
General Average in the 21st Century:

What Are The Arguments?

**A Briefing Paper Prepared for the General Average Subcommittee
of the Carriage of Goods Committee,
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General average is a method that allocates the costs of marine casualties among the parties who benefit from the cargo and ship being saved. Claims generally fall into two categories: (1) losses and sacrifice for the common benefit of the ship, cargo and property involved in the adventure and (2) expenses of common safety to complete the voyage which would include ports of refuge costs, port dues, wages and maintenance along with repairs of accidental damage.

EARLY HISTORY OF GENERAL AVERAGE

General average is an ancient practice that was first put in writing by the Greek Rhodians in the Digest of Justinian. Their basis for this primitive law was common benefit: “that which has been given for all should be replaced by the contribution of all.”¹ Vessel transport was the primary mode of cargo transportation, and certain obstacles such as storms frequently arose potentially causing shipwrecks, forcing shippers to lighten their load through jettison. All who had benefited from the loss of the disposed cargo would then pay their share of the loss.

The Romans adopted general average similarly but expanded it to include other instances of sacrifice made, such as cutting of the mast. Thus, general average became more of a general principle. After the fall of the Roman Empire, Europeans in the Middle Ages included general average in their sea laws.²

All maritime countries adopted different rules and processes. The first attempt toward unification began in 1860 through the National Association for Promotion of Social Science, resulting in various international conferences. The initial conference

¹ CHARLES L. BLACK & GILMORE GRANT, THE LAW OF ADMIRALTY 1 (2d Ed. 1975)(citing Digest of Justinian).

² *Id.* at 1-3.

was the Glasgow Conference in September of 1860 where they first agreed on various resolutions to establish a uniform law of general average. In York in 1864 at the Third International General Average Congress, they agreed on eleven rules known as “The York Rules” or the “Rules” and suggested them as legislation in the maritime countries along with charter parties and bills of lading. These Rules were amended at the 1877 conference at Antwerp, where a twelfth rule was added, and became known as “The York and Antwerp Rules,” which were further amended at a conference of the Association for the Reform and Codification of the Law of Nations in Liverpool in 1890, becoming “The York-Antwerp Rules 1890.”

This version of the Rules proved to be too specific and addressed only points significant at the time of each conference rather than establishing general principles. Thus, in 1924, after World War I, the Conference on the International Law Association revised the 1890 Rules and adopted a general declaration of principles (lettered A-G) to be applied in addition to the 12 numbered Rules. This created some confusion however, and at the 1950 Comite Maritime International (CMI) conference, a “Rule of Interpretation” was added:

“In the adjustment of general average the following lettered and numbered rules shall apply to the exclusion of any law and practice inconsistent herewith. Except as provided by the numbered Rules, general average shall be adjusted according to the lettered Rules.”

Another CMI conference in 1974 amended the Rules once again in Hamburg. Then, in June 1990 in Paris, the CMI amended Rule IV. In 1994 in Sydney, the Rule Paramount was added, which states:

“In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred.”

Lastly, the Rules were updated in 2004, which introduced amendments that included:

- the exclusion of Salvage from General Average, thus amending the present Rule VI, although credit will be given for any salvage paid by one party (usually ship) on behalf of others.
- an amendment to Rule XI so that crew wages will no longer be allowed while at a Port of Refuge.
- an amendment to Rule XIV so that savings to ship interests achieved by effecting temporary repairs to accidental damage at a port of refuge are accounted for first, before any allowance in General Average is considered.
- the removal of any allowance for commission.
- the adoption of a procedure whereby the rate of interest (currently 7%) will be reviewed annually by CMI.
- the introduction of a time bar provision, where national jurisdictions permit.³

It is reported that a considerable number of shipowners have avoided incorporation of the 2004 amendments.

The York-Antwerp Rules therefore came to contain: (1) one Rule of Interpretation, (2) seven lettered Rules of Principle (A - G), and (3) 22 numbered Rules (I - XXII). They are commonly incorporated into bills of lading, charter parties and policies of marine insurance. In general, they must be incorporated into a contract to hold legal power. A timeline of these conferences is below:⁴

³ Richards Hogg Lindley, *Commentary on the York-Antwerp Rules 2004*, July 8, 2004, at 3-4, <http://www.rhlg.com/pdfs/YorkAntwerpRules0704.pdf>.

⁴ UNCTAD Secretariat, *General Average, A Preliminary Review*, ¶¶ 16-26, U.N. Doc. 91-51506 (Aug. 19, 1991).

Sept 1860 - Glasgow Conference – Agreed on resolutions in attempt to establish a uniform law of general average

1950 – Comite Maritime International (CMI) – Included a new “Rule of Interpretation”

2004 – Included rule that disallowed salvage remuneration

1877 (Antwerp) – Antwerp Conference – Amended eleven rules and added a twelfth rule, forming the York and Antwerp Rules

June 1990 (Paris)– CMI – Amended Rule VI

1864 (York) - Third International General Average Congress – Established “New York Rules” consisting of 11 common rules for legislation based on the bill drafted at Glasgow.

1890 – Association for the Reform and Codification of the Law of Nations conference at Liverpool – Established “The York-Antwerp Rules 1890”

1974 (Hamburg) – CMI conference – Rules were subjected to further amendments

1990 (Sydney) – Rule Paramount added

ANALYSIS OF PRESENT USEFULNESS OF GENERAL AVERAGE

A. Most Common General Average Events Today

The ancient practice of general average has withstood time and one way or another continued from the Rhodians through 2013. While some shipowners may argue that this endurance proves its necessity, general average no longer functions merely to meet its original intent. It is also vastly more time-consuming and costly than when created. In times gone by, voyages were hazardous ventures warranting jettison or other sacrifices to avoid sinkings. Now, however, with the development of insurance and massive 18,000 TEU container ships, the issues are different:

“Today, the position is very much more complex. A general cargo or container ship usually carries a few hundred shipments – sometimes over a thousand – all belong to different shippers, none of whom, of course, travel with their goods. The total amount of money involved in the adventure runs into millions of dollars and it will be obvious that at the time the cargo is delivered at its destination the exact amounts to be contributed to any general average are not known.”⁵

“...[T]he relationship between shipowner and the cargo owner is no longer that of partners in a hazardous adventure, but is merely as provider and user of a routine service.”⁶

The majority of general average incidents today are the result of negligence in maintenance or operation of the ship, along with machine and engine failure.⁷ Also, as long ago as 1975 it was noted that the actual sacrificing of ship or cargo has become extremely uncommon, as these sacrifices rarely aid in recovery of the ship after fires, collisions, breakdown or other problems that, again, are mainly the result of negligence:

“Underwriters should be concerned at the lack of justice in a system which regularly allows losses caused by the negligence of one party to be paid by contributions from others.”⁸

“90 percent or more of all general average adjustments consist only of general average expenditure, plus bunkers

⁵ *Id.* ¶ 127 (citing L.J. Buglass).

⁶ UNCTAD Secretariat, *supra* note 4, ¶ 128 (citing P.H. Pinner).

⁷ UNCTAD Secretariat, *The Place of General Average in Marine Insurance Today*, ¶ 102, U.N. Doc. GE. 94-50984 (Mar. 8, 1994).

⁸ *Id.* ¶ 103.

and stores consumed. Further, the total value of cargo sacrifices almost certainly exceeds the value of ship sacrifices, so that there would be an increased burden on cargo interests with resultant increases in cargo rates of premium.”⁹

The shipowner inevitably would incur many of the expenses simply related to providing a service if general average did not exist. Therefore, some argue, general average no longer achieves the type of “common benefit,” which was its original purpose.

B. Changes in the Breadth of General Average

Oddly enough, rather than narrowing the scope of general average over time, it has widened, creating a snowball effect. The number of situations subject to general average has actually increased rather than decreased over the centuries and each allowance has provided a further precedent for a situation even further removed from the original reasons for general average, such as the jettisoning of cargo, which, again, is rarely even applicable today. As explained by the renowned Canadian maritime law professor William Tetley:

“In 1890, the expenses for which the carrier could claim were expanded by Rule X(b) to include the cost of discharging cargo, at a port of loading, call or refuge, when the discharge was ‘necessary for the common safety’ or to permit repairs ‘necessary for the safe prosecution of the voyage’. In 1924, Rule X(b) was expanded to include costs of ‘handling on board’, as well as actual discharge, and the rule was made applicable to fuel and stores, as well as cargo. Expenses of entering a port of refuge, where ‘necessary for the common safety’, as well as charges for leaving such a port, were also allowed in 1890 by Rule X(a). Under Rule XI(b), as drafted in 1950, where the ship's detention in a port of refuge was ‘necessary for the common safety’ or to permit repairs ‘necessary for the safe prosecution of the voyage’, wages and maintenance of the

⁹ BLACK & GRANT, *supra* note 1, at 838.

crew during that “extra period of detention” were eligible general average expenditures as well.

The expansion of general average is also reflected in Rule XII, which, for the first time in 1890, permitted in general average, loss of or damage to cargo incurred in the act of discharging, storing, reloading and stowing, where the cost of those measures respectively was admitted as general average. Previously, the rule had been that no allowance for cargo loss or damage during discharge at a port of refuge was permitted, where such discharge was done “in the manner customary at that port”. In 1924, the allowance was extended to include damage to or loss of fuel or stores, as well as damage or loss sustained in ‘handling’. Under the York/Antwerp Rules 1994, the words ‘caused in the act of’ have been replaced by ‘sustained in consequence of’, a further, albeit slight, widening of the provision's scope. Significantly, “peril” is not a requirement of the application of Rule XII.”¹⁰

In addition to the changes listed above, Professor Tetley explains, general average has also been widened over the years in other ways, such as to cover “artificial” general average, meaning potential rather than immediate perils.¹¹

Interestingly, as more modes of transportation (air, rail, etc.) have come into existence, general average has not been applied within these modes:

“[C]ircumstances in which it would be fair and equitable to distribute sacrifices and expenses amongst the various interests involved do arise, but no system of distribution, such as general average, has evolved, and evidently there has been no pressure from commercial interests to establish any such system.”¹²

¹⁰ Tetley, William. *General Average Now and in the Future*, 21-22, available at <http://www.mcgill.ca/maritimelaw/sites/mcgill.ca.maritimelaw/files/genaverage.pdf>

¹¹ *Id.* at 22-24.

¹² UNCTAD Secretariat, *General Average, A Preliminary Review*, ¶ 107, U.N. Doc. GE.91-51506 (Aug. 19, 1991).

In these other modes of transport, such expenses and losses are covered through insurance.

C. Arguments to Abolish General Average

Today, especially in the case of container ships, general average is by all accounts extremely time-consuming and expensive. Container ship voyages that become subject to general average due to an incident can involve thousands cargo interests all having different cargo insurers. The more cargo interests, the longer the case will take as general average involves numerous insurance settlements. Often delays occur just calculating liability, regardless of whether any disputes arise. Time must be taken to arrange for general average security, to obtain documentation, and to settle claims once statements have finally been produced. All of this requires immense work on all sides which includes experts, adjusters, surveyors, brokers and agents:

“The cost of the work carried out by these people appears in the adjustment and includes average adjuster’s fees, ship valuer’s fees, average disbursements, insurance premiums and brokerage, additional survey fees, expenses of collecting general average security, collecting or settling commission and the shipowner’s own expenses for declaring and handling the general average.”¹³

Increased overhead costs are often not taken into consideration, such as the extensive clerical work involving settlement.

As Professor William Tetley explains in his article, general average claims must be submitted by the shipowner’s underwriters in writing to the average adjuster within 12 months of the date of termination of the venture. A professional average adjuster then apportions the adjustment:

¹³ UNCTAD Secretariat, *The Place of General Average in Marine Insurance Today*, ¶ 123, U.N. Doc. GE. 94-50984 (Mar. 8, 1994).

“The general average is apportioned by multiplying the value of each contributory interest by a fraction, composed of the value of all the general average expenses, divided by the sum of the contributory values. These calculations can become very complex, with the result that it can take years, in some cases, for the adjustment to be completed and a final ‘general average statement’ to be issued by the average adjuster.”¹⁴

Moreover, even the issuance of the general average statement does not necessarily result in resolution. The contributions must then still sometimes be quantified by a court judgment or arbitral award. This process easily can take years and, while some may argue that general average guarantees timely action since specific rules are provided, this argument often fails in practice as a result of the complex adjustment and/or litigation processes.

Matthew Marshall, in his paper “General Average – the figures and their relation to the debate on reform,” prepared for the 2004 Singapore IUMI Conference, summarized and compared the data of approximately 1700 incidents compiled from Lloyd’s. He provided the following charts to illustrate the preparation times for general average:

Table 9 – preparation times for GA – number of cases

| Time taken | 1996 study | 1996 cumulative | current batch | current batch cumulative |
|----------------|------------|-----------------|---------------|--------------------------|
| Under one year | 25.7 | 25.7 | 32.1 | 32.7 |
| < 2 years | 39.1 | 64.9 | 34.0 | 66.0 |
| < 3 years | 18.1 | 82.9 | 22.6 | 88.7 |
| < 4 years | 8.7 | 91.6 | 3.8 | 92.5 |
| < 5 years | 3.7 | 95.3 | 5.7 | 98.1 |
| < 6 years | 2.0 | 97.3 | 0 | 98.1 |
| < 7 years | 1.2 | 98.5 | 1.9 | 100 |
| Over 7 years | 1.5 | 100 | 0 | 100 |

¹⁴ Tetley, *supra* note 10, at 29-30.

Table 10 – preparation times for GA – by total value of cases¹⁵

| Time taken | 1996 study | 1996 cumulative | current batch | current batch cumulative |
|----------------|------------|-----------------|---------------|--------------------------|
| Under one year | 6.2 | 6.2 | 16.1 | 16.1 |
| < 2 years | 23.2 | 29.4 | 25.5 | 41.7 |
| < 3 years | 33.3 | 62.7 | 38.5 | 80.2 |
| < 4 years | 7.7 | 70.4 | 12.9 | 93.2 |
| < 5 years | 19.7 | 90.1 | 6.5 | 99.6 |
| < 6 years | 2.0 | 92.1 | 0 | 99.6 |
| < 7 years | 2.6 | 94.7 | 0.4 | 100 |
| Over 7 years | 5.3 | 100 | 0 | 100 |

While the charts do indicate that the time to prepare these claims has decreased, there are still some taking 7 years to adjust. Surveys of underwriters in 2013 revealed that one still has open general average files dating back to 2004 – almost a decade.

More importantly, Marshall, in 2004, analyzing those 1700 general average incidents, and comparing his results to a 1996 IUMI study, found consistent results as follows:

| | 1996 IUMI Study | 2004 Marshall Study |
|---------------------------------------------------------------------------|------------------------|----------------------------|
| • Most losses involved some of the fault of vessel, lack of due diligence | 92% | 86% |
| • Few claims today involve cargo sacrifice | 8.4% | 7.9% |
| • Adjusting expenses, commission and interest eat up the percentage | 22% | 22.8% ¹⁶ |

¹⁵ Matthew Marshall, *General Average – The Figures and Their Relation to the Debate On Reform*, IUMI CONFERENCE 15 (Sept. 12-16, 2004), available at <http://www.gia.org.sg/iumi/presentation/14Sep2004/CollyerAndPadang/MatthewMarshall/GeneralAveragePaper.doc>.

shown of the claim
amounts

Marshall's paper does not calculate in dollars the fees charged by these general average adjusters who worked for 5, 6 or 7 years to complete their work – but presumably they are not insubstantial, given the time frames over which their work is done, and the fact that much of the work is done in London and Hamburg, where professional services hourly rates are among the world's highest. Where adjusters work on a percentage basis, the typical fees in the United States have been described as 6-9% of the amounts at issue.¹⁷

Over the years, certain reforms have been suggested to improve the system of general average. One is to simply narrow the scope of general average to include only those situations that truly fall under the concept of common benefit rather than common safety which would include certain sacrifices but eliminate instances of negligence or machinery problems, etc. Or, as a different solution, hull and machinery insurers could meet the costs of a general average claim up to an agreed figure. Of course, another solution is to eliminate general average altogether, allowing for the creation of an insurance market to take on the responsibility of the potential losses of the shipowner.

D. Arguments to Retain General Average

The largest conflicts regarding the present usefulness of general average are those between shipowners and cargo insurers. Shipowners worry that if expenses such

¹⁶ *Id.* at 13-14.

¹⁷ Conference Report, Int'l Marine Claims Conference, Anything But Average-How the Average Adjuster's Role Differs Depending on Jurisdiction. (Oct. 1, 2009), *available at* <http://www.marineclaimsconference.com/2009/docs/AveragePanel.pdf>.

as cargo handling are not subject to general average many of these expenses will fall on the shipowner along with repair costs. Shipowners also argue that general average acts as protection over sacrificing cargo so as to permit incurring expenses to save the voyage. However, others argue that sacrifice as a reason to decree general average is so rare today that all expenses should simply be allowed to lie where they fall.

As explained in “ General Average: A Position Paper By The International Chamber of Shipping,”¹⁸ in their view general average acts as a casualty management system understood by all parties and is therefore a steadfast system in a time of crisis. To them, narrowing the scope of general average or abolishing it would be a disadvantage to shipowners by reducing the amounts recoverable. As they argue:

General average is a very practical solution for sorting out distribution of losses following major maritime casualties. It is a system that is understood internationally and there is no point doing away with all or part of it. The recent lack of English case law on abandonment of the voyage is in no small part due to the way general average works in practice.

General average means that:

- action - often urgent in the circumstances - is not delayed, with the likelihood of even greater losses being incurred, by the need to start negotiations between different interests since the respective parties rights and obligations are already set out in clearly laid down rules;
- thus, in the event of danger, the Master does not have to make an arbitrary choice between preserving the interests of the ship or some or all of the cargo;

¹⁸ Int'l Chamber of Shipping, *A Position Paper By The International Chamber of Shipping*. (May 2004), available at <http://www.jssusa.com/assets/Uploads/GA-papers/ICS0504.pdf>.

- the Master can therefore concentrate on the safe navigation and safety of the vessel, taking whatever decisions are necessary in the interests of all engaged in the maritime adventure; and
- the Master's independence of action does not prejudice the interests of any one party since all contribute *pro rata* to their degree of loss.

The system therefore represents an equitable means of rateable sharing.¹⁹

Similarly, in 1996 a worldwide group known as the Association of Average Adjusters issued the following detailed argument predicting certain negative effects which would result if general average were abolished:

If General Average were abolished, i.e. either by change of law or by agreement, and those losses and expenses which are at present divided between ship and cargo were not so divided, some other method of dealing with those losses or expenses would have to be devised. The end of a well-known system would inevitably lead to uncertainty, and to litigation if any new system were not seen to be fair and workable.

The most frequently suggested method would be for the losses and expenses to 'lie where they fall.' Therefore, shipowners would recover for their sacrifice from their insurers, and cargo owners from theirs.²⁰

They give, as an example, that general average protects against the unnecessary jettisoning of cargo:

This, of course, pre-supposes that a shipowner or his Master will always make the 'right' sacrifice and raises the question as to what the 'right' sacrifice is. To take an example : a fully loaded ship strands: to refloat, the Master can either jettison a quantity of cargo or damage the

¹⁹ *Id.* at 2.

²⁰ Charles Hebditch, John Macdonald & Phillip Stacey, *General Average Briefing Notes*, Ass'n of Average Adjusters (Apr. 3, 1996), at 11, available at <http://www.jssusa.com/assets/Uploads/GA-papers/AAA030496.pdf>.

vessel's engines in forcing her off the ground : salvage assistance is not available. Now, it has been suggested to always "do the right thing", whichever is most efficient and involves least loss or expense : so if the 'right thing' is to strain his engines, he will do it. But, the choice is not so simple. The cost of jettisoning cargo is more easily quantifiable and the ship may have been so little damaged by the stranding that she can carry the balance of cargo to destination. The amount of damage to be done to the engines is almost wholly unquantifiable and, even after refloating, the damage so done may involve resort to a port of refuge, probably under tow, for repairs. Further the Master has a duty to his employers, and they have a duty to both their shareholders and their Insurers, under the MIA (78(4)), to avert or minimise a loss. If the Master damages his engines he will lose his employers' earnings while repairing them and the Hull underwriters will have to pay for the repairs. Indeed the Underwriters could argue that they are not liable for the claim as the Master could have jettisoned the goods. The Master will probably be sacked anyways for running the vessel aground in the first place, so he might as well jettison the cargo. In the absence of GA, the loss of cargo lies where it falls, with the cargo owner and his insurer.

When a vessel breaks down at sea, it and its cargo can be rescued by a tug employed either on a contractual basis at a daily rate or on a no-cure-no-pay salvage basis. The shipowner is the one who contracts on the daily basis and if losses lie where they fall, he and his insurers will have to pay the full amount of the hire: his insurers might not be too happy about this if the cargo is worth four or five times the value of the ship. If the ship and cargo are rescued on a salvage basis, then the salvor will obtain an award against the ship and cargo separately. Under these circumstances, it seems probable, in the absence of the General Average system, that the number of no-cure-no-pay salvages will increase : as salvage awards tend to be considerably more expensive than towage on a daily hire basis this will be to the disadvantage of both hull and cargo underwriters. The solution to that would be also to 'abolish' the law of salvage.²¹

They also highlight problems which could arise with respect to port of refuge expenses:

²¹ *Id.* at 11-12.

In the absence of the General Average system, there will be problems of how to allocate expenses, especially port of refuge expenses. If the vessel is towed into a port of refuge, under a no-cure-no-pay salvage, the shipowner, basing himself on the arguments successfully put forward in the “TROILUS” and “GLAUCUS” cases, may try to argue that the vessel is not in safety until repaired and insist that all the port of refuge expenses are paid for by the salvors. The expenses, plus the salvors’ mark-up, will be considered by the salvage arbitrator in his separate awards against ship and cargo, which will lie where they fall.

Even where the vessel reaches a port of refuge under her own power, there will probably be doubts about who is liable for the various expenses incurred there. Presumably the inward and outward port charges might be claimed from Hull Insurers as part of the reasonable cost of the repairs, subject to the terms and conditions of the policy. But what of the costs of discharging, storing and reloading cargo, if discharge is necessary to effect repairs? Again the shipowner, basing his argument on the “MEDINA PRINCESS”, may try to claim these costs also from his Hull Underwriters as part of the reasonable cost of repairs. But what if the cargo is damaged by water used to extinguish a fire and has to be discharged, stored, sorted and reconditioned before reloading? Under the General Average system, as these are General Average expenses, the shipowner traditionally arranges and pays for these operations. But if losses lie where they fall, he may be reluctant to do so and may insist on receiving cash in advance from the relevant cargo interests before he does so or, alternatively, try to collect some kind of security to guarantee payment of these “special charges”.

In many, probably nowadays the majority, of cases where a ship is likely to be detained at a port of refuge for a substantial time to effect repairs and discharge of cargo is necessary for these repairs, the shipowner arranges and pays for the cargo or part of it to be forwarded to destination by other means, confident that a substantial proportion at least, if not all, the cost will be allowable in General Average. If the loss lies where it falls, he will be reluctant to do so and the cargo interests, if they require their cargo urgently, will have to arrange and pay for this

themselves ; many cargo policies do not cover such forwarding costs.

The shipowner cannot, at least under English Hull policies, recover the wages and maintenance of his crew during repairs, as part of the reasonable cost of those repairs. He may therefore when his ship is at a port of refuge, choose to repatriate them and hire people at the port of refuge to act as watchmen, to shift the vessel to and from a repair berth etc. The cost of hiring these “riggers” is normally allowable as part of the reasonable cost of repairs.

If it is correct that the majority of the expenses at a port of refuge which are now allowed to General Average will, in the absence of General Average, fall on the shipowner and his Hull insurer, this will have further consequences. A shipowner may consider a voyage frustrated if the cost of completing it exceeds the sound market value of the ship. For example, if a ship has a value of US\$ 2,000,000 and the cost of repairing damage is US\$ 1,600,000 and the cost of the port of refuge expenses, previously General Average, now lying where they fall, on the shipowner, amount to US\$ 450,000, the total cost of completing the voyage exceeds the sound value and the voyage is frustrated: the cargo interests have to pay themselves to discharge and forward cargo to destination; under the General Average system they would only pay their contributions to the port of refuge and extra forwarding costs. Furthermore, using the same figures, the shipowner, assuming the vessel was insured for its sound value, could prove a claim for Constructive Total Loss from his Hull and Machinery Insurers, whereas, under the General Average system, he could only use the ship’s proportion of the expenses to prove the Constructive Total Loss and could not do so.²²

²² *Id.* at 12-13.

CONCLUSION

We leave it to each shipping interest to weigh the foregoing research and arguments and to reach its own conclusions concerning the usefulness of general average in the twenty-first century.

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