Governance of General Average in the Netherlands in the Nineteenth Century: A Backward Development?

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A. Introduction

General average refers to situations where a master or his crew deliberately jettison cargo or damage a ship in order to salvage the remainder of the cargo and the ship. The damages thus incurred will then be borne by all those benefitting from the action, not just by the individual owner of the merchandise or the ship. Generally, in the Low Countries, if a master decided to jettison cargo to lighten the ship in order to outrun pirates, the costs of the jettisoned cargo would be considered general average and all parties to the voyage would then contribute to the costs. Another well-known example of general average was when a master ordered the mast to be cut during a storm. If the action was deliberate and with the express intention to prevent further damage to the ship, cargo and crew, the damages would be distributed among merchants and the shipowner.[1]

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[1] See *Ivo Schöffer*, De vonnissen in de avarij-grosse van de Kamer van Assurantie en Avarij te Amsterdam in de 19e eeuw, (1956) 26 Economisch-Historisch Jaarboek 72–132; *Johan P. van Niekerk*, The development of the principles of insurance law in the Netherlands from 1500–1800, 2 vols. (1998); *Sabine C.P.J. Go*, General Average Adjustments in Amsterdam: Reinforcing Authority through Transparency and Accountability (late sixteenth–early seventeenth century), in: Maria Fusaro (ed.), Sharing Risk: General Average, 6th–21st Centuries (forthcoming, 2020).

General average has long been neglected by academics or at times even mixed up or lumped together with marine insurance, and although they both relate to maritime trade, they are distinctly different concepts.[2] Marine insurance is taken out by an individual merchant on his merchandise or by shipowners on the hull of a specific ship. A contract, the insurance policy, is drawn up in advance, a premium is paid by the insured to the underwriter and, in case of an accident, the insured can claim up to the amount of the insured merchandise or hull. With general average, no contract was agreed upon or signed beforehand. General average was a default rule, based on mutuality and generally accepted by merchants, shipowners and authorities. General average was only relevant in case more parties were involved. When a ship and cargo were owned by the same party, general average was, of course, not applicable. This was, for example, the case with the Dutch East India Company in the early modern period and the *Nederlandsche Handel-Maatschappij* in the nineteenth century.[3] At the other end of the spectrum, with the smallest of enterprises, general average was most probably not, or hardly ever, used, as here the ship and the (usually very modest) amount and value of cargo would be owned by the master/shipowner.[4] General average was most relevant for the 'middle section' of the industry, all those who were dependent on other parties in conducting their daily business: shipowners who needed cargo from independent merchants and merchants seeking space in a cargo hold of a ship to transport their goods.

Although general average was a generally accepted concept in the northern Low Countries, conflicts and disputes as to whether the incident was in fact general average, or whether certain damages should be accepted as general average costs, or what the correct value of the merchandise or ship were, continued for a long time. Prior to the seventeenth century, disputes regarding general average would be adjudicated by 'wise men'.[5] At the end of the sixteenth century, the Amsterdam authorities established the Chamber of Insurance and Average. From then on, this subsidiary court would deal with all marine insurance and general

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[2] For example, Spooner, mixed up marine insurance and general average cases of the Amsterdam Chamber of Insurance, *Frank C. Spooner*, Risks at Sea. Amsterdam Insurance and Maritime Europe, 1766–1780 (1983), 59 f.; *Karel Davids*, Zekerheidsregelingen in de scheepvaart en het landtransport, 1500–1800, in: Jacques van Gerwen and Marco H. van Leeuwen (eds.), Studies over zekerheidsarrangementen, risico's, risicobestrijding en verzekeringen in Nederland vanaf de Middeleeuwen (1998), 183–202, 199; *Schöffer* (n. 1).

[3] *Chris van Eeghen*, Over zalf- en hoeden-, over slaven- over kunst- en boekhandel in het Amsterdam der 18de eeuw, (1944) 40 Amstelodamum 171–196; *Willem M.F. Mansvelt*, Geschiedenis van de Nederlandsche Handelmaatschappij 1824–1924, 2 vols. (1924).

[4] In the peat colonies in the Northern Low Countries, shipowners would participate in mutual contracts to cover (part of) the financial consequences of misfortunes: *Sabine C.P.J. Go*, Mutual Marine Insurance in the province of Groningen, (2005) 17 International Journal of Maritime History 123–149.

[5] *Van Niekerk* (n. 1), vol. 1, 60–79.

average cases.[6] Thus, governance of these two distinctly different methods of risk management converged, only to go their separate ways in a peculiar manner two centuries later. In the nineteenth century, marine insurance was incorporated in the newly instated *Wetboek van Koophandel* of 1838 (Dutch Commercial Code) and for the most part of the nineteenth century and beyond, conflicts were handled by the District Court (*Arrondissementsrechtbank*). In Amsterdam – still then the dominant port of the Netherlands – the governance of general average was in effect dealt with outside the scope of the Dutch Commercial Code. The final report of a general average case (the so-called *dispach*) would be composed by an average adjuster (*dispacheur*), based on a standardized format (the *Amsterdamsch Compromis*, the Amsterdam Agreement)[7] and then ratified by the Average-Committee of Amsterdam. This Committee would also deal with conflicts regarding a *dispach*.[8] Only in cases where the Committee was unable to settle the matter between the parties involved did the Commercial Code come into play and the case would go to the District Court.[9] In effect, this construction meant that the governance of general average went back to the judgment of 'wise men' – a form of self-governance. This seems like an anomaly, considering conventional institutional theories regarding institutional developments; a backward institutional development – but was it?

Institutional development is, like institutions themselves, the focus of many heated debates among scholars of various disciplines. Generally, scholars agree that institutions affect economic choices, both on an individual and aggregate level and thus they affect economic development. However, it is still debated how and why institutions develop the way they do, which institutions advance economic growth and which tend to impede growth and development. An im-

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[6] Initially, the Chamber was called the Chamber of Insurance. Within its first year of existence, the court's responsibilities were expanded to include general average cases and hence its name was changed. For more on the Chamber of Insurance and Average in Amsterdam: *Schöffer* (n. 1); *Sabine C.P.J. Go*, On Governance Structures and Maritime Conflict Resolution in Early Modern Amsterdam: The Case of the Chamber of Insurance and Average (Sixteenth to Eighteenth Centuries), (2017) 5 Comparative Legal History 107–124.

[7] Hereafter: Compromis or Amsterdam Agreement.

[8] Also spelled dispatch and dispache.

[9] Stadsarchief Amsterdam (SAA): Archief van de Avarij Commissie Amsterdam, Toegang 1508 (Avarij Commissie, T1508), L. Hardenberg, De Avarij-Commissie te Amsterdam (1811–1982); *Ernst J. Asser*, Het Amsterdamsch Compromis voor de regeling der Avarij Grosse en Avarij Particulier op de lading (1879); *Carel D. Asser*, *Willem E.J. Berg van Dussen Muilkerk*, *Michael H. Godefroi*, *Jan W. Tydeman* and *Jeronimo de Vries Jz.*, Wetboek van Koophandel met aantekeningen van (1845).

portant issue, that has been explained by Avner Greif in his article on the eleventh-century Maghribi traders, relates to contract enforcement mechanisms.[10] Without some sort of contract enforcement mechanism, a merchant could not be certain that his counterpart to a transaction would honour his obligations, and the merchant would then not agree to a transaction. It was thus vital to create mechanisms that would create this trust and thus enable trade and commerce.[11] There are several kinds of enforcement mechanism: informal, quasi-formal and formal. Doing business within a trusted circle without external enforcement is an example of an informal enforcement mechanism. Arbitration can be considered a quasi-formal type of mechanism.[12] Having a conflict settled by a law court is an example of a formal enforcement mechanism, the opposite of informal enforcement on the continuum of enforcement mechanisms.[13] Most scholars will agree that, in general, these enforcement institutions develop from informal to more formal in time.[14] Therefore, following, for example, Douglass C. North, Greif and Sheilagh Ogilvie, one would expect the enforcement of general average to become more regulated with laws, regulations and formalized procedures. That does not seem to have been the case – the Commercial Code, the formal law, was in effect avoided by the combination of the Amsterdam Agreement and the Average-Committee of Amsterdam.[15] However, as is often the case with general average, the issue is a bit more complicated.

Whereas marine insurance was highly and formally regulated in early modern Amsterdam with ordinances and a great number of additions and alterations, general average was not.[16] The Amsterdam authorities stated that general average was not regulated by means of an ordinance as general average cases were so

[10] *Avner Greif*, Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition, (1993) 83 The American Economic Review 525–548; *idem*, The Maghribi Traders: A Reappraisal?, (2012) 65 The Economic History Review 445–469.

[11] *Avner Greif*, The Fundamental Problem of Exchange: A Research Agenda in Historical Institutional Analysis, (2000) 4 European Review of Economic History 251–284.

[12] Although this is debated. See *Sheilagh Ogilvie*, Institutions and European Trade: Merchant Guilds, 1000–1800 (2011), 299.

[13] *Greif*, Contract Enforceability (n. 10); *idem*, Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies, (1994) 102 Journal of Political Economy 912–950; *idem*, The Maghribi Traders (n. 10).

[14] *Douglass C. North*, Institutions, Institutional Change, and Economic Performance. The Political Economy of Institutions and Decisions (1990); *idem*, Structure and Change in Economic History (1981); *Avner Greif*, Institutions and the Path to the Modern Economy. Lessons from Medieval Trade (2006); *idem*, Contract Enforceability (n. 10).

[15] SAA, Avarij Commissie, T1508, L. Hardenberg, De Avarij-Commissie; *Asser et al.* (n. 9).

[16] *Hermanus Noordkerk*, Handvesten ofte privilegiën ende octroyen mitsgaders willekeuren, costuimen, ordonnantiën en handelingen der stad Amsterdam, 5 vols. (Amsterdam 1748), vol. 2, 667; *Schöffer* (n. 1), 73.

varied and too complex that the assessment was left to the expertise of the Commissioners of the Chamber of Insurance and Average.[17] Although both the insurance and general average verdicts were formally enforceable and could be appealed at the city's principal court, the *Schepenbank* (Eschevin Court), it would seem that the general average verdicts had a different status than the Chamber's verdicts regarding marine insurance.[18] The insurance cases that were dealt with by the Chamber always related to conflicts: Underwriters refusing to pay out a claim, insureds who had not paid the premium that was due, etc. General average cases on the other hand, were not *per se* related to conflicts or disputes – they were *ex post* settlements between parties that had been part of an unfortunate journey. There is a similar situation in contemporary Tokyo. In a study regarding the Tuna Court in Tokyo, Eric A. Feldman concluded that even though the Tuna Court has a formal set-up, with regulations, a judge and official verdicts, it is not considered as a formal court by those involved, but rather as an *ex post* price correction. This concurs with the setting of the institution: The Tokyo Tuna Market can be characterized as a close-knit community and trading in a repeated game setting.[19] Greif has emphasized the importance of informal enforcement mechanisms within this type of setting.[20] The enforcement mechanism of the Tuna Court, although it may appear as formal, is in fact perceived as an informal one by those involved in it. Going back to our early modern Chamber of Insurance, the same may well have been valid for the general average rulings of the Chamber of Insurance too: merchants and shipowners relied on the Chamber for an *ex post* handling or settlement of an informal, generally accepted rule. Lisa Bernstein has argued that, based on her research concerning the contemporary cotton industry, informal mechanisms may accomplish results that are not always possible with formal enforcement mechanisms.[21] I shall argue that the institutional development of the governance of general average in the nineteenth century is not the anomaly that it may at first seem. It is not only the formal structure

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[17] *Noordkerk* (n. 16), vol. 1, 667; *Marinus. Th. Goudsmit*, Geschiedenis van het Nederlandsche (1882), 292; *Jan Wagenaar*, Amsterdam in zijne opkomst, aanwas, geschiedenissen, voorregten, koophandel, gebouwen, kerkenstaat, schoolen, schutterij, gilden en regeringen, vol. 2 (Amsterdam 1765), 439; *Van Niekerk* (n. 1), vol. 1, 208–211; *Schöffer* (n. 1); *Sabine C.P.J. Go*, Marine Insurance in the Netherlands 1600–1870: A Comparative Institutional Approach (2009); *idem*, The Chamber of Insurance and Average: A New Phase in Formal Contract Enforcement (Late Sixteenth and Seventeenth Centuries), (2013) 3 Enterprise and Society 511–543; *idem* (n. 6).

[18] Nederlands Economisch-Historisch Archief (NEHA), Bijzondere Collecties (BC) 277, Archief College van de Commissarissen van Assurantie (1598–1621) (Archief Commissarissen), f. 29r; *Van Niekerk* (n. 1), vol. 1, 218–230; *Wagenaar* (n. 17), vol. 2, 439.

[19] *Eric A. Feldman*, The Tuna Court Law and Norms in the World's Premier Fish Market, (2006) 94 California Law Review 313–369.

[20] *Greif*, Contract Enforceability (n. 10).

[21] *Lisa Bernstein*, Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions, (2001) 99 Michigan Law Review 1724–1790.

of an enforcement mechanism that is relevant, but also the way the institution is perceived by those who are affected by its enforcement.[22] Before turning to general average in the nineteenth century, I will first explain the background, guidelines and procedures of general average, and continue with governance structures in the seventeenth and eighteenth centuries. I will then focus on the governance of general average in the Netherlands during the nineteenth century before concluding.

B. The background and mechanisms of general average in the Low Countries

General average has an impressive lineage, dating back to antiquity, even though the term itself was not in use until early modern times. In parts of medieval Europe, the concept of mutuality and contributions following an intentional act leading to loss was codified in a number of laws. While the concept of general average was already known in the Low Countries as present in the Corpus Iuris Civilis, the first significant description in the Low Countries came in 1551 with an Ordinance of Charles V.[23] It was then first described as '*Groote Avarye*', specifying that these types of damages were to be borne by the owners of the ship and cargo 'in accordance with maritime custom'.[24] A little over a decade later, another Ordinance promulgated by Philip II extended the regulations on general average, providing guidelines for those directly involved. It stated, for example, that the master was obliged to first jettison the goods that were heaviest and lowest in price.[25] This *Placcaat* (1563) formed the basis for one of the most well-known Dutch treatises on general average, the *Tractaet van Avarien*, by Quintijn Weytsen.[26] Weytsen provided a clear definition of general average, making a

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[22] *Go* (n. 17), 513.

[23] *Van Niekerk* (n. 1), vol. 1, 60; *Edda Frankot*, Of Laws of Ships and Shipmen, Medieval Maritime Law and its Practice in Urban Northern Europe (2012); *Gijs Dreijer*, Maritime Averages and the complexity of risk management in sixteenth-century Antwerp, (2020) 17/2 Tijdschrift voor Sociale en Economische Geschiedenis – Low Countries Journal of Economic History 31–53.

[24] 1551 Ordonnance, Arts. 1 and 42, edited in *Jules Lameere*, Recueil des ordonnances des Pays-Bas. Deuxième série, 1506–1700, vol. 6 (1922), 163–177. See also *Van Niekerk* (n. 1), vol. 1, 61; *Jolien A. Kruit*, General average – general principle plus varying practical application equals uniformity?, (2015) 21 Journal of International Maritime Law 190–202.

[25] *Schöffer* (n. 1), 77.

[26] Van Schip-breecking, Zee-werpinge, ende Avaryen of the Placcaat of 1563, in: Jean-Marie Pardessus (ed.), Collection de lois maritimes antérieures au XVIIIe siècle, vol. 4 (1828), 64–102*; Cornelis van Nieuwstadt*, Curiae Hollandiae Zlandiae Dicisiones (Leiden 1617), which includes *Quintijn Weytsen*, Een Tractaet van Avarien, 201–230; *G. Dreijer* and *O. Vervaart*, Een Tractaet van Avarien 1617 Quityn Weytsen (1517–1564), (2019) 21/2 Pro Memorie 38–41.

distinction between general average and other forms of average, and describing procedural standards. He defined general average as 'the communal contribution of goods, present in the ship, to help carry the loss of some merchants or of the shipper's goods, voluntarily sacrificed to salvage life, ship and goods' ('Avarie is ghemeene contributie, van goeden inden scheepe bevonden, om te helpen draghen t' verlies van eenige Coop-lieden ofte Schippers goeden ghewillichlijck gebuert, om lijf, schip ende goet te salveren').[27] This definition was in general use throughout the seventeenth and eighteenth centuries. Weytsen also listed which conditions had to be met in order to file a general average claim, for example, entering the bill of lading as evidence.[28]

However, Weytsen's primary contribution to the development of general average and its legal setting was identifying situations in which general average most frequently occurred. By the time Weytsen wrote his *Tractaet*, general average incorporated far more than the Rhodian concept of jettison. The most common occurrences of general average of course still included the jettison of goods (*werpen*), for example to outrun pirates and the cutting of the mast (*kerven*) during a storm. Other less obvious situations were now also acknowledged, such as the costs of pilotage exceeding a certain amount, negotiations with pirates or privateers or the financial consequences of deliberately beaching a ship. In spite of Weytsen's efforts, there were debates about whether certain damages should be accepted 'into general average' – for example, if a pirate stole flasks of wine, could that be considered general average or should this be considered as particular average (borne by the owner of the wine) because the pirate forcibly took the wine rather than having it given to him voluntarily by the master? Was a rope deliberately cut or did it break during a storm? Merchants were known to blame the incident on deficiencies of the ship or the lack of skills of the master in order to shift the damages to the shipowner.[29] And of course, there were debates about the value of the merchandise and the ship.[30]

A statement describing the incident, usually made by the ship's master and corroborated by members of his crew, was the basis of the general average procedure and calculations. The master was obliged to present this statement to the authorities in the first port he entered after the incident. He would describe the situation and invariably he had had to deal with the most vicious pirates or had been caught up in the fiercest of storms. The statement needed to confirm that there had indeed been immediate and unforeseeable danger. The statement often

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[27] *Weytsen*, in: *Van Nieustadt* (n. 26), 204; *Schöffer* (n. 1), 74.

[28] *Dreijer/Vervaart* (n. 26).

[29] *Van Niekerk* (n. 1), vol. 1, 68.

[30] NEHA, BC 277, Archief Commissarissen, fos. 58r–69r.

included phrases that the master had convened with the crew and they had decided that, in order to salvage goods, ship and life, they had to cut the mast or jettison cargo or take whichever action they deemed necessary. The consultation of the crew was an essential part. In case merchants were accompanying their merchandise, they would be consulted as well, but this had become rare by the seventeenth century.[31]

It was crucial that the actions that were taken were not to preserve either cargo or ship: the objective had to have been to salvage both the ship and the cargo.[32] Although many statements made by the masters would include 'life, body, or persons', preserving 'life' was not always included as a specific objective in ordinances or regulations.[33] However, if a crewmember had been injured or lost his life while defending the ship, the compensation such as his pay and the funeral expenses would be included as general average damages.[34] Finally, the jettison, cutting or other actions taken by the master and crew had to have been successful in order to be accepted as general average. This was the case in Amsterdam and also in the second major port of the Republic, Rotterdam, as well as in various ports in Spain and Sweden. In some ports, general average could also be claimed if the deliberate actions had not had the desired effect.[35]

C. General average adjustment in Amsterdam in the seventeenth and eighteenth centuries

Until the end of the sixteenth century, general average was handled informally, by 'wise men', of whom we know very little.[36] This would change in 1598, when the Amsterdam municipal authorities were urged by 'numerous merchants'

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[31] *Frankot* (n. 23), 8; *P. van der Hoeven*, Handleiding voor het opmaken van de Averijen (1854); *G. Dreijer*, Risk Management, Protection Costs and the Development of General Average in Sixteenth-Century Antwerp (forthcoming); NEHA, BC 277, Archief Commissarissen, fos. 47r–49r.

[32] NEHA, BC 277, Archief Commissarissen, fos. 47r, 48r, 56r, 58r.

[33] Weytsen does specifically include salvage of life, but in the Ordinance of 1551 and the 'guidelines' for the Commissioners of the Chamber of Insurance and Average of 1598, only ship and cargo are mentioned, NEHA, BC 277, Archief Commissarissen, fos. 47r–49r; *Van der Hoeven* (n. 31).

[34] NEHA, BC 277, Archief Commissarissen, f. 47r.

[35] In some ports the actions did not have to be successful. For example, the 1737 Ordonnances of Bilbao (Chapter 20, Art. 16) states that even in case a ship is lost, general average is applicable, *Johannes A. Molster*, Handboek voor de leer der avarijen voor die der Avarij-Grosse (1858) 17.

[36] These 'wise men' may have been Burgomasters or merchants, but we have no information regarding their background, their selection or whether they worked according to a set procedure or custom: *Van Niekerk* (n. 1), vol. 1, 70; SAA, Avarij Commissie, T1508, L. Hardenberg, De Avarij-Commissie.

to establish a specialized court to adjudicate conflicts regarding marine insurance. Marine insurance was most probably introduced in Amsterdam in the mid-sixteenth century by Mediterranean merchants who were familiar with the concept. As Amsterdam's trade and commerce experienced exceptional growth, so did the insurance market.[37] However, the authorities soon realized that insurance – a complex service and based on trust rather than a tangible product – led to numerous conflicts and disputes and was also prone to fraud. Thus, at the request of a number of merchants, they promulgated the city's first Insurance Ordinance and founded the Chamber of Insurance to enforce it.[38] The Commissioners of this Chamber from then on adjudicated all insurance cases that related to the trade and transport of Amsterdam. The municipality was apparently content with the Chamber's performance, as a few months after its foundation, general average adjustments were added to the Commissioners' responsibilities.[39] Although the Commissioners of the Chamber dealt with both insurance and general average cases, there were entirely separate administrations for general average and insurance cases.[40]

As mentioned before, the municipality did not issue an ordinance to regulate general average as, so it was stated, all general average cases were too diverse to regulate. The assessment of the incidents, the incurred damages, and the values of the various assets was thus left to the judgement and expertise of the Chamber's Commissioners. These Commissioners were usually prominent Amsterdam merchants, rather than legally educated professionals. It would seem that the position as Commissioner was considered honourable as the remuneration was rather modest.[41] The Chamber was an important part of the city's institutional infrastructure and its status was reiterated by the eminence of its Commissioners, as well as by its prominent location in the City Hall.[42]

The Commissioners based their judgements on a number of guidelines and rules. In addition, they used a table with standard amounts of rope per type of

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[37] *Davids* (n. 2); *Go*, Marine Insurance (n. 17); *Van Niekerk* (n. 1); *Johannes P. Vergouwen*, De geschiedenis der Makelaardij in Assurantiën hier te lande tot 1813 (1945); *Violet Barbour*, Marine risks and insurance in the seventeenth century, (1928/1929) 1 Journal of Economic and Business History 561–596; *Wagenaar* (n. 17), vol. 2, 439; *Henry L.V. de Groote*, De zeeverzekering, in: Gustaaf Asaert et al. (eds.), Maritieme Geschiedenis der Nederlanden, vol. 1 (1976), 206–219.

[38] *Van Niekerk* (n. 1), vol. 1, 207–218; *Go* (n. 6), 95–117; *Schöffer* (n. 1).

[39] Subsequently, the name was altered to: Chamber of Insurance and Average, first used in 1606, Alteration, 20 June 1606, *Noordkerk* (n. 16), vol. 1, 656.

[40] *Schöffer* (n. 1); *Go*, Marine Insurance (n. 17), 111 f.

[41] *Go*, Marine Insurance (n. 17), 100–104.

[42] *Willem F.H. Oldewelt*, Amsterdams oudste Raadhuis, (1931) 28 Jaarboek Amstelodamum 13–29; *Adriaan W. Weissman*, Het Stadhuis te Amsterdam, (1923) 10 Maandblad Amstelodamum 117–119.

ship, and had guidelines for exchange rates.[43] The Commissioner's handling of a general average case would result in a *dispach*: a 'verdict' with all the relevant information about the incident, the parties involved and the final apportioning of the general average damages between merchant(s) and shipowner(s). This *dispach* had the legal standing of a formal verdict and was enforced by the city's Sheriff.[44]

The Commissioners worked according to a straightforward procedure: after a case had been put before the Chamber, all relevant documents would be collected. This included the aforementioned statement by the ship's master about the incident, confirmed by a number of his crew or others that had been present. Next, the values of the merchandise and the ship would be assessed. There were two sides to this coin: in case of the jettison of goods, merchants were prone to increase the value of their damages. To prevent shipowners to add the costs of 'normal' wear and tear of the ship to general average damages, the Commissioners could rely, for example, on the aforementioned table regarding the quantities and value of rope per type of ship.[45] The Commissioners would assess all the damages as stated by the shipowners and merchants and it was not uncommon for Commissioners to decrease the amounts given, or even to refuse certain items into the general average claim.[46]

As for the other side of the coin: when determining the value of the salvaged goods and the ship, merchants and shipowners would do the opposite and state the lowest possible value, as the final individual general average contribution depended on the value of the assets. The higher the value of the salvaged goods or the ship, the higher the individual general average contribution. Merchants were obliged to give a 'correct value' of their merchandise and needed to corroborate the stated value with invoices, the bill of lading and the insurance policy (if applicable). In Amsterdam, it was common to take the prevailing sales prices of the goods in the port of destination if the incident had taken place after the halfway mark of the journey. If the incident had taken place closer to the port of departure, the purchase price of the goods would be used.[47] The combination of the three types of document mentioned above (i.e., invoice, bill of lading and insurance policy) made fraudulent behaviour not impossible but very difficult.[48]

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[43] NEHA, BC 277, Archief Commissarissen, f. 55r.

[44] Ordinance of 31 January 1598, Art. 36, *Noordkerk* (n. 16), vol. 1, 656; *Van Niekerk* (n. 1) vol. 1, 209, 218, 230.

[45] NEHA, BC 277, Archief Commissarissen, fos. 55r, 57r; *Schöffer* (n. 1).

[46] For example, see NEHA, BC 277, Archief Commissarissen, f. 62r.

[47] *Schöffer* (n. 1), 80.

[48] According to Schöffer, this meant that the values of the various goods in the records of the Chamber of Insurance are reliable sources regarding the prevailing values of the goods that were traded in Amsterdam: *Schöffer* (n. 1), 79 f.

If the Commissioners were in doubt, they could demand the merchant ratify the value under oath. If a merchant refused (by simply not showing up in court), the Commissioners could alter the value as they saw fit. In a case from 1764/1765, a merchant repeatedly ignored the court's summons, and then refused to swear under oath, after which the Commissioners decided to increase the value of his salvaged goods from 5,260 guilders to 20,000 guilders, thereby significantly increasing the merchant's contribution to the general average damages.[49]

Shipowners were obliged to state the value of their ship, in the state it arrived, as well as the amount of the freight that they should have been paid by the merchants. It was up to the merchants to choose between these two values – value of the ship or amount of freight – which would then be used for the calculation of the general average contribution for the shipowner. The value of the ship usually exceeded the value of the freight and therefore the Commissioners would generally use the ship's value for their calculations. This procedure was not as described by Weytsen, as he stated that both the value of the ship and the freight had to be taken into account to determine the contribution of the shipowner.[50] This meant, however, that the values of the merchandise had to be corrected for the freight fees. The freight fees would be deducted from the value of the goods, but they had to make additional adjustments in case freight was pre-paid and for freight for jettisoned goods. According to Ivo Schöffer, this was too complex and so the freight was usually entirely discounted.[51]

After having determined the damages and the total values, the fees for the Chamber's services were added. The fees were 10 cents per 100 guilders (i.e., 0.1%). This was lower than the fees for insurance cases, which were 0.3%.[52] This may well be an indication that general average cases had a different status than insurance disputes. Finally, a contribution to the poor of the city was added to round figures and so to make calculations easier.[53]

The general average contribution was determined by dividing the total damages by the total value of the assets of the journey. If, for example, the total damages were 1,569 guilders, 3 nickels and 15 pennies, and the value of the merchandise and the ship totalled 8,346 guilders and 16 nickels, the general average-contribution would be 18 guilders and 16 nickels per 100 guilders of value. In the *dispach* this would be stated as: 'every hundred guilders is to contribute

[49] Values that were adjusted by the Commissioners were threefold their (suspected) value. *Schöffer* (n. 1), 79; *J.G. Nanninga*, Bronnen tot de Levantsche Handel (1968), vol. 4, 534.

[50] *Weytsen* (n. 26).

[51] *Schöffer* (n. 1), 80.

[52] NEHA, BC 277, Archief Commissarissen, fos. 21r, 161r. Also, in the case of insurance cases, the fee for the servant was generally higher than in general average cases.

[53] For example, NEHA, BC 277, Archief Commissarissen, f. 58r; *Schöffer* (n. 1).

guilders 18–16' ('yeder hondert daerinne compt te dragen gul. 18–16'), followed by the names of the merchants and shipowner and their respective contribution.[54] Appeals were possible, before the Eschevin Court, at a cost of twelve guilders. Further appeals were to be directed at the *Hof van Holland* (High Court of Holland) and final appeals were possible at the *Hooge Raad* (Supreme Court).[55] There are numerous known cases of insurance disputes that were appealed at the *Hooge Raad*, for example when underwriters tried to avoid paying an insurance claim by delaying the process.[56] There is as yet no proof that general average cases were regularly appealed, but more research is necessary to determine if the Chamber's general average cases were often brought before higher courts.

D. The governance of general average in the nineteenth century

The invasion of French forces at the end of the eighteenth century ultimately led to the demise of the Dutch Republic and its intricate, fragmented institutional structure. In 1809, when the area that is now the Netherlands was part of the French Empire, the *Code Napoleon* was instated, which dealt the final blow to the various municipal regulations that had governed both marine insurance and general average.[57] By this time the Amsterdam Chamber of Insurance and Average, which had for two centuries adjudicated on general average and marine insurance matters, had formally ceased to exist. In practice, the Commissioners were requested by the municipal authorities to continue their adjudications as they were accustomed to do. So, in spite of the fact that the formal, regulatory framework was no longer valid, the Commissioners simply carried on as they had for almost 200 years. Even though the Chamber and the regulatory structure from the *Ancien Régime* were no longer active, there were no provisions in the *Code Napoleon*, or its successor, the *Code civil*, regarding general average. This would leave a regulatory and legal void.[58] In this period, from 1811 until 1838, marine insurance was adjudicated by the *Rechtbank van Koophandel* (Court of Commerce). The state of general average adjudications was far less clear. Two prominent lawyers, Mozes Salomon Asser and his son Tobias Asser, who were active as average adjusters, feared the regulatory vacuum and took the initiative to draft the so-called *Amsterdamsch Compromis* (Amsterdam Agreement) in

[54] This example from NEHA, BC 277, Archief Commissarissen, f. 61r.

[55] *Van Niekerk* (n. 1), vol. 1, 209, 218, 230; *Schöffer* (n. 1).

[56] To prevent this delaying tactic, the Chamber ruled that, regardless of an appeal, the claim had to be paid to the insured: *Van Niekerk* (n. 1), vol. 1, 217 f.; *Vergouwen* (n. 37).

[57] There were municipal ordonnances, not only in Amsterdam, but also, for example, in Middelburg (1600) and Rotterdam (1604). The Code Napoleon was supplanted by the Code civil in 1811. *Vergouwen* (n. 37); *Goudsmit* (n. 17), 315; *Asser* (n. 9).

[58] SAA, Avarij Commissie, T 1508, L. Hardenberg, *De Avarij-Commissie*; *Asser* (n. 9), 3 f.

1811. By signing this *Compromis* all parties agreed to commission an average adjuster, to hand over all relevant documents, and to cooperate with the adjusters during the process of adjusting. The *Amsterdamsch Compromis* did not follow the Dutch customs as practised during the *Ancien Régime* – that is, the practices that were known in Amsterdam. Rather, it complied with contemporary international customs and procedures – meaning those that were used in London, which by then had become the leading financial and insurance market.[59] The original version of the Amsterdam Agreement was published in 1811 and was soon endorsed by the Amsterdam Exchange, which meant that it was accepted practice.[60] This first version stated that the report composed by the average adjusters, the *dispach*, was a claim of the shipowner (*reder*) on the other parties involved (the owners of the cargo).[61]

Even though various parties lobbied for a specialized court to deal with the complex general average cases along the lines of the former Chamber of Insurance and Average, their pleas were to no avail.[62] It was again in Amsterdam that an initiative was taken by those dealing with general average adjustments in daily life: The *Avarij-Commissie te Amsterdam* (the Average-Committee of Amsterdam) was instated in the same year as the original version of the *Compromis* was drafted and endorsed.[63] The Committee was to homologate the *dispaches* that were composed by the average adjusters or, if applicable, adjudicate disputes regarding the apportionment among the various parties of the general average damages. As most of the archives of the Committee have unfortunately been lost, we have no information about the procedures, the number of cases dealt with or the general functioning of the *Avarij-Commissie*.[64]

When the French armies had marched south again, the newly formed Kingdom of the Netherlands was left to rebuild its economy, its trade position and, perhaps most importantly, its institutions. Although the French had initiated drafting a Commercial Code for the Netherlands, this was never officially put into force. Yet, it did influence and inspire those drafting the new Dutch Commercial Code. It was soon clear that marine insurance would be firmly incorporated in this new Code, the *Wetboek van Koophandel*, which came into force in

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[59] *Asser* (n. 9).

[60] *Asser* (n. 9), 1.

[61] SAA, Avarij-Commissie, T1508, L. Hardenberg, De Avarij-Commissie; *Van der Hoeven* (n. 31).

[62] *R. van Boneval Faure*, Het Nederlandsch Burgerlijk Procesrecht, vol. 1 (1871), 123; SAA, Avarij-Commissie, T1508, L. Hardenberg, De Avarij-Commissie.

[63] In the first version of the Amsterdamsch Compromis, the Average-Committee is not yet mentioned.

[64] I have recently located part of the archives of the Average-Committee of Amsterdam, which has subsequently been acquired by the National Maritime Museum in Amsterdam.

1838. In case of a conflict relating to marine insurance, for example between a merchant and his underwriters, the first court of appeal was the *Arrondissementsrechtbank* (District Court), the successor of the Court of Commerce.[65]

General average was also formally regulated in Book 2, Title 11 of this Code. In one of the first relevant articles it is stated that if the parties had not made other contractual arrangements, then average – both general and particular – would be dealt with according to the Commercial Code.[66] The articles that followed stipulated the difference between general average (*Gemeene Averij* or *Avarij-Grosse*) and particular average, and that in case of general average, the value of the ship, the amount paid in freight fees and the value of the cargo were to contribute to the amount of general average.[67] In the following articles the various actions that could lead to general average damages were defined, including the most well-known forms, such as the jettison of cargo and the cutting of masts and ropes, to less common incidents as the wounding of crew men while defending the ship against enemies.[68] The Code reiterated that the actions had to have been intentional and in the interest of both the ship and the cargo. Other articles of Title 11 focused on whether certain costs were 'to be admitted into general average', for example, the circumstances under which fees for pilots or lighter ships were to be included as damages incurred for the common good.[69] The final articles (Arts. 722–740) related to the actual procedure, calculation and allocation of general average. According to Art. 722, the calculation and apportionment of the general average damages was handled in the port of destination, unless parties had agreed otherwise. In practice, it seems that average adjustment took place in the city where the cargo was originally destined. The reason was that, in case the incident had taken place in the second half of the journey and thus the selling price of the merchandise had to be used for the calculations, it was easier to determine the value of the goods in this port. If, however, general average was adjusted elsewhere, even abroad, Dutch authorities would honour the foreign laws and customs.[70] A clear example of this can be found in the *dispach* regarding the unfortunate journey of the *Jan Maria*, a three-mast schooner whose crew was forced during a storm, while *en route* from the Baltic to its home port in the Netherlands, to jettison cargo. The ship, heavily damaged, reached the nearest port in Germany, where the general average procedures were put in motion by

[65] SAA, Avarij Commissie, T1508, L. Hardenberg, De Avarij-Commissie; *Asser* (n. 9).

[66] Wetboek van Koophandel (Commercial Code).

[67] Particular average was to be borne by an individual shipowner or merchants. General average was to be carried by ship, freight and cargo: Wetboek van Koophandel 1838, Arts. 696 and 698.

[68] Wetboek van Koophandel 1838, Art. 699; *Asser* (n. 9).

[69] Wetboek van Koophandel 1838, Book 2, Title 11, among others Arts. 702, 704 f., 708.

[70] Wetboek van Koophandel 1838, Book 2, Title 11, Arts. 711, 722 and 724; *Lodewijk J.H. Bouman*, Waarom worden op Java slechts weinige dispaches opgemaakt? (1861), 4.

local average adjusters. Their report and findings regarding the incident, the damages and the value of the ship, formed the basis of the average calculations and the appropriation of the damages and were an integral part of the final report. This final *dispach* was composed in the original port of destination, Amsterdam, by the company of Mr. Kool and Eduard N. Rahusen, who often acted as average adjusters.[71]

So, formally, general average was governed by the Commercial Code as well, and parties could resort to the District Court. In practice, however, the *Amsterdamsch Compromis* rendered the Commercial Code inactive for run-of-the-mill general average cases. The text of the *Compromis* stated that parts of the Commercial Code were not applicable until the case had been concluded by the average adjusters. The *Amsterdamsch Compromis*, an agreement drafted not by the government but by private lawyers, would supersede the Commercial Code. If a party did not agree with the conclusions and calculations of the average adjusters, he could appeal first with the Average-Committee. Only if the Committee was unable to solve the conflict did the Commercial Code become relevant again when the litigant turned to the District Court for a more formal appeal. Although the members of the Average-Committee seem to have functioned as arbitrators, there was a formal air to the institution as the Committee held court at the Amsterdam Palace of Justice, on formal, predetermined court days. The interconnectedness of formal and informal structures became even more tangible when, in 1860, an international conference on general average was organized in Glasgow. The objective of the meeting was to unify the varying international regulations regarding general average. The Dutch were not represented by a government official, but by the previously mentioned Rahusen, a well-known lawyer and average adjuster.[72]

E. Conclusion

The governance of general average in Amsterdam in the nineteenth century seems to have consisted of several layers: at first sight it would seem that general average was formally regulated by the Commercial Code which was enforced by

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[71] Findings based on research commissioned by the National Maritime Museum in Amsterdam for the Mr. Peter Rogaar Fellowship. Archives of the National Maritime Museum Amsterdam, inventory numbers 2009.0141-0143.

[72] The conference in Glasgow was the first of a series and led to the first version of the York-Antwerp Rules in 1890. The York-Antwerp Rules still govern general average up to the present day. *Justus G. Kist*, Het handelspapier, beginselen van het wisselregt en van het regt omtrent acceptatien, assignatien, papier aan toonder en cognossementen volgens de Nederlandsche wet, vol. 2 (1861); *Bouman* (n. 70), 4; Nieuwe Rotterdamsche Courant, 5–8 November 1860; *Eduard N. Rahusen*, Verslag van de vergaderingen over de Internationale Averij-Grosse regeling, gehouden te Antwerpen (1877).

the District Court, but the *Amsterdamsch Compromis*, a private order initiative, rendered the law inactive and added enforcement by arbitration as an extra layer to the setting. It would seem that the handling of general average cases was, in a way, returned to 'wise men' – enforcement was once again semi-formal by means of arbitrators.[73] This development would have been contrary to institutional theory regarding the path of development of enforcement mechanisms. However, the setting in the nineteenth century, whereby the semi-informal enforcement of general average – embodied by the *Amsterdamsch Compromis* and the Average-Committee – was layered with a formal coating of laws and a formal court, was not that much different from the situation in preceding centuries.

The Chamber of Insurance and Average adjudicated almost 2,000 litigation insurance cases over the course of the eighteenth century.[74] During this same period, the Chamber handled nearly 9,000 general average cases. As stated, these did not all relate to conflicts that needed to be resolved. In many, and probably the majority of the instances, it was merely the administrative handling of an unfortunate journey. The fact that the Commissioners were able to enforce the handing over of documents, adjust values and quantities may well have assisted the efficiency of the procedure. The verdicts of the insurance cases of the Amsterdam Chamber clearly had a different status from the general average *dispaches*. The former were considered formal verdicts, which could, and apparently were, often appealed, up to the highest possible court.[75] General average *dispaches* were perceived not so much as a verdict but rather as an administrative report (and calculation) of incidents that were inherent to long-distance trade.

It was perhaps not surprising that those handling general average cases in daily life – average adjusters – initiated both the *Amsterdamsch Compromis* and the Amsterdam Average-Committee. A crucial element of average adjustment was, according to Eduard Isaac Asser, the swiftness of the procedure. Especially in the case of perishable merchandise, merchants were eager to unload the goods as soon as possible. The shipowner on the other hand wanted a guarantee that all parties would ultimately pay their general average contribution. The set-up of the *Amsterdamsch Compromis* fulfilled both wishes: it was a relatively simple Agreement that bypassed legal courts and avoided slow processes. At the same

[73] SAA, Avarij Commissie, T1508, L. Hardenberg, De Avarij-Commissie; *Asser* (n. 9); *Bonefal Faure* (n. 62), vol. 1, 123.

[74] The records of the Chamber regarding the seventeenth century have nearly all been lost: *Go* (n. 6).

[75] *Van Niekerk* (n. 1), vol. 1, 217 f.; SAA, Avarij-Commissie, T1508, L. Hardenberg, De Avarij-Commissie.

time, it was legally binding to ensure that all parties would honour their obligations.[76] Thus, the composition and acknowledgement of the *Amsterdamsch Compromis*, followed closely by the establishment of the Average-Committee of Amsterdam, was not as inconsistent with institutional theory as it may seem at first sight.

A more formal regulation of general average (e.g., similar to the governance of insurance cases), would have led to objections from merchants, adjusters, shipping agents and shipowners as formal procedures would undoubtedly have taken up more time and money. Informal enforcement may at times, as argued by Greif, Feldman and Bernstein, achieve results that may not be accomplished by formal enforcement mechanisms.[77] Considering the way that general average was governed in preceding centuries, formal enforcement by a third party would have been an institutional step too far. Similar to the Tuna Court, the settings within which institutions function, are relevant. In spite of appearances, as in present-day Tokyo, the group for whom general average was relevant was a limited group of participants, bound by the necessity to cooperate as they were all too small to operate on their own. They needed one another, to provide cargo or space, for the future of their own enterprises.

The development of general average and the way that it was governed from the seventeenth until the late nineteenth century in Amsterdam, shows once again how complex institutions (and their development) are. Institutional theory must take into account not only that institutions have various functions that may have differing effects on various groups of actors, but also that the perception of an institution by those involved in it may not concur with its formal presentation.

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[76] *Asser* (n. 9).

[77] *Greif*, Contract Enforceability (n. 10); *idem*, The Maghribi Traders (n. 10); *idem*, Institutions (n. 14); *Bernstein* (n. 21); *Feldman* (n. 19).

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