

General average – general principle *plus* varying practical application equals uniformity?

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One of the recurring themes in today's quest for uniformity in maritime law is that historically uniform rules were applied. This article considers whether this applies to the concept of general average and analysis shows that there appears to have been universal agreement that apportionment of damages should take place under specific circumstances. However, the circumstances varied considerably according to place and over time. On balance, it is argued that agreement on principles does not automatically lead to uniform regulation.

I Introduction

Since the second part of the 19th century, many important steps have been taken to reach internationally uniform maritime legislation.² Conventions were ratified and implemented,³ standard rules were agreed and inserted into contracts for the carriage of goods by sea⁴ and standard contracts of affreightment in the meantime have become the norm rather than the exception.⁵ In more recent years, however, the enthusiasm for harmonisation of maritime law on the part of national governments seems to have faded.⁶ In fact, there appears to be a growing reluctance to participate

¹ The author is writing a PhD at Erasmus University Rotterdam on the law applicable to general average, which is expected to be published in 2016. The author is very grateful to Prof Dr F G M Smeele for his helpful comments on a draft of this article and to H Scholten for practical assistance with the collection of material.

² International cooperation in the legal maritime field only truly started in the second half of the 19th century, albeit on a small scale, when the need for international agreement in the maritime law was recognised by governments and practitioners. See A Lilar, C van den Bosch *International Maritime Committee* (Antwerp 1972) 6. Associations such as the Association for the Reform and Codification of the Law of Nations (founded in 1873, later changing its name to the International Law Association) and the National Association for the Promotion of Social Science (founded in 1857) promoted international cooperation and took steps to develop international law; see www.ila.hq.org.

³ Inter alia the International Convention for the Unification of Certain Rules of Law relating to Collision between Vessels, Brussels (23 September 1910); International Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea (Brussels 23 September 1910); International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels 25 August 1924) (Hague Rules).

⁴ For example Glasgow Resolutions (1860); York Rules (1864); York and Antwerp Rules (1877); York-Antwerp Rules (1890, 1924, 1950, 1974 (and as amended 1990), 1994 and 2004); A Maurer *Lex Maritima* (Mohr Siebeck 2012) 44.

⁵ For example New York Produce Exchange (NYPE 46 and 93); Baltimore; Gencon 1994.

⁶ W Tetley 'Uniformity of International private maritime law: The pros, Cons and alternatives to International Conventions – How to adopt an International Convention' (2000) 24 *Tul Mar LJ* 775–856.

in international conventions. Neither the Hague-Visby Rules⁷ nor the Hamburg Rules⁸ have even come close to the ratification and implementation rate of the Hague Rules.⁹ The Rotterdam Rules, which were signed in 2008, have still not entered into force.¹⁰

In legal literature concerns have been expressed in respect of this lack of progress in the harmonisation process.¹¹ When uniformity in maritime law is discussed, one of the recurring themes is maritime legal history. The notion is widespread that historical maritime law was uniform.¹² Various authors have argued that there used to be a kind of maritime *ius commune*; some broad maritime customs and principles which would internationally and universally have been accepted and which are sometimes referred to as the *lex maritima*.¹³ The concept of the *lex maritima*, however, is not well defined and its exact content is unclear.¹⁴

Recently, Van Hooydonk has argued that the *lex maritima* may nevertheless be used to bring the harmonisation process forward. With reference to the allegedly uniform maritime legal history, he suggests that an ‘international restatement of the general principles of maritime law’ is made.¹⁵ He argues that clarity on general principles ‘will make a major contribution to the international harmonisation of the law’.¹⁶ Van Hooydonk’s theory appears to be based on the assumption that once there is clarity on general principles, existing discord will be remedied and that in practice uniform rules may be established as a result, because this is what would have happened in history. The question is whether these assumptions are indeed correct.

One of the legal concepts that is generally used as substantiation of historic maritime law’s universal character and as an example of the *lex maritima* is the concept of general average.¹⁷ The general average principle entails that unexpected losses and expenses that have intentionally and reasonably been suffered or incurred for the purpose of preserving from peril the property involved in a common maritime adventure are borne by the different parties to the maritime adventure who have benefited therefrom.¹⁸ It is a means of mitigating the total overall damages by distributing specific losses and costs of the parties interested in, briefly summarised, the ship, the cargo carried on board, freight and bunkers.¹⁹ General average is one of the oldest maritime concepts. In addition, it is also one of the

⁷ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels 25 August 1924 as amended by the Brussels Protocol 1968) (Hague-Visby Rules).

⁸ United Nations Convention on the Carriage of Goods by Sea (Hamburg 30 March 1978) (Hamburg Rules).

⁹ Hague Rules (n 3).

¹⁰ Even though 24 countries have signed the Convention, so far only Togo, Spain and Congo have ratified the Rotterdam Rules <http://www.rotterdamrules.com/>.

¹¹ Inter alia P Myburgh ‘Uniformity or unilateralism in the law of Carriage of goods by sea?’ (2000) 31 *Victoria University of Wellington Law Review* 361–62 and W Tetley ‘The general maritime law: the *lex maritima* (with a brief reference to the *ius commune* in arbitration law and the conflict of laws)’ (1994) 20 *Syracuse Journal of International Law and Commerce* 105–45.

¹² F R Sanborn *Origins of the Early English Maritime and Commercial Law* (The Century Co 1930) 19, who writes that the greatest characteristic of maritime law has been uniformity; G W Paulsen ‘An historical overview of the development of uniformity in international maritime law’ (1983) 57 *Tul L Rev* 1065; Tetley (n 11); E van Hooydonk ‘Towards a worldwide restatement of the general principles of maritime law’ (2014) 20 *JIML* 170.

¹³ Tetley (n 11) 107 indicates that the *lex maritima* ‘is known as the general maritime law . . . composed of maritime customs, codes, conventions and practices from earliest times to the present, which have had no internal boundaries and which exist in any particular jurisdiction unless limited or excluded by a particular statute’. Maurer (n 4) 42 defines the *lex maritima* as a transnational maritime law which exists independently from governmental law and consists of trade uses and maritime customary law in the form of model laws, as well as general terms and conditions applicable regardless of national borders.

¹⁴ Van Hooydonk (n 12) 182; Maurer (n 4) 43; Myburgh (n 11) 357.

¹⁵ Van Hooydonk (n 12) 170–82.

¹⁶ *ibid* 181.

¹⁷ Tetley (n 11) 107, 128. In fact, general average is regarded as the ‘field of maritime law where the international unification effort has succeeded to the greatest degree’. See K S Selmer *The Survival of General Average: A Necessity or an Anachronism?* (Oslo University Press 1958) 58, cited with approval in N G Hudson, M D Harvey *The York-Antwerp Rules* (Lloyd’s List 2010) 9.

¹⁸ York-Antwerp Rules (YAR) rule A. See on general average in general inter alia R R Cornah, J Reeder *Lowndes and Rudolf: The Law of General Average and the York-Antwerp Rules* (Sweet & Maxwell 2013); Hudson and Harvey (n 17); F D Rose *General Average Law and Practice* (LLP 2005).

¹⁹ YAR rule XVII; Dutch Civil Code s 8:612.

first maritime subjects in which steps were taken to create an international uniform regime.²⁰ A set of rules was developed resulting in the York-Antwerp Rules (YAR) which were to be incorporated into contracts of affreightment.²¹ Nowadays, and many revisions later,²² a reference to the YAR can be found in almost all contracts of affreightment and most marine insurance policies worldwide.²³

In this article, the questions of whether the historical maritime law was universally applicable in fact and whether agreement on legal principles in maritime law leads to legal international uniformity will be considered in relation to general average. On the outset, the answers to both questions appear to be obvious. The concept that under specific circumstances a distribution of damages between the parties involved in a maritime adventure has to take place has ancient roots and is currently set out and specified in the YAR, which are applicable almost without exception. However, a closer examination of the general average concept shows that even though there is and in most periods of time has been agreement on the concept's underlying compensation or division of loss principle, the application of this commonly shared 'general average principle' has not been applied in the same way throughout its history. An analysis of the historical and the current application of the general average concept shows that throughout the centuries there have always been substantial differences in its legislative and practical application and that these have still not been rectified fully.

The historic maritime laws that will be considered are the Digest of the Roman Corpus Iuris Civilis, the Rhodian Sea Laws, the Rôles d'Oléron, the Wisby Sea Laws, the Ordinance of Charles V of 1551, the Ordinance of Philip II of 1563 and the Marine Code of 1681. These laws have played an important, if not essential role in the development of today's concept of general average.²⁴ First of all, a general outline is given of these regulations, their chronological development and the application of the various 'contribution systems', before a comparison is made of certain aspects of their practical application.

2 Historical general average regulations

2.1 Lex Rhodia de lactu

The rule that is invariably referred to when general average's history is discussed is the Lex Rhodia de lactu.²⁵ It is set out in title 14.2 of the Digest of the Roman Corpus Iuris Civilis published in 534 AD²⁶

²⁰ F Berlingieri *International Maritime Conventions: Volume 1, The Carriage of Goods and Passengers by Sea* (Informa 2014) xx; Lowndes and Rudolf (n 18) 43; C Sweeney 'From Columbus to Cooperation: Trade and shipping policies from 1492 to 1992' (1989) 13(4) *Fordham International Law Journal* 494. The international cooperation in the field of general average was preceded by the 'Declaration of Paris' of 1856, which inter alia included rules on seizure of cargoes carried on board vessels. See Sweeney *ibid* 488–89.

²¹ The first versions go back to the second part of the 19th century.

²² These revisions have resulted in different versions of the rules, ie after the 1860 Glasgow Resolutions, the York Rules were created in 1864. These were amended in 1877 in Antwerp and were renamed the York and Antwerp Rules. The York-Antwerp Rules were established in 1890. Amendments took place in 1924, 1950, 1974, 1974, 1990, 1994 and in 2004. Currently discussions are ongoing for a new updated version, which is to be adopted in 2016. <http://www.comitemaritime.org/Review-of-the-Rules-on-General-Average/0,27140,114032,00.html>.

²³ See inter alia Hudson and Harvey (n 17) 9; Selmer (n 17) 58.

²⁴ This overview is by no means complete. Other laws such as the *Consolato del Mare* and the laws of the Hanse cities have been (very) influential as well. However, a discussion of all these laws would be beyond the scope of this article.

²⁵ Throughout the ages, both in legal literature and in case law reference is made extensively to this title 14.2 of the Digest in which the general average principle can be found. Reference is made for example to *Dobson v Wilson* (1813) 3 Campb 480; *Anderson v Ocean SS Co* (1884) 10 App Cas 107 and *The Lehmann Timber* [2013] EWCA Civ 650 para 130. According to Cushing, the Roman principles of justice would be 'the soul of all our international and maritime regulations'. See R J Pothier *A Treatise on Maritime Contracts of Letting to Hire* (Cummings & Hilliard 1821) (some chapters from *Traité des Obligations selon les Règles tant du For de la Conscience que du For extérieur* (1761, translated by C Cushing) 153.

²⁶ The Corpus Iuris Civilis was created at the order of Emperor Justinianus in the years 528–534 AD. It is a compilation of several sources of law. The Digest or Pandect (D) is the Corpus Iuris Civilis most relevant for historic maritime law. It is an encyclopaedia composed mostly of brief extracts from the writings of Roman jurists and jurisprudence. See inter alia F P Walton *Historical Introduction to the Roman Law* (William Green & Son Law Publishers 1912) 300–318; J H A Lokin *Prota: Vermogensrechtelijke leerstukken aan de hand van Romeinsrechtelijke teksten* (V of Chimaira 1999) 1–16.

and concerns the jettison of cargo: 'The Lex Rhodia decrees that, if goods are thrown overboard to lighten a ship, all shall make good by contribution that which has been given for all'.²⁷ In spite of the fact that the Lex Rhodia de lactu has for many centuries been the subject of in-depth studies, many questions remain unanswered regarding both its origin, its contents and its application in practice. The Digest mentions the second century AD's Roman jurist Paulus as the source for the Lex Rhodia de lactu.²⁸ It is commonly accepted, however, that the Lex Rhodia de lactu's origin is much older. However, no specific or even approximate date of its origin is known. The tenth²⁹, ninth³⁰ eighth³¹ and third³² centuries BC have all been suggested. It is not even certain that the Lex Rhodia de lactu has (direct) Rhodian roots.³³ It is quite likely that the Romans adopted the sea law that was commonly applied in the Mediterranean, including the Lex Rhodia de lactu, and incorporated these rules to some extent, possibly with contemporary customary characteristics, into their legal system and eventually included them in Justinianus's *Corpus Iuris Civilis*.³⁴ How the distribution of damage principle was applied in practice before the principle was codified, which requirements were to be met and whether it was applied in a homogeneous way is not known.

The Lex Rhodia de lactu literally concerns the jettison of cargo only. In addition, title 14.2 of the Digest contains several provisions in which a division of damages is applied in other specific situations.³⁵ At first sight a random list is set out of specific circumstances in which a contribution was due,³⁶ including cutting of the mast,³⁷ ransom paid to pirates and transshipment of cargo in a lighter to lighten the ship and the lighter sinks.³⁸ No general rule is given.³⁹ It is unclear whether this was intended to mean that a division of damages was to take place in the specifically described cases only or whether the contribution provisions of the Digest should be regarded as mere examples of a general rule.⁴⁰

²⁷ Lowndes and Rudolf (n 18) 703.

²⁸ Lex Rhodia de lactu D 14.2.1. See also J-J Aubert 'Dealing with the abyss: the nature and purpose of the Rhodian Sea Law on jettison (D 14.2) and the making of Justinian's Digest' in J W Cairns, P du Plessis *Beyond Dogmatics: Law and Society in the Roman World* (Edinburgh University Press 2007) 157–72 at 158–64.

²⁹ W Paul Gormley 'The development of the Rhodian–Roman maritime law to 1681, with special emphasis on the problem of collision' (1961) 2 *Inter-Am L Rev* 320; R Lowndes *Remarks on the English and Foreign Laws and Usages Relating to General Average* (G and J Robinson Longman, Brown, Green and Longmans 1844) 4.

³⁰ R Stevens *Essay on Average and Other Subjects Connected with the Contract of Marine Insurance* (Richard and Arthur Taylor 1817) 4. See also authors mentioned by J Reddie *An Historical View of the Law of Maritime Commerce* (William Blackwood & Sons 1841) 63.

³¹ Tetley (n 11) 107.

³² Sanborn (n 12) 5.

³³ There are no known direct written sources regarding the maritime laws of Rhodes (see Reddie (n 30) 63). Some authors, including Cicero and Strabo refer to the Rhodian laws in their works, but neither of them, nor any other author, specifically mentions the existence of a Rhodian maritime code. See Reddie (n 30) 32. It is unclear whether Lord Emperor Antoninus's answer to a question in respect of a shipwreck in Icaria that 'I am, indeed, the Lord of the World, but the Law is the Lord of the sea; and this affair must be decided by the Rhodian law adopted with reference to maritime questions, provided no enactment of ours is opposed to it' relates to the Lex Rhodia de lactu or to other Rhodian maritime laws, if any. See D 14.2.9.

³⁴ D C Gofas 'The Lex Rhodia de lactu' in M H Nordquist, J Norton Moore (eds) *Entry Into Force of the Law of the Sea Convention* (Kluwer Law International 1994) 29–43 at 32; H Wagner 'Die Lex Rhodia de lactu' (1997) 44 *Revue Internationale des Droits de l'Antiquité* 357–80; Sanborn (n 12) 7–8; Gormley (n 29) 321; M D A Azuni *The Maritime Law of Europe* (I Riley & Co 1806) 325–26.

³⁵ These provisions have been taken over from authors other than Paulus (inter alia Servius, Ofilius, Labeo, Hermogenianus) who did not all live at the same time.

³⁶ Aubert indicates that the order of title D 14.2 shows the standard features of Roman case law, ie a definition, followed inter alia by a case citation of a jurist, exploration of more difficult cases, other solutions and ending with secondary issues. See Aubert (n 28) 164.

³⁷ Lex Rhodia de lactu (n 28) title D 14.2.5 para 1.

³⁸ *ibid* Title D 14.2.4.

³⁹ According to Thomas, this is not surprising as Roman law, like the English common law, would have grown on the basis of authority rather than reason and principles as such. See J A C Thomas *Textbook of Roman Law* (North-Holland Publishing Company 1976) 6.

⁴⁰ Selmer (n 17) 22 contends that the contribution provisions of the Digest should be regarded as mere examples and that it can safely be assumed that the doctrine was applied in a general manner. According to Lobingier, the Roman maritime law as a whole was never codified. Much of it would have existed in custom only and would have been passed on to the Middle Ages in the form of custom. C S Lobingier 'The maritime law of Rome' (1935) 47(1) *Jurid Rev* 1, 12.

Pursuant to the rules set out in the Digest, the merchants' contribution was due on account of the preservation of their property.⁴¹ The amount of the contribution was to be calculated on the basis of the value of the goods lost and the goods saved. The main criterion was the cargo's value to the owner. Cargo lost was valued in accordance with the value of the property at the time of its loss. The compensation was considered to be made for the loss sustained and not for expected gain.⁴² For this reason, the purchase price of the jettisoned goods was used as a guiding principle. In respect of the property that had arrived safely and was to contribute, the sale price was taken into account.⁴³

2.2 From Lex Rhodia de lactu to Rôles d'Oléron

After the decline and fall of the Roman Empire, first in the West and subsequently in the East, the provisions set out in the Digest have continued to be relevant for the maritime industry. It is safe to assume that the customs as codified in the Digest continued to exist in the following centuries.⁴⁴ Moreover, and in any event, the Digest's provisions of maritime law, including the Lex Rhodia de lactu, have been reproduced with some alterations, both in the Basilica and in the Rhodian Sea Law.

The Basilica is a collection of laws published by the Byzantine Emperor Leo VI in the late ninth century AD.⁴⁵ In practice, it was the Corpus Iuris Civilis's successor, although Justinian's code was only officially abrogated in 1453 AD.⁴⁶ In the Basilica, many provisions of the Digest have been included, with modifications to adjust the provisions to ninth century needs.⁴⁷ The Basilica was mainly used in the Eastern part of the Roman Empire that continued to exist long after the Western empire's decline. In the area of the former Western European empire, the Rhodian Sea Law has played a more important role. The Rhodian Sea Law is the collective noun for several medieval manuscripts with some varying titles and contents, in which rules are given regarding several topics of maritime law.⁴⁸ Throughout the centuries heated discussions have taken place as to whether the Rhodian Sea Law manuscripts had direct Rhodian origins and whether they should be regarded as the source of the Digest's Lex Rhodia de lactu. The prevailing view in recent legal literature is that the Rhodian Sea Law is not the direct codification of the sea law from the Isle of Rhodes.⁴⁹ The Rhodian Sea Law is probably based on the Digest with some additions of customary law.

The first version of the Rhodian Sea Law probably dates back to the seventh or eighth century AD,⁵⁰ so before the Basilica's completion in circa 877–892 AD. The manuscripts of the Rhodian Sea Law were copied many times throughout their existence.⁵¹ Some versions continued to be influential in

⁴¹ Lex Rhodia de lactu (n 28) title D 14.2.2.2.

⁴² Reddie (n 30) 99.

⁴³ Lex Rhodia de lactu (n 28) title D 14.2.2.4.

⁴⁴ Sanborn (n 12) 24 puts great weight on maritime custom and practice for the evolution of the maritime law. He submits that 'the influence of legislation practically disappears . . . during the entire length of the Middle Ages'. See also W Ashburner *The Rhodian Sea Law* (Clarendon Press 1909) 52.

⁴⁵ See on the Basilica for example Reddie (n 30) 120–25 as well as C P Sherman 'The Basilica: a ninth century Roman law code which became the first civil code of modern Greece' (1918) 66 *University of Pennsylvania Law Review* 363–67; Azuni (n 34) 321.

⁴⁶ Sherman (n 45) 364–65.

⁴⁷ Unlike the Corpus Iuris Civilis, the Basilica was written in the Greek language. In fact, according to the Greek jurist Harmenopoulos, the official language change of the eastern Roman Empire from Latin to Greek would have been one of the official reasons for the Digest's revision and the Basilica's creation. See Sherman (n 45) 364.

⁴⁸ Ashburner (n 44) 13.

⁴⁹ Inter alia Ashburner (n 44) 67; Azuni (n 34) 295; Lobingier (n 40) 1–32; R D Benedict 'The historical position of the Rhodian law' (1909) *Yale Law Journal* 223–42; Reddie (n 30) 70–74; B M Emerigon *A Treatise on Insurances, translated from the French with an introduction and notes by S Meredith* (Henry Butterworth 1850) xxxii. It has been suggested that the collections have been named 'Rhodian Sea Law' in order to enhance their status, which practice reportedly was often applied in the Middle Ages. See Selmer (n 17) 20 and contra, inter alia, Paulsen (n 12) 1068–69; E Gold *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (Lexington Books 1981); P K Mukherjee 'Maritime law and admiralty jurisdiction: historical evolution and emerging trends' <http://www.jtighana.org/links/trainingmaterials/Maritime%20Law%20&%20Admiralty%20Jurisdiction.pdf>.

⁵⁰ Sanborn (n 12) 35 cites different authors with varying views on the exact period of the origin of the Rhodian Sea Law.

⁵¹ The initial version of the Rhodian Sea Law was followed by later editions. Interestingly, throughout its existence (which lasted several centuries) the Rhodian Sea Law's substance never fundamentally changed. See Ashburner (n 44) 50.

the Eastern part of the Mediterranean up to the 15th century.⁵² In the Western part of the Mediterranean, from the 11th century the codes of the city states gradually gained importance. Through the Basilica, the Rhodian Sea Law and maritime practice in which the rules were applied, the principle of contribution underlying the Roman ‘general average provisions’ has probably found its way into the laws of Western Europe, more specifically the laws of the Italian city states, the Rôles d’Oléron, the maritime law of other (non-Italian) European states and the Baltic.⁵³ At the time of the Basilica’s completion, the Western Roman Empire had long ago ceased to exist. Nevertheless, Sanborn submits that the later (Eastern) Roman Empire would have continued to influence the Mediterranean and the Italian city states and would thereby have created continuity of the law.⁵⁴ However, the possibility that customs were so well established that they simply continued irrespective of any codified law cannot be excluded either.⁵⁵

The Basilica, Rhodian Sea Law and the maritime laws of various city states during the Middle Ages have been examined and compared with each other by Ashburner.⁵⁶ In respect of the general average principle, he concludes that all the specifics of the Digest’s provisions can be found both in the Basilica and in the Rhodian Sea Law.⁵⁷ However, where the Basilica’s provisions regarding the contribution principle are a direct copy of the provisions of the Roman Digest only,⁵⁸ the Rhodian Sea Law goes further. In addition to the rules of the Digest, it contains some extra requirements and specifications. For example, before goods were thrown overboard, the master had to ask the passengers’ opinion.⁵⁹ In addition, the merchant was to throw first before the crew could jettison any cargo.⁶⁰

In the apportionment of the damage, the sales price of the goods was a leading factor.⁶¹ A pecuniary limit was placed on the contributory value of personal luggage, whereas slaves were to be valued at a fixed amount.⁶² Moreover, the Rhodian Sea Law considerably extended the situations in which apportionment of damage was to take place.⁶³ It provided that every maritime disaster for which no-one was to blame formed the subject of contribution.⁶⁴ So if a vessel was wrecked by an accident for which the shipowners/master could not be blamed, the cargo interested parties had to make a contribution as well. The same applied in case of loss of or damage to cargo, as long as the owners had not defaulted under the contract of carriage. The property saved had to contribute to the property lost or damaged. This system of contribution did not require a common danger and/or intentional actions to prevent damage, which are essential elements of the contribution principle underlying the concept of general average. For this reason it could be said that this is not an application of the general average principle. Instead, it seems to have been more a kind of mutual insurance system.⁶⁵

The same appears to be true for another extension of the contribution system provided by the Rhodian Sea Law. In situations of shipwreck, the cargo interested parties whose goods had been

⁵² Ashburner (n 44) 49; Sanborn (n 12) 37; Reddie (n 30) 125.

⁵³ R Zimmermann *The Law of Obligations* (Kluwer 1992) 411; Selmer 1958 (n 17). For the application in the Baltic see N Bogojevic-Glusevic ‘The law and practice of average in medieval Towns of the Eastern Adriatic’ (2005) 36 *J Mar L & Com* 21–59.

⁵⁴ Sanborn (n 12) 25.

⁵⁵ The laws of local populations would have been left untouched by the invaders. See Selmer (n 17) 27; Sanborn (n 12) 22, 24.

⁵⁶ Ashburner (n 44).

⁵⁷ *ibid* 255.

⁵⁸ *ibid* 110–111, 255; Azuni (n 34) 322–23.

⁵⁹ The Digest provides in respect of damage to a vessel that in order to be made good, the damage must have occurred with the consent of the passengers or on account of their fear (*Lex Rhodia de lactu* (n 28) title D 14.2.2.1). The requirement of approval therefore seems limited to the situation where damage was caused to the vessel and does not appear to be required in other situations, including jettison of cargo.

⁶⁰ Gold (n 49) 29.

⁶¹ Ashburner (n 44) 278.

⁶² *ibid* 258–59.

⁶³ Selmer (n 17) 20.

⁶⁴ Ashburner (n 44) 111 and 257.

⁶⁵ *ibid* 258.

saved had to make a contribution to the master and crew, probably to provide an incentive to preserve the cargo and to prevent them from plundering the goods⁶⁶, akin to a reward for salvage assistance provided. It goes without saying that this contribution is not based on the ‘general average contribution principle’ either.

These examples, which were applied for several hundreds of years in a reasonably large geographic area show that more than just one system, and no continuous or single evolving system for the apportionment of damage was applied. This ‘extended contribution system’ in which particular average was shared as well seems to have been abandoned in the period that the codes of the medieval nation states were in place.⁶⁷

2.3 Rôles d’Oléron

Although the Rhodian Sea Law was used until the 15th century in some geographic areas,⁶⁸ in the Western part of Europe new maritime codes were created. The first of these medieval codes probably go back to the middle of the 12th century.⁶⁹ They were limited in geographical scope to a specific city or region⁷⁰ and were based on the Digest, Basilica and Rhodian Sea Law with some additions and amendments in accordance with local customs.⁷¹ Of the medieval maritime codes, the Rôles d’Oléron and the *Consolato del Mare* are deemed to have been the most influential for the historical development of maritime law.⁷² The Rôles d’Oléron are generally considered to be the ancestor of modern Northern European and English maritime law,⁷³ while the *Consolato del Mare* also influenced the development of the legislation in the Western Mediterranean and the Baltic.⁷⁴

The Rôles d’Oléron’s origins are obscure.⁷⁵ The rules probably date back to the 12th or 13th century AD.⁷⁶ All its provisions are concluded with the words ‘and this is the judgment in this case’.⁷⁷ In spite of this reference, several authors who have duly studied the rules have submitted that the rules are a collection of local customs rather than judgments.⁷⁸

The Rôles d’Oléron’s contents are a mixture of Roman and Germanic usages, probably extended by local customs.⁷⁹ In respect of the application of the general average contribution principle the Rôles,

⁶⁶ *ibid.*

⁶⁷ The system eventually seems to have been replaced by insurance. See Bogojevic-Glusevic (n 53) 33, 47, 57.

⁶⁸ Ashburner (n 44) 49; Sanborn (n 12) 37.

⁶⁹ Ashburner (n 44) 115.

⁷⁰ For example, the cities of Pisa, Trani, Venice, Amalfi etc all had their own maritime codes. See Ashburner (n 44); Reddie (n 30) 143–71 and Gold (n 49) 18–19.

⁷¹ Reddie (n 30) 137.

⁷² Studer even calls the Rôles d’Oléron the ‘chief code of maritime laws in the Middle Ages’. See P Studer *The Oak Book of Southampton Vol II – including a fourteenth century version of the medieval sea-laws known as the Rolls of Oléron* (Cox & Sharland 1911) 30.

⁷³ See Sanborn (n 12) 70, 74, who states that the Rôles became ‘the maritime common law of the North Sea and the Atlantic’. Gormley even states that the Rôles d’Oléron would be the foundation of all European marine codes. See Gormley (n 29) 321.

⁷⁴ See Bogojevic-Glusevic (n 53) 33. It should be noted, however, that the division should not be strictly applied. According to Studer the Baltic States (also) incorporated the provisions of the Rôles d’Oléron into their legislation. See Studer (n 72) 31. The *Consolato del Mare* also seems to have been influential in Western Europe. Reddie (n 30) 171; M Th Goudsmit *Geschiedenis van het Nederlandsche zeerecht* (Martinus Nijhoff 1882) 50.

⁷⁵ It is generally assumed that somewhere there must be a link with the (French) Isle d’Oléron. See J M Pardessus *Collection des lois maritimes antérieures au XVIIIe siècle Vol I* (L’Imprimerie Royal 1828) 304, 305; T Twiss *Black Book of Admiralty Part IV* (Longman & Co 1876) lxxxvii.

⁷⁶ Studer submits that the Rôles would date back to the 12th century. See Studer (n 72) 36. Krieger on the other hand deems it unlikely that their origin would lie anywhere before the 13th century. See K F Krieger *Ursprung und Wurzeln der Rôles d’Oléron* (Böhlau Verlag 1970) 71.

⁷⁷ That the Rôles are a collection of judgments is argued by Twiss (n 75) 87; Goudsmit (n 74) 64; Paulsen (n 12) 1070; Tetley (n 11) 111.

⁷⁸ Pardessus (n 75) 304, 305. The order of the provisions, which is basically in line with the chronology of the voyage by sea, indicates that the rules have not been put together randomly. See Th Kiessellbach ‘Der Ursprung der Rôles d’Oléron und des Seerechts von Damme’ (1906) 33 *Hansische Geschichtsblätter* 17–18; Studer (n 72) 34.

⁷⁹ Krieger (n 76) 94.

like the Digest and the Rhodian Sea Law, do not provide for a general rule of contribution.⁸⁰ They merely set out two situations in which apportionment was to take place.⁸¹ Obviously, the first situation was the classic example of jettison of cargo, which can be found in all regulations.⁸² Possibly influenced by the Rhodian Sea Law and/or custom, it was provided that if goods were to be thrown overboard in a heavy storm and violent sea, the master was to consult the merchants and had to obtain their approval ('the master ought to say, Gentlemen, we must throw part of the goods overboard').⁸³ If this approval was withheld, the master was to lighten the ship nevertheless, if necessary for the common safety. However, he and one-third of his crew then, upon arrival of the vessel, had to make an oath on the Holy Evangelical that the jettison had taken place for the preservation of the ship and the remaining cargo on board. The second situation in which a contribution was payable was when masts were cut off or cables were moored.⁸⁴ The merchants were to be consulted on such actions as well.⁸⁵

2.4 From Rôles d'Oléron to *Ordonnance de la Marine* of 1861

2.4.1 Wisby Sea Laws

The Rôles d'Oléron have been widely applied in France. In addition, they were also used in England, where they were included in the Black Book of the Admiralty⁸⁶ and in translated and extended version as the Judgments of Damme in the Netherlands and Belgium.⁸⁷ In the Netherlands, the Judgments of Damme together with the Ordinance of Amsterdam (*Ordonantie*)⁸⁸ formed the 'Waterrecht'.⁸⁹ After addition of some provisions from the laws of the German Hanseatic city Lübeck in the 15th century, the collection of the three sets of legal provisions became known as the Wisby Sea Laws.⁹⁰ The Wisby Sea Laws were widely applied in the territory of the Netherlands, in Northern

⁸⁰ Articles VIII, IX and XXXI in later editions. It was a common feature of the maritime regulations applied in Europe throughout the centuries that additions were made to them from time to time. As a result, the manuscripts in which the regulations were found differed from one another. Sometimes similar provisions can be found in differently numbered articles. This most notably happened in the Rhodian Sea Law's manuscript, the Rôles d'Oléron and the Wisby Sea Laws. The earliest versions of the Rôles d'Oléron contained 24 or 25 provisions, whereas later editions included up to 47 articles. T J Runyan 'The Rolls of Oléron and the Admiralty Court in Fourteenth Century England' (1975) 19 *Am J Legal Hist* 95, 98; Sanborn (n 12) 67; Studer (n 72) 29–42; Krieger (n 76).

⁸¹ Articles VIII and IX are set out in Lowndes and Rudolf (n 18) 4.

⁸² Selmer (n 17) at 3 indicates that jettison of cargo would be the only situation in the Norse sea laws in which a distribution of losses over the various interested parties would have been due.

⁸³ Rôles d'Oléron art VIII.

⁸⁴ *ibid* art IX.

⁸⁵ *ibid*: '(...) he ought to consult them, saying, Sirs, it is requisite to cut down the mast to save the ship and lading, it being in this case my duty'.

⁸⁶ The Black Book is a kind of code with provisions applicable to various aspects of shipping. See Reddie (n 30) at 416–17, who even regards the Rôles d'Oléron as the basis of the English maritime law. See also Paulsen (n 12) 1076. Because of their inclusion in the Black Book, the Rôles d'Oléron were administered by the English Admiralty Court. See Twiss (n 75) 87; Runyan (n 80) 97.

⁸⁷ Goudsmit (n 74) 68–72.

⁸⁸ The Ordinance of Amsterdam was a 'collection of judgments' used in the maritime trades from the Zuiderzee to other places in Europe. See E Frankot 'Medieval maritime law from Oléron to Wisby: jurisdictions in the law of the sea' in J Pan-Montojo, F Pedersen *Communities in European history: Representations, Jurisdictions, Conflicts* (Edizioni Plus Pisa University Press 2007) 159; C P Burger *Oude Hollandsche zeevaart-uitgaven: het waterrecht* (1909) 7–8.

⁸⁹ The Waterrecht was applied in the Netherlands in concert with customary rules from the mid-14th century until the mid-16th century. See in more detail on the 'Waterrecht' Burger (n 88). The customary rules also regulated shipping business in the period before the Waterrecht became the main maritime regulation. See A Verwer *Nederlants See-rechten: Avaryen en bodemeryen: begrepen in De Gemeene costuimen van der see, de Placcaten van Keiser Karel den Vijfden. 1551; en Koning Philips den II. 1563; t Tractaet van Mr. Quinten Weitsen van de Nederlantsche avaryen* (Jan Boom 1711) 30; Goudsmit (n 77) 6–7; A Oudeman 'Over den invloed onzer oud-vaderlandsche zeeregtten op het Nederlandsch Wetboek van Koophandel' (1850) *Themis* 44.

⁹⁰ Frankot (n 88) 159; Selmer (n 17) 31; Goudsmit (n 74) 53. Gormley, Azuni and Paulsen submit that the origin of the Wisby Sea Laws would lie in Wisby (see Gormley (n 29) 321, Azuni (n 34) 336–37, 384 and Paulsen (n 12) 1071). Frankot, after due research, concludes that none of the Laws of Wisby was created at Wisby. See Frankot (n 88) 160; Verwer (n 89) 36, A A van der Mersch *De Scheepsraad* (J L Beijers 1868) 25; Goudsmit (n 77) 148–66, as well as Reddie (n 30) 230–44.

Europe in general and in the Baltic. They have also served as the basis for subsequent legislation.⁹¹ As the Wisby Sea Laws are a compilation of three more or less separate collections of rules, the articles overlap in substance to a certain extent. This also applies to the provisions on apportionment of damage; there are various articles in which the general average principle can be recognised.⁹²

Like all historic maritime codes, the Wisby Sea Laws contained provisions regarding jettison and the cutting of the mast.⁹³ In essence, these are similar to the provisions of the *Rôles d'Oléron*. However, in addition the contribution principle was extended to apply in other situations. If costs had to be made during the voyage after a stranding to get the goods out of the vessel,⁹⁴ or if monies had to be paid to let the vessel enter a port,⁹⁵ the parties interested in the goods and the vessel had to pay 'like payment for jettison' (in Dutch: *gelijk werpgeld*). If the vessel had to be lightened to make sure that it could take a certain passage, the costs of the lightening, if successful, were to be paid as to two-thirds by the vessel and as to one-third by the cargo interests.⁹⁶ The cost of a pilot was also to be apportioned, provided that the pilot had to be instructed owing to extraordinary circumstances.⁹⁷ No general rule had yet been introduced. Apportionment was to take place only in the specifically described situations, of which jettison was the most important. Unlike the *Rôles d'Oléron*, the Wisby Sea Laws also included additional requirements. The merchants *inter alia* had to inform the master which goods and/or what sums of money they carried on board in their boxes before a jettison took place.⁹⁸

Compared to the *Rôles d'Oléron*, more specific provisions were given on the calculation of the amount of the contribution. The amount of the contribution was based on the value of the goods.⁹⁹ It depended on the moment of the jettison whether the value at the port of loading or the purchase value of the goods was taken into account. The turning point was halfway through the voyage.¹⁰⁰ As in the Rhodian Sea Law, some goods were given a fixed value.¹⁰¹ The shipowners' contribution was based on either the value of the vessel or the freight.¹⁰²

2.4.2 Ordinances on Shipping of 1551 and 1563

In the Netherlands, the maritime history continues with the Ordinances on Shipping of 1551 and 1563.¹⁰³ The 1551 Ordinance on shipping (in Dutch: *Placcaat der Zeerechten*) of Charles V¹⁰⁴ is one of the first European maritime codes.¹⁰⁵ Many of this Ordinance's provisions were taken from the *Waterrecht*. To these rules, provisions of local laws were added.¹⁰⁶ In respect of the general average contribution principle, Charles V's Ordinance of 1551 is noteworthy in particular as it contained the first known (Dutch) reference to the term 'general average' (in the Dutch of the time: *grote avarije*).

⁹¹ Many provisions of Charles V's Ordinance of 1551 have been taken over from the Wisby Sea Laws.

⁹² Wisby Sea Laws arts 12, 20, 21, 38, 39, 55, 56.

⁹³ *ibid* arts 20 and 21.

⁹⁴ *ibid* art 55.

⁹⁵ *ibid* art 59.

⁹⁶ *ibid* art 56.

⁹⁷ *ibid* art 59–60.

⁹⁸ *ibid* art 38 para 3.

⁹⁹ See art 39 Wisby Sea Laws.

¹⁰⁰ If goods were jettisoned before half of the voyage had been performed, the value at the port of loading was taken into account (Wisby Sea Laws art 69). In cases of jettison on the second half of the voyage, the value was determined on the basis of the sale price (Wisby Sea Laws art 70). Olivier indicates that, in practice, goods were also valued in accordance with the value at the place where they were jettisoned. See N Olivier *Het zeeregt van vroegeren en lateren tijd* (J van der Beek 1839) 220.

¹⁰¹ See for example art 39 para 6, in which it is provided that a bed is equal to three *schilden*, ie medieval currency (*waer t sake dat daer geworpen werde een matte met een bedde ofte eene hoppesak, dat sal men rekenen voor drie schilden*). The contribution to be made for money carried on board was half of the total value (Wisby Sea Laws art 38 para 3).

¹⁰² Wisby Sea Laws art 38 para 2.

¹⁰³ Internationally, the regimes that are generally discussed after the Wisby Sea Laws are the Laws of the Hanseatic League. See *inter alia* Paulsen (n 12); Lowndes and Rudolf (n 18) 4.

¹⁰⁴ Charles V (1500–1558) was emperor of the Holy Roman Empire, king of Spain and lord of the Netherlands.

¹⁰⁵ It is indicated in Hudson and Harvey (n 17) at 5 that the Ordinance of Marine 1681 would be the first European maritime Code. The Ordinances of Charles and Philip II both predate this code.

¹⁰⁶ Verwer (n 89) 62; Goudsmit (n 74) 9.

It provided that costs incurred and damage and losses suffered for the common benefit of ship and cargo, after taking into account the requirements traditionally set, will be apportioned in general average between ship and cargo in accordance with ancient customs of the sea.¹⁰⁷ Unlike previous and subsequent regulations, no overview was given in the 1551 Ordinance of the specific situations in which a division of loss and damage was to take place.¹⁰⁸ In addition to the general rule, it introduced a new event giving rise to a contribution. It was provided that if members of the crew were injured on board during battles with pirates and foreign vessels, the damage thereby suffered was to be compensated by ship and cargo (art 28).¹⁰⁹

Charles V's Ordinance was succeeded 12 years later by the Ordinance of his son Philip II.¹¹⁰ In Philip II's Ordinance of 1563 almost all provisions of the Wisby Sea Laws, including those regarding contribution, were taken over.¹¹¹ The general average definition introduced in the Placcaat of 1551 was not repeated. In the chapter *Van Schipbreckinghe, zeeverpinghe en Haverijen* ('of shipwreck, jettison and averages'), reference was made again to specific situations in which a contribution was due which were included in the Wisby Sea Laws, complemented by the new event introduced in the 1551 Ordinance.

The apportionment of damage under the 1563 Ordinance on Shipping was considerably simplified. All goods, saved or lost, were valued at the amount that could actually be obtained for the goods at the port of discharge, ie the sale price.¹¹² An exception was made for money, which was to be valued in accordance with its weight or net asset value.¹¹³

Five years after Philip II's Ordinance of 1563's introduction, the revolt started between the Dutch provinces and Spain. Nevertheless, the Ordinance of 1563 became very important for Dutch and probably also European maritime law. After the provinces of the Netherlands officially had regained their independence from the Spanish in 1648, the government in the Netherlands (the Dutch Republic) in the following centuries was for the main part decentralised.¹¹⁴ There was no central government responsible for the creation and implementation of laws. The cities arranged their own legislations. These 18th century city codes were generally based on the customary laws that had been developed in the preceding centuries and had been codified by the Ordinances on shipping.¹¹⁵ During the 16th and 17th centuries, Dutch maritime business flourished.¹¹⁶ As indicated by Gold, the Netherlands quickly became the 'greatest shipping nation the world had seen up to that time'.¹¹⁷ It is likely that, together with their business, the Dutch also distributed their laws and customs.¹¹⁸ These were in any event taken into account in the preparation of the French Marine Code of 1681.¹¹⁹

¹⁰⁷ Article 41 Charles V's Ordinance on Shipping of 1551. In Dutch: *soo verre 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*. See Verwer (n 89) 66.

¹⁰⁸ The 1551 Ordinance's direct successor, the 1563 Ordinance on Shipping, did not contain a general rule but merely provided for specific situations. The 1681 Ordinance of Marine provided a definition, but added specific situations.

¹⁰⁹ Verwer (n 89) 65. According to Goudsmit, this provision had already been introduced in the 'Hanze laws' of 1434 and was as such not a complete novelty. See Goudsmit (n 74) 228.

¹¹⁰ Philip II (1527–1598) was king of Spain and Portugal. He became lord of the Seventeen Provinces of the Netherlands after his father's (Charles V's) abdication in 1555. During the period of his rule in the Netherlands, in 1568, the Dutch rebellion against Spain started. See Olivier (n 100) 155–63.

¹¹¹ Goudsmit (n 74) 165, 236–40.

¹¹² Philips II's Ordinance of 1563 art 6 (chapter on shipwreck, jettison and average).

¹¹³ *ibid* art 7.

¹¹⁴ J I Israel *The Dutch Republic: Its Rise, Greatness and Fall 1477–1806* (Clarendon Press 1995) 700–1130; Azuni (n 34) 403.

¹¹⁵ The Wisby Sea Laws and the Ordinances of Charles V and Philip II of 1551 and 1563 respectively had become the 'general laws' of the Netherlands at the middle of the 17th century. See Verwer (n 89) 187; Olivier (n 100) 163. Cleveringa even mentions that the Ordinance of Philip II of 1563 was regarded as the 'constitution' of Dutch maritime law until the beginning of the 19th century. See R P Cleveringa *Zeerecht* (W E J Tjeenk Willink 1961) 12.

¹¹⁶ Israel (n 114) 307–327.

¹¹⁷ Gold (n 49) 42.

¹¹⁸ This was also the time in which the Dutch jurist Hugo de Groot (1583–1645) wrote his influential works *Mare Liberum* (1604), *De iure belli ac pacis* (1625) and *Introduction to the Jurisprudence of Holland* (1631).

¹¹⁹ B H D Hermesdorf 'Adriaen Verwer (1655–1717) en de *Ordonnance de la Marine* (1681)' in *Rotterdams Jaarboekje 7e reeks*, 5e jrg (1967) 227–61.

2.4.3 Ordonnance de la Marine of 1681

The French 1681 Marine Code (in French: *Ordonnance de la Marine*; in English: Ordinance of Marine) was created at the order of Louis XIV. In its preparation, the maritime laws and customs of various European countries were examined.¹²⁰ Even though it only had force of law in France, it also obtained great authority in other countries.¹²¹ Together with the Ordinance of Commerce (in French: *Ordonnance de la Commerce*) of 1673, the Marine Code also served as a model for the French *Code de Commerce* of Napoleon of 1807,¹²² which in turn was influential in the preparation of the Codes of Commerce of inter alia the Netherlands, Belgium, Spain and Italy.¹²³

Like Charles V's Ordinance on Shipping, the Ordinance of Marine of 1681 also contained a general average definition. It provided that:

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 equalised over the whole at the shilling in the pound.¹²⁴

The definition was complemented by specific situations in which a contribution was due, including jettisoning of cargo. In addition, rules were given for the calculation of the amount of the contribution. In line with the Wisby Sea Laws and Philip II's Ordinance on Shipping, all goods, saved or lost, were valued at the amount that could actually be obtained for the goods at the port of discharge, ie the sale price.¹²⁵

2.5 Evaluation of historic maritime laws

The above overview shows that all the historic rules provided for an apportionment of losses in case sacrifices were made or costs were intentionally incurred for the benefit of the parties interested in the maritime adventure. The first regulations discussed merely contained some limited specific situations in which a contribution was payable, rather than giving a general definition.¹²⁶ All included the classic general average example of jettisoning of cargo¹²⁷ and cutting of masts and or cables.¹²⁸ It can thus be said that a general principle existed that losses and damages under certain circumstances were shared.

Both the practical and the legal application, however, contained substantial differences. The situations in which apportionment was to take place varied regulation by regulation and over time.

¹²⁰ Pothier (n 25) 157–58; Emerigon (n 49) xl; Lilar and Van den Bosch (n 2) 4.

¹²¹ For example it served as a basis for the first English definition of general average given in 1799 in *The Copenhagen* (1799) 1 Ch Rob 289. See Lowndes (n 29) 22.

¹²² W Parker de Ruyter Rocher van Renays *Bijdragen tot beschouwing van het Nederlandsch Wetboek van Koophandel* (F Boogaard 1838) 6. Both the Ordinance of Marine and the Ordinance of Commerce were established under the administration of the French Minister Colbert. He introduced mercantilism in France, ie governmental regulation of the nation's economy with the purpose of increasing the state's power at other nation's expense. The Ordinances should be regarded against that background, even though they were influenced by the regulations applied in other states.

¹²³ Van Nievelt 1978, p. Xxviii; Lichtenauer 1934 (II), p. 115; Holtius 1861, pp. 3–4; Voorduin 1840, pp. xiii–xiv; Oudemans (n 89) 42–43, 47–48. In his comments to the Dutch Commercial Code of 1838's general average provisions, Holtius refers to their French origin or counterpart, if any. Holtius 1861, pp. 258–331.

¹²⁴ Ordinance of Marine 1681 arts 2, 3 'Des Avaries' (trans Lowndes 1888) 16.

¹²⁵ *ibid* arts 8–10 Du jet (for jettison); art 20 Du fret (for ransoms).

¹²⁶ It was only from the 16th century onwards that general rules were given and the term general average was introduced in written legislations, starting with Charles V's 1551 Ordinance on Shipping and the *Guidon de la Mer* of 1556.

¹²⁷ Lex Rhodia de lactu (n 28) title D 14.2.1; Rôles d'Oléron art VIII; Wisby Sea Laws arts 20 and 38; Philip II's Ordinance of 1563 art 4 (chapter on shipwreck, jettison and average); Marine Code 1681 art 1 Du jet.

¹²⁸ Lex Rhodia de lactu (n 28) title D 14.2.5 para 1; Rôles d'Oléron art IX; Wisby Sea Laws arts 12, 21 and 39; Philip II's Ordinance of 1563 art 4 (chapter on shipwreck, jettison and average); Marine Code 1681 arts 1 and 2 Du jet.

The fact that an event gave rise to a contribution in one regulation did not automatically mean that apportionment was to take place in subsequent regulations as well. Where, for example, ransoms paid to pirates were included in the apportionment in the Digest and Rhodian Sea Law,¹²⁹ no such apportionments were included in the Rôles d'Oléron or the Wisby Sea Laws.

The historic regulations also contained different requirements that had to be met before any apportionment of damage was to take place. Some provided that the merchants' approval was to be obtained before jettisoning cargo¹³⁰ and/or that the merchant was to throw first before the crew could jettison any cargo.¹³¹ In other laws it was provided that the goods heaviest in weight and lowest in value had to be thrown overboard first.¹³² In more recent regulations, jettisoned deck cargo was excluded from apportionment,¹³³ just like goods that were not registered with the master.¹³⁴

Differences can also be observed in the methods applied in the apportionment of the sacrifices and costs. No standard method of valuation of the goods was applied throughout the centuries either. In some laws, the purchase price was taken into account; in others the sale price was relevant; and it also happened that either of them was to be applied depending on the moment that the general average act took place.

3 From national regulations to YAR

In spite of the increase in international shipping business from the 16th century onwards, the legislative focus had become ever more nationalistic.¹³⁵ National commercial codes were implemented which were focused on protecting the state's own interests.¹³⁶

By the 19th century, the maritime codes and practices of the European states contained substantial differences in the specifics of the concept that had become known as 'general average'. The general average definitions, situations in which a contribution was payable, the provisions on contributing interests, contributory values and settlement of a claim were not uniformly accepted or applied in the same fashion.¹³⁷ There was no uniformity nationally¹³⁸ and even less internationally.¹³⁹ For example, reference is made to Kent:

There is no principle of maritime law that has been followed by more variations in practice than this perplexed doctrine of general average; and the rules of contribution in different countries, and before

¹²⁹ Lex Rhodia de lactu (n 28) title D 14.2.2.3 resp. Ashburner (n 44) 272.

¹³⁰ The Digest provides in respect of damage to a vessel that in order to be made good, the damage must have occurred with the consent of the passengers or on account of their fear: Lex Rhodia de lactu (n 28) title D 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 to be required in other situations, such as jettison of cargo. The Rhodian Sea Law (Ashburner (n 44) 258), Rôles d'Oléron (arts VIII and IX), Wisby Sea Laws (arts 20, 21, 38, 39) and Philip II's Ordinance of 1563 art 4 (chapter on shipwreck, jettison and average) all obliged the master to consult the merchants and/or crew before actions were taken that would give rise to a contribution. In case approval had not been obtained, some regulations required the master and/or crew to swear that the jettison had been necessary (Rôles d'Oléron art VIII; Wisby Sea Laws art 38).

¹³¹ This requirement was for example stipulated in some manuscripts of the Rhodian Sea Law. See Ashburner (n 44) 259; Gold (n 49) 29.

¹³² Philip II's Ordinance of 1563 art 5 (chapter on shipwreck, jettison and average); Ordinance of Marine of 1681 art 3, Du jet.

¹³³ Philip II's Ordinance of 1563 art 8 (chapter on shipwreck, jettison and average); Ordinance of Marine of 1681 art 13 Du jet.

¹³⁴ Ordinance of Marine of 1681 art 12 Du jet.

¹³⁵ Paulsen (n 12) 1073.

¹³⁶ Sweeney (n 20) 487–88.

¹³⁷ J Weskett *A Complete Digest of the Theory, Laws and Practice of Insurance* (Frys, Couchman & Collier 1781) 255; A Baldasseroni *Verhandeling over de Avarijen* (J S van Esveldt-Holtrop 1808 (*Trattate delle Assicurazioni Marittime* 1786, translated by C Vollenhoven) 144; W L P A Molengraaff *Internationale averij-grosseregeling* (S C van Doesburgh 1880) 17, 115–117.

¹³⁸ For example the provisions of the 18th century Amsterdam and Rotterdam Ordinances were not the same (Goudsmit (n 74)). According to Hopkins, practices also differed between London and Liverpool. See M Hopkins *A Handbook of General Average for the Use of Merchants, Agents, Ship-Owners, Masters and Others, with a Chapter on Arbitration* (Smith, Elder and Co 1859) vii. See also the invitation letter to the Glasgow conference of 1860. This letter is published in G P Rudolf *The York-Antwerp Rules: Their History and Development, with comments on the Rules of 1924* (Stevens and Sons Limited 1926) 3–5, whereas a translation of this letter has been inserted in Rahusen 1860, p. 133.

¹³⁹ Baldasseroni, for example, cites various authors and laws 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. See Baldasseroni (n 137) 1–10, 19–22.

different tribunals, are so discordant, and many of the distinctions are so subtle, and so artificial, that it becomes extremely difficult to reduce them to the shape of a connected and orderly system.¹⁴⁰

In the second half of the 19th century, the differences between the various national regulations had become so substantial that there was a strong need for international regulation. It was considered even more important that uniformity was created rather than how it should be achieved.¹⁴¹

In view of the notion that all regimes to some extent derived from the *Lex Rhodia de lactu*, it was thought possible to reach a uniform regime.¹⁴² These efforts eventually and over a period of several decades resulted in the York-Antwerp Rules. However, the York-Antwerp Rules made the material general average law uniform, but only to a certain extent. To begin with, several versions of the YAR are used in practice side by side.¹⁴³ Moreover, in principle, the YAR do not have a binding legal status; they have to be agreed contractually and can be contracted out of.¹⁴⁴ Furthermore, and most important, the YAR do not regulate the formal aspects of general average.¹⁴⁵ The YAR's regime has to be complemented by statutory provisions of national law, if and to the extent that issues have not been regulated contractually. Both contracts of affreightment and the national general average regimes contain varying provisions on the formal aspects of general average.

4 Conclusion

An analysis of the various historic regimes shows that they all incorporated the concept that expenditure and sacrifices made for the common safety of the parties interested in the maritime adventure were to be paid by (some of) the parties who had benefited therefrom. The analysis also makes it clear that each period of time and geographic area had its own regulations and application of the general average principle with specific features. Even at the same period of time, different rules were used in different geographic areas.¹⁴⁶ The rules varied inter se on the concept that was codified as general average in the 16th century. There has never been an overall uniform regulation in place. Even today, the YAR have not created a uniform application of the concept of general average. The YAR have neither a supranational nor overriding national status. The parties to a contract of affreightment may or may not, partially or in total, include them in their contracts.

The conclusion is that even though the historic general average regulations were all based on the principle that under specific circumstances an apportionment of damage has to take place, the application was not the same. That mere agreement on principle for the concept of general average has not led to uniformity is also shown by general average's more recent history. Owing to the various applications in practice, the need for uniform rules was strongly felt. Mere agreement on the general principle was insufficient. Uniform rules were necessary on a more detailed level.¹⁴⁷ The evaluation of the historical application of general average shows that even though agreement exists on general principles, this does not automatically lead to uniformity. As always, the devil is in the detail.

¹⁴⁰ J Kent *Commentaries on American Law Vol III* (O Halsted 1828) 189–90.

¹⁴¹ This was explicitly indicated in the invitation letter to the 1860 international conference of the National Association for the Promotion of Social Science in 1860, whose main topic was the international cooperation in the field of general average. The invitation letter can be found in in Rudolf (n 138) 3–5.

¹⁴² H G W Worst *Regel I tot en met XII van de York Antwerp Rules* (A P 1929) 3–4.

¹⁴³ The YAR 1974, the YAR 1974 as amended in 1990 and the YAR 1994 are most applied in practice. The YAR 1974 (amended 1990) for example do not include the Rule Paramount nor a non-separation agreement and Bigham clause (Rule G).

¹⁴⁴ It is not uncommon that contracts of affreightment provide that some specific provisions of the YAR are not incorporated. Some countries, including the Netherlands, have incorporated the YAR into their legal systems. As national GA provisions in principle are non-mandatorily applicable, the contractual provisions will generally set aside the provisions of national law.

¹⁴⁵ The YAR do not regulate how a contribution is to be enforced, which parties are to contribute or can claim a contribution and which measures can be taken to safeguard a contribution.

¹⁴⁶ The *Rôles d'Oléron*, for example, were not used by all nation and city states. At the time when the *Rôles d'Oléron* were being used, the majority of the Italian city states had their own maritime laws. The same is true for Northern European states. See Selmer (n 17) 28–31.

¹⁴⁷ Also Baldasseroni (n 137) x. He indicates that even though many legal authors have written about average and contribution, all have focused on their own laws and none has given an overview of the different customs and feelings of the various nations and their particular jurisdictions.