also argued that the laws of the vessel's place of discharge would apply to the contract of affreightment and that it would therefore make sense to apply the same law to other obligations between the parties.[24] In addition, the court of the place where the cargo was discharged would have jurisdiction on the merits and should apply its own laws.[25] Furthermore, it was argued that the law applicable to general average would relate to property rather than the parties involved in the property. To the property (law) aspects, the lex rei sitae was to be applied, i.e. the place where the cargo was to be discharged, and this law should therefore also govern the general average.[26] Practical arguments were also used to support the application of the law of the vessel's place of destination. The local adjusters would be well-versed in the local practices and laws and would be able to best apply these rules, rather than other regulations.[27]

5.2.2 **Criticism**

However, a closer look reveals that the application of the law of the vessel's place of final destination to a general average situation was less universally accepted or at least less generally supported, than indicated in the case law and legal literature referred to above.[28]
First of all, to some extent, parties had the possibility to make specific contractual arrangements where the adjustment was to be drawn up and which rules applied.[29]

289; *Galaxy Special Maritime Enterprise v. Prima Ceylon Ltd.* [2006] 2 Lloyd's Rep. 27; Wharton 1872, p. 367; Lowndes & Rudolf 2013, p. 582; Phillimore 1861, p. 594; Darmon 1908, p. 49-50; US case: *Loring v. Neptune Ins. Co*, 20 Pick. (Mass.) 411. The countries included in Ulrich's overview also apply the law of the place where the adjustment is prepared to the adjustment. (Ulrich 1906, p. 278.) This is still explicitly set out in s. 274 of the Chinese Maritime Code. See, however, the English case *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115.

23. *Moran v. Taylor* 1884 Carswell NB 18, 24 N.B.R. 39, with reference to the English cases *Power v. Whitmore* (1815) 4 M & S 141; *Simonds v. White* (1824) 2 B & C 805; *Dalgleish v. Davidson* 5 D&R 6.
24. Darmon 1908, p. 52. The general perception was that parties would voluntarily submit all problems arisen during the voyage to the law of the place of destination (Darmon 1908, p. 50; Korthals Altes 1891, p. 113). This conflict of law rule is no longer applied in all circumstances and/or cases. The place of discharge provides for applicability of its laws to the contract of carriage in absence of a valid choice of law clause, and the carrier's habitual place of residence is not situated in the country of the place of receipt, delivery or the consignor's habitual place of registry and the factual place of discharge was also the agreed place of discharge (Art. 3 *cf.* 5 Rome I).
25. HLR 1909, p. 612; Darmon 1908, p. 50.
26. Darmon 1908, p. 51, with reference to the decision of the French Supreme Court of 16 February 1841 (S. 41, 1, 177).
27. Report 1885 Conference, p. 122; Darmon 1908, p. 52. This was also pointed out by Abbot J. in the English case *Simonds v. White* (1824) 2 B & C 805. Sadikov also points out that the place of the vessel's destination and or the cargo discharge is closely connected with the 'settlement and distribution of general average' (Sadikov 1986, p. 240).
28. Darmon (1908, pp. 52-54) does not find the arguments which supported usage of the laws of the place of discharge to the adjustment and settlement of general average convincing and, apparently, neither did the other authors who supported the rule that the law of the flag must be applicable to general average. This is further discussed below.
29. Rabel/Bernstein 1964, p. 390; s. 722 Dutch Commercial Code of 1838 *cf.* 1374 Dutch Civil Code (old); Rahusen 1890 p. 4. Also: Dowdall 1895, p. 40; Dover 1922, p. 80. However, such choices did not

This was expressly provided for, for example, in Rule XVIII of the YAR 1890, which cryptically stated: '*Except as provided in the foregoing rules the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules.*'[30]

Secondly, exceptions were made in codes and case law for situations where the common maritime adventure was terminated before the vessel reached the place of final destination. If the common maritime adventure was ended at an intermediate port where the vessel called in distress, the adjustment was generally prepared at that place because the vessel and (some of the) cargo parted there.[31] As a matter of Dutch law, the rule that the adjustment was to take place at the vessel's destination was not applied either when the maritime adventure started or the vessel stranded in the Netherlands. In that case the adjustment was to be prepared at the place of the vessel's departure.[32] In English case law it was held that the place of departure would also be the proper place for the adjustment in case of a general average incident on a round voyage.[33]

Thirdly, and possibly most importantly, the prevailing opinion of legal scholars, rather than practitioners active in the maritime field like adjusters, appears at the end of the 19th century to have been that rather than the laws of the place of the

always have the desired effect. As Darmon points out, the French Supreme Court did not allow a clause for the adjustment to be settled in London where the vessel's final destination was a French port. Darmon refers to a decision of the French Court of Rouen (20 March 1876, Recueil de jurisprudence du Havre, 78, 2, 117) in which it would have been held that a charter party clause providing that the adjustment was to be drawn up in London, could not be invoked against cargo interested parties that were not a party to this charter party (Darmon 1908, p. 49).

30. Which law this would be and how it was to be determined is not specified. Rahusen indicates that this rule in his view would be completely unnecessary as it goes without saying that failing contractual deviations the code would obviously remain in force (Rahusen 1890, p. 4, 35). The rule was not repeated in subsequent YAR versions.

31. S. 725 Dutch Commercial Code of 1838 required that the adjustment was drawn up in the intermediate port if the voyage ended there or goods were sold at that place. It was held in *Fletcher v. Alexander* that if a voyage was abandoned at an intermediate port, the adjustment was to be drawn up at that place, taking into account the values at the place and time that the voyage was abandoned. *Fletcher v. Alexander* (1868), L.R., 3 C.P. 375. The position was confirmed in *Mavro v. Ocean Marine Insurance Co.* (1874) L.R. 9 C.P. 595; L.R. 10 C.P. 414. Whether the voyage was abandoned or not was a question of fact. However, consenting to terminate a voyage did not automatically mean that one also agreed to having the adjustment prepared at that place (*Hill v. Wilson* [1879] 4 C.P.D. 329; also Dowdall 1895, p. 40; Parsons 1868, p. 361). Benecke points out that the adjustment could only be made at an intermediate port if all parties agreed to this place of adjustment as there would not be any necessity to have it drawn up at an intermediate port (Benecke 1824, p. 326). This is arguably incorrect, in particular when there were several places of final destination. According to Stevens, it should be avoided that the adjustment was drawn up at an intermediate port (Stevens 1822, p. 53).

32. S. 722 Dutch Commercial Code of 1838. The provision looks like a codification of existing practice. Benecke indicates that the adjustments would sometimes be made in the place of departure to save expenses. The parties would agree that the cargo's contribution would be based on the invoice value and the ship as valued in the policies. In his view, these adjustments were against the law (Benecke 1824, p. 306).

33. *Williams v. London Assurance* (1813) 1 M&S 318 (referred to by Dowdall 1895, p. 40). Benecke also recommended that the adjustment was drawn up at the place of loading when the vessel was to return to this place, or when the jettison took place near the place of departure. In the latter situation, the jettisoned goods could be replaced. (Benecke 1824, p. 326 resp. 288-289.) According to Lowndes, all parties would have to agree to having the adjustment prepared at the port of loading (Lowndes 1844, p. 8).

vessel's destination, the laws of the vessel's flag should regulate the adjustment and the subsequent settlement of the general average.[34] It was argued that the carrier had the main interest in the general average and preferred the application of the law of the vessel's flag.[35] It was also emphasised that a change in the place of discharge during the voyage, either as a change of instructions, an incident or otherwise, could result in the application of a law which was completely unforeseeable and hence undesirable. The law of the vessel's flag would create certainty.[36] A rule to the effect that general average was regulated by the law of the vessel's flag was incorporated in several international regulations, including the Consular Convention concluded between Spain and the Netherlands of 18 November 1871,[37] the Montevideo Convention of 1889 and the Bustamante Code of 1928.[38] During the 1885 International Conference in Antwerp, the committee suggested that the law of the vessel's flag should govern the general average.[39] During the plenary sessions, the proposal was not accepted after objections, most notably from average adjusters.[40] It was argued that the introduction of the law of the vessel's flag as connecting criterion would lead to chaos as it would be contrary to the well-established maritime practice that the adjustment was drawn up at the place of destination.[41] The committee's proposal was rejected and it was agreed that the law of the vessel's place of destination should be applied.[42] In the follow up congress in Brussels in 1888, a draft private international law treaty on maritime aspects was accepted.[43] In respect of general average it was provided after all that it should be subjected to the laws of the place of the vessel's final destination, albeit not with general approval.[44]

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34. Rabel/Bernstein 1964, p. 39; Darmon 1908, pp. 52-54; Korthals Altes 1891, pp. 22-23; Ulrich 1903, p. 7; Jitta 1919, p. 148. The conflict of law rule that the law of the vessel's flag should be applied to general average was explicitly rejected by the English Court in *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115.
35. Darmon 1908, p. 52.
36. Report 1885 Conference, pp. 124-125. Darmon 1908, p. 53.
37. *Stb*. 1873, No 30; Korthals Altes 1891, p. 122.
38. Art. 21 of the 1889 Montevideo Convention (Rabel/Bernstein 1964, p. 390 f.nt. 76) resp. s. 288 Bustamante Code of 1928 (Rabel/Bernstein 1964, p. 390, f.nt. 76; Sadikov 1986, p. 240). The Bustamante Code, or as it was first named 'the Pan-American Code of Private International Law', is a treaty which was intended to regulate various private international law issues, including international civil law, international commercial law (including maritime issues), international criminal law and international law of procedure in the Americas. It was described by Taft as a '*landmark in unification efforts*' (cited in Gaillard 1986, p. 241). The Bustamante Code was in force inter alia between Brazil, Costa Rica, Cuba, Guatemala, Panama and Peru. See on the Code in more detail inter alia Tuininga 2009, pp. 435-436; Lorenzen 1930; Garro 1992, pp. 590-592.
39. Report 1885 Conference, pp. 119-120.
40. Report 1885 Conference p. 126 *cf.* 120. Also Korthals Altes 1891, p. 119.
41. Report 1885 Conference pp. 120-122.
42. The rule was adopted that '*Le règlement des avaries se fait d'après la loi du port ou le chargement se dêlivre*.' Report 1885 Conference, p. 126.
43. This draft treaty is set out in Report 1888 Conference, pp. 407-408 and has been taken over in Korthals Altes 1891, pp. 4-6.
44. Art. 3 Projet de convention internationale du conflit des lois maritimes (Korthals Altes 1891, p. 6) respectively Art. 9 draft text on general average (Ulrich 1906, p. 241): '*Le règlement des avaries se fait d'après la loi du port de reste*', i.e. 'port de la destination définitive du navire' or, in English, the place of the vessel's final destination (definition Damien 2010, p. 404; author's translation). This was a clear exception to the agreed general conflict of law rules for maritime matters, which provided that the law of the vessel's flag should govern. (Art. 1-2 and 4 Projet de convention internationale du conflit des lois maritimes; Korthals Altes 1891, pp. 4-6.) The rule was established in spite of Spain's lobby for the law of the vessel's flag. (Korthals Altes 1891, p. 120.)

It can also be derived from the fact that sometimes varying laws were to be applied, depending on the specifics of the issue at stake, that the law of the place of discharge was not applicable in all situations.[45] The most extensive conflict of law rules on general average, included in the Treaty on International Commercial Navigation Law signed at Montevideo in 1940,[46] for example, provided in respect of general average:

> '*Art. 15: The law corresponding to the nationality of the vessel determines the character of the average.*
> *(…)*
> *Art. 17: General average is governed by the law in force within the State in whose port its settlement and distribution is made.*
> *All matters relative to the conditions and formalities of the act of general average are excepted, and remain subject to the law of the nationality of the vessel.*
> *Art. 18: The settlement and distribution of the general average shall be made in the port of destination of the vessel, or, if the vessel fails to reach that destination, in the port where the discharge is made*.'[47]

5.2.3 Applicable law derived from adjustment

It follows that it is doubtful that there actually was a universally applied uncodified conflict of law rule for the place of the vessel's discharge. However, in spite of the discussions regarding the law applicable to the adjustment, it seems to have been commonly accepted that the applicable law to the settlement of a general average situation was derived from the adjustment.[48] This would have created certainty as it would have been clear to all parties involved which law was to be applied.[49] It would also facilitate the enforcement of an adjustment. In legal literature it was argued that it was unfair if merchants or the parties interested in the ship would have to sue all general average contributors pursuant to their respective laws, taking into account varying customs.[50] For this reason, a certain 'comitas iuris gentium', a mutual accommodation of the trading nations, would have applied. Pursuant to this principle, the rules and practices of the country where the adjustment was drawn up would have been followed.[51]

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45. Ulrich indicates that by the beginning of the 20th century, different laws applied depending on the particular aspect involved. The law of the flag state would have determined where the adjustment was to be drawn up. However, when the ship would arrive at the place of destination, all laws would provide that the adjustment was to be published at this place. The law of the place where the adjustment was prepared would have been applicable to the question which damage could be included in the apportionment and which parties were to contribute, whereas the law applicable to the contract of carriage would apply to questions arising out of the contract of carriage (Ulrich 1903, pp. 7-8). This 'conflict of law rule', however, does not appear to have been universally applied.
46. This treaty was the successor of the 1888-1889 Montevideo treaty. Irizarry y Puente indicates that the treaties '*have defined, for most of Latin America, at least, the origin and direction of private international law*' (Irizarry y Puente 1943, p, 98).
47. Irizarry y Puente 1943, p. 112.
48. For example, Art. 17 *cf.* 18 Montevideo Convention 1940; the Canadian case *Moran v. Taylor* 1884 Carswell NB 18, 24 N.B.R. 39, with reference to *Power v. Whitmore* (1815) 4 M & S 141; *Simonds v. White* (1824) 2 B & C 805; *Dalgleish v. Davidson* 5 D&R 6.
49. Worst 1929, p. 3.
50. Lipman 1839, p. 282.
51. Lipman 1839, p. 282.

The application of the 'comitas iuris gentium' rule to general average is easily explained as both share the notion of 'practical feasibility'.[52] The comity doctrine, developed by the Dutch jurists Voet and Huber, was not restricted to general average cases. At the beginning of the 19th century and even in the first part of the 20th century, the rule was applied as general private international law rule in several countries at the European continent and in the American case law.[53] The principle was defined by the Supreme Court of America in *Hilton v. Guyot*, 159 U.S. 113 (1895): '*Comity in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or other persons who are under the protection of its laws*.'
In respect of general average, the comity principle was codified in s. 711 of the Dutch Commercial Code of 1838, which provided that in situations where the damage was to be apportioned abroad, the laws and practices of that place were to be applied.[54] It was added in s. 724 of Dutch Commercial Code 1838 that a foreign adjustment was to be made by the authorised institute abroad. The Dutch Supreme Court clarified that this rule also applied in case the foreign authority had applied foreign law.[55] The decision may have been based on the assumption that the principle of general average in essence would be the same everywhere,[56] whereas regarding the application of the principle, nothing would prevent the application of foreign law.[57]

The comity principle was already strongly opposed at the end of the 19th century[58] and now, it seems to have lost most of its relevance.[59] The applicable law to the adjustment is no longer directly relevant for the enforcement of a right or title to a general average contribution. To the questions of applicable law and the enforcement distinct rules of private international law apply. The laws of the place where the adjustment is drawn up are no longer automatically applicable to the obligations arising out of the general average act.[60] In the Netherlands, this was confirmed by the District Court of Rotterdam in its decision of 14 May 2008 in the 'Devo'.[61] The Court considered that a clause stipulating where and pursuant to which law and

52. The practical basis of the comity doctrine is described by Getman-Pavlova 2013.
53. Koster/Dubbink 1962, pp. 37-40 resp. 65-66; Jitta 1919, p. 10.
54. The rule has been qualified as 'independent rule of private international law'. It was argued in legal literature that the rule should not be applied in a more general manner (Koster/Dubbink 1962, p. 261 rep. 818). The rule was also confirmed in English case law: *Simonds v. White* (1824) 2 B & C 805; *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115.
55. Dutch Supreme Court 22 June 1928, *NJ* 1928, 1486 ('Thalatta').
56. It is indicated in Rabel/Bernstein (1964, p. 392) that the Dutch court construed the provision '*as the consecration of the universal custom*'.
57. Koster/Dubbink 1962, p. 262.
58. Inter alia by Asser and Mancini (Nabermann 1972, p. 55).
59. The rules set out in s. 711 and 724 of the Dutch Commercial Code were not taken over in Book 8 Dutch Civil Code which was introduced in 1991, nor were they included in the statutory private international law instruments.
60. Both Rule G YAR and many national legislations provide that the contributory values are to be determined at the end of the voyage. For example, § 591 German Commercial Code; s. L5133-8 French Code of transport (in respect of the vessel and freight); s. 304 Russian Merchant Shipping Act; s. 796 *cf.* 789 under 6 Slovenian Maritime Code.
61. District Court of Rotterdam 14 May 2008, *NIPR* 2008, 185; ECLI:NL:RBROT:2008:BD4110 ('Devo').

practices the adjustment was to be drawn up, could not be regarded as a valid choice for the applicable law to obligations arising out of general average.[62] English authors also make a distinction between the law which applies to the adjustment and the law which is applied to determine whether a contribution has to be paid or whether defences can be raised to a request for a contribution.[63]

Moreover, the place of the vessel's discharge is no longer the main point of reference to determine the applicable law, neither to the contract of affreightment, nor to general average.[64] As most contracts of affreightment contain choice of law clauses, the laws of the place of delivery will hardly ever apply on the basis of the specific conflict of law rule. In addition, courts of the place of delivery will not automatically have jurisdiction to deal with the matter, at least not pursuant to the European legal instruments. The Brussels I instruments' main rule is that a person domiciled in a Member State is to be sued in the courts of the Member State where he is domiciled, regardless of the person's nationality.[65] The place of delivery may only give additional jurisdiction when this is the place where an obligation related to a contract has to be performed.[66] Parties are free, however, to choose their preferred forum.[67] Furthermore, under most regimes the focus seems to have transferred from the property involved in the maritime adventure to the parties interested in the property.[68] As a result, the lex rei sitae rule has lost (some of its) relevance for general average purposes.

It follows that the place where the voyage ended and/or the adjustment is drawn up does not automatically determine the applicable law to general average or necessarily regulates the values of loss and contribution.[69] However, at the same time, these places have not lost all relevance. Under some national laws, the place

62. The court eventually applied the applicable law to the contract of carriage. See also para. 6.5.3.2 below.
63. *Voyage Charters* 2014, p. 594; Lowndes & Rudolf 2013, pp. 566-567, 582-583. As indicated by Macdonald, when an adjustment is prepared in London, English law is often applied. (Macdonald 2001.)
64. In the European Union, the laws of the place of delivery only apply to the contract of affreightment in the absence of a valid choice of law and when neither the place of receipt nor the place of delivery is situated in the country where the carrier has its habitual place of residence. (Art. 5(1) *cf.* 3 Rome I.) The place of destination did not determine the applicable law in the Rome Convention or as a matter of Dutch private international law either. In fact, the Dutch Supreme Court ruled in 1971 that failing a choice of law, the contract of carriage was subject to the laws of the place of loading. Dutch Supreme Court 19 February 1971, S&S 1971, 28 ('Katsedijk').
65. Art. 2 Brussels Convention; Art. 2 Brussels I Regulation; Art. 4 Brussels I Recast; ECJ 10 June 2004, *C*-168/02, [2004] *ECR* I-6009, para. 12 (*Kronhofer*).
66. Art. 2 *cf.* 7(1) Brussels I Recast. The special jurisdiction provisions of Art. 7 and 8 Brussels I Recast grant a claimant the possibility at his option to bring proceedings against a party domiciled in a Member State in the court specified in these articles or in the court of the defendant's domicile. ECJ 9 July2009, C-204/08, *S&S* 2009, 119 (Rehder/Air Baltic).
67. Art. 23 Brussels I Regulation; Art. 25 Brussels I Recast. When a choice of forum agreement in the sense of Art. 25 Brussels I Recast has been made, the jurisdiction of the chosen forum is exclusive.
68. See also para. 4.5 above.
69. It is explicitly provided in the first paragraph of Rule G YAR 1974-2016 that the place where the adjustment is drawn up does not regulate the values of loss and contribution, which are to be determined at the place when and where the adventure ends. Rule G YAR does not determine the applicable law. This is regarded as an omission by the authors of Lowndes & Rudolf 2013. They deem it problematic that it would have to be determined in each and every case where the adventure ended (Lowndes & Rudolf 2013, pp. 197, 200).

where the voyage ended may still create jurisdiction.[70] Moreover, the laws of these places can still apply to general average or specific aspects thereof, if there is a specific conflict of law rule to this effect.[71]

5.3 Legal basis of conflict of law rule

The subject of private international law was still underdeveloped at the end of the 19th and first half of the 20th century but this changed completely during the second half of the 20th century. Nowadays, freewheeling is no longer allowed. Just like the claim for a general average contribution must have a basis in the law,[72] the choice for the applicable substantive general average provisions must be legally justified. The applicable law has to follow from a conflict of law rule included in the laws of the applicable forum.

An examination of various legal systems shows that the currently codified conflict of law rules on general average vary. The Italian Code of Navigation, for example, provides that the law of the vessel's flag is applicable to general average contributions.[73] Panama also applies the law of the place where the vessel is registered.[74] Russia has chosen to apply the law of the State where the vessel terminated her voyage to regulate the relationships arising out of general average, provided that parties have not agreed otherwise, or parties do not all belong to the same State, in which latter case the law of that common State shall apply.[75] A similar provision is included in the Slovenian Maritime Code, with the difference that it stipulates that when all parties involved are Slovenian, Slovenian law will apply.[76] Vietnam on the other hand has opted for applicability of the laws of the place where the vessel calls immediately after the general average incident to legal relationships relating to general average.[77]

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70. For example, s. 33 Chinese Code of Civil Procedure, which provides that territorial jurisdiction is given to the court of the place where the adjustment is drawn up. Also s. 163-164 Belgian Maritime Code.
71. See, for example, the conflict of law rules included in the maritime codes of the People's Republic of China and the Russian Federation (s. 274 Chinese Maritime Code resp. s. 419 Merchant Shipping Code of the Russian Federation). See also para. 5.3 below.
72. See para. 3.2.1 above.
73. S. 11 Italian Code of Navigation. According to Manca this rule is mandatorily applicable because it is not indicated that parties are allowed to agree otherwise, which is indicated in some other statutory conflict of law rules like s. 9 and 10 Italian Code of Navigation (Manca 1958, p. 219).
74. S. 221 Panamanian Maritime Commercial Code.
75. S. 419(1) Russian Merchant Shipping Act. The determination of values is to take place at the termination of the vessel's voyage, unless agreed otherwise (s. 304(1) Russian Merchant Shipping Act). See in general on the maritime conflict of law rules of the Russian Federation: Koslov 2010.
76. S. 971 Maritime Code of Slovenia: '*If it is impossible in the event of a general average to apply the law the parties have chosen to the entire contract or a relationship arising therefrom, or if the parties have not explicitly indicated which law should apply and their intentions as to the application of a particular law cannot be ascertained from the circumstances of the case, the law of the port of unloading of the last part of the cargo that was on board the ship at the time of the general average shall apply. If all the parties to a general average are citizens of the Republic of Slovenia or Slovenian legal entities, Slovenian law shall apply to the instances referred to in the preceding paragraph*.' Similarly s. 9 Polish Maritime Code. In view of the fact that several parties may be interested in the properties involved in the maritime adventure and the relevant party varies under the national laws, these conflict rules seem difficult to apply.
77. S. 3(2) Vietnamese Maritime Code.

The opinion that the applicable law to the contract of carriage also is to govern the general average more recently also received support in case law[78] and legal literature.[79] In addition, many contracts of affreightment contain clauses which provide where and pursuant to which rules the adjustment is to be drawn up.[80] A particular law may have been chosen to govern the general average. The question is what the effect is of a choice for the applicable general average regulation.[81] Most legal systems accept that the applicability of the YAR can be agreed, just as other provisions regarding the adjustment.[82] The more difficult question is whether a choice can also be made for the regime applicable to other aspects of general average, and if so, how such a choice should be worded and what the chosen regime's scope will be. Which aspects will be covered by the law applicable to the contract of carriage and which aspects are regulated by the applicable law to general average, determined on the basis of the conflict laws of the applicable forum?[83] As the comity principle has lost relevance, the mere determination of the rules on the adjustment has become insufficient.

5.4 Evaluation

It follows from the above overview that the perception that there was and/or is a universally applicable conflict of law rule for general average was already an incorrect simplification of matters in the 19th and 20th century, and is even more today. The conflict rules on general average included in the national regimes vary. In view of the fact that many parties can be entitled to claim a general average contribution from various, potentially varying debtors,[84] several fora may accept jurisdiction. The result may be that several conflict of law rules are applied in respect of a single general average, and that hence several substantive regimes apply. In fact, and as will be discussed in the next chapter, the idea that the law of the place of discharge is applicable to the adjustment and subsequent settlement has even become more insufficient in the European Union after the introduction of the Rome I and II Regulations.

78. District Court of Rotterdam 14 May 2008, *NIPR* 2008, 185, ECLI:NL:RBROT:2008:BD4110 ('Devo').
79. Inter alia Lowndes & Rudolf 2013, pp. 582-583; Von Laun 1953, p. 760. Von Laun concludes that the law applicable to the contract of carriage should be applied to interpret the YAR. In his opinion the YAR are in principle overriding due to the Rule of Interpretation, but interpretation of the rules could be necessary after all. Von Laun has not considered the applicable law to other aspects of general average.
80. See para. 4.4.2.2 above.
81. As already indicated by Darmon in 1908, choices on the applicable regulation are often made, but they cannot always be enforced (Darmon 1908, pp. 48-49).
82. As the national law in principle is the basis, the YAR should only regulate the adjustment for the issues which it regulates. The issues which are not covered are to be determined under the applicable law. See also para. 3.2.2.3 above.
83. The question is also raised in Lowndes & Rudolf 2013, p. 582. See also para. 3.3.6 above.
84. See para. 4.5 above.

Chapter 6

General average and the 'Rome I and II Regulations'

6.1 Introduction

As discussed in the preceding chapters, the national general average regimes contain different rules on how to effectuate a claim for a general average contribution.[1] It is therefore important to establish the applicable law to an obligation to contribute respectively to the right to claim a contribution. The traditional view that there is a universally applied, uncodified conflict of law rule for general average, no longer seems correct, if it ever was to begin with.[2] In the absence of a universal, mandatorily applicable conflict of law rule which regulates general average, the question is whether more general conflict of law rules can assist or even have to be used to determine the applicable law to obligations arising out of general average. More specifically, the question is whether in the European Union the 'Rome I and II Regulations' play a role, and if so, which.

The question of the applicable law, as also follows from Chapter 5 above, is not a modern phenomenon.[3] Examination of the statutes and case law of the 15th century shows that at that time the question of which law was to be applied was already debated in courts.[4] What has changed is that rules of private international law are no longer provisions of national law only.[5] Since the end of the 19th century, when the Hague Conference on Private International Law ('HCC') was formed which further promoted the progressive unification of the rules of private international law,[6] many international conflict of law rules were developed. In particular in the last decades, an 'unprecedented boom'[7] can be observed in rules which are binding for European nation states.[8] Specific private international law conventions were

1. See Chapter 4 above.
2. See Chapter 5 above.
3. Inter alia Jitta 1916, pp. 13-21; Koster/Dubbink 1962, pp. 11-28.
4. Inter alia Van Niekerk 1998, pp. 236-239. It was not uncommon either that merchants abroad set up local communities and arranged privileges like the possibility to submit their disputes to their own judges who were entitled to decide the case pursuant to their own laws (Frankot 2007, pp. 171-172; Goudsmit 1882, pp. 28, 36). The charter granted by King Albert of Sweden is one example. He authorised the merchants of Amsterdam and Enchuysen (respectively in 1363 and 1368) to have their disputes settled by their own judges pursuant to their own laws (Twiss 1876, p. xxxvii).
5. Kramer a.o. 2012, p. 15. By 1963, private international law in the Netherlands was still a special branch of national law (Asser 1963, pp. 5-6).
6. www.hcch.net/en/home.
7. Bělohlávek 2010 (I), p. 3.
8. The first real and rather successful step to come to internationally accepted rules on private international law in Europe was the (draft preceding the) Rome Convention (Convention on the law applicable to contractual obligations of 19 June 1980 ('Rome Convention'). The Rome Convention was based on the draft published in 1972 (inter alia Rauscher/Von Hein 2011, p. 21; Collins 2012, p. 1779).

created,[9] more recent maritime conventions include rules on jurisdiction[10] and serious steps have been taken by the legislators of the European Union to uniform and harmonise the European conflict of law rules. Art. 65 of the EG-Treaty, as amended by the Treaty of Amsterdam in 1997 and now set out in Art. 81 of the Treaty of the European Union, has brought the subject of private international law within the competence of the European Union.[11] On this basis, internationally applicable, uniform conflict of law rules have been created and set out in various European instruments. These rules are deemed to take precedence over national conflict of law rules.[12] None of these European regulations contain a specific rule to determine the law applicable to the general average concept, nor do they contain express rules to establish the law applicable to the adjustment or to obligations arising out of general average, including obligations to contribute, to appoint an adjuster and/or to obtain general average security.[13] However, in addition to regulations for specific topics, like insolvencies and divorces,[14] European Regulations have been developed which contain general provisions to determine the law applicable to obligations in 'civil and commercial matters'. They have been set out in the relatively recently introduced 'Rome I and II Regulations'. The first, Regulation 593/2008 ('Rome I'),[15] provides rules to determine the law applicable to *contractual obligations* in civil and commercial matters. The second, Regulation 864/2007 ('Rome II'),[16] sets the rules on how to establish the law applicable to *non-contractual obligations* in civil and commercial matters. The Courts of the European Member States are obliged to apply these regulations when subjects come within their scope, i.e. when there is a situation involving a conflict of law[17] that has not been excluded from the Regulations' scope.[18]

9. For example, the Convention on Choice of Forum Agreements of 30 June 2005.
10. For example, Art. 7 of the Arrest Convention 1952, Art. 21 Hamburg Rules and Art. 66 Rotterdam Rules. Also Art. 31 CMR and Art. 33 Montreal Convention.
11. Explanatory Memo (Rome I) 2005, pp. 3-4; Explanatory Memo (Rome II) 2003, pp. 6-7. Also Van der Weide 2010, p. 173; Van der Weide 2008, p. 214; Kramer 2008, p. 1; Bělohlávek 2010 (1), pp. 25-26; Chitty on Contracts (I) 2012, p. 2249.
12. That Regulations take precedence over provisions of national law has been confirmed by the European Court of Justice, inter alia in ECJ 15 July 1964, C-6/64 (*Costa/Enel*).
13. These obligations are discussed in Chapter 3 and 4 above.
14. Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings respectively Council regulation (EU) No. 1259/2010 of 20 December 2010 on divorce and legal separation ('Rome III')). These specifically regulated topics have been excluded from the Rome Regulations' scopes (Art. 1 Rome I respectively Rome II).
15. Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the Law Applicable to Contractual Obligations ('Rome I Regulation'), *OJ* 2008, L 177/6. Rome I, which entered into force on 17 December 2009, is the extended, modernised successor of the Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 ('Rome Convention'). Explanatory Memo (Rome I) 2005, p. 3. See also Behr 2011, pp. 235-237.
16. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual obligations ('Rome II Regulation'), *OJ* 2007, L 199/40. Rome II is applicable since 11 January 2009. As Kramer points out (Kramer 2008, p. 417), it initially was not clear when Rome II became operative (Art. 32 *cf.* Art. 29 Rome II). It was clarified by the European Court of Justice that the Regulation is applicable to events giving rise to the damage which occurred after 11 November 2011 (ECJ 17 November 2011, C-412/10, *NJ* 2012, 109 (*Homawoo/GMF Assurances*)).
17. Art. 1(1) Rome I respectively Rome II. See on whether a conflict of law exists inter alia Weller in: Calliess 2015, pp. 57-58; Halfmeijer in: Calliess 2015, p. 469; Basedow 2010, p. 137.
18. The Rome Regulations' scope is discussed in para. 6.2 below.

The first question discussed below is whether the Rome I and II Regulations' provisions also apply in principle to obligations arising out of general average. As the answer is affirmative, the applicable conflict of law rule is to be determined. It is discussed how this should be done and which problems arise. It is also considered whether Rome I and Rome II give a sufficient and/or satisfactory framework. Particularly bearing in mind that the legal concept of general average creates obligations between several parties, who may be both a debtor and a creditor at the same time, and that the source of the obligation(s) may be found in a national law, (a) contract(s) of affreightment and/or (a) security form(s).

For clarification and by way of background, an overview is given of the Rome I and II Regulations' contents. The focus will be on those provisions which are most relevant for the general average concept. In para. 6.2, the Regulations' scope of application is set out, whereas in para. 6.3 the most relevant conflict of law rules are discussed. In para. 6.4, the relationship between Rome I and Rome II respectively between a contractual and a non-contractual obligation is further considered, as well as their respective interaction. Para. 6.5 deals with the practical application of Rome I and Rome II to general average obligations, most notably to the obligation to contribute in general average. In para. 6.6 and 6.7 it is concluded that the Rome I and II Regulations are insufficient to cover general average; not only as a result of their limited contents, but mainly as a result of the general average concept's hybrid nature. In view of this nature as well as inter alia the absence of an appropriate connecting factor, it is argued that inclusion of a conflict rule on general average in the Rome I and/or Regulation(s) is not to be recommended.

6.2 Applicability of the Rome I and II Regulations

6.2.1 Universal, comprehensive scope

The Rome I and II Regulations' main aim is to create a situation where the same law is applied by all the courts of the European Member States in order to '*improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments*.'[19] It should be irrelevant which court is approached as all courts should discuss the matter on the basis of the same substantive rules. Rome I and Rome II appear to be intended to provide a comprehensive regime to determine the applicable law to non-excluded contractual and non-contractual obligations in civil and commercial matters,[20] although this is not generally accepted.[21] That the regulations are meant to complement each other may be derived

19. Recital 7 Rome I respectively Rome II. It would also make it easier to settle a claim amicably when the parties can predict the court's decision. Explanatory Memorandum Rome II 2003, p. 6.
20. Inter alia Kramer 2008, p. 416. Also Weller in: Calliess 2015, p. 49. It is indicated that obligations which would not be covered by either Rome I or Rome II would be '*quite rare and special*'.
21. Unberath and Cziupka indicate that obligations which cannot be qualified as one of the specifically regulated concepts do not fall under Rome II (in: Rauscher 2011, p. 666). The English House of Lords deemed the aim to cover all non-contractual obligations '*far too ambitious*' (House of Lords Report 2004, p. 44). Dickinson also doubts that the Rome Regulations have a universal coverage, in particular, as Rome II would not contain a general rule covering obligations which cannot be characterised as obligations arising out of tort, negotiorum gestio, unjust enrichment or culpa in contrahendo (Dickinson 2008, pp. 241-244, 254). He expects, however, that the courts '*will adopt a*

inter alia from the title of the first draft for Rome II, which provided for consultation on the '*law applicable to non-contractual obligations*'.[22] Support for the position that the Rome I and II Regulations provide a comprehensive regime indeed can be found in the European Court of Justice's recent judgments in *Ergo/If* and *Gjensidige Baltic/PZU Lietuva*.[23] In its judgments, the ECJ did not hold that all obligations which cannot be regarded as contractual obligations are to be regarded as non-contractual obligations. However, it did consider with reference to the Brussels I instruments that the concept '*matters related to tort, delict and quasi-delict*' includes all actions which seek to establish the liability of a defendant and are not related to a contract. It may be derived from the decision that as the terms should be given a consistent meaning for the Rome Regulations and Brussels I instruments, their scope is relatively wide.[24]

The Rome I and II Regulations do not prejudice the application of international conventions to which Member States (and non-Member States) are parties at the moment that the Regulations were adopted and which conventions contain conflict of law rules regarding contractual and non-contractual obligations.[25] As already indicated in the previous chapters, the general average concept is not substantively regulated in conventions.[26] Neither is there a convention that contains a specific conflict of law rule for the general average concept. It follows that there are no 'external' regulatory hurdles which prevent the Regulations' applicability.

6.2.2 Autonomous interpretation

As other concepts applied in other European instruments, the Rome I and II Regulations' concepts must be interpreted autonomously. They have to be regarded as independent, so not as a mere reference to the national law of one of the Member States concerned.[27] They must be interpreted in line with the regulations' objectives and scheme, as well as with the general principles which stem from the corpus of the national legal systems.[28] As a result, the regulated concepts' actual scope may be different and wider or more including than the national legal concepts. The decisive criterion adopted by the European Court of Justice to identify the area within which an action falls is not the textual or procedural context of which that action is part[29] or the court in which the claim is brought,[30] but the claim's legal

flexible approach' and will bring the non-contractual obligations which have not expressly been regulated under the Regulations' concepts (Dickinson 2008, p. 261).

22. Dickinson 2002, pp. 370, 382.
23. ECJ 21 January 2016, C-359/14 and C-475/14, (*Ergo Insurance/If P&C* and *Gjensidige Baltic/PZU Lietuva*). The judgments will be considered in more detail in para. 6.4 below.
24. The interaction between Rome I and Rome II is discussed in some detail in para. 6.4.3.3 below.
25. Art. 25 Rome I and Art. 28 Rome II. It follows from the articles' second paragraph that the Regulations take precedence over Conventions to which only European Member States are bound and which regulate issues that come within the Rome Regulations' scope. On Art. 25 Rome I and the difference with Art. 21 Rome Convention, Baatz in: Baatz 2014, p. 59.
26. See inter alia para. 3.2.1 and 4.2.1 above.
27. Explanatory Memo (Rome II) 2003, p. 12. In more detail on autonomous interpretation: Von Hein in Rauscher 2011, pp. 44-46 and Nehne 2012 (II), pp. 41-105.
28. Inter alia ECJ 14 October 1976, C-29/76, *ECR* 1541, *NJ* 1982, 95 (*LTU/Eurocontrol*).
29. ECJ 4 September 2014, C-157/13, *NJ* 2015, 89 (*Nickel & Goeldner Spedition/Kintra UAB*).
30. Conclusion AG Colomer 8 November 2006 to ECJ 15 February 2007, C-292/05, f.nt. 11: '*The Brussels Convention followed trends in international law: in Conférence de La Haye de Droit international privé, Actes et*

basis.[31] It must be determined whether the right or the obligation which forms the basis of the action finds its source in the common rules of private law.

6.2.3 'Civil and commercial matters'

The interpretation of the Rome I and II Regulations must be consistent with the Brussels I instruments,[32] which regulate jurisdiction and enforcement of judgments in civil and commercial matters within the European Union.[33] The reference to 'civil and commercial matters' in all three Regulations makes it clear that the Rome Regulations and the Brussels I instruments constitute a coherent set of rules covering the general field of private international law in matters of civil and commercial obligations.[34] This has also been confirmed by the European Court of Justice.[35]
As the concept 'civil and commercial matters' must be interpreted autonomously,[36] it follows that it also must be established autonomously whether obligations arising out of general average can be regarded as civil and commercial matters in the sense of Rome I and Rome II.
That shipping matters can be regarded as civil and commercial matters in the sense of the Brussels I instruments not only follows from their wording,[37] but has also been confirmed by the European Court of Justice in a clear line of case law.[38]
General average is not expressly covered in the Brussels I instruments. However, in its decision in the *Sequana*,[39] the European Court of Justice accepted by implication

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Documents de la quatrième session (mai-juin 1904), at p. 84, it is stated that the term 'civil and commercial matters' is very broad and does not encompass only cases in which civil or commercial courts have jurisdiction, particularly in countries where there is an administrative jurisdiction.'

31. ECJ 4 September 2014, C-157/13, *NJ* 2015, 89 (*Nickel & Goeldner Spedition/Kintra UAB*).
32. The Brussels Convention, Brussels I Regulation and Brussels I (Recast) hereafter jointly are referred to as 'Brussels I instruments'.
33. Recital 7 of Rome I respectively Rome II refers to Regulation EC No 44/2001 of 22 December 2000 (the 'Brussels I Regulation'). The Brussels I Regulation was replaced by Regulation (EU) No 1215/2012 of the European Parliament and the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) on 10 January 2015 (Art. 81 Brussels I Regulation Recast). The Brussels I (Recast) does not specifically address the relationship with the Rome Regulations.
34. Explanatory Memo 2003 (Rome II), p. 8. Also Explanatory Memo 2005 (Rome I), p. 2. According to Von Hein, the concept 'civil and commercial matters' should be explained similarly in the Brussels I and Rome Regulations. (Von Hein in Rauscher 2011, p. 31. Also Bělohlávek 2010 (I), p. 93.) Critical on the close analogy with the Brussels I instruments Max Planck Comments 2007, p. 237.
35. ECJ 21 January 2016, C-359/14 and C-475/14, (*Ergo Insurance/If P&C* and *Gjensidige Baltic/PZU Lietuva*). See also Asser/Kramer & Verhagen 2015, nr. 1180, p. 774 as well as para. 6.4.3 below.
36. That the Brussels I instruments have to interpreted autonomously was held inter alia in ECJ 14 October 1976, C-29/76, [1976] ECR 1541 (*LTU/Eurocontrol*); ECJ 16 December 1980, C-814/79, [1980] ECR 3807 (*Rüffer*); ECJ 14 November 2002, C-271/00, [2002] ECR I-10489 (*Gemeente Steenbergen/Baten*); ECJ 15 May 2003, C-266/01, [2003] ECR I-4867 (*Préservatrice foncière TIARD/Staat der Nederlanden*); ECJ 18 May 2006, C-343/04, [2006] ECR I-4557 (*Land Oberösterreich/ČEZ*); ECJ 7 December 2010, C-585/08 and C-144/09, [2009] ECR I-12527, *NJ* 2011/164 (*Pammer and Hotel Alpenhof*). Also: Chitty on Contracts (I) 2012, pp. 2250-2251.
37. The Brussels I Regulation and the Brussels I (Recast) contain some specific provisions on the purely maritime concepts of salvage and global limitation of liability for shipowners. Art. 5(7) and 7 Brussels I Regulation respectively Art. 7(7) and 9 Brussels I Recast.
38. See, for example, ECJ 6 December 1994, C-406/92, *NJ* 1995, 659, with case note of Th.M. de Boer ('*Tatry*'/'*Majiej Rataj*'); ECJ 27 October 1998, C-51/97, [1998] ECR I-6511, *NJ* 2000, 156 ('*Alblasgracht*'); ECJ 14 October 2004, C-39/02, *NJ* 2007, 389 with case note of P. Vlas ('*Cornelis Simon*').
39. ECJ 19 May 1998, C-351/96, *NJ* 2000, 155 ('*Sequana*'). The European Court of Justice considered the lis pendens rules of the Brussels Convention. The case is discussed in more detail in para. 4.5.3.3 above.

that a claim for a general average contribution falls within the concept civil and commercial matters.[40] Unlike the Brussels I instruments,[41] the Rome Regulations do not provide for special conflict rules for 'wet' shipping matters, like salvage and global limitation of liability.[42] However, this does not mean that the Rome Regulations would not apply to these concepts in general or to general average in particular.[43] In view of the fact that the Brussels I instruments and the Rome Regulations are to form a coherent set of rules, a claim in respect of general average is also be regarded as civil and commercial matter for the purposes of the Rome Regulations. This is confirmed by the fact that Rome I and Rome II do not exclude maritime matters from their scope. During the preparatory discussions on Rome II's contents, it was even suggested to include a specific conflict of law rule for incidents on the high seas.[44] The rule was abandoned because it was considered to have unsatisfactory results.[45] That general average obligations fall in the Rome II's scope was held in the decision of the German Court of Appeal of Düsseldorf of 26 February 2014.[46] That general average cases may be regarded as civil and commercial matters can also be derived from the fact that obligations arising out of general average were regarded to be covered by the Rome I's predecessor, the Rome Convention[47] and the national provisions which incorporated the same.[48] It is also accepted in legal literature that claims for a general average contribution come within the Rome Regulations' scope.[49] It follows that the Rome Regulations' conflict rules, in principle, have to be used to determine the applicable law to general average obligations, provided that no exclusion applies.

6.2.4 **Exclusions**

The Rome Regulations exclude several substantive and procedural issues from their respective scope. In view of the underlying idea that the Rome Regulations should provide a comprehensive regime, the exceptions will have to be interpreted narrowly.[50]

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40. That claims for a general average contribution are to be regarded as civil and commercial matters in the meaning of the Brussels I instruments was held expressly by the District Court of Rotterdam 4 June 2003, *S&S* 2004, 32; *JBPR* 2004, 76 ('Coral').
41. Art. 5(7) and 7 Brussels I Regulation respectively Art. 7(7) and 9 Brussels I Recast.
42. Rome I does contain a rule to determine the applicable law to contracts of carriage (Art. 5 Rome I), but contracts of carriage have to be distinguished from maritime concepts, like collisions, salvage, global limitation of liability and general average.
43. This corresponds with a more general trend to treat maritime laws as a part of the general civil law. For the longest part of its history, the law of the land and the law of the sea were regarded as distinct subjects. Each had its own rules. (Inter alia Myburgh 2000, p. 357.) Gradually it became common practice to apply the same general civil law rules to maritime and non-maritime cases. The transfer of the Dutch legal maritime provisions from the Commercial Code of 1838 to the Civil Code in 1991 may serve as an example of this equation of maritime and land law civil matters.
44. Explanatory Memo 2003 (Rome II), pp. 27, 38.
45. See also para. 6.7.3 and f.nt. 408 below in more detail.
46. Court of Appeal of Düsseldorf 26 February 2014, I-18 U 27/12 ('Margreta'/'Sichem Anne'). An obligation to contribute in general average was explicitly held to fall within the scope of the Rome Regulations.
47. Lowndes & Rudolf 2013, p. 566.
48. In England, this was the Contracts (Applicable Law) Act 1990. *Voyage Charters* 2014, p. 594.
49. Inter alia *Voyage Charters* 2014, p. 594; by implication also Asser/Kramer & Verhagen 10-III 2015, nr. 1180, p. 774.
50. Explanatory Memo (Rome II) 2003, p. 9.

The substantive exceptions[51] include public law matters, like custom and administrative matters,[52] but also civil matters which have been regulated elsewhere, like family relationships,[53] aspects of agency relationships[54] and questions governed by the law of companies.[55] Particularly relevant for general average obligations are the exclusions for arbitration agreements and in respect of negotiable documents. Whilst Rome I makes it clear beyond a shadow of a doubt that it does not apply to arbitration agreements,[56] the validity of such agreements has to be established on other grounds. A separate and not yet clearly answered question is whether the Rome Regulations should be applied in arbitration proceedings. Whereas recital 8 Rome II expressly provides that the Regulation has to be applied '*irrespective of the nature of the court or tribunal seized*', such provision has not been taken over in Rome I. It has been argued in legal literature that the same principle would apply nevertheless.[57] A full discussion of this question would be beyond the scope of this study. What is clear, however, is that the exact scope of the exception will have to be determined by the European Court of Justice.[58] The same applies in respect of the exclusion of obligations arising under bills of exchange, cheques, promissory notes and other negotiable instruments.[59] Recital 9 Rome I clarifies that the exclusion also covers bills of lading, albeit only to the extent that the obligations under such negotiable instruments arise out of their negotiable character.[60] Consensus does not exist on the exact scope of this exclusion.[61] Main point of contention is whether all obligations that arise under order and bearer bills of lading after they have been transferred to a third party are excluded from the Regulations' scope,[62] or whether the exclusion merely concerns issues where the bill of lading's negoti-

51. Art. 1(1) and 1(2) Rome I respectively Rome II. Most of these subjects have also been excluded from the scope of the Draft Common Frame of Reference (Art. I-1:101(2) DCFR).
52. Art. 1(1) Rome I respectively Rome II. On this exclusion also Halfmeijer in: Calliess 2015, p. 470; Kramer a.o. 2012, p. 21; Chitty on Contracts (I) 2012, p. 2253. On the difference between 'civil and commercial matters' and public matters also ECJ 14 October 1976, C-29/76, [1976] ECR 1541 (*LTU/Eurocontrol*); ECJ 14 November 2002, C-271/00, [2002] ECR I-10489 (*Gemeente Steenbergen/Baten*).
53. Art. 1(2)(b) and (c) Rome I respectively Art. 1(2)(a) and (b) Rome II. Some family relationship aspects have been regulated in the Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ('Rome III').
54. Art. 1(2)(g) Rome I excludes from Rome I's scope the question whether an agent can bind his principal. This question, as a matter of Dutch and French private international law, is regulated by the Convention of 14 March 1978 on the Law Applicable to Agency. The governing law, in principle, is the law which regulates the relationship between the agent and the principal. This Convention, however, excludes from its scope the question whether a master is entitled to bind parties (Art. 2 heading and under f). See, for example, District Court of Rotterdam 18 September 2013, *S&S* 2014, 42 ('Pomorye'). As a matter of English law, the question has to be answered pursuant to the law which would govern the contract if it would be established that the agent had authority to represent the principal. Inter alia *Haugesund Kommune & Anor v. Depfa ACS Bank* [2011] 1 All E.R. 190; see also Dicey, Morris & Collins 2012 (II), pp. 2122-2123.
55. Art. 1(2)(f) Rome I respectively 1(2)(d) Rome II.
56. Art. 1(2)(e) Rome I.
57. Weller in: Calliess 2015, p. 52. A footnote that clarified that the Rome Regulations would also apply in arbitration was removed from an earlier draft. (Dickinson 2008, p. 160.)
58. For more detail on the Rome Regulations and their applicability in arbitration proceedings, see Magnus & Mankowski 2002, pp. 10-12; Bělohlávek 2010 (II); Yüksel 2011; Al-Hawamdeh 2012; Weller 2015, pp. 64-65; Calliess 2015, pp. 99-100; Hartenstein 2008, p. 149; Asser/Kramer & Verhagen 10-III 2015, nr. 657, pp. 383-384.
59. Art. 1(2)(d) Rome I; Art. 1(2)(c) Rome II.
60. The remark is not included in Rome II's recitals.
61. Also Herber 2016, p. 421.
62. This position is defended inter alia by Boonk 2009, pp. 95-99; and Mankowski 2008, pp. 417-428.

ability plays a decisive role, like the questions which parties are entitled to claim, against which party a claim can be brought and questions regarding transfer of title.[63] Although it is important, the exclusion's impact, regardless of its actual scope, should not be exaggerated. Claims made by or against the original party to the bill of lading contract and probably also by or against the consignee under a straight bill of lading do not fall within its scope.[64] Claims on the basis of other contracts, which may form a basis of claim for a general average contribution, like security forms, charter parties, express bills of lading and sea waybills,[65] are not affected by the exception either.

Procedural and evidential matters are in principle also excluded from the Rome Regulations' scope.[66] To create certainty on the applicable law, renvoi is not allowed either.[67] The national law applicable pursuant to the Regulations' conflict of law rules will apply with the exclusion of its conflict of law rules and shall be applied by the courts of the Member States as if the provisions were included in their own national legal order.[68]

6.2.5 National conflict of law rules

The applicable law to subjects not covered by the Rome Regulations has to be determined by national conflict of law rules. In view of the fact that general average claims are considered as civil and commercial matters and taking into account the Rome Regulations' in essence all embracing scope, these national conflict of law rules should be applied by courts of European Member States in excluded and exceptional situations only.

The national private international law rules may differ per Member State and per subject.[69] As a matter of Dutch law, a distinction has to be made between non-applicability of the Rome Regulations because the subjects have been excluded from the latter's scope and non-applicability as a result of the fact that the subjects involved do not concern contractual or non-contractual obligations. In respect of the

63. The latter position was taken inter alia by Claringbould 2009, as well as by Smeele 1998 (pp. 277-279) and several Dutch courts in respect of the similar provisions under the Rome Convention, from which the wording was taken over: District Court of Amsterdam 3 January 2001, *S&S* 2006, 64 ('Elke'); District Court of Rotterdam 7 November 2002, *S&S* 2006, 50 ('Vera Khoruzhaya'); District Court of Amsterdam 5 February 2003, *S&S* 2003, 86 ('Leliegracht'); District Court of Middelburg 28 July 2004, *S&S* 2005, 85 ('Jin Feng'); Court of Appeal of Amsterdam 2 August 2007, *S&S* 2008, 114 ('Leliegracht'). When the exclusion for obligations arising under negotiable instruments was taken over from the Rome Convention in the Rome Regulations no further clarification was provided regarding the exclusion's scope. It was merely indicated that the exclusion was taken over for the same reasons as given in the Giuliano/Lagarde Report on the Rome Convention at p. 11 (Explanatory memorandum 2003, p. 9). Dickinson suggests that this may be related to the fact that the commission did not want to deal with this subject in view of its complexity (Dickinson 2008, p. 203). The Italian delegation's suggestion to delete this exclusion was not taken over (Council Document 9009/04 ADD 17 date 2 June 2004 at p. 2).
64. Also Hartenstein 2008, p. 159.
65. Weller 2015, p. 64; Mankowski 2008, p. 420; Asser/Kramer & Verhagen 10-III 2015, nr. 905, pp. 564-565.
66. Art. 1(3) Rome I respectively Rome II.
67. Art. 9 Rome I respectively Art. 16 Rome II.
68. Dickinson 2008, p. 136.
69. Generally: Kramer a.o. 2012, p. 55.

latter category, in the absence of another international regime to determine the applicable law, the 'national' Dutch conflict of law rules will apply. An example of the 'not specifically excluded, but not (completely) regulated in the Rome I and II Regulations either' category is the determination of the law applicable to property law aspects (in Dutch: 'zakenrechtelijke gevolgen').[70] As there is no other international regime to determine the applicable law to these property law aspects, the unregulated aspects, like the question whether an obligation to contribute in general average is attached to a particular property, are subject to national conflict of law rules.[71]

In respect of the category of expressly excluded contractual and non-obligations, the Dutch legislator for reasons of consistency has chosen not to create separate rules for state courts to determine the applicable law.[72] Instead, a Dutch Court will have to apply the Rome I and Rome II's conflict rules to determine the applicable law to most of these obligations after all.[73] This means that under Dutch domestic conflict rules, the Regulations' regime extends to obligations arising out of general average, in any event to the extent that the obligations can be regarded as contractual or non-contractual obligations, regardless whether they arise, for example, under a negotiable bill of lading or otherwise.

Such extended application of the Rome I and II Regulations' scope to excluded issues is not applied in all European Member States. The draft for the new Belgian Maritime Code, for example, provides that when liabilities are not covered by Rome II, the Belgian Court has to apply Belgian law.[74] Other countries have separate conflict of law rules for several specific (maritime) concepts.[75] If the Rome I and II Regulations would not apply to obligations arising out of general average after all, these rules could serve as a fall back position.

6.3 Rome I and Rome II's conflict of law rules

6.3.1 Objective: predictability

When it has been ascertained that a specific subject falls within the Rome I and II Regulations' scope, the next question is which conflict of law rules rule has to be applied in the specific matter. Before this question is considered in more detail in

70. Von Hein in: Rauscher 2011, p. 60. Art. 14(1) Rome I by way of exception regulates some property law aspects of assignment and subrogation. (Ibili 2014, pp. 49-52, 55.)
71. Ibili 2014, p. 17. Dutch law contains a separate regime in s. 10:127 et seq. Dutch Civil Code.
72. In the Dutch Civil Code, the scopes of the Rome I and II Regulations have been extended to excluded issues which fall within the Regulations' scopes. Travaux préparatoires Book 10 Dutch Civil Code, s. 10:154 Dutch Civil Code, p. 352 respectively s. 10:159 Dutch Civil Code, p. 361.
73. S. 10:154 Dutch Civil Code for contractual obligations and s. 10:159 Dutch Civil Code for non-contractual obligations. Exceptions have been made for obligations which fall under Conventions, as these international regimes may also contain rules to determine the formal validity of a contractual provision (Kramer 2013, pp. 5859-5860). For general average, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of New York, 10 June 1958 and the Brussels I (Recast) will be relevant in particular. In s. 10:166 Dutch Civil Code an exception has been made for arbitration agreements.
74. Van Hooydonck 2012, p. 286.
75. See, for example, the conflict of law rules set out in the Italian Code of Navigation (s. 1-14), the Slovenian Maritime Code (s. 960-974) and the Polish Maritime Code (s. 7-11). On some specific national conflict rules for general average also para. 5.3 above.

respect of several obligations arising out of general average,[76] an overview is given of the Regulations' most relevant rules for general average cases.

In general and by way of background, the Rome Regulations are influenced by the Savignian core values of harmonisation of international decisions and procedural efficiency.[77] Their main aim, however, appears to be to create legal certainty by ensuring that parties can predict the applicable law.[78] In order to obtain this predictability, Rome I and Rome II give specific conflict of law rules for pre-determined categories to establish the applicable law on the basis of objective criteria.[79] Party autonomy has been given priority.[80] Admittedly, even though a valid choice of law in theory is also overriding under Rome II, it will in practice have much less relevance than under Rome I.[81]
In the absence of a valid choice of law, the leading principle probably still is the closest connection,[82] albeit its importance has been reduced considerably.[83] Under the Rome I and II Regulations, the closest connection is to be established on the basis of objective connecting factors, which vary per obligation at stake. The closest connection is not an independent connecting factor or decisive in all situations either. Rules have been included to protect weaker parties.[84] Moreover, and unlike under the Rome I's predecessor, the Rome Convention,[85] only a *manifestly* closer connection with another *country* may actually set aside the law determined on the basis of the specific conflict of law rules.[86] Rome I intends to rectify the uncertainty caused by the fact that the Rome Convention's conflict rule set out in Art. 4 was applied differently by courts in the various jurisdictions.[87] Under the Rome I and II Regulations a manifestly closer connection is the exception rather than the rule, as it reduces the predictability.[88]

76. See para. 6.5 below.
77. Von Hein 2008, pp. 1668-1669, 1703, 1707; Kramer 2008.
78. Recital 6 and 16 Rome I respectively recital 6 and 14 Rome II. Also Asser/Kramer & Verhagen 10-III 2015, nr. 717, p. 433; Explanatory Memo (Rome II) 2003, p. 6. The Savignian influence, however, in the last years has been reduced in the European sphere in general and in the Rome I and II Regulations in particular (Weller 2011, p. 429).
79. Strikwerda 2009, p. 411.
80. Freedom of contract is not only a principle fundamental for the Rome I and II Regulations, but is also indicated as one of the starting points for contractual obligations in the DCFR (2010, pp. 61-62). Interestingly, in respect of non-contractual obligations, the principle in the DCFR is counteracted by principles of justice and security (DCFR 2010, p. 69).
81. Compare Kadner Graziano 2009. As also set out in para. 6.3.2, additional requirements apply under Rome II in order for the choice of law to be valid.
82. Recitals 15 and 16 *cf.* Art. 4(4), 5(3) and 8(4) Rome I respectively recital 14 Rome II. Also Dickinson in Basedow a.o. 2015, p. 85. Although the Rome Regulations are from recent date, the principle of the closest connection is not. It was already applied in the Rome Convention as well as by national courts, before the Rome II's introduction. See, for example, the decision of the Dutch Supreme Court of 23 February 1996, *NJ* 1997, 276 'Athenian Olympics', albeit the criteria to establish the law which was closest connected were applied in a different order. See De Boer in his case note to the 'Athenian Olympics' (*NJ* 1997, 276).
83. Van Wechem 2008, p. 34.
84. Asser/Kramer & Verhagen 10-III 2015, nr. 719, p. 434.
85. As also mentioned by Bogdan, there are some relevant differences between the Rome Convention and Rome I (Bogdan 2009, p. 410). Boonk (2010, p. 42) also points out that the Rome Convention and the Rome Regulations have diverging objectives.
86. On the issue of a close connection in some detail also Fentiman 2009, pp. 85-112; as well as Asser/Vonken 10-I 2013, nrs. 180-185, pp. 144-150.
87. Wallart & Van Wechem 2008, p. 83.
88. Explanatory Memo (Rome II) 2003, p. 12. Also Kramer 2008, pp. 421-422.

6.3.2 Choice of law

Both Rome Regulations give priority to the law chosen by the parties,[89] albeit with some restrictions. Overriding mandatory provisions of the law of the forum cannot be set aside by opting for another law.[90] Neither can a choice of law prejudice the application of provisions which cannot be derogated from by agreement,[91] both of EU law[92] and the law of the particular country[93] where all the elements relevant to the situation are located in a Member State other than the country of the chosen law.[94] Whereas under Rome I the relevant moment to determine where all the elements are located is the time that the choice of law is made, under Rome II the relevant moment is the time when the event giving rise to the damage occurs.[95] In addition, Rome I requires that the choice for a specific law is made '*expressly*' or is '*clearly demonstrated by the terms of the contract or the circumstances of the case*'. For Rome II, by contrast, it is sufficient that the clause is '*demonstrated with reasonable certainty by the contractual terms or circumstances of the matter*'.[96] Under both Regulations a choice of law can be concluded between the parties expressly, but a choice may also be implied.[97] Whether an implied choice of law has been made, may be regarded as a rule of procedure which is excluded from the Rome I and II Regulations' scope.[98] The circumstances under which a choice of law can be deemed to be implied may vary under the national laws. A choice of law may relate to a contract as a

89. Art. 3 (and Recital 11) Rome I respectively Art. 14 (and Recital 31) Rome II. The parties' freedom to choose the law that should govern their contractual obligations is one of the cornerstones of Rome I (Recital 11 Rome I). The party autonomy in Rome II was introduced by the European Parliament (Von Hein 2008, pp. 1687-1688).
90. Art. 9 Rome I respectively Art. 16 Rome II.
91. The concept '*provisions which cannot be derogated from by agreement*' is more embracing than mandatory rules applicable regardless of the governing law (Chitty on Contracts (II) 2012, p. 1832).
92. If the contract relates to one or more Member States and the country of the chosen law is not a European Union Member State, the mandatory provisions of Community law cannot be prejudiced. Art. 3(4) Rome I respectively Art. 14(3) Rome II.
93. If the law chosen is that of a country other than which is most closely related to the contract, the mandatorily applicable provisions of the law of the country which is most closely connected need to be respected. Art. 3(3) Rome I respectively Art. 14(2) Rome II.
94. A chosen law does not necessarily lead to the law that is most closely connected (also Pitel 2008, p. 457). Some influence is therefore given to the closest connected law after all.
95. Art. 3(3) and 3(4) Rome I respectively Art. 14(2) and 14(3) Rome II.
96. Art. 3(1) Rome I; Art. 14(1) Rome II. The wording is based on the Rome Convention. The wording of Art. 3(1) Rome I, however, intentionally differs from that of Art. 3 Rome Convention, which latter provision provides that the choice '*demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case*'. A stricter criterion was deemed useful in Rome I. Inter alia Von Hein 2015, pp. 711-712; Behr 2011, p. 243; Bogdan 2009, p. 408.
97. Guidance may be found in the Giuliano/Lagarde report on the Rome Convention (Giuliano/Lagarde 1980, p. 17). On implied choice of law also: Dicey, Morris & Collins 2012, pp. 1809-814; Van der Weide 2008, p. 222; Calliess 2015, p. 101; Herber 2016, p. 418. It has been held in the Dutch case law that a choice of law can be assumed to have been made when parties argue their case in their submissions on the basis of Dutch law: District Court of Utrecht 28 July 2010, ECLI:NL:RBUTR:2010:BN2268, *NIPR* 2010/454; District Court of Zutphen 15 August 2012, ECLI:NL:RBZUT:2012:BX4722, NIPR 2012/67; District Court of Rotterdam 17 October 2012, ECLI:NL:RBROT:2012:BY4982, NIPR 2013/39. In general average cases: District Court of Amsterdam 8 January 2003, *S&S* 2003, 76 ('Hea'); Court of Appeal of Amsterdam 18 March 1999, *S&S* 2001, 40 ('Pauline Olivieri'). German Courts have decided similarly (Von Hein in: Calliess 2015, p. 712). In England, when the parties do not argue the applicability of foreign law, the courts have to apply English law. (Chitty on Contracts (II) 2012, p. 2261.)
98. Art. 1(3) Rome I respectively Rome II.

whole, but also to parts of a contract.[99] In theory, a different choice of law can be made in respect of each legal concept. In practice, this will not often be the case. An initial choice of law can also be set aside by a subsequent choice.[100]

It follows from Rome I that the validity of a choice of law provision is to be determined by the law chosen.[101] However, the absence of consent for a contract or contractual term may be shown on the basis of the law of the party's habitual place of residence.[102] It is doubtful whether these provisions have to be applied by analogy to determine the validity of a choice of law clause under Rome II.[103] The Regulations' recitals give additional and diverging criteria that have to be taken into account by courts when deciding whether a choice of law agreement has validly been concluded. In Rome II, the parties' intentions and the protection of weaker parties are explicitly mentioned,[104] whereas in Rome I jurisdiction agreements are considered to be a relevant factor.[105]

Unlike Rome I, Rome II imposes additional requirements when a choice of law agreement was entered into by the parties *before* the event giving rise to the damage occurred. Such choice will only be regarded effective when (i) the parties to the agreement pursue commercial activities and (ii) the agreement was freely negotiated.[106] These restrictions do not apply to a choice of law agreement made *after* the event which has caused the damage. Such a choice of law can be made in all circumstances. Moreover, a choice of law under Rome II shall not prejudice the rights of third parties,[107] most notably rights of underwriters.[108]
In shipping matters and general average cases in particular, the requirement that commercial activities are pursued will invariably be met.[109] The second requirement that the agreement was freely negotiated will often prove to be a more difficult hurdle to take. It follows from the second explanatory memorandum to Rome II that an agreement should only be regarded as freely negotiated when the choice of law agreement was '*individually negotiated*'.[110] A choice of law clause on general average inserted in standard bill of lading or sea waybill terms and conditions, if

99. Art. 3(1) Rome I.
100. Art. 3(2) Rome I.
101. Art. 3(5) *cf.* 10, 11 and 13 Rome I.
102. Art. 10(2) Rome I. Whether silence can be held to constitute consent differs under national legal systems (Schulze in: Calliess 2015, pp. 271-274; Von Behr 2011, p. 244).
103. Von Hein in: Calliess 2015, p. 713.
104. Recital 31 Rome II.
105. Recital 12 Rome I.
106. Art. 14(1) under a and b Rome II.
107. Art. 14(1) Rome II.
108. Explanatory Memo (Rome I) 2003, p. 25.
109. In respect of general average, personal belongings often are expressly excluded from contribution. For example, in Rule XVII YAR 1994-2016 respectively s. 8:612 Dutch Civil Code.
110. Explanatory Memo, second (Rome II) 2006, p. 3. It is not completely clear when an agreement will be regarded as individually negotiated. The DCFR may give some guidance. They provide that: '*A term supplied by one party is not individually negotiated if the other party has not been able to influence its content, in particular because it has been drafted in advance, whether or not as part of standard terms.*' (Art. II-1.110 DCFR 2010, p. 185).

any,[111] is unlikely to be regarded as individually negotiated.[112] A choice of law agreement in a specifically negotiated charter party or skeleton agreement on the other hand is likely to qualify as an acceptable agreement in the meaning of Art. 14 Rome II.

A choice of law in the meaning of the Rome I and II Regulations includes living laws originating from a state body only.[113] A choice for a non-state body of law or international convention can be made,[114] but such provision's scope seems limited. It is indicated in the European Commission's explanatory memorandum to Rome I that it creates the possibility to apply the UNIDROIT principles or the Principles of European Contract Law, but that it does not open the possibility to opt for applicability of the lex mercatoria (because it would be too imprecise) and '*private codifications not adequately recognised by the international community*'. Moreover, it is expressly provided that a choice for an acceptable non-state body of law cannot be regarded as a choice for the governing law.[115] Incorporated provisions of a non-state body of law have a similar status as other contractual terms.[116] Although their exact scope of application has to be determined under the applicable substantive law, in general, their provisions, just as standard terms and conditions, are regarded to take preference over provisions of soft law of the applicable substantive law, but do not set aside provisions which apply mandatorily.[117] In this respect, it is irrelevant whether the YAR,[118] when validly incorporated in a relevant contract, are to be regarded as non-state body of law in the meaning of Rome I or not.[119] Even if the YAR could be regarded as a non-state body of law, which is unlikely,[120] their effect would not change.

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111. Such situations will be rare. The obligation must then be regarded as non-contractual obligation for which a specific choice of law clause has been agreed. See para. 6.5 below.
112. Boonk 2009, p. 97. It may be different when the terms and conditions have been accepted expressly (Kadner Graziano 2009, p. 121).
113. As pointed out by Bogdan, a choice for a state body of law that is no longer in force, is not a valid choice of law (Bogdan 2009, p. 407).
114. Explanatory Memo (Rome I) 2005, p. 5. The provision is criticized inter alia by Magnus & Mankowski 2002, pp. 13-15 and Max Planck Comments 2007, pp. 230-231.
115. Recital 13 Rome I. Also Bělohlávek 2010 (I), p. 695; Chitty on Contracts (I) 2012, p. 1804; Hartenstein 2008, p. 150; Strikwerda 2015, p. 128; Van der Velde 2009, p. 27. Boonk (2009, p. 101) advocates that a choice for a convention, like the Hague Rules or Hamburg Rules, should be possible. By contrast, the Hague Principles on Choice of Law in International Commercial Contracts, adopted on 19 March 2015 (www.hcch.net/en/instruments/conventions/full-text/?cid=135) in Art. 3 do allow a choice for a non-state body of law. See on Art. 3 of the Hague Principles inter alia Michaels 2014, Saumier 2014 and Symeonides 2013.
116. Calliess 2015, p. 87; Behr 2011, p. 241; Asser/Kramer & Verhagen 10-III 2015, nr. 783, p. 478.
117. Hartenstein 2008, p. 150; Mankowski 2006, p. 102.
118. The YAR are standard conditions which regulate the adjustment of general average. They are referred to in most contracts for the carriage of goods by sea. The various aspects of the YAR are discussed in Chapters 2, 3 and 4 above.
119. The validity and effect of a contractual reference to the YAR will have to be determined pursuant to the law which would govern the contract in which it is included. (Art. 10(1) Rome I.)
120. A stipulation of a YAR version's applicability of the YAR in a contract of carriage cannot be considered as a valid choice of law under Art. 14 Rome II. This was already the position under Dutch law before introduction of the Rome Regulations. Inter alia: District Court of Amsterdam 8 January 2003, *S&S* 2003, 76 ('Hea'); Court of Appeal of Amsterdam 18 March 1999, *S&S* 2001, 40 ('Pauline Olivieri'). See, however, and admittedly incorrect: District Court of Rotterdam 10 January 1986, *S&S* 1987, 41 ('Breehoek').

Rome II does not explicitly deal with non-state body of law. It seems reasonable to assume that Rome II has to be interpreted in line with Rome I. It is therefore unlikely that under Rome II a choice for a non-state body of law will be considered as a valid choice of law which sets aside the applicable national law.[121]

6.3.3 Specific conflict rules

6.3.3.1 *Overview*

In the absence of a (valid) choice of law, the Rome I and II Regulations' conflict of law rules for specific contractual respectively non-contractual obligations apply. Rome I, inter alia, contains conflict of law rules for sale of goods contracts (Art. 4(1)(a)), contracts of carriage (Art. 5), and insurance agreements (Art. 7). Rome II starts with a general conflict of law rule for tort (Art. 4), followed by rules for several species of tort, (including product liability (Art. 5), unfair competition (Art. 6) and environmental damage (Art. 7)) and rules for the 'quasi-delicts' unjust enrichment (Art. 10), negotiorum gestio (Art. 11) and culpa in contrahendo (Art. 12). In view of the Regulations' objective of predictability of the applicable law, the applicable law established pursuant to the specific conflict of law rules may be overruled only when it is clear from all the circumstances as a whole that the specific obligation is more closely connected with another country.[122] In that situation, the law of this other country shall apply,[123] provided no choice of law has been made[124] and/or a party or interest does not need protection either.[125]

In respect of general average, contracts of carriage and security forms will generally play a role.[126] Moreover, under Rome II the conflict rules of the concepts tort, negotiorum gestio and/or unjust enrichment may be relevant.[127] For this reason, it is briefly set out how the applicable law to the two types of contracts and in respect of these non-contractual legal concepts has to be determined under the Rome I and II Regulations.

6.3.3.2 *Contracts of carriage*

Pursuant to Art. 5 Rome I, failing a choice of law, the applicable law to a contract for the carriage of goods is the law of the country where the carrier is domiciled, provided that it is also the country of the shipper's domicile, or that receipt or de-

121. Rome II should be consistent with Rome I. Moreover, the wording of Art. 14(1) Rome II has been taken over from the Rome Convention (Art. 3), which did not seem to allow a choice for a non-state body of law either (Hartenstein 2008, p. 151; Kadner Graziano 2009, p. 119).
122. See also para. 6.3.1 above.
123. Art. 4(3), 5(3), 7(2), 8(4) Rome I respectively Art. 4(3), 5(2), 10(4), 11(4), 12(2 under c) Rome II.
124. Neither Art. 3 Rome I nor Art. 14 Rome II allows that the chosen law is set aside, because another law is manifestly more closely connected. Only mandatory provisions of this law cannot be derogated from. See also para. 6.3.1 above.
125. For example, Art. 6 and 8 Rome II.
126. Their actual relevance is discussed in para. 3.4 and 3.5 above in general, Chapter 4 in detail and para. 6.5.2 below in respect of the applicable law.
127. This is further discussed in para. 6.5.3 below.

livery of the goods has to take place in that country.[128] When these criteria are not met, the applicable law shall be the law of the country where delivery has to take place under the contract of carriage. If, however, the contract is manifestly closer connected with another country, the law of that country has to be applied.[129] The provision can be regarded as the (extended) successor of Art. 4(4) Rome Convention. In the European Court of Justice's case law on Art. 4(4) Rome Convention, the term 'contract for the carriage of goods' has been given a wide scope. The Court considered that the term includes all contracts which main purpose is the carriage of goods, whereby the contract's purpose is to be established by taking into account '*the objective of the contractual relationship and, consequently, all the obligations of the party who effects the performance which is characteristic of the contract*'.[130] It follows from Recital 22 Rome I that the interpretation of the Rome Convention's term 'contracts of carriage' will also apply to the identical term of the Rome I. It is also expressly mentioned in the Recitals that single voyage charter parties are to be regarded as contracts of carriage. Whether time charter parties fall under the provision is doubtful.[131]

6.3.3.3 *Security forms*

The applicable law to a general average security form,[132] in the absence of a choice of law and a specific conflict of law rule for security contracts, will be determined on the basis of the laws of the country of residence of the principal actor performing the characteristic obligation.[133] In respect of security contracts,[134] it has been argued that this is the law of the country where the party who has assumed the risk and is to make the relevant payment has its habitual residence.[135] If the security contract is manifestly more closely connected with another country, the law of that other country will be applied.[136]

128. The provision is considered in more detail inter alia by Boonk 2009; Book 2010; Claringbould 2009; Smeele 2009; Nielsen 2009; Schulze in: Calliess 2015, pp. 127-153; Thorn in: Rauscher 2011, pp. 257-308.
129. Art. 5(3) Rome I.
130. ECJ 6 October 2009, C-133/08, *NJ* 2010, 168 with case note of Th.M. de Boer (*ICF/Balkenende*); ECJ 23 October 2014, C-305/13, *NJ* 2015, 422 with case note of Th.M. de Boer (*Haeger & Schmidt/MMA IARD*).
131. That it is not clear whether time charters fall within the provision's scope is inter alia indicated in Scrutton 2015, p. 498 as well as in Dicey, Morris and Collins 2012, pp. 1931-1932. However, Schulze (in: Calliess 2015, p. 132) argues with reference to Mankowski and Schultsz that time charters as contracts for the rent of equipment do not fall under the provision. According to Boonk, the application of Art. 5(1) Rome I to time charter parties does not make sense (Boonk 2009, p. 100). Claringbould is of the opinion that the applicable law to time charters should not be determined by Art. 5(1), but by Art. 4(1)(b) Rome I (Claringbould 2009, p. 431).
132. The average bond and average guarantee have been discussed in general in Chapters 2 and 3, whereas their contents in respect of specific issues have been considered in Chapter 4.
133. Art. 4(2) Rome I.
134. Gebauer in: Calliess 2015, p. 122, with reference to Martiny in Münchener Kommentar.
135. Art. 4(2) Rome I.
136. Art. 4(3) Rome I.

6.3.3.4 *Tort, negotiorum gestio and unjust enrichment*

Rome II's rules to determine the law applicable to tort, negotiorum gestio and unjust enrichment have a hierarchic structure, with a flexible exception.[137] Several possibilities have been set out which only apply if the preceding possibility is inapplicable[138] and if the exception does not overrule. The decisive criterion to establish the applicable law to torts is the place where the damage occurred.[139] However, this law is overruled for the law of a common habitual residence of the person claimed to be liable and of the person who suffered damage[140] as well as for the law of the country with which the tort is manifestly more closely connected.[141] The main rule for both the concept of negotiorum gestio and unjust enrichment is that the non-contractual relationship arising out of a negotiorum gestio or unjust enrichment falls under the law which governs the existing relationship between the parties, if any.[142] Such relationship can arise, for example and as expressly indicated in the provision, out of a closely connected contract or tort. If there is no existing relationship between the parties, but the parties have their habitual residence in the same country, the law of the country where both parties have their habitual residence is applicable.[143] If there is neither an existing relationship nor a common habitual residence, the law of the country where the negotiorum gestio, respectively the unjust enrichment took place will be applicable.[144] However, and again, where it is clear from all the circumstances of the case that the non-contractual obligation arising out of the unjust enrichment or the negotiorum gestio is manifestly more closely connected with another country than that which would apply following the first three criteria, the law of that other country shall apply.[145]

6.3.4 **Subjects regulated by the indicated substantive law**

The Rome I and II Regulations do not only determine the applicable law. They also indicate which aspects are governed by the law determined pursuant to their conflict rules in any event.[146] The scopes of the laws applicable pursuant to Rome I respectively Rome II are similar to some extent.[147] They both govern the various ways of extinguishing obligations and prescription and limitation of actions,[148] whereas they may govern the obligation's formal validity.[149] In addition, the applicable

137. Rushworth & Scott 2008, p. 285.
138. As such, it can be described as a 'cascade'. This term was used by Hartley to describe the system of Art. 4 Rome II, which article has the same structure (Hartley 2008, p. 903).
139. Art. 4(1) Rome II.
140. Art. 4(2) Rome II.
141. Art. 4(3) Rome II.
142. Art. 11(1) respectively Art. 10(1) Rome II.
143. Art. 11(2) respectively Art. 10(2) Rome II.
144. Art. 11(3) respectively Art. 10(3) Rome II.
145. Art. 11(4) respectively Art. 10(4) Rome II.
146. Art. 12 Rome I respectively Art. 15 Rome II. That the overview of subjects given is not exclusive follows from the wording of the respectively articles which provide that the applicable law shall govern 'in particular' the indicated subjects.
147. Art. 12 Rome I respectively Art. 15 Rome II.
148. Art. 12(1)(d) Rome I respectively Art. 15 under h Rome II.
149. Art. 11 Rome I respectively Art. 21 Rome II. See also in general on the similarities in the scope of the applicable law pursuant to Rome I and Rome II: Wagner 2014.

substantive law regulates the assessment of damage.[150] In respect of general average this means that the adjustment[151] will be subject to the applicable substantive law to the obligation to contribute in general average.[152]
Under Rome I, the law applicable to the contract (pursuant to the criteria set out in Rome I) also governs inter alia the contract's material validity,[153] its interpretation, its performance and the consequences of the breach of an obligation.[154] Pursuant to Rome II, the law applicable to non-contractual obligations also governs the basis and extent of liability,[155] the division of liability, if any, and the vicarious liability.[156]

6.4 Rome I or Rome II?

6.4.1 Differences between Rome I and Rome II

It follows from the above outline that in spite of the Rome I and Rome II's identical objective, their elaboration differs.[157] Under Rome II, additional requirements are applied to determine the validity of a choice of law, most notably regarding choices of law made before the event giving rise to the damage occurred. In Rome I and Rome II, the indicated connecting factors not only differ,[158] but are also valued differently. In the absence of a choice of law, Rome I's conflict of law rules put great emphasis on one of the parties' habitual residence to establish the applicable law.[159] By contrast, Rome II's main connection points are the place where the damage occurred and an existing relationship between the parties.[160] A *common* habitual residence may only be relevant as one of the factors to establish the closest connection.[161] The habitual residence of one of the parties does not play an important role.[162] As discussed above,[163] another important difference between the two regulations concerns the scope of the substantive law which applies pursuant to the respective regulations. Similar, but yet different rules apply to determine the applicable law to a claim against several debtors who are liable for payment of the same claim.[164]

150. Art. 12(1)(c) Rome I respectively Art. 15 under c Rome II.
151. See on the adjustment para. 2.3.2 and 4.4 above.
152. Nevertheless, it is still argued in legal literature that the applicable law to the adjustment is to be determined separately (*Voyage Charters* 2014, p. 594 and Lowndes & Rudolf 2013, pp. 566-567, 582-583).
153. Art. 10 Rome I.
154. Art. 12 Rome I.
155. Art. 15 heading and under a Rome II.
156. Art. 15 heading and under g Rome II.
157. Wagner 2014, pp. 238-239; Scott 2009, p. 66.
158. See for a discussion of the connecting factors Weller 2011.
159. An exception is made in Art. 5(1) Rome I. The habitual place of residence of a company under the Rome Regulations in principle is the place of its central administration (Art. 19(1) Rome I respectively Art. 23(1) Rome II).
160. Art. 4(1), 4(3) and 7 respectively Art. 10(1), 11(1) and 12(1) Rome II.
161. Art. 4(2), 10(2), 11(2) and 12(2) Rome II. Art. 6(1)(a) Rome II can be considered as the exception that confirms the rule. Critical on the connecting factor of a common habitual residence: Stone 2007, pp. 107-109.
162. This connecting factor is only applied in Art. 5(1) Rome II.
163. See para. 6.3.2 above.
164. Art. 16 Rome I respectively Art. 20 Rome II. The fact that the claim derives from different sources does not prevent the rule's application. What is relevant is that it concerns the same performance

It follows that the application of the various conflict of law rules of either Rome I or Rome II may lead to a different substantive law and a different scope of application thereof.[165] It is therefore necessary to establish whether the applicable law has to be determined under Rome I or Rome II, and which conflict of law rules are to be applied. When determining the applicable law, it will be obvious in most situations whether Rome I or Rome II gives the relevant framework and which conflict of law rule has to be applied. In respect of general average, however, these important questions may be more difficult to answer.

6.4.2 Determination of the applicable law at obligation level

Rome I gives guidelines to determine the applicable law to *contractual obligations*. Rome II's conflict of law rules concern *non-contractual obligations* arising out of the concepts of 'tort/delict' on the one hand and 'unjust enrichment, negotiorum gestio and culpa in contrahendo' on the other.[166] These concepts, autonomously interpreted, are supposed to cover all contractual and non-contractual obligations in civil and commercial matters.[167] The first instinctive inclination may be to consider whether the concept of general average as a source of obligations, so as an 'all purpose' or 'container concept', can be brought under one of these specifically regulated legal concepts. Such approach, however, would disregard the fact that neither Rome I nor Rome II gives conflict of law rules which apply to all obligations deriving from one and the same source or event. They only deal with multiplicity of debtors for the same claim and not with multiplicity of liability as a result of one event.[168] Under the Rome Regulations, there is no such thing as a conflict of law rule to determine the applicable law to all obligations arising out of a particular negotiorum gestio, tort or contract.[169] As a result, there is no conflict of law rule to determine the applicable law which covers all obligations arising out of a general average situation either. Rather Rome I and Rome II give rules to determine the applicable law to a *specific obligation* between two parties which arises out of a particular event. The event may be the starting point but the connecting factors focus on the parties involved in the event. In the end, the parties' specific relationship

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and that it ranks at equal level. The fact that the performance is not completely identical due to applicability of different national legal systems would not change this (Asser/Kramer & Verhagen 10-III 2015, p. 399). The applicable law to 'unequally ranked' claims is to be determined on the basis of Art. 15 Rome I respectively Art. 19 Rome II (Baetge in: Calliess 2015, p. 365). When a debtor has paid the claim fully or partially, his rights to claim a compensation from the other debtors is governed by the law applicable to another debtor's obligation towards the creditor. Unlike Rome II, Rome I provides that the other debtors are entitled to rely on defences they could invoke against the creditor under the law applicable to their obligation. The Rome Regulations do not provide for the situation in which the claim arises both out of contractual and non-contractual obligations (Baetge in: Calliess 2015, p. 368). A full discussion of the rule on plurality of debtors is beyond the scope of this study.

165. Scott 2009, p. 66. According to Halfmeijer the risk is limited as Rome II's conflict of law rules take existing relationships into account (Halfmeijer in: Calliess 2015, p. 476).
166. See, for example, Art. 4(1) Rome II: '(…) *the law applicable to a non-contractual obligation arising out of tort* (…)'. Art. 2 Rome II. The concepts of contract and tort or delict were regarded insufficient to cover all legal concepts. Special rules have been given where the general rule '*does not allow a reasonable balance to be struck between the interests at stake*'. Recital 19 Rome II.
167. See para. 6.2.1 above.
168. Art. 16 Rome I respectively Art. 20 Rome II.
169. Even though Rome I provides for the applicable law to a contract, it explicitly allows partial choice of law clauses in Art. 3(1) Rome I.

determines the applicable conflict of law rule. The qualification has to take place at obligation level. As indicated by Stone: '*different laws may apply between different pairs of party, even though the claims arise out of the same incident*'.[170] To make it more concrete, when a particular act is qualified as a negotiorum gestio, for example, when payments are made for the interests of several persons, the Rome Regulations do not provide for a law which applies to this act and all ensuing obligations, regardless of the parties involved and/or existing relationships. Instead the law has to be determined for each of the specific relationships.[171] When A makes a payment to B for the benefit of C and D, this payment may be regarded as fulfilment of a contract between B and C and as negotiorum gestio in the relationship between B and D. It is not the act but the obligation in the specific legal relationship that is determining.[172] Similarly, in the relationship between A and B, contractual and non-contractual obligations can be created at the same time. Rome II's wording makes it clear that the fact that there is a 'contract'[173] between the parties does not necessarily mean that all obligations between the parties will arise out of this contract. Rome II accepts that a contractual relationship exists between parties and that a claim is nevertheless brought on the basis of the concept of unjust enrichment or negotiorum gestio.[174] The particular obligation has to be identified and qualified. In addition, Rome II allows the parties to choose the applicable law to a non-contractual obligation before the non-contractual obligation has arisen, albeit not unlimited.[175] It is clear that a contractual relationship must exist in order to do so. Rome I also accepts partial choice of law clauses,[176] which is yet another indication that qualification has to take place at obligation level. In addition, it was held by the ECJ in respect of the Brussels I Regulation that the mere existence of a contract between the parties does not automatically mean that all obligations between the parties have a contractual nature.[177] It follows that in a relationship between two parties different laws may be applicable to obligations arising out of various sources and that different laws may apply to obligations arising out of the same event. Such a qualification of the applicable law at obligation level creates a clear breach with traditional maritime conflict of law rules.[178]

170. Stone 2007, p. 103.
171. Nehne 2012 (II), pp. 113-115.
172. Scott 2009, pp. 57-58.
173. The concept 'contract' is discussed in detail by Mankowski 2007, pp. 102-104.
174. Art. 10(1) respectively 11(1) Rome II. As will be seen below, such existing contractual relationship is one of the connection factors to determine the applicable law to the obligations arising out of unjust enrichment or negotiorum gestio. See para. 6.3.3.4 below.
175. Art. 14 Rome II.
176. Art. 3(1) Rome I: '*By their choice the parties can select the law applicable to the whole or part only of the contract*'.
177. ECJ 13 March 2014, C-548/12, *NJ* 2015, 1 (*Brogsitter/Montres Normandes*). Also inter alia ECJ 27 September 1988, C-189/87, *NJ* 1990, 425 (Kalfelis/Schröder). Also Art. 7(1) Brussels I Recast: '(…) *the place of performance of the obligation in question*'. As pointed out by Hill & Chong, the qualification at obligation level under the Rome Regulations may create problems with jurisdiction under the Brussels I instruments (Hill & Chong 2010, p. 134).
178. Rome Regulations' approach to determine the applicable law at obligation level does not only change the applicable private international law rules for general average but also for collisions. See also Van der Velde 2006, p. 317; Basedow 2010; George 2007. More in general, the unilateral approach taken by the European legislator has created several difficulties. As indicated by Magnus & Mankowski, this approach is '*hardly compatible with the omnilateral approach of traditional conflicts of law which designates in an abstract way a certain law – which can be either the own one or a foreign one – as applicable to a certain situation*'. (Magnus & Mankowski 2002, p. 1). Basedow has argued that Rome I and Rome II try to nationalise a specific obligation and assign it to a single national system for

Following this line of reasoning in terms of the specific obligation, the qualification of 'general average' as the source of a particular obligation does not suffice. This is even more so as none of the regulated concepts covers the general average concept completely.[179] Positioning the general average concept within the dry/land civil law concepts is difficult. General average is and always has been a concept in its own right.[180] In essence, general average obligations arise by operation of law but contractual arrangements can be made.[181] Neither the conflict rules of Rome I nor of Rome II explicitly provide for such a hybrid concept. It is thus clear that the legal concept of general average cannot be brought under one of the concepts regulated in either of the Rome Regulations.[182] Instead, the applicable conflict rule to obligations arising out of general average under the Regulations will have to be determined in each and every relationship and regarding each and every obligation arising out of the general average event.

6.4.3 Contractual or non-contractual obligation?

6.4.3.1 *Distinction not clearly specified*

Rome I applies to contractual obligations whereas Rome II regulates non-contractual obligations. The first question therefore appears to be whether the obligation at stake in the specific relationship involved is 'contractual' or 'non-contractual'.[183] Neither the Regulations, nor their Recitals, nor their explanatory memoranda, clarify when an obligation is contractual and/or when it is non-contractual.[184] The distinction will have to be established autonomously, i.e. without reference to a particular national law.[185] The term 'contractual obligation' in the meaning of Rome I must be distinguished from the term 'contract' applied in national laws, at least in order to establish the relevant conflict of law rules.[186] As a result, it is possible that the applicable law to an obligation has to be considered on the basis

territorial reasons and that the added benefit thereof in purely international maritime incidents is questionable (Basedow 2010, p. 121).

179. This is further discussed in para. 6.5 below.
180. See para. 3.3.2.2 above.
181. The legal basis of general average obligations is discussed in Chapter 3 above.
182. See, however, Ramming 2016, p. 96. He considers general average to have a non-contractual nature. Admittedly, general average's legal basis lies in the national law but obligations to contribute in general average may also have a contractual nature. See para. 3.3 above. This distinction is not made by Ramming.
183. As pointed our by Nehne, the concept 'obligation' has not received much attention. It is generally considered in the context of a contractual or non-contractual obligation and has not been given a separate definition. (Nehne 2012 (II), p. 110).
184. Nehne 2012 (II), p. 123. The absence of a definition or other guidance to determine whether an obligation is contractual or not for the purposes of the Rome Regulations was criticised inter alia by Mankowski (2006, p. 101), Bitter (2008, p. 100) and Bělohlávek (2010 (1), pp. 102-103).
185. Recital 11 Rome II expressly mentions that the term non-contractual obligation should be regarded as an autonomous concept. The term contractual obligation will similarly have to be interpreted autonomously. (Chitty on Contracts (I) 2012, p. 2255.) See on autonomous interpretation also para. 6.2.3 above.
186. Distinct criteria apply to determine whether Rome I applies and to determine whether there is a 'contract' under the applicable substantive law. Only when it has been established that there is 'contractual obligation' in the autonomous European meaning and Rome I has been singled out as the relevant regime to establish the applicable law, the conflict rules of Rome I, including the provisions that criteria of the substantive national law have to be applied, come into play (Freitag in: Bernreuther a.o. 2010, p. 174).

of Rome II, whereas the obligation under the substantive law is regarded as a contractual obligation. It also follows from the Rome I and II Regulations' recitals that the substantive scope of Rome I should be consistent with Rome II.[187] In the European Commission's explanatory memorandum to Rome II it is indicated that the European Court of Justice will have to clarify the distinction.[188]

6.4.3.2 *Case law from the European Court of Justice*

In its decisions of 21 January 2016 in the cases *Ergo Insurance/If P&C and Gjensidige Baltic/PZU Lietuva*, the European Court of Justice has given some directions regarding the actual contents of the terms contractual and non-contractual obligation as applied in Rome I and Rome II.[189] The court was asked how Rome I, Rome II and the Directive 2009/103 on the insurance of civil liability in respect of the use of motor vehicles were to be interpreted. To this effect, the European Court of Justice first of all confirmed that the terms contractual and non-contractual obligation are to be interpreted independently taking into account the Regulations' scheme and purpose.[190] It is then expressly indicated that Rome I and Rome II, as follows from their respective recitals, should not only be applied consistently reciprocally, but also in a manner consistent with the Brussels I Regulation.[191] In previous case law on the Brussels I instruments, the European Court of Justice had already clarified that only '*a legal obligation freely consented to by one party towards another and on which the claimant's action is based*' qualifies as a 'matter relating to contract' in the meaning of Art. 5 Brussels I Regulation respectively Art. 7 Brussels I Recast.[192] By analogy with this case law and in view of the required consistency between the Brussels I instruments on the one hand and the Rome Regulations on the other, the European Court of Justice clarified on 21 January 2016 that a contractual obligation in the meaning of Rome I '*designates a legal obligation freely consented to by one person towards another*'.[193] The court repeats that, by contrast, the term non-contractual obligation is to include obligations which derive from tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo.[194]

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187. Recital 7 Rome I respectively Rome II.
188. Explanatory Memo 2003 (Rome II), p. 8 and 12.
189. ECJ 21 January 2016, C-359/14 and C-475/14 (*Ergo Insurance/If P&C* respectively *Gjensidige Baltic/PZU Lietuva*).
190. On autonomous interpretation, see also para. 6.2.2 above.
191. Recital 7 Rome I respectively Rome II.
192. ECJ 28 January 2015, C-375/13 (*Kolassa/Barclays Bank*). Also ECJ 14 March 2013, C-419/11, *NJ* 2013, 336 (*Ceska sporitelna/Feichter*); ECJ 20 January 2005, C-27/02 (*Engler/Versand*); ECJ 5 February 2004, *C*-265/02, ECR 2004 I-1543 (*Frahuil SA/Assitalia SpA)*. As explained by Advocate General Cosmas in his opinion to the case 'Alblasgracht': '*an action for compensation does not constitute a 'matter relating to a contract' except where there is an agreement freely entered into, not as between the plaintiff and a third party or between the defendant and a third party, but between the plaintiff and the defendant and on the condition that the plaintiff submits in his application that the defendant is in breach of the obligations imposed on him as a result of that agreement.*' Opinion of Advocate General Cosmas delivered on 5 February 1998 to ECJ 27 October 1998, C-51/97, *NJ* 2000, 156 *('Alblasgracht').* Also ECJ 17 June 1992, C-26/91 [1992] ECR I-3990, *NJ* 1996, 316 (*Jacob Handte/TMCS*). Also: ECJ 17 September 2002, C-334/00 [2002] ECR I-7357 (*Tacconi/Wagner*). See also ECJ 8 March 1988, C-9/87, *NJ* 1990, 424 (*Arcado/Haviland*).
193. ECJ 21 January 2016, C-359/14 and C-475/14, (*Ergo Insurance/If P&C* respectively *Gjensidige Baltic/PZU Lietuva*), para. 44.
194. ECJ 21 January 2016, C-359/14 and C-475/14, (*Ergo Insurance/If P&C* respectively *Gjensidige Baltic/PZU Lietuva*), para. 45-46. This also follows from Art. 2 Rome II.

It is clear that it will depend on the specifics of the obligation at stake and the relationship concerned whether an obligation was freely assumed and whether the parties had an intention to be bound indeed.[195] The European Court of Justice's recent judgments in *Ergo Insurance/If P&C* and *Gjensidige Baltic/PZU Lietuva* confirm that the case law regarding the Brussels I instruments is relevant for the interpretation of the Rome Regulations.[196] However, the concrete guidance that may be derived from this case as well as from the jurisprudence on the Brussels I instruments for the interpretation of the Rome Regulations should not be overestimated. To begin with, the European Court of Justice's case law on the question when a contract is deemed to exist for the purposes of the Brussels I instruments may be 'significant',[197] but does not provide a comprehensive regime. Judgments have been given in specific cases on the basis of the underlying facts and regulations applied in these cases. It should also be kept in mind that (most of) this case law predates the existence of the Rome Regulations. The Court was therefore unable to take into account effects, if any, of its decisions for the Rome Regulations' conflict of law rules. In more recent decisions on 'matters relating to contract' under Art. 5 Brussels I Regulation respectively Art. 7 Brussels I Recast, the ECJ did not revert to the term 'contractual obligation' as included in the Rome I and II Regulations.[198] Furthermore, it is relevant to note that the provisions of the Rome I and II Regulations and the Brussels I instruments serve a different purpose and therefore have a different wording.[199] Whereas the dividing criterion for applicability of the Rome I and II Regulations is whether the claim is contractual and arises *out of a contract* between the relevant parties and seems to require that a contract *exists between a claimant and a defendant*, under the Brussels I instruments it has to be determined whether there is a *sufficient connection* with a contract to apply the contractual jurisdiction grounds.[200] The Rome Regulations refer to obligations '*arising under*' or '*out of*' contracts,[201] whereas the Brussels I instruments use the phrase '*matters relating*

195. Nehne 2012 (II), p. 123; Mankowski 2003, p. 128.
196. The ECJ's reference to the Brussels I Regulation does not come as a surprise. In it explanatory memoranda to the Rome Regulations (Explanatory Memo 2003 (Rome II), p. 8), the European Commission already suggested that until the ECJ has clarified the distinction between a contractual and a non-contractual obligation, the ECJ's decisions regarding the distinction between contractual and non-contractual matters for the purpose of the Brussels I instruments can be of assistance. That the ECJ's case law on other European private international law instruments, most notably the Brussels I instruments, is taken into account also makes sense in view of the desire of internal coherence and consistency of EU law. General consistency requirements are set out inter alia in Art. 7 TFEU and Art. 21(3) TEU. These aim to retain predictability in EU law (Herlin-Karnell and Konstadinides 2012, p. 148). In addition, the European Union uses the consistency argument in its case law, for example, in ECJ 18 December 2007 C-341/05, [2007] ECR I-11767 (*Laval/Svesnka Byggnadsarbetareförbundet*); ECJ 11 December 2007, C-438/05, [2007] ECR I-10779 (*ITWF/Viking*). See also on consistency of EU law in more detail Franklin 2011; Herlin-Karnell and Konstadinides 2012.
197. Kramer 2008, p. 5.
198. For example, ECJ 13 March 2014, C-548/12, *NJ* 2015,1 (*Brogsitter/Montres Normandes*).
199. Max Planck Comments 2007, p. 237; Hill & Chong 2010, p. 134; Asser/Kramer & Verhagen 10-III 2015, nr. 655, p. 381. As indicated by Nehne, when the wording of the instruments is identical, the same meaning has to be applied. (Nehne 2012 (II), pp. 107-108.)
200. As it appears from its wording, article 7(1) of the Brussels I Recast does not require the conclusion of a contract as such. ECJ 20 January 2005, C-27/02 (Engler/Versand); ECJ 17 September 2002, C-334/00 [2002] ECR I-7357 (Tacconi/Wagner). At least this is the case in the English and Dutch version of the regulation. The German wording is less clear (Kropholler/Von Hein 2011, p. 148). Also: ECJ 4 March 1982, C-38/81 (Effer).
201. Recital 9 and 10 respectively Art. 1(a), (b), (c), (d) and (j) Rome I.

to contract'.[202] The Brussels I instruments' wording is thus literally broader than the description in the Rome Regulations,[203] at least, it is in the English version of the regulations. In the Dutch version of the Brussels I instruments and Rome I, the terms 'matters relating to contract' and 'contractual obligations' curiously are translated identically as 'verbintenissen uit overeenkomst'. A different wording may directly impact on the regulations' respective scopes and hence their interpretation.[204] Furthermore, the interests which have to be taken into account when interpreting the rules of international jurisdiction on the basis of the Brussels I instruments (for example, procedural economy or the idea that the court which is most closely connected to the facts and evidence should have the possibility to deal with the merits of the matter or the aim to establish the same jurisdiction for connected claims) by definition have a different tenor than the specific conflict of law and substantive law interests which underlie the Rome Regulations, which aim to establish a close connection between the obligation and the applicable law.[205] These varying interests cannot always be reconciled, which may well lead to a different outcome.[206] Moreover, matters which are excluded from the Rome Regulations' scope may fall within the scope of the Brussels I instruments.[207] For all these reasons, albeit guiding, not all case law on the Brussels I instruments is relevant for the interpretation and application of the Rome Regulations. The result is that an obligation which is considered to fall within the term '*matters relating to a contract*' under the Brussels I instruments does not necessarily mean that it is also a contractual obligation in the meaning of Rome I.[208]

The European Court of Justice's decision in the case *Martin Peters* may serve as an example.[209] In this case, the European Court of Justice considered that obligations based on the affiliation between an association and its members can be regarded as obligations in the meaning of Art. 5(1) of the Brussels Convention as the mem-

202. The case law of the ECJ on the Brussels I instruments which is referred to in the European Commission's Explanatory Memorandum concerns the question whether a person domiciled in a Member State could be sued in another Member State on the basis that there was a contractual or tortious relationship. The relevant provisions were set out in Art. 5 Brussels Convention respectively the Brussels I Regulation. In the Brussels I Recast, the provision has been set out in Art. 7. It provides that a person domiciled in a Member State may inter alia be sued in another Member State '(1)(a) *in matters relating to a contract, in the courts for the place of performance of the obligation in question*' (…) and '(2) *in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur*' (author's underlining).
203. Dickinson 2008, pp. 176-177. Pocar also points out that the Brussels I instruments are based on 'domicile' whereas the Rome Regulations use the 'habitual place of residence'. He questions whether these systems can be regarded to be 'coherent' (Pocar 2009, p. 346).
204. Strikwerda in his case note to ECJ 14 March 2013, C-419/11, *NJ* 2013, 336 (*Ceska sporitelna/Feichter*). Nehne 2012 (II), p. 108. Different: Scott who deems the difference in wording 'insignificant' (Scott 2009, p. 68).
205. Asser/Vonken 10-I 2013, nr. 124, p. 103-104; Max Planck Comments 2007, p. 237; Bělohlávek 2010 (I), p. 112. Rushworth & Scott also point out that the considerations applied in the case law of the ECJ regarding Art. 5(3) Brussels I Regulation do not (all) apply in the choice of law context (Rushworth & Scott 2008, pp. 278-279, 300).
206. Van Haersholte 2000, p. 389; Rauscher 2011, p. 57; Asser/Kramer & Verhagen 10-III 2015, nr. 655, pp. 381-382.
207. For example, ECJ 18 July 2013, C-147/12, *NIPR* 2013/362 (*ÖFAB/Koot*). Also Asser/Kramer & Verhagen 10-III 2015, nr. 655, p. 382.
208. For example, ECJ 16 January 2014, C-45/13, *NIPR* 2014, 51 (*Kainz/Pantherwerke*).
209. ECJ 22 March 1983, C-34/82, [1983] ECR 987 (*Martin Peters*). This case was referred to in the European Commission's explanatory memorandum to Rome II (Explanatory memorandum 2003, p. 8).

bership of a private law association would create between the members close links '*of the same kind*' as those which are created between the parties to a contract. At first glance, an analogy may be drawn with general average, where relationships exist between parties to a common maritime adventure, possibly of the same kind as contractual parties. If the case would be taken as guidance for application of the Rome Regulations, this may lead to an automatic qualification of an obligation to contribute in general average as contractual, and hence to applicability of Rome I. However, rather than defining the concept 'contract', the European Court of Justice in the *Martin Peters* case discussed whether the membership of an association should be considered as *similar to* a contractual relationship in order to be able to apply Art. 5 of the Brussels Convention. The Court did not say that there was a contractual obligation. Moreover, it clearly follows from the judgment that the criterion of '*efficacious conduct of the proceedings*' was leading. The decision's relevance for the interpretation of the Rome I's term contractual obligations therefore seems limited.[210] The case *Martin Peters* was decided almost 10 years before the European Court of Justice held in the case *Jacob Handte*[211] that a contract does not exist when there is '*no obligation freely assumed by one party towards another*'. Also in that respect its relevance is doubtful.
The distinction between the Brussels I instruments and the Rome I and II Regulations may not be a preferred outcome from the perspective that coherency between European private international law instruments' is desirable,[212] but does justice to the European Court of Justice's case law that a contract does not exist when there is no obligation freely assumed by one party towards another.

On the other hand, it can reasonably be assumed that where there is no matter relating to contract in the sense of the Brussels I instruments, a contractual obligation under Rome I will not exist either. In general, the mere existence of a contract between the claimant and a defendant seems insufficient to give a claim a contractual nature. The claim must be for a breach of contract, to be established considering the purpose of the contract.[213] Pursuant to the European Court of Justice, this will '*a priori be the case where the interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter*.'[214] It was also held by the European Court of Justice that a legal obligation freely consented to does not exist in a chain of international agreements between another person than the first buyer in the chain and the producer who was not the seller.[215] The Court considered that the parties' contractual obligations may vary from contract to contract, so that the contractual rights which the sub-buyer can enforce against his immediate seller will not necessarily be the same as those which the manufacturer will have accepted in his relationship with the first buyer. In view of these decisions, it is doubtful

210. The distinction is not made by Weller, who considers obligations based on an association and its members as contractual obligations also for the purpose of Rome I (Weller in: Calliess 2015, p. 54).
211. ECJ 17 June 1992, C-26/91 [1992] ECR I-3990, *NJ* 1996, 316 (*Jacob Handte/TMCS*).
212. See on coherency also f.nt. 196 above.
213. ECJ 13 March 2014, C-548/12, *NJ* 2015, 1 (*Brogsitter/Montres Normandes*).
214. ECJ 13 March 2014, C-548/12, *NJ* 2015, 1 (*Brogsitter/Montres Normandes*). In similar fashion: Kropholler/Von Hein 2011, p. 149; Leible in: Rauscher 2011, p. 211; Geimer 2010, p. 195.
215. ECJ 17 June 1992, C-26/91 [1992] ECR I-3990, *NJ* 1996, 316 (*Jacob Handte/TMCS*).

whether closely related obligations can be regarded as matters relating to contract in the sense of the Brussels I instruments and/or as contractual obligations under the Rome Regulations.[216] However, even though it is essential that an obligation is identified in order to apply Art. 5 Brussels I Regulation respectively Art. 7 Brussels I Recast, the conclusion of an actual contract is not required.[217] Such contract may, as discussed, well be required for a contractual obligation in the meaning of Rome I.

6.4.3.3 *Mutual exclusivity and/or preference?*

It follows from the above that in order to determine the applicable law in respect of a specific obligation the question has to be answered whether it is contractual or non-contractual. Interestingly, the question whether the claim substantively is contract based or not eventually will have to be determined pursuant to the rules of national law. The determination of the applicable law is a preceding test.

Even before the European Court of Justice's decisions in *Ergo/If P&C*, and *Gjensidige Baltic/PZU Lietuva*[218] possibly as a result of its case law on the Brussels I instruments,[219] the term non-contractual obligation was mainly determined in relation with the term contractual obligation. It seems to follow from the European Court of Justice's case law on the Brussels I instruments that the legal concepts of contract on the one hand and of tort, delict and quasi-delict on the other are mutually exclusive.[220] In legal literature, the concepts were already referred to by some authors as '*strict alternatives*'.[221] In view of the Court's recent case law on the interpretation of the Rome Regulations, the position indeed appears to be that an obligation which cannot be qualified as a contractual obligation (i.e. an obligation freely assumed between the parties and indispensable to establish the lawfulness of the conduct) and seeks to establish the liability of a defendant, is automatically non-contractual.

From a more positive perspective, obligations arising out of the legal concepts of tort/delict, unjust enrichment, negotiorum gestio and culpa in contrahendo, i.e. obligations which arise as a matter of law, fall within the category 'non-contractual obligations'.[222] Weller indicates that '*a contractual obligation arises where a party freely assumes an obligation that otherwise would not exist – as opposed to pre-existing obligations not to inflict harm on another person under tort law*'.[223] If this approach is correct, the relevant test to be applied in determining whether Rome I or Rome II has to be used, is whether an obligation exists by operation of law between the parties if they would not have regulated their relationship contractually. If such an obligation

216. See, however, Freitag in: Bernreuther a.o. 2010, p. 174. According to Freitag the debtor does not have to agree to the specific obligation in order to qualify it as contractual.
217. ECJ 14 March 2013, C-419/11, *NJ* 2013, 336 (*Ceska sporitelna/Feichter*); ECJ 17 September 2002, C-334/00 [2002] ECR I-7357 (*Tacconi/Wagner*).
218. ECJ 21 January 2016, C-359/14 and C-475/14, (*Ergo Insurance/If P&C* respectively *Gjensidige Baltic/PZU Lietuva*).
219. Most notably ECJ 27 September 1988, C-189/87, *NJ* 1990, 425 (*Kalfelis/Schröder*).
220. Also Hill & Chong 2010, p. 133.
221. Kunda & Gonçalves 2010, p. 7. In similar fashion Scott 2009, pp. 59, 61 and Chitty on Contracts (I) 2012, p. 2256.
222. Art. 2 Rome II. Also Nehne 2012 (II), p. 126 with reference to several German authors. Also ECJ 21 January 2016, C-359/14 and C-475/14, (*Ergo Insurance/If P&C* respectively *Gjensidige Baltic/PZU Lietuva*).
223. Weller in: Calliesss 2015, p. 54.

exists, the obligation will not be contractual and the applicable law will have to be determined pursuant to Rome II. Therefore, not the ground of the claim as chosen by the parties would be relevant,[224] but rather the 'objective' true legal basis would have to be determined. At first sight such approach seems to be supported by the European Court of Justice's decision in *Brogsitter/Montres Normandes* under the Brussels I Regulation.[225] In this case, the European Court of Justice held in respect of the Brussels I Regulation that there was a matter relating to a contract in the meaning of Art. 5(1) only where, '*the interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter.*' When an obligation implied by law exists, the contract may not be indispensable. In respect of general average cases, there may be obligations at law and obligations arising under contract at the same time, basically for the same claim.[226] The obligation to contribute may follow from a national substantive law and can be confirmed in a security form. In that situation, the security form is not indispensable to bring a claim for a contribution. It may be argued that the ECJ's decision in *Brogsitter/Montres Normandes* can be regarded to limit the impact of contractual general average provisions in that respect that for those claims that can be brought at law and on the basis of a contract, the contract is not indispensable and the claim, in essence, should be regarded as non-contractual. It should be mentioned though that rather than considering whether a non-contractual obligation existed, in the case *Brogsitter/Montres Normandes* the criterion was applied to determine whether there was a matter relating to contract. The European Court of Justice did not hold that the two would be mutually exclusive and/or that the non-contractual obligation would take precedence.

Weller's view that the non-contractual obligation is leading has not found general approval in legal literature. Several authors have argued that a qualification as contractual obligation, if and when possible, would be preferred.[227] In situations in which claims can be based both on contract and tort, the applicable law to a claim based on contract would have to be determined by Rome I. Even in situations where obligations follow from the Code, they should be regarded as contractual obligations insofar as they are indirectly related to a contract.[228] The decision in

224. In view of the European Commission's desire to enhance the predictability of the applicable law, a claimant's choice for the basis of the claim should not be given too much weight. It has not yet been clarified whether the claim as framed by the claimant is of overriding importance or whether a court is entitled to add legal grounds and thereby has to determine the applicable law.
225. ECJ 13 March 2014, C-548/12, *NJ* 2015, 1 (*Brogsitter/Montres Normandes*).
226. See also para. 3.3.5 above.
227. Dicey, Morris & Collins 2012, p. 1785; Nehne 2012 (II), p. 123. As pointed out by Advocate General Jacobs in point 38 of his Opinion to ECJ 20 January 2005, C-27/02 (Engler/Versand), the ECJ has not interpreted the concept '*matters relating to contract*' narrowly either. However, in view of the differences between the Brussels I instruments and the Rome Regulations (as discussed in para. 6.4.3.2 above), it is doubtful that this implies that a wide interpretation should also be given to the term 'contractual obligation' in the meaning of Rome I.
228. Bitter 2008, pp. 97-98, with reference to Mankowski 2003; Freitag in: Bernreuther a.o. 2010, p. 134. Also Rauscher 2011, pp. 57-58. As recognised by the European Committee in its Explanatory Memorandum to Rome II, not all national legal systems will allow contractual and non-contractual obligations between the same parties (Explanatory Memo (Rome II) 2003, pp. 12-13). This may play a role in the background.

Ergo/If P&C[229] may be relied upon as authority for this position. In this decision, the European Court of Justice recalls that it has clarified that the wording '*matters relating to tort, delict or quasi-delict*' as applied in Art. 5(3) of the Brussels Convention, covers '*all actions which seek to establish the liability of a defendant and which are not related to a "contract"*'.[230] It may be derived therefrom that the existence of a contract is guiding and it could be argued that when there is a contractual obligation, it takes precedence over a non-contractual obligation.[231] This approach, albeit tempting to accept if only because of its easiness to apply, however, would create the possibility to circumvent relatively easily the additional requirements to agree the applicable law to non-contractual obligations.[232] Moreover, it would require a very broad interpretation of the European Court of Justice's rule that a contract does not exist when the obligation is not freely assumed by one party towards another.[233] It may also cause difficulties regarding the *Brogsitter/Montres Normandes* case.[234] In view of the fact that the specific obligation is taken into account, it seems to be in line with the Rome Regulations' structure to consider whether the specific obligation is freely assumed rather than giving a contract 'umbrella capacities'. Arguably, when a claim has its basis in the code or common law, the starting point should be the law rather than the contract. It should then be determined if contractual amendments and/or additions have been made and, if so, whether they are allowed by the applicable law. There does not appear to be a need either to bring obligations which in essence are non-contractual under the conflict of law regime for contractual obligations. Rome II's conflict of law rules seem to provide enough leeway to take existing contractual relationships into account.[235]
The unsatisfactory conclusion is that the exact contents of the terms contractual and non-contractual obligation, as well as the relationship between these concepts, eventually will have to be determined by the European Court of Justice. Until the European Court of Justice has further clarified the distinction between the terms, national courts will have to ascertain (autonomously) whether a 'non-contractual' or a 'contractual' obligation exists.[236]

It may happen that an obligation to contribute in general average can be qualified both as a contractual and as a non-contractual obligation at the same time, depending on the question whether it is brought on the basis of a contract of affreightment, security form, or on the basis of an obligation arising under the applicable national law. Whether it does will depend on which parties will be considered as general average claimants and general average contributors. Only when claimants and contributors would be the same under the applicable national law and under the

229. ECJ 21 January 2016, C-359/14 and C-475/14 (*Ergo Insurance/If P&C* respectively *Gjensidige Baltic/PZU Lietuva*).
230. ECJ 27 September 1988, C-189/87, *NJ* 1990, 425 (*Kalfelis/Schröder*); ECJ 26 March 1992, C-261/90, [1992] ECR I-2149 (*Reichert and Kockler/Dresdner Bank*); ECJ 27 October 1998, C-51/97, [1998] ECR I-6511 (*Alblasgracht*); ECJ 1 October 2002, C-167/00, [2002] ECR I-8111 (*Henkel*).
231. Alternatively, it may also be the case as well that the decision's scope may not be stretched to cover a situation where contractual and non-contractual obligations exist next to each other.
232. Art. 14 Rome II. See also para. 6.3.2 above and para. 6.5.3.2.1 below.
233. ECJ 17 June 1992, C-26/91 [1992] ECR I-3990, *NJ* 1996, 316 (*Jacob Handte/TMCS*).
234. ECJ 13 March 2014, C-548/12, *NJ* 2015, 1 (*Brogsitter/Montres Normandes*).
235. Inter alia on the basis of Art. 4(3), 10(1), 11(1) and 14 Rome II.
236. Also inter alia Nehne 2012 (II), p. 23; Kunda & Gonçalves 2010, pp. 7, 33; Strikwerda 2015, p. 110.

relevant contractual relationship, the question arises whether the contractual or the non-contractual obligation would take preference, or whether they can coexist and a claimant is entitled to choose.[237] When it is established that both contractual and non-contractual obligations arise as a result of the same incident regarding the same damage, their internal relationship has to be determined. In respect of general average events, this situation may happen quite often. When the various obligations are governed by the same national law, this law will determine the internal relationship between the sources. When different national regimes apply, the court will most likely have to apply its lex fori.[238] In addition, several debtors may be liable for payment of the same contribution. Pursuant to which law it has to be determined whether they are jointly liable does not follow from the Rome Regulations either.[239]

6.5 General average obligations under Rome I and Rome II

6.5.1 Obligations arising out of general average

6.5.1.1 *Obligations between different parties from different sources*

The above analysis shows that in respect of general average obligations, it may not be an easy task to label them either as contractual or as non-contractual in the sense of the Rome I and II Regulations.[240] From a general average incident, many obligations can arise between various parties.[241] The 'main' obligation that arises from a general average incident, is the obligation to pay a contribution for disbursements incurred. This obligation can be found in practically all national legal regimes and in a substantial amount of contracts of affreightment. In addition, national legal systems may place specific obligations on the shipowner or master, most notably the obligation to instruct an adjuster and exercise a right of retention for the benefit of other parties with a claim for compensation in general average. These obligations may exist in several relationships and can arise from various sources. A shipowner, for example, may have a claim for a contribution against a cargo interested party under a contract of carriage, whereas another party interested in the same cargo may have a claim against a shipowner and/or against another cargo interested party as a matter of law, either for a contribution or because the shipowner is obliged to exercise his lien also on behalf of this cargo interested party. It also happens that various sources provide for an obligation to contribute in one relationship. A right to a contribution may exist, for instance as a matter of law *and* on the basis of a contract of carriage and/or average bond. The contents

237. The relevant parties are to be determined pursuant to the applicable substantive law. See Art. 10 and 11 Rome I respectively Art. 15 heading and under a Rome II.
238. Asser/Kramer & Verhagen 10-III 2015, nr. 656, p. 382; Polak 2007, pp. 137-145.
239. Baetge in: Calliesss 2015, p. 367.
240. The demarcation line between a contractual and non-contractual obligation is not always clear. See para. 6.4.3 above as well as Max Planck Comments 2007, p. 4; Dickinson 2008, pp. 137-154; and Nehne 2012 (II), p. 112. Different: Freitag in: Bernreuther a.o. 2010, p. 173. The distinction between a contractual and a non-contractual obligation (also as applied by the ECJ) is not similar to the distinction made in national legal systems. Explanatory Memo (Rome II) 2003, p. 12; Boonk 2009, p. 95; Bělohlávek (I) 2010, p. 103.
241. See also Chapter 4 in some detail.

of these sources can be identical, but in practice often are not. The general average provisions inserted in national legislations, contracts of affreightment and security forms, although similar to some extent, are not the same.[242] The German national regime, for example, differs from the English common law legal regime, whereas the contractual provisions may give yet another rule. Contractual provisions in a charter party may be different from the general average clause(s) in another charter party or a bill of lading. The contents may even vary per document. The exact obligations that are created depend on the applicable substantive regime.

In the EU, these obligations arising out of a general average incident will have to be regarded in light of and have to be placed within the concepts provided for in the Rome I and II Regulations. More concretely, it should be determined whether in respect of a specific obligation between two parties, Rome I or Rome II is applicable, whether an exclusion applies, which conflict of law rule applies, and what the scope of the applicable substantive law is. The source of the obligation may have implications for the application of the conflict rules of Rome I and Rome II and, as a result, for the applicable substantive law.

Below, the application and impact of the Rome I and II Regulations to obligations to contribute in general average is further considered in respect of various relationships between several parties to the maritime adventure. On the basis of particular examples, difficulties in the application of Rome I and Rome II are pointed out. A full discussion of all consequences, if possible at all, would go beyond the scope of this study. To begin with, the most relevant obligations which can arise from a general average event are briefly set out, whereby it is considered whether, in principle, they fall within the Regulations' scope. The main obligation arising out of a general average event, i.e. the obligation to contribute, is subsequently considered in more detail, both in respect of Rome I (in para. 6.5.2) and in respect of Rome II (in para. 6.5.3).

6.5.1.2 *Obligation to contribute*

The obligation to contribute in general average in a specific relationship is, in essence, a (civil and commercial) payment obligation. As such there should not be any discussion that it falls within the Rome I and II Regulations' scope. However, that does not mean that the Regulations' conflict of law rules will always be applicable to such claims. An exclusion may apply, for example, when the claim is brought in arbitration proceedings or when it is based on a negotiable bill of lading and brought by a third party bill of lading holder.[243]

6.5.1.3 *Relationship with the average adjuster*

The obligation to appoint an average adjuster also seems to fall within the Rome I and II Regulations' scope in the sense that it is an obligation arising in a civil and

242. Some differences have been discussed in Chapter 4 above.
243. See para. 6.2.4 above.

commercial matter. The obligation is not included in contracts of affreightment but may derive from the applicable national legal system.[244]
The exclusion in respect of the question whether an agent can bind his principal does not seem to apply to an obligation to appoint an agent and/or to the relationship between the principal and the agent.[245] However, the applicable law to the question whether the shipowner can appoint an adjuster also on behalf of cargo interested parties most likely is not to be determined by the Rome I and II Regulations in view of the exclusion of agency aspects.

A different, but related issue concerns the relationship between parties interested in the maritime adventure on the one hand and the adjuster on the other. It will depend on the particulars of the relationship between two specific parties, whether such relationship can be regarded to create contractual and/or non-contractual obligations between the parties. This concerns both obligations from the adjuster to act in a specific manner and/or to refrain from certain behaviour, and vice versa from the party interested in property involved in the maritime adventure as against the adjuster.
It follows that agency aspects will play a significant role. In view of the exclusion of some of these aspects in Rome I,[246] the Regulations will not answer all questions. Additional conflict of law rules will have to be taken into account as well.[247]

6.5.1.4 *Obligation to exercise a right of retention*

The applicable law to the shipowner's and/or master's obligation to exercise a right of retention on behalf of other parties, if any, in principle, is to be determined under the Rome I and II Regulations as well.[248] This obligation should be distinguished from the question whether the shipowner and/or master has a right to retain cargo on board or otherwise, and if so, how this right should be effectuated.[249] The determination of the applicable law to security measures to safeguard payment of a general average payment may prove a difficult exercise.[250] There is no universal conflict of law rule which applies to measures to secure obligations in general average. Rome I and Rome II, with some minor exceptions, do not deal with the property law aspects of obligations.[251] Neither is there another internationally applicable regime which does. In order to determine whether a right of retention can be exercised, the first question that needs to be answered is whether a right of retention is applicable in the relationship between the party exercising the right of retention and his debtor. This question whether a right of retention exists has to be answered by the law applicable pursuant to Rome I respectively Rome II. Neither Rome I nor Rome II expressly provides that the applicable substantive law determ-

244. It is doubtful whether the obligation arises at all when the obligation to contribute has a contractual nature only. See para. 4.3.2 above.
245. Asser/Kramer & Verhagen 10-III 2015, nr. 736, pp. 446-447.
246. Art. 1(2)(g) Rome I.
247. For example, the Convention of 14 March 1978 on the Law Applicable to Agency or national conflict of law rules.
248. See para. 4.6.3 above.
249. See para. 4.6 above.
250. See in general Asser/Kramer & Verhagen 10-III 2015, nr. 550-560, pp. 316-323.
251. Also briefly para. 6.2.5 above.

ines the contractual aspects of rights to retain property. However, both Regulations make it clear that the list of areas governed by the indicated substantive law is not exhaustive.[252] Moreover, pursuant to Rome I, the applicable substantive law determines the consequences of a breach of contract, whereas Rome II stipulates that the lex causae is applicable to measures that the court may take to ensure the provision of compensation.[253] A right of retention is not to be ordered by a court, but is applied to make sure that compensation is obtained. The distinction may be regarded as artificial. As a result, the question whether a right of retention exists may well be regarded to fall under these provisions.[254] Whether Rome I and Rome II apply to rights of retention indeed, and if so to what extent, will have to be clarified by the European Court of Justice.[255]
When it has been established that there is a valid right of retention in a particular relationship, the next question is whether it can also be invoked against third parties. Failing an international conflict of law rule, these property law consequences of the right of retention will have to be determined pursuant to the law established on the basis of the national rules of private international law.[256]

6.5.2 Obligation to contribute in general average under Rome I

6.5.2.1 *Requirement of a contractual obligation*

In practice, claims for a general average contribution are often based on a contract of affreightment and/or on a security form.[257] In view of the case law of the European Court of Justice on the Brussels I instruments and the Rome I and II Regulations,[258] it will have to be established autonomously whether one or more of these contracts can be regarded to create the *contractual obligation* or at least serve as an independent basis to contribute between the claimant and the defendant and/or can be regarded as a basis for other obligations. English authors submit that when there is a contract of carriage in place between two parties to the maritime adventure, the claim for a general average contribution automatically has a contractual rather than a legal nature, and that the applicable law has to be established on the basis of the Rome Convention or Rome I, as the case may be, rather than Rome II.[259] This line of reasoning, which is not universally applied in the European

252. Both Art. 12 Rome I and Art. 15 Rome II provide that the lex causae '*shall govern in particular*'.
253. Art. 12(1)(c) Rome I respectively Art. 15(d) Rome II.
254. Garnett 2012, pp. 182-183.
255. Van der Velde 2015, s. 10:163 Dutch Civil Code, pp. 6269-6270.
256. As a matter of Dutch law, these property law aspects are subject to the law of the State where the goods were delivered. S. 10:163 Dutch Civil Code.
257. See para. 3.3.4 and 3.3.5 above.
258. This case law is discussed in para. 6.4.3.2 above.
259. Lowndes & Rudolf 2013, p. 566; *Voyage Charters* 2014, p. 594; Rose 2005, p. 113. The opinion may be based on the Privy Council's decision in *The Potoi Chau*, in which case it was held that the mere reference in a bill of lading that '*General Average shall be adjusted, stated and settled according to the York Antwerp Rules 1950*' made the consignee of the bill of lading contractually liable to contribute in general average. *The Potoi Chau;* (*Castle Insurance Co. Ltd.* v. *Hong Kong Islands Shipping Co. Ltd.*) [1983] 2 Lloyd's Rep. 376. It is indicated in Van Hooydonk that the applicable law to general average has to be determined by the Rome I in general (Van Hooydonk 2012, p. 234).

Union,[260] disregards the fact that an autonomous interpretation is required for application of the Rome I and II Regulations. This means that the European perspective should be taken into account. More concretely, the question is not whether the claim can be based on the contract under the applicable national law, but whether there is a contractual obligation in the meaning of Rome I. Moreover, an automatic application of Rome I does not take into account that the Rome Convention and Rome I may not be applicable to obligations arising under negotiable documents and/or in arbitration. In view of the framework set out above, it has to be determined per obligation whether it can be said to be a contractual obligation in the meaning of Rome I in the particular relationship.[261]

As discussed above, in order to qualify as contractual obligation in the meaning of the European private international law instruments, there has to be a 'freely assumed' obligation in the relationship between the specific parties involved, on which obligation the claim is based.[262] This first of all supposes a sufficiently direct contractual relationship between the claimant and the defendant. Secondly, when there is a sufficient contractual connection between two parties to create a contractual obligation, the next question is whether a contractual general average obligation in fact has been agreed. It has to be ascertained whether the general average regulation in a contract of affreightment or security form is extensive enough to create a contractual payment obligation.[263]

For general average purposes, the shipowner and the cargo interested party (or parties) generally are most important.[264] For this reason, the relationships arising between these parties will be considered in some detail below, whereby the focus will be on contracts of carriage and security forms.

6.5.2.2 *Sufficient contractual connection?*

6.5.2.2.1 Contracts of affreightment

Contracts for international carriage of goods by sea often are not agreed directly between the actual carrier, i.e. the shipowner or bareboat charterer, and the (relevant) cargo interested party. International carriage of goods by sea usually involves chains of contracts of affreightment, including time charters and/or voyage charter parties and bills of lading or sea waybills. As already mentioned, in the 'Handte' case on the Brussels Convention, the European Court of Justice specifically considered that an obligation freely assumed by one party towards another did not exist in a chain of international agreements between the first buyer in the chain

260. Dutch Courts seem hesitant to accept that a claim for a general average contribution has a contractual basis. District Court of Rotterdam 4 June 2003, *JBPR* 2004, 76 ('Coral'); District Court of Rotterdam 14 May 2008, *NIPR* 2008, 185; ECLI:NL:RBROT:2008:BD4110 ('Devo').
261. See para. 6.4 above.
262. ECJ 21 January 2016, C-359/14 and C-475/14, (*Ergo Insurance/If P&C* respectively *Gjensidige Baltic/PZU Lietuva*); ECJ 14 March 2013, C-419/11, *NJ* 2013, 336 (*Ceska sporitelna/Feichter*); ECJ 13 March 2014, C-548/12, *NJ* 2015, 1 (*Brogsitter/Montres Normandes*). See also para. 6.4.3.2 above.
263. See also para. 3.3.3 above.
264. They or rather their underwriters will have the main financial exposure. See also para. 4.5 above.

and the producer who was not the seller.[265] By analogy, a contractual obligation for the purpose of the Rome I and II Regulations probably does not exist either in a chain of contracts of affreightment between the shipowner or bareboat charterer and the actual consignee of the goods, at least not in the absence of a direct contractual link. Such link could be created, for example, when a bill of lading signed by the master is issued, which under the applicable law is to be considered as an 'owners' bill', i.e. the shipowner is to be considered (the/a) contractual carrier under the bill of lading. Failing another contractual connection, such bill of lading may create a contractual relationship between the shipowner/bareboat charterer on the one hand and cargo interested parties on the other.[266]

> Boonk doubts whether a contractual relationship can be regarded to exist between the shipowner and the holder of a bill of lading, in particular in view of the decision of the Dutch Supreme Court in the 'North Stream'.[267] In this case, the Court held that a third party bill of lading holder can bring a claim against the shipowner, who is not the original counterparty of the third party bill of lading holder on the basis of a statutory provision in the Dutch Code.[268] Boonk derives from this case that the relationship is not considered as a contract freely entered into between the parties, but as an obligation arising from the Code.[269] Arguably this interpretation is too limited. When a bill of lading is signed by (or on behalf of) the master, the latter in principle binds the shipowner to the contract set out in the bill of lading.[270] That the master can bind his principal, i.e. the shipowner or bare boat charterer, by signing a bill of lading is a well-established rule under most if not all legal systems.[271] In view of this generally accepted practice, both the shipowner and the legal bill of lading holder can be regarded to have the intention to create a direct contractual connection. As such, a master bill of lading may create a contractual link after all. The fact that a third party either takes over the rights of the shipper or obtains separate rights under the bill of lading when he becomes a party to the bill of lading contract (depending on the applicable national law) does not appear to make this any different.

The parties to a contract of affreightment are not necessarily the parties who are entitled to claim or obliged to pay a general average contribution at law. When the contract of affreightment is entered into between the shipper and an intermediate NVOCC, these parties will unlikely bring any claim or pay any contribution itself, unless the claims are forwarded in the chain, which is unlikely. Moreover, the parties that may be regarded as the contributors for general average purposes

265. ECJ 17 June 1992, C-26/91 [1992] ECR I-3990, *NJ* 1996, 316 (*Jacob Handte/TMCS*).
266. If so, the question whether the Rome Regulations' exclusion for negotiable documents applies, will also have to be answered. This exclusion of Art. 1(2)(d) Rome I respectively Art. 1(2)(c) Rome II is discussed in para. 6.2.4 above.
267. Dutch Supreme Court 30 November 1979, *NJ* 1980, 340 ('North Stream').
268. S. 518d Dutch Commercial Code 1838 amended. The provision is currently included in s. 8:461 Dutch Civil Code.
269. Boonk 2009, p. 96.
270. That is provided that the bill of lading constitutes the contract between these parties.
271. See, for example, s. 8:461 Dutch Civil Code; Coghlin 2014, pp. 393-395; Scrutton 2015, pp. 89-91.

may not (yet) have become a party to the contract of carriage in place when the general average act was taken. As a matter of English law, the contributor for general average purposes is the cargo owner at the time of the incident.[272] The cargo owner could theoretically never become a party to any contract of carriage.[273] In addition, in bills of lading and sea waybills, use is often made of concepts which allow parties to rely on provisions of contracts to which they are not a party. Such concepts include Himalaya clauses[274] and bailment on terms[275] as well as provisions which extend the contractual scope to bind other parties than the contracting parties to the specific terms,[276] like merchant clauses.[277] In view of the European Court of Justice's requirement that an agreement must be freely consented to by a person towards another, these concepts and the implied contracts may not be sufficient to create a contractual link for the purpose of Rome I. More specifically, when a shipowner brings a claim for a general average contribution on the basis of a bill of lading to which he is not a direct party by relying on a Himalaya clause, such a claim may not be regarded as a contractual claim for the purposes of Rome I. This would only be different if the party to the bill of lading contract could be regarded to have agreed to the Himalaya or merchant clause and thereby have become bound to numerous unknown other parties, which would considerably extend the contractual scope. Especially in case of negotiable trade documents like bills of lading, if the obligations arising thereunder (if any) are not excluded from the Rome I and II Regulations' scope to begin with.[278] The kind of relationship created between a bill of lading carrier and a third-party bill of lading holder varies under the national laws.[279] The question may be asked whether, and if so when, in such

272. See para. 4.5 above.
273. When goods are sold whilst in transit, depending on the applicable law to the sales, the owner at the time that general average measures are taken may neither be the contractual shipper nor become a party to the contract of carriage at a later point in time.
274. A so-called Himalaya clause is a clause commonly included in bills of lading, which intends to extend the scope of the bill of lading contract in that respect that it provides that other parties than the bill of lading carrier can also rely on and/or invoke the bill of lading terms, in particular the clauses which exclude and/or limit liability. The name derives from the English case *The Himalaya* [1954] 2 Lloyd's Rep 267. See on Himalaya clauses in general inter alia Scrutton 2015, p. 71; Carver 2011, p. 452; Spanjaart 2006; Zwitser 1998.
275. Bailment on terms is the legal concept applied in the English law whereby the scope of contractual terms on the ground of which certain property is given in custody by its owner is extended to third parties who take possession of it. See on the concept inter alia Carver 2011, pp. 439-445; *Voyage Charters* 2014, pp. 531-537; Scrutton 2015, p. 76; Palmer 2009.
276. Provisions to this effect may also be incorporated in national legal systems. For example, s. 8:361-366 Dutch Civil Code.
277. A merchant clause is a clause commonly included in bills of lading which intends to extend the scope of the bill of lading contract in that respect that it provides that other parties than the party who in fact concluded the contract (like the shipper, receiver, owner of the cargo and/or holder of the bill of lading) are also bound by its terms. See on merchant clauses Geense 2011 and Van Steenderen 2014.
278. It is admitted that it is doubtful that the Rome I and II Regulations apply to relationships under bills of lading at all, as obligations arising out of bills of lading are excluded from the Regulations' scopes in as far as they arise out of their negotiable character (Art. 1(2)(d) Rome I respectively Art. 1(2)(c) Rome II *cf.* recital 9 Rome I) or at least that they apply without interference of a national provision which applies the rules when they would be regarded inapplicable. As set out above (para. 6.2.3), there do not appear to be overriding substantive arguments to exclude the contractual relationship under bills of lading from the Regulations' scope.
279. Whereas under Dutch law, a third party bill of lading holder is considered to become a party to the existing contract by way of accession to a bill of lading contract (Travaux préparatoires Book 8 Dutch Civil Code, p. 474), as a matter of German law, a new, separate contract is considered to be created between a carrier and the third party bill of lading holder. The differences between the

situation a contractual obligation in the meaning of Rome I arises between the claimant and the defendant. For example, is it a requirement that the bill of lading was presented to the carrier or is mere receipt of the bill of lading sufficient?[280] In view of the required autonomous interpretation,[281] national criteria may be guiding only.

6.5.2.2.2 Security forms

In an average bond or average guarantee, a party generally takes upon itself the specific obligation to pay a general average contribution. In such circumstances, it may seem difficult to contest that there is a sufficient contractual connection.[282] Nevertheless some caveats have to be made. First of all, it is common practice that the release of cargo is made conditional upon the provision of an average bond and average guarantee in the originally requested, non-amended wording drawn up for the benefit of the shipowner.[283] Due to this element of compulsion, the obligation to contribute assumed in the security form arguably is not *freely* assumed. Secondly, security forms which safeguard the payment of a general average contribution after the general average event has taken place, are generally not provided to cover a payment obligation in a single relationship, but rather are provided for the benefit of all parties interested in the maritime adventure with a claim for a general average contribution.[284] When there are more than two parties involved, the question may be asked whether security forms satisfy the requirement that they have freely been entered into between the issuer and its beneficiary, and thus qualify as a contractual obligation in the meaning of Rome I. If, for example, security is given by a cargo interested party to 'the parties interested in the maritime adventure' and the security is accepted by the shipowner, the question is whether this creates a contractual obligation in the meaning of Rome I between various cargo interested parties inter se. In respect of the Brussels I Regulation, it has been held by the European Court of Justice that the mere fact that the exact party who can claim under a security obligation is uncertain when the security is provided, does not mean that the obligation is not freely assumed.[285] In view of the importance of the European Court of Justice's case law on the Brussels I instruments for the interpretation of the Rome Regulations,[286] it may well be that the party providing an average bond may be regarded as having freely assumed the obligation to contribute to all parties with a potential interest.[287] Alternatively, it may also have to be taken into account which party has arranged the security, whether this person

Dutch, English and German systems are discussed by Spanjaart (2012). Regarding the position under Dutch law, see also Japikse 2000, p. 194.

280. The question when the bill of lading holder becomes bound to the bill of lading terms would probably also have to answered autonomously.
281. See on autonomous interpretation para. 6.2.2 above.
282. According to Mankowski, security forms are to be regarded as contracts in the meaning of Art. 5 Brussels I Regulation/Art. 7 Brussels I Recast (Mankowski 2007, pp. 105-106).
283. See also para. 3.3.5 above.
284. They are generally issued for the benefit of the owners of the vessel '*and all other parties as their interest may appear*'.
285. ECJ 14 March 2013, C-419/11, *NJ* 2013, 336 (*Ceska sporitelna/Feichter*).
286. See para. 6.4.3.2 above.
287. See, however, the qualifications made regarding the application of the case law on the Brussels I instruments to the Rome I and II Regulations in para. 6.4.3.2 above.

had authority to act on behalf of the beneficiaries[288] and whether the beneficiaries could exercise influence on the wording of the security forms. In particular, when security (as usual) is arranged by the average adjuster, the question may be asked whether he can be regarded to act as a representative of all the parties to the maritime adventure.[289]

6.5.2.3 *Sufficient contractual provision?*

The existence of a contractual relationship between two parties does not mean that all obligations are contractual.[290] Closely related contractual obligations are probably insufficient to consider an obligation to be contractual.[291] For this reason, it has to be ascertained whether the general average regulation in a contract of affreightment or security form is extensive enough to create a contractual (payment) obligation.[292]

It is submitted that a claim for a general average contribution based on a contract, either a contract of affreightment or security form, should only be regarded as a contractual obligation in the sense of Rome I when the particular contract contains a sufficiently extensive regulation of general average, which effectively and independently grants a right to claim a contribution. In this respect, the mere reference in a contract of affreightment '*general average to be adjusted, stated and settled in accordance with the YAR 1994*' may not be sufficient to create such contractual payment obligation.[293] Arguably, this merely specifies the calculation of an existing payment obligation. On the other hand, the wording '*the merchant will contribute with the carrier in general average*' or '*the merchant is obliged to contribute in general average*' does seem to create a contractual obligation in the meaning of the Rome I and II Regulations for the party respectively parties to contribute in general average against his or their contractual counterpart.

In theory, security agreements are separate, independent agreements in which the parties can assume new obligations towards each other or change existing obligations. Whether a general average security form contains a (separate) payment obligation or merely reinforces an obligation which exists on other grounds, first of

288. The question whether a party is able to bind a party is excluded from Rome I's scope (Art. 1(2)(g) Rome I).
289. This will inter alia depend on the position of the average adjuster pursuant to the applicable national law. This position varies under the different national laws. See also para. 4.3.3 above.
290. See para. 6.4.2 above. It was held by the ECJ in respect of the Brussels I Regulation that the mere existence of a contract between the parties did not automatically mean that all obligations between the parties have a contractual nature. ECJ 13 March 2014, C-548/12, *NJ* 2015, 1 (*Brogsitter/Montres Normandes*).
291. See also para. 6.4.3.3 above.
292. See also para. 3.3.3 above.
293. Even when it is regarded sufficient to incorporate the YAR in the contract, the YAR do not grant an actual right to claim and/or specify the relevant parties. Moreover, the question is whether they can bring other property in the division of damage in a relationship between two parties. See also District Court of Rotterdam 14 May 2008, *NIPR* 2008, 185, ECLI:NL:RBROT:2008:BD4110 ('Devo'). The question whether a claim for a general average contribution could be based on the contract was also considered in detail by the English House of Lords in *The Evje* [1974] 2 Lloyd's Rep. 57. It should be noted that both cases predate the Rome I and II Regulations.

all depends on the form's wording.[294] When a security form merely secures an obligation to contribute which exists between the parties on the basis of other sources, i.e. as a matter of law or under a contract of carriage, or when it confirms a non-existing payment obligation,[295] it does not appear to be a separate contractual obligation.[296] In fact, the claim for a contribution as such probably cannot be brought on the basis of the form. Only when it has been ascertained on other grounds that there is a right to contribution, the actual payment can be requested under the form. The underlying relationship will be indispensable in order to establish the claim.[297] In such situations, the security form probably cannot be regarded as to create a contractual obligation.
Average guarantees issued by underwriters generally confirm and preserve the status quo and do not provide any new substantive general average provisions.[298] No separate obligation to contribute is created by such form. In such circumstances, the security forms do not seem to contain a separate payment obligation.
An average bond or guarantee, however, may be considered as a separate obligation when it creates a liability to contribute that did not yet exist. This will, for example, be the case when the form has an on-demand nature.[299] In these circumstances, it may create a separate obligation and may give the claim for a contribution a contractual nature, thereby bringing it in Rome I's scope.

It may be argued that a strict application of the criterion 'contractual obligation' could further complicate the settlement of a general average as it would be useful to apply the same law to general average obligations and other contractual obligations, for example, arising out of the contract of affreightment between the parties, if any. This concern seems to be more theoretical than practical. Where there is a contract in place between the claimant and the defendant, the law of this contract will often be applied anyway under Rome I or Rome II.[300] Moreover, parties are

294. In German literature, a distinction is made between the 'Bürgschaft' which is dependent on the principal obligation and the 'Garantievertrag' which is not (Thorn in: Rauscher 2011, pp. 235-236).
295. It regularly happens that it is confirmed in an average bond and/or guarantee that the amount due form the shipper and/or the goods will be paid in a situation where neither is actually liable for a contribution.
296. See also para. 3.3.5 above.
297. Compare ECJ 13 March 2014, C-548/12, *NJ* 2015, 1 (*Brogsitter/Montres Normandes*); para. 6.4.3.2 above.
298. In its decision of 31 August 1995, the District Court of Rotterdam considered that the applicable law to an average guarantee issued by underwriters is not subject to the applicable law to the claim against the cargo interested party, but should be determined separately. District Court of Rotterdam 31 August 1995, *S&S* 1996, 13 ('Greta'). The decision was rendered when the Rome Regulations were not yet in force. In view of the fact that the Rome Convention was applied, it may still have some relevance. That the applicable law to the security form has to be determined independently from the underlying principal obligation is also held by the District Court of Amsterdam of 4 August 2010, ECLI:NL:RBAMS:2010:BO4131 and is indicated by Thorn in: Rauscher 2011, pp. 235, 237. See, however. Strikwerda 2009, p. 415. In general: Asser/Kramer & Verhagen 10-III 2015, nrs. 819-824, pp. 503-507.
299. See para. 3.3.5.3 above. Most security forms do not have such nature, as there does not appear to be an obligation to provide on demand security.
300. When the wording of a contract of carriage or security form would not be regarded wide enough to give an obligation a contractual nature, the applicable law to the claim will have to be determined under Rome II. In this situation, the applicable law to the contract of affreightment/security may still be relevant. The form may be regarded as a 'relationship between the parties that is closely connected with the non-contractual obligation' as established in Art. 10 and 11 Rome II and may be used for an accessory connection. See para. 6.5.3 below. It therefore remains necessary to determine whether such relationship is in place and which law is applicable thereto.

also free to insert more elaborate general average provisions in their contract, which make it clear beyond doubt that obligations arising out of general average have a contractual nature indeed. Alternatively or in addition, a specific choice of law clause on general average can be inserted in contracts of affreightment and/or average bonds.[301] It should be kept in mind as well that more than two parties are generally involved in a general average situation. When parties domiciled in different jurisdictions are involved in a maritime adventure, varying national laws may be applicable to the relationships between the various parties involved in the general average. Moreover, obligations deriving from maritime casualties will, in general, often be subject to different laws than the law of the contract of carriage. The concept of global limitation of liability, for example, is probably subject to the lex fori of the place where the limitation fund was established,[302] whereas the general rule in collision cases is that they are regulated by the lex loci delicti.[303] As a result, it may in individual cases actually be preferable to apply a different law to general average obligations than to obligations arising out of the contract of affreightment. Parties can agree that a different law applies to general average than to other obligations arising in their relationship.[304] This may be useful, for example, when an obligation to apply a specific law to general average is included in a related charter agreement,[305] or because it is attempted to agree the same law to all obligations arising out of a general average event in all general average security documents.

6.5.2.4 *Conflict of law rules*

When it has been established that the obligation to contribute is a contractual obligation in the meaning of Rome I, the next question is which conflict of law rule applies.

The general principle underlying Rome I is that the law chosen by the parties should be respected.[306] In many situations, it will not be difficult to single out the chosen law. However (and again), this may be different for general average obligations. Rome I allows that obligations arising under a contract are subject to different legal systems.[307] As a result, the applicable law to obligations arising out of general average may not necessarily be the law applicable to the contract from which the obligation to contribute arises. It has to be determined whether a separate choice of law has been made in respect of general average obligations, either expressly or

301. Such a choice of law clause for general average does not seem to create a contractual obligation in itself. Rome II also allows the choice of law clauses, albeit under stricter conditions than Rome I. See para. 6.3.2 above.
302. Art. 14 *cf.* 15(1) LLMC 1976/1996.
303. Art. 4 *cf.* 14 Rome II. It is questionable whether this conflict of law rule also has to be applied for collisions at open sea. By way of safety net, s. 10:164 Dutch Civil Code provides that failing Rome II's applicability, the applicable law is the lex fori of the place where the claim was brought. See also Pontier 2015, pp. 218-220; Van der Velde 2015, p. 6271; Van der Velde 2006, pp. 313-317.
304. Partial choice of law clauses are expressly allowed by Art. 3(1) Rome I.
305. An obligation to this effect is included, for example, in cl. 25 NYPE 1993 respectively 2015 in respect of the YAR. A similar clause could be included in respect of a preferred applicable law.
306. Art. 3 Rome I respectively Art. 14 Rome II. See also para. 6.3.2 above.
307. Art. 3(1) Rome I, last sentence: '*By their choice the parties can select the law applicable to the whole or to part of their contract only*'.

by implication.[308] Contracts of affreightment rarely contain an express choice of law for general average. As Rome I and II allow choices of law for a state body of law only, the standard reference in shipping documents to one of the YAR versions does not qualify as a choice of law under the Rome I and II Regulations.[309]
In the absence of a specific choice of law clause for general average, the question is whether the law applies that is applicable in general to the contract from which the obligation derives, or whether a specific choice of law in respect of general average may be implied, either from the contract of carriage, or from another contract, like a security form, when this contract was concluded between the same parties. It is uncertain whether the wording that the adjustment and settlement of general average is to take place in a specifically indicated place[310] may be regarded as an implied choice of law for the indicated place.[311] The average bond will generally contain a standard wording which does not take into account any specific relationship. It will often contain a choice for the law of the country where the average adjuster is based, which will not necessarily be the law agreed in the contract of carriage. As a result, the applicable law to the security form may differ from the applicable law to the underlying payment obligation.[312] In such situation, the question may also arise whether a choice of law in a security form, which differs from a general choice of law provision in a contract of carriage, is considered as an additional choice of law for general average.[313] The question may also arise whether in the absence of a choice of law clause in a general average security form, a choice of law has to be implied in the form. It has been argued in legal literature, and held in English case law, that a guarantee for performance of obligations under a contract by implication will be governed by the law of that contract.[314] It may seem that in order to determine the applicable law to a security form which does not contain an express choice of law, it has to be established whether the security confirms an existing payment obligation, and if so, whether it arises under a particular contract. However, this approach would disregard the fact that the criterion mentioned in Rome I is that a choice of law must be '*clearly demonstrated*'.[315] In the Giuliano/Lagarde report on the Rome Convention (i.e. Rome I's predecessor), it is clarified that '*the Court may, in the light of all the facts, find that the parties have made a real choice of law although this is not expressly stated in the contract*'.[316] The subsequent examples set out in the report show when a real choice of law may be inferred, rather than provide criteria themselves. A '*previous course of dealing between the parties*

308. It is generally accepted that under Rome I a choice of law clause may be implied. See also para. 6.3.2 above.
309. See also para. 6.3.2 above.
310. A similar wording is included in many contracts of affreightment and/or carriage. See also para. 4.4.2.2 above.
311. The District Court of Rotterdam was unwilling to derive a choice of law from such provision (District Court of Rotterdam 14 May 2008, *NIPR* 2008, 185, ECLI:NL:RBROT:2008:BD4110 ('Devo')). However, the English House of Lords did regard a similar clause as a choice for the law and practice of London (*The Evje* [1974] 2 Lloyd's Rep. 57).
312. In particular when a chain of contracts is in place, this risk is not imaginative.
313. Art. 3(2) Rome I allows the parties to make an additional choice for another applicable law.
314. Dicey, Morris & Collins 2012 (II), pp. 1810-1811, with reference to the Giuliano/Lagarde-report and English case law. Also Calliesss 2015, p. 101.
315. Art. 3(1) Rome I.
316. In the Giuliano/Lagarde report on the Rome Convention, several examples were considered from which a *real* choice for a specific law could be derived. (Giuliano/Lagarde 1980, p. 17.)

under contracts containing an express choice of law' may be regarded as implied choice of law for another contract only when it leaves the court '*in no doubt that the contract in question is to be governed by the law previously chosen, where the choice of law clause has been omitted in circumstances which do not indicate a deliberate change of policy by the parties*'.[317] As pointed out by Mr Justice Andrew Smith in the English case *Star Reefers Pool Inc./JFC Group Ltd.*,[318] the position under English common law and that under the Rome Convention differ. The criterion included in Rome I is even stricter than the criterion of the Rome Convention. The position taken in the English case law may thus give a too extensive interpretation. At least, it cannot be applied point-to-point in respect of average bonds that do not (merely) regulate the relationship between two parties that were directly contractually connected already.
Moreover, in respect of general average obligations it should also be noted that the obligation guaranteed in an average bond may not just relate to an obligation arising from a single source. It may cover both obligations arising as a matter of law and obligations under a charter party and/or bill of lading. It follows that unless general average security is provided for the benefit of one party only and a contractual relationship exists between these parties from which the obligation to contribute in general average arises, a choice of law probably cannot be implied in the security form.[319]

In the absence of a choice of law, either expressly or implied, the applicable law to claims for a general average contribution which can be brought on the basis of a contract of carriage or a security form, will have to be established on the basis of Art. 5 respectively Art. 4 Rome I.[320] The overriding connecting factor of a manifestly closer connection will hardly ever apply in case of a general average during an international carriage of goods in which many parties are involved.

6.5.3 **Obligation to contribute in general average under Rome II**

6.5.3.1 *Non-contractual obligation*

A right to apportionment in general average, in essence, arises by operation of law.[321] As a result, the obligations which arise out of general average, in principle and in the absence of contractual obligations, should be regarded as non-contractual obligations within the scope of Rome II.[322] As already discussed though, parties are in most cases allowed to regulate their general average relationship contractually. It is uncertain what the consequence is when a particular obligation between

317. Giuliano/Lagarde 1980, p. 17.
318. *Star Reefers Pool Inc./JFC Group Ltd.* [2011] 2 Lloyd's Rep. 215. It was indicated that the test of 'reasonable certainty' as applied in respect of establishing the applicable law to the guarantee for purposes of the requested anti-suit injunction (i.e. in *Star Reefers Pool Inc. v. JFC Group Ltd.* [2010] EWHC 3003 (Comm.)), was incorrect. The decision regarding the anti-suit injunction was reversed in appeal on different grounds (*Star Reefers Pool Inc./JFC Group Ltd.* [2012] 1 Lloyd's Rep. 376).
319. Before the introduction of the Rome Regulations, the English Court of Appeal judge Lord Justice Longmore already considered that the applicable law to the average bond did not automatically cover the obligation at law. *The Olympic Galaxy* [2006] 2 Lloyd's Rep. 27.
320. The conflict rules set out in these provisions have been discussed in para. 6.3.3 above.
321. See para. 3.2.1 and 3.3.2 above.
322. That is provided that no exclusion applies and that a contractual obligation to contribute, if any, does not take precedence.

two parties can be qualified as contractual and non-contractual obligation at the same time.[323] It is doubtful whether the contractual obligation 'overrules' the non-contractual obligation and prevents that the claim is based on the non-contractual source, rather than on the contract.[324] It does not appear to be correct as a matter of principle that the contractual claim automatically overrides a non-contractual claim, as there may be legitimate reasons to bring a non-contractual rather than a contractual claim. This will eventually have to be clarified by the European Court of Justice. In the meantime, the courts will have to solve the matter pragmatically. As will be seen below, in view of the conflict of rules which provide for an accessory connection, the same law may be applicable regardless of the obligation's qualification as contractual or non-contractual. At least, the obligations that cannot be regarded as contractual obligations, for example, because these have arisen between two parties that are not contractually connected, seem to fall under Rome II.[325]

6.5.3.2 *Conflict of law rules*

6.5.3.2.1 Choice of law

Just as in respect of contractual obligations, parties are also allowed to choose the law applicable to non-contractual obligations.[326] Rome II's specific conflict of law rules only apply in the absence of a choice of law which satisfies the criteria of Art. 14 Rome II.[327]

Most contracts of affreightment and security forms do not contain a specific choice of law for obligations arising out of general average.[328] When a choice of law is inserted in a contract of affreightment,[329] the additional requirement has to be complied with that a choice of law predating the incident has to be individually negotiated. Most choice of law clauses inserted in security forms are restricted to the security form itself. Such clauses may nevertheless be regarded as an implied choice of law for the general average relationship in the meaning of Art. 14 Rome II, but they do not necessarily qualify as such.[330] It will depend on the parties in-

323. Possibly the question whether Rome I or Rome II applies depends to some extent on the ground on which the claim is brought. ECJ 4 September 2014, C-157/13, *NJ* 2015, 89 (*Nickel & Goeldner Spedition/Kintra UAB*).
324. See also para. 6.4.3 above.
325. A payment obligation arising under the national legal system may not be covered by the average bond, even if the average bond can be regarded to create a contractual obligation to contribute, when different parties are involved.
326. Art. 14 Rome II. See para. 6.3.2 above.
327. Ramming indicates that a choice of law should be agreed between all parties to the adventure (Ramming 2016, p. 96). This view, albeit correct from the perspective of general average, disregards that Rome II's conflict of law rules apply to specific obligations between two parties. See para. 6.4.2 in some detail.
328. When a contract contains a choice of law for general average, this does not mean that the obligation is contractual. It may well be that a mere inclusion of a choice of law does not create an actual obligation to contribute. (See also para. 6.5.2.3 above.) Moreover, even if it does, it is doubtful that the contractual and non-contractual obligation can exist side by side.
329. See para. 6.5.2.2.1 above.
330. A choice of law clause in a security form cannot be taken into account to establish the applicable law to general average on the basis of an *existing* relationship between the parties (Art. 10(1) and 11(1) Rome II). Security will be provided after a general average incident. It is thus clear that the security relationship did not exist at the time of the general average incident, as required by Art. 10(1) and 11(1) Rome II.

volved and the wording of the specific form, whether a clause does.[331] In practice, a posterior procedural choice of law may be the most effective choice of law for general average purposes.[332]

6.5.3.2.2 General average under conflict rules for negotiorum gestio and unjust enrichment

In the absence of a choice of law, Rome II's specific conflict of law rules have to be applied. Rome II roughly divides non-contractual obligations in obligations arising out of torts/delicts on the one hand and obligations originating from other sources, including negotiorum gestio and unjust enrichment on the other.[333] The concepts will have to be given an autonomous interpretation.[334] The indication 'general rule' above Art. 4 Rome II is 'slightly misleading'[335] in that respect that it gives the general rule within the tort/delict category only. General average obligations do not appear to fit under this heading. Apart from the fact that general average acts are lawful rather than unlawful acts,[336] the conflict of law rule of *lex loci damni* as set out in Art. 4 Rome II seems difficult to apply to general average obligations. General average disbursements may, with some manipulation, be regarded as damage in the meaning of this conflict rule,[337] but localisation of the disbursements at one place may be a more difficult exercise.[338] Expenditures and sacrifices may be incurred at several places. In respect of one general average incident, payments may be made to salvors at their headquarters, port of refuge expenses may be incurred at the port of refuge, cargo sacrifices may take place on the high sea and the adjuster may have to be paid in yet another place, potentially by different parties.[339] In view of the international character of carriage of goods by sea, a common habitual place of residence or a close connection with a specific country will hardly ever exist.[340] Given the Rome II's conflict rules for other (restitution) concepts, there does not appear to be a need to extend the scope of the general tort rule to cover general average obligations either. Throughout general average's history, parallels have been drawn between the concept of general average on the one hand and the concepts of negotiorum gestio respectively unjust enrichment as applied in national laws on the other.[341] Single obligations to pay a general av-

331. See also para. 6.3.2 above.
332. Arguably, the law applied in adjustment confirmation proceedings may be regarded as an implied choice of law, if none of the parties objects to applicability of the law that is being applied. The adjustment confirmation proceedings are discussed in para. 4.4.4.2 above.
333. See also para. 6.3.3.4 above.
334. In view of recital 29 Rome II, the category tort/delict seems to apply to unlawful actions although it is admitted that the European Court of Justice has not yet confirmed this. Under the Brussels I instruments, the same rules apply to the concepts tort, delict and quasi delict. There does not appear to have been a need for further distinction.
335. Von Hein 2015, pp. 495-496.
336. Recital 29 Rome II, which provides that special rules have been given for situations in which '*damage is caused by an act other than a tort/delict, such as unjust enrichment, negotiorum gestio and culpa in contrahendo*'.
337. Art. 2 Rome II gives a broad interpretation to the word '*damage*'.
338. Also Basedow 2010, p. 136 on localisation difficulties of maritime torts in general.
339. For example, by shipowners, the vessel's managers, her underwriters, etc.
340. Art. 4(2) and 4(3) Rome II.
341. Comparisons with the negotiorum gestio have been made inter alia by Schadee 1953, pp. 359-360; Molengraaff 1880, p. 12; Jitta 1882, p. 88-89; Van der Tuuk 1882, p. 16; District Court of Amsterdam 26 February 1964, *S&S* 1964, 48 ('Nooit Gedacht'). Jitta distinguishes the situation in which costs

erage contribution can be regarded as obligations similar to obligations arising out of negotiorum gestio[342] respectively unjust enrichment, as regulated in Rome II.[343] None of these concepts governs the whole general average concept. However, this is unimportant in that respect that under the Rome I and II Regulations, not the concept, but the obligation at stake is relevant.[344] When the master or another person or party ('the active party') takes measures to mitigate the damage for all parties interested in the maritime adventure,[345] such actions may be qualified as negotiorum gestio in the meaning of Art. 11 Rome II, i.e. as a '*relationship between agent/intervener and principal caused by an intervention affecting the affairs of the principal without due authority*'.[346] The questions whether the master or another person has duly safeguarded the rights of the other parties to the maritime adventure and whether the master and/or the shipowner is obliged to arrange security on behalf of these other parties,[347] probably have to be answered pursuant to the applicable substantive law determined by this conflict of law rule as well.[348] It has been argued that the cargo interested parties can be regarded to have granted the master authority to take measures on their behalf.[349] This appears difficult to accept, in particular when there is no contractual relationship between the relevant cargo interested party for general average purposes and the master and/or shipowner.[350]

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are incurred from that in which sacrifices are made. In his opinion, only costs that the master incurs are to be regarded as negotiorum gestio (Jitta 1882, p. 88). Parallels with the concept of unjust enrichment have been drawn inter alia in the English case *Fletcher v. Alexander* (1868) L.R., 3 C.P. 375; and by Rose 2007; Goff & Jones 1998, p. 427 et seq.; Van Leeuwen 1664, p. 404; Scholten 1899, p. 109; Stevens 1817, p. 6; the authors mentioned by Van Empel 1938, p. 54, fn. 1, including inter alia Pothier, Lyon-Caen and Renault, Frignet, Smeesters, and Pöhls. See also Voet 1993, p. 273; Bokalli 1996, pp. 358-359. See also para. 3.3.2.2 above.

342. See Asser/Kramer & Verhagen 2015, nr. 1180, p. 774.

343. Different conflict of law rules may be applied to separate obligations, in particular as it is indicated in recitals 11 and 30 of Rome II that it should be established autonomously, thus without reference to the requirements of national law, whether specific situations fall within the described legal concepts. Strictly speaking Recital 30 refers to culpa in contrahendo only. However, it is generally accepted that this also applies to the other concepts (Schinkels 2015, p. 676). As indicated by Hartley, a '*European test*' will have to be applied (Hartley 2008, p. 907).

344. See para. 6.4.2 above.

345. General average acts are normally taken by the master before or after due discussion with the shipowner. Some legislations, like the German, require that the acts are taken by the master in order to qualify as general average. See also para. 4.2.2.1 above. The decision to take specific measures and whether or not to pursue the general average by having an adjustment prepared are invariably taken by the vessel's owner or managers.

346. Art. 11(1) Rome II. The definition is based on the wording of the initial proposal for Rome II. It has been questioned in legal literature whether acts taken by the intervener/agent that also served his own interests should be regarded as negotiorum gestio. As indicated by Schinkels, there does not appear to be a need to exclude such acts straight away (Schinkels in: Calliesss 2015, p. 677). Moreover, it should not be forgotten that the concept of negotiorum gestio for purposes of Rome II should be interpreted autonomously and, with respect, only serves to find the adequate conflict of law rule (see also para. 6.2.2 above on autonomous interpretation). Ramming also argues that Art. 11 Rome II gives the conflict of law rule to determine the applicable law to general average (Ramming 2016, p. 96).

347. Admittedly, when the master is not obliged to arrange security for all parties to the maritime adventure, but does so anyway, this may constitute another negotiorum gestio.

348. It should be established on the basis of the applicable national law whether the master and/or shipowner has/have acted reasonably and whether a contribution can be claimed. National general average regulations often do not contain extensive provisions on how the master/shipowner has to act. The national law provisions on negotiorum gestio may assist here. Possibly by analogy when their direct application has been excluded.

349. Lowndes & Rudolf 2013, p. 10.

350. See also para. 6.5.2.2.1 above.

Moreover, if such authority exists, it may only be indirect and not in respect of the specific actions taken.

As a result of the general average measures taken by the master and/or shipowner, some parties may have suffered a loss, for example, because their property was sacrificed, which was also inflicted to safeguard the interests of other parties to the adventure. It appears more difficult to construe a negotiorum gestio between these 'inactive' parties, as they have not acted themselves, even though in case of cargo sacrifices the property has been instrumental.[351] The parties whose property has survived may be regarded to be unjustly enriched by the measures taken by the master as against the parties whose property was sacrificed. The relationships between the parties involved in the maritime adventure who have not taken any action themselves, the inactive parties, as a result may be regarded to fall within Rome II's concept of unjust enrichment.[352]

In view of the fact that the Regulations' concepts have to be determined autonomously, their scope may be more embracing than the scope of the concepts applied in the national laws.[353] Even if a direct application of the conflict rules for obligations arising out of negotiorum gestio and unjust enrichment to general average obligations is not allowed, the concepts' conflict of law rules might still be applied by analogy. In view of the fact that the conflict of law rules for negotiorum gestio and unjust enrichment are rather similar, it will in most cases be irrelevant which of the two conflict of law rules applies.

6.5.3.2.3 Connecting factor of an existing relationship

In the absence of a valid choice of law in the meaning of Art. 14 Rome II, *existing* relationships between the parties can still play a role as connecting factor under Art. 10(1) and 11(1) Rome II.[354] An accessory connection appears easier to establish than a choice of law.[355] In fact, in most situations the connecting factor of an existing relationship will give the relevant conflict of law rule.[356] There will hardly ever

351. Schinkels in: Calliesss 2015, pp. 677-678; Bettex 1985, p. 47. Schadee regards this inactivity as a species of the Dutch concept of negotiorum gestio (Schadee 1953, p. 360).
352. Art. 10(1) Rome II. Pursuant to this concept, there is a right to claim a restitution by the party who has suffered a loss from the party who has been enriched. The concept of unjust enrichment is generally regarded to cover enrichments where no net profit is gained, but where relative profits are made if compared with other parties (inter alia Goff & Jones 1998, p. 427 et seq). There does not appear to be a reason why this would not also apply in respect of the autonomouos concept as applied in Rome II.
353. Rushworth & Scott 2008, p. 286. Pitel expects that given the variations in the national laws on unjust enrichment, a '*broad autonomous definition*' will probably be obtained. (Pitel 2008, p. 457.) It is explicitly provided in the Dutch Civil Code that the provisions of the negotiorum gestio do not apply to the concept of salvage (s. 8:577 Dutch Civil Code). As national provisions are not to be taken into account for the purpose of establishing whether a concept falls into the reach, the conflict rule for negotiorum gestio may be applicable to salvage after all.
354. Kadner Graziano doubts that an accessory connection can be governing when a choice of law clause has merely been inserted in standard terms and conditions, which is insufficient under Art. 14(1) Rome II (Kadner Graziano 2009, p. 128).
355. The interaction between the rules of party autonomy and accessory connection is an intricate one, which will need to be clarified by the European Court of Justice. (Also Kadner Graziano 2009, p. 132.)
356. Asser/Kramer & Verhagen 10-III 2015, nr. 1150, p. 758.

be a manifestly closer connection with another country than an existing relationship,[357] particularly as the vessel's flag may only be *a* relevant factor in the determination of the required connection.[358] Problems may arise when there is more than one existing relationship between the parties, which relationships are subject to varying laws.[359] In general average cases, such a situation is not unimaginable. The question is whether one of these relationships should be taken into account and if so, which one. Moreover, in view of the fact that an existing relationship may be subject to varying applicable laws depending on the issue at stake,[360] and the applicable law can vary in time,[361] the influence given to existing relationships as the connecting factor should be applied with caution.

The limited available case law shows that national courts take a wide discretion in establishing an existing relationship.[362] In respect of general average, accessory connections were found in a contract of affreightment and in a collision which necessitated the general average measures.

A connection with the contract of affreightment was made by the District Court of Rotterdam in the 'Devo'. In this case, which was considered by the court before Rome II entered into force, the court had to establish the applicable law to a claim from a shipowner for a contribution in general average against cargo interested parties.[363] Those interested in the cargo inter alia argued that the shipowner's claim had become time barred. After considering that the claim could not be based on the bill of lading and that the bill of lading did not contain a valid choice of law clause in respect of the general average claim, the court held that the applicable law to general average should be the same as the law applicable to the contract of carriage under the bill of lading.[364] The outcome of this case may well have been the same when the case was decided under the Rome I and II Regulations. In fact, it is almost as if the court applied the connecting factor of an existing relationship as inserted in Art. 10(1) and 11(1) Rome II. As Rome II's wording had already been accepted when the judgment was rendered, the Court may have relied upon or

357. Art. 10(4) respectively 11(4) Rome II provides that the law of the country which is manifestly closer connected is applicable. In general average incidents, such closer connection will hardly ever exist. It probably only does when a general average incident occurs on board a vessel sailing the flag of the country where the parties interested in the cargo and the carrier are all based, whereas the contract of carriage is concluded there as well. In such situation, the presence of a choice of law or of a contractual obligation to contribute in general average would not lead to applicability of another legal system either in view of Art. 3(3) Rome I and Art. 14(2) Rome II.
358. In its case law, the ECJ sometimes considers the vessel's flag as one of the relevant factors. Inter alia ECJ 27 February 2002, C-37/00, ECR 2002 I-2013 (*Weber/Universal Ogden Services*); ECJ 5 February 2004, C-18/02, ECR 2004 I-1417 (*DFDS/Sjöfolk*); ECJ 15 December 2011, C-384/10 (*Voogsgeerd/Navimer*); ECJ 25 February 2016, C-292/14, (*Dimosio/Stroumpouli*).
359. When relationships with third parties can be considered as 'existing relationship' in the meaning of Art. 10(1) and 11(1) Rome II, even more existing relationships with potentially varying laws may exist.
360. Art. 3(1) Rome I expressly allows partial choices of law.
361. Art. 3(2) Rome I expressly allows additional choices of law.
362. A wide interpretation of Art. 10(1) Rome II is supported in legal literature. Inter alia Verhagen 2008, pp. 1006-1007.
363. District Court of Rotterdam 14 May 2008, *NIPR* 2008, 185, ECLI:NL:RBROT:2008:BD4110 ('Devo').
364. The decision can be regarded to show a change in opinions. In its decision of 28 June 1929 (*W.* 12158), the District Court of Amsterdam decided that the applicable law to general average was *not* to be determined by the charter party.

taken guidance from the Regulation's wording. However, under the Regulations, the Court should have made a clearer choice regarding the claim's nature.[365]

In its decision of 22 February 2014, the German Court of Appeal of Düsseldorf regarded the cause of the incident which necessitated the general average measures as the connecting factor of an existing relationship between the parties.[366] The case concerned the general average measures taken after the collision between the inland waterway container vessel 'Margreta' and the seagoing chemical tanker 'Sichem Anne' on the Dutch inland waterway Hollands Diep. After the incident, the shipper of the 'Margreta' intentionally stranded his vessel to prevent that she would sink. The seller of the cargo carried in 7 containers on board the 'Margreta' at the time of the collision and its cargo underwriter started legal proceedings against the contractual carrier, who was not the shipowner. The Düsseldorf Court of Appeal held that as a result of the collision, a non-contractual relationship existed between the parties. Pursuant to Art. 4 Rome II, the non-contractual obligation arising out of the collision was governed by the laws of the place where the damage occurred. Because the collision had taken place in the Netherlands, Dutch law was held to be applicable. The Court subsequently considered that on the basis of the connecting factor of a close connection of Art. 11(1) Rome II, Dutch law also applied to the general average. It follows that the Court did not find a connecting factor in a contract of carriage, but considered the preceding collision as the relevant connection. Possibly the choice was influenced by the fact that the court did not establish the applicable law in the relationship between the claimants and the defendant, but determined the law that would be applied in the Dutch adjustment confirmation proceedings.[367] The Court apparently intended to bring the various parties interested in the general average together under the same law. It is respectfully submitted that, albeit valid from a general average point of view, this is not compatible with the Rome II's system. The Rome I and II Regulations give rules to determine the applicable law to a specific obligation in a certain relationship between two parties. As will be further discussed below, they do not cover a general average situation in which many relationships between various parties are created.[368]

It is uncertain whether the relevant connection must exist between the parties in whose relationship the non-contractual obligation to contribute and/or to appoint an adjuster or to exercise a lien arose or whether relationships with third parties may be relevant as well.[369] More concretely, it is clear that in order to establish the

365. In its judgment, the District Court of Rotterdam does not make a clear choice whether the claim is contract based or not. The court considers that it does not follow that in issuing an average bond it was meant that this would overtake the obligations in respect of general average out of the bill of lading conditions (author's translation). It thus appears that the Court considers the obligations in general average to have a contractual nature.
366. Court of Appeal of Düsseldorf 26 February 2014, I-18 U 27/12 ('Margreta'/'Sichem Anne').
367. No cargo sacrifices had taken place and only the shipowner had a claim for a general average contribution. The question which law should be applied to claims from cargo interested parties did not arise.
368. See in more detail para. 6.6 below.
369. The question whether the 'identity requirement' prevents accessory connection is raised by Verhagen. In his opinion it does not (Verhagen 2008, pp. 1006-1007). In the decision of the German Court of Appeal of Düsseldorf 26 February 2014, I-18 U 27/12 ('Margreta'/'Sichem Anne'), third party relationships were taken into account. As discussed, the decision does not appear to be correct on other grounds.

applicable law to an obligation between a shipowner and a cargo interested party, an existing contractual relationship between these parties can be taken into account. However, when the cargo interested party has not, or not yet, become a party to the contract from which a contractual obligation arises, for example, for formal reasons, the contract does not appear to be relevant under Art. 10(1) and 11(I) Rome II, even though it may actually have governed the carriage during which the general average measures were taken.[370] In addition, an 'existing relationship' in the sense of Art. 10(1) and 11(1) Rome II will probably not be held to exist either between two parties to the maritime adventure, between whom there is no contractual relationship, for example, between two parties interested in different cargoes carried on board the same ship. A mere factual relationship is probably insufficient.[371] Even when both parties have concluded contracts of affreightment with the same carrier, which contracts are subject to the same law and on the same terms, this does not appear to be sufficient to be qualified as existing relationship. The Dutch case *Athenian Olympics* may serve as an example. In this decision, which predates the Rome Regulations,[372] the Dutch Supreme Court was unwilling to look at other contractual relationships than relationships between the claimant and the defendant.

> The Dutch Supreme Court was to establish the applicable law to a situation of negotiorum gestio. Briefly summarised, shipowner Blue Aegean had taken its vessel 'Athenian Olympics' with on board a consignment of gasoil out of Lebanon without the authorities' permission to save ship and cargo, and had subsequently sold the cargo with the Rotterdam Court's permission when no clear instructions were provided by the cargo's buyer Total. The cargo was originally carried on board the vessel under a voyage charter party between Blue Aegean and Mackay. The latter had sold the consignment to Total. Due to the vessel's prolonged stay in Lebanon, the voyage charter party had been terminated. In proceedings before the Dutch Court, Blue Aegean argued that taking the cargo out of Lebanon was a case of negotiorum gestio and claimed that its costs were to be compensated out of the proceeds of the sale of the cargo. One of the issues that arose was which law was applicable to the alleged negotiorum gestio. It was argued by Total that the law which governed the voyage charter party between Blue Aegean and Mackay should be applied. The Dutch Supreme Court dismissed the argument on the basis that Total was not a party to this contract, which had anyway already been terminated at the time that the negotiorum gestio took place. The fact that the Supreme Court in the 'Athenian Olympics' was unwilling to apply the law applicable to a contract between one of the parties and a third party could mean that it is hesitant to do so in general. However, when a contract is still in force or when there are two contracts involved, both applying the same

370. This situation may arise in respect of contracts of carriage under bill of lading or sea waybill. See for example ECJ 27 October 1998, C-51/97, *NJ* 2000, 156 *('Alblasgracht')*. That the consignee under a bill of lading and the party obliged to contribute and/or allowed to claim in general average may not be the same person is discussed in para. 4.5.2.4 above.
371. Nehne 2012 (I), p. 138.
372. Dutch Supreme Court 23 February 1996, *NJ* 1997, 276 ('Athenian Olympics').

law, the Court might be willing to apply the law of the contract(s) after all.

An existing relationship may nevertheless be deemed to exist between two parties who are not directly related through a contract, when the general average act or negotiorum gestio,[373] or the cause of the incident necessitating the general average measures is taken into account.[374] It follows that an accessory connection with relationships with third parties may be made in specific circumstances only, if at all.[375]

6.5.3.2.4 Other connecting factors

Failing both a choice of law and an existing relationship in the meaning of Art. 10(1) and 11(1) Rome II, the common habitual residence of both parties or the place where the unjust enrichment or negotiorum gestio took place may provide the connecting factor.[376] As already pointed out, in general average cases, the place where the 'unjust enrichment' and/or 'negotiorum gestio' took place, may be very difficult to establish.[377] This connecting factor is therefore unlikely to be used in respect of general average. Ramming suggests that the negotiorum gestio is situated on board the vessel and that the place where the vessel actually was at the time of the general average act provides the relevant connection.[378] In his opinion, if the vessel was at this time on the high seas, the law of the vessel's flag is governing. As the disbursements would be incurred for the benefit of vessel and cargo, these could all be situated in the same place. Admittedly, situating all disbursements at one single place seems useful indeed and the vessel does seem a logical place. Nevertheless, it is doubtful whether Ramming's suggestions should be followed, if only because he disregards that a conflict of law rule that regulates all relationships arising out of a general average event does not exist.[379] Moreover, the distinction between an incident on the high seas and, for example, at anchorage, seems artificial and may not justify the use of varying connecting factors. It must be taken into account as well that the connecting factor of the vessel's flag was intentionally removed from Rome II's wording.[380] The distinction is probably true in respect of a manifestly closer connection with another country as provided in Art. 10(4) Rome II as well.

373. It may be useful to also consider the law applicable to the actions taken by the master, i.e. the negotiorum gestio. Rather than taking it into account under Art. 10(1) Rome II, it may be used in the consideration of Art. 10(4) Rome II.
374. One of the parties may be liable in tort for the incident causing the general average. Such liability may exist, for example, if the incident was caused by dangerous cargo which exploded during the voyage. The party interested in the dangerous cargo may be liable in tort as against other parties whose goods had been damaged due to general average measures taken after the incident. The law applicable to the tort may then also apply to the claim for a contribution in general average (Art. 10(1) Rome II).
375. Asser/Kramer & Verhagen 10-III 2015, nrs. 1158-1164, pp. 762-766.
376. Art. 10(2) respectively Art. 11(2) Rome II.
377. See para. 6.5.3.2.2 above.
378. Ramming 2016, p. 96.
379. See also para. 6.6 below.
380. As in practice Art. 11(1) Rome II will likely in most cases give the relevant conflict of law rule, the discussion's practical relevance seems limited.

6.6 Rome I and II Regulations' insufficiency to regulate general average

It follows from the above analysis that there are many uncertainties when the applicable law to general average obligations must be determined on the basis of the Rome I and II Regulations. These concern both fundamental questions, for example, whether an obligation to contribute in general average is a contractual or non-contractual obligation, but also particular issues in specific matters. It is doubtful, for example, whether the validity of a clause contracting out of the obligation under national law to safeguard rights to a contribution of third parties has to be determined on the basis of the law to the contract of carriage or on the basis of the law applicable to the non-contractual obligation to contribute. What is clear is that the determination of the applicable law to obligations arising out of general average on the basis of Rome I and Rome II requires both substantial flexibility and creativity. The initially apparent inclination to bring claims based on contracts of carriage and security forms under Rome I and claims based on a national legal system under Rome II appears to be misleading shorthand.

In the absence of an exclusion,[381] the applicable law to a single general average obligation which either arises as a matter of law *or* clearly and merely derives from a contract[382] can be determined on the basis of the Rome I and II Regulations without too many problems.[383] Their conflict of law rules give a sufficiently wide framework for a court to determine the applicable law to a specific obligation between two parties, taking into account the merits of the particular matter. Difficulties may arise, however, when it is not clear whether an obligation is contractual[384] and/or when a contribution is due both as a matter of law *and* on the basis of a contract,[385] or can be based on two separate contracts.[386] Even when only one shipowner and a single cargo interested party are involved in the maritime adventure, the obligation to contribute potentially has several sources i.e. national law, contract of affreightment and/or security form, with possibly varying applicable laws.[387] Questions then arise whether these obligations coexist or whether one takes precedence, and if so which obligation, and on the basis of which law this precedence is determined. It becomes even more difficult when a general average incident creates obligations between several parties, which is the case more often than not. When general average disbursements are incurred by the shipowner, he

381. See para. 6.2.4 above.
382. This will be the case when there does not exist an obligation at law between the claimant and defendant under the applicable national law, whereas either a contract of affreightment or a security form does provide a right to claim a general average contribution.
383. This would be different if Art. 14 Rome II was considered to limit the scope of Art. 10(1) and 11(1) Rome II. In fact, the outcome under Rome I and Rome II's conflict of law rules may well be similar. The law applicable to the existing relationship will probably also apply to the general average, either pursuant to Rome I or pursuant to Rome II. See para. 6.5 above.
384. For example, because the wording is ambiguous and it cannot be said to give rise to a claim.
385. See also para. 6.4.3.3 above.
386. For example, on a contract of affreightment and an average bond. This may be the case when the contract of affreightment provides a right to claim a general average contribution, whereas the average bond has an on demand nature.
387. See, for example, *The Olympic Galaxy* [2006] 2 Lloyd's Rep. 27, where it was argued that the applicable law to the security form did not govern the liability to contribute in general average.

will have claims for contributions against potentially many parties interested in property involved in the maritime adventure. Even more obligations are created when cargo sacrifices have been made. Obligations may then arise between cargo interested parties and the shipowner, just as obligations between cargo interested parties inter se, possibly but not necessarily, on a mutual basis. A further complicating factor is that depending on the applicable law and contractual arrangements, if any, various parties may be regarded as the debtor for a single property.[388]

If one takes a step back from a specific obligation to contribute, to appoint an adjuster and/or to exercise a security right, and one looks at the general average concept as a whole, it is immediately clear that the Rome I and II Regulations are unsuitable to regulate the applicable law to general average obligations, at least when more than two parties are involved. The principles underlying the Regulations and the general average concept are basically irreconcilable. The Regulations focus on the individual relationship between two parties and give a tailor made solution to determine the law that is most closely connected to the specific obligation ensuing from this relationship.[389] Not the property involved in the maritime adventure, but the party or parties interested in the property are of utmost importance. By contrast, general average's focus traditionally has been on the common maritime adventure (the 'community of interests') and the properties involved therein. The general average concept brings parties with different relationships inter se together under the 'general average umbrella', in order to distribute losses and costs on a pro rata basis. The obligations which arise out of a general average event are interconnected and cannot be separated completely. The adjustment connects the various interests. A separation, however, is exactly what happens when general average is brought under the Rome I and II Regulations. The applicable law is determined for a specific obligation in the relationship between two parties, whereby the bigger picture is ignored. The application of Rome I and II to the various separate general average obligations may have the result that different substantive laws are applicable to obligations arising out of the general average event, with potentially different requirements to qualify an event as general average, different rules on quantification, different interested parties, etc.[390] This could lead, for example, to the situation where some obligations are regarded as general average obligations under one national legal system whereas under another they do not qualify as such. The same applies for the quantification of the amounts due. This should take place on the same basis in all relationships arising out of the general average.[391]

388. See para. 4.5 and 4.9 above.
389. From the perspective of the European private international law regulations it is obvious that every relationship and obligation is regarded on its own merits. This is also the situation in the Brussels I instruments. In order to determine the applicable jurisdiction, the specific relationship between a claimant and the alleged debtor is the starting position. The application of the Rome I and II Regulations to individual obligations arising out of the general average concept to some extent is in line with current general average practice in which each relationship is determined on its own merits. Unlike under the Rome I and II Regulations, current practice starts with the net amounts payable as specified in the adjustment. From a theoretical point of view, this practice has to be questioned. The Rome I and II Regulations do not deal with multi party relationships extensively. The contents and scope of Art. 16 Rome I and Art. 20 Rome II are limited.
390. See also para. 4.9 above.
391. Multiple adjustments are possible in theory but highly unpractical in practice (Cleveringa 1961, p. 902; Lowndes & Rudolf 2013, pp. 578-581). See also para. 4.3.3.2 above.

The various contributions are set out in the adjustment, which traditionally was regarded to be subject to its own regulation.[392] Under the Rome I and II Regulations, by contrast, the amounts due are subject to the law applicable to the specific obligation as determined by the Regulations' conflict of law rules.[393] The Regulations seem to require that it is established by the substantive law determined on the basis of their conflict of law rules whether the adjustment can be regarded as a sufficient quantification of the claimed amount in the specific relationship. Where different laws apply to general average obligations arising from one event between various parties, it is not unimaginable that an adjustment will be acceptable under some laws, but not under all. The pro rata distribution of losses and costs over various parties may effectively be frustrated. It is admitted that Rome II takes existing relationships into account. However, it seems to follow from the wording of Art. 10(1) respectively 11(1) Rome II, that the relevant relationship must exist between the parties in whose relationship the non-contractual obligation arose.[394] Moreover, it may well be that several contracts of affreightment are concluded in respect of the maritime adventure in which the general average occurred, which are subject to different laws. Obligations arising out of general average, as a result, may be subject to varying laws as well.

In order to duly apply the general average concept, the same law should be applied to the obligations arising out of the general average as much as possible. This law should determine questions on a higher, overall level, apart from the individual relationships and/or specific obligations. It has to determined, for example, for all parties interested in the maritime adventure, whether there is a case of general average, which are the relevant contributory properties, which are the parties interested in these properties and how the individual contributions are to be calculated. When this is merely determined at obligation level, it may actually undermine the uniformity created by the general average concept.
The conclusion is that the Rome I and II Regulations are incapable of regulating the bigger general average picture, at least they cannot regulate the same in a satisfactory manner when more than two parties are involved and/or the claim can be based on different sources.

392. The general average relationships between the various parties to the maritime adventure do not appear to be given much attention, neither when drawing up the adjustment, nor when collecting security and/or a contribution. In some jurisdictions, general average was even considered as a separate concept which should not be influenced by existing previous relationships at all. In the Netherlands, this has even resulted in the situation that an existing legal relationship between the parties, if any, was completely disregarded in general average cases. See inter alia District Court of Rotterdam 5 December 1994, *S&S* 1995, 33 ('Delta Bulk II'); also Kruit 2004, pp. 42-43. Interestingly, it is still argued that the applicable law to the adjustment is to be determined separately, for example, *Voyage Charters* 2014, p. 594 and Lowndes & Rudolf 2013, pp. 566-567, 582-583. In spite of the fact that it is also indicated that Rome I applies to contractual general average obligations.
393. Quantification of the amounts due has to take place pursuant to the applicable substantive law (Art. 12(1)(c) Rome I respectively Art. 15(1)(c) Rome II).
394. See para. 6.5.3.2.3.

6.7 Inclusion of a conflict of law rule for general average in Rome I and/or Rome II?

6.7.1 Aspects to be covered

In view of the conclusion that the current conflict of law rules set out in the Rome I and II Regulations do not adequately cover the general average concept, the question may be asked whether it would be helpful to include a separate conflict of law rule for general average in Rome I and/or Rome II when their contents are revised.[395] Or, in other words, are the current contents of Rome I and Rome II merely insufficient to deal with general average or is the real problem general average hybrid's character?

A separate conflict of law rule for general average in the Rome I and/or II Regulation(s) would acknowledge that general average is a concept in its own right. It would also fit in with the Regulations' aim of creating more certainty and predictability to determine in advance which law will be applied to general average obligations.[396] However, there appear to be three main problems when bringing general average obligations under the Rome I and II Regulations, which should be solved. First of all, problems of qualification and coexistence arise. When is an obligation contractual and non-contractual and which source of general average obligations takes precedence when a claim can be based on more than one source? Secondly, an appropriate connecting factor would need to be found, which recognises that the obligations arising out of a general average event are interconnected. Thirdly, as general average obligations are interconnected, one substantive regime with 'umbrella capacities' should determine specific aspects on a higher level, regardless of the substantive laws applicable to other obligations which arise in a relationship between two parties. In order to have serious added value, a conflict of law rule on general average would have to deal with these aspects in a satisfactory manner.

6.7.2 Qualification and coexistence

General average has a hybrid nature. It has features of both the concept of unjust enrichment and negotiorum gestio, whereas contractual arrangements often play a role as well.[397] As such the legal concept of general average does not fit in the Rome I and II Regulations' structure, which makes a clear distinction between

395. Art. 27 Rome I and Art. 31 Rome II provide for a review. It has also been suggested that the Rome Regulations are included in a private international law convention, like the Hague Convention on non-contractual obligations (Guinchard 2015, p. 109) or to include European conflict of law rules in a Private International Law Code (Kramer a.o. 2012, p. 73 et seq). Admittedly it is unlikely that a special conflict of law rule for general average will be inserted in either Rome I or Rome II, or at least not any time soon. The Rome I and II Regulations are relatively new and it may take some time before an extensive revision may be considered. It also has to be acknowledged that general average is not a subject which is regarded as important by legislators. It is therefore unlikely to be placed on the agenda in the near future.

396. The importance of predictability follows from recital 6 and 16 Rome I respectively recital 6 and 14 Rome II. Also Asser/Kramer & Verhagen 10-III 2015, nr. 717, p. 433; Explanatory Memo (Rome II) 2003, p. 6. See also para. 6.3.1 above.

397. See para. 3.3 below.

contractual and non-contractual obligations.[398] The obvious solution seems to be to insert a specific conflict of law rule for general average obligations, either in Rome I and/or in Rome II, and then to clarify which rule would apply. But this is easier said than done. First of all, the question arises whether such a rule should be inserted in Rome I and/or Rome II. The insertion of such a conflict of law rule in Rome II would acknowledge that general average obligations in essence arise by operation of law and should be regarded as non-contractual obligations. However, at the same time, it would disregard the fact that contractual general average obligations can be and are created in practice, and that they generally set aside the substantive provisions of the applicable national law.[399] Not only should contractual obligations be dealt with under Rome I as a matter of the Regulations' structure, more importantly, Rome II's conflict of law rules are not written to deal with contractual concepts. They do not provide rules to determine how a contract's validity or one of its terms, like the incorporation of a version of the YAR, has to be ascertained. An option may be to make an exception to the general rule inserted in Rome II for contractual general average obligations, which could be made subject to Rome I's conflict rules. But when would and/or should an obligation fall under Rome I and when should it fall under Rome II? Does a contractual general average obligation, if any, set aside a non-contractual obligation? These issues should be regulated as well. In view of the fact that the Regulations' concepts have to be interpreted in an autonomous manner and the regulations should be internally consistent, these issues should probably not only be solved for general average obligations, but for all non-excluded obligations in civil and commercial matters. Insertion of a rule for general average would probably have consequences for other obligations as well, which would also have to be taken into account.

6.7.3 **Connecting factor**

Even if a suitable place for a conflict of law rule on general average could be found and the relationship between contractual and non-contractual obligations could be regulated satisfactorily, the problem remains that mere clarity on the applicable conflict of law rule is not automatically going to lead to more substantive uniformity.
The general average concept creates inter-related obligations between various parties. In order to give due effect to the general average principle of a division of loss over parties involved in the maritime adventure, it is important that obligations arising out of general average between the various parties are subject to the same substantive law, at least to some extent. As the connecting factors currently applied in the Rome I and II Regulations concern obligations arising in the relationship between two parties only, they will for many situations be insufficient to obtain this result.

The connecting factor to determine the applicable law to general average obligations should be an objective one and should not be dependent on the peculiarities of

398. See para. 6.4 above.
399. See para. 3.3.2.3 above.

two or more parties when many parties are involved.[400] Unlike the purpose of the other conflict of law rules in the Rome I and II Regulations, a connection may not have to be found with the closest connected country,[401] but rather a connection may have to be established with a legal regime, under which the various parties are brought together. A conflict of law rule should be singled out which fixates the applicable law for all concerned parties. In a general average situation which involves only two parties, the specifics of the relationship should be taken into account in order to find a practical solution. But as long as it is not clear which parties are the relevant parties for general average purposes,[402] specifics cannot be used to determine the overall applicable law on the basis of which the relevant parties have to be established.[403] When many parties are involved in the general average, either because many properties are involved and/or several parties are interested in one property, it would become even harder, if not impossible to apply criteria which depend on the specifics of the parties involved.

At the end of the 19th and the beginning of the 20th century, there was considerable support in legal literature for the law of the vessel's flag as connecting factor to establish the applicable law to general average.[404] This connecting factor seems suitable indeed in view of general average's close connection with the property on board and the fact that one overall applicable law is to be singled out that can be ascertained upfront. It would also make sense in view of Rome II's general rule that the law of the place where the damage occurred has to be applied,[405] if one situates general average actions on board the vessel.[406] A serious downside of a connection with the vessel's flag is that many ships sail so-called 'flags of convenience'. These vessels are not registered in the State where their owners are based or which provides the objectively best regime, but rather in States where operating costs are lower or certain regulations do not apply.[407] As also recognised by the European Commission in the drafting process of Rome II,[408] the legislation of these

400. A connecting factor which is unrelated to the parties between whom the (non-contractual) obligation has arisen, is also applied in Art. 4 Rome II. On Art. 4 Rome II, in some detail Stone 2007, p. 103; Dickinson 2008, pp. 295-362; Von Hein in: Calliess 2015, pp. 495-534.
401. In shipping matters it is doubtful in general whether it makes sense to determine a territorial connection. Also Basedow 2010, p. 121 on maritime torts.
402. The parties involved in a non-contractual relationship are to be determined pursuant to the applicable substantive law. Art. 15 under a Rome II.
403. The 'liable' party has to be established on the basis of the applicable substantive law as indicated by Rome II's conflict of law rules (Art. 15 heading and under a Rome II).
404. The law of the flag is an important connecting factor in maritime private international law. See inter alia the overview given by Tetley & Wilkins 1994, pp. 185-212.
405. Art. 4 Rome II.
406. In the ECJ's case law, the vessel's flag so far seems one of the relevant connecting factors only. Inter alia ECJ 27 February 2002, C-37/00, ECR 2002 I-2013 (*Weber/Universal Ogden Services*); ECJ 5 February 2004, C-18/02, ECR 2004 I-1417, *NJ* 2006, 322 with note P. Vlas (*DFDS/Sjöfolk*); ECJ 15 December 2011, C-384/10 (*Voogsgeerd/Navimer*); ECJ 25 February 2016, C-292/14, (*Dimosio/Stroumpouli*).
407. On flags of convenience inter alia Tetley & Wilkins 1994, pp. 213-216; Mandaraka-Sheppard 2013, pp. 69-70; Özçayir 2000; Boczek 1962. There may be substantial tax benefits of registration in such states, as well as advantages as a result of freedom of manning and the possibility not to disclose the actual interested parties.
408. The European Commission's proposal contained a special conflict of law rule for torts on the high seas. To such torts, the lex registrationis was to apply. (Explanatory Memo 2003 (Rome II), pp. 27, 30.) The proposed Art. 18 (heading and under b) provided that a ship on the high seas which is registered in the State or bears 'lettres de mer' or a comparable document issued by the State or on its behalf, or which, not being registered or bearing 'lettres de mer' or a comparable document, is

flag states may not adequately deal with a specific legal concept or at least may not be best suited to cover the same in a specific case.[409] Moreover, it will be the exception rather than the rule that the law of the vessel's flag will apply to other existing relevant relationships between the parties to the maritime adventure. Especially when there are only two parties involved in the general average or when all existing relationships are subject to the same law, such existing relationship(s) should be taken into account to determine the applicable regime.

The prevailing, traditional view in respect of general average is that the place of the vessel's destination provides the appropriate connection.[410] Currently, this place may also be taken into account to establish the law applicable to a contract of carriage,[411] to create additional jurisdiction for courts of European Member States to deal with claims under contracts of carriage,[412] as well as in respect of other issues like title to sue and property law aspects.[413] A serious problem is that general average cases often do not concern a single voyage or contract. When a vessel carries cargoes with various destinations on board,[414] a connecting factor of the place of destination would be difficult to apply. The same is true in respect of a choice for the law of the contract of affreightment as the connecting factor, especially when many contracts of carriage are involved in the maritime adventure during which the general average arose. If all contracts of affreightment are subject to the same law, it makes sense to look at this law. However, courts may not be able to determine whether the same law applies, as they may not have jurisdiction in respect of all obligations arising out of a general average. Moreover, in practice the choice of law clauses incorporated in contracts in a chain of contracts of carriage, may vary. In particular NVOCCs often use their own standard terms in their bill of lading and sea waybill forms. In many cases, these terms provide for applicability of the law of the place of the NVOCC's habitual residence. This is not necessarily the law which applies to (all) other contracts of affreightment concluded in respect of other cargo involved in the maritime adventure. It does not seem fair either, if possible at all from a practical perspective,[415] to look at the applicable law to the majority of the contracts. A shipowner could stipulate in the 'head charter' that his charterers are obliged to insert choice of law clauses in subsequent contracts concluded by them, stipu-

owned by a national of the State, was to be treated as the territory of a State. The rule was objected to as it would lead to applicability of laws of cheap flag states, which would be contrary to the more general purposes of the European legislation (Explanatory Memo 2003 (Rome II), p. 38). The suggested provision eventually was deleted by the European Parliament. See also Van der Velde 2006, p. 316-317 as well as George 2007, pp. 168-172.

409. Critical on the vessel's flag as connecting factor in conflict of law rules also Mandaraka-Sheppard 2013, p. 180; Tetley & Wilkins 1994, p. 224.
410. This view is discussed in some detail in Chapter 5 above.
411. Art. 5 Rome I.
412. Art. 5 under 1a Brussels I Regulation respectively 7 under 1a Brussels I Recast *cf.* ECJ 9 July2009, C-204/08, *S&S* 2009, 119 (Rehder/Air Baltic).
413. See, for example, s. 10:162 Dutch Civil Code. It is uncertain whether the provision is still applicable in view of the Rome I and II Regulations. See inter alia Eckoldt & Ten Bruggencate 2010, p. 600; Claringbould 2010, p. 214.
414. It is not at all unusual that vessels carry cargo on board destined for various destinations.
415. A court will generally have to consider the applicable law in a relationship between two parties. It will be an exception when a court of a European Member State, in an international dispute in which many parties are involved, has jurisdiction in respect of all parties involved. See, for example, the decision of the District Court of Rotterdam 4 June 2003, *JBPR* 2004, 76 ('Coral').

lating the applicability for general average of the law chosen in the head charter.[416] In practice, it is doubtful that shipowners, even if they would have the bargaining position to so do, would be inclined to stipulate the same. And even if such stipulation were to be agreed, it may not be complied with. NVOCCs generally do not verify whether their standard bill of lading and/or sea waybill terms are compatible with each and every charter party they conclude. Such conflict rule for the law of the contract of affreightment would also disregard the fact that when cargo sacrifices have been made, there is no direct contractual relationship between the various cargo interested parties. Additional contractual provisions may then have to be agreed as well. Difficulties are expected under Rome II as such provisions would probably not satisfy the test that the choice of law provision has to be individually negotiated.[417] Similar difficulties can be expected when the place where the adjuster is based is taken into account to establish a connection. A specific adjuster would have to be chosen, which is not too different from a specific law. These issues would not arise if the law applicable to the head charter would be used as connecting factor to determine the law applicable to general average. Questions then arise which contract should be regarded as the head charter.[418] Moreover, the law applicable to this charter party may well have nothing to do with the general average incident or any of the parties and/or their contracts involved. When vessels are operated by the main shipping firms who have issued their own bills of lading, the shipowner may not be involved in the general average at all. Parties involved in the general average may not even be aware of this law. It follows that the applicable law to general average could not be predicted and would become arbitrary for many of the interested parties. The same disadvantages arise when the law of the vessel's port of refuge or first port of call after the incident is applied. Also in view of the fact that predictability is one of the underlying reasons of the Rome Regulations,[419] a choice for this connecting factor is difficult to support.
Therefore the rather disappointing conclusion is that an adequate connecting factor for a suitable conflict of law rule on general average does not appear to exist.

6.7.4 Priority rule regarding substantive elements

The main problem of a specific choice of law rule for general average, however, seems to be that a conflict of law rule in Rome I or Rome II would likely have little added value. Many national general average regulations do not contain a full regime, whereas many regimes also provide that their general average provisions have a non-mandatory nature.[420] As a result, an identical substantive regime for all obligations arising out of general average would not prevent that diverging substantive provisions are agreed. In order to do justice to the nature of general average, to prevent forum shopping and to make sure that the same substantive law applies to (preferably) all obligations, it should also be prevented that the applicable law

416. This would be an extension of the stipulation that a reference to a particular YAR version is to be incorporated in contracts issued under the charter as applied in cl. 25 NYPE 1993/2015.
417. Art. 14 Rome II.
418. Generally the head charter party will be the charter party concluded between the shipowner and the first time charterer. Inter alia *Voyage Charters* 2014, p. 510; Özdel 2015, p. 22.
419. Recital 6 and 16 Rome I respectively recital 6 and 14 Rome II. See also para. 6.3.1 above.
420. See para. 3.3.2.3 above.

can be manipulated and that parties can agree deviating contractual agreements on various substantive general average aspects. This means that the freedom of contract should be excluded or at least limited, unless all parties commit to the chosen law. This is an infringement on yet another of the Rome I and II Regulations' underlying principles as under the Regulations, exceptions to the freedom of contract are only hesitantly allowed to protect weaker parties.[421] For general average, the freedom of contract should be excluded in respect of all parties involved with and many obligations arising out of general average. In order to be truly effective, a conflict of law rule on general average should have substantive law elements, in that respect that it should also impact in an overriding manner on the substantive law which applies pursuant to the conflict of law rules. In order to duly apply the general average principle of a division of loss on a pro rata basis, the substantive law should in any event and for all parties involved in the maritime adventure, determine whether there is a situation of general average. If it is established that the actions and/or disbursements qualify as general average, the same substantive law should govern the appointment and role of the adjuster, the applicable rules to the adjustment, the general average creditors and debtors, the consequence of an 'actionable' fault and time bar issues. Parties should not be allowed to make contractual arrangements in respect of these issues.

A conflict rule to this effect would completely change the current general average practice, which is based on freedom of contract. Contractual application of the YAR would become difficult and additional debtors may no longer be created in contracts of affreightment or security documents. Moreover, and even more important, such rule would not be a conflict of law rule anymore, but rather a mandatory 'priority rule'. Even though substantive elements already play a role in the decision on the applicable law,[422] insertion of a rule that impacts on the nature of the substantive law and would make it compulsorily applicable also in situations in which the substantive regime provides that it is not, would be something completely different. It is unlikely that the European Commission would extend Rome I and/or Rome II's scope in such manner, also because the national regimes may not give a sufficient general average regulation.[423]

6.7.5 **Evaluation**

The main purpose of the conflict of law rules in the Rome I and II Regulations is ensuring legal certainty by creating predictability of the applicable law. Similarly, the main advantage of incorporation of a conflict of law rule on general average in these Regulations seems to be the predictability it would create. The question is whether this predictability is so important that it outweighs the considerable disadvantages of inserting a specific conflict of law rule, also taking into account that such rule would have a limited scope anyway. The Rome I and II Regulations'

421. Art. 8(1) Rome I, for example, provides that a chosen law may not deprive an employee of protection afforded to him under the law that would be applicable if no choice had been made. Art. 14(1) Rome II allows a choice of law when it does not prejudice the rights of third parties.
422. The relationship between conflict of law interests and substantive interests in respect of the determination of the applicable law is discussed inter alia in Asser/Vonken 10-I 2013, nr. 183, pp. 148-149.
423. Luxembourg, for example, only incorporates the YAR, whereas inter alia the French law does not specify which parties are to be considered as creditors and debtors, etc. See Chapter 4 above.

scope is limited, both territorially, formally and substantively.[424] A conflict of law rule on general average inserted in these Regulations would face the same limitations. It would only apply in the European Union's Member States (with the exception of Denmark), in non-excepted cases, and possibly even in state courts only. In addition, a specific, useful conflict of law rule for general average would be based on other principles than the principles underlying the Rome I and II Regulations.[425] Because it should respect the pro rata division of losses and costs over several parties, unlike the conflict of law rules currently set out in Rome I and Rome II, a conflict rule for general average could not be chosen (unless with all parties' consent which may be difficult to obtain in bigger general average cases), that would not be restricted to a specific obligation and would not take into account the specifics of the parties in the relationship in which the obligation arose. Even apart from problems of structure, a conflict rule for general average would be flawed in any event as there does not appear to be a suitable connecting factor.[426] In fact, the consequences of the potential connecting factors are likely to be so undesirable that it seems better not to implement any of them. Finally, a conflict rule for general average would have effective added value only if combined with a rule which would impact on the applicable substantive law, in the sense that it would prohibit parties to make contractual arrangements on several specific aspects. This would eliminate the principle of party autonomy, which plays an important role both in the Rome I and II Regulations and in current general average practice.

As put by Pocar: '*There is no doubt that rigid conflict of law rules may favour predictability, both as far as jurisdiction and the applicable law are concerned. However, should it be regarded as a dogma that predictability based on rigid private international law rules is the only way to reach appropriate and just solutions* (…)?'[427] The better option appears to be to let the courts determine the most closely connected law to a particular general average obligation based on the facts that are presented to them, and from regulatory point of view, to focus on creating further substantive uniformity, preferably in the form of a general average convention.[428]

424. See para. 6.2 above.
425. As it should respect the pro rata division of losses and costs over several parties.
426. Even apart from the inherent unsatisfactory nature that conflict of law rules by definition have (Kozyris 2008, p. 479).
427. Pocar 2009, pp. 347-348.
428. See also para. 4.9 above and Chapter 7 below.

Chapter 7

Conclusion

The general average distribution principle has ancient roots. However, the way in which general average is currently settled is rather modern. The practice of the preparation of an adjustment, the collection of security, the possibility for all cargo interested parties to bring claims against each other and the insertion of provisions on general average in contracts of carriage are only applied for a few hundred years, if at all. The YAR have yet to celebrate their 150th anniversary. Since they were created, there have been considerable changes in international trade and shipping. Not only the carrying capacity of vessels has grown exponentially but the whole organisation of maritime transport in itself changed. Contracts of carriage are no longer necessarily concluded between the parties who are directly interested in the shipped property, while at the same time chains of sales and shipping contracts have become standard practice. It will come as no surprise that the general average apportionment and the adjusting process have become (even) more challenging as well as a result.[1]

Impressive progress has been made in international cooperation when it comes to the adjustment of general average cases in the YAR, i.e. at substantive, adjustment level. However, this has not happened in respect of other relevant, mostly formal or procedural, aspects to effectuate a right to claim a general average contribution. The analysis of the various national and contractual general average regulations[2] shows that substantial differences exist between these provisions. Nevertheless, or possibly also for this reason, the legal basis of a claim for a general average contribution is often disregarded. In practice, contractual arrangements are considered to be most important, in spite of the fact that general average obligations in essence arise as a matter of law. The freedom of contract seems to have taken precedence over the law, and in fact with the legislators' consent. General average provisions hardly ever have a mandatory nature. The overall factual connection from which the general average concept derives is a kind of 'lost in translation' to the concept's current legal application. This concerns both national and international regulations. The European Rome I and II Regulations do not contain a conflict of law rule which ensures that a single national regime governs all obligations arising out of a general average incident either. Even if there was a willingness to create a mandatory conflict of law rule which would bring all parties together under the same law (which would effectively mean that the principle of freedom of contract would be set aside), an adequate connecting factor is unlikely to be found. In addition, such conflict of law rule would not solve the issue that a claim for a general average

1. This was already recognised by Cole in 1924 (p. 9). Since then and especially due to the containerisation, the adjusting process has only become more complex.
2. See Chapter 4 above.

contribution may be based on various sources (national law, contract of affreightment and security forms).

In this respect, it is not difficult to conclude that general average is not exactly a prime example of a well regulated concept from a legal perspective. Maritime law may have grown up with commerce indeed, but general average appears to have lost ground.[3] The practical and legal developments have not adequately been reflected in the general average rules. Neither have the various national and contractual regimes regulated their interaction and interference. Nevertheless and somewhat surprisingly, most general average cases are settled without too many problems.[4] In the absence of a uniform legal regime of mandatory application, practice appears to have found its own solution, making use of the regulatory nature of most provisions on general average, the gaps in the laws and contractual arrangements.[5] With some optimism, this could be regarded as a sign that parties appreciate the concept and are therefore willing to turn a blind eye to the concept's legal imperfections. More likely is that parties are used to the apportionment system and have accepted it as a traditional particularism connected to carriage of goods by sea. In any event, the practical reality shows that the general average concept can work and apparently serves a purpose. Contrary to continuous predictions that general average would soon become extinct or should be abolished,[6] it is still around. The fact that a new version of the YAR as well as CMI Guidelines on General Average have been adopted in May 2016 shows that the concept is very much alive indeed.

That the general average system seems to work in practice, however, is not the final word on the matter. So far the concept has proved immune from abolition arguments.[7] In 1985, the English average adjuster Crump wrote: '*My own view has consistently been that the principle of general average is still as sound as it is ancient and that, provided its application can be made commercially effective, there is no case for its abolition*.' Mere commercial effectiveness, however, does not appear to be a sufficient justification for the concept's existence. In an ever more closely regulated legal order, the general average concept should be given a sound foundation if it is to survive. Contractual reference to various versions of the YAR provides an insufficient legal basis, both as a result of the freedom of contract and of the YAR's limited contents.[8] The obvious solution seems to implement uniform rules on the most fundamental general average aspects and rights to effectuate rights arising out of the general average concept in a Convention. Especially as the fundament already seems to be

3. As indicated by Tetley: '*Legislation and change take time. There are mountains to move.*' (Tetley 2000, p. 778).
4. Parties interested in the property involved in the maritime adventure often pay the contributions requested from them amicably. This may be because the amounts of the requested contributions are too small to justify the costs of a legal fight or because the parties simply are not aware of their legal possibilities, but also because contractual provisions prevent effective legal action or parties cannot obtain sufficient evidence.
5. The fading knowledge of the concept may also have contributed to the current legal disorder. It was already recognised by the Swedish average adjuster Pinéus in 1973 that (even) lawyers tend to stay away from general average (p. 619).
6. See also para. 1.2 above.
7. See on the abolition arguments para. 1.2 and in particular f.nt. 12 above.
8. See also para. 3.2.2 above.

available in the YAR, which are generally accepted in practice and even already considered as the relevant regime.[9] Moreover, in the preparation of the YAR 2016, several contentious issues were discussed and settled by representatives of the interested parties.[10] With some effort, it should be possible to extend and transform these rules in a convention which regulates general average in a comprehensive manner, for example, by giving binding uniform rules to determine a general average contribution due per property, whereby it would be irrelevant which party would actually settle the contribution so calculated.[11] The status of a convention may also circumvent the application of the Rome I and II Regulations and hence interference by national regulations, as arguably no international conflict of laws will then be present.[12]

By the end of the 19th century, it was argued that the time had not yet come for an international general average regulation.[13] From a legal point of view, it now seems to be in the interest of all parties involved that an internationally uniform mandatory general average regulation is created to cope with the increasing complexity of global shipping practice. Such a regulation would enhance predictability, lead to more procedural and cost efficiency and would make the general average concept less vulnerable for abolition arguments. It may be time that the YAR finally live up to the general perception and are, in extended form, indeed taking the position of the all embracing international general average regime.[14]

9. The fact that none of the YAR versions contains a full regulation is often disregarded. See para. 3.2.2 above.
10. According to Von Hein a bottom up is preferable to a top down approach. Also in this respect an extension and upgrade of the YAR makes sense (Von Hein 2008, pp. 1706-1707).
11. This would be in line with the underlying principle that general average merely concerns property involved in the maritime adventure rather than other interests like human lives or prevented liabilities. See also para. 4.4.3.4 above.
12. It has been argued that uniform substantive law takes precedence over conflict of law rules, and that as a result a convention, when ratified by and applied in the legal order of a claimant, would have the result that the specific conflict rules of the Rome I and II Regulations would not be applied (Asser/Kramer & Verhagen 2015, pp. 385-386; Basedow 2010, p. 138).
13. Inter alia Molengraaff 1880, pp. 258-259. However, it was acknowledged by Insinger and Rahusen in their letter of support to the Dutch government to implement the York and Antwerp Rules in the Dutch Code, that the more international transport increases, the more necessary uniformity in laws will be (Insinger & Rahusen 1878, p. 19).
14. Although it is respectfully submitted that, as also indicated in the invitation letter to the first conference on general average, the manner in which uniformity is created is less important than that uniform rules are agreed. (Invitation letter to the 1860 conference of the National Association for the Promotion of Social Science, printed in Rudolf 1926, pp. 3-5 and Molengraaff 1880, pp. 315-318.)

Summary

Extraordinary situations call for extraordinary remedies. A maritime voyage is an adventure, or at least it certainly was until quite recent times. When a ship loaded with cargo left the port of loading, she was in many ways outlawed. There was little to no shore contact at all, and whether she was able to deliver her cargo at the intended place of destination often only became clear when she made it back safely. This special position contributed to the development of several maritime legal particularisms. The most peculiar is probably the concept of general average. During a voyage overseas the need could arise to take extraordinary emergency measures to save the vessel as well as the property and people carried on board. For at least 2,000 years, but probably for much longer, maritime practitioners have accepted that it may be unfair to let the financial consequences of such intentional responses for the protection from peril of all involved lie where they fall. The concept of general average provides for a distribution of these intentional losses and costs amongst the parties interested in the properties involved in the maritime adventure. The party who incurred general average expenditures or suffered general average losses can claim a contribution from other parties with an interest in other property involved in the maritime adventure. General average, in essence, can be regarded as a maritime burden sharing mechanism, which stems from natural justice.

Apart from being regarded as one of the most peculiar and oldest maritime legal concepts, general average is also considered to be one of the maritime law topics which is most uniformly regulated. The general perception is that the widespread use of the York-Antwerp Rules ('YAR') has resulted in a uniform application of the general average concept. The YAR, however, do not provide a comprehensive general average regime or even a legal basis to claim a general average contribution. In the absence of a comprehensive internationally uniform regulation, general average is, in essence, a legal concept based on national legal systems. As a result, questions arise as to which law or laws apply to a general average case, how the applicable national law is to be determined, and what the actual contents of the national regimes are. As most national general average regimes have a non-binding nature, questions also arise as to what the influence is of contractual provisions set out in contracts for the carriage of goods by sea and general average security forms and how the various sources interact.

In this study, Chapter 1 provides an introduction. Chapter 2 gives an overview of the general average concept, the security collection and adjustment process as currently applied, both from historical and practical perspective. Chapter 3 explains the actual right to claim a general average contribution and its various legal bases in more detail. After it has been shown that a universal general average regulation with an acknowledged legal status does not exist, neither in the YAR nor otherwise,

the various grounds which may serve as a basis to bring a claim are set out and discussed, i.e. substantive provisions of national law, contracts of affreightment and general average security forms. Chapter 4 reveals the diversity in the national and contractual provisions necessary to effectuate a claim for a general average contribution. The conflict of law rules to determine the applicable law to various obligations arising out of general average are discussed in Chapters 5 and 6. Finally, Chapter 7 provides an analysis of this study and includes the suggestion to create a uniform general average regime of mandatory nature by means of a convention.

In the introductory **Chapter 1**, the study's theme is set out. It is argued that the perception that general average is uniformly regulated, as a result of the standard reference to the YAR in contracts for the carriage of goods by sea, is flawed. In view of the fact that the YAR are not applicable in all relationships arising out of general average, do not contain a comprehensive regime and the additionally applicable national and contractual general average provisions vary, the legal basis of the right to claim a contribution and the applicable law to such claim become highly relevant. Only when the legal basis of and the applicable law to a claim for a general average contribution have been ascertained, a claim can be effectuated successfully. In practice, the legal basis of a claim for a general average contribution is nevertheless often disregarded. It is argued that from a legal perspective, this is unacceptable.
The chapter also accounts the chosen approach and methodology. It is pointed out that an analysis is made of the general average concept through a desk based study of literature and case law. The main focus thereby is on the Dutch, English and German rules on general average as well as on their application and interpretation. In addition, national legislation of various other States, including the maritime codes of Norway, France, Spain, Argentina, the People's Republic of China and Russia, are referred to as well. These references serve as examples for the various manners in which the relevant aspects to effectuate a general average contribution can be regulated.

In **Chapter 2**, the general average concept is subjected to a further analysis. An overview is given of the concept's historical development and contemporary practical application. The concept is explained with reference to the classic example of general average; the jettison of cargo. When in earlier times cargo was thrown overboard to lighten the vessel, the parties interested in the vessel and other property carried on board had to pay a compensation to the party whose cargo had been sacrificed. Nowadays, jettison of cargo may still give rise to an apportionment in general average, but more often, the principle is applied when a maritime casualty has occurred and measures are taken to minimise the total overall damage, which results in expenses being incurred. Fires on board vessels are extinguished, 'dead' vessels are towed to ports of refuge where motor problems are resolved and stranded vessels are refloated. All these expenditures, in principle, can be apportioned in general average.

The general average principle has developed over the centuries, mostly in practice. Opinions vary on the exact century to which the principle underlying such apportionment dates back, but it is generally accepted that it was already applied at least

several centuries B.C. As such, the concept derives from a time when there were fewer and shorter chains of contracts of carriage, fewer contractual provisions on general average and in which private international law and negotiable trading documents played a much less important role, if they were relevant at all. Moreover, many merchants accompanied their cargoes on board and were personally involved. All this has an impact on the rules that were applied and the disbursements that could be apportioned. It is therefore not surprising that the characteristics of and requirements for application of the distribution principle underlying general average have varied according to the place and time in which they were applied. Inter alia the Digest, Rhodian Sea Laws, Roles d'Oléron, Wisby Sea Laws and the Ordinance of Marine of 1681 all contained their own provisions for apportionment of specifically indicated losses and costs. Until Charles V's 1551 Ordinance of Shipping, a codified general rule for apportionment does not even appear to have existed.

When the influence of the nation states on the regulation increased from the 17th century onwards, a substantive (further) diversification of the applicable rules took place. In the following centuries, shipping and international trade went through major changes. Wooden sailing ships, for example, were replaced by steel steamers, whereas contracts for the carriage of goods by sea became ever more extensive. In view of the fact that maritime transportation often involves parties from different countries, varying laws were applied with uncertain outcomes and risks, which were not always covered under insurance policies as a result. In the second half of the 19th century, such variety in the rules that were applied in respect of the general average concept had arisen that a strong need was felt to create an international uniform regime. The initiative taken by the International Law Association's predecessor has proved most successful. The rules developed at the time, in updated forms and names, are still invariably applied, since 1890 as the York-Antwerp Rules ('YAR'). The YAR are updated regularly. The most recent revision dates back to May 2016, when the YAR 2016 and the CMI Guidelines relating to general average ('CMI Guidelines') were adopted.

The YAR are standard conditions that contain rules on the adjustment of a general average case. Specific examples of disbursements which can be apportioned in general average are given, just as a definition of a general average act and rules to determine the contributory values of contributing properties. In addition, the YAR inter alia provide for treatment of cash deposits, a rule on interest and, since 2004, a time bar. The CMI Guidelines, which do not have any status, basically contain a very basic explanation of the general average concept for those parties that do not frequently deal with general average, average adjusters' best practices as well as a clarification of some of the amendments made in the YAR 2016.

In practice, the calculation of the various amounts due in general average is generally made by an average adjuster and set out in an adjustment. The main contributory properties which are taken into account in the apportionment are the ship, the cargo, the freight and the bunkers. As it will generally take quite some time before the calculation will be finalised, security is generally requested by the average adjuster from and provided by the parties interested in property involved in the common maritime adventure during which the general average incident arose.

The security in most cases is twofold. First of all, an average bond is requested from the party interested in the property involved in the maritime adventure. The average bond is complemented by financial security, either in the form of an average guarantee issued by reputable underwriters or by the provision of a cash deposit.

In **Chapter 3**, the legal basis of the right to claim a general average contribution is considered in some detail. The foundation of the general average concept is generally regarded to lie in natural justice. The principle of natural justice, however, does not form a basis to claim a general average contribution. In practice, the YAR are often regarded as providing a comprehensive, uniform regulation of general average. It is explained that this is an incorrect perception. The YAR lack an internationally accepted legal status. In order to apply, a particular YAR version either has to be incorporated in a contract for the carriage of goods by sea, insurance policy of security form, or it has to be given force of law by a national legal regime. In addition, their contents do not give a comprehensive general average regime. The YAR, inter alia, do not provide which property is to be included in the apportionment, which parties are considered to be the relevant parties in these properties for general average purposes, do not grant a lien, nor deal with the position of the average adjuster. More generally put, they do not contain rules to effectuate a claim for a contribution. It follows that the YAR's contents are insufficient to serve as a legal basis for such claim. The rules need to be applied jointly with other provisions of national law or a contractual nature. Which provisions apply depend on the specifics of a particular case and the parties involved.

In general, national general average rules are based on the idea that apportionment of losses and costs takes place over parties interested in the property involved in the common maritime adventure and that the contributions are interdependent. At the same time, they allow that contractual general average arrangements are made, albeit not always in respect of all issues and in all relationships. In practice, claims for a general average contribution are often based on contracts for the carriage of goods by sea and/or on security forms. Such contracts may provide a separate basis to claim a general average contribution indeed. However, the mere presence of some general average provisions in contracts for the carriage of goods by sea should not automatically provide a contractual right to claim a contribution. Similarly, the availability of general average security forms does not by definition imply that an additional, separate legal ground exists to base a claim on. It depends on the applicable legal regime whether and to what extent contractual arrangements can be made and on the agreed contractual provisions' wording what in fact has been agreed upon.
In practice, the provisions of the various sources are applied interchangeably and complementarily on dubious legal grounds to come to the preferred outcome. From a legal perspective, this course of action is difficult to justify. Especially as the various sources may be subject to varying national laws, with distinct contents.

That the provisions of the varying national legal regimes as well as the provisions set out in the various contracts differ is evidenced in **Chapter 4**. It discusses several aspects of the general average concept which play a role in the effectuation of a right to a general average contribution and which are regulated in varying ways

in the national legal regimes, contracts of carriage and security forms. After the general introduction of **para. 4.1**, **para. 4.2** sets out that a uniform general average definition does not even exist. There does appear to be a common understanding of the concept's approximate contents, but national laws may set specific, varying requirements that have to be complied with. Some laws, for example, require that measures have to be taken at the instruction of a specifically indicated person in order to apportion them in general average, whereas others, for example, apply a reasonableness test. Contracts of carriage and security forms hardly ever contain a separate general average definition, but mainly refer to the YAR only. Uncertainty may then arise regarding the applicable requirements to determine whether there is a case of general average and whether the YAR apply at all.

In **para. 4.3**, the legal position of the adjuster, most notably his appointment and status, is discussed. His position appears to be subject to (the limited) regulations given by the national legal regimes and contractual arrangements, if any. Substantial differences exist between the various national laws. Whereas the adjuster is regarded as an independent and impartial person under some laws, others qualify him as agent of the shipowner. None of the YAR versions contains a regulation on the adjuster. The suggestion to include a regulation in the YAR 2016 merely resulted in an overview of adjusters' best practices in the CMI Guidelines. It is argued that serious inconsistencies and conflicts of interest will arise by definition where the adjuster is not regarded as an impartial and independent person. It is also argued that courts should give more attention to the different hats that adjusters may be wearing and, as a result, should not automatically accept adjustments as independent statements.

The adjustment is further discussed in **para. 4.4**. The status given to an adjustment by national legislators and courts varies. Whereas some legal regimes merely regard the adjustment as a proposal for apportionment, under other laws, the adjustment may obtain a binding status, either as a matter of law or by the court's confirmation.

Most adjustments of general average related to the carriage of goods by sea are drawn up on the basis of one of the YAR versions. In view of the standard reference to the YAR in contracts of carriage, many legislators have aligned their national systems with the YAR. Specific provisions may have been taken over, whereas some regimes even incorporate a specific YAR version, either completely or partially. Just like the YAR do not regulate all aspects of a general average case, they do not regulate all aspects relevant for the calculation of the contribution(s) either. They do not determine when the obligation to contribute arises, whether a contribution is due in respect of property that was lost during the voyage, whether a single contribution can exceed the maximum value of the property involved in the maritime adventure and what the effect is of successful recourse against a third party. These closely related questions will have to be answered on the basis of the applicable national law. The national regimes also deal with these issues in varying manners.

In the last decades, the focus in respect of general average contributions appears to have shifted from the property involved in the common maritime adventure to

the party interested in this property. The applicable adjustment rules often depend on the personal relationship between two parties with an interest in the relevant properties. In practice, the agreed provisions are guiding. When many properties are involved, various regulations may apply between the parties interested in the properties, both as a matter of law (for example, between two parties interested in separate cargoes) and contractually (for example, between a shipowner and a cargo interested party). Obviously, this could result in the applicability of conflicting adjustment rules. In view of the fact that varying parties may be considered to have an interest in a single property, as discussed in **para 4.5**, the calculation set out in the adjustment may not so much relate to the property involved in the maritime adventure, but rather to a specific party interested in this property for general average purposes.

Nowadays it is completely normal that different parties have diverging interests and relationships in respect of the properties involved in the maritime adventure. A ship may have been given in bareboat charter by the registered owner and may be operated by yet another party. Similarly, a cargo carried on board the vessel may at the relevant time be owned by party A, travelling for risk of party B, whereas party C may be the party entitled to receive the cargo at the port of discharge. In addition, all or some of these parties may have taken out insurance. The question then arises which party or parties should be regarded as interested in the property for general average purposes. The YAR do not regulate the general average claimants and/or contributors as their traditional focus is on the properties involved in the maritime adventure. National laws and contractual provisions may consider different parties interested in a particular property as relevant general average parties. It follows from the fact that many different relationships are created by a general average incident, that there may be various parties entitled to claim and/or be obliged to contribute in respect of a single contributory interest on the basis of varying legal grounds. In fact, the party entitled to claim a contribution in respect of a particular property may not even be the same as the party who is to contribute in general average. The potential variety of parties interested in a single property involved in the maritime adventure raises several interesting questions, including the questions whether various parties are jointly and several liable as well as regarding the internal relationship between the various parties interested in a particular property. Answers should be provided either in national legal systems, or in the contracts involved in the maritime adventure, but in practice, they are not.

Par. 4.6 discusses the measures that may have to be taken in order to prompt security provision when general average security is not provided voluntarily. The most commonly applied measure to ensure that financial security is provided and payment of the general average contribution is safeguarded is the shipowner's, master's and/or carrier's right to retain cargo. This right which is granted by various national laws and contracts of affreightment, although similar to a certain extent, differs regarding its specifics, including contents and requirements for application. Some legal systems require that the shipowner, master and/or carrier exercises his right of retention/lien for the benefit of all parties entitled to claim a general average contribution, as other, non-ship interested parties have less possibilities to secure their claim. They may arrest the vessel and/or other property involved in the

maritime adventure, but such arrests are not always allowed and/or possible from practical and cost efficiency perspective.

The cause of the incident necessitating measures to mitigate loss or damage subsequently to be apportioned in general average may have been the result of the actionable fault of one of the parties to the maritime adventure. The several different ways in which the presence of an actionable fault influences general average cases in various jurisdictions are analysed in **para. 4.7**. Tension exists between the principle of a fault free general average concept and the principle that a party who actionably caused damage, should not be able to take recourse for expenditures incurred or sacrifices made to minimise damage resulting therefrom. Some regimes do not regard measures necessitated by an actionable fault as general average disbursements at all. Other regimes may not allow the 'liable' party to claim a compensation, give innocent parties a defence to the request for contribution, or disregard actionable fault completely and/or merely give rise to a counter claim. The chosen approach may have consequences, inter alia, for the application of time bars and limitations of liability. It is argued that none of the procedural approaches establishes a smooth and reasonable interaction between general average on the one hand and the liability regime on the other.

Par. 4.8 describes that the time bar provisions regarding general average, including the duration of the time bar, the starting moment and the way in which a time bar can be interrupted, may vary per statutory and contractual regime. Distinct time bars may apply in different relationships arising from a single general average event. It goes without saying that in situations which involve many parties, it may be difficult to ascertain the correct time bars, not even to mention to safeguard all of them, in particular when they are of a rather short duration.

In the evaluation set out in **para. 4.9**, it is concluded that considerable differences exist between the various national laws and contractual provisions in respect of the regulation of basically all relevant aspects to effectuate a claim for a general average contribution. The analysis of these various aspects also illustrates that none of the regimes gives an adequate and sufficient regulation of these aspects. Different legal regimes cover various aspects and leave other issues unregulated. Moreover, none of the regimes, neither the national nor the contractual, appears to duly regulate the relationship between the various sources on which a claim for a contribution can be made and the relationship between the various parties interested in a single property inter se. Such regulation is duly missed in those situations in which the provisions set out in the various legal sources differ. This concerns both the situation in which a single party is obliged to pay a contribution for a particular property on varying grounds (liabilities may exist, for example, as a matter of law and on the basis of a contract of affreightment), but also when different parties are liable regarding the same property on the basis of distinct regimes (the party liable as a matter of law may differ, for example, from the party who assumed liability to contribute in a security form).

In practice, the provisions of the various sources are applied interchangeably, often in an inconsistent manner. In many cases, no clear distinction is made between

the properties involved in the maritime adventure and the parties interested in the same. The general perception is still that liability to contribute in general average concerns the amount due in respect of a particular property set out in the adjustment and ascertained in an objective manner. A net figure is established per property, which either has to be paid or is to be received. The property, and hence the contribution due in respect of the property, is regarded as an objective, almost an absolute notion. Claims for a general average contribution, however, are considered to have an in personam nature. In the absence of an overall applicable adjustment regime, the contribution per property is calculated on the basis of a regime which applies in a particular relationship between a specifically singled out party interested in the property and another specific party interested in other property. As a result, the question whether a contribution is due and if so, which amount, may vary per party interested in the same property, depending on the applicable provisions. It follows that the calculated amounts set out in the adjustment may only be relevant in some specific relationships and consequently may be rather subjective.

Chapter 5 and 6 focus on the determination of the law applicable to general average obligations.
The traditional view, which is still advocated, is that general average in the absence of a contractual provision is regulated by the laws of the place where the common maritime adventure ends. In **Chapter 5** it is argued that this view is an incorrect simplification of reality. It appears that there never was a universally applied conflict of law rule (to this effect). Just like the substantive general average provisions vary, the conflict rules on general average included in the national regimes differ as well. Conflict of law rules on general average codified in contemporary legal regimes inter alia connect to the law of the vessel's flag, the law of the place where the shipowner is registered and the law of the place where the vessel calls immediately after the general average incident. In view of the fact that many parties can be entitled to claim a general average contribution, several fora may accept jurisdiction. The result may be that several varying conflict of law rules are applied in respect of a single general average event, and hence potentially several substantive regimes apply as a result. Contractual provisions which provide for applicability of a specific regime may give helpful guidance, but may not solve all problems, in particular not in those general average cases in which many parties are involved which are not all contractually bound.

Obligations arising out of general average are most likely to be regarded as obligations arising in civil and commercial matters in the meaning of the European Regulations on private international law. This means that within the European Union the applicable law to such obligations, in principle and provided that no exclusion applies, has to be established on the basis of the more general mandatorily applicable conflict of law rules set out in the Rome I and II Regulations. The impact of these Regulations on various obligations arising out of general average is discussed in **Chapter 6**.
In most situations it will be obvious whether Rome I on the applicable law to contractual obligations or Rome II regarding non-contractual obligations gives the relevant framework as well as which conflict of law rule has to be applied. However,

in respect of general average these important questions may be more difficult to answer, also because none of these regulations contains a specific conflict of law rule for general average. The Rome I and II Regulations' conflict of law rules are aimed to establish the applicable law to obligations. In that respect, it is not the relationship or the incident from which an obligation arises that is relevant, it is the specific obligation itself. For this reason, it has to be determined for each and every individual obligation arising out of a general average event whether the Regulations are applicable (that no exclusion applies) and, if so, whether Rome I or Rome II applies (i.e. whether it concerns a contractual or a non-contractual obligation), and which exact conflict of law rule provides the relevant rule.

When no exclusion applies, the applicable law to a single general average obligation between two parties which either arises as a matter of law or clearly and merely derives from a contract can be determined on the basis of Rome I and Rome II without too many difficulties. These regulations' conflict of law rules give a sufficiently wide framework for a court to determine the applicable law to a specific obligation between two parties, taking into account the merits of the particular matter. In the absence of a choice of law, specific conflict of law rules apply, depending on whether the obligation is regarded to derive from a contract (in practice either a contract of carriage or a security form) or is based on the applicable law. In the latter situation, the conflict of law rules for obligations arising out of negotiorum gestio and/or unjust enrichment may be applied, either directly or by analogy. Difficulties may arise, however, when it is not clear whether an obligation is contractual and/or when a contribution is due both as a matter of law and on the basis of a contract, or can be based on two separate contracts. Even when only one shipowner and a single cargo interested party are involved, the obligation to contribute potentially has several sources, i.e. national law, contract of affreightment and/or security form, with possibly varying applicable laws. Questions then arise whether these obligations coexist or whether one takes precedence and, if so, which obligation, and on the basis of which law this precedence is determined. It becomes even more difficult when a general average incident creates obligations between several parties, which is the case more often than not.

If one takes a step back from a specific obligation to contribute, to appoint an adjuster and/or to exercise a security right, and looks at the general average concept as a whole, it is clear straight away that the Rome I and Rome II Regulations are unsuitable to regulate the applicable law to general average obligations, at least when more than two parties are involved. The principles underlying the Rome I and II Regulations and the general average concept are basically irreconcilable. The Regulations focus on the individual relationship between two parties and give a tailor made solution to determine the law that is most closely connected to the specific obligation ensuing from this relationship. Not the property involved in the maritime adventure, but the party or parties interested in the property are of utmost importance under the Rome I and II Regulations. By contrast, general average's focus traditionally has been on the common maritime adventure (the 'community of interests') and the properties involved therein. General average brings parties together under the 'general average umbrella', in order to distribute losses and costs on a pro rata basis. Obligations which arise out of a general average event as

a result are interconnected and cannot be separated completely. A separation, however, is exactly what happens when general average is brought under the Rome I and II Regulations. The applicable law is then determined to the specific obligation, whereas the bigger picture is disregarded.

The Rome I and II Regulations' insufficiency hence not only results from their limited contents, but mainly as a result of the general average concept's hybrid nature, which permits that the basis of claim lies in national legal regimes and in contractual provisions. In view of this nature as well as, inter alia, the absence of an appropriate connecting factor and the fact that the Regulations' scope is limited (territorially, formally and substantively), it is argued that inclusion of a conflict rule on general average in the Rome I and II Regulations is not to be recommended, as it will not give a helpful solution.

Finally, **Chapter 7** provides an evaluation of the study. It is concluded that even though the application of the general average concept seems to work in practice, from a legal point of view the current application is hard to justify. In a nutshell, general average is not exactly a prime example of a well-regulated concept. In an ever more closely regulated legal order, the general average concept should be given a sound legal foundation, if it wants to survive. In view of the fact that the principle is generally supported and still serves an important purpose, its survival appears to be desirable indeed. Mere contractual reference to (various versions of) the YAR is insufficient. The obvious solution seems to be an implementation of uniform rules on the most fundamental general average aspects into a Convention. Especially as the fundaments already seem to be available in the YAR, which are not only generally accepted in practice, but are even already considered as the relevant regime. With some effort, it should be possible to extend and transform these rules into a convention which regulates general average in a comprehensive manner. Such regulation would enhance predictability, would lead to more efficiency and would make the general average concept less vulnerable to abolition arguments. It may be time that the YAR finally live up to the general perception and in a more extensive form indeed take the position of the all embracing international general average regime.

Samenvatting

Buitengewone omstandigheden vragen om buitengewone maatregelen. Een zeereis is een avontuur, althans dat was het in ieder geval tot betrekkelijk kort geleden. Als een schip met lading vertrok uit de laadhaven was het in verschillende opzichten vogelvrij. Er was weinig tot geen contact met de wal en of het uiteindelijk in staat was om de lading op de afgesproken plaats van bestemming af te leveren bleek vaak pas als het schip weer veilig was teruggekeerd in de laadhaven. Deze speciale positie heeft geleid tot de ontwikkeling van diverse maritieme juridische particularismen. Waarschijnlijk het meest bijzondere is het concept van de averij-grosse (in het Engels: 'general average'). Tijdens een zeereis kan het noodzakelijk worden om buitengewone noodmaatregelen te treffen om zowel het schip, de lading vervoerd aan boord van het schip als de daarop aanwezige personen te redden. Voor ten minste 2000 jaar, maar waarschijnlijk al veel langer, is men het erover eens dat het oneerlijk kan zijn om de financiële gevolgen van dergelijke bewuste acties om allen tegen gevaar te beschermen voor rekening te laten komen van degene die de kosten gemaakt of de schade geleden heeft. Het averij-grosseconcept voorziet in een verdeling van de opzettelijk toegebrachte verliezen en gemaakte kosten over de belanghebbenden bij de goederen betrokken in het maritieme avontuur. De partij die averij-grossekosten heeft gemaakt of dergelijke verliezen heeft geleden kan een bijdrage vorderen van de belanghebbenden bij andere goederen betrokken in het maritieme avontuur. In essentie is het averij-grosseconcept dus een maritieme verdeelsleutel van bepaalde kosten, die voortvloeit uit de redelijkheid.

Naast het feit dat averij-grosse een van de bijzonderste en oudste maritieme juridische concepten is, wordt averij-grosse ook beschouwd als één van de meest uniform geregelde maritieme onderwerpen. De algemene perceptie is dat het wijd verspreide gebruik van de York-Antwerp Rules ('YAR') heeft geresulteerd in een uniforme toepassing van het averij-grosseleerstuk. Echter, de YAR geven geen allesomvattende averij-grosseregeling of zelfs maar een juridische basis om een bijdrage in de averij-grosse te vorderen. Aangezien er geen algehele internationaal uniforme regeling bestaat, is averij-grosse in de kern een juridisch concept dat is gegrond in de nationale rechtssystemen. Dit roept de vragen op welk recht of welke rechtstelsels van toepassing is, althans zijn op een averij-grossegeval, hoe het toepasselijke recht dient te worden vastgesteld en wat de inhoud is van de nationale regelingen. Gelet op het feit dat de meeste nationale averij-grosseregelingen niet dwingendrechtelijk van aard zijn, doen zich eveneens de vragen voor wat de invloed is van contractuele bepalingen opgenomen in overeenkomsten voor het vervoer van goederen over zee en in zekerheidsformulieren. Ook speelt de vraag hoe de verschillende bronnen zich tot elkaar verhouden en op elkaar inwerken.

Het onderzoek is als volgt opgebouwd. Hoofdstuk 1 bevat een introductie van het onderzoek. Hoofdstuk 2 geeft een overzicht van het averij-grosseconcept, zowel

vanuit historisch als praktisch perspectief, waarbij de huidige praktijk van het inwinnen van zekerheid en het vaststellen van de verschillende waarden en bijdragen kort uiteengezet worden. In hoofdstuk 3 wordt in meer detail ingegaan op het recht een averij-grossebijdrage te vorderen, alsmede op de verschillende potentiële juridische gronden hiervan. Nadat is verduidelijkt dat er geen universele averij-grosseregeling met een erkende juridische status bestaat, in de YAR noch anderszins, worden de verschillende gronden op basis waarvan een vordering kan worden ingesteld (dat wil zeggen inhoudelijke bepalingen van zowel nationaal recht, vervoersovereenkomsten en zekerheidsformulieren) uiteengezet en besproken. Hoofdstuk 4 toont de verscheidenheid in de nationale en contractuele bepalingen die nodig zijn om een vordering tot een bijdrage in de averij-grosse te effectueren door middel van een analyse van diverse relevante aspecten. De conflictregels om het toepasselijke recht vast te stellen op de verschillende verplichtingen die voortvloeien uit de averij-grosse worden besproken in hoofdstuk 5 en 6. Tenslotte bevat hoofdstuk 7 een conclusie van het onderzoek met de suggestie om een uniform averij-grosseregime te creëren in de vorm van een verdrag.

In **hoofdstuk 1** wordt het onderwerp van het onderzoek geïntroduceerd. Betoogd wordt dat de algemene perceptie dat de averij-grossematerie uniform geregeld is als gevolg van de standaard verwijzing naar de YAR in overeenkomsten voor het vervoer van goederen over zee onjuist is. Gelet op het feit dat de YAR niet op alle averij-grosserelaties van toepassing zijn, geen allesomvattende regeling geven en de aanvullend toepasselijke nationale en contractuele averij-grossebepalingen verschillen, worden de juridische basis van het recht om een averij-grossebijdrage te vorderen en het toepasselijk recht op een dergelijke vordering hoogst relevant. Pas als de juridische basis van en het toepasselijke recht op een vordering tot een bijdrage in de averij-grosse zijn vastgesteld, kan een vordering juridisch gezien met succes geëffectueerd worden. In de praktijk wordt de juridische basis van een vordering tot een bijdrage in de averij-grosse desalniettemin vaak genegeerd. Betoogd wordt dat dit vanuit juridisch opzicht onacceptabel is.
In hoofdstuk 1 worden ook de gekozen insteek van het onderzoek en de methodologie verantwoord. Uiteengezet wordt dat een onderzoek is gedaan van literatuur en rechtspraak. De nadruk ligt daarbij op de Nederlandse, Engelse en Duitse regels met betrekking tot averij-grosse, alsmede op hun toepassing en interpretatie. In aanvulling daarop wordt verwezen naar diverse nationale regelingen, waaronder de maritieme wetten van Noorwegen, Frankrijk, Spanje, Argentinië, de Volksrepubliek China en Rusland. Deze verwijzingen dienen als voorbeelden van de verschillende manieren waarop relevante aspecten om een vordering tot een bijdrage in de averij-grosse te effectueren kunnen worden geregeld.

In **hoofdstuk 2** wordt het averij-grosseconcept nader geanalyseerd. Een overzicht wordt gegeven van de historische ontwikkeling van het concept en van de hedendaagse praktische toepassing daarvan. Het averij-grosseconcept wordt uitgelegd aan de hand van het klassieke voorbeeld van averij-grosse, de werping van lading. Als in vroegere tijden lading overboord werd gezet om het schip lichter te maken, waren de belanghebbenden bij het schip en de aan boord van het schip vervoerde lading gehouden om een vergoeding te betalen aan degene wiens lading overboord gezet was. Tegenwoordig kan werping van lading nog steeds leiden tot omslag in

averij-grosse, maar vaker wordt een omslag toegepast als er een maritiem ongeval heeft plaatsgevonden en maatregelen zijn genomen om de totale schade te beperken, hetgeen kosten met zich heeft gebracht. Branden aan boord van schepen worden geblust, 'dode' schepen worden naar noodhavens gesleept waar motorproblemen worden opgelost en gestrande schepen worden losgetrokken. Al deze kosten komen in beginsel voor omslag in averij-grosse in aanmerking.

Het averij-grosseprincipe heeft zich in de loop van de tijd voornamelijk in de praktijk ontwikkeld. De meningen verschillen tot welke eeuw de toepassing van het averij-grosseprincipe teruggaat, maar algemeen aanvaard is dat het principe al een aantal eeuwen voor het begin van de jaartelling werd toegepast. Het principe komt dus voort uit een tijd dat er minder en kortere ketens van vervoerovereenkomsten waren, contractuele averij-grossebepalingen niet werden gebruikt en waarin internationaal privaatrecht en verhandelbare handelsdocumenten een veel beperktere rol speelden, voor zover deze überhaupt relevant waren. Bovendien begeleidden kooplieden hun ladingen aan boord van de schepen en waren zij dus persoonlijk betrokken. Dit had allemaal invloed op de regels die werden toegepast en de schade- en kostenposten die voor omslag in aanmerking kwamen. Het is dan ook niet verbazingwekkend dat de kenmerken van en de vereisten voor toepassing van de verdeelsleutel die aan averij-grosse ten grondslag liggen verschillen per plaats en tijd. Onder meer de Romeinse Digesten, de Rhodische zeewetten, de Rôles d'Oléron, de Wisbysche zeewetten en de Ordinance de la Marine van 1681 bevatten allemaal hun eigen bepalingen voor verdeling van de specifiek aangegeven verliezen en kosten. Tot het plakkaat van keizer Karel V op de zeevaart uit 1551 schijnt er niet eens een gecodificeerde algemene regel voor omslag te hebben bestaan. Toen de invloed van de nationale staten op de toepasselijke regelgeving vanaf de 17e eeuw toenam, ontstond een verdere inhoudelijke diversificatie van de toepasselijke regels. In de volgende eeuwen vonden ingrijpende veranderingen plaats in de scheepvaart en de internationale handel. Houten schepen werden bijvoorbeeld vervangen door stalen stoomschepen, terwijl de overeenkomsten voor het vervoer van goederen over zee steeds uitgebreider werden. Gelet op het feit dat in overzees vervoer vaak diverse partijen uit verschillende landen betrokken zijn, werden verschillende, onderling sterk afwijkende rechtsstelsels toegepast met onzekere uitkomsten en risico's. In de tweede helft van de 19e eeuw was er zo'n verscheidenheid ontstaan aan regels die werden toegepast in verband met averij-grosse dat er een grote behoefte ontstond een internationaal uniform regime te ontwikkelen. Het initiatief dat is ondernomen door de voorloper van de International Law Association is het meest succesvol gebleken. De regels die destijds zijn ontwikkeld worden in geactualiseerde vorm(en) en onder aangepaste naam nog altijd toegepast, sinds 1890 onder de naam York-Antwerp Rules ('YAR'). De YAR worden op regelmatige basis herzien; sinds 1950 onder supervisie van de CMI. De meest recente herziening dateert uit mei 2016, toen de YAR 2016 en 'CMI Guidelines relating to general average' ('CMI Guidelines') zijn aangenomen.

De YAR zijn standaardvoorwaarden die regels bevatten met betrekking tot de verdeling van een averij-grosse. Specifieke voorbeelden van schade- en kostenposten die in aanmerking komen voor vergoeding in averij-grosse zijn erin uiteengezet, net als een definitie van een averij-grossehandeling en regels om de dragende

waarden van de dragende belangen vast te stellen. In aanvulling daarop bevatten de YAR onder meer bepalingen met betrekking tot deposito's, rente en, sinds 2004, een verjaringstermijn. De CMI-Guidelines, die geen enkele status hebben, bevatten een zeer basale toelichting op het averij-grosseconcept voor diegenen die niet frequent met de averij-grosse te maken hebben, net als regels van 'best practice' voor dispacheurs met een toelichting op diverse wijzigingen ingevoerd in de YAR 2016.

In de praktijk wordt de berekening van de verschillende bedragen die verschuldigd zijn dan wel kunnen worden gevorderd in averij-grosse uitgevoerd door een dispacheur en uiteengezet in een rapport, dat dispache wordt genoemd. De belangrijkste goederen waarover de verdeling van de averij-grosseposten plaatsvindt zijn het schip, de lading, de vracht en de bunkers. Aangezien het doorgaans geruime tijd duurt voordat de berekening is afgerond, wordt normaal gesproken zekerheid gevraagd door de dispacheur aan de partijen betrokken in het gemeenschappelijk avontuur voor betaling van een eventueel door partijen verschuldigde bijdrage in de averij-grosse. De zekerheid is in de meeste gevallen tweeledig. Om te beginnen wordt een average bond gevraagd aan degene die direct belang heeft bij de goederen betrokken in het maritieme avontuur. Deze average bond wordt gecompleteerd door financiële zekerheid, ofwel in de vorm van een 'average guarantee' afgegeven door kredietwaardige verzekeraars ofwel door storting van een cash deposito.

In **hoofdstuk 3** wordt ingegaan op de juridische basis van het recht om een bijdrage in de averij-grosse te vorderen. Toegelicht wordt dat de oorsprong van het averij-grosseconcept wordt geacht te zijn gelegen in de redelijkheid. Dit algemene beginsel vormt echter geen grond om een vordering tot bijdrage in de averij-grosse op te baseren. In de praktijk worden de YAR vaak beschouwd als een complete, uniforme regeling van averij-grosse. Toegelicht wordt waarom dit een incorrecte perceptie is. De YAR missen een internationaal geaccepteerde status. Om van toepassing te zijn, dient een specifieke YAR-versie te zijn geïncorporeerd in een overeenkomst voor het vervoer van goederen over zee, een verzekeringsovereenkomst of zekerheidsformulier, of moet kracht van wet hebben gekregen door een nationaal rechtssysteem. Bovendien geven de YAR geen allesomvattende regeling. De YAR bepalen onder meer niet welke vermogensbestanddelen in de verdeling moeten worden betrokken en welke partijen moeten worden beschouwd als de relevante belanghebbenden bij deze vermogensbestanddelen voor averij-grossedoeleinden. Ze geven geen retentierecht en gaan evenmin in op de positie van de dispacheur. Meer in algemene zin bevatten ze geen regeling om de vordering tot een bijdrage in de averij-grosse te effectueren. De YAR moeten worden toegepast samen met andere bepalingen van nationaal recht of van contractuele aard. Welke bepalingen van toepassing zijn hangt af van de specifieke omstandigheden van een bepaalde zaak en de daarin betrokken partijen.

In algemene zin zijn de nationale regels gebaseerd op het idee dat een pro rata verdeling van kosten en verliezen plaatsvindt over de belanghebbenden bij de goederen betrokken in het gemeenschappelijke maritieme avontuur en dat de bijdragen dus van elkaar afhankelijk zijn. Tegelijkertijd wordt toegestaan dat contractuele afspraken worden gemaakt met betrekking tot de averij-grosse, zij het niet altijd met betrekking tot alle aspecten en in alle relaties. In de praktijk worden

vorderingen voor een averij-grossebijdrage vaak gebaseerd op vervoerovereenkomsten en/of zekerheidsformulieren. Zulke overeenkomsten kunnen inderdaad een separate basis bieden om een averij-grossebijdrage te vorderen. Betoogd wordt dat de enkele aanwezigheid van één of meerdere averij-grossebepaling(en) in vervoerovereenkomsten niet automatisch een juridische basis verschaft voor het instellen van een vordering tot een bijdrage in de averij-grosse. In vergelijkbare zin betekent het feit dat averij-grossezekerheidsformulieren zijn afgegeven niet per definitie dat een aanvullende, separate rechtsgrond bestaat om een vordering op te baseren. Het hangt af van het toepasselijke rechtsregime of, en zo ja in hoeverre, contractuele afspraken kunnen worden gemaakt en van de bewoordingen van de overeengekomen contractuele bepalingen welke afspraken zijn gemaakt.

In de praktijk worden de bepalingen van de diverse bronnen waarop een averij-grossevordering kan worden gebaseerd door elkaar heen gebruikt op dubieuze juridische basis om tot de gewenste uitkomst te komen. Vanuit juridisch perspectief is deze gang van zaken moeilijk te rechtvaardigen. Dat geldt te meer nu de verschillende bronnen onderhavig kunnen zijn aan verschillende nationale rechtsstelsels met van elkaar afwijkende inhoud.

Dat de bepalingen van de verschillende nationale rechtssystemen en de bepalingen zoals uiteengezet in de diverse contracten van elkaar afwijken, wordt uiteengezet in **hoofdstuk 4**. Diverse aspecten van het averij-grosseconcept die een rol spelen bij de effectuering van een recht tot een bijdrage in de averij-grosse en op verschillende wijzen geregeld zijn in de nationale rechtssystemen, vervoersovereenkomsten en zekerheidsformulieren worden behandeld. Na een algemene introductie van het hoofdstuk in **par. 4.1**, wordt in **par. 4.2** belicht dat er niet eens een uniforme averij-grossedefinitie bestaat. Er bestaat wel een algemeen begrip van wat het concept ongeveer inhoudt, maar nationale rechtssystemen kunnen aanvullende en afwijkende voorwaarden stellen waaraan voldaan moet worden. Sommige rechtstelsels bepalen bijvoorbeeld dat maatregelen om in averij-grosse te kunnen worden omgeslagen moeten zijn genomen op instructie van een specifiek bevoegde persoon, terwijl andere bijvoorbeeld een redelijkheidstoets hanteren. Vervoerovereenkomsten en zekerheidsformulieren bevatten vrijwel nooit een aparte averij-grossedefinitie; doorgaans wordt slechts verwezen naar de YAR. Onzekerheid kan dan ontstaan met betrekking tot de toepasselijke vereisten om vast te stellen of er sprake is van een averij-grossesituatie en of de YAR wel van toepassing zijn.

In **par. 4.3** wordt de juridische positie van de dispacheur, en dan met name zijn aanstelling en zijn status, besproken. Zijn positie blijkt te worden gereguleerd door de (beperkte) regels van nationaal recht en eventuele contractuele afspraken. Substantiële verschillen bestaan tussen de verschillende nationale rechtssystemen. Terwijl de dispacheur onder diverse rechtstelsels wordt beschouwd als een onafhankelijk en onpartijdig persoon, beschouwen andere systemen hem als de agent van de scheepseigenaar. Geen van de YAR-versies bevat een regeling met betrekking tot de dispacheur. Pleidooien om een regeling op te nemen in de YAR 2016 hebben slechts geleid tot een overzicht van 'best practices' van adjusters in de CMI-Guidelines. Betoogd wordt dat serieuze inconsistenties en belangenconflicten per definitie zullen ontstaan als de dispacheur niet beschouwd wordt als een onpartijdig en

onafhankelijk persoon. In dat kader zouden rechtscolleges meer aandacht moeten schenken aan de verschillende petten die dispacheurs dragen en, als gevolg daarvan, dispaches niet automatisch moeten accepteren als onafhankelijke stukken.

De dispache wordt nader beschouwd in **par. 4.4.** De status die aan een dispache wordt toegekend door nationale wetgevers en rechtbanken verschilt. Terwijl sommige rechtssystemen de dispache slechts beschouwen als *een* voorstel voor verdeling kan de dispache onder andere rechtstelsels een bindende status krijgen, hetzij van rechtswege, ofwel door homologatie door de rechtbank.
De meeste dispaches met betrekking tot het vervoer van goederen over zee worden opgesteld op basis van één van de versies van de YAR. Gelet op de standaardverwijzing naar de YAR in zeevervoerovereenkomsten hebben veel wetgevers hun nationale systeem in overeenstemming gebracht met de YAR. Specifieke bepalingen zijn soms overgenomen, terwijl sommige systemen zelfs een bepaalde YAR-versie geheel of gedeeltelijk incorporeren. Net zomin als geen van de YAR-versies voorziet in alle aspecten van de averij-grosse, voorzien de YAR in alle aspecten die in aanmerking moeten worden genomen bij de berekening van de bijdrage(n). Zo bepalen zij niet wanneer de verplichting tot bijdrage ontstaat, of een bijdrage dient te worden betaald voor zaken die tijdens de reis verloren zijn gegaan, of een bijdrage de waarde van het vermogensbestanddeel waarop het ziet te boven kan gaan en wat het gevolg is van succesvol regres op een derde partij. Deze nauw met elkaar samenhangende vragen dienen te worden beantwoord op basis van het toepasselijke nationale recht. De rechtstelsels regelen ook deze punten op verschillende manieren.

In de laatste decennia lijkt de focus met betrekking tot de averij-grossebijdrage te zijn verschoven van de goederen betrokken in het gemeenschappelijke maritieme avontuur naar de belanghebbende(n) bij het relevante goed. De toepasselijke regels met betrekking tot de verdeling zijn veelal afhankelijk van de specifieke relatie tussen twee partijen met een belang bij de goederen betrokken in het maritieme avontuur. De door hen overeengekomen bepalingen zijn leidend. Als meerdere partijen zijn betrokken kunnen bij gevolg verschillende regelingen van toepassing zijn tussen de partijen die belang hebben bij deze goederen, zowel van rechtswege (bijvoorbeeld tussen belanghebbenden bij twee verschillende ladingen) als contractueel (bijvoorbeeld tussen een scheepseigenaar en een ladingbelanghebbende).
Gelet op het feit dat diverse partijen een belang kunnen hebben in een bepaald goed, is de berekening zoals opgenomen in de dispache niet zo zeer gerelateerd aan het in het maritieme avontuur betrokken goed, maar meer aan de belanghebbende bij dit goed voor averij-grosse doeleinden.
Op deze belanghebbenden voor de averij-grosse wordt nader ingegaan in **par. 4.5**. Tegenwoordig is het algemeen geaccepteerd dat verschillende partijen separate belangen hebben bij en relaties hebben tot de goederen betrokken in het maritieme avontuur. Een schip kan in rompbevrachting zijn gegeven door de geregistreerde eigenaar, maar feitelijk worden geëxporteerd door weer een andere partij. In vergelijkbare zin kan een lading die wordt vervoerd aan boord van het schip op het relevante tijdstip in eigendom toebehoren aan partij A, reizen voor risico van partij B, terwijl partij C de partij kan zijn die bevoegd is de lading in de loshaven in ontvangst te nemen. Daar komt bij dat al deze partijen verzekeringsdekking kunnen hebben uitgenomen. De vraag doet zich dan voor welke partij of partijen dient,

althans dienen te worden beschouwd als de relevante belanghebbende(n). De YAR gaan niet in op de partijen die recht hebben op en/of gehouden zijn tot betaling van een bijdrage; zij zijn van oudsher gericht op de betrokken goederen. Nationale rechtssystemen en contractuele bepalingen kunnen verschillende partijen als belanghebbende bij een specifiek goed aanwijzen. Uit het feit dat een veelvoud van relaties wordt gecreëerd door een averij-grosse incident volgt dat er verschillende partijen bevoegd kunnen zijn om een vordering in te stellen en/of verplicht kunnen zijn om bij te dragen met betrekking tot een bepaald goed op basis van verschillende juridische gronden. Partij A kan een contractuele verplichting hebben om bij te dragen, terwijl partij B daartoe van rechtswege verplicht kan zijn. De gerechtigde om een bijdrage te vorderen met betrekking tot een bepaald goed hoeft niet eens dezelfde te zijn als de partij die voor dit goed dient bij te dragen in de averij-grosse. De potentiële verscheidenheid van betrokken belanghebbenden bij een bepaald goed leidt tot diverse interessante vragen, waaronder de vragen of verschillende partijen hoofdelijk aansprakelijk zijn, alsmede met betrekking tot de interne relatie tussen de verschillende partijen. Antwoorden dienen te worden gegeven door de nationale juridische systemen en/of in de overeenkomsten. Echter, in de praktijk gebeurt dit niet.

In **par. 4.6** wordt ingegaan op de maatregelen die genomen kunnen worden om averij-grossezekerheid af te dwingen als deze niet vrijwillig wordt verschaft. De meest gebruikte maatregel om financiële zekerheid te verkrijgen en de betaling van een bijdrage in de averij-grosse veilig te stellen is het recht van de scheepseigenaar, kapitein en/of vervoerder om afgifte van lading te weigeren. Het retentierecht dat wordt toegekend in diverse nationale rechtstelsels en vervoersovereenkomsten is tot een bepaalde hoogte vergelijkbaar, maar verschilt in de uitwerking, onder meer op inhoud en de vereisten voor toepassing. Sommige rechtsstelsel verplichten de scheepseigenaar, kapitein en/of vervoerder het retentierecht uit te oefenen ten gunste van alle partijen die gerechtigd zijn tot een bijdrage in de averij-grosse. De mogelijkheden van partijen die geen belang hebben in het schip om zekerheid te regelen voor hun vordering zijn immers beperkt. Zij kunnen eventueel beslag leggen op het schip en/of andere vermogensbestanddelen betrokken in het maritieme avontuur. Dergelijke beslagmaatregelen zijn echter niet altijd toegestaan en/of mogelijk vanuit praktisch oogpunt en gelet op de aan dergelijke maatregelen verbonden kosten.

Het incident dat het nemen van averij-grossemaatregelen noodzakelijk heeft gemaakt kan het gevolg zijn van de toerekenbare fout van één van de partijen betrokken in het maritieme avontuur. De verschillende manieren waarop de aanwezigheid van een dergelijke toerekenbare fout de averij-grosse kan beïnvloeden en op welke wijze contractuele bepalingen een rol spelen worden geanalyseerd in **par. 4.7**. Spanning bestaat tussen het beginsel van een ‘schuldvrij’ averij-grosseconcept enerzijds en het principe dat het een partij die toerekenbaar schade veroorzaakte niet vrij zou moeten staan om regres te nemen voor uitgaven of opofferingen gedaan om de schade die daaruit voortvloeit te beperken. Sommige regimes kwalificeren maatregelen die nodig zijn geworden als gevolg van een toerekenbare fout sowieso niet als averij-grosseposten. Onder andere regimes kan de aansprakelijke partij geen vergoeding vorderen, hebben ‘onschuldige’ partijen een verweer tegen een

dergelijke vordering tot bijdrage, wordt de toerekenbare fout volledig genegeerd en/of is slechts voorzien in een tegenvordering. De gekozen benadering kan onder meer gevolgen hebben voor de toepasselijkheid van verjaringstermijnen en een beroep op een beperking van aansprakelijkheid. Betoogd wordt dat geen van de procedurele benaderingen een soepele, redelijke interactie tussen averij-grosse enerzijds en het aansprakelijkheidsregime anderzijds geeft.

Par. 4.8 beschrijft dat de verjaringstermijnen met betrekking tot averij-grosse verschillen per rechtsstelsel en contractueel regime. Dat betreft zowel de duur van de termijn, het aanvangsmoment en de manier waarop de termijn kan worden gestuit. Afwijkende termijnen kunnen van toepassing zijn in de verschillende relaties die ontstaan uit één averij-grosse incident. Het behoeft geen verdere toelichting dat in situaties waarin een veelvoud van partijen betrokken is, het moeilijk kan zijn om vast te stellen welke termijnen er gelden, nog afgezien van de moeilijkheden met betrekking tot het veiligstellen van termijnen, zeker in situaties waarin deze van korte duur zijn.

In de evaluatie opgenomen in **par. 4.9** wordt geconcludeerd dat aanzienlijke verschillen bestaan tussen de verschillende nationale rechtstelsels en contractuele bepalingen met betrekking tot de regeling van in principe alle relevante aspecten om een vordering tot een bijdrage in de averij-grosse te effectueren. De analyse van de verschillende aspecten laat ook zien dat geen enkel regime een adequate, afdoende regeling geeft van deze aspecten. Verschillende juridische regimes gaan in op onderscheiden aspecten en laten andere punten ongeregeld. Bovendien blijkt geen van de regimes, de nationale noch de contractuele, de relatie tussen de verschillende bronnen waarop een vordering tot bijdrage kan worden ingesteld, alsmede de relatie tussen de verschillende belanghebbende partijen bij een specifiek goed, op afdoende wijze te regelen. Een dergelijke regeling wordt serieus gemist in die situaties waarin de bepalingen van de verschillende juridische bronnen verschillen. Dit betreft zowel de situatie waarin één partij verplicht is tot betaling van een bijdrage voor een bepaald goed op verschillende gronden (aansprakelijkheid kan bijvoorbeeld zowel van rechtswege bestaan als op basis van een vervoerovereenkomst), maar ook als verschillende partijen aansprakelijk zijn met betrekking tot eenzelfde goed op basis van verschillende regelingen (de partij die aansprakelijk is van rechtswege kan bijvoorbeeld afwijken van de partij die aansprakelijkheid heeft erkend door middel van afgifte van een zekerheidsformulier). In de praktijk worden de bepalingen van de verschillende bronnen door elkaar gebruikt, vaak op inconsistente wijze. De algehele perceptie is nog altijd dat aansprakelijkheid om bij te dragen in averij-grosse het bedrag betreft dat is opgenomen in de dispache met betrekking tot een bepaald goed, dat dit bedrag op objectieve wijze is vastgesteld en geldt met betrekking tot het goed. Vorderingen voor een bijdrage in averij-grosse zijn echter 'in personam' van aard. In afwezigheid van een algeheel toepasselijk regime met betrekking tot de opstelling van de dispache wordt de vergoeding per goed berekend op basis van een regime dat van toepassing is in een bepaalde relatie tussen een specifieke belanghebbende bij het goed en een andere specifieke partij die belang heeft bij een ander goed. Hieruit volgt dat de bedragen zoals uiteengezet in de dispache in beginsel slechts relevant zijn in de relatie tussen de specifiek aangeduide partijen en als gevolg nogal subjectief zijn.

In **hoofdstuk 5 en 6** wordt ingegaan op de bepaling van het toepasselijk recht op verbintenissen uit averij-grosse. De traditionele opvatting, die nog steeds wordt verkondigd, is dat averij-grosse in afwezigheid van andersluidende contractuele afspraken wordt gereguleerd door het recht van de plaats waar het gemeenschappelijke maritieme avontuur eindigt. In **hoofdstuk 5** wordt betoogd dat deze opvatting een incorrecte simplificatie is van de werkelijkheid. Er schijnt nooit een dergelijke conflictregel te zijn geweest die universeel is toegepast. Net zoals de inhoudelijke averij-grosse bepalingen verschillen, wijken ook de conflictregels met betrekking tot averij-grosse zoals opgenomen in de nationale regimes onderling af. De regels opgenomen in de hedendaagse codificaties knopen onder meer aan bij het recht van de vlag van het schip, het recht van de plaats waar de scheepseigenaar is geregistreerd en bij het recht van de plaats die het schip direct na het averij-grosse incident heeft aangedaan. Gelet op het feit dat een veelvoud van partijen gerechtigd kan zijn om een averij-grossebijdrage te vorderen, kunnen rechtscolleges in verschillende landen jurisdictie aanvaarden. Het gevolg kan zijn dat meerdere, verschillende conflictregels worden toegepast met betrekking tot één averij-grosse evenement en dat meerdere inhoudelijke regimes van toepassing zijn. Contractuele bepalingen die de toepasselijkheid van een bepaald regime stipuleren kunnen nuttige richting geven, maar lossen mogelijk niet alle problemen op, zeker niet in die gevallen waarin meerdere partijen betrokken zijn die niet allemaal gebonden zijn aan contractuele afspraken.

Verbintenissen uit averij-grosse kunnen vrijwel zeker worden beschouwd als verbintenissen in burgerlijke en handelszaken in de zin van de privaatrechtelijke EU-verordeningen. Dit betekent dat binnen de Europese Unie het toepasselijk recht op dergelijke verbintenissen in principe en mits er geen uitsluiting van toepassing is, dient te worden vastgesteld op basis van de meer algemene, dwingendrechtelijk toepasselijke conflictregels zoals uiteengezet in de Rome I en Rome II verordeningen. De toepassing van deze verordeningen op diverse verbintenissen voortvloeiend uit een averij-grosse incident, waaronder de verplichting tot bijdragen, het aanstellen van een dispacheur en het regelen van zekerheid, wordt besproken in **hoofdstuk 6**.

In de meeste gevallen zal het duidelijk zijn of Rome I met betrekking tot contractuele verbintenissen of Rome II met betrekking tot niet-contractuele verbintenissen het relevante kader geeft, alsmede welke conflictregel dient te worden toegepast. Echter, met betrekking tot verbintenissen uit averij-grosse is die niet altijd evident, ook omdat geen van deze verordeningen een specifieke conflictregel voor averij-grosse bevat. Rome I en Rome II geven conflictregels om het toepasselijk recht op verbintenissen vast te stellen. Niet de relatie of het incident is relevant, maar de specifieke verbintenis. Derhalve dient voor elke separate verbintenis die voortvloeit uit een averij-grosse evenement te worden vastgesteld of de verordeningen van toepassing zijn (en er dus geen uitsluiting geldt), en zo ja, of Rome I of Rome II moet worden toegepast (oftewel of het gaat om een contractuele of een niet-contractuele verbintenis), en welke specifieke conflictregel de relevante regel geeft.

Het toepasselijk recht op een aparte verbintenis uit averij-grosse tussen twee partijen, die ofwel voortvloeit uit het nationale recht of duidelijk en alleen van contractuele aard is, kan zonder al te veel problemen worden bepaald op basis van

Rome I en Rome II. De conflictregels van deze verordeningen geven een voldoende ruim kader om het toepasselijk recht vast te stellen, met inachtneming van de merites van het specifieke geval. In afwezigheid van een rechtskeuze, gelden specifieke conflictregels, afhankelijk van het antwoord op de vraag of de verbintenis dient te worden beschouwd als contractueel (in de praktijk voortvloeiend uit een vervoerovereenkomst of een zekerheidsformulier), of is gebaseerd op het toepasselijke recht. Als het een niet-contractuele vordering van rechtswege betreft, kunnen de conflictregels met betrekking tot verbintenissen uit zaakwaarneming en of ongerechtvaardigde verrijking worden toegepast, hetzij direct hetzij naar analogie. Moeilijkheden kunnen echter ontstaan als het niet duidelijk is of de verbintenis contractueel is en als een bijdrage zowel op grond van het recht als op basis van een contract verschuldigd is, of de vordering tot een bijdrage kan worden gebaseerd op twee verschillende contracten. Zelfs als één scheepseigenaar en één ladingbelanghebbende partij zijn betrokken kan de verplichting om bij te dragen uit verschillende rechtsgronden voortkomen, namelijk het nationale recht, een vervoerovereenkomst en/of een zekerheidsformulier, waarop mogelijk verschillende rechtstelsels van toepassing zijn. Vragen doen zich dan voor of deze verbintenissen naast elkaar bestaan of dat één voorrang neemt en zo ja, welke en op basis van welk recht deze voorrang dient te worden vastgesteld. Het wordt nog moeilijker als een averij-grosse incident verbintenissen creëert tussen meerdere partijen, hetgeen vaker wel dan niet het geval is.

Als één stap terug wordt gezet van de specifieke verbintenis om bij te dragen, om een dispacheur aan te stellen en om een zekerheid te regelen en het averij-grosseconcept wordt beschouwd in zijn geheel, is het onmiddellijk duidelijk dat Rome I en Rome II ongeschikt zijn om het toepasselijk recht op verbintenissen uit averij-grosse te bepalen, in ieder geval als er meer dan twee partijen betrokken zijn. De onderliggende principes van deze verordeningen enerzijds en het averij-grosseconcept anderzijds zijn in feite onverenigbaar. Rome I en Rome II gaan uit van de individuele relatie tussen twee partijen en geven een speciaal gemaakte oplossing om het recht te bepalen dat het nauwst verbonden is met de specifieke verbintenis die uit deze relatie voortvloeit. Niet de goederen (schip, lading, etc.), maar de partij of partijen met een belang in de goederen staat/staan onder de verordeningen centraal. Precies het tegenovergestelde geldt bij de averij-grosse, waar de focus van oudsher is gericht op de goederen betrokken in het gemeenschappelijke maritieme avontuur (‘de gemeenschap van goederen’). Averij-grosse brengt partijen samen onder de ‘averij-grosseparaplu’ om verliezen en kosten op een pro rata basis te kunnen verdelen. Verbintenissen die uit averij-grosse voortvloeien hangen dus met elkaar samen en kunnen niet volledig los van elkaar gezien worden. Een scheiding is echter precies wat er gebeurt als individuele verbintenissen die voortvloeien uit een averij-grosse incident onder Rome I en Rome II worden gebracht. Het grotere geheel wordt dan uit het oog verloren.
De ontoereikendheid van de Rome I en Rome II is dus niet alleen het gevolg van hun beperkte inhoud, maar met name ook van de hybride natuur van het averij-grosseconcept, waarbij de grondslag van een vordering kan liggen in nationale rechtssystemen, maar ook in contractuele bepalingen. Gelet op deze natuur, net als onder meer op de afwezigheid van een geschikt aanknopingspunt en het feit dat de reikwijdte van de Rome I en Rome II beperkt is (zowel territoriaal, formeel

als inhoudelijk), wordt betoogd dat invoering van een conflictregel met betrekking tot averij-grosse in deze verordeningen niet aan te bevelen is, omdat deze naar verwachting geen meerwaarde zal hebben.

Ten slotte bevat **hoofdstuk 7** een evaluatie van het onderzoek. Geconcludeerd wordt dat hoewel de huidige toepassing van het averij-grosseconcept in de praktijk blijkt te werken, een en ander vanuit juridisch oogpunt moeilijk te rechtvaardigen is. Om het in een notendop te zeggen: averij-grosse is bepaald geen schoolvoorbeeld van een heldere regeling. In een steeds strikter gereguleerde rechtsorde dient het averij-grosseconcept een solide juridische basis te hebben, als het tenminste wil overleven. Gelet op het feit dat het principe algemeen wordt ondersteund en nog altijd een belangrijk doel dient, lijkt instandhouding van het principe inderdaad wenselijk. Enkele contractuele verwijzing(en) naar (diverse versies van de) YAR is daartoe onvoldoende. De voor de hand liggende oplossing lijkt een implementatie van uniforme regels met betrekking tot de meest fundamentele averij-grosseaspecten in een verdrag. Dat geldt temeer, nu het fundament al aanwezig lijkt te zijn in de YAR, die niet alleen algemeen geaccepteerd zijn in de praktijk, maar zelfs al worden beschouwd als het relevante regime. Met enige inspanning zou het mogelijk moeten zijn om deze regels uit te breiden en te transformeren in een verdrag dat de averij-grossematerie op allesomvattende wijze regelt. Een dergelijke regeling zou de voorspelbaarheid verbeteren, zou leiden tot meer efficiëntie en zou het averij-grosseconcept minder kwetsbaar maken voor argumenten dat het moet worden afgeschaft. Het lijkt tijd dat de YAR gaan voldoen aan de algemene perceptie en in uitgebreide vorm de positie innemen van een allesomvattende internationale averij-grosseregeling.

Curriculum vitae

Jolien Kruit was born on 10 April 1982 in Dordrecht. In 2004, she graduated (cum laude) in civil and business law at the University of Leiden. The following year she completed the Maritime Law Master programme at Southampton University. Subsequently, in 2005, Jolien joined the law firm Van Traa Advocaten N.V., specialised in transport, international trade and insurance law in Rotterdam, where she became a partner in 2016. Besides her work as an attorney at law, Jolien regularly publishes and lectures on various aspects of maritime law. She also is a member of the general average committee of the Dutch Transport Law Association in which capacity she attended the CMI International Working Group's subcommittee meetings in preparation of the YAR 2016.

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Legislations and Conventions

LLMC 1976/1996

Art. 1(1)	3.3.2.1
Art. 3	3.2.1, 4.2.1, 4.4.3.4
Art. 14	6.5.2.3
Art. 15(1)	6.5.2.3

Luxembourg Maritime Code

s. 119	4.2.2, 4.4.2.1, 4.8.1, 4.9

Maltese Commercial Code

s. 296	4.4.2.3.2, 4.4.3.2.2
s. 305	4.6.2.1, 4.6.2.4
s. 442	4.4.2.1
s. 444	2.2.1, 4.2.2
s. 449(1)	4.7.2
s. 451	4.5.2.6.1
s. 452	2.2.1
s. 453	2.2.1
s. 455	5.2.1
s. 460	4.2.2
s. 467	4.4.3.6, 4.5.2.4.1
s. 468	4.4.3.4, 4.5.2.4.1

Montevideo Convention 1889

Art. 21	5.1, 5.2.2

Montevideo Convention 1940

Art. 15	5.2.2
Art. 17	5.2.2
Art. 18	5.2.2
Art. 33	6.1

Norwegian Insurance Contracts Act of June 16 1989

s. 7(6)	4.5.2.6.1
s. 7(8)	4.5.2.6.1

Norwegian Maritime Code

s. 51	4.5.2.2.1, 4.5.2.4.1, 4.6.1
- s. 51(5)	- 4.5.2.1, 4.5.2.2.1
s. 52	4.5.2.2.1
s. 55	4.4.3.2.1
s. 61	4.6.1
- s. 61 under 1	- 4.6.2.1, 4.6.2.2
s. 63	4.6.2.2, 4.6.2.2
s. 92 under g	4.6.3.2
s. 270	4.6.2.1
s. 289	4.7.3, 4.7.4
s. 386	4.5.2.5

Polish Maritime Code

s. 7-11	6.2.5
- s. 9	- 5.3
s. 255	4.3.2
- s. 255(2)	- 4.4.2.1

Rome Convention

Art. 3	6.3.2
Art. 4	6.3.1
- Art. 4(4)	- 6.3.3.2
Art. 21	6.2.1

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- Art. 1(2)	- 6.2.4
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- Art. 3(1)	- 6.3.2, 6.4.2, 6.5.2.3, 6.5.2.4, 6.5.3.2.3
- Art. 3(2)	- 6.3.2, 6.5.2.4, 6.5.3.2.3
- Art. 3(3)	- 6.3.2, 6.5.3.2.3
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York and Antwerp Rules 1877

Rule VII	3.2.2.2.2
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YAR

	1890	**1924**	**1950**	**1974**	**1990**
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Rule E	4.3.3.4	4.3.3.4	4.3.3.4	4.3.3.4	4.3.3.4
Rule F					
Rule G		5.2.1	5.2.1	2.3.5.1, 5.2.1	
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Rule XVI					
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	1890	**1924**	**1950**	**1974**	**1990**
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Rule XIX		2.3.5.2, 4.2.2	2.3.5.2, 4.2.2	2.3.5.2, 4.2.2	2.3.5.2, 4.2.2
Rule XX					
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Rule XXII	4.3.3.4	4.3.3.4	4.3.3.4	4.3.3.4	4.3.3.4
Rule XXIII					

	1994	**2004**	**2016**	**No date**
Rule of interpretation	2.3.5.1, 3.2.2.3	2.3.5.1, 3.2.2.3	2.3.5.1, 3.2.2.3	2.2.2, 3.2.2.2.2, 3.2.2.3, 3.3.6, 4.2.1
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Rule A	2.2.2, 2.3.5.1, 4.2.1, 4.5.1	2.2.2, 2.3.5.1, 4.2.1, 4.5.1	2.2.2, 2.3.5.1, 4.2.1, 4.5.1	2.2.1, 2.2.2, 3.2.2.2.2, 4.2.2, 4.4.3.4
Rule B			4.3.3.4	
Rule C				4.2.2
Rule D	4.7.2	4.7.2	4.7.2	3.2.2.3, 4.2.2, 4.7.4
Rule E	4.3.3.2, 4.3.3.4, 4.8.1	4.3.3.2, 4.8.1	2.3.5.2, 4.3.3.4, 4.4.3.6, 4.8.1	2.3.5.2
Rule F			4.4.2.3.2	
Rule G	2.3.5.1, 3.2.2.3, 4.4.2.3.2, 4.4.3.2.3, 4.5.1, 5.2.1	2.3.5.1, 4.4.2.3.2, 4.4.3.2.3, 4.5.1, 5.2.1	2.3.5.1, 4.4.2.3.2, 4.4.3.2.3, 4.5.1, 5.2.1	2.3.5.1, 2.3.5.2, 4.5.1, 5.2.2

	1994	2004	2016	No date
Rules I-XIV				2.2.1
- Rule VI	2.1	2.1	2.1	
- Rule X		3.2.2.2.2		3.2.2.2.2
- Rule Xb	4.2.1			
- Rule XI		3.2.2.2.2		3.2.2.2.2
- Rule XIb	4.2.1			
- Rule XIc				4.5.1
Rule XV	4.5.1	4.5.1		
Rule XVI				2.3.5.2
Rule XVII	2.3.5.1, 2.3.5.2, 4.4.3.3, 4.4.3.4, 4.5.1, 4.5.2.1, 4.5.2.3, 6.3.2	2.3.5.1, 2.3.5.2, 4.4.3.3, 4.4.3.4, 4.5.1, 4.5.2.1, 4.5.2.3, 6.3.2	2.3.5.1, 2.3.5.2, 4.4.3.3, 4.4.3.4, 4.5.2.1, 4.5.2.3, 6.3.2	2.3.5.1, 2.3.5.2, 4.5.2.3
Rule XVII (a)(ii)			2.3.5.1, 4.4.2.2	
Rule XVIII				2.3.5.2
Rule XIX	2.3.5.2, 4.2.2	2.3.5.2, 4.2.2	2.3.5.2, 4.2.2	3.3.2.1
Rule XX	4.4.3.3	4.4.3.3	4.4.3.3	
Rule XXI	2.3.4, 3.2.2.3			3.2.2.3
Rule XXII	3.2.2.2.2, 4.3.3.4		2.3.3, 4.3.3.4	3.2.2.3
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Index A – Keywords

Index B – Authors

Appendix A – YAR 1994, 2004, 2016

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
Rule of Interpretation	**Rule of Interpretation**	**Rule of Interpretation**
In the adjustment of general average the following Rules shall apply to the exclusion of any Law and Practice inconsistent therewith.	In the adjustment of general average the following Rules shall apply to the exclusion of any law and practice inconsistent therewith.	In the adjustment of general average the following Rules shall apply to the exclusion of any Law and Practice inconsistent therewith.
Except as provided by the Rule Paramount and the numbered Rules, general average shall be adjusted according to the lettered Rules.	Except as provided by the Rule Paramount and the numbered Rules, general average shall be adjusted according to the lettered Rules.	Except as provided by the Rule Paramount and the numbered Rules, general average shall be adjusted according to the lettered Rules.
Rule Paramount	**Rule Paramount**	**Rule Paramount**
In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred.	In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred.	In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred.
Rule A	**Rule A**	**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.	1. There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.	1. There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.
General average sacrifices and expenditures shall be borne by the different contributing interests on the basis hereinafter provided.	2. General average sacrifices and expenditures shall be borne by the different contributing interests on the basis hereinafter provided.	2. General average sacrifices and expenditures shall be borne by the different contributing interests on the basis hereinafter provided.

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
Rule B	**Rule B**	**Rule B**
There is a common maritime adventure when one or more vessels are towing or pushing another vessel or vessels, provided that they are all involved in commercial activities and not in a salvage operation.	1. There is a common maritime adventure when one or more vessels are towing or pushing another vessel or vessels, provided that they are all involved in commercial activities and not in a salvage operation.	1. There is a common maritime adventure when one or more vessels are towing or pushing another vessel or vessels, provided that they are all involved in commercial activities and not in a salvage operation.
When measures are taken to preserve the vessels and their cargoes, if any, from a common peril, these Rules shall apply.	When measures are taken to preserve the vessels and their cargoes, if any, from a common peril, these Rules shall apply.	When measures are taken to preserve the vessels and their cargoes, if any, from a common peril, these Rules shall apply.
A vessel is not in common peril with another vessel or vessels if by simply disconnecting from the other vessel or vessels she is in safety; but if the disconnection is itself a general average act the common maritime adventure continues.	2. If the vessels are in common peril and one is disconnected either to increase the disconnecting vessel's safety alone, or the safety of all vessels in the common maritime adventure, the disconnection will be a general average act.	2. A vessel is not in common peril with another vessel or vessels if by simply disconnecting from the other vessel or vessels she is in safety; but if the disconnection is itself a general average act the common maritime adventure continues.
	3. Where vessels involved in a common maritime adventure resort to a port or place of refuge, allowances under these Rules may be made in relation to each of the vessels. Subject to the provisions of paragraphs 3 and 4 of Rule G, allowances in general average shall cease at the time that the common maritime adventure comes to an end.	

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
Rule C	**Rule C**	**Rule C**
Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average.	1. Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average.	1. Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average.
In no case shall there be any allowance in general average for losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutant substances from the property involved in the common maritime adventure.	2. In no case shall there be any allowance in general average for losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutant substances from the property involved in the common maritime adventure.	2. In no case shall there be any allowance in general average for losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutant substances from the property involved in the common maritime adventure.
Demurrage, loss of market, and any loss or damage sustained or expense incurred by reason of delay, whether on the voyage or subsequently, and any indirect loss whatsoever, shall not be admitted as general average.	3. Demurrage, loss of market, and any loss or damage sustained or expense incurred by reason of delay, whether on the voyage or subsequently, and any indirect loss whatsoever, shall not be allowed as general average.	3. Demurrage, loss of market, and any loss or damage sustained or expense incurred by reason of delay, whether on the voyage or subsequently, and any indirect loss whatsoever, shall not be allowed as general average.
Rule D	**Rule D**	**Rule D**
Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault.	Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the common maritime adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault.	Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault.

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
Rule E	**Rule E**	**Rule E**
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.	1. 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.	1. 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.
All parties claiming in general average shall give notice in writing to the average adjuster of the loss or expense in respect of which they claim contribution within 12 months of the date of the termination of the common maritime adventure.	2. All parties to the common maritime adventure shall, as soon as possible, supply particulars of value in respect of their contributory interest and, if claiming in general average, shall give notice in writing to the average adjuster of the loss or expense in respect of which they claim contribution, and supply evidence in support thereof.	2. All parties claiming in general average shall give notice in writing to the average adjuster of the loss or expense in respect of which they claim contribution within 12 months of the date of the termination of the common maritime adventure.

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
Failing such notification, or if within 12 months of a request for the same any of the parties shall fail to supply evidence in support of a notified claim, or particulars of value in respect of a contributory interest, the average adjuster shall be at liberty to estimate the extent of the allowance or the contributory value on the basis of the information available to him, which estimate may be challenged only on the ground that it is manifestly incorrect.	3. Failing notification, or if any party does not supply particulars in support of a notified claim within 12 months of the termination of the common maritime adventure or payment of the expense, the average adjuster shall be at liberty to estimate the extent of the allowance on the basis of the information available to the adjuster. Particulars of value shall be provided within 12 months of the termination of the common maritime adventure, failing which the average adjuster shall be at liberty to estimate the contributory value on the same basis. Such estimates shall be communicated to the party in question in writing. Estimates may only be challenged within two months of receipt of the communication and only on the grounds that they are manifestly incorrect.	3. Failing such notification, or if within 12 months of a request for the same any of the parties shall fail to supply evidence in support of a notified claim, or particulars of value in respect of a contributory interest, the average adjuster shall be at liberty to estimate the extent of the allowance or the contributory value on the basis of the information available to him, which estimate may be challenged only on the ground that it is manifestly incorrect.
	4. Any party to the common maritime adventure pursuing a recovery from a third party in respect of sacrifice or expenditure claimed in general average, shall so advise the average adjuster and, in the event that a recovery is achieved, shall supply to the average adjuster full particulars of the recovery within two months of receipt of the recovery.	

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
Rule F	**Rule F**	**Rule F**
Any additional expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expenses avoided.	Any additional expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided.	Any additional expense incurred in place of another expense, which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided.
Rule G	**Rule G**	**Rule G**
General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the adventure ends.	1. General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the common maritime adventure ends.	1. General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the adventure ends.
This rule shall not affect the determination of the place at which the average statement is to be made up.	2. This rule shall not affect the determination of the place at which the average adjustment is to be prepared.	2. This rule shall not affect the determination of the place at which the average statement is to be made up.

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
When a ship is at any port or place in circumstances which would give rise to an allowance in general average under the provisions of Rules X and XI, and the cargo or part thereof is forwarded to destination by other means, rights and liabilities in general average shall, subject to cargo interests being notified if practicable, remain as nearly as possible the same as they would have been in the absence of such forwarding, as if the adventure had continued in the original ship for so long as justifiable under the contract of affreightment and the applicable law.	3. When a ship is at any port or place in circumstances which would give rise to an allowance in general average under the provisions of Rules X and XI, and the cargo or part thereof is forwarded to destination by other means, rights and liabilities in general average shall, subject to cargo interests being notified if practicable, remain as nearly as possible the same as they would have been in the absence of such forwarding, as if the common maritime adventure had continued in the original ship for so long as justifiable under the contract of carriage and the applicable law.	3. When a ship is at any port or place in circumstances which would give rise to an allowance in general average under the provisions of Rules X and XI, and the cargo or part thereof is forwarded to destination by other means, rights and liabilities in general average shall, subject to cargo interests being notified if practicable, remain as nearly as possible the same as they would have been in the absence of such forwarding, as if the adventure had continued in the original ship for so long as justifiable under the contract of affreightment and the applicable law.
The proportion attaching to cargo of the allowances made in general average by reason of applying the third paragraph of this Rule shall not exceed the cost which would have been borne by the owners of cargo if the cargo had been forwarded at their expense.	4. The proportion attaching to cargo of the allowances made in general average by reason of applying the third paragraph of this Rule shall be limited to the cost which would have been borne by the owners of cargo if the cargo had been forwarded at their expense. This limit shall not apply to any allowances made under Rule F.	4. The proportion attaching to cargo of the allowances made in general average by reason of applying the third paragraph of this Rule shall not exceed the cost which would have been borne by the owners of cargo if the cargo had been forwarded at their expense.

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
Rule I – Jettison of Cargo	**Rule I – Jettison of Cargo**	**Rule I – Jettison of Cargo**
No jettison of cargo shall be made good as general average, unless such cargo is carried in accordance with the recognised custom of the trade.	No jettison of cargo shall be allowed as general average, unless such cargo is carried in accordance with the recognised custom of the trade.	No jettison of cargo shall be allowed as general average, unless such cargo is carried in accordance with the recognised custom of the trade.
Rule II – Loss or Damage by Sacrifices for the Common Safety	**Rule II – Loss or Damage by Sacrifices for the Common Safety**	**Rule II – Loss or Damage by Sacrifices for the Common Safety**
Loss of or damage to the property involved in the common maritime adventure by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.	Loss of or damage to the property involved in the common maritime adventure by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be allowed as general average.	Loss of or damage to the property involved in the common maritime adventure by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be allowed as general average.
Rule III – Extinguishing Fire on Shipboard	**Rule III – Extinguishing Fire on Shipboard**	**Rule III – Extinguishing Fire on Shipboard**
Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage by smoke however caused or by heat of the fire.	Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be allowed as general average; except that no allowance shall be made for damage by smoke however caused or by heat of the fire.	Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be allowed as general average; except that no allowance shall be made for damage by smoke however caused or by heat of the fire.

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
Rule IV – Cutting Away Wreck	**Rule IV – Cutting Away Wreck**	**Rule IV – Cutting Away Wreck**
Loss or damage sustained by cutting away wreck or parts of the ship which have been previously carried away or are effectively lost by accident shall not be made good as general average.	Loss or damage sustained by cutting away wreck or parts of the ship which have been previously carried away or are effectively lost by accident shall not be allowed as general average.	Loss or damage sustained by cutting away wreck or parts of the ship which have been previously carried away or are effectively lost by accident shall not be allowed as general average.
Rule V – Voluntary Stranding	**Rule V – Voluntary Stranding**	**Rule V – Voluntary Stranding**
When a ship is intentionally run on shore for the common safety, whether or not she might have been driven on shore, the consequent loss or damage to the property involved in the common maritime adventure shall be allowed in general average.	When a ship is intentionally run on shore for the common safety, whether or not she might have been driven on shore, the consequent loss or damage to the property involved in the common maritime adventure shall be allowed in general average.	When a ship is intentionally run on shore for the common safety, whether or not she might have been driven on shore, the consequent loss or damage to the property involved in the common maritime adventure shall be allowed in general average.

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
Rule VI – Salvage Remuneration	**Rule VI – Salvage Remuneration**	**Rule VI – Salvage Remuneration**
(a) Expenditure incurred by the parties to the adventure in the nature of salvage, whether under contract or otherwise, shall be allowed in general average provided that the salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure.	(a) Expenditure incurred by the parties to the common maritime adventure in the nature of salvage, whether under contract or otherwise, shall be allowed in general average provided that the salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure and subject to the provisions of paragraphs (b), (c) and (d)	a. Salvage payments, including interest thereon and legal fees associated with such payments, shall lie where they fall and shall not be allowed in General Average, save only that if one party to the salvage shall have paid all or any of the proportion of salvage (including interest and legal fees) due from another party (calculated on the basis of salved values and not General Average contributory values), the unpaid contribution to salvage due from that other party shall be credited in the adjustment to the party that has paid it, and debited to the party on whose behalf the payment was made.
	(b) Notwithstanding (a) above, where the parties to the common maritime adventure have separate contractual or legal liability to salvors, salvage shall only be allowed should any of the following arise:	
	(i) there is a subsequent accident or other circumstances resulting in loss or damage to property during the voyage that results in significant differences between salved and contributory values,	

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
	(ii) there are significant general average sacrifices,	
	(iii) salved values are manifestly incorrect and there is a significantly incorrect apportionment of salvage expenses,	
	(iv) any of the parties to the salvage has paid a significant proportion of salvage due from another party,	
	(v) a significant proportion of the parties have satisfied the salvage claim on substantially different terms, no regard being had to interest, currency correction or legal costs of either the salvor or the contributing interest.	
Expenditure allowed in general average shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment such as is referred to in Art. 13 paragraph 1(b) of the International Convention on Salvage, 1989 have been taken into account.	(c) Salvage expenditures referred to in paragraph (a) above shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment such as is referred to in Article 13 paragraph 1(b) of the International Convention on Salvage, 1989 have been taken into account.	b. Salvage payments referred to in paragraph (a) above shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment such as is referred to in Art. 13 paragraph 1(b) of the International Convention on Salvage 1989 have been taken into account.

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(b) Special compensation payable to a salvor by the shipowner under Art. 14 of the said Convention to the extent specified in paragraph 4 of that Article or under any other provision similar in substance shall not be allowed in general average.	(d) Special compensation payable to a salvor by the shipowner under Article 14 of the International Convention on Salvage, 1989 to the extent specified in paragraph 4 of that Article or under any other provision similar in substance (such as SCOPIC) shall not be allowed in general average and shall not be considered a salvage expenditure as referred to in paragraph (a) of this Rule.	c. Special compensation payable to a salvor by the shipowner under Art. 14 of the said Convention to the extent specified in paragraph 4 of that Article or under any other provision similar in substance (such as SCOPIC) shall not be allowed in General Average and shall not be considered a salvage payment as referred to in paragraph (a) of this Rule.
Rule VII – Damage to Machinery and Boilers	**Rule VII – Damage to Machinery and Boilers**	**Rule VII – Damage to Machinery and Boilers**
Damage caused to any machinery and boilers of a ship which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage; but where a ship is afloat no loss or damage caused by working the propelling machinery and boilers shall in any circumstances be made good as general average.	Damage caused to any machinery and boilers of a ship which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage; but where a ship is afloat no loss or damage caused by working the propelling machinery and boilers shall in any circumstances be allowed as general average.	Damage caused to any machinery and boilers of a ship which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage; but where a ship is afloat no loss or damage caused by working the propelling machinery and boilers shall in any circumstances be allowed as general average.

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Rule VIII – Expenses Lightening a Ship when Ashore, and Consequent Damage	**Rule VIII – Expenses Lightening a Ship when Ashore, and Consequent Damage**	**Rule VIII – Expenses Lightening a Ship when Ashore, and Consequent Damage**
When a ship is ashore and cargo and ship's fuel and stores or any of them are discharged as a general average act, the extra cost of lightening, lighter hire and reshipping (if incurred), and any loss or damage to the property involved in the common maritime adventure in consequence thereof, shall be admitted as general average.	When a ship is ashore and cargo and ship's fuel and stores or any of them are discharged as a general average act, the extra cost of lightening, lighter hire and reshipping (if incurred), and any loss or damage to the property involved in the common maritime adventure in consequence thereof, shall be allowed as general average.	When a ship is ashore and cargo and ship's fuel and stores or any of them are discharged as a general average act, the extra cost of lightening, lighter hire and re-shipping (if incurred), and any loss or damage to the property involved in the common maritime adventure in consequence thereof, shall be allowed as general average.
Rule IX – Cargo, Ship's Materials and Stores Used for Fuel	**Rule IX – Cargo, Ship's Materials and Stores Used for Fuel**	**Rule IX – Cargo, Ship's Materials and Stores Used for Fuel**
Cargo, ship's materials and stores, or any of them, necessarily used for fuel for the common safety at a time of peril shall be admitted as general average, but when such an allowance is made for the cost of ship's materials and stores the general average shall be credited with the estimated cost of the fuel which would otherwise have been consumed in prosecuting the intended voyage.	Cargo, ship's materials and stores, or any of them, necessarily used for fuel for the common safety at a time of peril shall be allowed as general average, but when such an allowance is made for the cost of ship's materials and stores the general average shall be credited with the estimated cost of the fuel which would otherwise have been consumed in prosecuting the intended voyage.	Cargo, ship's materials and stores, or any of them, necessarily used for fuel for the common safety at a time of peril, shall be allowed as general average, but when such an allowance is made for the cost of ship's materials and stores the general average shall be credited with the estimated cost of the fuel which would otherwise have been consumed in prosecuting the intended voyage.

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Rule X – Expenses at Port of Refuge, etc.	**Rule X – Expenses at Port of Refuge, etc.**	**Rule X – Expenses at Port of Refuge, etc.**
(a) When a ship shall have entered a port or place of refuge or shall have returned to her port or place of loading in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return shall likewise be admitted as general average.	(a) (i) When a ship shall have entered a port or place of refuge or shall have returned to her port or place of loading in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, the expenses of entering such port or place shall be allowed as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return shall likewise be allowed as general average.	a. (i) When a ship shall have entered a port or place of refuge or shall have returned to her port or place of loading in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, the expenses of entering such port or place shall be allowed as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return shall likewise be allowed as general average.
When a ship is at any port or place of refuge and is necessarily removed to another port or place because repairs cannot be carried out in the first port or place, the provisions of this Rule shall be applied to the second port or place as if it were a port or place of refuge and the cost of such removal including temporary repairs and towage shall be admitted as general average. The provisions of Rule XI shall be applied to the prolongation of the voyage occasioned by such removal.	(ii) When a ship is at any port or place of refuge and is necessarily removed to another port or place because repairs cannot be carried out in the first port or place, the provisions of this Rule shall be applied to the second port or place as if it were a port or place of refuge and the cost of such removal including temporary repairs and towage shall be allowed as general average. The provisions of Rule XI shall be applied to the prolongation of the voyage occasioned by such removal.	(ii) When a ship is at any port or place of refuge and is necessarily removed to another port or place of refuge because repairs cannot be carried out in the first port or place, the provisions of this Rule shall be applied to the second port or place of refuge as if it were a port or place of refuge and the cost of such removal including temporary repairs and towage shall be allowed as general average. The provisions of Rule XI shall be applied to the prolongation of the voyage occasioned by such removal.

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(b) The cost of handling on board or discharging cargo, fuel or stores whether at a port or place of loading, call or refuge, shall be admitted as general average, when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, except in cases where the damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstances connected with such damage having taken place during the voyage.	(b) (i) The cost of handling on board or discharging cargo, fuel or stores, whether at a port or place of loading, call or refuge, shall be allowed as general average when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, except in cases where the damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstances connected with such damage having taken place during the voyage.	b. (i) The cost of handling on board or discharging cargo, fuel or stores whether at a port or place of loading, call or refuge, shall be allowed as general average, when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, except in cases where the damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstances connected with such damage having taken place during the voyage.
The cost of handling on board or discharging cargo, fuel or stores shall not be admissible as general average when incurred solely for the purpose of restowage due to shifting during the voyage, unless such restowage is necessary for the common safety.	(ii) The cost of handling on board or discharging cargo, fuel or stores shall not be allowable as general average when incurred solely for the purpose of restowage due to shifting during the voyage, unless such restowage is necessary for the common safety.	(ii) The cost of handling on board or discharging cargo, fuel or stores shall not be allowable as general average when incurred solely for the purpose of restowage due to shifting during the voyage, unless such restowage is necessary for the common safety.

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(c) Whenever the cost of handling or discharging cargo, fuel or stores is admissible as general average, the costs of storage, including insurance if reasonably incurred, reloading and stowing of such cargo, fuel or stores shall likewise be admitted as general average. The provisions of Rule XI shall be applied to the extra period of detention occasioned by such reloading or restowing.	(c) Whenever the cost of handling or discharging cargo, fuel or stores is allowable as general average, the costs of storage, including insurance if reasonably incurred, reloading and stowing of such cargo, fuel or stores shall likewise be allowed as general average. The provisions of Rule XI shall apply to the extra period of detention occasioned by such reloading or restowing.	c. Whenever the cost of handling or discharging cargo, fuel or stores is allowable as general average, the costs of storage, including insurance if reasonably incurred, reloading and stowing of such cargo, fuel or stores shall likewise be allowed as general average. The provisions of Rule XI shall be applied to the extra period of detention occasioned by such reloading or restowing.
But when the ship is condemned or does not proceed on her original voyage, storage expenses shall be admitted as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.	(d) When the ship is condemned or does not proceed on her original voyage, storage expenses shall be allowed as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.	But when the ship is condemned or does not proceed on her original voyage, storage expenses shall be allowed as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.

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Rule XI – Wages and Maintenance of Crew and Other Expenses Bearing up for and in a Port of Refuge, etc.	**Rule XI – Wages and Maintenance of Crew and Other Expenses Putting in to and at a Port of Refuge, etc.**	**Rule XI – Wages and Maintenance of Crew and Other Expenses Putting in to and at a Port of Refuge, etc.**
(a) Wages and maintenance of master, officers and crew reasonably incurred and fuel and stores consumed during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be admitted as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X(a).	(a) Wages and maintenance of master, officers and crew reasonably incurred and fuel and stores consumed during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be allowed as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X(a).	a. Wages and maintenance of master, officers and crew reasonably incurred and fuel and stores consumed during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be allowed as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X(a).
		b. For the purpose of this and the other Rules wages shall include all payments made to or for the benefit of the master, officers and crew, whether such payments be imposed by law upon the shipowners or be made under the terms of articles of employment.

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(b) When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, the wages and maintenance of the master, officers and crew reasonably incurred during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted in general average.	(b) (i) When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extra-ordinary circumstances which render that entry or detention necessary for the common safety, or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, the wages and maintenance of the master, officers and crew reasonably incurred during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be allowed in general average.	c. (i) When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, fuel and stores consumed during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be allowed in general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.
Fuel and stores consumed during the extra period of detention shall be admitted as general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.	(ii) Fuel and stores consumed during the extra period of detention shall be allowed as general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.	

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Port charges incurred during the extra period of detention shall likewise be admitted as general average except such charges as are incurred solely by reason of repairs not allowable in general average.	(iii) Port charges incurred during the extra period of detention shall likewise be allowed as general average except such charges as are incurred solely by reason of repairs not allowable in general average.	(ii) Port charges incurred during the extra period of detention shall likewise be allowed as general average except such charges as are incurred solely by reason of repairs not allowable in general average.
Provided that when damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstances connected with such damage having taken place during the voyage, then the wages and maintenance of master, officers and crew and fuel and stores consumed and port charges incurred during the extra detention for repairs to damages so discovered shall not be admissible as general average, even if the repairs are necessary for the safe prosecution of the voyage.	(iv) Provided that when damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstance connected with such damage having taken place during the voyage, then the wages and maintenance of master, officers and crew and fuel and stores consumed and port charges incurred during the extra detention for repairs to damages so discovered shall not be allowable as general average, even if the repairs are necessary for the safe prosecution of the voyage.	(iii) Provided that when damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstance connected with such damage having taken place during the voyage, then fuel and stores consumed and port charges incurred during the extra detention for repairs to damages so discovered shall not be allowable as general average, even if the repairs are necessary for the safe prosecution of the voyage.

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When the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers and crew and fuel and stores consumed and port charges shall be admitted as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.	(v) When the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers and crew and fuel and stores consumed and port charges shall be allowed as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.	(iv) When the ship is condemned or does not proceed on her original voyage, fuel and stores consumed and port charges shall be allowed as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.
(c) For the purpose of this and the other Rules wages shall include all payments made to or for the benefit of the master, officers and crew, whether such payments be imposed by law upon the shipowners or be made under the terms of articles of employment.	(c) (i) For the purpose of these Rules wages shall include all payments made to or for the benefit of the master, officers and crew, whether such payments be imposed by law upon the shipowners or be made under the terms of articles of employment.	
	(ii) For the purpose of these Rules, port charges shall include all customary or additional expenses incurred for the common safety or to enable a vessel to enter or remain at a port of refuge or call in the circumstances outlined in Rule XI(b)(i).	

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(d) The cost of measures undertaken to prevent or minimise damage to the environment shall be allowed in general average when incurred in any or all of the following circumstances:	(d) The cost of measures undertaken to prevent or minimise damage to the environment shall be allowed in general average when incurred in any or all of the following circumstances:	d. The cost of measures undertaken to prevent or minimise damage to the environment shall be allowed in general average when incurred in any or all of the following circumstances:
(i) as part of an operation performed for the common safety which, had it been undertaken by a party outside the common maritime adventure, would have entitled such party to a salvage reward;	(i) as part of an operation performed for the common safety which, had it been undertaken by a party outside the common maritime adventure, would have entitled such party to a salvage reward;	(i) as part of an operation performed for the common safety which, had it been undertaken by a party outside the common maritime adventure, would have entitled such party to a salvage reward;
(ii) as a condition of entry into or departure from any port or place in the circumstances prescribed in Rule X(a);	(ii) as a condition of entry into or departure from any port or place in the circumstances prescribed in Rule X(a);	(ii) as a condition of entry into or departure from any port or place in the circumstances prescribed in Rule X(a);
(iii) as a condition of remaining at any port or place in the circumstances prescribed in Rule XI(b) provided that when there is an actual escape or release of pollutant substances the cost of any additional measures required on that account to prevent or minimise pollution or environmental damage shall not be allowed as general average;	(iii) as a condition of remaining at any port or place in the circumstances prescribed in Rule XI(b), provided that when there is an actual escape or release of pollutant substances, the cost of any additional measures required on that account to prevent or minimise pollution or environmental damage shall not be allowed as general average;	(iii) as a condition of remaining at any port or place in the circumstances prescribed in Rule XI(c), provided that when there is an actual escape or release of pollutant substances the cost of any additional measures required on that account to prevent or minimise pollution or environmental damage shall not be allowed as general average;
(iv) necessarily in connection with the discharging, storing or reloading of cargo whenever the cost of those operations is admissible as general average.	(iv) necessarily in connection with the handling on board, discharging, storing or reloading of cargo, fuel or stores whenever the cost of those operations is allowable as general average.	(iv) necessarily in connection with the discharging, storing or reloading of cargo whenever the cost of those operations is allowable as general average.

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Rule XII – Damage to Cargo in Discharging, etc.	**Rule XII – Damage to Cargo in Discharging, etc.**	**Rule XII – Damage to Cargo in Discharging, etc.**
Damage to or loss of cargo, fuel or stores sustained in consequence of their handling, discharging, storing, reloading and stowing shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.	Damage to or loss of cargo, fuel or stores sustained in consequence of their handling, discharging, storing, reloading and stowing shall be allowed as general average, when and only when the cost of those measures respectively is allowed as general average.	Damage to or loss of cargo, fuel or stores sustained in consequence of their handling, discharging, storing, reloading and stowing shall be allowed as general average, when and only when the cost of those measures respectively is allowed as general average.
Rule XIII – Deductions from Cost of Repairs	**Rule XIII – Deductions from Cost of Repairs**	**Rule XIII – Deductions from Cost of Repairs**
Repairs to be allowed in general average shall not be subject to deductions in respect of 'new for old' where old material or parts are replaced by new unless the ship is over fifteen years old in which case there shall be a deduction of one third. The deductions shall be regulated by the age of the ship from the 31st December of the year of completion of construction to the date of the general average act, except for insulation, life and similar boats, communications and navigational apparatus and equipment, machinery and boilers for which the deductions shall be regulated by the age of the particular parts to which they apply.	(a) Repairs to be allowed in general average shall not be subject to deductions in respect of 'new for old' where old material or parts are replaced by new unless the ship is over fifteen years old in which case there shall be a deduction of one third. The deductions shall be regulated by the age of the ship from the 31st December of the year of completion of construction to the date of the general average act, except for insulation, life and similar boats, communications and navigational apparatus and equipment, machinery and boilers for which the deductions shall be regulated by the age of the particular parts to which they apply.	a. Repairs to be allowed in general average shall not be subject to deductions in respect of 'new for old' where old material or parts are replaced by new unless the ship is over fifteen years old in which case there shall be a deduction of one third. The deductions shall be regulated by the age of the ship from the 31st December of the year of completion of construction to the date of the general average act, except for insulation, life and similar boats, communications and navigational apparatus and equipment, machinery and boilers for which the deductions shall be regulated by the age of the particular parts to which they apply.

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The deductions shall be made only from the cost of the new material or parts when finished and ready to be installed in the ship.	(b) The deductions shall be made only from the cost of the new material or parts when finished and ready to be installed in the ship. No deduction shall be made in respect of provisions, stores, anchors and chain cables. Drydock and slipway dues and costs of shifting the ship shall be allowed in full.	b. The deductions shall be made only from the cost of the new material or parts when finished and ready to be installed in the ship. No deduction shall be made in respect of provisions, stores, anchors and chain cables. Drydock and slipway dues and costs of shifting the ship shall be allowed in full.
No deduction shall be made in respect of provisions, stores, anchors and chain cables.		
Drydock and slipway dues and costs of shifting the ship shall be allowed in full.		
The costs of cleaning, painting or coating of bottom shall not be allowed in general average unless the bottom has been painted or coated within the twelve months preceding the date of the general average act in which case one half of such costs shall be allowed.	(c) The costs of cleaning, painting or coating of bottom shall not be allowed in general average unless the bottom has been painted or coated within the 24 months preceding the date of the general average act in which case one half of such costs shall be allowed.	c. The costs of cleaning, painting or coating of bottom shall not be allowed in general average unless the bottom has been painted or coated within the twelve months preceding the date of the general average act in which case one half of such costs shall be allowed.
Rule XIV - Temporary Repairs	**Rule XIV - Temporary Repairs**	**Rule XIV - Temporary Repairs**
Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or of damage caused by general average sacrifice, the cost of such repairs shall be admitted as general average.	(a) Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or of damage caused by general average sacrifice, the cost of such repairs shall be allowed as general average.	a. Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or of damage caused by general average sacrifice, the cost of such repairs shall be allowed as general average.

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Where temporary repairs of accidental damage are effected in order to enable the adventure to be completed, the cost of such repairs shall be admitted as general average without regard to the saving, if any, to other interests, but only up to the saving in expense which would have been incurred and allowed in general average if such repairs had not been effected there.	(b) Where temporary repairs of accidental damage are effected in order to enable the common maritime adventure to be completed, the cost of such repairs shall be allowed as general average without regard to the saving, if any, to other interests, but only up to the saving in expense which would have been incurred and allowed in general average if such repairs had not been effected there.	b. Where temporary repairs of accidental damage are effected in order to enable the adventure to be completed, the cost of such repairs shall be allowed as general average without regard to the saving, if any, to other interests, but only up to the saving in expense which would have been incurred and allowed in general average if such repairs had not been effected there. Provided that, for the purposes of this paragraph only, the cost of temporary repairs falling for consideration shall be limited to the extent that the cost of temporary repairs effected at the port of loading, call or refuge, together with either the cost of permanent repairs eventually effected or, if unrepaired at the time of the adjustment, the reasonable depreciation in the value of the vessel at the completion of the voyage, exceeds the cost of permanent repairs had they been effected at the port of loading, call or refuge.
No deductions 'new for old' shall be made from the cost of temporary repairs allowable as general average.	(c) No deductions 'new for old' shall be made from the cost of temporary repairs allowable as general average.	c. No deductions 'new for old' shall be made from the cost of temporary repairs allowable as general average.

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Rule XV – Loss of Freight	**Rule XV – Loss of Freight**	**Rule XV – Loss of Freight**
Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.	Loss of freight arising from damage to or loss of cargo shall be allowed as general average, either when caused by a general average act, or when the damage to or loss of cargo is so allowed.	Loss of freight arising from damage to or loss of cargo shall be allowed as general average, either when caused by a general average act, or when the damage to or loss of cargo is so allowed.
Deductions shall be made from the amount of gross freight lost, of the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.	Deduction shall be made from the amount of gross freight lost, of the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.	Deduction shall be made from the amount of gross freight lost, of the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

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Rule XVI – Amount to be Made Good for Cargo Lost or Damaged by Sacrifice	**Rule XVI – Amount to be Allowed for Cargo Lost or Damaged by Sacrifice**	**Rule XVI – Amount to be Allowed for Cargo Lost or Damaged by Sacrifice**
The amount to be made good as general average for damage to or loss of cargo sacrificed shall be the loss which has been sustained thereby based on 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. The value at the time of discharge shall include the cost of insurance and freight except insofar as such freight is at the risk of interests other than the cargo.	(a) (i) The amount to be allowed as general average for damage to or loss of cargo sacrificed shall be the loss which has been sustained thereby based on 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. Such commercial invoice may be deemed by the average adjuster to reflect the value at the time of discharge irrespective of the place of final delivery under the contract of carriage. (ii) The value at the time of discharge shall include the cost of insurance and freight except insofar as such freight is at the risk of interests other than the cargo.	a. The amount to be allowed as general average for damage to or loss of cargo sacrificed shall be the loss which has been sustained thereby based on 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. The value at the time of discharge shall include the cost of insurance and freight except insofar as such freight is at the risk of interests other than the cargo.
When cargo so damaged is sold and the amount of the damage has not been otherwise agreed, the loss to be made good in general average shall be the difference between the net proceeds of sale and the net sound value as computed in the first paragraph of this Rule.	(b) When cargo so damaged is sold and the amount of the damage has not been otherwise agreed, the loss to be allowed in general average shall be the difference between the net proceeds of sale and the net sound value as computed in the first paragraph of this Rule.	b. When cargo so damaged is sold and the amount of the damage has not been otherwise agreed, the loss to be allowed in general average shall be the difference between the net proceeds of sale and the net sound value as computed in the first paragraph of this Rule.

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
Rule XVII - Contributory Values	**Rule XVII - Contributory Values**	**Rule XVII - Contributory Values**
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.	(a) (i) The contribution to a general average shall be made upon the actual net values of the property at the termination of the common maritime 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. Such commercial invoice may be deemed by the average adjuster to reflect the value at the time of discharge irrespective of the place of final delivery under the contract of carriage.	a. (i) 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.
The value of the cargo shall include the cost of insurance and freight unless and insofar as such freight is at the risk of interests other than cargo, deducting therefrom any loss or damage suffered by the cargo prior to or at the time of discharge.	(ii) The value of the cargo shall include the cost of insurance and freight unless and insofar as such freight is at the risk of interests other than the cargo, deducting therefrom any loss or damage suffered by the cargo prior to or at the time of discharge. Any cargo may be excluded from contributing to general average should the average adjuster consider that the cost of including it in the adjustment would be likely to be disproportionate to its eventual contribution.	(ii) The value of the cargo shall include the cost of insurance and freight unless and insofar as such freight is at the risk of interests other than the cargo, deducting therefrom any loss or damage suffered by the cargo prior to or at the time of discharge.

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
The value of the ship shall be assessed without taking into account the beneficial or detrimental effect of any demise or time charterparty to which the ship may be committed.	(iii) The value of the ship shall be assessed without taking into account the beneficial or detrimental effect of any demise or time charterparty to which the ship may be committed.	(iii) The value of the ship shall be assessed without taking into account the beneficial or detrimental effect of any demise or time charterparty to which the ship may be committed.
To these values shall be added the amount made good as general average for property sacrificed, if not already included, deduction being made from the freight and passage money at risk of such charges and crew's wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the general average act and have not been allowed as general average; deduction being also made from the value of the property of all extra charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average or fall upon the ship by virtue of an award for special compensation under Art. 14 of the International Convention on Salvage, 1989 or under any other provision similar in substance.	(b) To these values shall be added the amount allowed as general average for property sacrificed, if not already included, deduction being made from the freight and passage money at risk of such charges and crew's wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the general average act and have not been allowed as general average; deduction being also made from the value of the property of all extra charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average. Where payment for salvage services has not been allowed as general average by reason of paragraph (b) of Rule VI, deductions in respect of payment for salvage services shall be limited to the amount paid to the salvors including interest and salvors' costs.	b. To these values shall be added the amount allowed as general average for property sacrificed, if not already included, deduction being made from the freight and passage money at risk of such charges and crew's wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the general average act and have not been allowed as general average; deduction being also made from the value of the property of all extra charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average or fall upon the ship by virtue of an award for special compensation under Art. 14 of the International Convention on Salvage, 1989 or under any other provision similar in substance.

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
In the circumstances envisaged in the third paragraph of Rule G, the cargo and other property shall contribute on the basis of its value upon delivery at original destination unless sold or otherwise disposed of short of that destination, and the ship shall contribute upon its actual net value at the time of completion of discharge of cargo.	(c) In the circumstances envisaged in the third paragraph of Rule G, the cargo and other property shall contribute on the basis of its value upon delivery at original destination unless sold or otherwise disposed of short of that destination, and the ship shall contribute upon its actual net value at the time of completion of discharge of cargo.	c. In the circumstances envisaged in the third paragraph of Rule G, the cargo and other property shall contribute on the basis of its value upon delivery at original destination unless sold or otherwise disposed of short of that destination, and the ship shall contribute upon its actual net value at the time of completion of discharge of cargo.
Where cargo is sold short of destination, however, it shall contribute upon the actual net proceeds of sale, with the addition of any amount made good as general average.	(d) Where cargo is sold short of destination, however, it shall contribute upon the actual net proceeds of sale, with the addition of any amount allowed as general average.	d. Where cargo is sold short of destination, however, it shall contribute upon the actual net proceeds of sale, with the addition of any amount allowed as general average.
Mails, passengers' luggage, personal effects and accompanied private motor vehicles shall not contribute in general average.	(e) Mails, passengers' luggage and accompanied personal effects and accompanied private motor vehicles shall not contribute to general average.	e. Mails, passengers' luggage, personal effects and accompanied private motor vehicles shall not contribute to general average.
Rule XVIII – Damage to Ship	**Rule XVIII – Damage to Ship**	**Rule XVIII – Damage to Ship**
The amount to be allowed as general average for damage or loss to the ship, her machinery and/or gear caused by a general average act shall be as follows:	The amount to be allowed as general average for damage or loss to the ship, her machinery and/or gear caused by a general average act shall be as follows:	The amount to be allowed as general average for damage or loss to the ship, her machinery and/or gear caused by a general average act shall be as follows:

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
(a) When repaired or replaced,	(a) When repaired or replaced,	a. When repaired or replaced,
The actual reasonable cost of repairing or replacing such damage or loss, subject to deductions in accordance with Rule XIII;	The actual reasonable cost of repairing or replacing such damage or loss, subject to deductions in accordance with Rule XIII;	The actual reasonable cost of repairing or replacing such damage or loss, subject to deductions in accordance with Rule XIII;
(b) When not repaired or replaced,	(b) When not repaired or replaced,	b. When not repaired or replaced,
The reasonable depreciation arising from such damage or loss, but not exceeding the estimated cost of repairs. But where the ship is an actual total loss or when the cost of repairs of the damage would exceed the value of the ship when repaired, the amount to be allowed as general average shall be the difference between the estimated sound value of the ship after deducting therefrom the estimated cost of repairing damage which is not general average and the value of the ship in her damaged state which may be measured by the net proceeds of sale, if any.	The reasonable depreciation arising from such damage or loss, but not exceeding the estimated cost of repairs. But where the ship is an actual total loss or when the cost of repairs of the damage would exceed the value of the ship when repaired, the amount to be allowed as general average shall be the difference between the estimated sound value of the ship after deducting therefrom the estimated cost of repairing damage which is not general average and the value of the ship in her damaged state which may be measured by the net proceeds of sale, if any.	The reasonable depreciation arising from such damage or loss, but not exceeding the estimated cost of repairs. But where the ship is an actual total loss or when the cost of repairs of the damage would exceed the value of the ship when repaired, the amount to be allowed as general average shall be the difference between the estimated sound value of the ship after deducting therefrom the estimated cost of repairing damage which is not general average and the value of the ship in her damaged state which may be measured by the net proceeds of sale, if any.

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
Rule XIX – Undeclared or Wrongfully Declared Cargo	**Rule XIX – Undeclared or Wrongfully Declared Cargo**	**Rule XIX – Undeclared or Wrongfully Declared Cargo**
Damage or loss caused to goods loaded without the knowledge of the shipowner or his agent or to goods wilfully misdescribed at time of shipment shall not be allowed as general average, but such goods shall remain liable to contribute, if saved.	(a) Damage or loss caused to goods loaded without the knowledge of the shipowner or his agent or to goods wilfully misdescribed at the time of shipment shall not be allowed as general average, but such goods shall remain liable to contribute, if saved.	a. Damage or loss caused to goods loaded without the knowledge of the Shipowner or his agent or to goods wilfully misdescribed at time of shipment shall not be allowed as general average, but such goods shall remain liable to contribute, if saved.
Damage or loss caused to goods which have been wrongfully declared on shipment at a value which is lower than their real value shall be contributed for at the declared value, but such goods shall contribute upon their actual value.	(b) Where goods have been wrongfully declared at the time of shipment at a value which is lower than their real value, any general average loss or damage shall be allowed on the basis of their declared value, but such goods shall contribute on the basis of their actual value.	b. Damage or loss caused to goods which have been wrongfully declared on shipment at a value which is lower than their real value shall be contributed for at the declared value, but such goods shall contribute upon their actual value.
Rule XX – Provision of Funds	**Rule XX – Provision of Funds**	**Rule XX – Provision of Funds**
A commission of 2 per cent. on general average disbursements, other than the wages and maintenance of master, officers and crew and fuel and stores not replaced during the voyage, shall be allowed in general average.		
The capital loss sustained by the owners of goods sold for the purpose of raising funds to defray general average disbursements shall be allowed in general average.	(a) The capital loss sustained by the owners of goods sold for the purpose of raising funds to defray general average disbursements shall be allowed in general average.	(a) The capital loss sustained by the owners of goods sold for the purpose of raising funds to defray general average disbursements shall be allowed in general average.

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
The cost of insuring general average disbursements shall also be admitted in general average.	(b) The cost of insuring general average disbursements shall be allowed in general average.	(b) The cost of insuring average disbursements shall also be allowed in general average.
Rule XXI – Interest on Losses Made Good in General Average	**Rule XXI – Interest on Losses Allowed in General Average**	**Rule XXI – Interest on Losses Allowed in General Average**
Interest shall be allowed on expenditure, sacrifices and allowances in general average at the rate of 7 per cent. per annum, until three months after the date of issue of the general average adjustment, due allowance being made for any payment on account by the contributory interests or from the general average deposit fund.	(a) Interest shall be allowed on expenditure, sacrifices and allowances in general average until three months after the date of issue of the general average adjustment, due allowance being made for any payment on account by the contributory interests or from the general average deposit fund.	a. Interest shall be allowed on expenditure, sacrifices and allowances in general average until three months after the date of issue of the general average adjustment, due allowance being made for any payment on account by the contributory interests or from the general average deposit fund.
	(b) The rate for calculating interest accruing during each calendar year shall be the 12-month ICE LIBOR for the currency in which the adjustment is prepared as announced on the first banking day of that calendar year, increased by four percentage points. If the adjustment is prepared in a currency for which no ICE LIBOR is announced, the rate shall be the 12-month US Dollar ICE LIBOR, increased by four percentage points.	b. Each year the Assembly of the Comite Maritime International shall decide the rate of interest which shall apply. This rate shall be used for calculating interest accruing during the following calendar year.

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
Rule XXII – Treatment of Cash Deposits	**Rule XXII – Treatment of Cash Deposits**	**Rule XXII – Treatment of Cash Deposits**
Where cash deposits have been collected in respect of cargo's liability for general average, salvage or special charges such deposits shall be paid without any delay into a special account in the joint names of a representative nominated on behalf of the shipowner and a representative nominated on behalf of the depositors in a bank to be approved by both. The sum so deposited together with accrued interest, if any, shall be held as security for payment to the parties entitled thereto of the general average, salvage or special charges payable by cargo in respect of which the deposits have been collected. Payments on account or refunds of deposits may be made if certified to in writing by the average adjuster. Such deposits and payments or refunds shall be without prejudice to the ultimate liability of the parties.	(a) Where cash deposits have been collected in respect of general average, salvage or special charges, such sums shall be remitted forthwith to the average adjuster who shall deposit the sums into a special account, earning interest where possible, in the name of the average adjuster.	Where cash deposits have been collected in respect of cargo's liability for general average, salvage or special charges, such deposits shall be paid without any delay into a special account in the joint names of a representative nominated on behalf of the shipowner and a representative nominated on behalf of the depositors in a bank to be approved by both. The sum so deposited together with accrued interest, if any, shall be held as security for payment to the parties entitled thereto of the general average, salvage or special charges payable by cargo in respect of which the deposits have been collected. Payments on account or refunds of deposits may be made if certified to in writing by the average adjuster. Such deposits and payments or refunds shall be without prejudice to the ultimate liability of the parties.

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
	(b) The special account shall be constituted in accordance with the law regarding client or third party funds applicable in the domicile of the average adjuster. The account shall be held separately from the average adjuster's own funds, in trust or in compliance with similar rules of law providing for the administration of the funds of third parties.	
	(c) The sums so deposited, together with accrued interest, if any, shall be held as security for payment to the parties entitled thereto, of the general average, salvage or special charges in respect of which the deposits have been collected. Payments on account or refunds of deposits may only be made when such payments are certified in writing by the average adjuster and notified to the depositor requesting their approval. Upon the receipt of the depositor's approval, or in the absence of such approval within a period of 90 days, the average adjuster may deduct the amount of the payment on account or the final contribution from the deposit.	

YORK-ANTWERP RULES 1994	YORK-ANTWERP RULES 2016	YORK-ANTWERP RULES 2004
	(d) All deposits and payments or refunds shall be without prejudice to the ultimate liability of the parties.	
	Rule XXIII – Time Bar for Contributing to General Average	**Rule XXIII – Time Bar for Contributions to General Average**
	(a) Subject always to any mandatory rule on time limitation contained in any applicable law:	a. Subject always to any mandatory rule on time limitation contained in any applicable law:
	(i) Any rights to general average contribution including any rights to claim under general average bonds and guarantees, shall be extinguished unless an action is brought by the party claiming such contribution within a period of one year after the date upon which the general average adjustment is issued. However, in no case shall such an action be brought after six years from the date of termination of the common maritime adventure.	(i) Any rights to general average contribution including any rights to claim under general average bonds and guarantees, shall be extinguished unless an action is brought by the party claiming such contribution within a period of one year after the date upon which the general average adjustment was issued. However, in no case shall such an action be brought after six years from the date of termination of the common maritime adventure.
	(ii) These periods may be extended if the parties so agree after the termination of the common maritime adventure.	(ii) These periods may be extended if the parties so agree after the termination of the common maritime adventure.
	(b) This rule shall not apply as between the parties to the general average and their respective insurers.	b. This rule shall not apply as between the parties to the general average and their respective insurers.

Appendix B – CMI Guidelines relating to General average

CONTENTS

A) INTRODUCTION

1. Objective

These guidelines are intended to assist in dealing with general average cases and to provide:
- general background information
- guidance as to recognised best practice
- an outline of procedures

2. Effect of guidelines

These guidelines do not form part of the York-Antwerp Rules; they are not binding and are not intended to over-ride or alter in any way the provisions of the York- Antwerp Rules, the contracts of carriage or any governing jurisdictions.

3. Review and amendment

The first edition of the CMI Guidelines has been adopted by the plenary session of the 42nd International Conference of CMI in New York, May 2016, and ultimately approved by the Assembly of CMI.

In order to monitor the working and effectiveness of the CMI Guidelines, a Standing Committee shall be constituted to consist of:
- A chairman nominated by the Assembly of CMI
- A representative nominated by the International Chamber of Shipping
- A representative nominated by the International Union of Marine Insurance
- Five additional members nominated by the Assembly of CMI

The Standing Committee may recommend changes to the Guidelines as circumstances dictate, which shall be submitted to the Assembly of CMI for approval.

B) BASIC PRINCIPLES

1. Background

The principle of general average has its origin in the earliest days of maritime trade, and is based on simple equity; if one merchant's cargo is jettisoned to save the ship and the rest of the cargo, the shipowner and other cargo interests would all contribute to make good the value of the jettisoned cargo. The word 'average' is a medieval term meaning a 'loss'. Thus a 'general' average involved all the interests on a voyage, whereas a 'particular' average affects only one interest. As the doctrine developed various types of losses were added to that of jettison; perhaps the most important step was the recognition that expenditure of money was in principle no different from the sacrifice of property, if it was incurred in similar circumstances and for the same purpose.

General average varied in its development in the different leading maritime countries, so that by the latter part of the 19th century substantial differences existed in law and practice throughout the world. In view of the international character of shipping the disadvantages of this were obvious, and there began the series of attempts to obtain international uniformity. An International Conference held in York in 1864 produced the York Rules, which were revised at Antwerp in 1877 to become the first set of York- Antwerp Rules.

In a modern context, as well as continuing to provide an equitable remedy when property is sacrificed for the common good, the principles of general average, as now embodied in the York-Antwerp Rules, also continue to perform a useful function in helping to define important borders that lie between:

- Matters that form part of the shipowners' reasonable obligations to carry out the contracted voyage and those losses and expenses that arise in exceptional circumstances.
- Property and liability insurers as their differing responsibilities meet and sometimes merge, in the context of a serious casualty.

Both of these difficult areas benefit from the reservoir of established law and practice that general average provides, helping to secure a degree of certainty that is always the objective of commercial interests.

It is important to appreciate that the York-Antwerp Rules do not have the status of an international convention. They take effect only by being incorporated into contracts of affreightment. The Rules are updated periodically under the auspices of Comite Maritime International, which is made up of national Maritime Law Associations.

Rule A of the York-Antwerp Rules defines a general average act as follows:

> *'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.'*

2. York-Antwerp Rules

The York-Antwerp Rules consist of lettered rules (A-G) and 23 numbered rules. The lettered rules set out various broad principles as to what constitutes general average; the numbered rules deal with specific instances of sacrifice and expenditure and set out detailed guidelines concerning allowances etc.

Broadly speaking, the York-Antwerp Rules have recognised two main types of allowance:

> 'Common safety' allowances: sacrifice of property (such as flooding a cargo hold to fight a fire) or expenditure (such as salvage or lightening a vessel) that is made or incurred while the ship and cargo were actually in the grip of peril.
>
> 'Common benefit' allowances: once a vessel is at a port of refuge, expenses necessary to enable the ship to resume the voyage safely (but not the cost of repairing accidental damage to the ship) for example, the cost of discharging, storing and reloading cargo as necessary to carry out repairs, port charges, and wages etc. during detention for repairs and outward port charges.

The York-Antwerp Rules are prefaced by a Rule of Interpretation which gives priority to the numbered rules when there is a conflict with the lettered rules. For example, Rule C excludes losses due to delay but Rule XI says that certain detention expenses at a port of refuge (e.g. port charges, wages and maintenance) can be allowed; Rule XI takes priority over the lettered Rule C and such expenses can therefore be allowed.

The York-Antwerp Rules also include a Rule Paramount after the Rule of Interpretation, which states as follows:

> *'Rule Paramount*
>
> *In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred.'*

The burden of proof lies on the party claiming in general average to prove that both the general average act and the amount of any allowance are reasonable. It is suggested that in applying this rule there can be no absolute standard of 'reasonableness' and that a situation must be judged on the particular facts prevailing at the time and place of the incident.

3. General Average events

The following are simple examples of potential general average situations:-

Casualty	**Type of sacrifice or expenditure**
Grounding:	Damage to vessel and machinery through efforts to refloat. Loss of or damage to cargo through jettison or lightening of the vessel. Cost of storing and reloading any cargo so discharged. Port of refuge expenses.
Fire:	Damage to ship or cargo due to efforts to extinguish the fire. Port of refuge expenses.
Shifting of cargo in heavy weather:	Jettison of cargo. Port of refuge expenses.
Heavy weather, collision, machinery breakdown, or other accident involving damage to ship and resort to or detention at a port:	Port of refuge expenses. Towage
General:	Payments relating to salvage may also be allowed as general average in any of the above circumstances.

4. Adjustment of general average

The basic principles are:

1. Property at risk

Generally, all the property that is involved in the voyage (or 'common maritime adventure') and is at risk at the time of the occurrence giving rise to the general average act is required to contribute to the general average losses and expenses. The contribution is based on a pro rata division according to the value of that property at the end of the voyage.

2. Contributory values

The sharing of general average sacrifices and expenses is achieved by a pro rata division over what the York-Antwerp Rules refer to as 'Contributory Values'.

The basis for calculation of contributory values and general average losses is the value of the property to its owner at the termination of the adventure. Expenses incurred in respect of the property after the general average act (other than those which are allowed in general average) must be deducted in arriving at the contributory value. This ensures that property contributes according to the actual net benefit it has received, by deducting the expenses it has had to bear to realise the benefit of getting the property at destination.

Since values are assessed as at the end of the voyage, it also follows that the amount of contribution may be varied by further loss or damage to the property between the time of the general average act and the arrival at destination. For example, if the property is totally lost due to a subsequent accident it will have no contributory value and will not contribute to the general average.

3. Termination of the voyage

Normally, the 'common maritime adventure' is considered to be terminated on completion of discharge of cargo at the port of destination. If there is an abandonment of the voyage at an intermediate port then the adventure terminates at that port. If, because of a casualty, the whole cargo is forwarded from an intermediate port by another vessel the cost of forwarding may be allowable as general average, subject to criteria set out in Rules F and G of the York-Antwerp Rules.

4. Equality of contribution

Equality of contribution must be maintained between the owner of the property sacrificed and the owner of the property saved. In practice this is achieved by the device of adding to the contributory values of property lost or damaged by general average sacrifice the amount allowed (or 'made good') in general average in respect of that sacrifice. If this were not done the owner of jettisoned cargo

would receive benefit in the form of money from the general average for loss of his goods without participating in or contributing to the general average losses, as can be seen from the following example:

Assume that cargo B worth 1,000 is sacrificed for the common safety. A general average of 1,000 is apportioned over the values of ship and arrived cargo (which are all 1,000). If this were between only those parties arrived, the figures would be:

Ship on	1,000	pays	334
Cargo A on	1,000	‘	333
Cargo B on	-	‘	-
Cargo C on	1,000	‘	333
	3,000	pays	1,000

The result of this apportionment is that after paying their contributions to B the shipowner and merchants A and C would have property with an effective value of 667, whereas merchant B would receive cash amounting to 1,000. This is clearly inequitable, so merchant B also makes a notional contribution to the general average on the amount of the loss made good to him in general average, that is:

Ship on	1,000	pays	250
Cargo A on	1,000	pays	250
Cargo B on	1,000	is liable for	250
Cargo C on	1,000	pays	250
	4,000	pays	1,000

By making Cargo B ‘contribute’ on the basis of the amount made good he will receive 1,000 less 250 = 750, and everyone is now in the same position.

5. Example adjustment

			General Average
Shipowners' losses and expenses			
Cost of repairs of damage to vessel's machinery sustained in refloating operations.			US$ 250,000
Cost of discharging, storing in lighters, and reloading cargo discharged to lighten vessel.			100,000
Salvage paid to tugs for refloating vessel.			1,150,000
Cargo owner's losses			
Value of cargo jettisoned in efforts to refloat.		US$ 500,000	
Damage to cargo caused by forced discharge, storage and reloading.		100,000	
			600,000
			US$ 2,100,000
Apportioned			
Ship			
Arrived value at destination in damaged condition.		US$ 6,750,000	
Add allowance in general average for refloating damage.		250,000	
		US$ 7,000,000	pays in ppn. US$ 700,000
Cargo			
Invoice value after deduction of loss and damage.	US$ 13,400,000		
Add allowance in general average in respect of jettison and damage due to forced discharge.	600,000		
		14,000,000	' 1,400,000
			pays in ppn.
		US$21,000,000	US$2,100,000

(General Average equals 10% of the contributory values.)

Balance under the adjustment

The Shipowner:

Receives credit for general average losses and expenses.	US$	1,500,000
Pays general average contribution.		700,000
Balance to receive	US$	800,000

The cargo owner:		
Pays general average contribution.	US$	1,400,000
Receives credit for general average losses.		600,000
Balance to pay	US$	800,000

6. Contract of carriage

The parties to the adventure usually make special provision in the contract of carriage regarding general average, the most common being a clause to the effect that general average is to be adjusted in accordance with the York-Antwerp Rules. Such stipulations may be contained in the charter party, if any, or the bills of lading, or in both documents, thereby giving contractual effect to the Rules.

Rule D of the York-Antwerp Rules gives explicit recognition to the fact that general average exists irrespective of fault or breach of contract by any of the parties. It follows that normally the procedures for protecting the rights of the parties in general average must be observed even when it is suspected that such a fault or breach has taken place. Equally, the existence of a general average situation does not prejudice any rights or defences that are open to parties, for example with regard to cargo damage or alleging a breach of contract as grounds for not paying a general average contribution.

The giving of general average security in the customary terms is a promise to pay any general average contribution that is found to be properly and legally due. Generally, if there has been a causative breach of contract the contribution cannot be so described, and cargo interests may have grounds for declining to pay their contribution to general average.

C) GENERAL AVERAGE PROCEDURES

1. General Average security

Most jurisdictions recognise that the shipowner can exercise a lien (i.e. refuse to allow delivery) on cargo at destination in respect of general average losses sustained by any of the parties to the adventure. The preparation of an adjustment will usually take some time, so that the shipowner will relinquish his lien in return for satisfactory security. Generally, the shipowner or appointed average adjuster will send notices to cargo interests setting out what is required by way of security (the exact procedure may vary slightly according to the jurisdiction(s) involved). The usual security requirements will be as follows:

(a) Signature to an Average Bond by the owner or receiver of the cargo.

(b) A cash deposit for an amount estimated by the adjuster to cover likely general average liabilities, usually expressed as a percentage of the invoice value of cargo. It is usual for an Average Guarantee signed by a reputable insurer to be accepted by the shipowner in place of the cash deposit, and the insurer will then take over the handling of the general average aspects of the case through their normal claims procedures.

Variations in the wordings of such forms have arisen largely as a result of market practices and CMI have a working party looking at providing recommended standard wordings, which may form part a future edition of these Guidelines.

The objectives of the security forms currently in use include:

- Providing an acceptable level of security to the shipowner and other parties to the adventure that may be GA creditors.
- Preserving the position under Rule D in respect of defences.
- Encouraging the timely provision of information and evidence to ensure the adjustment process is not delayed.

Both the Average Bond and Guarantee are distinct contracts in their own right, and may, like any contract, be altered by agreement between the parties.

2. Salvage security

In some circumstances and jurisdictions, and under salvage contracts such as Lloyd's Open Form, the salvor will have a separate right of action against each individual piece of property that is salved, once that property is brought into a place of safety. The salvor may therefore exercise a lien on all the cargo at that place and the cargo interests will have to provide two sets of security:

a) salvage security to salvors at the place where the salvage services end
b) general average security to the shipowner, at destination.

If there are numerous cargo interests, as on a container ship, interim security may be provided to salvors by the shipowner or charterer to enable the vessel to continue from the place where salvage services ended to destination, where both types of security will then have to be provided.

3. Claim Documentation

The burden of proof lies with any party wishing to claim general average sacrifices and expenses, and York-Antwerp Rule E includes time limits for submitting claims.

After collecting security the average adjuster will need information from cargo interests in order to:

- calculate the contributory value of the cargo.
- make any allowances in general average that are due to cargo.

Cargo interests will generally need to submit the following information to the adjuster:

a) A copy of the commercial (CIF) invoice. If cargo has been sold on terms other than CIF the freight invoice and insurance premium details may be required.
b) Details of any damage that has occurred to cargo during the voyage, including:
    - survey reports stating the cause and extent of damage.
    - the cargo insurers' settlement. (If applicable)

The damage to cargo will be deducted from the sound value to reach the contributory value; this will determine how much the cargo's general average contribution will be. If any of the damage is allowable as general average (e.g. water damage during fire- fighting operations) credit will be given in the adjustment.

D) ROLE OF THE AVERAGE ADJUSTER REGARDING GENERAL AVERAGE

1. The effect of the adjustment

In the majority of jurisdictions the findings of an average adjuster regarding amounts payable by the parties to a maritime adventure are not legally binding, unlike with an arbitration award. The majority of adjustments are accepted by the parties (subject to any Rule D defences) on the basis of the professional standing and expertise of the adjuster.

2. Best practice of average adjusters

Average adjusters work under different regulatory and professional regimes, however the following elements of best practice appear to be universal and are endorsed by the leading professional associations.

2.1 Irrespective of the identity of the instructing party, the average adjuster is expected to act in an impartial and independent manner in order to act fairly to all parties involved in a common maritime adventure.

2.2 In all cases the average adjuster should:

(a) Give particulars in a prominent position in the adjustment of the clause or clauses contained in the charter party and/or bills of lading that relate to the adjustment of general average or, if no such clause or clauses exist, the law and practice obtaining at the place where the adventure ends. Where conflicting provisions exist, the adjuster should explain in appropriate detail the reason for the basis of adjustment chosen.
(b) Set out the facts that give rise to the general average.
(c) Where the York-Antwerp Rules apply, identify the lettered and/or numbered Rules that are relied upon in making the allowances in the adjustment.
(d) Explain in appropriate detail the choice of currency in which the adjustment is based.
(e) Make appropriate enquiries as to whether any recovery relating to the casualty is being undertaken, and set out the results of those enquiries in the adjustment.

2.3 On request, and when practicable, the adjuster should make available copies of reports and invoices relied upon in the preparation of the adjustment.

E) ROLE OF THE GENERAL INTEREST SURVEYOR

The 'General Interest' or 'G.A. Surveyor' may be appointed by the Shipowners on behalf of all parties involved in the common maritime adventure, usually only in the larger casualties or where cargo sacrifices are likely to be involved. The Shipowner is responsible for settlement of the G.A. Surveyor's charges, which are allowed as General Average, but the G.A. surveyor is expected to act in an independent and impartial manner when recording the facts and making recommendations.

The G.A. Surveyor's role is not to investigate the circumstances leading up to a general average situation (e.g. the cause of a fire) but once the situation exists, his role is generally as follows:

1) To advise all parties on the steps necessary to ensure the common safety of ship and cargo.
2) To monitor the steps actually taken by the parties to ensure that proper regard is taken of the General Interest.
3) To review General Average expenditure incurred and advise the Adjusters as to whether the costs are fair and reasonable.
4) To identify and quantify any General Average sacrifice of ship or cargo.
5) To ensure that General Average damage is minimized wherever possible i.e. by reconditioning or sale of damaged cargo. Except in cases of extreme urgency or where communications are difficult, any significant action with regard to cargo (e.g. arranging for its sale at a Port of Refuge) must be taken in consultation with the concerned in cargo.

2. The authority and funds to make disbursements will generally come from the Shipowner, usually via the Master or the Local Agents. The G.A. Surveyor therefore has no authority to order any particular course of action and his role is an advisory one. However, the G.A. Surveyor's impartial position and his influence on the eventual treatment of the expenditure will give his advice considerable weight with the other parties involved.

3. The G.A. Surveyor should also be aware that several other Surveyors may be in attendance on behalf of particular interests and that, for reasons of economy, duplication of reporting should be avoided. In the event of any doubt arising as to the depth of investigation required from the G.A. Surveyor, the Adjuster should be contacted for guidance. The G.A. Surveyor is effectively appointed to act on behalf of the whole General Average community, any of whom are generally entitled to view all his exchanges of correspondence and reports.

F) YORK-ANTWERP RULES 2016

1. Rule VI - Salvage

The wording of Rule VI paragraph (b) is new to the York Antwerp Rules 2016. It arises from concerns that, if the ship and cargo have already paid salvage separately (for example under Lloyd's Open Form) based on salved values (at termination of the salvors' services), allowing salvage as general average and re-apportioning it over contributory values (at destination) may give rise to additional cost and delays, while making no significant difference to the proportion payable by each party.

A variety of measures to meet these concerns have been considered, ranging from complete exclusion of salvage to using a fixed percentage mechanism. Such measures were found, during extensive CMI discussions to produce inequitable results or were impossible to apply across the range of cases encountered in practice.

It was pointed out that many leading adjusters will, when appropriate, propose to the parties that if re-apportionment of salvage as general average will not produce a meaningful change in the figures or will be disproportionately costly, the salvage should be omitted from the adjustment; it is then up to the parties to decide whether it should be included or not. However, it was considered that a means should be found to make this practice more universal and to set out express criteria that would help to ensure that the allowance and re-apportionment of salvage as general average (where already paid separately by ship and cargo etc.) would only occur in cases where there was a sound equitable or financial basis for doing so.

The average adjusters will still be required to exercise their professional judgement in applying paragraph (b) because several of the criteria (i-v) that are listed require a view to be taken as to what should be deemed to be 'significant' in the context of a particular case. Because of the wide range of cases that the York-Antwerp Rules apply to, it was not considered desirable to offer a fixed definition of how 'significant' should be construed, other than to note that the objective of the new clause was to reduce the time and cost of the adjustment process where it is possible to do so.

When assessing whether there is a significant difference between settlements and awards for the purposes of Rule VI(b)(v) the adjuster should have regard only to the basic award or settlement against all salved interests before currency adjustment, interest, cost of collecting security and all parties' legal costs.

2. Rule XXII – Treatment of Cash Deposits

Under Rule XXII(b) the adjuster is required to hold deposits in a special account constituted in accordance with the law regarding holding client or third party funds that applies in the domicile of the appointed average adjuster.

Unless otherwise provided for by the applicable law, CMI recommends that any special account should have the following features:

- Funds should be held separately from the normal operating accounts of the adjuster.
- Funds should be protected in the event of liquidation or the cessation of the average adjuster's business.
- The holding bank should provide regular statements that show all transactions clearly.