2014 EWHC 3445 (Comm)
Case No: 2013 Folio 1270

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Friday, 24 October 2014

BEFORE:

STEPHEN HOFMEYR QC (Sitting as a Deputy High Court Judge)

BETWEEN:

(1) MITSUI & CO LTD
(2) THAI PLASTIC AND CHEMICALS PUBLIC COMPANY LIMITED
(3) STEPHEN REDMOND
(on his own behalf and on behalf of all underwriting members of Antares Syndicate 1274 and in a representative capacity on behalf of all underwriting members subscribing to policy number 2004B090209M463418002 for the underwriting year of account 2009)
(4) RSA INSURANCE GROUP PLC

Claimants

- and -

(1) BETEILIGUNGSGESELLSCHAFT LPG TANKERFLOTTE MBH & CO KG
(2) LPG CARRIERS LTD

Defendants

Paul Toms (instructed by SALVUS LAW LTD) appeared on behalf of the Claimants
Richard Sarll (instructed by STEPHENSON HARWOOD) appeared on behalf of the Defendants.

Hearing dates: 7 and 24 October 2014

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

STEPHEN HOFMEYR QC (sitting as a Deputy Judge of the High Court)

Introduction

1. On 29 January 2009, Somali pirates forcibly took possession of the chemical carrier *MV LONGCHAMP* in the Gulf of Aden. At the time, the vessel was fully laden with the First or Second Claimants' cargo of vinyl chloride monomer in bulk. The pirates demanded a ransom of US$6 million. On 22 March 2009 a ransom payment of US$1.85 million was agreed by the First Defendant, the vessel's owner. It was paid five days later. During the period of the negotiation, the ship-owner incurred items of expenditure in the total sum of US$181,604.25. The sole issue in this action is whether the expenditure incurred by the ship-owner during the period of the negotiation is allowable in general average. The Defendants say that it is allowable in general average; the Claimants say that it is not.

2. General average was an important part of the maritime law of antiquity. It formed part of the maritime law of Rhodes and was based in earlier custom. It was adopted into the Digest of Justinian and was independently recognised and extended among other maritime peoples and embodied in the early codes and statements of maritime law. From these, and through the practices of commercial people, it has become part of English law.

3. In maritime adventures, at least three classes of interests are usually concerned – the interests in the ship; those in the cargo; and those in the freight to be paid on the cargo. These interests are liable to their own particular risks of total or partial loss, and also to risks which threaten them as a whole. Subject to any contract, any loss sustained by one of them, whether arising from a danger peculiar to it, or from one common to the whole adventure, must generally be borne by that interest itself. It is "*particular average*" and lies where it has fallen.

4. However, to that general rule there is an exception of great importance. The exigencies of marine enterprise at times require that to avert a danger which threatens the whole adventure, some particular interest or interests must be intentionally sacrificed for the benefit of the remainder. Examples in times past were the throwing overboard of cargo or the cutting away of masts for safety in a storm. Where such a sacrifice has been made, the whole burden of the loss occasioned is not

left on the interest upon which it has fallen. It is imposed upon all those for whose benefit the sacrifice has been made, rateably, in proportion to their saved values. The loss is said to be a general average loss; and the contributions made to it by those benefited are general average contributions.

5. A closely similar principle requires that some kinds of extraordinary expenditure made for the benefit of the maritime adventure as a whole must be borne by all concerned. Expenditure incurred by the ship-owner in the performance of its contract ordinarily falls upon it alone. Further, any extraordinary expenses for the peculiar benefit of the ship, or for the preservation of some portion of the cargo, must be borne wholly by the interest for which it has been incurred. However, where, under the pressure of a common danger, an extraordinary expenditure becomes necessary to save both ship and cargo, the position is different. In such circumstances, the burden incurred by the ship-owner is distributed amongst all those interests which benefit from it. It is a general average expenditure and general average contributions towards it become payable.

6. The two kinds of general average loss were embraced in an often quoted single definition framed by Lawrence J in ***Birkley v Presgrave*** (1801) 1 East 220 at 228:

> "*All loss which arises in consequence of extraordinary sacrifices made, or expense incurred, for the preservation of the ship and cargo comes within general average, and must be borne proportionably by all who are interested.*"

7. Whether the principle of general average ought to be regarded as a matter of implied contract or as a rule of positive law resting upon the dictates of natural justice is a question on which judicial opinions have been divided over many years. In ***Strang, Steel & Co v A Scott & Co*** (1899) 14 App Cas 601, a dispute involving the jettison of cargo following a stranding, Lord Watson (delivering the judgment of the Privy Council consisting of Lords Watson, FitzGerald, Hobhouse and MacNaughten) said that it was unnecessary for their Lordships to decide the question. He said:

> "*The principle upon which contribution becomes due does not appear to them to differ from that upon which claims of recompense for salvage services are founded. But, in any aspect of it, the rule of contribution has its foundation in the plainest equity. In jettison, the rights of those entitled to contribution, and*

the corresponding obligations of the contributors, have their origin in the fact of a common damage which threatens to destroy the property of them all; and these rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved."

8. The preponderance of judicial opinion, however, favours the view that general average is a general rule of maritime law, independent of the contract of carriage. This view is shared by many textbook and academic writers: Lowndes and Rudolf, *The Law of General Average and The York-Antwerp Rules*, 14th edition, para 00.29; Goff and Jones, *Law of Restitution*, 6th edition, paras 13.003, 14.042b; Rose, *General Average Law and Practice*, 2nd edition, paras 1.14-1.20; Carver, *Carriage by Sea* (British Shipping Laws, Volume 2), para. 1349. Where there is a contract between relevant parties which makes provision relating to general average, the rights and liabilities of the parties may nevertheless be limited or varied by the terms of that contract.

9. Whatever be the true basis of the principle of general average, and whether the rights and liabilities of the parties are governed by a general rule of maritime law or by the terms of a contract, it is not in doubt that the rule is founded upon equitable principles and natural justice. In ***Strang, Steel & Co v A Scott & Co*** (1899) 14 App Cas 601, Lord Watson (delivering the judgment of the Privy Council) stated that "*the rule of contribution has its foundation in the plainest equity.*" Similar statements have been made by other judges at other times: in ***Pirie v Middle Dock Co*** (1881) 4 Asp. Mar. Law Cas. 388 at 390, Watkin Williams J said: "*It is a law founded upon justice, public policy, and convenience and rests … upon reasons which are so obvious that it is not surprising to find that it is older than any other law or rule in force …*"; in ***Burton v English*** (1883) 12 QBD 218 at 220, the Master of the Rolls, Lord Brett, said: "*It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute …*"; and in ***Milburn v Jamaica Fruit Importing Co*** [1900] 2 QB 540 at 550 Vaughan Williams LJ said: "*The liability to contribute in no sense results from the contract of carriage, but exists wholly independently of the contract of carriage, by virtue of the equitable doctrine of the Rhodian law, which as part of the law maritime has been incorporated in the municipal law of England.*" Textbook writers have shared this view. For example, in the 6th edition of *A treatise on the law of Merchant Shipping* (1923), the editors, Edward L de Hart and Alfred T

Bucknill, stated (at 528) that the principle of general average was introduced and justified by expediency and sanctioned "*by the principles of natural equity*".

10. By the middle of the nineteenth century, important divergences emerged in the application of the principle of general average between different systems of maritime law. The practical inconvenience this caused had already become apparent in the eighteenth century and, with the enormous development of international commerce which followed the Napoleonic wars, the differences became serious. This created an appetite for a uniform international system of rules for the ascertainment of what losses were properly to be regarded as coming within the principle of general average, for determining the method of calculating them, and for deciding the manner in which they were to be borne. After a good deal of preliminary work the sponsors of the movement came to the conclusion that it was more feasible to secure the desired uniformity of rules in the first instance by means of incorporating an agreed set of rules in contracts of affreightment, leaving the attempt to bring about a common rule to a later period. Lord Chorley of Kendal and C. T. Bailhache, the editors of the 15th edition of Arnould, *The Law of Marine Insurance and Average*, 1961, recount the history.

11. A conference was held at York in 1864 at which the "*International General Average Rules*" were framed and accepted. The practical results which at first followed from this beginning were not encouraging, but, in 1877, after another conference held at Antwerp at which the earlier set of rules was considerably modified and somewhat extended, a determined effort was made in England to give currency to the rules which came to be called the York-Antwerp Rules.

12. As from that time the rules have been more and more frequently incorporated in contracts of carriage by sea. Now it is the usual practice to adopt them. The result is that English law relating to general average is normally applied only so far as it corresponds with the requirements of the rules, and in some respects there is considerable divergence between the two systems.

13. One such divergence concerns the principle of substituted expenses. As the decision of Blackburn J in ***Wilson v Bank of Victoria*** (1867) LR 2 QB 203 shows, English law did not recognise any such principle. The *ROYAL STANDARD* was a large sailing ship with an auxiliary steam screw. She sailed on a voyage from Australia to England carrying a

cargo of gold and about 500 tons of bunker coal. Eleven days into the voyage she hit an iceberg and suffered so much damage to her masts and sails that, in practical terms, she lost all power of sailing. She reached Rio de Janeiro under steam alone and nearly exhausted her stock of coal. The repairs necessary to restore her ability to sail would have cost many thousands of pounds more than in England and taken several months to perform, and the cargo would have had to be discharged and warehoused. In the circumstances, the master had temporary repairs performed. The temporary repairs took only 3 days to perform and enabled him to avoid discharging the cargo and to complete the voyage under steam. However, in order to do this, he had to purchase coals at Rio and again *en route* at Fayal.

14. The voyage having been completed under steam alone, the ship-owner sought to charge the cost of the coal against the shippers of the cargo as general average on the principle that the expenditure was a substitution, beneficial to all parties, for the greater expenditure of discharging, storing and reloading the cargo, which the master had the right to incur by repairing at Rio, and ought to be apportioned in the same way as the greater expenditure would have been.

15. Giving the judgment of the Court, Blackburn J questioned whether repairing the sailing ship at Rio would have been justifiable, but, without deciding the question, said that English law did not recognise a principle of substituted expenditure and that any such principle, if it were to be adopted, would have to evolve as a custom in the trade or be a matter of express contract between the parties:

> "*… we think that the expenses actually incurred must be apportioned according to the facts that actually happened, and that there is no principle on which they can be apportioned according to what might have been the facts if a different course had been pursued.*
>
> *No case or authority was cited to support the principle contended for, nor are we aware of any. If in any particular trade it has been found convenient to act on this principle, and that has been done to such an extent as to create a custom, tacitly making it part of the contract that this shall be the principle applied, or if the parties to a charterparty stipulate that it shall be so, and by words of reference to the charterparty in the bills of lading and the policies of insurance,*

> *make it part of the contract affecting every one, the case would be different; but as it is, the principle proposed is not, we think, tenable at law.*"

16. Although in 1867 there was no accepted custom to apply the principle of substituted expenses, it does appear that those involved in maritime trade favoured the principle and, in the ensuing years, English practices emerged on the subjects of towage and forwarding of cargo from a port of refuge.

17. In the first set of York-Antwerp Rules (1890) the English practice was adopted; and, in 1924, the two specific examples were supplemented with a new lettered rule F which introduced for the first time a general statement of the principle of substituted expenses. In the York-Antwerp Rules 1924, Rule F provided as follows:

> "*Any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed but only up to the amount of the general average expense avoided.*"

18. In all subsequent versions, the principle of substituted expenditure has been adopted as an express standard provision for incorporation into contracts of carriage by sea. Accordingly, where the York-Antwerp Rules apply by contract, as is now normal, the English law of general average is modified by agreement.

19. According to the current editors of Lowndes and Rudolf, *The Law of General Average and The York-Antwerp Rules* (2013), between 1924 and 1950, substituted expenses falling to be dealt with under Rule F were in practice charged entirely to general average up to the amount of the hypothetical general average expense avoided and without regard to any possible savings to other interests. However, to address a concern that the rule might be interpreted to mean that all parties who had benefited by a substituted expense should contribute to that expense, the words "*without regard to the saving, if any, to other interests*" were added to the 1950 version of the York-Antwerp Rules. There was no further change to Rule F, not in 1974, 1994 or 2004, save that in 1994, the word "*additional*" was substituted for the word "*extra*".

20. The history of the introduction and development of the principle of substituted expenses reveals that both the English practices and the York-Antwerp Rules on the subject of substituted expenses proceeded from the outset on the basis that substituted expenses are the expenses incurred in respect of a course of action

undertaken as an alternative to or in substitution for the expense of an action that would be allowable as general average. The principle of substituted expenses contemplates that the hypothetical alternative expenditure, if it had been incurred, would have been recoverable in general average.

The contracts

21. The issue in this case arises because, at the time of the hijacking on 29 January 2009, the cargo was being carried under a contract of carriage contained in or evidenced by bills of lading dated 6 January 2009 which expressly incorporated the York-Antwerp Rules 1974.

22. The vessel had loaded a cargo of 2,728,732 metric tons of Vinyl Chloride Monomer in bulk at Rafnes, Norway for carriage to Go Dau, Vietnam. Upon completion of loading, on 6 January 2009, bills of lading were issued to order naming the First Claimant as the "*notify address*". The bills of lading stated expressly that "*General Average, if any, shall be settled accorded* (sic) *to the York/Antwerp Rules 1974*".

23. The vessel is a chemical carrier of 4,316 mt dwt. At the time of the hijacking she was crewed by a complement of 13 officers and ratings.

24. The First and Second Defendants were the owner and bareboat charterer, respectively, of the vessel which was under time charter to Bridge Chartering Marine Ltd, Monrovia, Liberia and under voyage charter to Mitsui & Co Benelux N.V/S.A. Münchmeyer Petersen Steamship and Bernhard Schulte Shipmanagement were the Commercial and Technical Managers of the vessel, respectively.

25. The Claimants contend that the cargo was sold by the First Claimant to the Second Claimant on CIF Go Dau terms. This is not admitted by the Defendants but the dispute is not material because it is common ground that, at the time of the hijacking, the cargo was owned by either the First or Second Claimant.

The pertinent facts

26. Most of the relevant facts are not in dispute.

27. At about 04:12 hours on 29 January 2009 the vessel entered the recommended corridor in the Gulf of Aden in which international naval forces monitor the movement of all vessels. At about 06:28 hours the Third Officer observed a very fast skiff approaching. After further identification it became obvious that the skiff was under the command of pirates. The vessel's security alert was triggered at about 06:35 hours and about five minutes later seven heavily armed pirates boarded the vessel and took over the bridge. At the time the Vessel was in a position 14˚09,37' North and 49˚57,45' East.

28. A warship of the Indian Navy appeared on the scene at about 06:50 hours and a fire fight commenced. One crewman and two pirates were slightly wounded. The pirates forced all of the crew to assemble in the wheel house on the bridge and then commanded the Master to alter course towards the bay of Eyl, Somalia.

29. At about 08:06 hours the Manager's Company Security Officer was in telephone contact with the Master who confirmed the hijacking of the vessel and kidnapping of the crew. These facts were also confirmed in a telephone conversation with the international naval forces at about 09:25 hours. Having been informed of the hijacking and kidnapping, the vessel's owners and managers, together with the Hamburg State Criminal Police and consultants from a security firm which specialised in kidnapping cases, formed a crisis management team.

30. The following day, at about 14:05 hours, two additional pirates and a negotiator boarded the vessel. During a telephone conversation with the Manager's CSO the negotiator demanded a ransom of US$6 million. At about 21:15 hours, the vessel was boarded by two further heavily armed pirates and a second negotiator.

31. On 31 January 2009 the vessel anchored in a position 07˚38,0' North and 49˚51,9' East. Another four heavily armed pirates boarded the vessel and the first negotiator disembarked.

32. On 3 February 2009 General Average was declared, Stichling Hahn Hilbrich GmbH of Hamburg, Germany, having been appointed Average Adjusters.

33. The negotiations were generally conducted by the Manager's CSO on behalf of the Second Defendant and by a negotiator on behalf of the pirates. At the outset, the Manager's CSO informed the pirates' negotiator that the ransom demand was too

high and the pirates' negotiator assured him that the pirates wanted to settle as soon as possible. Thereafter, the Manager's CSO negotiated within parameters set by the crisis management team, namely, a target settlement figure of US$ 1.5 million and an initial offer of US$373,000.00. A major objective of the crisis management team was to reduce the length of the crew's captivity and to settle for what they considered to be a reasonable ransom figure. They were apparently not willing to insist on a hard and prolonged negotiation to meet the initial target settlement figure if this could not be achieved.

34. During the negotiations an advisor appointed by hull underwriters to assist the vessel's Managers in the negotiations informed the crisis management team that Somali pirate cases "*were taking more time and costing more money to settle than just a few months ago*". During the same period the pirates allowed the crew to call their families. Permission was given for these calls to be made, primarily to encourage the families to apply pressure on the ship-owners. The Master also complained about deteriorating conditions on board the vessel.

35. After a period of negotiation which lasted in excess of 50 days, on 22 March 2009, a ransom was agreed in an amount of US$1.85 million. The ransom was delivered in the afternoon of 27 March 2009, dropped at sea from a chartered aircraft. The pirates disembarked on 28 March 2009 and at about 08:00 hours the vessel recommenced her voyage. She proceeded first to Galle, Sri Lanka, where the crew were released and replaced.

36. The Vessel departed Galle on 6 April 2009, called at Singapore for bunkers and provisions on 12 April 2009 and arrived at Go Dau, Vietnam on 14 April 2009. Discharge of the cargo was completed on 16 April 2009.

37. In the meantime, prior to discharge of the cargo at Go Dau, General Average security had been provided by cargo interests in the form of an Average Bond dated 23 March 2009 signed by the Second Claimant. The Average Bond was counter-secured by two General Average Guarantees, dated 31 March and 1 April 2009, signed by the cargo underwriters, the Fourth and Third Claimants, respectively, for their respective shares of 52,9802% and 47,0198%. The standard form non-separation agreement was incorporated in both the Average Bond and the Guarantees.

38. The Adjustment of General Average was issued by Stichling Hahn Hilbrich on 31 August 2011. The Adjustment calculated the total contributory capital to be US$5,452,278.00 and the contributory value of the cargo to be US$787,186.00 (i.e. about 15%). It also calculated the total general average expenditure to be US$3,298,365.49 and the cargo interests' contribution to be US$476,209.60.

39. By the time the Adjustment was issued the cargo underwriters had made payments on account of the cargo interests' contribution to general average in the total amount of US$499,977.64. Taking into consideration interest, commission and payments on account, the cargo underwriters have on any view overpaid in the amount of US$97,328.66. There is no dispute that this overpayment should be repaid by the Second Defendant.

40. The ransom payment of US$1.85 million was included within the expenditure allowed in general average in the Adjustment and it is common ground that this allowance was correct. The Adjustment also allowed substituted expenses in an amount of US$181,604.25. The substituted expenses were said to be allowable pursuant to Rule F of the York Antwerp Rules 1974 on the following basis:

> "*Vessel's Owners and Managers together with the appointed Consultant negotiated successfully the initial demand of ransom in an amount of USD 6,000.000.00 down to an amount of USD 1.850.00.00 during a negotiation period of about 51 days, so that an amount of USD 4.150.000.00 was saved in the common interest of all property owners concerned, which would have been otherwise recoverable in General Average as per Rule A of the York-Antwerp Rules 1974. We are of the considered opinion that the expenses, which were incurred during the period of negotiation over the ransom amount, can be allowed in General Average as substituted expenses as per Rule F of the York-Antwerp Rules 1974, but only up to the amount of the General Average expense, which has been avoided.*"

41. The cargo interests contend that the substituted expenses should not have been allowed in the Adjustment and that the amount of the overpayment was accordingly greater than US$97,328.66. They seek an order to that effect.

42. The disputed costs and expenses allowed as substituted expenditure in the Adjustment in the total amount of US$ 181,604.25 were made up as follows:

(1) US$ 20,639.30 for professional media response services said to have been incurred to facilitate the negotiations over the ransom amount in a manner free from pressure and influence of public opinion;

(2) US$ 75,724.80 for crew wages (including basic wages, fixed overtimes, social security contributions and leave allowances) paid to the crew during the period of negotiation;

(3) US$ 70,058.70 for "*high risk area bonus*" payments to the crew during the period of the negotiation by reason of the fact that the vessel was detained within the Gulf of Aden;

(4) US$3,315.00 for crew maintenance at a reduced rate of US$ 5.00 per man per day for the period of the negotiation – the daily rate was reduced because there was not sufficient food on board during the period of detention;

(5) US$ 11,115.45 for bunkers consumed during the period of negotiation; and

(6) US$751.00 for telephone charges said to have been incurred using the Vessel's Telaccount satellite traffic network in connection with the hijacking and negotiation over the ransom amount.

43. The Claimants admit that each of these items of expenditure was incurred.

44. The Claimants adduced no witness statement evidence at the trial. The Defendants, in contrast, relied on factual evidence contained in the witness statements of Mr Wolfgang Chruscz, Mr Thomas Riepen and Mr Karsten Poetzsch. However, there was no live evidence at the trial. When each of the witness statements was served the Defendants informed the Claimants that the witnesses would not be called to give oral evidence on the ground that the witnesses were over the seas.

45. Mr Chruscz was the Director of Finance and Accounting at Münchmeyer Petersen Steamship, the vessel's Managers, at the material time. In his witness statement, he gives evidence about some of the categories of expense claimed as substitute

expenditure. The crew, he says, were each contractually entitled to a "*high risk area bonus*" whilst the vessel was in the Gulf of Aden. This was because the area had been declared a High Risk Area in 2008 by the International Bargaining Forum, with the crew of vessels transiting the area being entitled to a 100% bonus of their basic wage. The US$ 3,315.00 claimed for crew maintenance, he says, concerned the cost of victualing the crew during the period of the negotiation. Whilst it is normal practice to allow US$ 10.00 per day per crew member, a reduced rate of 50% was applied because the vessel ran out of food. The US$ 751.00 claimed for telephone charges, he says, relates to the use of the vessel's Telaccount satellite traffic network for the purposes of negotiating the ransom.

46. Although he no longer works for a company related to the Defendants, at the material time in early 2009 Mr Riepen was employed in the Manager's Operating and Chartering Department. He was responsible, amongst other things, for the operation of the vessel and is able to say, based on first-hand knowledge, that the various expenses claimed as substituted expenditure were incurred in order to achieve a reduction in the amount of the ransom ultimately paid. He was also able to provide additional information about Maritime Technical International Inc. who provided advice to the crisis management team as to how best to manage the press coverage during the period of negotiations. Maritime Technical International formulated responses to the media, including the preparation of press releases and briefings provided to editorial departments of media outlets, in order to prevent news of the kidnapping being misrepresented in the media. I was shown a number of examples of press reports which tended to support this evidence. These services, Mr Riepen says, had an important effect upon the reduction of the amount of ransom demanded by the pirates. Without such services, the crisis management team could have faced public pressure to secure an earlier release of the crew at a higher rate of ransom. Equally, if the pirates, who were known to be aware of the Western media, had discovered that the situation was attracting media coverage, they could have taken a more threatening stance towards their hostages and been less willing to agree the ransom at a lower sum. In this way, he says, the work of Maritime Technical International had a real effect on reducing the amount of the ransom paid. Mr Riepen was also able to give evidence about the bunkers consumed by the vessel during the period of the negotiations and how the bunker consumption was calculated. No dispute arises in relation to his bunker calculations.

47. The third witness to provide a witness statement was Mr Poetzsch of Stichling Hahn Hilbrich GmbH, the Average Adjusters. He gave evidence about the information available at the time of the hijacking as to the value of the various properties interested in the maritime adventure. He explained in his statement that the vessel's insured value under the hull war risks and increased value war risks policies were US$ 7 million and US$1.5 million, respectively; that oral valuations were received from Messrs N Shipley & Co Ltd and English White Shipping Limited as to the sound market value of the vessel which valued the vessel at US$ 3.5 million and US$ 5.5 million, respectively; that an oral valuation was received from Captain Reinhard Jeske-Tiemann of Messrs Capt. Klaus Foerster GmbH as to the sound market value of the cargo which valued the cargo at between US$ 1.431 million and US$ 2.025 million; and that a value of about US$ 100,000 was placed on the bunkers on board of about 290 metric tons HFO and 40 metric tons MDO. He said that, based on the information which he had gathered, he informed the ship-owners on 30 January 2009 that the value of the property interested in the maritime adventure was likely to be in excess of US$ 6 million.

48. None of the witness evidence was seriously challenged and I have no reason to doubt its veracity.

Opinion of the Association of Average Adjusters

49. In mid-2010, an Advisory Committee of the Association of Average Adjusters, consisting of five Fellows of the Association of Average Adjusters, was requested to provide an opinion in relation to a different adjustment arising out of a different act of piracy. Their terms of reference and conclusion are set out in full in an Opinion dated 30th June:

> "*The Advisory Committee was requested to respond to a referral from cargo insurers in a London general average adjustment matter involving seizure of a vessel and her cargo by Somali pirates and in particular to address the question as to '*whether or not expenses for crew and bunker during the detention of the vessel are to be allowed in GA.*' It was subsequently confirmed that the question referred solely to wages of the crew and bunker consumption during the period when the vessel was held by the pirates and at such time a further enquiry was made by the cargo insurers – i.e. '*to consider the removal (theft) of navigational

equipment by the pirates and consumption of food and stores during the same period, which were included in the GA claim'.

In addressing this enquiry the Committee members concerned have not been provided with any further information other than that summarised and in particular the relevant adjustment has not been sighted.

Having reviewed the matter the five members of the Advisory Committee selected to respond were unanimous in their opinions which may be summarised as follows.

1. It is not considered that wages and maintenance of crew and bunkers consumed during the period of seizure by pirates can be allowed in general average since (a) a location to which the pirates take a vessel and her cargo is not deemed to represent a port or place of refuge so as to give rise to an allowance under Rule 11 of the York-Antwerp Rules and (b) the resort to such location was not intentionally incurred within the terms of Rule A and relevant costs would represent a loss by delay excluded by the second paragraph of Rule C.

2. It is not thought that any claim can be allowed in general average for the loss of navigational equipment or food and stores which evidently amounts simply to theft by the pirates and not a GA act for the common safety of ship and cargo.

We hope the above is clear but if you have any further questions we would be happy to address these."

50. In 2012 a submission was made to the Advisory Committee in relation specifically to the Adjustment concerning the hijacking of the *MV LONGCHAMP*. The Report of the Advisory Committee, dated 21 June 2012, was in the following terms:

"*The following submission has been made to the Association:*

'I would like to bring before the Association of Average Adjusters' Advisory and Dispute Resolution Panel an issue for guidance that we believe generally concerns ship, cargo and other contributing Interests as well as average adjusters.

This office represents Lloyds Underwriters and London Companies who insured the only cargo on board a chemical tanker in a piracy and ransom case.

We have a number of issues on the adjustment received however the purpose of this approach is concerning expenses claimed under Rule F.

We are aware of the Advisory Panel's previously published opinion that wages and maintenance of crew and bunkers consumed during the period of seizure by pirates are not allowable in GA. Therefore you can understand our concern when we noted from the adjustment in this particular case that these very expenses were being claimed under Rule F.

The adjusters' explanatory note in the adjustment reads:

"*Vessel's Owners and Managers together with the appointed Consultant negotiated successfully the initial demand of ransom in an amount of $6,000,000.00 down to an amount of finally $1,850,000.00 during a negotiation period of about 51 days, so that an amount of $4, 150,000.00 was saved in the common interest of all property owners concerned, which would have been otherwise recoverable in General Average per Rule A of the York - Antwerp Rules 1974. We are of the considered opinion that the expenses, which were incurred during the period of negotiation over the ransom amount, can be allowed in General Average as substituted expense as per Rule F of the York- Antwerp Rules 1974, but only up to the amount of General Average expense, which has been avoided.*"

In response to our query, the adjusters gave further justification of the general principle of the saving by a series of "what if' alternatives of say after day 10 the ransom demand was lowered to $4,000, 000 which demonstrated a saving.

The expenses claimed as substituted expenses are as follows:-

- Crew wages and for 51 days
- Crew maintenance at a reduced rate (part stolen by pirates) for 51 days

- Crew high risk area bonus for 51 days
- Media response costs in the negotiation period
- Bunkers consumed during negotiations
- Telephone charges during the negotiation period

Our rebuttal is that the negotiation period is common in all piracy cases, and the expenses were not extraordinary in nature and the expenses claimed could not be in any way be (sic) classed as substituted expenses for costs normally and reasonably allowed in GA. In the thirteenth edition of Lowndes & Rudolph, the alternative course of action which would give rise to expenses allowable as general average is dealt with particularly at F29-31. In F31 it states "*it should be a natural and logical alternative and not a matter of artificial invention*."

In our experience there is always a period of negotiation before a vessel is released and it is the normal means of dealing with such situations and this case is just such an example. There was no alternative course of action taken, the case followed the unfortunate but normal course of events. We are of the view that the "*saving*" of $4,150,000 is in fact an erroneously manufactured "*catch all*" and certainly not within the meaning or spirit of Rule F.

Despite what we consider to be reasoned arguments, the adjusters remain entrenched in their views and we would appreciate receiving the guidance of the panel. This is an important issue and if the panel needs any more information we can supply the details with which to approach the adjusters.'

The Association convened a panel to consider the matter, consisting of the following Fellows: …

Mr. [X] had declared an interest in the matter in that the adjustment, which he supported, was approved and signed by a colleague in his London office. However, it was agreed by the Association that he should participate as a member of the panel so that the rationale behind the disputed allowances could be set out and examined fully.

Mr. [X]'s paper in support of the allowances is shown in the attached Appendix, together with the comments of the other panel members on the detailed points raised.

After careful consideration, the remaining members of the panel find that they are not in agreement with the allowance of crew wages, bunkers and other costs being allowed under Rule F in the circumstances set out in this submission.

While the detailed reasons are shown in the Appendix, the majority view of the panel can be summarised as follows:

1. *Treatment of the place where the vessel is detained as a "port of refuge" in terms of Rules X and XI of York Antwerp Rules 1994/2004.*

This point had been dealt with previously by the Advisory Committee in an opinion dated 30 June 2010, which concluded:

> "It is not considered that wages and maintenance of crew and bunkers consumed during the period of seizure by pirates can be allowed in general average since (a) a location to which the pirates take a vessel and her cargo is not deemed to represent a port of place of refuge so as to give rise to an allowance under Rule 11 of the York Antwerp Rules and (b) the resort to such location was not intentionally incurred within the terms of Rule A and relevant costs would represent a loss by delay excluded by the second paragraph of Rule C."

The present Panel has considered the point again, in the light of points submitted by Mr. [X] and shown in the Appendix, and all members with the exception of Mr. [X], confirm their agreement with the conclusion expressed above.

The majority noted that the line of argument is that the Master intended to follow the Pirates' instructions and his decision to do so was reasonable. Therefore the deviation to the Pirates' lair should be treated as a General Average act equivalent to a deviation to a port of refuge.

This is an attempt to place the circumstances in this case on a par with those of a Master who, obliged by the duress imposed by a leaking vessel or a

damaged engine, decides to put into a port of refuge where his vessel may lie in safety and, if necessary, repair. The aim is therefore that the danger threatening his vessel and cargo will be diminished at that port of refuge.

In this case, however, the pirates' lair, far from being a location in which the danger threatening the vessel and her cargo and crew would be diminished, was a place where such dangers would be maximised, and where the property and the lives of the crew would be subject to the pirates' complete control.

2. *Allowance of wages and maintenance, fuel and other expenses under Rule F in substitution for the reduction in the ransom demand arising out of the process of protracted negotiation.*

With the exception of Mr. [X], the members of the Panel considered that there was no justification for an allowance on this basis.

The flaw in the argument put forward is that, before a substituted expense can be allowed in General Average, the hypothetical alternative scenario must involve greater costs which would have been allowable as GA. The hypothetical alternative in this case is that the matter might have been settled earlier for the higher amount of ransom demanded, before negotiation reduced it to the amount actually paid.

The original rationale was that the detention costs during the period of negotiation leading to the actual settlement should be treated as having been substituted for the reduction in the ransom demand achieved by the period of negotiation. The difficulty with this suggested reasoning is that, if the ransom ultimately agreed and paid is treated as the reasonable amount to have paid, then by definition any greater amount, even if settled earlier, must be regarded as unreasonable to the extent that it exceeds the amount actually settled. Thus there can be no excess which can constitute savings against which the putative substituted expenses can be allowed in General Average.

It is noted that Mr. [X] subsequently (see para. 15 in the Appendix) advised that he was in agreement "in principle with [Y]'s premise that only when the negotiations reach a point where the requested ransom would be considered "reasonable" could any argument for a substituted expense start". This would

appear to be a concession that the original adjustment was incorrect in taking the first ransom demand as the starting point for the substituted expense argument.

He then goes on to identify the difficulty of deciding at what point in the negotiation a "reasonable" amount would have been reached. The Panel did not find this to be a difficulty at all. That point is reached when the negotiation arrives at a figure which is at once the highest amount the Owners are prepared to pay and the lowest amount the pirates are prepared to accept; it is, in short, the amount for which the ransom was actually settled.

In the circumstances there can be no savings against which any detention or other costs during the negotiation can be allowed as substituted expenses."

51. It is common ground that neither the Opinion of the Advisory Committee nor the Advisory Committee Report is binding on the Court. The Claimants contend that the Court should nevertheless have regard to them and treat them as being of some persuasive value. When pressed during oral submissions, Counsel for the Claimants, Mr Toms, did not seek to uphold the reasoning of the Advisory Committee in their Report.

The Issues

52. The most significant issue between the parties is whether the substituted expenses were allowable in General Average as contended for by the Second Defendant or whether they were not allowable as General Average as contended for by the Claimants. On the statements of case there was an issue as to whether the substituted expenses were allowable pursuant to Rule A of the York-Antwerp Rules on the basis that they were intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in the common maritime adventure. However, subject to two minor exceptions, to which I will return, the Second Defendant no longer contends that the substituted expenses are allowable pursuant to Rule A. The real issue between the parties is therefore whether the expenses should be allowed pursuant to Rule F of the York-Antwerp Rules on the basis that the expenses were incurred in order to reduce the amount of

the ransom demanded by the pirates and in substitution for expenditure which would have been allowable as general average.

53. Rule F of the York-Antwerp Rules 1974 provides as follows:

> "*Any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests but only up to the amount of the general average expense avoided.*"

54. There is, I am informed, no binding authority in this jurisdiction on the meaning of Rule F.

55. As regards the expenses referred to in sub-paragraphs 42(1) and 42(6) different and distinct issues additionally arise. The Claimants accept that, in principle, the costs of media response services are a type of expense that can be recoverable under Rule A subject to proof that the costs claimed were incurred "*for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure*" and not some other purpose, but contend that the Second Defendant has failed to discharge the burden of proof upon it. The Claimants also accept that the telephone charges would have been recoverable under Rule A if the incurring of the telephone charges had been "*extraordinary*" within the meaning of Rule A, which they contend it was not. Accordingly, additional issues arise in relation to these categories of expense, namely, (1) whether the Second Defendant has proved that the costs of media response services were incurred "*for the purpose of preserving from peril the property involved in* [the] *common maritime adventure*" and (2) whether the telephone charges were "*extraordinary … expenditure*" within the meaning of Rule A.

56. Rule A of the York-Antwerp Rules 1974 provides as follows:

> "*There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.*"

The rival contentions

57. The Defendants' case in respect of Rule F is simply stated. The expenses were incurred in order to reduce the amount of the ransom demanded by the pirates and, accordingly, were incurred in substitution for another expense (i.e. the saving between the ransom demanded and the ransom paid) which would have been "*reasonably … incurred*" and thus would have been allowable pursuant to Rule A. The Defendants further say that reasonableness must be assessed on the hypothetical assumption that the alternative course (i.e. to negotiate the amount down) was not an available option.

58. The Claimants disagree. Their primary argument proceeds as follows. Rule F applies only if, on the hypothesis that the substituted expenses had not been incurred, the costs or expenses that would have been incurred (i.e. the hypothetical costs and expenses) would have been allowable as general average. Costs and expenses are only allowable as general average if, *inter alia*, they are "*reasonably … incurred*" within the meaning of Rule A of the York-Antwerp Rules 1974. If the Defendants had made payment of the pirates' initial ransom demand of US$6 million without attempting to negotiate, the sum of US$6 million would not have been allowable as general average expenditure because the expenditure would not have been "*reasonably … incurred*". In the premises, because the original demand of US$6 million would not, had it been paid, have been reasonably incurred, the costs and expenses in the sum of US$181,604.25 were not substituted expenses falling within Rule F.

59. The Claimants make three further submissions in respect of the Rule F claim. First, they contend that Rule F is not engaged because the expenditure has not been incurred in place of the expense of a ransom payment but, rather, in addition to the expense of a ransom payment. Second, they contend that the expenditure is not "*extra*" within the meaning of Rule F. Third, they contend that bunkers are not recoverable under Rule F as they are not "*expenses*", which are recoverable under Rule F, but losses, which are not recoverable under Rule F.

60. As regards the fees for media response services, the Defendants assert that they were incurred "*for the purpose of preserving from peril the property involved in* [the] *common maritime adventure*" within the meaning of Rule A. The Claimants contend that the assertion is not established on the facts before the court.

61. As regards the additional telephone charges, the Defendants assert and the Claimants deny that the charges were "*extraordinary … expenditure*" within the meaning of Rule A. The Claimants' case is that expenditure which is not abnormal in kind but only abnormal in degree will not suffice to bring a claim within Rule A; that the York-Antwerp Rules, in some of the numbered paragraphs, have created exceptions which result in the allowance of expenditure which is not abnormal in kind, but only in degree (for example, under rule XI); and that, in the absence of an exception in any of the numbered paragraphs which applies (and none is asserted), all of the expenses relating to telephone calls cannot be said to be extraordinary. The charges are ordinary in themselves and constitute expenditure which the ship-owner was bound to incur in the ordinary course of the voyage. The Claimants also assert that the incurring of such expenditure during a period of detention by pirates cannot be said to be extraordinary for a voyage through the Gulf of Aden at the material times since the risk of detention was not an extraordinary or abnormal peril. They place reliance on ***Société Nouvelle D'Armement v Spillers & Bakers Ltd*** [1917] 1 KB 865.

Legal principles

62. For the most part, the relevant legal principles are not in dispute. Thus, it is common ground that, in order to constitute a general average act, the sacrifice or expenditure must be *extraordinary* in its nature. Rule A of the York-Antwerp Rules 1974 provides expressly that "*there is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred*" (emphasis added). If part of the cargo is voluntarily, and without fraud or cowardice delivered up to a pirate by way of composition or ransom, to induce him to spare the vessel and the residue of the goods, of if a sum of money be agreed to be paid to a pirate or enemy by way of ransom, all writers agree that the value of the ransomed property must contribute to the loss: *A Treatise on the Law of Merchant Shipping,* 6th edition, 540, referring to ***Hicks v Palington*** (1590) Moore 297 and Justinian's Digest 14.2.2.3.

63. In ***Wilson v Bank of Victoria***, referred to above, the court was also concerned with the question whether the money paid for the additional coal purchased at Rio de Janeiro and Fayal to fuel the auxiliary steam engine was extraordinary expenditure allowable in general average. The argument was dismissed by the court in the following paragraph:

> "*The shipowners, by their contract with the freighters, are bound to give the services of their crew and their ship, and to make all disbursements necessary for this purpose. In the case of such a vessel as this, which is equipped with an auxiliary screw, their contract includes the use of that screw, and consequently the disbursements necessary for fuel for the steam engine. Now, the disaster which occurred in this case, no doubt, caused the engine to be used to a much greater extent than would generally occur on such a voyage, and so caused the disbursement for coals to be extraordinarily heavy; but it did not render it an extraordinary disbursement. The case is similar to that of an ordinary sailing vessel in which, owing to disasters, the voyage is unusually protracted, and consequently the owner's disbursements for provisions and for the wages of his crew, if they are paid by the month, are extraordinarily heavy. It is not similar to that of the master hiring extra hands to pump when his crew are unable to keep the vessel afloat, or any other expenditure which is not only extraordinary in its amount but is incurred to procure some service extraordinary in its nature*."

64. Similar considerations applied in ***Harrison v Bank of Australasia*** (1872) LR 7 Ex 39 and in ***Robinson v Price*** (1876) 2 QBD 91; (1877) 2 QBD 295, cases which were decided in the following decade. These cases provide useful, although dated, examples of how the word "*extraordinary*" is to be interpreted.

65. The editors of Arnould, *Law of Marine Insurance and Average*, 18th edition, summarise the principle at paragraph 26-11:

> "*Another principle, of great importance in determining whether a loss be such as to give a claim to general average contribution, is that no such claim can be sustained unless the sacrifices and expenditures out of which it arises were of an extraordinary nature, in other words, unless they were something over and beyond those ordinary duties and ordinary expenses of the navigation to which the ship-owner is bound by the nature of the contract between himself and the freighter, and for which he is to be remunerated by the freight. By the contract of affreightment the ship-owner is bound to do all that is requisite, in the ordinary course of the voyage, for the safe transport of the goods to their port of delivery. All ordinary expenses, therefore, incurred, and all ordinary manoeuvres rendered necessary, for the purpose of transporting the goods, or keeping the ship in a fit state to transport them, are a direct consequence of his contract with*

> *the freighters, and, being merely within the strict scope of his ordinary duty as ship-owner, cannot entitle him to any recompense but that which was his consideration for undertaking such duty, viz. the freight*".

66. In general, where the owner is under a contractual duty to incur the expenditure, the benefit derived from the expenditure *may* be said to be a benefit for which the cargo interests have already paid in freight. However, there seems to be no rigid rule that the expenditure cannot qualify for general average merely because the ship-owner was under a contractual duty to incur it: ***Marida v Oswal Steel (The Bijela)*** [1992] 1 Lloyd's Rep 636, 643 (per Hobhouse J); [1993] 1 Lloyd's Rep 411, 420 (per Hoffmann LJ). The actual decision at first instance was affirmed on appeal, Hoffmann LJ dissenting, and overturned in the House of Lords [1994] 1 WLR 615, but the dicta to which I have referred nevertheless appear accurately to state the law. Each case, it seems, will turn on its own particular facts.

67. There is a further stipulation in Rule A which provides that, in order to qualify as a general average act, a sacrifice or expenditure must be made or incurred "*for the common safety for the purpose of preserving from peril the property involved in a common adventure*". This requires that the act must be specifically designed to secure the particular safety of the particular adventure. It is generally not enough that the act should be done, for example, in order to secure the general safety of all shipping in a given area, even though this includes the common adventure: ***Athel Line Ltd v Liverpool and London War Risks Insurance Association Ltd*** [1944] KB 87, 95. Further, so long as the act is done specifically for the purpose of preserving from peril the property involved in the common adventure, that purpose need not be the sole or exclusive purpose. There is nothing in the wording of Rule A or in the history of the development of the principle of general average which requires the application of the principle to be restricted in this way.

68. A number of points of principle and construction were raised in relation to Rule F of the York-Antwerp Rules 1974. In addressing these points, it is as well to have in mind the philosophy behind the concept of substituted expenses. The philosophy was explained in practical terms by Mr Geoffrey Hudson in an article written in response to the decision of Hobhouse J in ***Marida v Oswal Steel (The Bijela)*** [1992] 1 Lloyd's Rep 636:

> "*What the practitioner says is, in effect 'Here are two (or possibly more) permissible courses of action which the shipowner may take consistently with his obligations under the contracts of carriage. Either (or any) of them involve extra expense in addition to that to which the shipowner was committed prior to the casualty. However, only one of those courses of action involves expenditure for which there is specific provision in the York-Antwerp Rules for a general average contribution. It would be unfair to leave the shipowner without recourse in general average if he should decide to take a course of action for which the Rules do not specifically provide; consequently we shall look at each available course of action as an option in fact, and we shall allow the actual additional expense incurred, but not exceeding the cost which would have been incurred and allowed as general average under the specific provisions in the York-Antwerp Rules.' This, it is submitted, is the true philosophy of the substituted expenses concept, based on the facts of each case, and not on any fantasy.*"

It is not without significance that the philosophy behind the concept of substituted expenses, like the principle of general average itself, is founded upon equity, convenience and natural justice.

69. Whilst there is no English authority in which Rule F has been applied, it is generally accepted that Rule F imposes the following requirements:

(1) First, the Rule is concerned only with "*expenses*";

(2) Second, it is only those expenses which can be described as "*extra*" which qualify;

(3) Third, there must have been an alternative course of action which, if it had been adopted, would have involved expenditure which could properly be charged to general average; and

(4) Fourth, the extra expenses must have been incurred in place of the alternative course of action.

70. The third requirement has given rise to a lively debate as to what, if any, reasonableness requirement applies to the hypothetical alternative course of action envisaged by Rule F. That the expense must be reasonably incurred is of course a

requirement imposed by Rule A of the York-Antwerp Rules: "*there is a general average act when, and only when, any extra-ordinary … expenditure is intentionally and reasonably … incurred*". If, as Rule F requires, the hypothetical alternative expense "*would have been allowable as general average*", this suggests that the hypothetical alternative expense must satisfy the requirement of Rule A that it is "*reasonably … incurred*". But this presents a problem. The ship-owner will have taken the actual course of action because it will have appeared to be the most economical. By contrast, the hypothetical alternative course of action will have appeared less economical. Must the hypothetical alternative course of action really be a reasonable one in order that the substituted expenses may be allowed under Rule F?

71. The problem was considered by Mr Hudson in the first edition of *The York-Antwerp Rules* at page 47:

> "*To fall within the terms of the Rule, there must be another course of action available to the ship-owner which if followed would give rise to a general average expense. This may be an expense admissible in general average under the terms of the numbered Rules or of Rule A. If the alternative course of action would be allowed under Rule A or when it comprises wages and maintenance of crew incurred during the prolongation of a voyage or a period of detention allowable under Rule XI, the expense must be reasonable in order to qualify in general average.*
>
> *For this reason it is sometimes argued that there must be some point at which the "other" expense becomes unreasonable, and hence it should not rank in full in justification of the substituted expense. It is submitted that this argument is circular and self-defeating. Consider the cost of repatriating from the port of refuge a substantial number of vessel's crew in order to avoid the expense of paying their wages and maintenance over an extended period. If, for such extended period, it would be considered unreasonable to incur the cost of wages and maintenance of a full crew, then clearly it becomes reasonable to repatriate so many of them as are not required to ship and assist in the repairs. ... .*"

72. As Mr Hudson noted, any suggestion that the alternative course of action, by reason of its comparatively high expense, might prevent the allowance under Rule F of the

substituted expense on account of its being unreasonable and as such inadmissible in GA, seems "*circular and self-defeating*". The comparatively high expense of the hypothetical alternative course of action is precisely why the substituted expenditure has been incurred.

73. In his 3rd edition, written after the introduction in 1994 of the Rule Paramount ("*In no case shall there be any allowance for … expenditure unless reasonably made or incurred*"), Mr Hudson returned to address the problem at 11.33:

> "*Although Rule F is phrased in terms which refer to the incurring of the expense, its application in practice presupposes a choice between two (and sometimes more) different courses of action. If one of those courses of action, say to effect permanent repairs in the port of refuge, would open the door to allowances in general average under Rules X(b) and X(c) for the cost of discharging, storing and reloading cargo and under Rule XI(b) for the wages and maintenance of crew and fuel and stores consumed during the extra detention for repairs, then we have a benchmark by which to measure the effect, so far as general average is concerned, of any alternative course of action. Let us suppose that the alternative course of action is to forward the cargo to destination, and that this is the course adopted. If the extra cost of forwarding cargo exceeds the general average allowances which would have been made if permanent repairs had been effected at the port of refuge, this will tend to show that the latter course would have been the "more reasonable" so far as the general average is concerned, and the allowance under Rule F will be limited to this figure. On the other hand, if the extra cost of forwarding cargo turns out to be the lesser figure, then that is the amount allowed in general average, and the reasonableness or otherwise of the cost of the alternative ceases to be of any importance. For these reasons it appears to the authors that the advent of the Rule Paramount will have little, if any, impact in practice upon the allowances which may be made under Rule F.*"

74. This analysis suggests that in most cases Rule F will work without too much difficulty. The substitute expenses will typically be allowed on account of the fact that they appeared more economical than the hypothetical alternative expenses, but if the substitute expenses turn out to be more expensive than the hypothetical alternative expenses, they will be capped by the amount of the hypothetical alternative expenses.

75. The question remains, however, whether any hypothetical alternative will do. This is considered by the editors of the 13th edition of Lowndes & Rudolf at F.31:

> "*It should be a natural and logical alternative, and not a matter of artificial invention. As an extreme example, the continuing hire payable on containers at a port of refuge is a loss by delay and excluded by r. C, but the suggestion has been made that the hire can be charged to general average as a "substituted" expense for the cost of unstuffing the containers and storing the contents in a warehouse. Such a course of action would be clearly unreasonable, and outside normal shipping practice. A further example of an excessively contrived alternative that is often quoted is the possibility of bringing a floating drydock to a vessel at a port of refuge, and again such an alternative would clearly be outside normal practice. The use of semi-submersible barges to remove vessels for repair has been encountered with regard to damaged naval vessels, however, the special considerations of security and lack of financial constraints would not be found with merchant vessels and, although less obviously artificial, is also unlikely to qualify as a realistic alternative for the purposes of r. F.*"

76. In the view of the editors, the answer to the question, whether any hypothetical alternative will do, is clearly "no". This must be correct. However, the editors do not give any clear guidance as to where the line is to be drawn. In his dissenting judgement in ***Marida v Oswal Steel (The Bijela)*** [1993] 1 Lloyd's Rep 411 at 421, Hoffmann LJ provided some guidance as to a possible threshold requirement:

> "[Rule F] *… seems to contemplate that the hypothetical alternative would be a course which the owner was at least legitimately entitled to take.*"

But this statement does not identify whether anything more is required and, if so, what.

77. In my view, despite the problems canvassed by the textbook writers, there is little room for doubting the proposition that, on the true construction of Rule F of the York-Antwerp Rules 1974, the hypothetical alternative course of action must meet the requirement that it was "*reasonably … incurred*" if the substitute expense is to be allowed in general average. What the problems canvassed by the textbook writers show is that the requirement that the expense, if it had been incurred, would have

been "*reasonably … incurred*" must be interpreted and applied with a sufficient degree of latitude to give Rule F practical effect.

78. Next, it is said on behalf of the Defendants that reasonableness must be assessed on the assumption that the hypothetical alternative course of action – in this case, to negotiate down the amount of the ransom demand – was not an available option. The submission is based on a passage in the dissenting judgment of Hoffmann LJ in ***Marida v Oswal Steel (The Bijela)*** [1993] 1 Lloyd's Rep 411.

79. The issue in ***The Bijela*** was whether costs of temporary repairs to a vessel carried out at Jamestown could be recovered in general average under Rule XIV of the York-Antwerp Rules 1974. Rule XIV provided, *inter alia*, as follows:

> "*When temporary repairs of accidental damage are effected in order to enable the adventure to be completed, the cost of such repairs shall be admitted as general average without regard to the saving, if any, to other interests, but only up to the saving in expense which would have been incurred and allowed in general average if such repairs had not been effected there.*"

Rule XIV concerns temporary repairs, a sub-species of substituted expenses.

80. On the facts of the case, it was common ground that, if the temporary repairs had not been carried out in Jamestown, permanent repairs (the costs of which, being particular average, would not have been allowable) would have had to be carried out in New York. But carrying out those permanent repairs in New York would have involved discharging, storing and reloading cargo at Providence, and those costs were potentially allowable under Rule X.

81. The first argument advanced on behalf of cargo interests for disallowing the costs of the temporary repairs is recorded by Neil LJ at 416:

> *"(1) that as a matter of construction of r. XIV, r. X(b) and r.X(c) … the handling and other charges which will have been incurred to enable repairs to be carried out in New York could not have been necessary because such repairs were not necessary "for the safe prosecution of the voyage". The safe prosecution of the voyage could be secured by effecting repairs in Jamestown, as was in fact done. For the purposes of the comparison contemplated in the second paragraph of r.*

> *XIV it was not permissible to ignore the option of the Jamestown repairs because the ship-owners were obliged to carry out the temporary repairs*."

82. By a majority, the Court of Appeal accepted the argument. It concluded that the ship-owners could not show that repairs in New York "*were necessary for the safe prosecution of the voyage*" within r. X(b), because all that was necessary for this purpose were the temporary repairs which could be carried out afloat and were in fact effected at Jamestown. Unless the repairs were necessary for the prosecution of the voyage the handling and other charges referred to in r.X(b) and r.X(c) could not be admitted as general average.

83. Hoffmann LJ, the judge in the minority in the Court of Appeal, interpreted the rules differently at 423:

> "*I think that a fair reading of* [Rule XIV] *clearly requires one to assume that (1) the temporary repairs actually done had not been done and (2) the ship nevertheless completed the voyage. I do not see how these two assumptions can stand together except upon the further assumption that permanent repairs had been done instead. However, in order to avoid a conclusion that the rule requires one to assume that the owner was acting uncommercially or even in breach of duty, I think it must be assumed that temporary repairs was not an available option.*"

84. The decision of the Court of Appeal was reversed in the House of Lords: [1994] 2 Lloyd's Rep. 1. In the House of Lords the leading speech was delivered by Lord Lloyd of Berwick. He held that:

> "'[t]*he second paragraph of r. XIV obliges us to suppose that the temporary repairs had not been effected at Jamestown. What then would have happened? The answer is simple. She would have gone into dry-dock in New York. Was the discharge of the cargo necessary to enable the damage to the cargo to be repaired in dry-dock? The answer is clearly yes. Were those repairs necessary to enable the vessel to proceed safely from New York to India, always assuming that she had not already been repaired in Jamestown. The answer again is clearly yes. The assumption required by r. XIV must be carried through when applying Rule X. It is not necessary to assume that the vessel could not have*

> *been repaired in Jamestown in order to give effect to the two rules. It is necessary only to assume that she was not so repaired, as r. XIV required*."

85. Based on the assumption that the temporary repairs had not been effected at Jamestown, Lord Lloyd held that the shipowners had shown that the cost of discharging, storing and reloading cargo at Providence would have been allowable in general average, if repairs had been carried out in New York instead of Jamestown, since such repairs would have been necessary, within the meaning of rule X(b), for the safe prosecution of the voyage.

86. It was urged upon me at the trial that I should apply to Rule F the same reasoning as was applied in ***The Bijela*** to Rule XIV. Just as Rule XIV required the assumption that the relevant substitute expenditure had not been incurred and just as this assumption had to be carried across to Rule X under which the avoided expenses were potentially allowable, so too, in the context of Rule F, it is necessary, when determining whether the hypothetical alternative expenses would have been allowable in general average, to assume that the substitute expenses had not been incurred. It was said on behalf of the Defendants, further, that this required the assumption that the substitute expenditure "*was not an available option*" (to adopt the language of Hoffmann LJ).

87. The final stage of the submission, which is set out in the previous sentence, suffers from the immediately obvious difficulty that the approach espoused by Hoffmann LJ was expressly eschewed by Lord Lloyd at 619E:

> "*It is not necessary to assume that the vessel could not have been repaired in Jamestown in order to give effect to the two rules. It is necessary only to assume that she was not so repaired, as rule XIV requires.*"

88. For this reason, I must reject it. If the reasoning adopted by the House of Lords in ***The Bijela*** can appropriately be transferred to the different context of Rule F, it seems to me that, when determining whether the hypothetical alternative expenses would have been allowable in general average, the appropriate assumption would be that the substitute expenses *had not been* incurred, and not that the substitute expenses *could not have been* incurred.

89. There was also some debate as to the meaning of the word "*extra*" used in Rule F to qualify the expense permitted as a substitute expense in general average. Some

commentators have contended that the word should be read as a shortened form of "*extraordinary*", the word which is used in Rule A (which I have already dealt with above): Lowndes & Rudolf, *General Average and York-Antwerp Rules*, 14th edition, F.18. In my view, this is to read too much into the word "*extra*" in Rule F. The word should be given its ordinary and natural meaning, namely, "*additional*", which is the word which has been used in substitution for the word "*extra*" in the York-Antwerp Rules since 1994. When the change from "*extra*" to "*additional*" was introduced in 1994, it was reported that no change in meaning or practice was intended, merely clarification to express what has always been the intention and also is expressed in the French text, which uses the word "*supplémentaire*". Properly construed, the phrase "*extra expense*" is intended to indicate no more than that the substituted course which has been undertaken has resulted in additional financial outlay which would not ordinarily have been incurred.

90. Further support for this interpretation may perhaps be derived from the historical development of Rule F (which is recounted by the editors, Messrs Hudson and Harvey, in the 3rd edition of *The York-Antwerp Rules*). In the discussion on this rule which took place in the Association Internationale de Dispacheurs Européens International Sub-Committee prior to the Sydney Conference in 1994, it was suggested that the expression which had been utilised since 1924 (i.e. "*any extra expense*") did not adequately convey the element of extraordinariness and should be replaced by the words "*any extraordinary expense*". This suggestion did not commend itself to AIDE members who considered that the French test (i.e. "*toute dépense supplémentaire*") more accurately conveyed the required meaning. Accordingly, in order to align the English text with the French version, the former was amended to its current form, "*any additional expense*".

91. Even the noun "*expense*" in the opening phrase in Rule F did not escape careful analysis at the trial. The analysis was relevant to the Claimants' submission that the cost of bunkers should not have been allowed in general average as a substitute expense because the consumption of bunkers is a loss and not an "*expense*". It was said on behalf of the Claimant that the oft repeated suggestion that the words "*or loss*" should be added to Rule F has always been rejected: Lowndes & Rudolf, *General Average and York-Antwerp Rules*, 14th edition, F.14-15 and that this means that any claim to be considered has to be calculated solely by reference to "*expenses*" which have been incurred.

92. On behalf of the Defendants it was argued that the Claimants' interpretation is unreasonably pedantic. Mr Sarll pointed to examples elsewhere in the York-Antwerp Rules 1974 where the word "*expenses*" bears a wider meaning and includes bunker consumption. Rule XI, for example, is entitled "*Wages and Maintenance of Crew and other Expenses …*", and reads:

> "*Wages and maintenance of master, officers and crew reasonably incurred and fuel and stores consumed during the prolongation of the voyage occasioned by a ship entering a port or place of refuge … shall be admitted as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X(a).*"

The words in the title, "*other Expenses*", often referred to as "*detention expenses*" (Lowndes & Rudolf, *General Average and York-Antwerp Rules*, 14th edition, 11.01), must be interpreted, he says, as including fuel consumption. Given that wages and fuel charges are treated elsewhere in the York-Antwerp Rules 1974 as "*expenses*", it would be surprising if they were to be treated differently for the purposes of Rule F. The reason why the word "loss" is not included within Rule F, he says, is to avoid the admission by way of substituted expenses of market losses which would not qualify for direct admission in general average by reason of Rule C.

93. For the reasons given by Mr Sarll, I am of the view that the word "*expenses*" in the opening words of Rule F should be interpreted as including the consumption of bunkers. Just as a conference speaker will make a claim for travel expenses in respect of the consumption of fuel by his motorcar on the journeys to and from the conference venue, so too, from the perspective of a ship-owner, the consumption of bunkers will involve the incurring of an expense.

Claim for substituted expenses

94. The Claimants' first contention is that Rule F is not engaged because the expenditure which has been allowed in the Adjustment was not incurred in place of the expense of a ransom payment but, rather, in addition to the expense of a ransom payment. This contention can be dealt with shortly. There can be no doubt that the expenditure was incurred in substitution for the saving in ransom, i.e. the difference between the

ransom initially demanded and the ransom ultimately paid. This is sufficient to engage Rule F.

95. Shorn of unnecessary detail, the essential question separating the parties is whether the hypothetical expenditure in substitution for which the expenses referred to in sub-paragraphs 42(2) to 42(5) above were incurred "*would have been allowable as general average*" within the meaning of Rule F. The Defendants contend that, had the hypothetical expenditure been incurred, it would have been allowable in general average. The Claimants contend that, had the hypothetical expenditure been incurred, it would not have been allowable in general average because it would not have been "*reasonably … incurred*" within the meaning of Rule A. The Claimants contend that the expenditure would not have been reasonably incurred because, in the circumstances prevailing at the material time, there was a natural and logical alternative open to the Defendants, namely, negotiating a reduced ransom. The Claimants contend that the *only* reasonable course of action was for the ship-owner to negotiate to a lower price.

96. In support of their contention the Claimants relied on four particular facts and matters:

(1) The initial demand was reasonably understood by the ship-owner as being a starting shot in a negotiation and, therefore, the amount of the ransom payment would inevitably be reduced by a process of negotiation.

(2) The amount of the ransom was significantly reduced by the process of negotiation.

(3) Immediate acquiescence in the sum demanded might well have led to a higher sum being demanded.

(4) At the time of the ransom demand, the amount of the demand (i.e. US$6 million) was broadly commensurate with what the Defendants understood to be the total value of the property which would have been saved by the payment of the ransom (i.e. about US$6.35 million). Any reasonable ship-owner would have regarded the payment of a ransom in the amount of the value of the property saved to be grossly excessive.

The Claimants also referred to the Association of Average Adjusters' Advisory Committee Report although, ultimately, they did not seek to uphold its reasoning. I return to deal with these specific facts and matters below.

97. The Claimant's contentions proceed on the assumption that US$1.85 million was a "*reasonable*" ransom and that US$6 million would not have been a "*reasonable*" ransom. When asked by me during oral submissions where the line was to be drawn between a "*reasonable*" and an "*unreasonable*" ransom and on what basis the line falls to be drawn, Mr Toms, on behalf of the Claimant, was unable to provide cogent and satisfactory answers. As I have already indicated, he did not seek to support the reasoning of the Association of Average Adjusters' Advisory Committee Report that the only "*reasonable*" ransom would be the amount actually agreed and paid. In my view, he was right to make this concession. I have no difficulty in rejecting the suggestion that there is some sort of "market" in ransom payments and that the point in a negotiation at which a "*reasonable*" amount is reached is "*when the negotiation arrives at a figure which is at once the highest amount the Owners are prepared to pay and the lowest amount the pirates are prepared to accept*".

98. I did not find Mr Toms' inability to provide cogent and satisfactory answers to my questions at all surprising because I have the most profound difficulty with the concept of a "*reasonable*" ransom. At least in one sense, no ransom payment could ever be described as "*reasonable*". Pirates are criminals engaged in extortion and their demands are unlawful and deplorable. How can a payment extorted by pirates be described as "*reasonable*"? In my view, it cannot. The idea of a "*reasonable ransom*" is radically misconceived and the term an oxymoron.

99. This conclusion does not create a conundrum, as I see it, because the essential question is not whether a ransom in a particular amount is or is not "*reasonable*". The essential question is whether in particular circumstances the payment of a ransom was "*reasonably … incurred*". Once it is appreciated that this is the appropriate question, it becomes obvious that, save in exceptional circumstances (e.g. where the amount demanded clearly exceeds the value of the property involved in the maritime adventure), it would not be reasonable to say of a ship-owner under an obligation to proceed with the utmost dispatch who is faced with a demand for a ransom made by pirates who have detained his ship and her crew and cargo that the payment of the ransom was not "*reasonably … incurred*". Pirates are not reasonable people. In the

minds of most right-thinking people their behaviour is seldom rational. Even if it may be said that, by January 2009, a pattern of dealing between Somali pirates and ship-owners had developed, as described by David Steel J in ***Masefield AG v Amlin Corporate Member Ltd*** [2010] 1 Lloyd's Rep 509 at paras. 19, 23, 25 and 26 (affirmed on appeal: [2011] 1 WLR 2012), such a pattern would not remove the potential for unreasonable, irrational and illogical behaviour. Just as, in a particular set of circumstances, it is possible that a ransom amount might be negotiated down, so it is also possible that, in a different set of circumstances, a ransom amount might end up being negotiated up. There is no means of knowing or predicting with a sufficient degree of certainty how particular negotiations will progress. For this reason, I do not accept the Claimants' assertion that it was inevitable that the amount of the ransom would be reduced by a process of negotiation.

100. It is true that, with the benefit of hindsight, it can be said that the amount of the ransom in this case was significantly reduced by the process of negotiation. However, for the reasons which I have identified, it was not possible to state with reasonable certainty when the ransom demand was made that the amount of the ransom would inevitably be significantly reduced by the process of negotiation. Further, the contention that immediate acquiescence in the sum demanded might have led to a higher sum being demanded is no more than speculation.

101. The value of the property involved in the maritime adventure is undoubtedly a relevant factor in the assessment of whether a ransom payment was "*reasonably … incurred*". If the amount of the demand clearly exceeded the reasonably understood value of the property involved in the maritime adventure, it would be unlikely that, if the payment was made, it would have been reasonably incurred. However, the same cannot be said of the situation where the amount of the demand was clearly less than the reasonably understood value of the property involved in the maritime adventure and where a saving would be made if the amount of the demand was paid.

102. For the reasons set out above I have come to the conclusion that it is not possible reasonably to conclude that a ransom payment of US$6 million would not have been "*reasonably … incurred*" within the meaning of Rule F of the York-Antwerp Rules 1974.

103. In reaching this conclusion, I derive comfort from the fact that the rule of contribution which has been invoked in the Adjustment under consideration has its foundation in

the plainest equity and that the circumstances of this case were such that natural justice requires that all should contribute to the substituted expenses incurred by the Second Defendant. The reduction in the amount of the ransom was only achieved by a process of negotiation which necessarily involved the ship-owner incurring expenditure.

104. For these reasons, I am unable to accept the Claimants' contentions on this issue and it is unnecessary for me to proceed further with an analysis of the question whether the hypothetical expenditure in substitution for which the expenses were incurred "*would have been allowable as general average*" within the meaning of Rule F.

105. For completeness, let me just add this. If it is legitimate, in the context of the application of Rule F, to adopt the approach which the House of Lords in ***The Bijela*** adopted in the context of the application of rules X and XIV of the York-Antwerp Rules 1974, the resolution of the primary issue in this case becomes simpler. The question would become, what would have happened on the hypothetical assumption that the substitute expenses *had not been incurred*? The answer to that question is simple. Unless the voyage had been abandoned, which would have been an unreasonable course for the ship-owner to adopt in the circumstances prevailing when the demand was made, the amount demanded would have been paid. (The position is *a foritiori* if, in answering the question, it is appropriate to make the hypothetical assumption that incurring the substitute expenses was *not an available option*. However, in the light of the decision of the House of Lords in the in ***The Bijela***, it would clearly not be appropriate for me to make this hypothetical assumption.)

106. The Claimants also contend that the expenditure claimed under Rule F and allowed in the Adjustment was not "*extra*" within the meaning of Rule F and, accordingly, that it should be disallowed for this reason. I do not agree. In the context of Rule F, as I have held above, all that is required is that the substituted expense which has been undertaken has resulted in additional financial outlay which would not ordinarily have been incurred. That is precisely what happened in this case.

107. Finally, in this context, it is contended on behalf of the Claimants that the cost of bunker consumption is not recoverable under Rule F because the consumption of bunkers are losses and not "*expenses*". I have already dismissed the suggestion that the consumption of bunkers is not the incurring of an "*expense*" within the meaning of

Rule F. Accordingly, the consumption of bunkers was properly allowed in the Adjustment as an additional "*expense*".

Claim in respect of media response services

108. The Claimants accept that, in principle, the cost of media response services is a type of expense that can be recoverable under Rule A. Their stated reason for contending that the cost is irrecoverable on the facts of this particular case is that the Defendants cannot prove that the costs were incurred for *no other purpose* than for the common safety for the purpose of preserving from peril the property involved in the common maritime adventure. The Claimants put forward three additional reasons why the services of a media response company might be engaged by a ship-owner in response to a hijacking: to protect the corporate image of the ship-owner and to avoid or minimise reputational or commercial damage; to suppress details of the hijacking so as to minimise the risk of other vessels within the ship-owners' fleet being hijacked if there is a particular feature of the vessel or the crew which renders it vulnerable to successful piracy and the same feature applies to other vessels; and to seek to avoid or reduce the possibility of litigation by the crew or their families by giving the impression that all possible steps are being taken to secure the release of the vessel and her crew (whether or not those steps play any role in the ultimate release of the Vessel). They argue that, whilst Mr Riepen has given evidence of the Second Defendant's purpose in engaging Maritime Technical International Inc. to provide media response services, he was not tendered to give live evidence and it was not possible to explore with him the precise purpose or purposes of incurring the expenditure. They also complain that no disclosure has been given of any material said to have been produced by Maritime Technical International Inc. For these reasons, they contend that the Defendants have failed to discharge the burden on them to establish that the expenditure is properly allowable in general average.

109. The complaint based on a lack of disclosure is without merit. This is a case in which the parties agreed that standard disclosure would be dispensed with and no request for specific disclosure of material produced by Maritime Technical International Inc. was made by the Claimants.

110. It is unfortunate that Mr Riepen was not available to give oral evidence at the trial but I am informed that this could not have been avoided. Mr Riepen lives in Hamburg,

Germany, and is no longer employed by the vessel's Managers. In these circumstances, it would not have been reasonable to have expected the Defendants to have produced him as a live witness at the trial. I must accordingly proceed on the basis that his statement is admissible in evidence and none of his evidence was seriously challenged.

111. Turning to the question of purpose, there is simply no basis in the evidence before me for the suggestion that the Defendants might have engaged Maritime Technical International Inc. in order to suppress details of the hijacking so as to minimise the risk of other vessels within the ship-owners' fleet being hijacked and I can discount this as a possible purpose. As regards the other two reasons postulated by the Claimants, whilst there is no evidence before me which suggests that one or other or both of them might have been the reasons why Maritime Technical International Inc. were engaged, I am prepared to proceed on the assumption that they were reasons for the engagement.

112. As noted above, Mr Riepen has given evidence of the Second Defendant's purpose in engaging Maritime Technical International Inc., namely, to secure the release of the vessel and cargo as cheaply, quickly and efficiently as possible, and I have no reason to doubt his evidence. On the assumption that this was one of the Second Defendant's three purposes in engaging Maritime Technical International Inc., the other two being to protect the corporate image of the ship-owner and to seek to avoid or reduce the possibility of litigation by the crew or their families by giving the impression that all possible steps were being taken to secure the release of the vessel and her crew, the question is whether the Second Defendant has done sufficient to establish that the cost of employing Maritime Technical International Inc. is allowable in general average. The Claimants contend that the Second Defendant has not done sufficient, because it has not shown that the purpose upon which it relies was the *sole* reason why it engaged Maritime Technical International Inc.. The Second Defendant contends that Mr Riepen's evidence is sufficient because the Second Defendant need only establish that the purpose on which it relies was one of the reasons why it engaged Maritime Technical International Inc.

113. For the reasons I have already given at paragraph 67 above, the law appears to be that, so long as the expense is incurred specifically for the purpose of preserving from peril the property involved in the common adventure, that purpose need not be the

sole or exclusive purpose. It follows that the Second Defendant has done sufficient to prove that the costs claimed are recoverable under Rule A.

Claim in respect of telephone charges

114. The Claimants' contend that the telephone charges referred to in sub-paragraph 42(6) above should not have been allowed in general average because they were not "*extraordinary … expenditure*" within the meaning of Rule A of the York-Antwerp Rules 1974. The cost of US$751.00 allowed in the Adjustment was the cost of the telephone calls made and received in connection with the negotiation of the ransom payment. The calls were made on the vessel's Telaccount satellite network.

115. In my view, the expenditure does qualify as "*extraordinary … expenditure*" within the meaning of Rule A. The expenditure was incurred to procure a service which was extraordinary in nature, namely, the negotiation of a ransom demanded by pirates. The expenditure was above and beyond the kind of expenses of navigation which the ship-owner was obliged to incur under the contract of carriage, as illustrated in ***Wilson v Bank of Victoria*** (1867) LR 2 QB 203, ***Harrison v Bank of Australasia*** (1872) LR 7 Ex 39 and ***Robinson v Price*** (1876) 2 QBD 91; (1877) 2 QBD 295. The suggestion, based on the dictum of Blackburn J in ***Wilson v Bank of Victoria***, that the expenditure was only extraordinary in degree and not in kind is, in my view, too simplistic. It does not follow from the mere fact that a vessel will ordinarily be expected to incur expenditure by using its satellite telephone network to communicate with the vessel's managers and third parties whilst trading, that the use of the facility to provide a service of an abnormal kind cannot properly be described as extraordinary in nature. In ***The Bona*** [1895] P 125, the Court of Appeal held that an abnormal user of the engines and an abnormal consumption of coal in endeavouring to re-float a steamship stranded in a position of peril are an extraordinary sacrifice and an extraordinary expenditure, respectively. Further, and in any event, neither the dictum in ***Wilson v Bank of Victoria*** nor a proper reading of the York-Antwerp Rules supports any general rule that expenditure which is abnormal in kind but not in degree can never suffice to bring it within Rule A of the York-Antwerp Rules.

116. Reliance was placed in the Claimant's skeleton argument on the Judgment of Sankey J in ***Société Nouvelle D'Armement v Spillers & Bakers, Limited*** [1916] 1 KB 865 in support of the proposition that the incurring of the telephone charges during the

period of detention by the pirates cannot be said to be extraordinary for a voyage through the Gulf of Aden at the material times since the risk of detention was not an extraordinary or abnormal peril. The contention was not developed in oral argument. In my view, ***Société Nouvelle D'Armement v Spillers & Bakers, Limited*** was decided on its own particular facts and is not support for the general proposition advanced by the Claimants. On the facts before him, Sankey J reached the conclusion that the cost of hiring a tug during the First World War to tow the French barque *ERNEST LEGOUVÉ* through waters in which submarines could be anticipated was not extraordinary. His conclusion was an application of the general principle that "*there must be expenditure abnormal in kind or degree, and it must be incurred on an abnormal occasion for the preservation of the property*" to the facts of the case.

Conclusion

117. For the reasons set out above, the professional media response services (US$20,639.30) and the telephone charges (US$751.00) incurred by the Second Defendant are recoverable under Rule A of the York-Antwerp Rules 1974 and the substituted expenses in an amount of US$160,213.95 incurred by the Second Defendant are recoverable under Rule F of the York-Antwerp Rules 1974. It follows that the Claimants' claim fails.

118. The parties are invited to agree a draft order which incorporates the conclusions which I have reached and which are set out in this judgment.