

General average in maritime law: International experience and considerations for Vietnam

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ABSTRACT

The transportation of goods by sea is conducted based on carriage contracts, which stipulate the rights and obligations of the involved parties, the carrier's responsibilities, as well as provisions for dispute resolution, compensation for damages, and the allocation of losses in case of risks, ... This is a complex process that requires a thorough understanding of maritime law and international principles related to marine transport. During the transportation process, one of the most important aspects is the identification of the general average — a long-standing legal concept in international maritime law. General average involves the difficult decisions that a captain or shipowner must make in emergencies, such as sacrificing cargo or incurring extraordinary expenses to save the ship and goods from common danger.

The challenge lies in defining what constitutes "sacrifice" or "extraordinary expenses" that align with the concept of the general average. This is not only a matter of legal interpretation but also relates to the rights and obligations of parties involved in the transportation of goods, particularly the responsibilities of the shipowner and carrier regarding the determining general average in specific cases exactly. Currently, Vietnam regulations, especially the Maritime Code 2015, have yet to provide specific and clear guidelines on handling cases of general average. This creates difficulties in the application of laws, the resolution of disputes, and the compensation of losses when incidents occur during the transport of goods.

In the international context, many countries have implemented more specific regulations and standards regarding the general average, based on the common principles outlined in the York-Antwerp Rules — a well-known set of international guidelines in the maritime field. These rules not only provide a clear legal framework for determining reasonable costs and sacrifices but also help relevant parties foresee their responsibilities in emergencies. For Vietnam, learning from international experience to enhance legal regulations in this area is both a necessary and urgent issue.

Key words: General average, contract of carriage of goods by sea, York-Antwerp Rules

1 INTRODUCTION

2 Hundreds of years ago, the transportation of goods
3 by sea had to face many dangers such as fire, pirates,
4 storms, etc. and the parties involved in the voyage
5 had to bear certain risks. Then, the general average
6 (hereinafter referred to as "GA") emerged as an inde-
7 pendent mechanism in ancient times to adjust losses
8 incurred to ensure the safety of common maritime ad-
9 ventures. Today, to adapt to the global integration
10 process, the need to exchange goods between coun-
11 tries and territories is increasing. The more vibrant in-
12 ternational trade is, the more necessary the existence
13 and development of the GA becomes. Thanks to its
14 effectiveness as a tool for adjusting losses and risks in
15 common maritime adventure, the GA has been rec-
16 ognized and regulated in the laws of many countries
17 around the world, including Vietnam.
18 However, the authors found that there have not been
19 many research works or databases on GA in con-

tract of carriage of goods by sea in Vietnam. Besides, 20
Vietnamese law in general and the Vietnam Maritime 21
Code 2015 in particular have not had clear regulations 22
on this issue. The process of determining GA is a com- 23
plex and time-consuming assignment. Therefore, the 24
authors chose the issue "General Average in Contract 25
of Carriage of Goods by Sea: International Experience 26
and Lessons for Vietnam" as a research topic and 27
offer recommendations to improve our domestic law. 28
In this article, the authors focus on clarifying two 29
main objectives: (1) Analyzing the conditions under 30
which a loss is considered a general average as well as 31
identifying specific examples of general average losses 32
and (2) proposing solutions to improve the Vietnam 33
Maritime Code concerning the regime of "General 34
Average". 35

The purpose of the first objective is to help read- 36
ers clearly understand the conditions that losses must 37

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38 meet to be considered general average, while also providing practical illustrations to enhance readers' understanding of basic general average in real-world scenarios. Therefore, the authors first analyze the conditions under which a loss can be considered a general average. Additionally, the authors examine some of the fundamental types of GA to illustrate for the readers which losses are classified as GA in specific situations.^a

47 Furthermore, to achieve the second objective of proposing solutions to improve the Vietnam Maritime Code concerning the regime of General Average, the authors analyze domestic and international cases related to GA (particularly those applying the York-Antwerp Rules (hereinafter referred to as "YAR") on GA^b). The authors also compare and contrast the regulations of other countries on GA to provide the most objective and comprehensive recommendations.

57 RESEARCH METHODOLOGY

58 The authors employ the following research methods to complete this study:

60 * Analytical and Synthesis Method

61 In this study, the authors analyze and synthesize regulations and viewpoints on the general average in maritime cargo transport contracts. This method is also used to summarize researched perspectives and compare them with international and foreign laws to draw experiences for improving Vietnamese laws in this area.

68 * Comparative law method

69 The authors apply this method throughout the study to compare and contrast relevant regulations in various jurisdictions with foreign laws (the laws of the United Kingdom, Singapore, the People's Republic of China, South Korea, Japan, the Federal Republic of Germany), international laws (the Hague-Visby Rules), international customs, and model contracts (the York-Antwerp Rules, Gencon, Shellvoy), as well as with Vietnamese law, to derive multidimensional conclusions. Through this approach, the study identifies strengths and weaknesses of Vietnamese law and proposes solutions for enhancing Vietnamese Maritime Law provisions on the general average.

^aThe authors focus on analyzing specific general average based on two criteria: (1) whether the general average is commonly encountered in practice, and (2) whether the general average remains a subject of significant debate. Given that there are countless instances of general average in practice, it is not feasible to analyze all possible cases within the scope of this article.

^bThe authors chose YAR for analysis because it is the most commonly used set of rules on general average, trusted by cargo owners, shipowners, and other parties involved in sea transportation operations to apply to their contracts of carriage for the adjustment of general average when they occur.

RESULTS AND DISCUSSION

Overview of the "General Average" theory

GA is applied throughout the world as part of maritime law. In general, GA refers to a doctrine of maritime law that provides for the proportionate sharing by all parties to a maritime adventure of losses incurred where cargo is sacrificed in the event of a peril or expenses incurred for the common benefit of the parties to the adventure.¹

There are four main sources of GA regulations. *Firstly*, laws and customs of trade are fundamental sources of GA regulations. Before GA principle was embodied in the YAR, the adjustment of GA was governed by the law and custom of the place where the voyage ended.² *Secondly*, case law also contributes to the understanding of GA principles. Court decisions are another source of the GA principle. *Thirdly*, statutes in some jurisdictions include GA principles. For instance, many Scandinavian countries have periodically enacted various versions of the YAR into their national statutes, which govern GA adjustments within their legal systems.¹ *Finally*, YAR is considered the most widely accepted international document regulating GA adjustments. YAR is applied by most countries as the primary framework for dealing with GA cases.

Regarding the concept of GA, most reference countries widely apply it to partly minimize the damage caused by unexpected factors to the entire vessels. In Vietnam, the concept of GA is specified in Clause 1, Article 292 of the Vietnam Maritime Code 2015, specifically: "General average is any extraordinary sacrifice and expenditure is intentionally and reasonably made or incurred for the common safety in order to save the ship, goods, luggage, freight services, and passengers from common peril." This means that an action in GA arises if and only if any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred, with the common safety for the purpose of preserving property on a common maritime voyage from danger.

Where there is a GA act, any extraordinary sacrifice or expenditure reasonably and voluntarily incurred shall be calculated and allocated among the participants.³ This allocation is intended to preserve the property threatened in the common voyage. Depending on the case, there will be a corresponding provision for the party suffering the loss to receive a contribution from the participants, who may be the shipper, the carrier, the consignee, etc. The cost of such sacrifice or expense must be allocated proportionately among all the

133 interests in the voyage, including the interests result- 183
 134 ing from such sacrifice or expense. 184

135 In general, GA principle is developed on the princi- 185
 136 ple of fairness to preserve the common interests of all 186
 137 parties involved in a contract for the carriage of goods 187
 138 by sea.⁴ The adjustment of GA in a contract of cari- 188
 139 riage by sea plays an indispensable role because these 189
 140 clauses carry a series of important values and mean- 190
 141 ings for the parties involved in the contract. The concep- 191
 142 t of GA extends beyond the basic notion of cost- 192
 143 sharing; it also encompasses the broader goal of pro- 193
 144 tecting the common safety of the entire shipping sys- 194
 145 tem. The key functions of GA can be summarized in 195
 146 four main points: 196

- 147 (i) To encourage ship owners and all parties involved 197
 148 to take necessary and prompt relief measures to pre- 198
 149 serve ships and cargo from unusual dangers. 199
- 150 (ii) To ensure that all parties involved in the transport 200
 151 bear their share of the GA in a fair and reasonable 201
 152 manner.⁵ 202
- 153 (iii) To facilitate the GA adjustment process. 203
- 154 (iv) To promote cooperation and trust. 204

155 In conclusion, GA provisions are indispensable not 205
 156 only for the preservation of maritime safety but also 206
 157 for ensuring the rights of all parties involved in the 207
 158 transport. By fostering fairness and cooperation, GA 208
 159 contributes to a sustainable and effective global ship- 209
 160 ping industry. 210

161 **Conditions for determining General Aver-** 203 162 **age** 204

163 Rule A of the YAR establishes that an action in GA 205
 164 arises if and only if any extraordinary sacrifice or ex- 206
 165 penditure is intentionally and reasonably made or in- 207
 166 curred for common safety for the purpose of preserv- 208
 167 ing property from peril during a common maritime 209
 168 adventure. Thus, there are 5 important conditions to 210
 169 determine the GA: (1) extraordinary sacrifice or ex- 211
 170 penditure, (2) intentional act, (3) reasonable act, (4) 212
 171 time of peril and (5) for the common safety of the ad- 213
 172 venture. 214

173 **Extraordinary sacrifice or expenditure** 215

174 The YAR stipulates that one of the factors to determine 216
 175 GA is either extraordinary sacrifice or extraordinary 217
 176 expense. In fact, sacrifices may include cargo, ships 218
 177 and freight, etc. while extraordinary expenses that 219
 178 may arise are salvage, refuge costs at the port of refuge, 220
 179 environmental costs, substituted expenses, etc. 221

180 A typical case involving sacrifice is *Robinson v Price*⁶, 222
 181 where during a voyage, the vessel had a leak causing 223
 182 water to flood into itself. To stay afloat, the vessel must 224

continuously pump water out. By doing this action, the 183
 vessel quickly used up all the coal, cargo and parts of 184
 the vessel were forced to be burned to get fuel to con- 185
 tinue pumping water. As this sacrifice was unusual, 186
 the loss of parts of the vessel and its cargo was consid- 187
 ered GA. 188

Regarding expenses, in *Société Nouvelle d'Armement* 189
*v Spillers & Bakers Ltd.*⁷, the captain hired a tugboat 190
 to tow their vessel from Ireland to England to avoid 191
 being attacked by undersea submarines during World 192
 War I. Typically, a tugboat is engaged to assist a ves- 193
 sel in entering and leaving port, however, in this in- 194
 stance, the tugboat intervened in the vessel's voyage. 195
 However, the Court held that towing costs were not 196
 GA because they were not unusual during wartime. 197

In short, a sacrifice or expenditure must be of an ex- 198
 traordinary nature to be considered a GA.⁸ There- 199
 fore, ordinary expenses or losses incurred by the 200
 shipowner when performing the contract of carriage 201
 are not recognized as GA. 202

Intentional act 203

The sacrifice or expenditure shall be made or incurred 204
 intentionally.⁸ This means that the action must be 205
 chosen according to the free will of the decision maker 206
 and there are no accidental losses. Losses due to the 207
 effects of natural factors are only counted as particu- 208
 lar averages, regardless of their unusual nature.⁹ For 209
 example, when a fire occurs, using water to put out 210
 the fire is intentional. Therefore, water damage can 211
 be recognized as a GA, while fire damage remains a 212
 particular average because it arises due to an accident. 213
 The intentional act is either that of the captain or an 214
 act that he has ratified or approved.⁹ In case of emer- 215
 gency or for any reason the captain is absent, if the 216
 chief officer or another person on board makes a de- 217
 cision, the action will still be considered as GA, pro- 218
 vided that in such a situation the captain would make 219
 the same decision. 220

In *Athel Line v London & Liverpool WRA*¹⁰, two ves- 221
 sels in a convoy departing from Bermuda to the UK 222
 had to return to Bermuda on orders from the Con- 223
 voy Commander. As a result, the two vessels con- 224
 sumed more fuel and stores. The court held that the 225
 losses due to this delay were not the GA because the 226
 expenses were the result of blind compliance with or- 227
 ders from higher authority rather than a deliberate ac- 228
 tion by the captain. It can be seen that a forced action 229
 is not an intentional action, so the loss caused by it is 230
 not considered a GA. 231

232 **Reasonable act**

233 For a sacrifice or expenditure to qualify as a GA, it
 234 must be reasonably made or incurred.⁸ The captain’s
 235 action would be reasonable if taken with due discre-
 236 tion based on the information available to the captain
 237 at the time of the action.¹

238 In *The Cape Bonny*¹¹, when the engine broke down,
 239 the ship booked a tugboat for \$55,000 per day, despite
 240 the apparent availability of another tugboat at approx-
 241 imately \$40,000. The court held that the decision to
 242 order the more expensive tugboat was reasonable un-
 243 der the circumstances. As immobilization due to en-
 244 gine failure is a danger that must be resolved immedi-
 245 ately even in fine weather. Furthermore, in this case,
 246 the ship is also likely to be in danger due to the risk of
 247 storm MA-ON.

248 The Rule Paramount of YAR emphasized the reason-
 249 ableness requirement of a GA action that “*In no case*
 250 *shall there be any allowance for sacrifice or expendi-*
 251 *ture unless reasonably made or incurred*”. The phrase
 252 “all the circumstances” in this provision made reason-
 253 ableness of action the paramount criterion for a valid
 254 GA claim under the YAR.

255 **Time of peril**

256 A sacrifice or expenditure must be made or borne in
 257 times of peril.⁸ This means that the danger has to
 258 threaten the safety of the vessel and its cargo, it must
 259 exist in reality and not be imaginary. A sacrifice re-
 260 sulting from an erroneous assessment of the existence
 261 of a danger is not considered a GA.¹²

262 In *Joseph Watson and Sons Ltd v Fireman’s Fund In-*
 263 *surance Co*¹³, the captain believed the vessel was on
 264 fire and to extinguish it, he put steam into the cargo
 265 hold, which damaged the cargo. In fact, the ship never
 266 caught fire. It was held that there was no GA because
 267 there was no real peril.

268 Although the hazard must be real, it does not need to
 269 be immediate. In *Vlassopoulos v The British & For-*
 270 *eign Marine Insurance Co Ltd*¹⁴, the ship was placed
 271 in a port of refuge to have a faulty propeller repaired.
 272 The expenses incurred were recognized as GA since
 273 although the ship was not in actual peril at the time it
 274 entered the port of refuge, the action was reasonable
 275 to avoid potential danger later in the voyage. In other
 276 words, even though the danger has not yet occurred, it
 277 still exists. Thus, costs arising from reasonable actions
 278 to avoid potential dangers during the voyage may also
 279 be recognized as GA.

280 **Common safety**

281 To contribute to the GA, sacrifice or expenditure must
 282 be made for the common safety of the common mar-
 283 itime voyage.⁹ Therefore, a sacrifice or expenditure
 284 incurred just to ensure the safety of a part of the prop-
 285 erty during the voyage is not a GA. This principle rep-
 286 resents the will of sacrifice, which is to put common
 287 safety first, the losses of the minority can be sacrificed
 288 to ensure the benefits and safety of the majority. This
 289 principle leads to the following two consequences:

290 *First*, expenses incurred after a cargo has been brought
 291 to safety cannot be included in GA.⁹ These costs are
 292 considered to be beyond the scope of GA, as they do
 293 not contribute to the immediate preservation of the
 294 cargo during the voyage. Additionally, any expendi-
 295 tures related to routine maintenance or repairs carried
 296 out after the cargo’s safety is ensured are typically ex-
 297 cluded from GA contributions.

298 *Second*, the GA depends on the ultimate success of
 299 the sea voyage.⁹ The act of sacrifice must truly bring
 300 safety to both vessels and cargoes. If it does not bring
 301 common benefits or does not make the voyage suc-
 302 cessful, it is not recognized as a GA.

303 In short, sacrifices and expenses are recognized as GA
 304 when they are made or incurred voluntarily and rea-
 305 sonably in time of emergency for the purpose of pre-
 306 serving property in danger during the common voy-
 307 age. A loss that does not satisfy the above analyzed
 308 conditions is counted as a “particular average” and the
 309 other parties in the common maritime voyage do not
 310 have to share this type of average.

311 **Sacrifices or expenditures qualify as Gern-**
 312 **eral Average in specific cases**

313 **Jettisoned cargo**

314 The most popular GA case is about the cargo being
 315 sacrificed when they are jettisoned from ship
 316 to ensure the common safety.⁹ In normal circum-
 317 stances, when goods are jettisoned for reasons of gen-
 318 eral safety, all losses resulting from this action are
 319 considered GA losses. These losses may affect the
 320 ship itself or other cargo, as long as they directly arise
 321 from the sacrifice of the jettisoned goods.¹⁵ However,
 322 to mitigate the contribution to GA from such losses,
 323 Rule I of the YAR specifies that cargo jettisoned shall
 324 only be considered a GA loss if the cargo was carried
 325 in accordance with recognized commercial usage.¹⁶
 326 Alongside those general principles, the determination
 327 of GA arising from the jettisoned cargo from the ves-
 328 sel needs to be examined in specific cases such as jet-
 329 tioned cargo resulting from the fault of this cargo, jet-
 330 tioned cargo on deck, or incidents of damage caused
 331 by the jettisoned cargo.

332 *Jettisoned cargo resulting from the fault of this cargo*

333 A theory, established and applied in practice among
 334 parties allocating GA, holds that the sacrifice of an ob-
 335 ject that is itself the cause of danger, even if necessary,
 336 will not contribute to GA.¹⁷ For example, goods may
 337 self-destruct to the extent that they are no longer fit for
 338 carriage, or goods may become dangerously hot, pos-
 339 ing a threat to the safety of the vessel, and therefore
 340 be jettisoned. In such cases, the goods are not con-
 341 tributed to the GA as they are the cause of the danger.
 342 However, this theory has been shaken and narrowed
 343 in scope by court decisions¹⁷, notably including the
 344 following cases:

345 In *Johnson v. Chapman*¹⁸, a vessel laden with cargo on
 346 deck encountered adverse weather conditions, during
 347 which two significant events should be emphasized.
 348 Firstly, a large wave struck the cargo on deck, causing
 349 some materials to impact the pump, rendering it in-
 350 operable. Subsequently, the crew repositioned and se-
 351 cured the cargo. Secondly, seawater flooded the deck,
 352 causing the cargo to shift and collide with pumps on
 353 both sides. To avoid damaging the pumps and the ves-
 354 sel's integrity, and for the general safety of the voyage,
 355 the captain threw some cargo overboard. The cargo
 356 owner sued the shipowner to claim contribution to
 357 GA for the jettisoned cargo. This claim was contested
 358 on the basis that the cargo was jettisoned in a damaged
 359 condition. Additionally, it was argued that there was a
 360 custom among parties allocating GA not to recognize
 361 jettisoned defective cargo as GA. However, the Court
 362 decided that the jettisoned cargo in this case indeed
 363 constituted GA. This is because the cargo had previ-
 364 ously been secured once adrift, hence it was evidently
 365 not in a damaged condition (in the sense of having be-
 366 come lost or irretrievable or unusable upon recovery).
 367 The danger posed by the cargo was a common peril
 368 faced by all, including the vessel, cargo, and crew, so
 369 the jettisoned cargo can be considered a contributing
 370 factor to GA. It can be seen that the aforementioned
 371 theory does not apply to cargo shifted or damaged due
 372 to maritime accidents.

373 *Jettisoned cargo on deck*

374 In the rule concerning the jettisoned cargo as GA,
 375 there is an ancient and well-established exception that
 376 if cargo carried on the deck of a vessel is thrown
 377 overboard, generally, it will not be compensated for
 378 through contribution, although if saved, it must con-
 379 tribute to GA like other cargo interests.¹⁷ This means
 380 that cargo on deck thrown off the vessel is not consid-
 381 ered GA, but if they are ensured safety through sacri-
 382 fice or other expenses, the owners of cargo on deck

383 still have to contribute to GA. This is because cargo
 384 carried on deck is more likely to be damaged by sea-
 385 water. They also affect the stability of the vessel, in-
 386 crease difficulties in maneuvering, and impede ves-
 387 sel handling in times of peril. Their jettison is “the
 388 proper casting away of an unreasonable burden, and
 389 not a sacrifice for the common safety”.¹⁹ In general,
 390 the deck of a vessel is not a suitable place for cargo
 391 stowage, so their owners have no right to claim con-
 392 tribution.

393 However, there is an exception that the jettisoned
 394 cargo on deck will give rise to a contribution to GA
 395 when carried in accordance with recognized commer-
 396 cial usage or with the consent of all interested par-
 397 ties in the voyage.⁹ This exception acknowledges that
 398 such actions, when agreed upon collectively and per-
 399 formed under standard maritime practices, may be
 400 justified and contribute to GA to cover the shared
 401 costs incurred.

402 Such as, in case *Burton v. English*²⁰, the vessel was
 403 chartered to transport a full load of timber from a port
 404 in the Baltic region to London. The charter party con-
 405 tains a clause: “*The vessel to be provided with full deck
 cargo capacity, if required, at full freight... but seller to
 bear risk*”. It was demonstrated that there is a custom
 407 of timber being carried on deck in similar voyages.
 408 The Court of Appeal determined that when cargo is
 409 carried on deck according to commercial custom, its
 410 jettison must be considered a GA loss, despite a provi-
 411 sion in the charter party stating that cargo on deck is
 412 “*at seller's risk*”. At the Queen's Bench Division, it was
 413 decided that the phrase “*at seller's risk*” only exempts
 414 the shipowner from liability to contribute to the law-
 415 ful jettisoned cargo loss.

416 In conclusion, the jettisoned cargo carried on deck
 417 does not contribute to GA unless there is commer-
 418 cial usage or the consent of all interested parties in the
 419 voyage.
 420

421 *Salvage cost*

422 Salvage first appeared in Rule VI YAR 1974. The pur-
 423 pose of this rule is to force the parties to bear the cost
 424 of salvage whether it is stipulated in the contract or
 425 not, and at the same time recognize salvage as GA af-
 426 ter the end of the common voyage when this salvage
 427 action is taken for the common safety.^{21,22}

428 However, as Rule VI evolved to the YAR 2004 version,
 429 salvage costs were no longer recognized as GA,²³
 430 leading to this version being rarely used in contracts.
 431 Therefore, at the 2012 CMI Conference in Beijing, the
 432 International Working Group (IWG) was established
 433 to draft a new set of Rules to meet this requirement,
 434 which is the YAR 2016 version.
 435

435 Accordingly, Rule VI of YAR 2016 provides that any
 436 payment in the nature of salvage, made for the pur-
 437 pose of preserving the property concerned from peril
 438 during a common adventure at sea, whether under
 439 contract or arising independently from the contract
 440 is considered GA. However, this rule is applied differ-
 441 ently depending on the legal perspective of each coun-
 442 try, leading to different consequences for the payment
 443 of salvage costs.

444 In several countries, pure salvage (salvage without a
 445 contract) is still accepted if it meets the relevant con-
 446 ditions.²⁴ Accordingly, this salvage operation arises
 447 when a person, voluntarily (that is, without any pre-
 448 existing contractual or legal obligation), acts to pro-
 449 tect or contribute to the preservation of any vessel,
 450 cargo, or other salvage object at sea from danger.²⁵
 451 Thus, it can be seen that when performing obligations
 452 under a pre-existing contract, salvage will not be con-
 453 sidered a voluntary activity according to customary
 454 salvage law.

455 Unlike pure salvage, contractual salvage is carried out
 456 based on agreements between the ship owner and the
 457 prospective salvor, and this contract is binding on the
 458 parties.^c Typically, salvage agreements are based on
 459 a standard form; The most widely known form today
 460 is Lloyd’s Standard Form of Salvage Agreement.^{24,26}
 461 Accordingly, LOF is the most commonly used form
 462 for a “no cure - no pay” contract^d, meaning that the
 463 salvor will only receive a reward for his salvage ser-
 464 vice if the salvage operation is successful. However,
 465 the “no cure - no pay” clause still has an exception.
 466 When the salvage is unsuccessful, but the salvage ship
 467 has prevented the risk of causing damage to the envi-
 468 ronment, it will still receive an award.²⁷

469 For both types of salvage mentioned above, according
 470 to Rules VI YAR 2016, they are considered GA. In *Ja-*
 471 *son*²⁸, the United States Court of Appeals (Fifth Area)
 472 rendered that all salvage costs paid to salvors are de-
 473 termined based on various criteria related to the facts
 474 of the situation and at that time are recorded as GA.

475 In other cases, the GA adjustment agencies might pro-
 476 pose to the parties that if it is found that recalculating
 477 salvage costs according to GA will not significantly al-
 478 ter the figures or lead to extraordinary costs. The par-
 479 ties may then decide whether to include salvage costs
 480 in GA or not.²⁹

^cVietnam’s maritime law only recognizes salvage activities carried out on the basis of maritime salvage contracts, specifically in Article 264(1) of the Vietnam Maritime Code 2015.

^dAccording to the concept of “no cure, no pay” stipulated in the International Convention on Salvage 1989, salvors can only receive a salvage award if they succeed, otherwise, they must bear the responsibility themselves as risk of having an incident that leads to failure to salvage.

Therefore, whether salvage costs are recognized as GA
 depends on the version of the YAR that the parties
 agree to apply. However, if the parties choose to ap-
 ply the YAR 2016 to their contract and incorporate
 them with the BIMCO (Baltic and International Mar-
 itime Council) standard carriage contract, then sal-
 vage costs shall be recorded as GA.

Repair and expenses at port of refuge

Temporary repairs

According to Rule XIV YAR 2016, the costs of tempo-
 rary repairs to the vessel at the loading or discharge
 port for GA purposes or to repair damages to the ves-
 sel resulting from the sacrifice of GA are considered
 GA. This means that all temporary repair costs in this
 case are considered GA.

Furthermore, in the case of temporary repairs to the
 vessel damaged by an accident to enable the comple-
 tion of the voyage, such repairs must be carried out
 reasonably to minimize the GA incurred.³⁰ This is a
 difference in the YAR 2016 version^e compared to the
 YAR 2004 version. For the YAR 2004, the costs of tem-
 porary repairs considered GA, in this case, would be
 limited as follows: the temporary repair costs plus the
 permanent repair costs at the destination (not the port
 of refuge) exceeding the permanent repair costs that
 would normally be carried out at the port of refuge.³¹

The costs of temporary repairs considered GA are ex-
 pressed by the following formula:

$$\text{Expenses considered as GA} = \text{TRPR} + \text{PR} - \text{PRPR}$$

In which:

TRPR: temporary repair costs at the port of refuge;

PR: permanent repair cost at destination;

PRPR: permanent repair if conducted at the port of
 refuge.

The following example will illustrate the regulation
 clearly: in the event that a vessel needs to repair at a
 port of refuge to continue its voyage, the temporary
 repair costs amount to 3 billion VND, and upon ar-
 rival at the destination port, the vessel proceeds with
 permanent repair costs at the port of destination at 6
 billion VND; conversely, assuming that if permanent
 repairs are carried out at the port of refuge, the cost
 would be 10 billion VND (without temporary repairs
 and permanent repairs at the destination port).

Applying the YAR 2016 version, the 3 billion VND
 would be considered GA because all temporary re-
 pair costs are now considered GA under Rule XIV.
 However, if the YAR 2004 version were applied, the
 cost of temporary repairs to the vessel damaged by an

^eYAR 2016 and YAR 1994 have the same provision about tempo-
 rary repairing cost.

530 accident would not be considered GA because, when
531 applying the formula, the temporary repair costs and
532 the permanent repair costs at the destination port are
533 lower than the full repair costs if carried out at the port
534 of refuge.

535 In a similar case, the permanent repair costs at the
536 destination are still 6 billion VND, and the permanent
537 repair costs if conducted at the port of refuge are still
538 10 billion VND. However, the temporary repair costs
539 now amount to 5 billion VND. In this case, the total
540 amount of temporary repair costs and permanent re-
541 pair costs at the destination are 11 billion VND. The
542 excess of 1 billion VND over the permanent repair
543 costs at the port of refuge would be considered GA
544 under YAR 2004.

545 This has led to shipowners, historically, tending to
546 carry out permanent repairs immediately at the port
547 of refuge under the YAR 2004 version. These re-
548 pairs take much longer than temporary repairs, pos-
549 ing greater risks for cargo owners in terms of costs and
550 market loss.¹ This is also one of the reasons why cargo
551 owners have restricted the use of this version and re-
552 vised the provision in the YAR 2016 version by allow-
553 ing for the temporary repair costs in the event of a ves-
554 sel accident to complete the voyage.

555 Furthermore, to accurately ascertain reasonable ex-
556 penses during the repair process, other costs such as
557 reasonable or necessary expenses incurred in moving
558 a vessel from one port to another when the original
559 port is inadequate for repairs are deemed reasonable
560 repair costs. These expenses include, but are not lim-
561 ited to, crew wages, provisions, towing fees, port dues,
562 or fuel.³²⁻³⁴

563 *Expenses at port of refuge*

564 Under the common law and Section 66 of the UK
565 Marine Insurance Act 1963, there remains much de-
566 bate regarding which expenses at a port of refuge or
567 any other place for ensuring common safety (here-
568 inafter referred to as “*port of refuge*”) are considered
569 GA. Through case law, expenses of entering the port
570 of refuge and discharging cargo are considered GA,
571 whereas expenses such as departure from the port or
572 reloading cargo onto the vessel still have various per-
573 spectives. In *Atwood v Sellar*³⁵, the costs of entering
574 and leaving the port of refuge, as well as the costs of
575 discharging and reloading cargo, were deemed GA.
576 Conversely, in *Svendsen v Wallace*³⁶, only the ex-
577 penses of entering the port of refuge and discharging
578 cargo were considered GA, while the expenses of de-
579 parture and reloading cargo were not.⁸

580 In contrast to the disputes within the common law,
581 the YAR 2016 provides clear and consistent provisions

582 regarding the expenses considered GA at the port of
583 refuge. In situations similar to the two aforemen-
584 tioned cases, if the YAR 2016 is applied, the costs of
585 entering and leaving the port of refuge, as well as the
586 costs of discharging and reloading cargo, are all con-
587 sidered GA if carried out for the common safety in the
588 event of an accident, sacrifice, or any other extraor-
589 dinary circumstance.³⁴ Additionally, under Rule XI
590 YAR 2016, expenses incurred during the time spent
591 at the port of refuge such as wages and allowances
592 for the master, officers, and crew, fuel, consumed re-
593 serve provisions during the extended voyage duration
594 are also considered GA if they meet the conditions
595 deemed GA under Rule X.

596 *Piracy and Kidnap and Ransom Insurance*

597 Kidnap and Ransom (hereinafter referred to as
598 “*K&R*”) at sea occurs when pirates^f engage in “shop-
599 ping”³⁷ raids, which may result in property loss, or
600 more seriously, threaten the lives of shipowners and
601 crews as shipowners and crews hold little value to pi-
602 rates. They could be killed, thrown overboard, or left
603 adrift.³⁸

604 Previously, K&R insurance was developed to indem-
605 nify shipowners against risks from pirate attacks. In
606 *Hicks v Palington*³⁹, where property was voluntarily
607 surrendered to pirates in exchange for the release of
608 the vessel, cargo, and crew, such sacrifice was deemed
609 a GA loss. In such cases, insurance compensation is
610 based on the loss of goods seized.

611 However, modern piracy tends to involve attacking
612 vessels and holding crew members hostage for ran-
613 som. Moreover, besides ransom payments, signifi-
614 cant additional expenses arise to ensure the release of
615 the vessel and cargo, such as payments to negotiation
616 teams, transportation of ransom, ransom insurance,
617 as well as initial search costs.⁴⁰ It’s worth noting that
618 expenses including crew wages, vessel maintenance,
619 and fuel consumed during the time the vessel is avoid-
620 ing being detected after a pirate attack, or while de-
621 tained awaiting negotiation for vessel release, are ex-
622 cluded under Rule C(3) of YAR 2016 from the GA.
623 In the case of *MV Longchamp*⁴¹, a crucial issue in
624 the appeal was whether operational expenses incurred
625 during negotiations could be included in the GA un-
626 der Rule F YAR 1974⁴⁸. After deliberation, the UK
627 Supreme Court accepted the owner’s appeal. It ruled

^fPiracy (as defined by Carver in the 4th edition of the study ‘Carriage of Goods by Sea’) refers to acts of robbery, violence, or coercion at sea, carried out by individuals external to the vessel, crew members, or passengers within the vessel.

⁸The F Rule of YAR 2016, while replacing the term ‘extra expense’ from the YAR 1974 with ‘additional expense’, still carries a similar meaning.

628 that reducing the ransom payment to \$1.85 million
 629 was not a “substitute action” for the initially de-
 630 manded ransom but a variation.⁴² Accordingly, Rule
 631 F does not mandate expenses arising after a substitute
 632 action. Thus, expenses incurred during ransom ne-
 633 gotiations shall be recognized in the GA loss. Addi-
 634 tionally, the court held that Rule C was not applica-
 635 ble in this case: “Rule C applies to expenses and other
 636 payments required to be indemnified as GA losses re-
 637 sulting from an action causing GA... This rule does not
 638 apply to expenses referred to in Rule E... By definition,
 639 the amounts that may be recovered under Rule F are
 640 not to be taken into GA, but are alternative choices to
 641 the amounts allowed”. Furthermore, there’s no need to
 642 consider the owner’s intention when assessing an ex-
 643 pense under Rule F, and even if the shipowner agreed
 644 to the initial ransom, costs due to delay may still arise
 645 and should be considered part of the shared costs.
 646 Under English law, paying ransom itself is not ille-
 647 gal;⁴³ Therefore, if the ransom meets the 5 criteria of
 648 Rule A YAR, it may be considered a GA.^h However, in
 649 Somali piracy cases, there’s a perspective that piracy is
 650 to fund terrorist activities, which according to mod-
 651 ern anti-terrorism laws, financing terrorism directly
 652 or indirectly is illegal.⁴⁰ Therefore, expenses related
 653 to kidnap and ransom may not be considered GA.
 654 Thus, whether expenses related to kidnapping and
 655 ransom are considered GA depends on the domestic
 656 law where the ship is destined. If the parties do not
 657 have clear provisions agreeing on the applicable law
 658 in the carriage contract, it will govern the activities
 659 contributing to the GA.

660 **GA loss caused by the fault of a party in the** 661 **common maritime adventure**

662 The right to claim contribution to GA is independent
 663 and not dependent on the cause of the GA. When a
 664 GA occurs, any party may demand contribution from
 665 other interested parties without considering whether
 666 the fault lies with them. This stems from the fact that,
 667 in many cases, the interested parties have an obliga-
 668 tion to contribute to GA to immediately remedy po-
 669 tential damages, such as oil spills, which pose a risk of
 670 marine environmental pollution. However, this con-
 671 tribution to GA will not prejudice any form of com-
 672 pensation or defense that may be pursued against the
 673 party responsible for this fault. This means that, at the
 674 time of the GA occurrence, interested parties have an
 675 obligation to contribute to address the consequences,
 676 but they retain the right to initiate separate legal pro-
 677 ceedings to recover the amount they have contributed

^hFive conditions which were analyzed by authors in sub-
 paragraph Overview of the “General Average” theory

678 to the GA from the party at fault for the GA. Prior-
 679 itizing the exercise of the right to contribute to GA
 680 will not prejudice or limit the rights of other entities
 681 to exercise rights of complaint or litigation against the
 682 party causing the fault leading to the GA incident.⁴⁴
 683 This issue is recognized in Rule D YAR 2016. As a
 684 consequence of this rule, a party suffering loss from
 685 the GA incident may be compensating for other inter-
 686 ested parties from the contribution they have made to
 687 the GA.⁴⁵

688 The case of a vessel being unseaworthy is one of the
 689 typical examples of a GA loss arising from the fault of
 690 one party. In *Alize 1954 and another v Allianz Elementar*
 691 *Versicherungs AG and others*⁴⁶, the vessel CMA
 692 CGM Libra was berthed at Xiamen port, and upon
 693 commencement of the voyage, the working chart mal-
 694 functioned, failing to indicate the risk of shallower
 695 depth outside the navigational channel, which could
 696 endanger the vessel. The second officer prepared a
 697 passage plan based on the faulty working chart with-
 698 out noting the hazardous positions. This led the ves-
 699 sel to enter shallow waters and run aground. Conse-
 700 quently, the shipowner had to pay for the incurred
 701 expenses for salvage operations and refloating the ves-
 702 sel. Subsequently, the shipowner declared GA and
 703 demanded contribution from all interested parties
 704 under YAR. However, some cargo owners disagreed
 705 with the shipowner’s contribution demand, so the
 706 shipowner sued for contribution against these cargo
 707 owners. According to Rule D YAR 2016, the damaged
 708 party is entitled to contribution for sacrifices or ex-
 709 traordinary expenses it had to bear, even if it was at
 710 fault for the GA event. However, this right of the at-
 711 fault party does not affect the ability of interested par-
 712 ties to file claims/litigation against that party’s fault.
 713 In the aforementioned case, cargo owners argued that
 714 the vessel was unseaworthy from the outset of the voy-
 715 age due to the shipowner’s failure to accurately up-
 716 date the working chart. The Court concluded that
 717 the shipowner breached the duty under Article III(1)
 718 of the Hague-Visby Rules to exercise due diligence
 719 to make the vessel seaworthy at the commencement
 720 of the voyage and therefore was not entitled to any
 721 exceptions under Article IV(2) of the Hague-Visby
 722 Rules. In this case, the authors agree with the Court’s
 723 finding that the shipowner must compensate cargo in-
 724 terest for the amount they contributed or were not re-
 725 quired to continue contributing to the GA in case they
 726 had not contributed. This is because, from the outset
 727 of the voyage, the vessel was unseaworthy due to faults
 728 arising from the nautical chart and the faulty working

729 chart. Nautical charts and working charts are docu- 782
 730 ments related to the voyage aimed at ensuring the ves- 783
 731 sel’s seaworthiness.⁴⁷ Therefore, when failing to en- 784
 732 sure these factors to guarantee the vessel’s seaworthi- 785
 733 ness, in the event of a complaint from parties with re- 786
 734 lated interests, the shipowner will have to compensate 787
 735 parties with related interests for the amount they con- 788
 736 tributed or were not required to continue contributing 789
 737 to the GA in case they had not contributed. 790

738 However, in another case, the shipowner was exempt 791
 739 from liability under Article IV(2)(b) of the Hague- 792
 740 Visby Rules and had the right to claim a GA contri- 793
 741 bution from cargo interest. In *Glencore Energy UK* 794
 742 *Ltd v Freeport Holdings Ltd*, a dispute arose between 795
 743 the cargo owner (Glencore) and the shipowner re- 796
 744 garding the expenses of the salvage operation. Dur- 797
 745 ing the voyage, the chief engineer intentionally set fire 798
 746 to the ship’s engine room, resulting in the vessel be- 799
 747 ing immobilized and requiring salvage to be brought 800
 748 safely back to port. These salvage costs were deemed 801
 749 a GA, and the cargo owners reimbursed the salvage 802
 750 expenses to the salvors. At the time of the litigation, 803
 751 the cargo owner sued the shipowner on the grounds 804
 752 that the GA arose from the shipowner’s direct fault in 805
 753 deliberately setting fire to the engine, and therefore, 806
 754 the shipowner was liable to compensate for the GA in- 807
 755 curred by the cargo owners. However, the shipowner 808
 756 argued that they were exempt from liability and had 809
 757 the right to claim a GA contribution from the cargo 810
 758 owners. In the Appellate Court session, the judges 811
 759 ruled that the shipowner was exempt from liability 812
 760 and had the right to claim a GA contribution. This 813
 761 conclusion was based on two grounds: (i) the fire did 814
 762 not result from the carrier’s actual fault or intentional 815
 763 act; they determined that the fire arose from the inten- 816
 764 tional act of the chief engineer (a member of the crew) 817
 765 rather than the intentional act of the carrier, while 818
 766 also determining that the chief engineer did not ex- 819
 767 ercise civil competence when performing the act; and 820
 768 (ii) the fire did not result from a breach of the car- 821
 769 rier’s obligation as provided for in Article III(1)(a) of 822
 770 the Hague-Visby Rules. Therefore, the shipowner was 823
 771 exempt from liability under Article IV(2)(b) of the 824
 772 Hague-Visby Rules and had the right to claim a GA 825
 773 contribution from parties with related interests.^{48,49} 826

774 From the above cases, it can be observed that claim- 827
 775 ing a GA contribution in cases where the fault arises 828
 776 from the actions of the shipowner/crew is very com- 829
 777 plex. Parties need to determine whether shipowners 830
 778 are exempt from liability under relevant international 831
 779 conventions (such as the Hague-Visby Rules). If it is 832
 780 determined that the shipowner is exempt from liabil- 833
 781 ity, then the shipowner has the full right to demand

contributions to the GA from cargo interest, and con- 782
 versely, if the shipowner is not exempt from liability, 783
 then they have no right to demand contributions to 784
 the GA from cargo interest. 785

786 Additionally, faults leading to GA may arise from 786
 787 cargo owners. For example, a ship catches fire while 787
 788 underway due to a chemical leak from an ISO Tank 788
 789 Container¹. This incident was determined to be 789
 790 caused by the fault of the container owner. The ex- 790
 791 tinguishing of the fire resulted in salvage costs and 791
 792 other expenses. In cases where the shipowner de- 792
 793 clares a GA, only expenses such as salvage costs and 793
 794 damage to cargo due to water ingress during firefight- 794
 795 ing are considered GA. Expenses related to damaged 795
 796 cargo due to the fire and damage to ISO Tank Con- 796
 797 tainers are not considered GA. Damaged cargo due 797
 798 to the fire constitutes separate losses, as it is not in- 798
 799 curred for the purpose of ensuring common safety for 799
 800 the vessel or damages resulting from actions to ensure 800
 801 common safety. In particular, not only shall the con- 801
 802 tainer owner not receive any contribution to general 802
 803 average from other interested parties for the general 803
 804 average act caused by their fault, but they shall also 804
 805 contribute to other general average losses.⁸ 805

806 Recommendation 806

807 Regulations on Supplementary Costs 807

808 The definition of GA is outlined in Article 292(1) of 808
 809 the Vietnam Maritime Code 2015 and sacrifices or ex- 809
 810 penses must satisfy the criteria specified in this article 810
 811 to qualify as GA. Article 292(2) also provides “Only 811
 812 losses, damages and expenses which are the direct con- 812
 813 sequence of the act causing the general average shall be 813
 814 included in the general average.”⁵⁰ Nevertheless, the 814
 815 Vietnam Maritime Code presently lacks a provision 815
 816 equivalent to Rule F of the YAR regarding supplemen- 816
 817 tary costs. In the Longchamp case referred to in sec- 817
 818 tion 4.4 of Piracy and Kidnap and Ransom Insurance, 818
 819 when considered under Rule F, the operating costs of 819
 820 the vessel incurred during the negotiation period are 820
 821 not required to satisfy the exclusion principle of “ind- 821
 822 irect loss” of Rule C of the York-Antwerp Rules or Ar- 822
 823 ticle 292(2) of the Vietnam Maritime Code 2015. In 823
 824 addition, we do not need to consider the “intentional” 824
 825 criterion of the owner when considering an amount 825
 826 under Rule F. Hence, supplementary costs substitut- 826
 827 ing for another expense that would otherwise qual- 827
 828 ify as GA are prone to be disregarded in the assess- 828
 829 ment of which sacrifice, or expense qualifies as GA, as 829

¹ISO Tank Container is a specialised container designed to transport powdered products, gases, and hazardous and non-hazardous liquids in maritime, road, or air transport. ISO tank containers are constructed based on ISO standards (International Organization for Standardization).

830 they may not meet the criteria and principles outlined
 831 in Clauses 1 and 2 of Article 292 of this Code. This
 832 flaw renders the process of ascertaining and distribut-
 833 ing the GA. Typically, these expenses are substantial,
 834 and if treated as individual average, they would im-
 835 pose a financial strain on shipowners or cargo own-
 836 ers. Based on the aforementioned reason, the authors
 837 contend that supplementary costs should be classified
 838 as a “distinct” form of GA in the Vietnam Maritime
 839 Code. This would enable justice agencies, average ad-
 840 justers, and other interested parties to assess sacrifices
 841 and GA costs more comprehensively. This provision
 842 can be incorporated as a clause within Article 292,
 843 with the content drawing inspiration from Rule F of
 844 the YAR. The stipulations are as follows: “Any sup-
 845 plementary costs assumed in place of another expense
 846 that would typically be acknowledged as general aver-
 847 age shall be regarded as general average and granted up
 848 to the maximum extent of avoidable general average,
 849 without considering any other potential savings.”

850 **Criteria for sacrifices “and” extraordinary ex-**
 851 **penditure to determine general average**

852 Article 292(1) of Vietnam Maritime Code 2015 is built
 853 as the same as Rule A of YAR, however, there exists a
 854 discrepancy in how Rule A defines one of the crite-
 855 ria for extending GA, including “sacrifice or extraor-
 856 dinary expenditure”, whereas Article 292(1) specifies
 857 “sacrifice and extraordinary expenditure”.

858 From a comparative law perspective, there are virtu-
 859 ally no countries that require the criteria for deter-
 860 mining general average losses to include both sacrifice
 861 and expenditure simultaneously. For instance, the
 862 UK Marine Insurance Act of 1963, Thailand’s Gen-
 863 eral Average Act in maritime voyages, and the Mar-
 864 itime Code of the People’s Republic of China 1992,
 865 all stipulate this criterion as either “sacrifice” or “ex-
 866 traordinary expenditure”, similar to the YAR. Besides,
 867 in the case of *Star of Hope*⁵¹, Supreme Court of the
 868 United States has defined GA as: “The contribution of
 869 all parties on common maritime adventure to indem-
 870 nify for the losses incurred by one of their members
 871 either due to the relinquishment of a portion of the
 872 vessel or cargo to preserve the remaining assets and
 873 protect the lives of the crew or individuals from im-
 874 minent peril; or on account of specific essential ex-
 875 penditures that one or more parties must shoulder for
 876 the mutual advantage of all rights holders in the en-
 877 terprise”.⁵²

878 Thus, the losses determined in GA will include:

- 879 (i) Losses arising from the deliberate sacrifice of a por-
 880 tion of the vessel or the jettisoning of part of the cargo,
 881 carried out to rescue the ship from peril; or

- (ii) Amounts arising from special charges for the gen-
 eral benefit of the vessel and cargo.⁵³

Sacrifice and extraordinary expenditure are two dif-
 ferent concepts and scopes of determination. If the
 cargo heats up to a degree that jeopardizes the vessel’s
 safety and is accordingly abandoned, it will be consid-
 ered sacrificed without incurring any additional ex-
 traordinary expenditure. Similarly, the expenditure
 accrued during the entry and departure from a port of
 refuge, related to unloading and reloading cargo, will
 not warrant any additional sacrifices. It means, when
 determining the GA, it is not necessary to have “sac-
 rifice” and “extraordinary expenditure” at the same
 time according to the provisions of the Vietnam Mar-
 itime Code, which just rely on (i) there are unusual
 sacrifices; or (ii) there is extraordinary expenditure.
 Based on the aforementioned analysis, the authors
 suggest that Vietnam Maritime Code 2015 revise the
 provisions in Article 292(1) to read as follows: “Gen-
 eral average comprises sacrifices or extraordinary ex-
 penditure made deliberately and reasonably for the col-
 lective safety aimed at rescuing the vessel, cargo, lug-
 gage, freight services, and passengers from common
 peril.”

CONCLUSION

In the context of Vietnam today, the development of
 clear legal regulations governing the GA is absolutely
 necessary and has important implications for interna-
 tional trade activities. This is because parties will be
 more confident when they have a basis for determin-
 ing their rights and obligations from the outset of a
 marine carriage contract. Therefore, the authors con-
 ducted this study with the aim of proposing solutions
 to improve Vietnamese legal regulations on the GA.
 The research study has clarified the following issues:
Firstly, through the analysis and evaluation of the
 views of scholars around the world as well as com-
 menting on related cases, the authors clarify the prac-
 tice of GA in maritime operations.
Secondly, proposing a number of solutions to improve
 the legal regulations on the GA in the Vietnam Mar-
 itime Code.

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ABBREVIATIONS

- GA: General average
- YAR: York-Antwerp Rules

931 Port of refuge: Port of refuge or any other place for
 932 ensuring common safety
 933 K&R: Kidnap and Ransom

934 **CONFLICT OF INTEREST**

935 The authors declare that they have no conflicts of in-
 936 terest.

937 **AUTHORS' CONTRIBUTION**

938 - Author Vu Kim Hanh Dung is responsible for struc-
 939 turing the paper and providing general comments.
 940 - Author Bui Doan Minh Tri is responsible for the
 941 content: Introduction, Overview of the General Aver-
 942 age theory, Repair and expenses at the port of refuge,
 943 GA loss caused by the fault of a party in the common
 944 maritime adventure.
 945 - Author Nguyen Thanh Mai is responsible for
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 947 Conclusion.
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 951 tent: Salvage cost, Piracy and Kidnap and Ra son In-
 952 surance, Recommendation for Criteria for sacrifices
 953 "and" extraordinary expenditure to determine gen-
 954 eral average.
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 956 the content: Conditions for determining General Av-
 957 erage, Jettisoned cargo.

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Phân bổ tổn thất chung trong bộ luật hàng hải: Kinh nghiệm quốc tế và bài học gợi mở cho Việt Nam

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TÓM TẮT

Vận chuyển hàng hóa bằng đường biển được thực hiện dựa trên các hợp đồng vận chuyển, trong đó quy định quyền và nghĩa vụ của các bên liên quan, trách nhiệm của người chuyên chở, cũng như các điều khoản về giải quyết tranh chấp, bồi thường thiệt hại, và phân bổ tổn thất trong trường hợp xảy ra rủi ro, ... Đây là một quá trình phức tạp, đòi hỏi sự hiểu biết kỹ lưỡng về pháp luật hàng hải và các nguyên tắc quốc tế liên quan đến vận tải biển. Trong quá trình vận chuyển, một trong những khía cạnh quan trọng nhất là việc xác định tổn thất chung – một khái niệm pháp lý đã tồn tại từ lâu trong luật hàng hải quốc tế. Tổn thất chung liên quan đến những quyết định khó khăn mà thuyền trưởng hoặc chủ tàu phải đưa ra trong trường hợp khẩn cấp, chẳng hạn như hy sinh hàng hóa hoặc chi phí bất thường để cứu tàu và hàng hóa khỏi nguy hiểm chung.

Vấn đề phát sinh từ việc xác định thể nào là "hy sinh" hoặc "chi phí bất thường" để phù hợp với khái niệm tổn thất chung. Đây không chỉ là việc xác định về mặt pháp lý mà còn liên quan đến quyền và nghĩa vụ của các bên tham gia vào quá trình vận chuyển hàng hóa, đặc biệt là trách nhiệm của chủ tàu và người vận chuyển đối với xác định chính xác các tổn thất chung cụ thể. Hiện nay, các quy định pháp luật của Việt Nam, đặc biệt là Bộ luật Hàng hải 2015, vẫn chưa đưa ra hướng dẫn cụ thể và rõ ràng về việc xử lý các trường hợp tổn thất chung. Điều này tạo ra khó khăn trong việc áp dụng pháp luật, giải quyết tranh chấp và bồi thường tổn thất khi xảy ra sự cố trong quá trình vận chuyển hàng hóa.

Trong bối cảnh quốc tế, nhiều quốc gia đã áp dụng các quy định và tiêu chuẩn cụ thể hơn về tổn thất chung, dựa trên các nguyên tắc chung được đề cập trong Quy tắc York-Antwerp - một bộ quy tắc quốc tế nổi tiếng trong lĩnh vực hàng hải. Những quy tắc này không chỉ cung cấp khung pháp lý rõ ràng cho việc xác định các chi phí và hy sinh hợp lý, mà còn giúp các bên liên quan dự đoán trước được trách nhiệm của mình trong các tình huống khẩn cấp. Đối với Việt Nam, việc học hỏi kinh nghiệm quốc tế để cải thiện quy định pháp luật trong lĩnh vực này là một vấn đề cần thiết và cấp bách.

Từ khóa: Phân bổ tổn thất chung, hợp đồng vận chuyển hàng hóa bằng đường biển, Quy tắc York-Antwerp

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