

# FESTSCHRIFT RESI HACKSTEINER

*EEN REIS DOOR HET  
BINNENVAARTRECHT*

*EINE REISE IM  
BINNENSCHIFFFAHRTRECHT*

*A VOYAGE THROUGH  
THE LAW OF  
INLAND SHIPPING*

*UN VOYAGE DANS LE  
DROIT DE LA NAVIGATION  
INTÉRIEURE*

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international publishing

# THE FUTURE OF GENERAL AVERAGE IN INLAND WATERWAY SHIPPING

*Where are we now and where are we going?*

Jolien Kruit\*

One of the traditional maritime law subjects is the concept of general average. It is applied both in respect of the carriage of goods by sea and the carriage of goods by inland waterways. And where inland waterway aspects are concerned, Resi is present. Unsurprisingly, Resi therefore also volunteered to participate in the General Average Committee of the Dutch Transport Law Association. In view of our pleasant cooperation in this field and the IVR's important role in general average, a piece on general average in this well deserved bundle should not be absent.

## 1 SHORT HISTORY, LONG FUTURE?

The general average principle entails that certain costs and losses incurred/suffered under particular circumstances to protect the assets involved in a common maritime adventure from peril are shared between the parties interested in these assets.<sup>1</sup> Although the principle's history is ancient, its application in inland waterway carriage is not.<sup>2</sup> Reportedly, the merchants involved in inland waterway shipping did not support the apportionment as they deemed their risks lower than in the carriage by sea and regarded general average beneficial for carriers only.<sup>3</sup> Apparently they were able to block the application of the apportionment principle.

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1 See for example the definition of the IVR Rules 2006, set out in Rule I:

'Sacrifices and expenditure reasonably made and/or incurred, in extraordinary circumstances, for the purpose of saving a vessel and its cargo from a common peril are general average.'

2 The 17<sup>th</sup> century Dutch scholar and Supreme Court Judge Bynkershoek supported the view that the general average provisions applied to inland waterways, but he does not seem to have received much support, if any. J.P. van Niekerk, *The Development of the principles of Insurance Law in the Netherlands from 1500-1800, Volume 1*, Jutta & Co Ltd: Cape Town 1998, p. 62.

3 M. de Decker, *Europees Internationaal Rivierenrecht*, Maklu: Antwerpen/Apeldoorn, 2015, p. 1211-1212 (para. 2030).

Only in the nineteenth century, the concept was slowly introduced in national laws on inland waterway shipping.<sup>4</sup> To start with, the Dutch Commercial Code of 1838 included provisions that allowed the apportionment of losses in cases of inland water way shipping in situations of jettison and in situations in which goods had been loaded in a lighter to preserve vessel and cargo.<sup>5</sup> Since the end of the nineteenth century and in particular in the second half of the twentieth century, the principle has been given a much wider application.<sup>6</sup> In the Dutch Code in 1952,<sup>7</sup> but also and more importantly by private regulations, including most notably the General Average Rules IVR ('IVR Rules') and its predecessors (the Rhine Rules (Antwerp – Rotterdam)) as well as the Danube Rules.

Rather than looking at general average's relatively short history in inland water way shipping and setting out the developments that have taken place since its introduction in the various regimes in detail, the focus in this article is on the bigger picture. It particularly looks at the future. What may lie ahead; which way may the general average practice in inland waterway shipping develop? First of all and by way of reference, a brief overview is given of the status quo. Several regimes that are currently being applied are briefly mentioned and some information is given on general average numbers in inland waterway shipping. Thereafter, it is considered how further uniformity may be created. Finally, several cost reducing measures in respect of general average related to seagoing transport are discussed that may also influence general average in inland waterway shipping. On balance it is argued that general average's future in inland waterway shipping at present seems bright.

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4 M. de Decker, *Europees Internationaal Rivierenrecht*, Maklu: Antwerpen/Apeldoorn, 2015, p. 1212 (para. 2031).

5 Art. 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 (art. 759 Dutch Commercial Code of 1838 declares that the provisions of art. 708-710, 712-719 and 721 Dutch Commercial Code of 1838 also apply to inland waterway shipping).

6 For example German Binnenschiffahrtsgesetz 1895. Also: M. de Decker, *Europees Internationaal Rivierenrecht*, Maklu: Antwerpen/Apeldoorn, 2015, p. 1212-1213 (para. 2032).

7 In 1952, an extended general average regime for inland waterway shipping was introduced in the Dutch Commercial Code (J. Verhoeve, *Het nieuwe Binnenvaartrecht*, W.E.J. Tjeenk Willink: Zwolle 1954, pp. 303-307).

## 2 WHERE ARE WE NOW? CURRENT GENERAL AVERAGE REGIMES AND NUMBERS

### 2.1 Patchwork of contractual and statutory regulations

#### 2.1.1 Various sources

In maritime law discussions on the topic of uniformity, general average will invariably be mentioned as the success story.<sup>8</sup> However, the mere application of the same principle does not create a uniform system.<sup>9</sup> General average arises when the requirements set by the applicable regulation have been complied with. In spite of the fact that there is a general idea of what the concept entails, the exact requirements to qualify an event, act or disbursement as general average vary. Both under the national laws<sup>10</sup> and in private regulations.<sup>11</sup> It is therefore important to establish the applicable regime. This can be a very easy, but also a very complicated exercise.

As will be set out below, in respect of general average in inland waterway shipping, a patchwork of regulations can be observed that may apply. In fact, the diversity in applicable general average rules is even more substantial than in general average related to the carriage of goods by sea, where one of the versions of the York-Antwerp Rules ('YAR') will generally be applicable.<sup>12</sup>

8 See for example W. Tetley, 'The general maritime law – The Lex Maritima (with a brief reference to the ius commune in arbitration law and the conflict of law)', 20 *Syracuse Journal of International Law and Commerce*, 1994, p. 107, 128. Also J. Kruit, *General Average, Applicable Law and Legal Basis*, Paris Legal Publishers: Zutphen 2017, p. 15.

9 This is shown in J.A. Kruit, 'General average – general principle *plus* varying practical application *equals* uniformity?', *JIML* (21) 2015, p. 190-202.

10 J. Kruit, *General Average, Applicable Law and Legal Basis*, Paris Legal Publishers: Zutphen 2017, p. 91-93.

11 The definitions of the various private regulations differ slightly:

YAR 2016 - 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.'

IVR Rules 2016 - Rule I:

'Sacrifices and expenditure reasonably made and/or incurred, in extraordinary circumstances, for the purpose of saving a vessel and its cargo from a common peril are general average.'

Danube Rules 1990 - Rule I:

'Unter Havarie-Grosse versteht man außerordentliche Aufwendungen und Opfer, die absichtlich und vernünftigerweise zum Zweck der Sicherung und/oder Rettung des Vermögens (Schiff, Ladung und Fracht) vor einer gemeinsamen Gefahr gemacht worden sind.'

12 A reference to the YAR can be found in basically all contracts of affreightment for sea going voyages and marine insurance policies.

### 2.1.2 Absence of a supranational regime

There is no supranational regime that regulates general average in a binding manner. Neither in general, nor in respect of inland waterway carriage. A general average convention does not exist. Nor is there an EU-Regulation in place that regulates general average.

#### CMNI

The convention that regulates the carriage of goods by inland water ways, the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway ('CMNI'), merely acknowledges general average's existence, but does not provide for a regime to deal with it. The CMNI refers back to the contractual provisions or the national law for the amount of damages and contributions payable in general average:

Art. 26 CMNI:

'Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding the calculation of the amount of damages and contributions payable in the event of general average.'

Interestingly, the CMNI does not provide for a general average definition or an explanation in which circumstances general average is deemed to exist. It is indicated in the Travaux Préparatoires that the concept is to be regarded and interpreted as in other transport agreements and in particular as in sea carriage.<sup>13</sup> This in spite of the fact that the definitions applied in the various regulations vary<sup>14</sup> and the private rules in addition to the definition expressly provide for specific disbursements to qualify as general average.<sup>15</sup>

The CMNI contains some provisions on the parties that are liable to contribute in general average. Pursuant to the CMNI, the shipper has to pay amounts due under the contract of carriage (art. 6). The consignee is liable for inter alia general average as well after he has requested delivery of the goods:<sup>16</sup>

13 T. Hacksteiner, *Travaux Préparatoires des Budapester Übereinkommens über den Vertrag über die Güterbeförderung in der Binnenschifffahrt (CMNI)*, Uitgeverij Paris: Zutphen 2014, p. 411: 'Es besteht Einvernehmen darüber, dass der Begriff Große Havarie genau so zu verstehen und auszulegen ist, wie in allen anderen Übereinkommen im Verkehrsbereich und insbesondere im Seeverkehr.'

14 See footnote 11 above.

15 For example, Rule II and XXIV IVR Rules 2006.

16 By contrast, the Dutch Civil Code stipulates as the relevant parties for general average the owner of the inland waterway vessel (unlike the contractual carrier – art. 1 under 2 CMNI), the party interested in the freight, the receiver of the cargo and the owners of other goods carried on board. Interestingly and possibly contradictory, Rule XXVI IVR Rules 2006 regards containers as cargo. The IVR Rules merely deal with contributory assets, but not with the parties interested in these assets (Rule XII IVR Rules 2006). It is indicated in the 'General Average IVR Rules IVR and commentary, Edition 2006', in the commentary to Rule XII that it was 'implicitly agreed in accordance with universal practice, that

Art. 10 CMNI:

‘Notwithstanding the obligation of the shipper under article 6, paragraph 1, the consignee who, following the arrival of the goods at the place of delivery, requests their delivery, shall, in accordance with the contract of carriage, be liable for the freight and other charges due on the goods, as well as for his contribution to any general average. In the absence of a transport document, or if such document has not been presented, the consignee shall be liable for the freight agreed with the shipper if it corresponds to market practice.’

The CMNI’s scope is limited to contracts of carriage.<sup>17</sup> General average, however, is not necessarily a contractual obligation.<sup>18</sup> When cargo has been sacrificed, a cargo interested party may claim a contribution from another cargo interested party. As further discussed below, it is doubtful that the CMNI’s scope extends to such obligations as well.<sup>19</sup>

CLNI

Other supranational regimes, like the Strasbourg Convention on the limitation of liability in inland navigation 2012 (‘CLNI’) do not provide for a substantive general average regime either. Art. 3 CLNI merely provides that:

‘The rules of the present Convention shall not apply to: (b) claims for contributions in general average.’

Again, the draftsmen seem to assume that a general understanding or definition of general average exists rather than deliberately providing for flexibility.

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general average must be borne by the parties interested in the vessel, the cargo and the freight’. It is not specified who these parties are. This may give rise to discussion. See J. Kruit, ‘Liability for the general average contribution due in respect of the cargo’, (2017) 23 *JIML*, p. 246-249.

17 See on the CMNI’s scope also T.K. Hacksteiner, ‘Reikwijdte van het Verdrag van Boedapest inzake de overeenkomst van goederenvervoer over de binnenwateren (CMNI)’, *TVR* 2007-5, p. 144-150.

18 J. Kruit, *General Average, Applicable Law and Legal Basis*, Paris Legal Publishers: Zutphen 2017, p. 68-69.

19 The question is also whether a claim against another party in the chain of contracts of carriage than against the contractual party is a contractual claim. See also M. Fischer, ‘Der Ladungsbeitrag zur Havarie-grosse und die Obhutshaftung des Frachtführers in der Binnenschifffahrt’, *TranspR* 2019, p. 170.

### 2.1.3 National regimes

The national laws do provide for general average rules.<sup>20</sup> Their contents differ, both in extent and in respect of substance.<sup>21</sup>

Most states provide for (some) freedom of contract in the field of general average in their national rules.<sup>22</sup> Uniformity on the applicable rules can thus be created to some extent in contracts of carriage and security forms, but contractual provisions aiming to create uniformity are rare.<sup>23</sup> They are also subject to the limits set by the applicable national law.

### 2.1.4 Private regulations

Contractual general average arrangements can be tailor made, but also of a more general nature.

Following the success of the York-Antwerp Rules for the adjustment of general average related to the carriage of goods by sea, private regulations were also developed to regulate general average for inland waterway shipping. The Rhine Rules, which aimed to regulate general average on the Rhine, were published in 1956 by the IVR.<sup>24</sup> In the following decades, the Rhine Rules were regularly updated. Their name was changed to General Average Rules IVR ('IVR Rules') in 2003 in order to 'recommend an analogue application of the IVR Rhine Rules also in Middle- and East European countries.'<sup>25</sup>

To regulate the general averages on the Danube, the Danube Rules were agreed under the Bratislava Agreements.<sup>26</sup>

20 See inter alia M. de Decker, *Europees Internationaal Rivierenrecht*, Maklu: Antwerpen/Apeldoorn, 2015, p. 1215-1216 (para. 2034-2035) and J. Kruit, *General Average, Applicable Law and Legal Basis*, Paris Legal Publishers: Zutphen 2017, p. 68.

21 The German regime is quite extensive, whereas the Dutch regime only exists of 3 articles (art. 8:1020-1022 DCC), including a reference to the Rhine Rules 1979 (edition 1996). See also M. de Decker, *Europees Internationaal Rivierenrecht*, Maklu: Antwerpen/Apeldoorn, 2015, p. 1214 (para. 2034) and J. Kruit, *General Average, Applicable Law and Legal Basis*, Paris Legal Publishers: Zutphen 2017, p. 91-93, 99-101, 106-108.

22 J. Kruit, *General Average, Applicable Law and Legal Basis*, Paris Legal Publishers: Zutphen 2017, p. 74-75 en M. de Decker, *Europees Internationaal Rivierenrecht*, Maklu: Antwerpen/Apeldoorn, 2015, p. 1215 (para. 2034).

23 The standard IVR "revers" does not contain a choice of law clause. For jurisdiction it refers to the contract of carriage. Obviously, when many contracts of carriage are involved, various jurisdictions may play a role.

24 [www.ivr.nl](http://www.ivr.nl).

25 Foreword to the issue of the IVR General Average Rules Edition 2003.

26 The Bratislava Agreements ('Bratislava Abkommen 1956') were agreed at a Director's Conference. As also pointed out by Zsolt Kovacs in his presentation during the 9<sup>th</sup> IVR Colloquium in Belgrade, the Bratislava Agreements and the Danube Rules are difficult to actually get hold of.

It has been argued that the Bratislava Agreements are no longer to be applied as they are contrary to the EU-rules on competition in inland waterways. Inter alia Informal Document SC.3 4(2009) of the Economic

The IVR Rules and the Danube Rules can be and are incorporated in contracts for carriage by inland waterway or are agreed upon in security forms after a general average event occurred. Moreover, national laws may incorporate the IVR Rules in their national systems.<sup>27</sup>

In 2009, in order to harmonize the patchwork of potentially applicable regimes, Serbia took the initiative to create 'pan-European Rules on General Average'.<sup>28</sup> The Rules were to be based on the IVR Rules 2006. Although positive feedback was provided by the Russian Federation,<sup>29</sup> the initiative was not pursued.

## 2.2 *Establishment of the applicable regime*

In situations involving a conflict of laws, the applicable national regime in member states of the European Union will have to be determined on the basis of the conflict rules of the Rome Regulations.<sup>30</sup> Either on the basis of the Regulations' substantive rules or on the basis of other supranational conflict rules which are allowed by the Rome Regulations. Art. 25 Rome I respectively art. 28 Rome II provides that the Regulation will not prejudice conflict rules set out in a Convention to which one or more Member States were parties at the time when the Regulation was adopted. Art. 29 CMNI is generally regarded as such conflict rule that takes precedence.<sup>31</sup> Clearly, the precedence is limited to the questions which are dealt with by the specialised convention.<sup>32</sup>

The CMNI contains several conflict of law rules in art. 29 to close the gap between the Convention and unregulated aspects. It provides for 'Additional national provisions':

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Commission for Europe: [www.unece.org/fileadmin/DAM/trans/doc/2009/sc3wp3/SC3-53-inf04e.pdf](http://www.unece.org/fileadmin/DAM/trans/doc/2009/sc3wp3/SC3-53-inf04e.pdf). Thereafter some amendments were made to the Bratislava Agreements.

27 For example art. 8:1022 DCC *cf.* Royal Decree dated 5 February 2000, *Stb.* 112. Also art. 623 of the Serbian Merchant Shipping Act. The Hungarian Act on Waterway Transport provides in art. 68 (3) that 'The international rules generally applied on the place where the perilous event occurred shall apply for the method and terms of the adjustment'.

28 [www.unece.org/fileadmin/DAM/trans/doc/2009/sc3wp3/SC3-53-inf04e.pdf](http://www.unece.org/fileadmin/DAM/trans/doc/2009/sc3wp3/SC3-53-inf04e.pdf).

29 [www.unece.org/fileadmin/DAM/trans/doc/2011/sc3wp3/ECE-TRANS-SC3-WP3-inf17e.pdf](http://www.unece.org/fileadmin/DAM/trans/doc/2011/sc3wp3/ECE-TRANS-SC3-WP3-inf17e.pdf).

30 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'), respectively 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').

31 P. Mankowski in: E. Magnus and P. Mankowski, *European Commentaries on Private International Law ECPIL, Volume II, Rome I Regulation*, Verlag Dr. Otto Schmidt KG: Köln 2017, p. 873. Also: District Court of Rotterdam 20 August 2014, *Se&S* 2015/88 (Jonas).

32 P. Mankowski in: E. Magnus and P. Mankowski, *European Commentaries on Private International Law ECPIL, Volume II, Rome I Regulation*, Verlag Dr. Otto Schmidt KG: Köln 2017, p. 864.

1. In cases not provided for in this Convention, the contract of carriage is governed by the law of the State agreed by the Parties.
2. In the absence of such agreement, the law of the State with which the Contract of carriage is most closely connected is to be applied.
3. It is to be presumed that the contract of carriage is most closely connected with the State in which the principal place of business of the carrier is located at the time when the contract was concluded, if the port of loading or the place where the goods are taken over, or the port of discharge or the place of delivery or the shipper's principal place of business is also located in that State. Where the carrier has no place of business on land and concludes the contract of carriage on board his vessel, it is to be presumed that the contract is most closely connected with the State in which the vessel is registered or whose flag it flies, if the port of loading or the place where the goods are taken over, or the port of discharge or the place of delivery or the shipper's principal place of business is also located in that State.
4. The law of the State where the goods are located governs the real guarantee granted to the carrier for claims set out in article 10, paragraph 1.

In line with the Rome Regulations, it gives precedence to the law chosen by the parties.<sup>33</sup> When no choice of law has been made, the contract of carriage is to be governed by the law that is most closely connected with the contract of carriage.<sup>34</sup> Several presumptions have been provided to establish the most closely connected law, based on the carrier's place of registration.<sup>35</sup>

It is doubtful whether art. 29 CMNI covers general average provisions in the contract of carriage as well. Although general average (or at least the adjustment regime) is often regulated contractually, in essence it is not a contractual concept.<sup>36</sup> In the absence of a clear provision, the question may therefore be asked whether it falls within the CMNI's scope and hence under art. 29 CMNI to begin with. In addition, art. 26 CMNI provides that 'Nothing in this Convention shall prevent the application of provisions in the contract of carriage'.<sup>37</sup>

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33 Compare art. 3 Rome I and art. 14 Rome II.

34 The closest connection plays a role as well under the Rome Regulations. However, the connection is there made to the specific obligation rather than with a contract. In addition, specific rules have been given rather than mere presumptions. Compare art. 4-7 Rome I; art. 4-7, 10-12 Rome II.

35 Art. 29 lid 3 CMNI.

36 J. Kruit, *General Average, Applicable Law and Legal Basis*, Paris Legal Publishers: Zutphen 2017, p. 68-69. See also para. 2.1.1 above.

37 M. de Decker, *Europees Internationaal Rivierenrecht*, Maklu: Antwerpen/Apeldoorn, 2015, p. 1125 (para. 1840).

As such, general average may well fall outside the CMNI's scope and its conflict of law rule. At the same time, an obligation to contribute in general average may be a contractual obligation when the contract of carriage provides this. For those obligations, the position may be different and they could arguably be subject to art. 29 CMNI as it does not expressly exclude general average from its scope.<sup>38</sup> Moreover, the provision in art. 29 (4) that 'The law of the State where the goods are located governs the real guarantee granted to the carrier for claims set out in article 10, paragraph 1', does seem to be written also for general average, as art. 10 CMNI expressly mentions general average. It will not infrequently occur that the contract of carriage is subject to another law than the security provided. When the security is regarded to govern the general average relationship between the parties, this may lead to confusion. The same is true when various contracts involved are subject to varying national laws.

In case art. 29 CMNI does not apply, the Rome Regulations are supposed to give the relevant framework. However, neither of the Rome Regulations provides for a specific conflict of law rule for general average.<sup>39</sup>

### 2.3 Numbers

When the status quo is discussed, it would be helpful to have a rough idea of the amount of general averages on an annual basis. In the Netherlands, a reasonable estimate seems to be in the region of 5 per month, so around 60 per year. In Germany, the amount seems roughly half of the Dutch annual figure. This estimate is based on information provided by Dutch insurance brokers, underwriters and (Dutch and German) average adjusters, who kindly provided their input in this respect.

However, the times that general average cases are pursued by instructing an independent adjuster appear to be very limited.<sup>40</sup> In particular in respect of the smaller general averages, the hull and machinery underwriters (surveyor) will often draw up a general average statement. As such it is difficult to get a clear picture of accurate numbers.

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38 M. de Decker, *Europees Internationaal Rivierenrecht*, Maklu: Antwerpen/Apeldoorn, 2015, p. 1126 (para. 1840).

39 This is discussed in some detail for general average in respect of the international carriage of goods by sea in J. Kruit, *General Average, Applicable Law and Legal Basis*, Paris Legal Publishers: Zutphen 2017, p. 203-260.

40 Reportedly a serious percentage of the general averages is related to low water levels in Germany. Under the IVR Rules 2006, the port of refuge costs in such situation are excluded under Rule XXIV (2).

## 2.4 *Many regimes for relatively few incidents*

It follows that there are many regimes that may be applicable and that it is not so easy to determine which regime is actually applicable. Especially not when long chains of contracts and/or many parties are involved in the general average. On the other hand, there do not appear to be that many general average incidents that give rise to disputes, or at least not that end up in published court decisions. As such the need for further unifying regulation may seem absent. However, in situations in which an independent average adjuster is not involved and courts are not checking what happens either, it is arguably even more important that there is clarity on the applicable rules.

## 3 WHAT MAY LIE AHEAD?

### 3.1 *Abolishment unlikely*

Since the creation of the first versions of the York-Antwerp Rules at the end of the 19<sup>th</sup> century, it has been argued by different persons for varying reasons that general average should be abolished.<sup>41</sup> The concept would be expensive, slow and susceptible to fraud.<sup>42</sup> The reservations for introducing the concept in inland waterway in and before the nineteenth century, as briefly mentioned above, could also be seen as to support a plea for abolishment. On the other hand, general average in the meantime has become such an established concept that it will be difficult to do away with it completely. It would require amendment of conventions, national legislations and contracts of carriage that all contain some general average provisions. More importantly, the mere abolishment of the general average apportionment system would not mean that no compensation could be requested for costs which are now regarded as general average anymore on the basis of other legal concepts, like unjust enrichment and benevolent interference in another's affairs (*negotiorum gestio*).<sup>43</sup> As such, an abolishment seems unlikely to happen.

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41 J. Kruit, *General Average, Applicable Law and Legal Basis*, Paris Legal Publishers: Zutphen 2017, p. 16-17 (in particular footnote 12 which contains references to literature in which the issue was discussed more extensively).

42 The process of general average, including the preparation of an average adjustment can be quite expensive and time consuming.

43 Throughout the centuries, comparisons have been made between general average and unjust enrichment respectively benevolent interference in another's affairs. J. Kruit, *General Average, Applicable Law and Legal Basis*, Paris Legal Publishers: Zutphen 2017, p. 244-245 (in particular footnote 341).

### 3.2 *Further uniformity desirable and not unrealistic*

#### 3.2.1 **Benefits of uniformity**

When general average will continue to exist indeed, it is not clear at all that it will continue in its current form, i.e. meddling through with various deviating regimes. In 2014 Stuart Hetherington, the then President of the Comité Maritime International wrote: 'The goal of uniformity, or at least greater uniformity is a noble one and it should be pursued'.<sup>44</sup> This equally applies to inland waterway shipping<sup>45</sup> and in particular to general average.

General average binds parties that may have no relationship but for the fact that the property in which they have an interest is involved in the same maritime adventure. Most national regimes provide for freedom of contract in respect of general average, at least to some extent.<sup>46</sup> Confusion may arise when different regimes are agreed upon in contracts involved in the same maritime adventure, for example when a contract for one container refers to the Danube Rules and the contract for another to the IVR Rules. Things may even get more complicated when contracts in the same contractual chain for a particular cargo refer to different regimes. It goes without saying that it would be extremely useful when they are all subject to the same regime, regardless of their nationality or the national legal regime that is applicable to the contract of carriage in addition to the CMNI.

In fact, the question is not whether, but how further uniformity should be obtained from a practical and from a substantial perspective

#### 3.2.2 **Creation of uniformity**

In the last decades, important steps have been taken in unifying the rules governing the international inland waterway transport. Unlike in the carriage of goods by sea where the willingness to ratify conventions is waning, the CMNI has soon after its signing become a success.<sup>47</sup> In August 2019, it was applicable in 15 countries.<sup>48</sup> This is also promising for general average in inland waterway shipping. Diplomacy has clearly worked before and may do so again. As such, further unification of the applicable rules on general average may be possible as well. Also as the IVR aims to further unify the laws on inland waterway

44 S. Hetherington, 'The CMI and the Panacea of Uniformity', *Tul. Mar.L.J.*, 2014-1, p. 159-182.

45 As Johannes Trost mentioned at the 9<sup>th</sup> IVR Colloquium in Belgrado (5 September 2019), 'The need and relevance of unification is undisputed'.

46 M. de Decker, *Europees Internationaal Rivierenrecht*, Maklu: Antwerpen/Apeldoorn, 2015, p. 1214 (para. 2034); J.A. Kruit, 'Avarij-grosse in Boek 8 BW: Less is more?', *TVR* 2017-4, p. 120.

47 Also T.K. Hacksteiner, 'Reikwijdte van het Verdrag van Boedapest inzake de overeenkomst van goederenvervoer over de binnenwateren (CMNI)', *TVR* 2007-5, p. 149.

48 Belgium, Bulgaria, Germany, France, Hungary, Croatia, Luxembourg, Moldavia, the Netherlands, Romania, the Russian Federation, Serbia, Slovakia, Czech Republic and Switzerland.

shipping and it administers both the main private general average rules applied in inland waterway shipping (the IVR Rules) and the main conventions applied in the carriage of goods by inland waterways (the CMNI and CLNI).

The issue of substantive rules should not cause great difficulty. The IVR Rules are generally accepted as providing a sound regime for general average in inland waterways. They are frequently applied in contracts of carriage, are referred to in the 'Internationale Verlade- und Transportbedingungen 2010' ('IVTB')<sup>49</sup> and have been given statutory application.<sup>50</sup> In addition, the suggestion to use the IVR Rules as basis for the Pan-European Rules on General Average does not seem to have been objected.<sup>51</sup>

It would be sensible, however, to make some amendments and/or extensions to the IVR Rules. Additions may be made in respect of inter alia the general average interested parties, time bars, the influence of fault and security rights.<sup>52</sup> But altogether there should be less discussion on the contents of uniform rules.

The more difficult issue from a practical perspective may be how to give the IVR Rules overall application. It is clear that an overriding, supranational status is advisable. A mere contractual application of the rules is unlikely to lead to their overall applicability on all aspects. In particular as general average is not a contractual subject only. It should also be noted that a contractual application is based on the willingness of the parties to agree to their application. Moreover, in the absence of the same additionally applicable law,<sup>53</sup> the

49 The IVTB play an important role in inland water way shipping. See also: T.K. Hacksteiner, 'Inwerkingtreding Verdrag van Boedapest inzake de overeenkomst van goederenvervoer over de binnenwateren (CMNI)', TVR 2006-4, p. 119-125.

In respect of the incorporation of the IVR Rules on general average, § 20(1) IVTB provides: 'Für die Havarie-Grosse gelten die Havarie-Grosse-Regeln der IVR in ihrer jeweils letzten gültigen Fassung (publiziert in [www.ivr.nl](http://www.ivr.nl)). Der Text steht auf Verlangen zur Verfügung'.

50 Art. 8:1022 DCC; art. 623 Serbian Merchant Shipping Act.

51 In respect of the Pan European Rules on General average, the Russian Federation suggested that the IVR Rules were extended with provisions included in their national legislation. [www.unece.org/fileadmin/DAM/trans/doc/2011/sc3wp3/ECE-TRANS-SC3-WP3-inf17e.pdf](http://www.unece.org/fileadmin/DAM/trans/doc/2011/sc3wp3/ECE-TRANS-SC3-WP3-inf17e.pdf).

52 M. de Decker, *Europees Internationaal Rivierenrecht*, Maklu: Antwerpen/Apeldoorn, 2015, p. 1216 (para. 2036). These issues have not been duly regulated in the YAR either. J. Kruit, *General Average, Applicable Law and Legal Basis*, Paris Legal Publishers: Zutphen 2017, p. 65-66.

53 There is no internationally uniform rule to determine which law is applicable to the various aspects of general average. It is uncertain whether art. 29 CMNI applies to general average at all. When it does, it will not regulate all aspects. The same applies in respect of the question which court is entitled to deal with a general average situation. Uniformity can be created to some extent in security forms, but that is a voluntary decision after an incident occurred. See also para 2.2. above.

criteria for application<sup>54</sup> as well as the actual application and interpretation of the provisions may vary – even in respect of the same general average incident.

The main options to give a supranational status to uniform rules are to include them in a Convention or EU Regulation. The obvious benefit of an EU Regulation would be its scope. It would automatically bind all EU-member states. Nevertheless, its scope would at the same time be a downside. The benefit of a status of a convention is that it may also bind non-EU Member States, like the Russian Federation, Ukraine and Serbia. A conventional status also seems preferred from the point of view that it could supplement the CMNI. In fact, rather than creating a separate general average convention that would have to be agreed upon by countries individually, an option may also be to incorporate the IVR Rules in the CMNI. For the contributions/calculations in general average, the CMNI in art. 26 merely refers to the national law or the contractual provisions.<sup>55</sup> This provision could be amended with a reference that general average is regulated by and the adjustment is to be drawn up pursuant to the IVR Rules in extended form. It should also provide that it applies to all general averages arising from or in respect of contracts for the carriage of goods.

It is uncertain whether and if so when a revision of the CMNI will take place.<sup>56</sup> A suggested inclusion of a general average regime may be an excellent cause to also consider other issues that may be good to address.<sup>57</sup>

### 3.3 *Cost reduction measures*

Other, less substantial changes that may be observed in the field of general average in the following years are the introduction of cost reducing measures.

In shipping, like in other fields of business, there has been a general trend to reduce costs as much as possible. General average is generally regarded as an expensive venture, especially when many parties are involved. Security has to be collected, documentation needs

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54 The criteria for agreeing upon contractual terms and especially for the of incorporation general terms and conditions as set by the national laws vary.

55 The Dutch Civil Code incorporates the Rhine Rules IVR 1979 (edition 1996) by Royal Decree dated 5 February 2000, *Stb.* 112 (*cf.* art. 8:1022 DCC). The Dutch general average committee advised the Dutch government in 2018/2019 that the incorporation of the Rhine Rules IVR 1979 should be replaced by an incorporation of the General Average Rules IVR 2006.

56 Art. 36 CMNI provides that at the request of one third of the contracting states, a conference is convened for revising/amending the convention.

57 For example, IVR's wish to extend the CMNI's scope to national inland waterway carriage. T.K. Hacksteiner, 'Reikwijdte van het Verdrag van Boedapest inzake de overeenkomst van goederenvervoer over de binnenwateren (CMNI)', *TVR* 2007-5, p. 149.

to be gathered and processed by the average adjuster, contributions need to be obtained and redistributed, etc. It goes without saying that when the overall financial value of the general average is modest, going through the motions may create an unreasonable amount of costs. In smaller inland waterway general averages, costs have already been reduced by refraining to instruct an independent average adjuster. But also in those cases, security collection and obtaining payment can be a time consuming and expensive exercise.

In general averages related to carriage of goods by sea, various measures have been implemented to reduce the overall financial burden. Some of these measures may also be worthwhile to apply in inland water way shipping. These are discussed below.

### 3.3.1 Commercial invoice leading for contributory value cargo

As first example, the fixation of the cargo's contributory value at the commercial invoice value can be mentioned.<sup>58</sup> In the YAR 1974, a provision was inserted that the contributory value of the cargo is to be established on the basis of the invoice value. This effectively prevents that for each and every cargo, the actual market value at the place of destination needs to be ascertained. The simplification was estimated to be achieved in 95% of the cases in which cargoes arrived in sound condition.<sup>59</sup> By comparison, Rule XII IVR 2006 still takes the actual CIF value of the cargo at the end of the voyage into account and does not give the option to merely look at the commercial invoice.

### 3.3.2 Exclusion of (too) low value cargoes

Another example is the addition made in the YAR 2016 in Rule XVII(a)(ii) that an adjuster is allowed to exclude cargo from contributing in general average when he deems 'the costs of including it in the adjustment would be likely to be disproportionate to its eventual contribution'. When small cargo values are involved, for example in container shipping and especially in case of consolidated containers, the actual costs of obtaining a contribution for the particular cargo may be much higher than the actual contribution that can be obtained for the contributory value in general average. It is then more cost efficient for all parties not to include these low value cargoes in the adjustment.<sup>60</sup>

### 3.3.3 General average absorption clauses

Most effectively, however, appears to have been the inclusion of general average absorption clauses in the vessel's H&M's insurance policies, whether or not completed by a related

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58 Rule XVII YAR 1974.

59 R.R. Cornah, R.C.G. Sarll and J.B. Shead, *Lowndes and Rudolf – The Law of General Average and The York-Antwerp Rules*, Thomas Reuters: Croydon 2018, p. 447.

60 The provision is in line with the Lloyd's Open Form (art. 15 Lloyd's Standard Salvage and Arbitration Clauses). See also R.R. Cornah, R.C.G. Sarll and J.B. Shead, *Lowndes and Rudolf – The Law of General Average and The York-Antwerp Rules*, Thomas Reuters: Croydon 2018, p. 460.

clause in the contract of carriage.<sup>61</sup> The absorption clause provides that the vessel's underwriters pay the full general average up to a certain agreed amount.<sup>62</sup> When the total costs of the general average are below the indicated amount, this prevents that other parties to the maritime adventure have to be bothered and/or security needs to be arranged from them. Serious costs can be saved. Moreover, carriers do not have to burden their commercial relationships with the inconvenience of providing security for and paying a compensation in general average either.<sup>63</sup>

The use of absorption clauses has become so well accepted that it is nowadays unusual for hull policies for ocean-going vessels not to include an absorption clause.<sup>64</sup> Due to the absorption clause's success, the actual general averages in which security and contributions were obtained from cargo interested have been significantly reduced.<sup>65</sup>

Inland waterway vessel's insurance policies, by contrast, do not include general average absorption clauses. This may be related to the fact that inclusion of the clause may not always be in the interest of the vessel interested parties. Amounts paid under the clause will be included in the damage history of their policy and may impact on (future) premiums. The absence of the clause in policies in some instances may also result from high deductibles, or simply because cargo interested parties have not requested the same to be arranged by the carriers.

### 3.3.4 Application of measures in inland waterway shipping?

In inland waterway transport, none of the above cost reducing measures that are applied in sea carriage general averages have yet become common practice or are even used (otherwise than incidentally). In view of the trend to reduce costs and given the success in the carriage of goods by sea, their application may well rise in the next years. Especially

61 J. Kruit, *General Average, Applicable Law and Legal Basis*, Paris Legal Publishers: Zutphen 2017, p. 123-124.

62 The agreed amount may be USD 100,000 but could also be USD 5 million for a big container vessel.

63 Also J. Spencer, 'Hull Insurance and General Average – Some Current Issues', *Tulane Law Review* 2009 (83), p. 41.

64 R.R. Cornah, R.C.G. Sarll and J.B. Shead, *Lowndes and Rudolf – The Law of General Average and The York-Antwerp Rules*, Thomas Reuters: Croydon 2018, p. 619.

65 R.R. Cornah, R.C.G. Sarll and J.B. Shead, *Lowndes and Rudolf – The Law of General Average and The York-Antwerp Rules*, Thomas Reuters: Croydon 2018, p. 16.

In 2002, BIMCO already predicted a very serious reduction due to the use of absorption clauses: 'Collecting security on all contributing interests and settling afterwards is an extremely time-consuming business for average adjusters and could account for up to 50 percent of general average costs. This work and the consequential cost thereof is the same irrespective of the amounts allowable in general average. It has been estimated that an absorption limit of 3 percent of the insured value of the vessel would eliminate one-third of general average claims. A limit of 6 percent of the insured value of the vessel would reduce the number of general average claims by half.' BIMCO Special Circular 'Standard General average absorption clause', 2002-2, 14 August 2002.

when container shipping by inland waterways increases and the amount of parties involved may rise accordingly.

#### 4 CONCLUSION: GENERAL AVERAGE'S FUTURE IS BRIGHT

It follows from the above that general average is regarded as a helpful instrument to share particular costs and losses. With increasing inland waterway shipping, both in tonnage, in values<sup>66</sup> and numbers of containers,<sup>67</sup> the concept's role may arguably only extend. It is then obviously even more important that a proper regime is in place that is easy to single out and to apply. As such, further uniformity is welcome and given the successful steps taken in unifying the rules on inland waterway shipping (inter alia by Resi), not unimaginable.

At the same time, there is a general trend to limit costs as much as possible. It is therefore not unlikely that cost reducing measures which have shown their value in general average in the carriage of goods by sea will also find their way in inland water way shipping. Moreover, further uniformity is likely to lead to a reduction of costs as well.

The more efficient the system, the likelier that the general average concept will continue to be applied. Hopefully the concept of general average and the IVR Rules (whether or not in amended form) will continue to prove their value even long after Resi's retirement as Secretary General. At present there does not appear to be a reason why they should not.

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66 In its extensive report from 2017 with a forecast for the next five years, Panteia expects a growth of cargo volume: [www.panteia.nl/uploads/sites/2/2017/02/MLT-binnenvaart-2017-2021.pdf](http://www.panteia.nl/uploads/sites/2/2017/02/MLT-binnenvaart-2017-2021.pdf). The ING Economic Office expects an increase of volumes of 2,5% in 2019 and 1,5% in 2020: [www.ing.nl/zakelijk/kennis-over-de-economie/uw-sector/outlook/shipping.html](http://www.ing.nl/zakelijk/kennis-over-de-economie/uw-sector/outlook/shipping.html).

67 <https://www.ad.nl/rotterdam/meer-containers-via-de-binnenvaart-van-rotterdam-naar-zeeland-en-gent~ac4e7817/>; [https://ec.europa.eu/eurostat/statistics-explained/index.php/Inland\\_waterways\\_-\\_statistics\\_on\\_container\\_transport](https://ec.europa.eu/eurostat/statistics-explained/index.php/Inland_waterways_-_statistics_on_container_transport).