Saving acts in the law of marine insurance: A study of salvage, general average and sue and labour implications.

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SAVING ACTS IN THE LAW OF MARINE INSURANCE:

A STUDY OF SALVAGE, GENERAL AVERAGE AND SUE AND LABOUR IMPLICATIONS

BY

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SUMMARY

Shipping concerns persons and property. Both are subjected to the inherent dangers of the sea and as such, maritime safety is, and has been, a matter of serious concern. This thesis is concerned with property endangered at sea by fortuitous events as well as through the agency of human error, and the law governing the saving of property so imperilled.

The thesis addresses the three acts of saving maritime property namely, salvage, general average and sue and labour in selective detail and examines the evolution of each, the legal principles, and their distinctive and common features within the context of indemnification or recovery under the law of marine insurance which serves as the common link. A comparative analysis of the three saving acts is carried out within this context. The relevant provisions of the Marine Insurance Act 1906 as well as express clauses pertinent to the three principal subject matters provide the *foci* for the discussions. Recent developments in the regimes of salvage and general average and the treatment of sue and labour in recent decisions, are addressed. It is concluded that redistribution of risks and liabilities may take different shapes and forms in maritime commerce, particularly in view of other concerns such as security of life and property at sea, coming to the forefront in the principal international maritime fora.

The thesis consists of seven chapters. In the introductory chapter, the purpose of the thesis and the framework of research are set out. Chapters 2 to 5 contain detailed discussions and analyses of each of the three saving acts. The comparative analysis of the three regimes is presented in Chapter 6. In the concluding chapter a summary of the findings of the research effort and the conclusions are presented.

DECLARATION

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

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Date..15/3/05

STATEMENT 1

This thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references. A bibliography is appended.

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To My children

Faryal, Bilal & Daniyal

CHAPTER 1

INTRODUCTION

Maritime law is the law governing matters maritime. This is as general a statement as one can make without a given context. It begs the question as to what are matters maritime? Without delving into a detailed analysis of that question, suffice it to say that this work is concerned with maritime matters, first, in a private law sense, and second, that it straddles the areas between the so-called "wet" and "dry" areas of maritime law. The starting point of this enquiry is an appreciation of what constitutes maritime property and an acknowledgement of the fact that over a period of more than two millenia a crucial aspect of maritime trade has centred on the activity of saving maritime property in and from peril at sea.

As sophistication developed in the movement of goods on waterborne vessels, free and easy accesses to faraway places through waterways were discovered. Maritime trade and commerce flourished during the early civilisations of the far and the middle east and, in subsequent eras, in the Mediterranean region and the seas of Northern Europe.[1]

The earliest known set of maritime laws is found in the Babylonian Code of Hammurabi[2] and there are some remnants of a maritime culture evident in the ancient Code of Manu[3] as well. The earliest maritime laws that have through various streams of civilisation survived to this day are found in the Rhodian Sea Law in which was recorded the notion of jettison, the primary basis of general average. The law of salvage comes to us through Roman law and it is well known that the progenitor of what we know today as marine insurance were the early practices of bottomry and respondentia.[4] It is thus historically evident that the genesis of early maritime law lies in the customs and practices of seafarers and merchants. The Akkadians and Sumerians of the Tigris

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1. For a general overview of the historical evolution of maritime trade and transport, see Thomas J. Schoenbaum, *Admiralty and Maritime Law,* 2nd Ed., Vol. 1, St. Paul, Minn., West Publishing Co., 1994 at pp. 1-4.
2. C.S. Lobingier, "The Cradle of Western Law," *United States Law Review* 34 (1930), pp. See also C.S. Lobingier, "The Maritime Law of Rome," *Judicial Review* 47 (1935), pp.1-2.
3. James Reddie, *Historical View of the Law of Maritime Commerce*, William Blackwood & Sons, Edinburgh & London, 1841 at pp. 492-493.
4. Edgar Gold, *Maritime Transport: The Evolution of International Marine Policy and Shipping Law*, Toronto: Lexington Books, 1981 at p .2. See also, *ibid.* at p. 482.

Euphrates valley had developed usages which regulated maritime commerce of that era in that region. Eventually customs, usages and practices culminated into their codification through the Rhodian Sea Laws, the Consolato del Mare of Barcelona and other Mediterranean city states, the Laws of Wisby and the Hanseatic states surrounding the Baltic Sea. Finally, it was the Roles d'Oleron of France, the very basis of the Black Book of Admiralty that shaped the English maritime law of modern times.[5]

Maritime property being the subject of maritime adventure is constantly exposed to danger and peril at sea. The need to protect maritime property from such eventuality has been manifested in terms of both preventive as well as remedial legal regimes. The former is evident in regulatory maritime conventions such as the International Convention on Safety of Life at Sea, 1974 (SOLAS) and the International Convention on Loadlines, 1966 (LOADLINE). The latter is largely governed by the rules of private maritime law contained in specific regimes pertaining to salvage, general average and sue and labour and the indemnification of losses under the law of marine insurance.

This thesis is about acts of saving maritime property. The right to be rewarded for saving or preserving property from a danger or peril is a notion that is peculiar to maritime law. An eminent judge once referred to the uniqueness of this aspect of maritime law by stating that "No similar doctrine applies to things lost upon land nor to anything except ships or goods in peril at sea."[6] This principle is embodied in the law of maritime salvage. The essence of the law of general average is that co-adventurers whose properties are saved by the sacrifices of others must contribute proportionately to making good the losses suffered by the sacrificers. These two are in the main, the so-called saving acts.[7] In the law of marine insurance, there exists a duty of the assured to sue and labour similar to the common law duty of mitigation. By suing and labouring, the assured partially alleviates the insurer's contractual liability and is entitled to recover the charges incurred from the insurer. Thus, the act of suing and labouring can be characterised as another kind of saving act in maritime law similar to an act of salvage or a general average act for which the maritime law provides for a reward or remuneration.

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5. *Ibid.* at pp. 5-20; *supra*, note 1.
6. *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch.D. 234, 248-249 per Bowen L.J.
7. See Steven J. Hazelwood. *P & I Clubs Law and Practice*, London: LLP, 2000 at pp. 344-349, where the term "saving acts" is used.

The principal objective and central thrust of this thesis is to discuss and review these three legal regimes in appropriate contextual detail, and in the process, to examine and analyse relevant decided cases.

The regime of maritime salvage is entrenched in the principles of customary salvage law which English lawyers refer to as common law salvage. In the opinion of this writer, the common law of salvage, if there is any such thing, derives from international custom and practice which has come down to us from Roman times.[8] A noted American author states that "[T]he general maritime law of salvage can be considered as a part of the *jus gentium*, customary international law."[9] The common law of England has simply acknowledged it as such, and with the influence of equity, the customary law has merged into the domain of English admiralty law and has been immensely enriched by English case law jurisprudence for the benefit of the international maritime community. Since 1910, the customary law of salvage has been codified through international conventions. The latest of these is the International Convention on Salvage, 1989 which has brought in a number of important changes which will be discussed in detail in the thesis. The other significant aspect of salvage law as it stands today is the standard form salvage agreement, the best known of which is the Lloyds Open Form of Salvage Agreement (LOF). The standard form agreements are based on the principles of customary salvage law tempered by the international convention which essentially subsumes those principles.[10]

The law of general average is almost as old as maritime law itself having been first recorded in the ancient Rhodian Sea Law. Its antiquity was acknowledged in the Justinian Digests of the Roman era.[11] General average embodies the principle that one who sacrifices property or by his own volition suffers a loss or incurs an expenditure in order to save from peril the common interest in a maritime adventure is entitled to defrayment by way of contribution from his co-adventurers who derived a benefit. It is

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8. See *infra,* Chapter 2.

9. Thomas J. Schoenbaum, *Admiralty and Maritime Law*, Vol. 2, Fourth Edition, (2004) St. Paul, Minn.: Thompson West Publishing at p. 164. The author cites as authority the case of *Sobonis* v. *Sheer Tanker Nat'l Defender*, 298F. Supp. 631 (S.D.N.Y., 1969).

10 In chapter 2 the evolution of LOF and its present contents are addressed in adequate detail.

11 *Supra,* note 1 at p. 4. See also, Robert D. Benedict, "The Historical Position of the Rhodian Law, (1909), 18 *Yale Law Journal* 223.

thus essentially a matter of maritime equity.[12] The act of jettisoning cargo to lighten a ship is recorded in the Justinian Code as far back as 540 A.D[13]. The rules relating to the adjustment of contributions were traditionally held to be those that obtained in the destination port of the ship concerned. This gave rise to a gross lack of uniformity in the rules. Eventually, in the interests of global uniformity and harmonisation, the York Antwerp Rules were developed which remain the international yardstick for application of general average. The York Antwerp Rules are not an international convention. They are embodied in a non-treaty international instrument developed under the auspices of the Comite Maritime International and feature largely by reference or incorporation in maritime contracts.

The law of marine insurance deals with the indemnification of losses resulting from insured risks and perils. It is based, *inter alia*, on the principle of indemnity. In other words, in the event of a loss the assured is entitled to recover only to the extent of his pecuniary loss, and in any case, no more than the insured value of the *res.* The loss must be one that has resulted from an insured peril. Not only is a marine insurance contract a contract of indemnity, it is also a contract *uberrimae fidei*, *i.e.*, one of utmost good faith, the absence of which can vitiate the contract. The non-disclosure of a material fact by either party to the contract is a breach of this principle. The doctrine of subrogation is another essential principle of marine insurance. It entitles the insurer, after he has indemnified the assured, "to step into his shoes" and exercise a right of action against the perpetrator of the loss to recoup as much as possible what he has paid out. Closely related to subrogation is the concept of abandonment which is incidental to the doctrine of constructive total loss. An actual total loss occurs when the *res* in question ceases to be a thing of the kind insured, or the assured is irretrievably deprived of that property. In contrast, a constructive total loss occurs when it is unlikely that the property is recoverable, or even if recovery or repair is possible, the cost of it is so prohibitive that it far exceeds the post- recovery value of the property. In such event, the assured upon receiving indemnification for a total loss is required to abandon his interest in the property in favour of the insurer by issuing a notice to that effect. In relation to the

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[12] Lord Wright, "*Legal Essays and Addresses*" (1939), at p. 55, cited in Francis Rose, W. R. Kennedy, *Kennedy and Rose on the Law of Salvage*, 6th. Edition, Sweet & Maxwell at p. 18 in footnote 3 at that page.

[13] Alex L. Parks, *The Law and Practice of Marine Insurance and Average,* Vol. I, Cornell Maritime Press, Centreville, Maryland, 1987 at p.481.

doctrines of subrogation and abandonment, the insurer is in effect the assignee of the risk to which the assured is exposed.[14]

As mentioned earlier, under the law of marine insurance one of the duties of the assured is to sue and labour to minimise or avoid losses and is entitled to a contribution to the charges thereof from the insurer. The law of marine insurance was codified in the Marine Insurance Act 1906; a historical piece of English legislation drafted by Sir MacKenzie Chalmers. The substance of this Act constitutes the legislation on marine insurance in numerous common law jurisdictions, such as Canada, Australia, Singapore, Malaysia and the common law Caribbean countries. The statute law regulates the contractual relationship between the insurer and the assured. The terms of the contract which essentially specify details of the cover provided by the insurance are contained in the policy, including the cover relating to saving acts. Lloyd's, which to this day is the world's biggest insurance market, generated the first Lloyd's S.G. (Ship and Goods) form of policy. It was appended as Schedule 1 to the Marine Insurance Act 1906.[15] The successor to the S.G. policy is the current MAR policy, the standard form used in English marine insurance contracts. The terms themselves consist of the so-called "Institute Clauses" developed by the Institute of London Underwriters.[16]

As appropriate, the legal implications of these saving acts will be examined within the context of the relevant provisions of the Marine Insurance Act, the express clauses in policies and the associated case law.

Recent trends with regard to law reform in the international regimes of salvage and general average will also be addressed in this thesis in the appropriate chapters. The Salvage Convention of 1989 represents a dramatic turn in the traditional law of salvage. Arguably, the age-old principle of "no cure no pay" has been diluted by the introduction of the special compensation regime. How this affects the indemnifiability of salvage charges under the Marine Insurance Act remains to be seen. So far there has been only one major court decision on special compensation.[17]

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14 For a good overview of the matters referred to in this paragraph see R.J. Lambeth, *Templeman on Marine Insurance*, 6th. Edition, 1986, London: Pitman Publishing Ltd.

15 See *infra*, Chapter 5, footnote 6.

16 See *infra*, Chapter 2 under the heading "Express Cover: The Institute Clauses" for further details.

17 *The Naga Saki Spirit*, [1997] 1 Lloyd's Rep. 323 (H.L.)

It is notable that the York Antwerp Rules on general average have been amended to reflect the changes brought about by the new Salvage Convention. Furthermore, following extensive debates at the Comite Maritime International (CMI), which continued through the Sydney and Singapore conferences of the Comite, at the Vancouver conference held in April-May 2004, a decision was taken to exclude salvage from general average adjustment given that salvage arbitration already involves the process of apportionment of liability for payment of the award, among the interested parties benefiting from the salvage operation.[18] Perhaps the most dramatic future prognosis is the proposition that general average is obsolete and should be abolished. All these issues will be examined in this thesis with liberal mixtures of retrospection, circumspection and logical anticipation of law reform.

A subsidiary objective of this thesis is to analyse comparatively the regimes of salvage, general average and sue and labour. In that discussion, their co-relation, particularly in terms of indemnifiability under the law of marine insurance will be examined. It will be observed that where such a clause exists in the policy, to sue and labour is a contractual duty of the assured. In contrast, both salvage and general average are voluntary acts. The connecting thread is that all three constitute acts done to save property in a maritime adventure. Whether and how they are indemnifiable under the law of marine insurance will inevitably emerge as the common denominator. It is to be noted that protection of the rights of the insurer acquired by subrogation are not addressed. While, pursuant to the doctrine of subrogation, the insurer is in effect an assignee of the risks and losses to which the assured is exposed, this thesis is not concerned with charges incurred in protecting the insurer's rights of recovery which are choses in action. It is concerned with charges incurred by the assured in saving the insured subject matter.[19]

The thesis consists of seven chapters. The first chapter is introductory and sets out the objectives of the thesis and a framework for the remainder of the work. In the second chapter, the regime of salvage law is discussed, and following it, in the third chapter, its emerging environmental dimension is addressed together with recent trends and

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18 See CMI Proceedings of Vancouver Conference, May 2004. Details of the decision are discussed in Chapter 6 – Comparative Analysis of Saving Acts.

19 See s.79 of the Marine Insurance Act 1906, which deals with subrogation. See also Institute Cargo Clauses A, B and C, Clause 16.2 and International Hull Clauses 2003, Clause 49.

developments in the international law of salvage. This chapter includes discussion on the revision of the Lloyd's Open Form of Salvage Agreement (LOF) including SCOPIC. In the fourth and fifth chapters the relevant aspects of the legal regimes of general average and sue and labour, respectively, are discussed in detail including the pertinent case law. In chapter 4, recent debates on general average within the CMI culminating into recent changes to the York-Antwerp Rules are mentioned. In chapter 6, a comparative analysis of the three regimes of salvage, general average and sue and labour, is presented.

As maritime trade and commerce enters the new millenium amidst global economic ebbs and tides and profound technological changes, indemnification through marine insurance may assume an expanded role. A summary of the findings of the study and conclusions resulting from the enquiry and research will constitute the final chapter of this thesis.

CHAPTER 2

SALVAGE AND ITS INDEMNIFICATION

1. INTRODUCTION AND HISTORICAL EVOLUTION

As indicated in the introductory chapter, the main thrust of this thesis is to carry out a contextual examination of the three subject matters which constitute saving acts in maritime law. The first of these is the law of salvage. This chapter will address the salient features of the law of salvage so that the discussion on the salvage aspects of the law of marine insurance will be meaningful and within a proper context. It is also submitted that the position of salvage law in the English jurisprudence is not an isolated area of domestic law but is intimately connected to the origins of that law in the international field. It is therefore imperative that salvage law be understood and appreciated not only in terms of English law but also in terms of its background outside the confines of England. As such, for the purposes of this thesis, the term "customary salvage law"[1] will be used to refer to what some call "common law salvage" or salvage under the maritime law.[2]

It is further submitted that no country has its own exclusive maritime law. Due to the inherently international characteristics of maritime commerce, maritime law, regardless of national jurisdictional peculiarities, is essentially of international origin and character. It is no co-incidence that most of maritime law today is governed by international regimes, whether they be multilateral or regional treaty instruments; and the Salvage Convention is as good an example as any, or even non-treaty private international instruments such as the Lloyds Open form and the York-Antwerp Rules.

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1 See Chapter 1, footnote 9 where Thomas J. Schoenbaum is cited as stating that "[T]he general maritime law of salvage can be considered as a part of the *jus gentium*, customary international law."

2 See e.g. Francis D. Rose, "Aversion and Minimization of Loss", Chapter 7 at p. 216 in D. Rhidian Thomas (Ed.) *The Modern Law of Marine Insurance*, London: Lloyd's of London Press Ltd., 1996. Professor Rose uses the term "common law salvage" for convenience and explains it as "judge made" law, *i.e.*, judicially laid down principles governing liability as distinguished from liability subject to a contract of salvage, which he, for convenience, refers to as "contractual salvage". In Donald O'May and Julian Hill, *Marine Insurance Law and Policy*, (hereafter referred to as "O'May") London: Sweet & Maxwell, 1993, the author, at p. 337, uses the term "pure salvage" in the same sense, and defines it as "salvage service rendered independent of contract". The term "pure salvage" is also used by American authors Nicholas J. Healy and David J. Sharpe, *Cases and Materials on Admiralty*, Second Edition, St. Paul, Minn.: West Publishing Co., 1986 at p. 687. The expression "salvage under maritime law" is used in s.65 of the Marine Insurance Act 1906 in the same sense.

1.1 Origins of Customary Salvage Law

It is conclusively acknowledged that the origins of the international law of salvage are found in Roman law. In the classic case of *Falcke* v. *Scottish Imperial Co.*,[3] Bowen L.J. stated with regard to, *inter alia,* salvage, that maritime law was different from the common law and this was so "... from the time of the Roman law downwards." It is also unequivocally acknowledged that the law of salvage having derived from the Roman law is international in scope and having filtered through the various medieval maritime codes of the Mediterranean region is in the main, similar in most common and civil law jurisdictions,[4] and is "the law of all maritime countries".[5] It is stated that "[T]he law of salvage is fundamentally Roman law as modified by the custom of maritime powers and codifications of that custom..." The most prominent of these codes are the Rolls of Oleron and the Laws of Wisby and of the Hanseatic city states of the Baltic region.[6]

In the case of *Hartford* v. *Jones,*[7] Holt C.J. remarked that "... salvage is allowed by all nations, it being reasonable that a man shall be rewarded who hazards his life in the service of another." Thus, the international character of salvage and salvage law was recognised in an English decision as early as in 1698, and in *Admiralty Commissioners* v. *Valverda (Owners),*[8] Lord Roach acknowledged that-

> The law of salvage as administered by the Court of Admiralty is a maritime law derived from ancient and various sources and developed and built upon by decisions of the Court.

One commentator has stated that the law of salvage, in the typical fashion of its civil law origins, is not stated in terms of a principle or rule as is the case with common law, but is rather characterised as a general approach to a certain set of facts.[9] Indeed, the

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3 (1886), 34 Ch. D. 234 at pp. 248-249.

4 W.K. Hastings, "Non-tidal Salvage in the United Kingdom: Going, Going, Gone", (1988), *JMLC*, Vol 19, No. 4, at p. 475 in note 5 at that page.

5 In *The Gaetano and Maria* (1882), 7 P.D. 137 at 143 per Brett L. J. it was so stated in the context of a bottomry case.

6 See Francis Rose, W. R. Kennedy, *Kennedy and Rose on the Law of Salvage*, 6th Edition, 2001, London: Sweet & Maxwell, at p. 3-4. This text is hereafter referred to as "Kennedy".

7 (1698), 1 Ld. Raym. 393 (91 E.R.. 1161). See *ibid* at p. 68 in footnote 92 at that page.

8 [1938] A.C. 173 at 200. See *supra*, note 6 at p. 3.

9 *Supra,* note 4.

most fundamental principle of salvage law, as a concept, is quite alien to English common law thinking. This is the ancient Roman law principle whereby a person who voluntarily risks his own life and property to save another person's property is entitled to a reward. The traditional English law position is reflected in Lord Mansfield C.J.'s decision in *Cornu* v. *Blackstone* [10] where he held that "... no man can be compelled to pay salvage unless he chooses to have the property back." In *Falcke* v. *Scottish Imperial Co.*, Bowen L.J also drew attention to the common law position that liability is not imposed on a person any more than there is compulsion on a person to accept a benefit against his will. In contrast, a voluntarily conferred benefit would give rise to an action against unjust enrichment at Roman law. Furthermore, it would give rise to a maritime lien against the *res* in favour of the salvor. At Roman law, both the value of the benefit voluntarily conferred as well as the value of the volunteer's costs and expenses, *i.e.*, the detriment suffered by him would be taken into consideration.[11]

1.2 Origins and Development in English Law

The roots of salvage in English law, it is said, are to be found in equity. While this is true, it is also to be said that the law of salvage was imported into English law from the European maritime codes of the middle ages prior to which the common law of England did not recognise the notion of rewarding the person for saving him and his property. It is also important to note that the principles of equity on which the English law of salvage is based emanated from the decisions of Roman Praetors who were akin to English judges in the courts of chancery.[12] Thus, in referring to salvage in English law, Kennedy notes that whether or not the right to a reward is characterised as a kind of natural equity-

> it demonstrates at least an affinity with the broad principle against unjust enrichment, that the recipient of a benefit at the plaintiff's expense should make restitution, a vital principle in Roman law, which legal system has provided one of the strongest influences on the law administered by the Admiralty Court. However, salvage has also appeared in the various ancient maritime and commercial codes, such as the laws of Oleron,

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10 (1781), 2 Dougl. 641, cited in Kennedy pp. 68-69.

11 *Supra*, note 4 at pp. 475-476.

12 Sir Henry Maine, *Ancient Law*, Oxford University Press, London: Humphrey Milford, 1931, "The World's Classics" at pp. 23, 53-54.

> which, along with other writings and custom, have influenced the development of English, as well as other national, maritime laws.[13]

It is admitted that the development of salvage law in various jurisdictions did not take place in a uniform manner, but nevertheless, to say that the law of salvage as developed and administered by the courts of England is a brand of "English maritime law" is, in this writer's opinion, somewhat dubious. This is the sort of statement that was made by Brett L.J. in *The Gaetano and Maria* [14] albeit in the context of a bottomry case. In that case, the learned judge made this statement after referring to "...that which is called the common maritime law, which is not the law of England alone but the law of all maritime countries...", and after claiming support for his proposition by referring to those great admiralty judges, Lord Stowell, Dr. Lushington and Sir Robert Phillimore, but without citing any of their cases.[15] It is not clear whether Kennedy supports this position or whether the statement that it is English law but not any "particular type of English law" is one of reconciliation, given that the text then goes on to say -

> ...albeit predominantly the admiralty law developed by the judges of the original Admiralty Court, often termed maritime law, though those expressions in their broader sense incorporate the relevant law derived from various sources.[16]

It is submitted that the salvage law administered today by the English Admiralty Court is, in essence, the law contained in the International Convention on Salvage, 1989. One might argue that the United Kingdom having ratified that Convention and Parliament having incorporated that Convention into the Merchant Shipping Act 1995, it is English law that the Admiralty Court is administering. At the risk of sounding pedantic, it is submitted that the form of the law may be English, *i.e.*, the legislation in question, but the substance is international as contained in the Convention.

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13 *Supra,* note 6 at pp. 2-3.

14 *Supra*, note 5 at p. 143.

15 Brett L.J. who subsequently became Lord Esher was known to be an antagonist of admiralty in the historical strife between admiralty jurisdiction and the jurisdiction of the common law courts. See F.L. Wiswall, *The Development of Admiralty Jurisdiction and Practice since 1800*, Cambridge University Press, 1970, at p. 125.

16 *Supra,* note 6 at p. 7-8.

The jurisdiction of the Admiralty Court in salvage matters has been described time and again "as being of a peculiarly equitable character." This classic statement was made by Sir James Hannen P. in *Five Steel Barges*[17] and was reiterated eighty years later by Lord Denning in *The Teh Hu.*[18] In *The Beaverford* v. *The Kafiristan*[19] Lord Wright held that "...the maritime law of salvage is based upon principles of equity"; and in *The Tubantia* [20] the equitable remedy of injunction was handed down by Sir Henry Duke P. in respect of possessory rights of salvors.[21]

2. FUNDAMENTAL PRINCIPLES OF SALVAGE LAW

2.1 Definition of Salvage

Before entering into a discussion on the fundamental principles, it is useful to briefly examine the definition of the term salvage and some of the terminology associated with it. In 1815, the eminent Lord Stowell had remarked that there was no exact definition of salvage given in any book and he was not about to create one.[22] The remark, in essence, reflected the fluid attitude of the Admiralty Court of the times to salvage cases.[23] Indeed, the classic definition of salvage is the one given by Sir James Hannen P. in the case of *Five Steel Barges* [24] which reads as follows-

> The right to salvage ... is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract upon the subject.

In essence, the above exposition is a restatement of the first fundamental principle of salvage law alluded to earlier in this Chapter.

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17 (1890) 15 P.D. 142 at p. 146.

18 [1970] P. 106 at p.124.

19 [1938] A.C. 136 at p. 147.

20 [1924] P. 78.

21 *Supra,* note 6 at p. 11-12.

22 *The Governor Raffles* (1815), 2 Dods 14 at p. 17.

23 *Supra*, note 6 at pp. 8-9.

24 (1890), 15 PD 142 at p. 146.

When we speak of "salvage" we refer to the salvor's service as well as his reward. Indeed in bygone eras, when the reward took the form of a piece of the saved property, the term was also used to describe that property.[25] The term "salvage service" is defined in the fifth edition of Kennedy as -

> ... a service which confers a benefit by saving or helping to save a recognised subject of salvage when in danger from which it cannot be extricated unaided, if and so far as the rendering of such service is voluntary in the sense of being attributable neither to a pre-existing obligation nor solely for the interests of the salvor.[26]

It is worth noting that the above definition is not nearly as comprehensive as the definition appearing in the previous edition of Kennedy, *i.e.*, the fourth edition, which captures more of the basic attributes and ingredients of salvage in the following words:

> A service which saves or helps to save maritime property - a vessel, its apparel, cargo or wreck - or lives of persons belonging to any vessel, when in danger, either at sea or on the shore of the sea, or in tidal waters, if and so far as the rendering of such service is voluntary and attributable neither to legal obligation, nor to the interest of self-preservation, nor to the stress of official duty.[27]

It is apparent that the above-noted definitions incorporate the essential ingredients of salvage which will be discussed in detail later in this chapter. Some of the important parameters of these ingredients are also mentioned. The reference to "recognised subject of salvage" in the Kennedy definition is noteworthy. It will lead us into the discussion below on maritime property. In the International Salvage Convention, 1989, in addition to "salvage service", the term "salvage operation" is used. It is defined as "any act or activity undertaken to assist a vessel or any property in danger in whatever waters the act or activity takes place. [28] It is also pertinent to mention in this context that the predecessor of the current 1989 Convention, namely, the Brussels Salvage Convention of 1910, employed the terms "assistance" and "salvage". The former denoted services rendered to a

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25 *Abbot*, First Edition, (1802) at p. 320; cited in Kennedy, *supra*, note 6 at p. 9 in footnote 52 at that page.

26 *Supra,* note 6 at p. 8.

27 McGuffie, *Kennedy's Civil Salvage*, 4th Edition at p.5.

28 See Article 1(a) of the International Convention on Salvage, 1989.

manned vessel, and the latter to an unmanned vessel. The rules of the Convention were expressly stated to apply both assistance and salvage without any discrimination. The distinction has never been relevant in English law and has been removed in the 1989 Convention.[29]

One fundamental principle of salvage law, namely, that a person who voluntarily confers a benefit on another is entitled to a reward, has been alluded to earlier. This was originally a Roman law principle the rationale for which was to prevent unjust enrichment of the receiver of the benefit. Furthermore, a salvage lien accrued against the salved property in favour of the salvor. That such a concept was alien to English law was clearly expressed by Bowen L.J. in the *Falcke* case [30] in the following words -

> The general principle is beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefitted, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people upon their backs any more than you can confer a benefit upon a man against his will.

It is said, however, that in the contemporary law of restitution the general principle referred to by Bowen L.J. is rather the exception than the rule.[31] That the general principle is not applicable in the case of salvage was equally clearly expressed by the learned judge in the same passage.[32]

It is further notable in the present context that the notion of a reward or award in salvage law goes beyond restitution as perceived by the common law. In other words, a salvage reward can and often does extend beyond re-imbursement on a *quantum meruit* basis for costs and labour expended, as would be the case in common law restitution.[33] The value of the benefit conferred and the cost of labour are, of course, factors which feature in the determination of the award.[34] Thus in salvage cases the courts have not

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29 *Supra,* note 6 at p. 9.

30 *Supra,* note 3 at pp. 248-249.

31 *Supra,* note 6 at p.18-19, in particular footnote 1 at that page.

32 *Supra*, note 3.

33 *Supra*, note 4 at p. 476. See also *The William Beckford* (1801) 3 C. Rob. 355 at pp. 355-356; *The Clifton* (1834), 3 Hagg. 117 at 120-121 and *The Industry* (1835), 3 Hagg. 203 at p. 204.

34 *The Hector* (1823), 3 Hagg. 90 at p. 95.

hesitated in granting an award considerably higher than what a nominal *quantum meruit* would warrant, especially where the value of the saved *res* is quite high.[35] Where the salvorial risk is relatively high and where the award would otherwise be low due to the low salved value of the property the courts have been inclined to grant awards higher than a *quantum meruit* reimbursement. Thus, the level of risk, the effort expended and the effectiveness of the resources and means employed by the salvor have traditionally been taken into account in arriving at awards well above what would generally be awarded as *quantum meruit* for work and labour under common law restitution principles.[36]

The rationale stated above underlies the second fundamental principle of salvage, namely, that of public policy. Undoubtedly, the public policy element stems from the historical need to save maritime property in the face of danger and peril at sea and thereby protect and sustain maritime commerce for the universal public good. The soundness of the policy to encourage and foster enterprising salvors in their endeavours to save maritime property has been self-evident throughout the ages since the dawn of maritime civilisation. Nowhere is this rationale set out as lucidly as in Eyre C.J.'s dictum in *Nicholson* v. *Chapman* [37] in the following words -

> Principles of public policy dictate to civilised and commercial countries not only the propriety but even the absolute necessity of establishing a liberal recompense for the encouragement of those who engaged in so dangerous a service ... Such are the grounds upon which salvage stands.

The public policy element was also emphasised by Bowen L.J. in the *Falcke* case, when he stated -

> The maritime law, for the purposes of public policy and for the advantages of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances.[38]

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35 *The Earl of Eglinton* (1855), Swab.7 at p. 8.

36 *The Ella Constance* (1864), 33 L.J.Adm. 189 per Dr. Lushington at p. 193.

37 (1793), 2 H Bl 254.

38 *Supra*, note 3 at pp. 248-249.

In a relatively recent case, *The Goring*,[39] the Court of Appeal held that "[T]he law of salvage is justified in public policy by the nature of the perils of the sea and the circumstances in which ships encounter those perils."

The two fundamental underlying principles on which the law of salvage is based were articulated together by Dr. Lushington in an admirable diction in *The Fusilier*.[40] In that case, he first refers to the principle of direct benefit conferred by the salvor and states that it is not the only principle on which salvage is payable. He invokes the support of Lord Stowell and Story J. for what he is about to say and states as follows -

> Salvage is not governed by the ordinary rules which prevail in mercantile transactions on shore. Salvage is governed by a due regard to benefit received, combined with a just regard for the general interests of ships and marine commerce.

The words of Story J. in *The Henry Ewbank* [41] are just as instructive in this regard. He states -

> Salvage, it is true, is not a question of compensation *pro opera et labore*. It raises to a higher dignity. It takes its source in a deeper policy. It combines with private merit and individual sacrifices larger considerations of the public good, of commercial liberality, and of international justice. It offers a premium by way of honorary reward, by prompt and ready assistance to human sufferings; for a bold and fearless intrepidity; and for that effecting chivalry, which forgets itself in an anxiety to save property, as well as life.

No expression of the fundamental principles of the law of salvage is as lucid and articulate as the statement cited above. In a few words, the underlying essence and *raison d'etre* of the law of salvage is presented with the characteristic clarity and eloquence that is the hallmark of that illustrious American judge.

To summarise then, it may be stated that the first principle of the law of salvage, rooted in the ancient Roman law, is that one who confers a benefit on another, even if it is voluntary, is entitled to a reward. This basic principle, although alien to the common law,

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39 [1987] 1 Q.B. 687 at p. 710 (C.A.) per Ralph Gibson L.J.

40 (1865), Br. of Lush. 341 at p. 347.

41 (1883), 11 Fed. Cas., (Case No. 6376) 1166 at p. 1170.

was nurtured in English law through the equitable doctrine of restitution for unjust enrichment. It gained maturity by application of the other fundamental principle of salvage law, namely, public policy considerations. This element elevated the notion of restitution simply on the basis of *quantum meruit* for mere work and labour, to the status of a reward to be commensurate with the difficulty of the task, the nature of the peril, the skill and effort expended and the value of the salved property, all in the interest of fostering maritime commerce. As Bowen L.J expounded in his classic statement - "No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea."[42]

As a concluding statement it is noted that whether in law salvage is payable, and if so, what should be the quantum, is central to the question of indemnifiabilty of salvage expenses under the law of marine insurance. As indicated earlier, this question is one of the strands of the theme of this thesis. The validity of this enquiry is evident in the following statement made by the eminent Dr. Lushington in *The Fusilier*.[43]

> All owners of ships and cargoes and all underwriters are interested in the great principle of adequate remuneration being paid for salvage services; and none are more interested than the underwriters of the cargo.

3. Maritime Property

Only maritime property can be the subject of salvage. In the introductory chapter a preliminary discussion was presented on what constitutes maritime property within the wider context of maritime law as a whole. It is intended in this section to examine in detail the notion of maritime property as it pertains to the law of salvage. In doing so, it will be useful to briefly look at the historical evolution of admiralty jurisdiction over wreck and salvage.

Maritime property basically consists of vessel, cargo and freight. The first two items have further sub-divisions. The apparel of a ship is considered a part of the ship along with other property belonging to the ship and is thus rightly identified as maritime

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42 *Supra,* note 3 at p. 249.

43 *Supra*, note 40 at p. 347.

property and qualifies as a subject of salvage. The cargo of a ship also has subdivisions; these are included in the elements that constitute wreck, namely, pieces and remnants of ship or cargo. Thus wreck is maritime property and is a proper subject of salvage. Freight may be characterised as an intangible form of property in the context of salvage. It is notable that the personal effects of the members of the ship's complement and passengers are not considered to be maritime property because they are not appropriated to the ship.[44]

The need for identifying subjects of salvage is two-fold. Obviously, unless the property saved qualifies as maritime property no salvage will be payable. Furthermore, it is necessary to identify the salved property as a separate subject of salvage so that the value of each saved proprietary interest can be independently evaluated and the salvor's reward can be quantified accordingly.[45]

What constitutes a ship for the purposes of salvage law was expounded in the classic case of *The Gas Float Whitton No. 2*.[46] It can be said that the *ratio decidendi* of this case in simple terms is that every thing that looks like a ship is not necessarily a ship and therefore does not qualify as a subject of salvage. In this case an unmanned gas float of shipshape construction moored in tidal waters went adrift in a storm and was secured by plaintiffs who claimed salvage. The County and Divisional Courts held that it was a ship; the Court of Appeal and the House of Lords disagreed. The gas float in question was used like a light ship but was neither fitted nor intended to be used for navigation. The Court of Appeal held that "... the thing in question on this appeal is not a ship in any sense."[47] The House of Lords made the point that the gas float was not in fact used nor intended to be used for navigation or the carriage of cargo and passengers and the preposterous suggestion that the gas could be considered as cargo was "more ingenious than sound".[48]

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[44] Things appropriated to a ship are those which are necessary for the prosecution of the voyage, see for example *The Humorous, The Mable Vera* (1933), 45 Ll. L. Rep. 51.

[45] *Supra*, note 6 at p. 78.

[46] *Wells* v. *The Owners of the Gas Float Whitton No.* 2 (1897) A.C. 337; affirming (1896) P. 42 (C.A.); reversing [1895] P. 301 (Div. Ct.)

[47] (1896) P. 42 at p. 64.

[48] (1897) A.C. 337 at p. 343.

It is Lord Esher M.R.'s judgement in the Court of Appeal, unanimously affirmed by the House of Lords, that is famous for its clear and authoritative articulation of what are subjects of salvage. In his judgement his Lordship held as follows-

> I come, therefore, to the conclusion that by the common or original law of the High Court of Admiralty the only subjects in respect of the saving of which salvage reward could be entertained in the Admiralty Court were ship, her apparel and cargo, including flotsam, jetsam and lagan, and the wreck of these and freight; that the only subject added by statute is life salvage; [49]

It is arguable that the rationale for the holding in this case, that a gas float could not be a subject of salvage, is based on a technicality rather than on sound reasoning from a practical, nautical perspective. It smacks of judicial conservatism to the extent that Lord Herschell recognises a floating beacon as "property connected with navigation" but, in his opinion, merely because it is so, is not enough justification for the extension of admiralty jurisdiction. The "mere" conservatism is reflected in his statement that "... it would not be right by judicial decision to add to the subjects to which the doctrine of salvage has hitherto been confined by the maritime law of this country." Yet he does not appear to close the door completely when he says "... every object intended to assist the navigation of vessels and guard them from danger, would, if exposed to perils of waters, be, I suppose, equally the subject of salvage claims."[50]

3.1 The Triumverate

There are three main ingredients to a salvage claim under the customary law of salvage. These are danger, voluntariness and success, the triumvirate of customary salvage law. If any of these ingredients are missing a salvage claim cannot subsist; neither can a maritime lien arise in respect of such a claim. All of these three ingredients are alluded to in the International Convention on Salvage, 1989 as well as in its predecessor, the 1910 Convention. As mentioned earlier, the conventions represent a codification of international custom and practice. There is thus no doubt that these ingredients have their roots in the historical evolution of salvage law as much as the fundamental principles discussed earlier.

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[49] (1896) P. 42 at pp. 63-64.

[50] *Supra*, note 48 at p. 345-346.

3.1.1 Danger

Shipping, by its very nature is inherently a dangerous business. Ships at sea, their cargo and freight, as well as the persons on board are frequently exposed to the risk of loss, damage or injury. Common dangers at sea include stranding, grounding, collision, drifting, dragging anchor, *etc.* Loss of steering or machinery power can result in any of the aforementioned situations. There are also other situations of danger or peril resulting from stormy weather and heavy seas, such as, shifting of cargo, damage to the hull and ingress of water. Fires and explosions can result from the nature of the cargo.

For a salvage claim to subsist, the property being salved must be exposed to danger. As a consequence of the danger, there may be physical loss or damage to the property or financial detriment suffered by its owner. The danger need not be absolute or immediate, but must not be fanciful or only vaguely possible.[51] In *The Charlotte* [52] Dr. Lushington held as follows -

> It is not necessary that the distress should be actual or immediate or imminent and absolute; it will be sufficient if, at the time assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the service were not rendered.

Similarly, in *The Phantom*[53] it was held -

> It is not necessary that there should be absolute danger in order to constitute a salvage service; it is sufficient if there is a state of difficulty, and reasonable apprehension.

What is danger that is not immediate and yet is real and sensible is described by Kennedy as -

> such reasonable present apprehension of danger that, in order to escape or avoid the danger no reasonably prudent and skilful person in charge of the

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51 *The Mount Cynthos* (1937), 58 Ll.L.R. 18.

52 (1848), 3 Wm. Rob. 68.

53 (1886), L.R. 1 A & E.

> venture would refuse a salvor's help if it were offered to him upon the condition of his paying for it a salvage reward.[54]

It is not necessary that the danger should threaten the destruction or total loss of the property. A stranded vessel in no immediate or reasonably apprehended danger of destruction but without reasonable expectation of being able to get off with ease soon, is nevertheless in danger because it cannot pursue its intended voyage or deal effectively with any emergency which might arise.[55] In contrast, in *The North Goodwin No. 16* [56] Sheen J. dismissed a claim for salvage on the grounds that the vessel was not in a situation of real danger when its towing hawser parted and it started drifting, because it had three anchors, which if it had used would have prevented it from drifting until the towing gear was reconnected.

An important point to note is the reasonableness that is expected of a prudent and skilful seaman when he makes his decision to accept or refuse a salvor's offer of assistance. In the *Amoco Cadiz* disaster which took place in 1978, the steering gear of the gigantic oil tanker failed. The vessel became disabled and drifted towards the French coast when salvage assistance was offered by a tug in the vicinity. The master initially refused to sign a Lloyd's Open Form and accept assistance because he had to obtain permission from the owners' headquarters. Eventually the authorisation came through, but the pollution damage caused by the grounding could have been minimised, if not avoided, had the master accepted the salvor's offer of assistance sooner.

3.1.2 Voluntariness

The second requirement is that the salvage service must be rendered voluntarily. In other words, there must be no pre-existing contractual, statutory or other duty or obligation to save the vessel or property. That is the first element of voluntariness which was eloquently expressed by Lord Stowell in *The Neptune*[57] in the following words -

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54 *Supra*, note 6 at pp. 160-161. See in particular cases cited in footnote at that page.

55 *The National Defender,* [1970] 1 Lloyd's Rep. 40.

56 [1980] 1 Lloyd's Rep. 71.

57 (1824), 1 Hagg. 227.

> A person who, without any particular relation to a ship in distress, proffers useful service and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship.

A pre-existing duty may exist by virtue of contract. This is often misunderstood because most salvage today is carried out under the terms of a salvage contract, the best known of which the Lloyd's Open Form of Salvage Agreement (LOF). It is submitted that the LOF does not create a "pre-existing" contractual duty. It is entered into in the face of danger; not with expectation that danger may arise in the future, nor after the vessel has sunk or the property destroyed and the danger has ceased to exist. In that sense, the service is undoubtedly offered voluntarily. The saving of property in instances where the danger may arise in the future, or where, after the fact the danger is over, is carried out under what is generally referred to as "contract salvage", which is quite different from a salvage contract. Contract salvage does not give rise to a maritime lien. Another characteristic of the LOF type salvage contract is that it is an agreement by which the salvage remuneration is to be decided by arbitration. In *The Tojo Maru*,[58] Lord Diplock held that the right to a salvage reward was based on an expressed or implied contractual obligation. In the view of one commentator, such a statement moves "perilously close to an eventual acknowledgement that salvors are not truly volunteers."[59]

Other examples of pre-existing contractual duty are the cases of salvage services rendered by the crew of the vessel in danger or its pilot. The crew are clearly under a duty to preserve the ship, the cargo and the lives of people on board. They will therefore not ordinarily be entitled to salvage. However, if a ship is abandoned at sea and if the abandonment is *bona fide* in consequence of danger to the ship caused by the elements or otherwise, the crew may claim salvage as volunteers if they subsequently succeed in saving the ship or its cargo. This is because a seaman's employment is deemed to be terminated if the ship has been abandoned or captured. Thus, if he carries out a salvage act after such termination, he would be entitled to remuneration.[60]

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58 [1972] A.C. 242.

59 Christopher Hill, *Maritime Law*, 4th. Edition, Lloyd's of London Press Ltd. at p. 313.

60 *The San Demetrio* (1941), 69 Ll.L.R. 5.

A pilot, by virtue of the nature of his contractual services, will not ordinarily be entitled to salvage in circumstances which might enable others to claim as salvors. The courts have in the main been reluctant to acknowledge pilots as salvors.[61] However, a pilot will be entitled to claim salvage where the circumstances are more difficult than those with which he will normally be expected to cope in the performance of his duties. Thus, in certain emergency situations, where a pilot may be compelled to remain on board and provide extraordinary service, he will be entitled to salvage, but the burden of proof will rest heavily on him.

Another element which negates voluntariness is pre-existing official duty. Ordinarily, government authorities responsible for wreck removal would not be entitled to salvage under customary salvage law. But in some jurisdictions, the rights of such authorities to salvage remuneration are provided for by statute. With regard to rescue and salvage services provided by Coast Guards, Naval Forces and lifeboat men of the Royal National Lifeboat Institution, there will be entitlement to salvage if it is evident that the service rendered has gone well beyond the performance of official public duty. In *The Gorliz*,[62] it was held that navy personnel will not be entitled to salvage if the service "is no harder and involved no more risk than the work in which they would normally be engaged".

The last element concerning voluntariness is that if the salvage act is committed in the interest of self-preservation alone, it is not a voluntary act and no salvage will be payable. But if self-preservation is incidental to the saving of property there is entitlement to salvage. In *The Lomonosoff*,[63] during the first world war, a number of British and Belgian officers managed to board a ship flying the flag of Northern Russia and escape the Bolsheviks. Hill J. held that these officers were true volunteers because in the course of saving themselves, they also managed to save the property of the shipowner from the enemy.

3.1.3 Success

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61 *The Luigi Accame* (1938), 60 Ll.L.R. 106.

62 [1917] P. 233.

63 [1921] P. 97.

This third ingredient of customary salvage is that the salvage operation must be successful; in other words, it must yield a "useful result" which is the language used in the Salvage Conventions. In the absence of success, a salvor is not entitled to any award, regardless of how much effort he has expended or how great his costs have been for expending that effort. However, a contribution to success will attract an award. This general principle of customary salvage law was admirably expressed in a classic statement by Lord Phillimore in *The Melanie* (Owners) v. *The San Onofre* (Owners)[64] as follows-

> Success is necessary for a salvage reward. Contributions to that success, or as it is sometimes expressed meritorious contribution to that success, give a title to salvage reward. Services, however meritorious, which do not contribute to the ultimate success, do not give a title to salvage reward.

From this principle stems the notion of "no cure no pay", the hall mark of the best known standard form of salvage agreement, the Lloyd's Open Form (LOF). In traditional salvage, there are no prizes for trying. Expensive salvage efforts can remain without remuneration if the ship sinks before getting to a port of refuge.[65]

Success includes ultimate preservation of the *res*. This was stated by Lord Phillimore in the passage referred to above, in the following words –

> Services which rescue a vessel from one danger but end by leaving her in a position of as great or nearly as great danger though of another kind, are held not to contribute to the ultimate success and do not entitle to salvage rewards.

If a ship is in distress, requests assistance and salvage services are rendered, but the ship is ultimately saved through some other cause, the assisting ship is nevertheless entitled to salvage. It was so held in *Manchester Liners Ltd.* v. *M.V. Scotia Trader.*[66] Thus, partial success is rewardable as salvage so long as the service has been rendered

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64 [1925] A.C. 262-263.

65 The position is somewhat different in terms of the special compensation regime under the International Convention on Salvage, 1989. There will be further discussion on this point later in the thesis.

66 [1971] F.C.R. (Can. Fed. Ct. T.D.)

without any negligence or want of ordinary skill. This is the test of reasonableness required of a prudent salvor and is provided for in Clause 15 of the LOF.

Sometimes it is difficult to ascertain whether a salvor has contributed in some degree to the final success, particularly when a number of salvors are involved in the same operation. The question then arises as to whether any particular act materially assisted in the rescue of the ship or cargo and, later, when the amount of the award is to be fixed, by how much did that act materially assist the successful resolution of the dangerous situation. Some salvage services may even render the situation worse than it was originally. In *The Killeena,*[67] the damaged *Killeena* was abandoned by its master and crew. The *Nova* came upon the *Killeena*, and put five men on board who attempted, at first, to save the ship but soon lost heart and hoisted a distress signal. The *Beatric* then came along and took the *Killeena* in tow. The hawser parted and the *Beatric* left the *Killeena* to be worked by the men aboard. Eventually the *Leipzig* towed the *Killeena* into port. The Court held that all others involved were entitled to salvage except the crew of the *Nova* who had not materially assisted in the successful salvage of the *Killeena.*[68]

3.2 Life Salvage

A few words on life salvage in the present discussion should be in order. Originally there was no such concept in salvage law; the premise being that a salvage claim gave rise to a maritime lien which was exercisable through an action *in rem*, *i.e.,* an action against the *res*. This fundamental notion precluded a salvage claim for saving life. In *The Zephyrus,*[69] Dr. Lushington held -

> The jurisdiction of the Court, in salvage cases, is founded upon a proceeding against the property which has been saved, and I am at a loss to conceive upon what principles the owners can be answerable for the mere saving of a life.

As a matter of public policy, it was thought that a right to life salvage would impinge on the humanitarian element of safety of life at sea and that no value could be put on human life. The moral implication was that people should be prepared to save lives without the

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67 (1881), 6 P.D. 193.

68 See also *The Camellia* (1883), 9 P.D. 27 as another example.

69 (1842), I.W. Rob. 329.

expectation of a reward. In more practical terms, by the mere saving of life, there was no fund out of which a salvor could be rewarded as in the case of property salvage. In subsequent years, it was thought that if life was saved in the course of saving property, life salvage could be paid out of the fund created by the salved property. In *The Renpor*[70] Brett L.J. held that something other than life had to be saved in addition to human life in order to provide a fund out of which the life salvor could be remunerated. The International Salvage Convention, 1989 provides for life salvage, characterised as salvage of persons in its Article 16. It is important to note that no salvage is payable by a person whose life is saved, but a salvor of human life may by way of remuneration be entitled to a fair share of the salvage awarded for saving the ship or other property and for preventing or minimising damage to the environment. In many jurisdictions, pursuant to the Convention or otherwise, there is statutory provision for life salvage. The United Kingdom being a party to the Salvage Convention of 1989, life salvage is provided for in the Merchant Shipping Act 1995.[71]

4. SALVAGE AS A MARINE RISK

4.1 Marine Risks

In terms of marine insurance cover, insured risks are usually characterised as marine risks or war and strikes risks.[72] The former is a general expression which encompasses all the risks of traditional ship and goods (S.G.) insurance.[73] In section 1 of the Marine Insurance Act 1906 where "marine insurance" is defined, the term "marine losses" is defined as "losses incident to marine adventure". In section 3(2)(a) it is provided that there is a marine adventure where "[A]ny ship, goods or other moveables are exposed to maritime perils", and "maritime peril" in that context is defined in that subsection.

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70 (1883), 8 P. D. 115.

71 See s.224 (1) (2) of MSA 1995.

72 Susan Hodges, *Law of Marine Insurance*, London: Cavendish Publishing Ltd., 1996 at p. 173.

73 The "S.G." designation of old stood for 'ship and goods'. See O'May, *supra,* note 2 at p. 8 in footnote 21 at that page. The "ship" consists of hull and machinery insurance, and "goods" is what is commonly referred to as cargo insurance taken out by the shipowner or charterer. The Marine Insurance Act 1906 had appended to it as the First Schedule, the Lloyd's S.G. policy which was the forerunner of the present Lloyd's MAR policy.

While we talk about marine risks mainly in terms of perils and losses, salvage and general average are distinguished from other marine risks, in that although they arise out of fortuitous circumstances, there is an element of voluntariness on the part of someone. This is apart from the fact that both share the common characteristic that maritime property is saved. In the case of general average, voluntariness may be an act of the assured in the form of a sacrifice or expenditure. Conversely, it may be in the form of contribution of the assured towards a sacrifice made voluntarily by another co-adventurer. The assured, under the law of marine insurance seeks to be indemnified for such contribution, although it is made not by his own volition, but is obliged to do so by operation of law. This second attribute of general average in the context of indemnification, it shares with salvage[74].

Indeed, salvage stands unique in that the assured seeks to be indemnified for the pecuniary obligation in respect of a voluntary act not committed by himself, but by another person, the salvor, who has saved his property. The salvor, in his own right, is entitled to salvage under customary salvage law or under a salvage contract for voluntarily saving the assured's maritime property. The assured, in turn, seeks to be indemnified by the insurer for that pecuniary obligation which he has incurred, and which the Marine Insurance Act 1906 refers to as a "salvage charge". This is the rationale underlying the notion of salvage as a marine risk.

Perhaps reimbursement of salvage charges incurred by a shipowner, whether it is salvage done under contract or otherwise, can be considered under protection and indemnity cover. It is true that traditionally, risks that the hull and cargo insurer has refused to cover or has made it unfavourable for the shipowner, are covered by protection and indemnity insurance.[75] For example, life salvage[76] and liability for personal injury at work[77] are covered by P & I insurance. Indeed, virtually all third party liability is covered

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[74] Note that salvage and general average are treated in the same clauses in Institute clauses. See *e.g.* Reference Book of Marine Insurance Clauses, 75th Edition, London: Witherby Publishing, 2004. An up to date version of this publication is produced in October of each year by the International Underwriting Association of London (IUA).

[75] N.J.J. Gaskell *et al.*, *Chorley & Giles' Shipping Law,* 8th. Edition, Pitman Publishing Ltd., at p. 502. This text is hereafter referred to as "Chorley and Giles".

[76] *Ibid.* at p. 430.

[77] *Ibid.* at p. 153.

by this form of mutual insurance. As such, it is submitted that salvage charges incurred by a shipowner is a third party liability which could be reimbursable by protection and indemnity insurance. As will be seen in chapter 3, indemnification in the context of the environmental aspect of salvage is shared between the so- called property insurers and the P & I Clubs.

At the present time, salvage charge is a marine risk and we shall endeavour to examine how it is treated in the law of marine insurance both within and outside the purview of the Marine Insurance Act 1906, and how the matter is addressed through express cover in the standard clauses for hull and cargo developed by the Institute of London Underwriters, commonly referred to as "Institute Clauses".

4.2 Salvage Charges Prior to The 1906 Act

The leading case on this issue is the decision of the House of Lords in *Aitchison* v. *Lohre*.[78] It stands for the proposition that salvage done under maritime law and general average (which is always by operation of law and non-contractual) are not recoverable (or indemnifiable) under the suing and labouring clause.[79] It is arguable that this perceived *ratio decidendi* of *Aitchison* v. *Lohre* is, at least challengeable as will be shown in the discussion below.

The facts of this case are as follows. The ship *Crimea* fell into adverse weather in the North Atlantic on its homeward voyage from Canada to the United Kingdom and was in danger of being lost. The steamer *Texas* came to the rescue and towed it to safety. The Irish Admiralty Court awarded £800 for salvage. The ship was insured for £1200 being valued in the policy for £2,600. The owner elected to repair the ship instead of claiming a total loss and abandoning it in favour of the insurer. By application of the rule of practice prevailing in such circumstances, *i. e.*, a deduction of one third new for old, the insurer's liability under the policy came to £1,200 but the Trial Court did not allow the recovery of any salvage expenses which would have amounted to £519 as the proportion of the

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78 (1879) 4 App. Cas. 755 (H.L.).

79 See *e.g.* Susan Hodges generally, *supra,* note 72 at pp. 430 – 433.

general average and salvage taken together for the preservation of ship, cargo and freight.[80]

The Court of Appeal reversed the Trial Court's decision relating to the indemnification of the salvage expenses and added it to the amount for which the policy was underwritten. On further appeal to the House of Lords by the defendant insurer, the decision of the Trial Court was reinstated and the salvage amount of £519 was disallowed.

It is apparent from the facts of the case, that there was no express clause in the policy relating to indemnification of salvage and general average expenses incurred by the assured. The claim for the £519 was thus based on the sue and labour clause which was worded in the usual terms, and, as pointed out by counsel for the assured,[81] contained the words "defence, safeguard and recovery" of the ship and cargo. Thus, as contended by counsel "sums paid for labour and executions in securing the vessel from total destruction may well come within that description".

Much is made of Lord Blackburn's statement at p. 765 of the judgement that "(the) owners of the *Texas* did the labour here, not as agents of the assured, and having to be paid by them wages for their labour, but as salvors acting on the maritime law ... " In other words, the salvors in this case not being "contract salvors" were not "factors, servants or assigns" of the assured and therefore the sue and labour clause did not apply.[82] The learned Law Lord then went on to say –

> salvors acting on the maritime law,... gives them a claim against the property saved by their exertions, and a lien on it, *and that quite independently of whether there is an insurance or not; or whether, if there be a policy of insurance, it contains the suing and labouring clause or not.*

The emphasised words are true but superfluous. No doubt salvage is recoverable under customary salvage law in the circumstances and the question is whether the shipowner in the position of an assured can then recover these expenses from the insurer.

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80 *Ibid.* at p. 761.

81 *Ibid.* at pp. 758 – 759.

82 See *Supra*, note 2.

The House of Lords says – only if it is done under contract, for then only will it fall under the words "factors, servants or assigns". One commentator has pointed out[83] that in Arnould's 13th edition, 1950, it is stated at paragraph 865 that in order for salvage charges to be recoverable, it must be shown that the expenses were incurred by the assured, or his factors, servants or assigns within the strictest meanings of these terms.[84]

Yet in Lord Blackburn's judgement, he refers to the opinion of the editor of what was then the last edition of Arnold, who stated that salvage "is recoverable from him in virtue of an express clause in the policy inserted for such a case, and known as the sue and labour clause". His Lordship then remarks that Arnould cites no authority for that proposition and that although the Court of Appeal agreed with that position, His Lordship was unable to do so. He continued –

> With great deference to the Judges of the Court of Appeal, I think that general average and salvage do not come within either the words or the object of the suing and labouring clause, and that there is no authority for saying that they do.[85]

It is notable that the decision "was the subject of scathing criticism by Machlachlan (Arnould's 6th edition)".[86] While in Lord Blackburn's view, Arnould's statement that salvage is recoverable under an express sue and labour clause, is without authority, so is His Lordship's opinion that it is not so recoverable, devoid of any decided cases on that point. What it boils down to is that the decision was arbitrarily based on a technicality; a narrow construction of the words of the sue and labour clause, that it could not accommodate salvage charges, simply because it was carried out under "maritime law" and not under contract. The arbitrariness of this decision is borne out by the following words of Lord Blackburn –

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[83] Brendan P. O'Sullivan in "The Scope of the Sue & Labour Clause" (1990), *JMLC.* Vol. 21, No. 4, at p. 56.

[84] The reference to "Arnould" is to *Arnould on the Law of Marine Insurance and Average* variously cited in this chapter according to the relevant edition of this authoritative work. The current edition which is the sixteenth is edited by Sir Michael J. Mustill and Jonathan C.B. Gilman, 1996, London: Sweet & Maxwell.

[85] *Supra,* note 78 at p. 764.

[86] See p. 793 and App. to Chap. 2, P. 3 of the 6th Edition. The words in quotation marks are found in footnote 32 of Ch. 25 of Arnould's Sixteenth Edition.

> There have been very few cases in which it has been necessary to discuss the nature of the suing and labouring clause. *Kidston* v. *The Marine Insurance* is, I think, the only one in which there has been a recovery under it. There, however, all the extra labour was directly and voluntarily employed by the agents of the assured; and the charges were paid by them in consequence of this employment. In the very able and elaborate judgement of Mr. Justice Willes not a word can be found to countenance this extension of the construction of the clause beyond what seems to me both its language and its object; and except the passage introduced for the first time into Arnould by the present editor, I can find nothing in any Text book tending to support it.[87]

It appears from the supporting judgement of Lord Hatherley that a rationale for the decision was that "if the salvage and general average expenses are added the loss will be very considerably more than 100 per cent".[88] Thus, an element, at least, of the *ratio decidendi* is based on economics rather than law. Also notable in this context is Lord O'Hagan's following statement – "I have had some grave doubts as to the second point with reference to the operation of the suing and labouring clause..." [89]

Chorley and Giles appears to focus on the following passage in the judgement of the Lord Chancellor (Earl Cairns) –

> It shows that the salvage expenses were not expenses incurred under the suing and labouring clause by the owner of the ship; but were a payment which the ship, as an actual chattel, had to submit to by maritime law, and would be obliged to make good in proceedings against the ship *in rem.*[90]

The contention that voluntary salvage charges become payable by operation of maritime law "even though the assured has done nothing for the preservation of the subject matter"[91] is a fallacious statement. Even in a voluntary salvage situation, the master of a ship has the right to refuse salvage; although a prudent master, in the interest of preserving his ship would accept the voluntarily offered service. That the sue and labour clause "inducement" is not instrumental in the salvage charges being incurred is

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87 *Supra,* note 78 at p. 766.

88 *Ibid.* at pp.763 and 768.

89 *Ibid.* at p. 769.

90 *Ibid.* at p. 767.

91 *Supra,* note 75 at p. 580.

equally fallacious;[92] and Earl Cairns' statement cited above has little bearing on the position that non-contractual salvage shall not be indemnified under the sue and labour clause.

Interestingly enough, *Dent* v. *Smith* [93] which already had a bearing on the subject matter was not cited in the *Aitchison* Case. In *Dent* v. *Smith*, a cargo of gold was safely off-loaded from a ship which was a casualty. The cargo was delivered to a Russian Consul in Turkey. After the subsequent salvage of the vessel, the matter was heard before a Russian Consular Court which held that the gold was liable to salvage contribution. The assured paid the required amount to regain the gold which was in effect a salvage expense. It was held to be recoverable from the insurer as a loss caused by an insured peril. Notably, the salvage was done under maritime law. [94]

The narrow construction put to the words in the sue and labour clause, by Lord Blackburn in *Aitchison* v. *Lohre* was followed in a curious decision called *Uzielli* v. *Boston Marine Insurance Co.*[95] In this unsatisfactory decision,[96] the Court of Appeal held that as among A, an underwriter, B as A's re-insurer, and C as B's re-insurer, A could recover salvage expenses from B after paying for a total loss, but B could not recover the same from C because under the suing and labouring clause, A was not a "factor, servant or assign" of B.[97]

The impact of *Aitchison* v. *Lohre* in terms of the distinction made between salvage under maritime law and salvage under contract is of no practical significance where the situation involves general average.[98] The discussion on this will unfold later in this thesis. Professor Rose has gone on to say that the distinction between these two types of salvage in the *Aitchison* decision as well as in s. 65 of the Marine Insurance Act 1906 is unclear.[99]

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92 *Ibid.*

93 (1869), LR 4 Q,B. 414.

94 See Rose, *supra*, note 2 at p. 221, footnote 41.

95 (1884), 15 Q.B.D. 11.

96 See Arnould *supra,* note 84 p. 911 at footnote 32, where it is noted that the decision was criticised in a number of subsequent cases.

97 See *ibid.* at p. 911; see also O'Sullivan, *supra*, note 83 at p. 556.

98 Arnould, *ibid.*

99 Rose, *supra*, note 2 at pp. 221 – 222.

This comment progressively leads us on to a detailed discussion of section 65 of the Marine Insurance Act 1906.

4.3 Salvage Charge under Section 65 of the Marine Insurance Act 1906

As we have seen, salvage services in respect of maritime property may be rendered as a saving act by the assured himself or by a third party. In the case of *Aitchison* v. *Lohre*, it is evident that if the services are carried out by an agent or contractor of the assured, the treatment in law is different as compared to a situation where the party has no contractual or other obligatory connection with the assured. In the former situation, there is recovery under the suing and labouring clause, in particular, under the words "factor, servant or assign" in that clause. In the latter case, *i.e.,* where salvage is rendered under customary salvage principles, there is no recovery under that clause.

Voluntariness is one of the essential ingredients of customary salvage law, as we have seen. The services rendered must not be pursuant to a "pre-existing obligation".[100] The *Aitchison* decision, which pre-dated the enactment of the Marine Insurance Act 1906, it is reported, "occasioned some surprise" to put it lightly.[101] Indeed, as stated earlier, it was the subject of scathing criticism by Machlachlan in the 6th Edition of Arnould. The decision was rationalised on the basis that a voluntary salvor was not an agent of the assured. As such, a voluntary salvor was not privy to the marine insurance contract entered into between the assured and the insurer and did not fall within the wording "factor, servant or assign" in the suing and labouring clause to warrant recovery. The concept of an agent of necessity, which would have been a ground for recovery otherwise, is generally not recognised in English law as it is in the continental civil law.[102]

Whatever the *Aitchison* decision may have settled as law in 1879 has been discussed, its impact so far as salvage agreements are concerned will be addressed later.

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[100] *Supra*, note 6 para 11.

[101] E.R. Hardy Ivamy, *Chalmer's Marine Insurance Act*. 10th. Edition, at p. 102. This text is hereafter referred to as "Chalmer".

[102] Robert Merkin, *Annotated Marine Insurance Legislation*, London: Lloyd's of London Press, 1997, at p. 57. But see Geoffrey Brice, *Maritime Law of Salvage*, London: Sweet & Maxwell, 1999, at pp. 328-329 and 332-334. See also International Convention on Salvage, 1989, Article 6(2) and LOF 2000 Clause K in Appendix 1 to this thesis.

At the present time it is necessary to examine section 65 of the Marine Insurance Act which deals specifically with salvage charges. Contrary to the predominant view that section 65 codified the law enunciated by *Aitchison* v. *Lohre,*[103] it is submitted that section 65 is rather a remedial provision which fills a gap left by the case law. This provision makes salvage charges incurred under customary salvage indemnifiable by statute, but subject to any express provisions contained in the policy itself. It is further submitted that section 78 of the Marine Insurance Act is a re-statement of the *Aitchison* decision.

At this point it would be in order to examine section 65 and analyse each element of that provision. The section reads as follows –

(1) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by these perils.

(2) "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.

The first subsection is a statement of law. It simply legislates on the recoverability of salvage charges. This statement of law is only fully appreciated when the exact meaning of salvage charge is exposed. This is elaborated in sub-section (2). The statement of law that salvage charges are recoverable is, however, made subject to any express provisions contained in the policy itself. The details of such express provisions contained in the Institute Clauses will be examined in a later section of this Chapter.

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[103] See *supra,* note 84 at p. 910 and the statement of Professor Rose "The MIA 1906 was designed to codify the common law, *inter alia, Aitchison* v. *Lohre*" in *supra*, note 2 at p. 220.

The second element in subsection (1) is that the salvage charges must be incurred in respect of an insured peril. This was confirmed in case law even before the enactment of the Marine Insurance Act 1906 in *Ballantyne v. Mackinnon.*[104] In this case, it was held that salvage paid by the assured for towage services resulting from the lack of adequate supply of coal fuel was not recoverable because the cause of the loss, *i.e.*, insufficiency of fuel was not an insured peril.[105]

It is important to note in subsection (1) that the salvage charge itself is treated as if it were a loss resulting from the peril in respect of which the charge is incurred. Subsection (2) contains the statutory definition of "salvage charges". There are three elements to the definition. First, the charges must be those recoverable by a salvor under "maritime law". Second, the charges must be so recoverable independent of any contract. Third, the charges must not be in respect of services rendered by the assured himself, or his agent or a person employed for hire by him. In other words, contract salvage is precluded under this definition of salvage charges.

The first two elements which are expressed in one sentence in the definition are interrelated. By "maritime law" is meant the customary law of salvage as distinguished from the common law of England and "independently of contract" means service voluntarily rendered which, as stated earlier, is an essential ingredient of customary salvage law. The phraseology "do not include ...*etc*", implies, in the opinion of this writer, that contract salvage does not fall within the scope of this definition. The reason for this is that as per the *Aitchison* decision, contract salvage expenses are recoverable under the sue and labour clause.

Going back to subsection (2) of section 65, the last element is the sentence following the definition of "salvage charges". In reference to "such expenses", *i.e.,* those that do not qualify as salvage charges as defined, may be recoverable as particular charges or as a general average loss. Suffice it to say, in this context, that "general average" and "particular average" are defined terms under the Marine Insurance Act 1906 in section 66 (1) and section 64 (1), respectively. Both are partial losses; but whereas "general average"

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104 (1896), 2 J.B. 455 (C.A.)

105 Chalmer, *supra*, note 101 at p. 108.

is voluntary, "particular average" is fortuitous. The loss in the former is proportionally made good by all co-adventurers; the loss in the latter is borne by him on whom it falls.[106] Section 64 provides in subsection (2) that particular charges are not included in particular average, and defines particular charges as "expenses...other than general average and salvage charges". It is implied in section 76 (2) that particular charges are recoverable under the sue and labour clause.

5. SALVAGE CONTRACT VERSUS CONTRACT SALVAGE: THE LLOYD'S OPEN FORM OF SALVAGE AGREEMENT (LOF)

5.1 Salvage Contract and Contract Salvage

The starting point of this discussion is a fundamental statement of maritime law that the right to salvage is essentially independent of contract.

> It is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him notwithstanding that he has not entered into any contract on the subject.[107]

In *The Hestia* [108] it was stated that –

> salvage claims do not rest on contract... the right to salvage is in no way dependent on contract and may exist and frequently does exist in the absence of any expressed contract or of any circumstances to raise an implied contract.

It is perhaps a fair statement that since the advent of power driven vessels in the 19th century and professional salvors undertaking salvage operations, the opposite of part of the above statement is true; namely, that it is rather more infrequent that salvage is carried out without the benefit of a contractual arrangement.[109] Thus evolved the standard form of salvage agreement. The focus of the present discussion is to examine the legal status of the typical standard form salvage agreement, *vis à vis*, the customary law of salvage outside of contract; and most importantly, the two-fold question of what

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106 *Ibid.* at p. 106 and Rose, *supra*, note 2 at pp. 218-219.

107 per Hannen P. in *Five Steel Barges*, *supra*, note 24.

108 (1875) P. 193.

109 *Supra,* note 6 at p. 790.

constitutes "independently of contract" in section 65 of the Marine Insurance Act 1906, and the status of the typical LOF in light of *Aitchison* v. *Lohre*.

There are basically two types of contractual arrangements involving salvage services. One is typically referred to as the salvage contract. It bears all the hallmarks of customary salvage. The remuneration payable for the services may be stipulated or it may be not; it may be left to be determined by other devices such as arbitration.[110] Indeed, in the early years of the salvage agreements prior to the Lloyd's Form,[111] it was customary for the remuneration to be fixed. Thus in *The Renpor,*[112] Brett M.R. described the salvage agreement by remarking that "...it fixes the amount of salvage to be paid both for services to life and property, but leaves untouched all the other conditions necessary to support a salvage award."

In *The Raisby,*[113] the master of the disabled vessel *Raisby* entered into a written agreement with the master of the *Gironde* under which the latter ship would tow the *Raisby* to St. Nazaire, the nearest port for repairs. The remuneration payable for the service was to be determined by arbitrators to be appointed by the respective owners. In an action by the owners of the *Gironde* against the owners of the *Raisby* for salvage in respect of cargo, (salvage for ship and freight was awarded by the French Court), the English Court held that the agreement in question encompassed salvage proper, *i.e.*, customary salvage, and that the shipowner was not liable for any salvage award which was owed directly by the cargo owners. In so ruling, Sir James Hannen in effect held that the agreement did not alter the legal position of the master which was to be determined by application of the rules of salvage law.[114]

It is noteworthy that where the salvage services are not on a "no cure – no pay" basis, but are contractual in terms of hired services, *i.e.*, the services are not offered voluntarily and the remuneration is fixed as part of the contract, it is not a salvage charge under section 65 of the Marine Insurance Act, but could well be a particular charge. In

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110 *Ibid.* at p. 718, p. 337.

111 *Ibid.* at pp. 368-369.

112 (1883), 8 P.D. 115 at p.118.

113 (1885) 10 P.D. 114.

114 *Ibid.* at p.116.

such case, it would be recoverable under a sue and labour clause pursuant to section 78 of the Act, or as general average depending upon the circumstances giving rise to the charges.[115]

Kennedy notes that the Lloyd's Standard Form of Salvage Agreement is referred to as "open" because earlier forms contained a blank where an agreed figure could be inserted followed by the words "unless this sum shall be afterwards objected to as hereinafter mentioned in which case the remuneration for the services shall be fixed by arbitration in London." Filling in the blanks fell into disuse and gradually London arbitration for determination of the award became the norm, which is the case to this day.[116] In contrast to the above, the other type of contractual arrangement for the provision of salvage services is one which does not have the characteristics of customary salvage. These are sometimes referred to as contract salvage as distinguished from a salvage contract. In this thesis, the term "salvage contract" and "salvage agreement" are used interchangeably.

The distinction between a salvage contract and contract salvage is actually quite basic. The former is an arrangement whereby the remuneration may be agreed to be determined later, but all other requirements of customary salvage are either provided for in the agreement or is applicable otherwise anyway. Contract salvage is like any other contract and is treated as such. In other words, the right to remuneration is based entirely on the terms of the contract. Such a contract can be entered into before any danger arises; in other words, as a responsive and remedial arrangement between the property owner and a prospective salvor (usually a professional commercial salvor) in anticipation of a dangerous or fortuitous incident arising in the course of a maritime adventure. As well, contract salvage can be entered into by the parties after the danger has gone and left the property damaged. The contract is for recovery of the lost or damaged property under such circumstances. In contract salvage it is therefore not necessary that the element of danger be present.

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115 *Supra*, note 72 at p. 724.

116 *Supra,* note 6 p. 368.

It is worth analysing this distinction further. In *The Neptune*,[117] Lord Stowell defined "salvor" as –

> one who, without any particular relation to the ship in distress, profers useful service and gives it as a volunteer, adventurer *without any pre-existing covenant* that connected him with the duty of employing himself for the preservation of that ship.

It is a classic exposition of all of the three ingredients of salvage, *i.e.,* the triumvirate of danger, voluntariness and success, although not exactly those words are used. It is further stated by Brice that – "A right to salvage arises when a person, acting as a volunteer (that is, without any pre-existing contractual or other legal duty so to act) preserves or contributes to preserving at sea any vessel, cargo, freight or other recognised subject of salvage from danger."[118]

The operative words in the above quotation are those in parenthesis, and in reference to both the above quotations, the word "pre-existing" in particular. They explain what is meant by a volunteer in the customary law of salvage. It is submitted that in a LOF type salvage agreement there is no pre-existing contractual duty. The contract is entered into in the face of danger (one of the other ingredients of customary salvage). It is not pre-existing; and is therefore a salvage contract. Where the contract is entered into before the danger arises, it is pre-existing and therefore any services provided pursuant to it is contract salvage and not subject to the rules of customary salvage law. The contract itself is the only basis for the rights, duties and liabilities of the parties involved. In the case of a salvage contract, the rights, duties and liabilities of the parties involved are also subject to the contract, which, as stated earlier, largely incorporate the rules of customary salvage law and bears all its hallmarks; but those rights, duties and obligations only arise when the contract is entered into in the face of danger. There is therefore nothing pre-existing.

The "other legal duty" referred to in the Brice quotation has been discussed earlier. They are duties of public authorities such as port authorities and coast guards which are statutory or otherwise and *prima facie* are pre-existing, although there may be

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[117] 1 Hag. ADM 227.

[118] Geoffrey Brice, John Reeder (Editor) *Brice on Maritime Law of Salvage,* 2002, London: Sweet & Maxwell, at p. 1.

occasions when official personnel may go well beyond their call of duty to effect a saving act when salvage under customary law may well be payable. Also, as mentioned earlier, acts done entirely in the interest of self-preservation are not considered voluntary acts, but they have nothing to do with whether or not there is a pre-existing contractual duty.

The question of danger as an ingredient of customary salvage has been discussed. It is clear that neither a contract entered into before danger arose nor after the danger has passed would qualify as being subject to the customary rules of salvage law and would therefore not be considered a salvage contract. Services provided under such a contract would be contract salvage.

The last element of the triumvirate, the requirement of success being expressly incorporated in a LOF type agreement is possibly the strongest factor in support of the submission that a salvage contract, properly so-called, is one that encompasses all the ingredients of customary salvage. The requirement for success is expressed by the words "no cure no pay" conspicuously printed on the LOF. The notion of "ultimate preservation of the *res*" falls within the compass of success. Kennedy states that "... if no property is ultimately in some way preserved the remuneration payable will not be salvage remuneration".[119] The underlying rationale is quite apparent. There must be a source from which salvage payment must be derived. If no property is ultimately preserved, there is no source. It is also for this reason that where life salvage is payable, property must be saved as well from which the life salvage is to be paid. As mentioned earlier, under the International Convention on Salvage, 1989, and United Kingdom statute law incorporating that convention, no salvage is due from the person whose life is saved.

However, according to Kennedy –

> An agreement may provide for remuneration on alternative bases without losing its character as a salvage agreement. It may provide for salvage remuneration in the event of the services proving successful or beneficial, and for payment of expenses, loss or damage incurred if the services are not successful or beneficial. Such an agreement does not prevent the agreement as a whole from being regarded as a salvage agreement.[120]

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[119] *Supra,* note 6 at p. 370.

[120] *Ibid.* at p. 345.

The anomaly in the above passage is that the latter part of it is inconsistent with the International Convention on Salvage 1989, which provides in Article 12, para 2 that no salvage is payable under the convention in the absence of "useful result". At the risk of re-iteration it is submitted that the United Kingdom having ratified this Convention and having implemented it through statute, a contract that provides for remuneration regardless of whether the salvage operations have been successful is not a salvage contract. Rather, it falls squarely within the concept of contract salvage. One commentator has stated that " ... contracts providing for payment to the salvor whether he succeeds or not are not in the nature of salvage contracts".[121] This writer subscribes to the aforementioned view.

5.2 The Lloyd's Open Form: Recovery under Section 65 of the Marine Insurance Act

In the late 1800s and early 1900s, various forms of salvage agreements were devised which were of the "open" type, *i.e.*, the award was to be determined by arbitration. Revisions and alterations of these forms developed by different salvage organisations eventually culminated into the first Lloyd's Standard Form of Salvage Agreement (No Cure – No pay) being published by the Committee of Lloyd's. In subsequent years, the LOF, as it has come to be known, underwent further revisions to keep in step with developments in the maritime field. Radical changes have taken place in the articulation of the form since 1980, taking into account tanker disasters, their salvage and the marine environmental dimension of salvage and indemnification under marine insurance.[122] It is undoubtedly the most widely used standard form of salvage agreement.

The current version, the LOF 2000, is at once comprehensive and "user friendly". The agreement proper is a two-page document consisting of nine boxes, two of which are for the signatures of the parties, and twelve lettered clauses A to L. It squarely incorporates the spirit of the International Convention on Salvage, 1989. This is reflected in Clause J which provides that the agreement is governed by English law. The relevant English law, of course, mainly consists of the Merchant Shipping Act 1995 which incorporates the International Convention on Salvage, 1989 and includes the so-called

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121 W.A. Bishop, IMLI, Salvage Lecture 1 (unpublished) at p. 2. See Appendix 2 to this thesis.

122 *Supra*, note 6 at pp. 373-374.

special compensation regime which marks a radical diversion from the entrenched "no cure – no pay" principle. However, as discussed in detail later, the LOF 2000 provides for invoking of the Special Compensation P&I Clause (SCOPIC) by the salvor as an alternative to the special compensation regime of Article XIV of the International Convention on Salvage, 1989. The traditional LOF requirement for the salvor to use his "best endeavours" to carry out the salvage services, and now, to prevent or minimise damage to the environment is contained in Clauses A and B. Besides the agreement proper there are two other documents, namely, the Lloyd's Standard Salvage and Arbitration Clauses (LSSA Clauses) and the Procedural Rules. By virtue of Clause I these two documents are deemed to be incorporated into the agreement and form an integral part of it.[123]

Among other salient features of LOF 2000, the salvage services are to be provided on a "no cure – no pay" basis except with regard to the application of Article 14 – the special compensation provision of the International Convention on Salvage, 1989. The remuneration of the salvor (referred to in the agreement as "the contractor") is to be fixed by arbitration in London (Clause I) and the agreement applies to services rendered prior to its signing (Clause E). Security is to be provided by persons firms or corporations either acceptable to the contractors or resident in the U.K. and acceptable to the Council of Lloyd's (Clause 4.5 of LSSA Clauses) upon notification by the contractor to the Council of Lloyd's and the owners (Clause 4.1 of LSSA Clauses); and the security, together with the award are to be expressed in a currency agreed to by the parties, or in the absence of agreement, in U.S. dollars (Clause 4.3 of LSSA Clauses and Box 4 of agreement proper). The agreement and arbitration under it are governed by English Law (Clause J). Pursuant to Clauses 6 and 10 of the LSSA Clauses, the arbitration and appeals are to be conducted in accordance with the Procedural Rules. The fact that the Agreement is so widely used is itself evidence of the fairness of its provisions.

The central question in the context of the discussion under this section is whether salvage paid by an assured to a salvor under Lloyd's Open Form (LOF) is indemnifiable as salvage charges under section 65 of the Marine Insurance Act. W.A. Bishop describes

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[123] The LOF 2000 appears as Appendix 1 to this thesis which includes the agreement proper, the LSSA Clauses, the Procedural Rules as well as SCOPIC together with its Appendices, Codes of Practices and the Salvage Guarantee Form ISU 5.

the LOF as "in effect simply an agreement to arbitrate on certain terms."[124] Professor Rose states in reference to the LOF –

> The main purpose of this is not, as with most standard form contracts, to settle in detail the incidents of the parties' relationship, but to provide for a reference to arbitration for determination there of the amount to be paid for the service in accordance with *the principles of the maritime law of salvage* (emphasis added).[125]

In this regard, American authors Healy and Sharpe have this to say-

> Even though a contract is made, the salvage is considered pure salvage, as distinguished from contract salvage, if the contract leaves open the compensation to which the salvor will be entitled in the event of success, as does LOF 1980.[126]

O'May opines that "[I]f the services are rendered in an emergency, without any *prior contract*, (emphasis added) underwriters would be liable for "salvage charges" and then goes on to say –

> If salvage services are rendered, as is more common, under Lloyd's Form of Salvage Agreement, the liability would not be for "salvage charges" under section 65 (2) of the Act because it is contractual, but instead either as sue and labour or general average expenditure.[127]

The statement is rather sweeping and categorical and for which no authority is cited by the author. In contrast, Dr. Hodges has an interesting viewpoint in regard to the definition of salvage charges as provided in section 65 (2) of the Marine Insurance Act, which is "charges recoverable under maritime law by a salvor independently of contract." She states-

> The purpose of this statement is not only to restrict salvage charges to those "recoverable under maritime law", but also to distinguish it from salvage performed pursuant to contractual arrangements. These words

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124 *Supra*, note 121 at p. 3.

125 Rose, *supra*, note 2 at p. 222.

126 Nicholas J. Healy and David J. Sharpe, *Cases and Materials on Admiralty*, Second Edition, St. Paul, Minn.: West Publishing Co., 1986, at p. 687, in footnote 75 at that page. See also *The Elfrida* (1898), 172 U.S. 186, 19 S. Ct. 146, 43 L. Ed. 413.

127 O'May, *supra,* note 2 at p. 391.

> point to the fact that only salvage awards or salvage strictly so-called, as understood in maritime law, are recoverable as salvage charges. It could be said that the words" independently of contract" are superfluous, for the very essence of maritime salvage is that the salvors must act voluntarily, and not under contractual compulsion. They were, presumably, inserted for emphasis.[128]

The above quotation deserves some close examination. It is submitted that the term "contractual arrangement" must refer only to contract salvage. This is borne out by the words "the very essence of maritime salvage is that the salvors must act voluntarily, and not under contractual compulsion". Only in contract salvage, *i.e.*, where the contract is a pre-existing obligation or where it is entered into after the danger has passed, does a salvor act under contractual compulsion. It is further submitted that in a LOF type arrangement, the salvor acts voluntarily in as much as he offers his services by his own volition in the face of danger and not pursuant to any pre-existing obligation or official duty.

The comment by Dr. Hodges that the words "independently of contract" are superfluous and that "they were, presumably, inserted for emphasis" is debatable. It is submitted that the words "independently of contract" were inserted to exclude salvage charges from charges recoverable under contractual arrangements which do not fall within the scope of "voluntary act", as construed under customary salvage law. These would be contracts giving rise to pre-existing obligations or contracts entered into after the passage of danger. Thus, the words "independently of contract" are not superfluous and not inserted simply for emphasis. They are meant to exclude contract salvage from the definition, but not a salvage contract which has all the characteristics of customary salvage.

The words of Lowndes and Rudolf are pertinent and instructive in this regard. They state –

> Where the Marine Insurance Act defines "salvage charges" as meaning '... the charges recoverable under maritime law by a salvor independently of contract', it does not require that the salvage services should be performed without a contract, but is simply restating the far more fundamental

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128 *Supra*, note 72 at p. 427.

> concept that the right to an award of salvage is independent of whether there was a contract or not.[129]

There may be another reason why it is contended that the words "independently of contract" are not superfluous. As mentioned earlier, it is section 78 (2) of the Marine Insurance Act which codifies the decision in *Aitchison* v. *Lohre*.

The subsection reads as follows –

> General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

It has been submitted earlier that section 65 was created to fill the vacuum left by *Aitchison* v. *Lohre.* Thus, where salvage charges incurred pursuant to contract can be recovered under the suing and labouring clause, salvage charges independent of contract cannot, under the *Aitchison* decision. Section 65 creates a regime for recovery where salvage services are rendered outside the scope of contract and therefore not recoverable as sue and labour. The words "independently of contract" in section 65 thus fits in quite neatly with the exclusionary statement in section 78 (2).

This writer is in agreement with the conclusion of Dr. Hodges that remuneration for services provided pursuant to LOF could possibly qualify as salvage charges under section 65 of the Marine Insurance Act. Her conclusion is based on a different premise but it is sound. She states –

> Lloyd's Open Form (LOF) 1995, specifically describes itself as an "agreement", rather than a contract, and, as it operates in accordance with the principles of the law maritime on a "no cure – no pay" basis, it is presumed that such an agreement would fall within the definition of "salvage charges" as contained within the Act.[130]

The fact that the LOF does not stipulate the remuneration payable has two facets. First, the reason remuneration is not stipulated is that it depends on whether or not the

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[129] D.J. Wilson and J.H.S. Cooke, *Lowndes & Rudolf: General Average and the York-Antwerp Rules*, 12th Edition, 1997, London: Sweet & Maxwell at p. 298.

[130] Susan Hodges, *Cases and Materials on Marine Insurance Law,* London: Cavendish Publishing Ltd. 1999 at p. 723.

operation is successful and produces a useful result. Thus, as expressed by Dr. Hodges, "[T]he 'no cure no pay' basis of the agreement indelibly stamps it with the hallmark of maritime salvage."[131] It is therefore reasonable to conclude that under the LOF payment for salvage is "charges recoverable under maritime law" in terms of section 65(1) of the Marine Insurance Act, as opposed to payment under contract. As stated by Dr. Hodges, although salvage is payable under the LOF agreement if the operation is successful, the quantum of salvage is not fixed by the agreement; but is assessed *post facto* by arbitration. The second facet of the remuneration not being stipulated in the LOF is that the agreement is thereby rendered incomplete and uncertain and therefore outside the scope of contract proper; it being simply an agreement to determine salvage by arbitration.

Thus, if the LOF is nothing more than an agreement to agree in the future on a material term it would appear not to be a contract;[132] and if that is the case, salvage services rendered under it would qualify as salvage charges under section 65 (2) of the Marine Insurance Act. This conclusion is based on the premise that incomplete bargains are not really contracts because of the lack of certainty. However, this premise is not entirely free of exceptions in so far as the general law of contracts is concerned. In *Foley* v. *Classique Coaches*,[133] Maugham L.J. stated-

> An agreement to agree in future is not a contract; nor is there a contract if a material term is neither settled nor implied by law and *the document contains no machinery for ascertaining it.*[134] (emphasis added)

It is arguable that in the case of the LOF the above-noted exception applies because the agreement does provide the machinery for ascertaining the salvage award. In the *Foley* case, defendants repudiated a contract in which price was not stipulated. There was provision in the contract for arbitration in the event of a dispute. The court held that the absence of agreement on price was not fatal because the intention of the parties to be bound was clearly evinced in the contract and the price could be settled by arbitration.

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131 *Supra,* note 72 at p. 429.

132 *Foley* v. *Classique Coaches Ltd.* [1934] 2 K.B. 1, per Maugham L.J. at p. 13. See J. Beatson, *Anson's Law of Contract*, 28th Edition, Oxford University Press, at p. 60.

133 *Ibid.*

134 *Ibid.*

Thus, even if the transaction could be characterized as an agreement to agree, the parties were agreeable to the price being fixed by an objective mechanism such as arbitration. This case is analogous to salvage under LOF. In *Hillas & Co.* v. *Arcos Ltd.,*[135] Lord Tomlin stated in the context of incomplete or uncertain agreements that-

> without violation of essential principle, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains.[136]

Lord Wright, in the same case in upholding the validity of certain types of incomplete or uncertain contracts stated as "obvious illustrations ... prices or times of delivery in contracts for the sale of goods or times of loading or discharging in a contract of sea carriage."[137]

Thus, while the law does not generally recognize an agreement to agree as a valid contract, exceptions are made for practical and commercial reasons such as in contracts for repairs, even where a material element such as price (akin to an award in the context of salvage) is missing in the agreement.[138] The upshot of this conclusion is that the LOF could well be regarded as a contract proper, so much so that services provided under it would fall outside the scope of s.65 of the Marine Insurance Act because they would not be considered as being "independent of contract".

6. EXPRESS COVER: THE INSTITUTE CLAUSES AND INTERNATIONAL HULL CLAUSES

The substance of a marine insurance contract is contained in the policy. Indeed, in practical terms, the policy represents the contract inclusive of all its terms. Section 22 of the Marine Insurance Act provides that" a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy...". Section 23 provides what the policy must specify. These include the assured's name, the subject matter and risk insured, the

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135 [1932] All E.R. 494 (H.L.)

136 *Ibid.* at p. 499.

137 *Ibid.* at p. 504.

138 P.S. Atiyah, *An Introduction to the Law of Contract*, 4th Edition, London: Clarendon Press, at pp.118-120.

voyage or time period involved, the amount of the insurance and the names of the insurers.

Almost invariably, marine insurance policies are on standard forms developed by Lloyd's and the International Underwriting Association of London (IUA).[139] There are two such forms; the Lloyd's Marine Policy (MAR) and the Companies Marine Policy. Collectively, they are referred to as Marine Policies. A standard form policy typically contains a brief statement reflecting the insurer's agreement to provide insurance in consideration of payment of the requisite premium. The schedule to the policy contains all the elements referred to in section 23 of the Marine Insurance Act. The last item in the Schedule is headed "Clauses, Endorsements, Special Conditions and Warranties." Attached to it are a set of clauses which represent the operative terms of the contract. Under the last heading there is a statement providing that the attached clauses and endorsements form part of the policy.

There are some 124 sets of clauses covering different types of policies and risks. These are referred to as the Institute Clauses; they contain in express terms, details of the insurance cover provided under the policy. In this section, the typical clauses dealing with salvage charges and the exclusions to the cover provided will be briefly examined. It should be noted in this context that the wordings of Institute Clauses relating to salvage are designed so as to include indemnification of general average as well. This is abundantly clear from the text of these clauses set out below. For the purposes of this thesis it will therefore not be necessary to repeat the discussion pertaining to these clauses in Chapter 4 which address the subject of General Average.

The Joint Hull Committee of the Institute of London Underwriters, following consultations with the shipping industry and the marine insurance market, introduced the International Hull Clauses, 2002 (IHC) on 1 November, 2002. The intention of the interested parties is to adopt a gradual phased-in approach to the use of these clauses in relevant marine insurance policies. It is envisaged that eventually the new clauses will replace the existing ITC-Hulls clauses, but for a period of time, the two systems will

[139] On 31 December,1998 the Institute of London Underwriters (ILU) merged with the London International Insurance and Reinsurance Market Association (LIRMA) to form the International Underwriting Association of London (IUA). Source: IUA website www.iua.co.uk.

inevitably operate in parallel. No major problems are anticipated during this transition period because the IHC system is substantively not very different from the ITC-Hulls system, but is rather a more updated version in which some of the uncertainties of the 1983 version have been fixed and some new clauses pertaining to classification, ISM Code, *etc.* have been added. New provisions relating to procedures for the handling of claims have also been added.[140]

6.1 TYPES OF CLAUSES

The Institute Clauses, broadly speaking, pertain to two types of policies in so far as insurance of merchant shipping is concerned. They are hull policies and cargo policies. The hull policies are either for a fixed period of time where they are known as time policies or they are for a voyage when they are called voyage policies. Thus we have varieties of Institute Time Clauses- Hull and Institute Voyage Clauses- Hull. There are, of course, various sub-divisions among these types of hull coverage for specialized risks such as port risks, port risks including limited navigation, leased equipment, passenger equipment, etc. The clauses for cargo policies, whether pertaining to time or voyage have numerous sub-categories covering various types of cargo and trades. Then there are three other types of clauses, namely, the war clauses, the strikes clauses and combined war and strikes clauses, which pertain to both cargo (time and voyage) as well as hull (time and voyage) policies, but are articulated somewhat differently for obvious reasons.

Aside from these major types of Institute Clauses dealing with merchant shipping, there are also sets of clauses dealing with fishing vessels, yachts, builder's risks, etc. There are, in addition, specialised clauses related to merchant shipping dealing with, for example, mortgagee's interest and ship owner's liability. These are both related to hull cover. There are also sets of clauses covering freight as a risk under both time and voyage policies.[141]

6.2 Clauses Relating to Salvage Charges

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[140] See Edgar Gold, Aldo Chircop, Hugh Kindred, *Maritime Law*, 2003, Toronto: Irwin Law, at pp.333-334.

[141] See generally Reference Book of Marine Insurance Clauses, 75th Edition, London: Witherby Publishing, 2004. An updated edition of this publication is produced by the IUA annually in October.

6.2.1 The Institute Cargo Clauses (ICC)

The Institute Cargo Clauses (A) (B) and (C) contain the following provision in clause 2 -

> This insurance covers general average and salvage charges, adjusted or determined according to the contract of affreightment and / or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in clauses 4, 5, 6 and 7 or else where in this insurance.[142]

This formulation appears in a virtually identical formation in some 17 sets of institute clauses related to cargo, including the three sets ICC (A), (B) and (C).[143] It is notable that the clause is designed to address both general average and salvage charges. It is thus obvious that the word " adjusted" refers only to the general average component of the clause and the word "determined" relates to salvage charges. Similarly, the expression "contract of affreightment" refers to the adjustment of general average pursuant to the relevant provision in the bill of lading or charterparty. It is virtually a universal practice that contracts of affreightment stipulate the application of the York- Antwerp Rules for average adjustment.[144]

The words "and/or the governing law and practice" apply to both general average as well as salvage. In the case of general average, the governing law and practice may be something other than the York-Antwerp Rules. [145]

In respect of salvage alone, the words of this clause would thus read "this insurance covers salvage charges determined according to the governing law and practice

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[142] *Ibid.* at pp.5,7 and 9.

[143] The formulation of clause 2 in the Institute Container Clauses-Time is some what different. See *infra*, text in 6.2.4 IWSC.

[144] See N. Geoffrey Hudson & J. C. Allen, *The Institute Clauses*, 3rd. Ed., London: L.L.P., 1999 at p. 17.

[145] In *Simonds* v.*White* (1824), 2 B & C 811, the principle was upheld that where the contract of affreightment does not provide for the application of any specific rules for the adjustment of general average, such adjustment should be done in accordance with the law and practice of the port where the cargo is discharged . See also *ibid* at p.15.

incurred to avoid or in connection with the avoidance of loss from any cause except those included...*etc.*"

In terms of English law, the governing law and practice would be the relevant provisions of the Marine Insurance Act, in particular s.65 and any pertinent case law dealing with determination of the salvage award.

The exceptions noted in clause 2 are those found in clauses 4, 5, 6 and 7.[146] These clauses read as follows in ICC (A), (B) and (C), but are appropriately modified in other sets of clauses relating to cargo.

EXCLUSIONS

4. In no case shall this insurance cover -

4.1 loss damage or expense attributable to willful misconduct of the Assured

4.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear the subject-matter insured

4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured (for the purpose of this Clause 4.3 "packing" shall be deemed to include stowage in a container or lift van but only when such stowage is carried out prior to attachment of this insurance or by the Assured or their servants)

4.4 loss damage or expense caused by inherent vice or nature of the subject matter insured

4.5 loss damage or expense proximately caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above)

4.6 loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel

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[146] In the Institute Container Clauses- Time, the exclusions are to be found in clauses 5 to 8.

4.7 deliberate damage to or deliberate destruction of the subject matter insured or any part thereof by the wrongful act of any person or persons

4.8 loss damage or expense arising from the use of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.

5 5.1 In no case shall this insurance cover loss damage or expense arising from unseaworthiness of vessel or craft, unfitness of vessel craft conveyance container or liftvan for the safe carriage of the subject-matter insured, where the Assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein.

5.2 The Underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness.

6 In no case shall this insurance cover loss or damage or expense caused by

6.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power

6.2 capture seizure arrest restraint or detainment, and the consequences thereof or any attempt thereat

6.3 derelict mines torpedoes bombs or other derelict weapons of war.

7 In no case shall this insurance cover loss damage or expense

7.1 caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions resulting from strikes, lock-outs, labour disturbances, riots or civil commotions.

7.2 resulting from strikes, lock-outs, labour disturbances, riots or civil commotions

7.3 caused by any terrorist or any person acting from a political motive.[147]

It is notable that some of the exceptions, for example, war and strikes cover are obtainable under separate sets of clauses against payment of requisite premium.

6.2.2 The Institute War Clauses (Cargo) (IWC)

The relevant provision regarding salvage charges is contained in clause 2. Again the clause addresses both general average and salvage charges together. The wording of the clause pertaining only to salvage would read as follows -

> This insurance covers salvage charges determined according to the governing law and practice, incurred to avoid or in connection with the avoidance of loss from a risk covered under these clauses.[148]

Since the war clauses deal with a specific type of risk, namely, loss or damage caused by war and associated or similar circumstances, the words "... any cause etc." found in clause 2 of the ICC are not used in clause 2 of the IWC. However, in the IWC there are exclusions set out in clauses 3 and 4. There are three sets of war clauses relating to cargo, the general IWC and two other specialised sets; one in respect of commodity trades and the other, known as FOSFA Trades relating to oils, seeds and fats. The formulation of clauses 2 and the exceptions in clause 3 are identical in all three sets. The formulation of the exception in clause 4 is identical in the latter two sets but is slightly different from clause 4 in the general IWC set.[149]

6.2.3 The Institute Strikes Clauses (Cargo) (ISC)

The provision relating to general average and salvage charges is contained in clause 2 and is identical in wording to clause 2 in the IWC. Thus, the wording of the clause pertaining to salvage alone would read exactly as set out above. The exclusions are contained in clauses 3 and 4. There are two extra items in clause 3 of the ISC; otherwise the remainder of clause 3 and the whole of clause 4 in the ISC are identical to their

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147 *Supra,* note 141 at pp. 5, 7 and 9.

148 *Ibid.* at p.11.

149 *Ibid.* at pp. 46 and 68.

counterpart provisions in the IWC. Including the general ISC (cargo), there are some 10 sets of strikes clauses in respect of cargo such as coal, bulk oil, jute, frozen meat natural rubber, FOSFA, and timber.

6.2.4 The Institute War and Strikes Clauses (IWSC)

The Institute war and Strikes clauses are two sets of clauses designed for special situations. One is for cargo stored afloat in mechanically self-propelled vessels. The other is in respect of Container- Time.[150]. In both cases, clause 2 is the relevant provision . In the first set, clause 2 is identical to its counterpart clause in the IWC and the ISC. In the other set, i.e, in Containers-Time, the formulation is slightly different. It is worded as follows -

> 2. This insurance covers general average, salvage, salvage charges, adjusted or determined according to the contract of affreightment and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from a risk covered under these clauses. For the purpose of claims for general average contribution salvage and salvage charges recoverable hereunder the subject matter insured shall be deemed to be insured for its full contributory value.

The reason for inclusion of the word "salvage" in addition to "salvage charges" is not readily apparent. It can only be surmised that "salvage" as envisaged in this formulation falls outside the scope of "salvage charges" as defined in s.65 (2) of the Marine Insurance Act. In other words, "salvage" here would be salvage carried out under contract and would be covered regardless of whether or not there is a sue and labour clause. Notably, this formulation of clause 2 is found in all three sets of container clauses, namely-

(a) the Institute Container Clauses-Time

(b) the Institute Container Clauses- Time Total Loss, General Average, Salvage, Salvage Charges, Sue and Labour; and

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150 *Ibid.* at p.36.

(c) the Institute War and Strikes Clauses Containers- Time.[151]

In the first set the exclusions are contained in clause 3 where as in the other, they are found in clause 5. In substance the exclusions in both sets of clauses are quite similar although the formulations are somewhat different.

6.2.5 Institute Time Clauses-Hulls (ITC)

In the Institute Time Clauses- Hulls, which is the general set of clauses, the provision relating to general average and salvage is contained in clause 10 which reads as follows -

10 GENERAL AVERAGE AND SALVAGE

10.1 This insurance covers the Vessel's proportion of salvage, salvage charges and/or general average, reduced in respect of any under-insurance, but in case of general average sacrifice of the Vessel the Assured may recover in respect of the whole loss without first enforcing their right of contribution from other parties.

10.2 Adjustment to be according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; but where the contract of affreightment so provides the adjustment shall be according to the York-Antwerp Rules.

10.3 When the Vessel sails in ballast, not under charter, the provisions of the York-Antwerp Rules, 1994 (excluding Rules XI(d), XX and XXI) shall be applicable, and the voyage for this purpose shall be deemed to continue from the port or place of departure until the arrival of the Vessel at the first port or place thereafter other than a port or place of refuge or a port or place of call for bunkering only. If at any such intermediate port or place there is an abandonment of the adventure

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[151] *Ibid.* at pp.32-36.

originally contemplated the voyage shall thereupon be deemed to be terminated.

10.4 No claim under this clause 10 shall in any case be allowed where the loss was not incurred to avoid or in connection with the avoidance of a peril insured against.

10.5 No claim under this clause shall in any case be allowed for or in respect of

10.5.1 special compensation payable to a salvor under Article 14 of the International Convention on Salvage, 1989 or under any other provision in any statute, rule, law or contract which is similar in substance

10.5.2 expenses or liabilities incurred in respect of damage to the environment, or the threat of such damage, or as a consequence of the escape or release of pollutant substances from the Vessel, or the threat of such escape or release.

10.6 Clause 10.5 shall not however exclude any sum which the Assured shall pay to salvors for or in respect of salvage remuneration in which the skill and efforts of the salvors in preventing or minimizing damage to the environment as is referred to in Article 13 paragraph 1(b) of the International Convention on Salvage, 1989 have been taken into account.[152]

It is notable that in clause 10.1, reference is made to both salvage and salvage charges. In clause 10.4 it is provided that no claim under clause 10 would be allowed unless the loss in question arose from an insured peril. In this connection, the general statement is given particular consideration through an express statement in clause 10.5 disallowing any claim in respect of special compensation pursuant to the International Salvage Convention, 1989 and any kind of pollution liability or expenses incurred in respect of environmental damage. However, under clause 10.6, any salvage remuneration payable by the assured in which skill and effort of salvors in preventing or mitigating pollution

[152] *Ibid* at pp.112.

damage is taken into account as per Article 13, paragraph 1(b) of the Salvage Convention will not be disallowed by virtue of clause 10.5. Clauses 10.5 and 10.6 are very important in view of the recently evolved environmental dimension of salvage operations and their indemnifiability under the law of marine insurance. This aspect will be discussed in more detail later in this chapter.

The text of clause 10 of ITC-Hulls is repeated in clause 10 of ITC- Hulls, Restricted Perils and also in the Institute Voyage Clauses IVC- Hulls in clause 8. These are corresponding clauses in the two latter sets of clauses which deal with general average and salvage.[153]

6.2.6 Institute Time Clauses- Hulls Loss, General Average and 3/4ths Collision Liability. (Including Salvage, Salvage charges and Sue and Labour)

In this set of clauses, salvage together with general average is dealt with in clause 10 as well. All of the provisions are identical to those of the corresponding clauses 10 in ITC- Hulls. But there is an extra sub-clause appearing as clause 10.2 which reads as follows-

> 10.2 This insurance does not cover partial loss of and/or damage to the Vessel except for any proportion of general average loss or damage which may be recoverable under clause 10.1 above.[154]

The exclusions of cover for partial loss expressed in the above provision is understandable since this set of clauses deals with total loss cover only.

6.2.7 ITC-Hulls, Total Loss Only

(Including Salvage, Salvage Charges and Sue and Labour)

In this set of clauses, salvage is addressed in clause 8. The text of clauses 10.4 to 10.6 in the ITC-Hulls is repeated as the substance of clauses 8.2 to 8.4 of this set of clauses. Clause 8.1 is a modified version. It reads-

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153 *Ibid.* at pp. 118, 140.

154 *Ibid.* at p. 124.

8.1 This insurance covers the Vessel's proportion of salvage and salvage charges, reduced in respect of any under-insurance. The formulation of clause 8 of this set of clauses seems to be unique.[155]

6.2.8 ITC- Hulls, Disbursements and Increased Value

In this set of clauses, general average, salvage and salvage charges are dealt with in clause 6.4.1. It is quite a complex, technically oriented formulation. It reads as follows-

6.4.1 General Average, Salvage and Salvage Charges recoverable under the insurances on hull and machinery but not recoverable in full by reason of the difference between the insured value of the Vessel as stated therein (or any reduced value arising from the deduction therefrom in process of adjustment of any claim which law or practice or the terms of the insurances covering hull and machinery may have required) and the value of the Vessel adopted for the purpose of contribution to general average, salvage or salvage charges , the liability under this insurance being for such proportion of the amount not recoverable as the amount insured hereunder bears to the said difference or to the total sum insured against excess liabilities if it exceeds such difference.[156]

The text is identically expressed in clause 1.1.1 of the ITC-Hulls (excess Liabilities)[157]

6.2.9 Institute Time Clauses- Freight and Institute Voyage Clauses- Freight

In both these sets of clauses, the text of general average and salvage covers are identical. In the ITC- Freight, the relevant clause is clause 11 and in the IVC- Freight it is clause 8. Reference is made to both salvage and salvage charges. In substance, clause 11.1 and 11.3 to 11.5 in ITC-Freight and clause 8.1 and 8.3 to 8.5 are virtually identical to the text of clause 8 in `ITC-Hulls, Total Loss only. But clause 11.2 in ITC-Freight and

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155 *Ibid.* at p.128.

156 *Ibid.* at p.132.

157 *Ibid.* at p. 134.

clause 8.2 in IVC- Freight is an additional provision. It pertains to average adjustment only.[158]

6.2.10 ITC- Hull, Port Risk and ITC- Hull, Port Risk Including Limited Navigation

In the ITC-Hull Port Risks, the relevant clause is clause 11 with three sub-clauses. The texts are identical to clauses 8.1, 8.2 and 8.3 of the IVC- freight. In the ITC-Hull, Port Risks including Limited Navigation the relevant clause covering general average and salvage is clause 12. Sub- clauses 12.1, 12.2 and 12.4 are identical to the whole of clause 8 of IVC- freight. Clause 12.3 is an additional formulation relating to general average. The text is somewhat similar to that of clause 10.3 of ITC- Hulls.[159]

6.2.11 International Hull Clauses 2003 (IHC)

The relevant provisions in the IHC 2003 are contained in Clause 8 under the heading GENERAL AVERAGE AND SALVAGE. The textual content of this clause is no different in substance from the text of Clause 10 of the ITC-Hulls set out in 6.2.5 above except for a new item, that is Clause 8.6.2 pertaining to general average which will be addressed in Chapter 4.

7. LIABILITY INSURANCE FOR SALVORIAL NEGLIGENCE

Although historically the Rhodian Sea Laws provided for a somewhat limited obligation on the part of a salvor to act with due care,[160] since the 19th century, two strands of debate have emerged, one contending that there is no duty of care, and the other acknowledging the existence of such duty only where the higher threshold of gross negligence is applicable.[161] The former position, emanating largely from public policy considerations has by evolution been counter-balanced by the need to ensure that in the proper circumstances, a salvor who demonstrably has not exercised reasonable care and has acted unscrupulously is held negligent.[162]

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158 *Ibid* at pp.152 and 155.

159 *Ibid.* at pp. 181 and 186.

160 See Ashburner, *Rhodian Sea Law*, Oxford University Press cited in D.R. Thomas, "Salvorial Negligence and its Consequences" (1977), 2 *L.M.C.L.Q.* 167.

161 Thomas, *ibid.* at p. 167.

162 *The St. Blane*, [1974] 1 Lloyd's Rep. 557 at p. 560.

The classic case which represents the law as it stands today is *The Tojo Maru.*[163] In this case a salvage diver negligently fired a cox bolt gun against the hull of a crippled tanker. The gun shot through into a cargo tank that had not been gas-freed. As Professor Cadwallader put it so vividly, "[T]he resulting explosion hurled learned counsel back some 130 years in a search for precedent and, almost incidentally, caused some £202,514 damage to the tanker."[164] The salvors claimed an award for services; the shipowners counterclaimed for damages alleging salvorial negligence. At arbitration, the salvors were held liable but were entitled to limit liability in the absence of fault or privity. At trial, Willmer L.J. in a stated case held that the salvors were not entitled to limit liability because limitation was based on ship tonnage and the act was not committed on board the salvor's tug. On appeal to the Court of Appeal, Lord Denning M.R. held that the salvors were not liable for negligence; therefore, there was no question of limitation or a set off relevant to a counterclaim. He held that the award should be reassessed taking into account the salvors' negligence. On further appeal the House of Lords held that the owners were entitled to counterclaim for the salvors' negligence and the salvors were not entitled to limit liability.[165]

As a consequence of the House of Lords' decision, the salvage industry instigated the inclusion of a provision in the International Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC 1976) which would alleviate their liability burden.[166] This provision contained in paragraph 4 of Article 6 of the Convention allows salvors not operating from a ship or operating solely on the ship which is the subject of the salvage services, to limit liability by reference to a fixed tonnage of 1500 limitation tons.[167] In Article 1, paragraph 3, a salvor is defined as a person who renders services in direct

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163 [1969] 1 Lloyd's Rep. 133 (first instance); 3 All E.R. 1179 (C.A.) and [1971] 1 Lloyd's Rep. 341 (H.L.)

164 F.J.J. Cadwallader, "The Salvor's Duty of Care", (1973), 1 *Marit. Stud. Mgmt* 3 at p.3.

165 The salvage award was for £125,000 and the quantum of damages on the counterclaim was 330,000. The set off amount was £205,000 which was payable by the salvors. Incidentally, if limitation was allowed on the basis of the tonnage of the salvage tug, the limited liability of the salvors would have amounted to only £10,000.

166 Patrick Griggs, Richard Williams, *Limitation of Liability for Maritime Claims*, 3rd Edition, London: LLP, at p.10.

167 Paragraph 5 of that article provides that a ship's tonnage for the purposes of the Convention is the gross tonnage calculated according to the International Tonnage Convention, 1969.

connection with salvage operations. Pursuant to Article 2, paragraph 1(a) of the Convention, a salvor can invoke limitation for claims in respect of loss of life or personal injury or loss of or damage to property occurring on board or in direct connection with salvage operations including consequential losses. The term "salvage operation" is illustratively defined in Article 1, paragraph 3 as including the operations mentioned in Article 2, paragraph 1 (d), (e) and (f) which are *inter alia*, operations involving removal, destruction or rendering harmless of a sunken, wrecked, stranded or abandoned ship, or anything on board including cargo, as well as the raising of such a ship. Sub-paragraph (f) above refers to third party claims against a person liable who is entitled to limit his liability in respect of measures taken by the third party to avert or minimize loss. Under paragraph 2 of Article 2, claims relating to subparagraphs (d), (e) and (f) of paragraph 1 are not subject to limitation to the extent that they relate to the remuneration payable by the liable person to his contractor. Thus, a shipowner would be precluded from pleading limitation against a salvor in such circumstances as described above.[168]

Aside from the above-mentioned development the upshot of *The Tojo Maru* case is well summarized by Professor Cadwallader in the following words-

> The stark outcome of the House of Lords' decision is to render the successful but negligent salvor liable to the owner in damages. If an award is made, it must be assessed on the assumed salved value of the ship disregarding any subsequent negligence of the salvor. In this way the salvor is penalised only once for the breach, a decision which seems fair in law and equity.[169]

In the Court of Appeal decision of this case, Lord Denning steadfastly expressed his support for salvors by declaring that "owners ... are not entitled to counterclaim damages for negligence. They can use it as a shield against paying high salvage reward, but not as a sword to pierce the salvors to the heart".[170] Professor Thomas refers to utilising negligence defensively as the "shield" approach and the right to counterclaim, or the concept of affirmative damages in the event of salvorial negligence as the "sword".[171]

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168 See *Supra*, note 166 at p. 19 for a more detailed explanation.

169 *Supra,* note 164 at p. 14.

170 See citation of C.A. decision in *supra*, note 163 at p.1186.

171 Thomas, *supra*, note 160 at pp. 171-173.

Undoubtedly, there is merit in looking at the particular circumstances to determine whether or not a duty of care exists on the part of the salvor which makes him liable at law and allows the shipowner to counterclaim for damages. That there is such a duty of care is reaffirmed in Article 8(1) of the International Convention on Salvage, 1989. It would follow that a breach of the duty could lead to liability for salvorial negligence and a consequential right of counterclaim in favour of the owner. As Professor Thomas concludes, in such a situation, the salvor is still afforded the right to limit his liability, and with respect to the amount for which he remains liable, he can purchase insurance cover.[172]

The above statement leads to the consideration of such liability as an insurable risk. Liability cover is almost without fail procured through protection and indemnity insurance and salvorial negligence is no exception. While P&I clubs routinely provide cover to tugs engaged in towing operations, they are not overly enthusiastic when it comes to salvage tugs.[173] At any rate, P& I cover is available only in respect of ships, not companies or individuals; and where the cover is for salvage, it must pertain to the salvage in question. In other words, the vessel entered in the club must have been a salvage tug or other vessel used for salvage operations at the time the relevant claim arose and must have resulted from a salvage operation or an attempted salvage operation. In such cases it is necessary for special cover to be arranged between the club manager and the member; otherwise a club would generally not include such liability under the normal cover.[174]

The special agreement between the club member who is an owner or operator of a salvage vessel and the club managers may include salvage operations performed by a sub-contractor of the member. As well, the cover may be subject to terms specifying that the liability need not be vessel or operation specific so long as it arises in connection with the member's business as a salvor. The arrangement contemplates a condition precedent to

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[172] *Ibid.* at p. 180.

[173] Christopher Hill, Bill Robertson and Steven J. Hazelwood, *Introduction to P & I.*, 2nd Edition, London: L.L.P., 1996 at pp. 104- 105.

[174] Steven J. Hazelwood, *P&I Clubs Law and Practice,* 3rd. Edition, London: LLP, 2000 at p. 243. See pp. 87-89 for details on "special entries" or special cover. It is notable that where there are such "special entry" arrangements, an assured is not treated as a true member for all purposes. (p. 88). See also *In re Arthur Average Association (De Winter and Co.'s Case)* (1876), 34 L.T. 942; 3 Asp. M.L.C. 245 and *Container Transport International Inc. and Reliance Group Inc.* v. *Oceanus Mutual Association Underwriting (Bermuda) Ltd.,* [1982] 2 Lloyd's Rep 178; [1984] 1 Lloyd's Rep. 476 (C.A.)

every insurance cover whereby the member at the time of application for entry into the club and within a certain number of days of the annual renewal of the policy, a list of vessels intended to be used in salvage operations is submitted. The club managers have the discretion to determine which of these vessels are to enjoy cover under the arrangement.[175]

[175] Hazelwood, *ibid.* at p. 233.

CHAPTER 3

ENVIRONMENTAL DIMENSION OF SALVAGE

1. BACKGROUND AND IMPLICATIONS FOR INSURER

With the advent of the oil tanker as the principal means of transportation of oil leading to a number of major pollution disasters, a new dimension was added to the traditional role of salvors. It all started with the *Torrey Canyon* in 1967 when the vessel grounded on the Seven Stones Reef while attempting to take a short cut. In 1978, the steering gear of the *Amoco Cadiz* failed, and subsequently under adverse weather conditions the vessel ran aground off the French coast.[1] In 1979, the Greek super tanker *Atlantic Empress* collided with the Liberian VLCC *Aegean Captain* 10 miles off the island of Tobago resulting in the release of 270,000 tons of crude oil from the *Atlantic Empress*; the largest oil spill to date.[2] These were followed by other major pollution disasters including the *Exxon Valdez* in 1989 in Alaska, the *Haven* in the Adriatic Sea in 1991 and the *Braer* off the Shetland Islands in 1993,[3] not to mention the *Erica* incident in 1999 which occurred off the French coast, and the *Prestige* in 2002, off the coast of Spain.

Incidents such as the ones mentioned above have had a serious impact on the international regime of salvage and the role of insurers. As we know, salvage has always been primarily associated with the saving of maritime property and insurers of saved property have traditionally indemnified the owners of salved property. In major pollution cases, the third party liability insurer of the shipowner, *i.e.,* the P& I club, has been responsible for indemnifying claims against the assured for pollution damage. The hull insurer's indemnity burden is increased where the salvage operation is unsuccessful or only partially successful due to the salvor's failure to achieve ultimate preservation of the *res*. The liability insurer faces the same fate if the salvor has not been able to prevent or mitigate pollution damage. Under the "no cure no pay" principle, often in such

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1 See Geoffrey Brice, John Reeder (Editor) *Brice on Maritime Law of Salvage*, London: Sweet and Maxwell, (4th Edition) 2002 at p. 397.

2 Colin de la Rue and Charles B. Anderson, *Shipping and the Environment*, London, Hong Kong: Lloyds of London Press, 1998 pp. 568 to 569.

3 *Supra*, note1 at p. 397.

circumstances salvors have returned empty handed from salvage arbitration proceedings.[4] Thus, it was in the commercial interests of insurers to promote the provision of suitable incentives to the salvage industry so that salvors would not walk away from the so-called "leper ships".[5]

Furthermore, there is another commercial aspect of salvage operations that is relevant in this context. The salvor, after taking the salved property into port may cause it to be arrested until either salvage is paid or security for the salvage claim is posted. The payment of security, of course, would result in the release of the property; otherwise, the arrested property could be subjected to a judicial sale. Usually, in such circumstances, the insurers of the salved property will provide security to enable the property to be released from arrest and the salvage paid. If the salvage has been carried out pursuant to LOF, the salvor is obliged to give prompt notice of the amount of security required so that the insurer can put up the security without delay.[6]

The basis of a salvage award for preventing or mitigating pollution damage has its roots in the notion of the enhanced award within the bounds of the "no cure no pay" principle. In other words, out of the salved value of the property saved, an enhancement of the award may be granted by the arbitration tribunal. Indeed, the notion of the enhanced award has been the device used by English courts to grant life salvage awards where life and property has been saved.[7] Enhanced awards have also been made in respect of other kinds of extra benefits conferred by the salvor. In *The Whippingham*,[8] an enhanced award was granted to a salvor for assisting a passenger ferry encountering difficulties in adverse weather in avoiding collision with a number of sailing yachts. In *The Gregerso*,[9] the risk of liability for wreck removal was taken into account in assessing

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4 The salvors of the *Atlantic Empress* were refused a reward because they had failed to save any property even though the salvors' act of towing the mangled, leaking tanker to sea and sinking it prevented any serious pollution damage to the shore. Colin de la Rue, *ibid.*

5 See Geoffrey Brice, "Salvage and the Role of the Insurer" in [2000] *L.M.C.L.Q*, Part 1 at p. 27. See also Edgar Gold, "Marine Salvage: Towards a New Regime for Marine Salvage" in *J. Mar L. & Com.*, Vol. 20, No. 4, October 1989, 489 at p. 492.

6 Brice, *Ibid.* at p. 28.

7 See *The Fusilia* (1865), Brown & Lush 341 per Dr. Lushington. Also, *The Bosworth* (No. 2), [1960] 1 Lloyd's Rep. 163 (C.A.)

8 (1934), 48 Ll.L.R. 49.

9 [1971] 2 Lloyd's Rep. 220.

a salvage award. In *Trico Marine Operators Inc.* v. *Dow Chemical Co.*, an American case, an enhanced award was granted under customary salvage law for avoiding pollution in addition to saving property.[10] In this case, the court gave effect to the relevant provision of the International Convention on Salvage, 1989 before it entered into force.

There has been much debate over the question of which insurer of the shipowner, the hull and machinery underwriters or the P&I Club should be the one to indemnify payments of salvage awards. As we have seen, under section 65 of the Marine Insurance Act 1906, salvage charges as defined in that section, *i.e.,* those incurred outside the scope of a contract, are indemnifiable under that section. The second sentence in section 65(2) provides that salvage paid under a contract is recoverable as general average. A shipowner's liability for salvage will, in all normal situations fall to be indemnified by the hull and machinery insurer. Pollution risks are associated with third party liability for which a hull and machinery insurer will not pay. By the same token, a salvor's claim for preventing or mitigating pollution damage will generally fall outside the scope of the hull and machinery underwriter's liability to indemnify. However, an enhanced award paid to a salvor will be fully attributable to the hull and machinery underwriter even though the element of the award representing the enhancement is one, which falls outside the scope of risks covered by the policy.[11]

Thus, the principle of an enhanced award could well be applied in respect of prevention or mitigation of pollution damage, but it would only come into play if property of sufficient value were also saved. Salvage thus paid, even if it is an enhanced award should be indemnifiable in the normal course. Conversely, if no property is saved, the rigour of the "no cure no pay" principle will prevail, regardless of how meritorious the services might have been in terms of avoiding pollution. While the possibility of failure or only partial success is a normal consideration in any salvage operation, failure of a salvor to ultimately preserve the *res* because of government intervention is something that is outside the control of the salvor. In the *Torrey Canyon,* for example, pursuant to orders given by government authorities, the stranded vessel was bombed and sunk. After the *Kurdistan* broke in two, its bow section was towed out to sea by the Canadian Coast

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10 809 F. Supp. 440, 1993 A.M.C. 942 (E.D.La. 1992).

11 *Supra*, note 2 at p. 566.

Guard and sunk.[12] In some of these cases even after there was partial success by the salvor the vessel was not ultimately preserved. In other instances, the saved *res* has been refused entry into a port or roadstead by the Port Authority or Maritime Administration such as in the *Christos Bitas* incident.[13] The *Atlantic Empress* and the *Andros Patria* suffered similar consequences.[14] These were incidents that threatened the very survival of the salvage industry until the world maritime community at large, including the marine insurance industry took notice and acted.

2. THE BRUSSELS CONVENTION ON SALVAGE, 1910 AND ITS IN ADEQUACIES.

Before examining further developments in the field of salvage remuneration for averting environmental damage and the consequential indemnification of such charges or expenses, one would need to step back and revisit the traditional international regime governing salvage. It is well known that the customary law of salvage was codified by the Brussels Convention on Salvage of 1910. Not only did this convention withstand the test of time by remaining the governing international law for nearly eight decades, it was one of the few international conventions to which the United States became a party. As pointed out by O'May, if it wasn't for the failure of the steering gear on the *Amoco Cadiz* in March 1978, the 1910 Convention may well have crossed over into the 21st. century.[15]

It was recognised by the law makers of the United Kingdom of the time that, by and large, the prevailing English law of salvage was reflected in the 1910 Convention. They therefore did not feel it necessary to incorporate the entire convention into English legislation.[16] In Article 2 of the convention it is provided that the right to an equitable remuneration is subject to the salvage act yielding a useful result and a beneficial result. Furthermore, the remuneration cannot be greater than the salved value of the property.

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12 www.ec.gc.ca/ee-ue/incidents/british_tanker_kurdistan_e-asp (accessed on 17 November 2004). See also Gold, *supra,* note 5 at P. 492.

13 *Supra*, note 2 at pp. 567 to 568.

14 *Supra*, note 5 at p. 492.

15 Donald O'May and Julian Hill, *Marine Insurance Law and Policy*, (hereafter referred to as "O'May") London: Sweet & Maxwell, 1993, at p. 395.

16 *Supra*, note 1 at p. 417.

Article 8 of the convention largely reflected the English law regarding the assessment of salvage remuneration. The text of Article 8 sets out in paragraph (a), the initial criteria to be followed in fixing the remuneration, and in paragraph (b) it is stated that in the second instance the value of the salved property must be taken into account. The inadequacies of the above mentioned provisions of the convention are well articulated by Brice in the following words.

> The 1910 Convention therefore mentions the danger run by the salved vessel, by her passengers, crew and cargo and by salvors and by the salving vessel but is silent as to any danger run by the owners of any other property as a factor to be taken into account. Again the Convention mentions expressly the risks of liability and other risks run by the salvors but is silent as to the risks of liability and other risks to which the owners of the salved property might be subject. The Convention refers to the value of the property salved but is silent as to the manner in which the salvage remuneration shall be borne by the different salved interests.
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> Further, Article 8 goes on to provide that the court may deprive the salvors of all remuneration or reduce the remuneration in the event of theft, fraudulent concealment or other acts of fraud by the salvors but is silent as to whether there are circumstances in which the salvage remuneration may be enhanced.

The author then makes the point that outside of the references to "useful result", "beneficial result" and "equitable remuneration", in the two Articles mentioned above, there are no other indications of the manner in which equitable remuneration is to be assessed.[17]

No doubt, with these inadequacies and the concerns triggered largely by the *Amoco Cadiz* disaster, the international maritime community felt that perhaps the time for law reform in the field of salvage had arrived. The *Amoco Cadiz* incident brought environmental concerns into sharp focus. It exemplified the gross inadequacies prevailing at the time to deal with such massive pollution damage as the incident had engendered. It also drove home the urgent need for prompt and effective salvage assistance for the protection of coastal areas and related marine ecosystems in the event of an oil spill of such mammoth proportions and signalled the inevitable direct involvement of the marine

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17 *Ibid.* at p. 417.

insurance industry in salvage.[18] The IMCO (now IMO) Secretariat produced a study entitled "Coastal State Protection Against Major Maritime Disasters" (Misc. (78) 7.E) addressing the question of possible replacement of the 1910 Convention.[19] The stimulus for a major revision of the 1910 Convention regime was prompted by the following issues which surfaced in the context of the environmental disasters.

Firstly, within the strict framework of "no cure no pay", the courts were unwilling to grant an award solely on the basis of success in the prevention or mitigation of pollution damage. Such success could lead to an award only if property was saved as well and its salved value was sufficient to accommodate an award for avoidance of pollution. Secondly, it had to be recognised that the higher the risk of oil escaping from a ship, the higher was the need for preventive and mitigative measures, and the lower was the corresponding incentive of the salvor to provide services. Thirdly, the level of awards had not kept pace with the increasing capital costs of tugs and salvage gear needed to cope with the sizes of contemporary tankers. Furthermore, there were technical difficulties and a substantially higher degree of danger involved, not to mention the legal risks associated with failing to avoid pollution and allegations of salvorial negligence. Fourthly, even if a salvor succeeded in preventing or mitigating pollution, no indemnification was forthcoming from the ship's liability insurer.[20]

Two major developments evolved out of the pressures for altering the *status quo*. The first was the reaction of the Committee of Lloyd's which eventually led to a revision of the LOF. The second was the movement of the CMI towards the replacement of the 1910 Brussels Convention with a new international convention regime. Both these initiatives advanced along parallel courses towards a common objective. It was recognised by the CMI that the lack of provisions in the 1910 Convention to provide for any form of enhanced award for salvorial action to prevent or mitigate pollution damage rendered the convention grossly outmoded.[21] Meanwhile, the LOF started to undergo a revision which ushered in a dramatic departure from the age-old principle of "no cure no pay"; a concept as old as salvage itself. Because of its widespread international use, the

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18 *Supra,* note 5 at p. 28.

19 *Supra,* note 2 at p. 569; see footnote 43 at that page.

20 *Ibid.* at p. 570.

21 *Supra*, note 1 at pp. 418-419.

LOF enjoyed the status of a quasi-convention.[22] This development was therefore all the more significant.

3. LIABILITY SALVAGE AND THE SAFETY NET OF LOF 1980

The Committee of Lloyd's appointed a Working Party in 1979 to review the existing version of the LOF and come up with a revised draft designed to meet the concerns referred to above in the previous section. What emerged out of the deliberations of the Working Party was the proposal for a pollution fund based on what came to be known as liability salvage.[23] The notion of liability salvage can in general terms be stated as follows. Where salvage services rendered result in the avoidance of potential liability for damage caused by the property, such services are rewardable regardless of whether any property is saved.[24] The avoidance of pollution liability fell squarely within the ambit of this concept which broke new ground even though, there were analogous precedents under which enhanced awards were made, albeit where property was also saved.

In the marine pollution context, liability salvage may be defined as a salvage operation, which prevents or mitigates damage to the environment and consequentially avoids or minimises liability for such damage. It became apparent from the deliberations taking place within the various forums mentioned above that a salvor carrying out liability salvage would be entitled to a reward to be paid by the shipowner, the maximum quantum of which would be based on the ship's tonnage.[25]

At first, the liability insurers, i.e., the P&I Clubs were totally opposed to the proposal, mainly because of the uncertainties of the various parameters involved in terms of the quantifiability of the insurer's indemnification of the shipowner's liability in a pollution situation. This was a notion that was far removed from the traditional comfort of a determinable fund, namely, the value of the salved property. Other uncertainties included questions of whether the shipowner could successfully invoke limitation,

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22 *Supra,* note 15 at p. 395.

23 *Supra,* note 2 at p. 571.

24 For a further explanation of the application of this principle to oil pollution liability, see Enrico Vincenzini, *International Salvage Law* (1992), at pp. 120 – 123.

25 *Supra,* note 1 at p. 420-421.

whether claims would extend to economic losses, and also how the insurer's rights of subrogation would be affected if a third party perpetrator was involved such as in a collision situation. This was the first time that the P&I Clubs got directly involved with salvage.[26] They maintained that these were issues which would render the computation of a "pollution fund" insurmountably difficult, and remained of the firm view that the proposition would be unworkable. Subsequently, the Committee of Lloyd's Working Party was expanded into a Lloyd's Form Review Committee, in which the International Group of P&I Clubs, among others, was represented. It was here that the P&I Clubs presented the so-called "safety net" proposal, the first major reform in the law of salvage in centuries. The safety net device was then incorporated into the revised LOF 1980.[27] It was to be applicable anywhere in the world, *i.e.,* regardless of where the incident occurred, in waters under coastal state jurisdiction or on the high seas. It would be guaranteed by the P&I Clubs as liability insurers of the shipowners and would have nothing to do with the cargo owners.[28]

The principal features of LOF 1980 constituted the new environmental provisions. As such, the contractor, i.e., the salvor, committed himself to using his best endeavours to prevent the escape of oil from the vessel while performing the salvage services. This, of course, was in addition to using his best endeavours to salve the property at risk. The practice of an enhanced award for a successful salvage operation continued to exist. The enhanced award would take account of the enhanced efforts expended to prevent or mitigate pollution damage. Then came the most dramatic detour taken ever from the sacrosanct principle of "no cure no pay", the safety net provision. This allowed for the payment of an award to the salvor, even if the services were not successful or only partially successful or if the salvor was prevented from completing the job, provided there was no negligence on his part or on the part of his servants or agents. This award would only be payable if the vessel in question was a laden or partly laden tanker with a cargo of oil.[29] The quantum of the award would be the expenses reasonably incurred by the salvor

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26 *Supra,* note 5 at p. 28.

27 *Supra,* note 2 at pp. 571 - 572 for more details.

28 *Supra,* note 5 at p. 28.

29 The definition of oil in this instance was similar to that of persistent oil in the CLC. The safety net did not cover damage caused by hazardous and noxious substances or pollution from bunker oil of non-tankers or tankers in ballast.

together with an increment of maximum 15% of those expenses. The expenses were defined to include actual out of pocket expenses plus a fair rate for tugs, craft other equipment and personnel used in the operation. The safety net payment was only available if and to the extent the package (expenses plus increment) exceeded the amount of salvage payable for saving property under the traditional "no cure no pay" principle. The payment by the shipowner of the safety net amount was indemnifiable under P&I coverage.

The safety net of LOF 1980 provided the basis for the special compensation regime which was to come under the new Salvage Convention. The convention was in its preparatory stages at the time under the auspices of the CMI. Before the finalisation of LOF 1980, the principal players in the game had to be brought in once again. These, needless to say, would be the hull and machinery insurers on the one hand and the P&I Clubs as the liability insurers on the other. A Funding Agreement was reached between the two parties with regard to the apportionment of indemnification under the new arrangement.[30] The main elements of this Agreement are set out below-

In order that the revision of the Lloyd's Open Form can proceed as quickly as possible, the International Group of P&I Clubs for their part and the Institute of London Underwriters and Lloyd's Underwriters' Association for their part confirm the following:

> the Clubs, as shipowners' pollution liability Underwriters, will provide security for and bear the full cost of the "safety net" provisions in Clause 1 of the new LOF for tankers laden or partly laden with a cargo of oil; the Underwriters will continue to accept that Salvage Awards are recoverable by ship, cargo and freight under the existing forms of policies for those interests, notwithstanding that such Awards may have been enhanced to take account of measures taken to prevent the escape of oil from the Ship.

The foregoing undertakings are given subject to usual policy terms and applicable deductibles and shall continue until either party gives reasonable notice to the other that there has been a material change in circumstances.

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30 *Supra,* note 2 at pp.573-574.

This Agreement initially applied only to London underwriters, but other major insurance markets soon followed suit, as did the Oil Companies International Marine Forum (OCIMF) who are self-insurers of the cargo of their members.[31]

4. THE INTERNATIONAL CONVENTION ON SALVAGE, 1989

4.1 Development and Salient Features

As indicated earlier, two initiatives on law reform were running in parallel. Although LOF 1980 was in the forefront making headway, it was realised by the world maritime community at large that not all salvage was done under LOF, and that environmental issues had serious public law and policy implications. Thus, the need for a new international salvage regime was imminent. A new Salvage Convention replacing the 1910 Convention would serve to revise the customary law of salvage within and without the ambit of a salvage agreement. In tandem with the IMO study mentioned earlier, which focused mainly on the pure public law aspects of the problem, the CMI, at the request of the IMO, undertook a review of private salvage law, the initial report of which came out shortly after the LOF 1980 went into effect.[32]

The CMI initiative culminated into the adoption of a draft Salvage Convention at the Montreal Conference of the CMI in May 1981. The Montreal draft contained a wider safety net than did LOF 1980 by including all vessels in its application and by providing a higher percentage of the salvor's expenses as the maximum increment. The Montreal draft obviously found favour with the salvage industry. But on the whole it represented a fair balance of diverse commercial interests as well as public concerns over environmental protection.[33]

The CMI Montreal draft was then handed over to IMO in 1984 to be deliberated on by the Legal Committee with the view to its eventual adoption as a convention. It took almost five years for that to happen. During that period, following strenuous debate and deliberation, the safety net was transformed into the special compensation regime in

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31 *Ibid.*

32 *Ibid.* at p. 574.

33 *Ibid.*

which the increment formula, a product very typical of an IMO compromise, reflected a significant change from what was contained in LOF 1980. It became 30% with the possibility of it being raised to 100% in extreme cases. This was the whole thrust, the virtual focal point of the new convention. Of course, other related provisions were developed which can be characterised as environmentally progressive. In all of these negotiations and deliberations culminating into the Diplomatic Conference which adopted the convention in April 1989, the marine insurance interests, in particular the P&I Clubs, had a significant input.

The International Convention on Salvage, 1989 came into force in July 1996. It has become part of English law by incorporation into the Merchant Shipping Act 1995. Article 14 of the convention which provides for the special compensation regime will be discussed in detail shortly. Meanwhile, some of the other important environmental provisions are explained below.

Perhaps it is first important to recognise that the convention is an international instrument and should therefore be given a purposive interpretation following the teleological approach to treaty interpretation.[34] As pointed out by Brice, the preamble to the convention contains a clear articulation of its objective. Interpretation of any provision of the convention should be by reference to the preamble.

In essence, the preamble states that the parties recognise that uniform international rules regarding salvage operations are desirable. They note the increased concern for environmental protection and that substantial developments have demonstrated the need for review of the 1910 Convention. They are conscious of the fact that efficient and timely salvage operations contribute to the safety of maritime property and protection of the environment. And finally, they are convinced that adequate incentives are needed to entice salvors under these circumstances.[35] As such, an enquiry into the scope of the convention *vis-a-vis* any proposition should be addressed in light of whether it fits the purposive parameter of "increased concern for the protection of the environment" and whether it extends to providing adequate incentives to salvors for protecting the

[34] Proshanto K. Mukherjee, *Maritime Legislation,* Malmo: WMU Publications, 2002 at p. 134. See also Vienna Convention on the Law of Treaties, 1969, Article 31.1.

[35] For the exact text of the preamble reference should be made to the convention itself.

environment.[36] As noted by Brice, references to the need for sufficient salvage capacity worldwide, rewarding the salvor for carrying out preventive measures and the recognition of professional salvage expertise and experience in marine pollution casualties are to be found in the OPRC Convention as well.[37]

In Article 1, the definitions of "salvage operation" and "damage to the environment" are particularly important. They are as follows-

> "Salvage operation" means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever. "Damage to the environment" means substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents.

It is apparent from the above that while salvage operations carried out in any waters whatsoever will fall within the scope of the convention, damage to the environment does not include the high seas. Thus, salvage carried out on the high seas to prevent or mitigate marine pollution damage will not attract payment of special compensation and will therefore not be indemnifiable by insurance. It is notable that the term "salvage services" is not used and therefore not defined in the convention, but in Article 7(b) there is mention of "services actually rendered". Thus, within the context of the convention the operative term is "salvage operation" and not "salvage services". The definition of "damage to the environment" also begs the question as to what is "substantial physical damage" and what is a "major incident". To discern the meanings of these expressions, resort may be had to the CMI Report which states as follows -

> By using the words "substantial" and "major" as well as the reference to "pollution, explosion, contamination and fire" it is intended to make clear that the definition does not include damage to any particular person or installation. There must be a risk of damage of a more general nature in the area concerned, and it must be a risk of substantial damage.[38]

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36 *Supra,* note 1 at pp. 421-422.

37 *Ibid.* Note the full name of the convention is Oil Pollution Preparedness and Response Convention, 1990.

38. See Appendix 8 of Brice, *ibid.* for the text of the Report.

Another important provision is Article 8 which sets out the "Duties of the salvor and of the owner and master", all of whom must take due care to minimise damage to the environment. Article 13 sets out the "Criteria for fixing the reward." There are ten itemised criteria, which basically reflect the customary law found in the 1910 convention with the exception of paragraph 1(b) which is new. It reads "the skill and efforts of the salvors in preventing or minimizing damage to the environment". Thus, there is provision for enhanced rewards provided the efforts are successful. The provision in paragraph 3 stating that the rewards cannot exceed the salved value of the vessel and other property means that property has to be saved for the enhanced reward provision in paragraph 1(b) to operate.[39]

4.2 SPECIAL COMPENSATION REGIME, LOF 1990, LOF 1995 AND LOF 2000

The special compensation regime of the convention is contained in Article 14 which warrants some detailed examination. It is to be studied by cross-reference to Article 13 and some of the other contextually relevant provisions of the convention. Paragraphs 1 and 2 of Article 14 read as follows-

1. If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined.

2. If, in the circumstances set out in paragraph 1, the salvor by his salvage operations has prevented or minimized damage to the environment, the special compensation payable by the owner to the salvor under paragraph 1 may be increased up to a maximum of 30% of the expenses incurred by the salvor. However, the tribunal, if it deems it fair and just to do so and bearing in mind the relevant criteria set out in article 13, paragraph 1, may increase such special compensation further, but in no event shall the total increase be more than 100% of the expenses incurred by the salvor.

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[39] For a more detailed analysis of the environmental provisions of the convention, see, *supra,* note 2 at pp. 577 - 584 and Brice text *ibid.* at pp. 421- 429.

Paragraph 1 expresses a statement of law that something known as special compensation is payable and that in the first instance it is equivalent to the salvor's expenses. The paragraph then sets out the conditions under which it is payable. The first of these is that the salvor must have "carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment". Here, of course, the meaning of the term "damage to the environment" is relevant. Given the way "damage to the environment" is defined, it is apparent that pollution salvage, will not attract special compensation unless the location of the threat of damage is coastal or inland waters or areas adjacent thereto. Also, there is the question of what is "threatened damage". Apparently it is the current practice of Lloyd's arbitrators to define it as reasonable apprehension of danger of damage at the time the salvor initially responded.[40] In this context the P&I Clubs have apparently expressed some concern that if the notion of threat is given too liberal a construction, the special compensation provisions may be invoked in far more instances than was envisaged by the framers of the convention.[41] Other elements of that definition must also fall into place. The damage must be physical and substantial; it must be to human health, marine life or resources in the locations mentioned. It must be caused by pollution, contamination, fire, explosion or similar major incident. Some of these have been alluded to earlier. Furthermore, given the fairly wide definitions of "vessel" and "property", the regime is not restricted to laden tankers as in the case of the CLC convention.

The second condition under paragraph 1 is that the salvor must have failed to earn a reward under Article 13 and a subset of that condition is that even if he earned a reward, it must be less than the amount of special compensation assessable under Article 14. In other words, so long as the reward is anything between zero and the amount of the salvor's expenses, some special compensation is payable.[42]

The second paragraph of Article 14 provides for an increase of the special compensation payable under paragraph 1 within certain limits. The increase is subject to a

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40 J. Willmer Q.C., (Lloyd's Arbitrator), "Salvage and Current Problems", Public lecture at London Shipping Law Centre, June 1997, at p. 13. For a further discussion on what is meant by "threat" and how it compares with "danger", see Brice *ibid.* at pp. 414 - 416.

41 *Supra,* note 2 at p. 588.

42 Article 13 is connected to Article 12 which sets out the conditions for a reward, basically reflecting the customary law requirement of success.

condition. Only if damage to the environment has been prevented or minimized in the circumstances described in paragraph 1, is there entitlement to an increased special compensation. The increase, in the first instance is up to a maximum of 30% of the salvor's expenses. In the second instance, the increase can go up to a maximum of 100% of those expenses, but only in very extreme cases if the tribunal feels it is equitable to give the increase. In determining whether it is equitable, the tribunal must take into consideration the criteria set out in paragraph 1 of Article 13. It will be noted that the formula for the increased special compensation is quite a bit more favourable from the salvor's perspective than the safety net provision of LOF 1980. What is, of course, quite remarkable is that the P&I Clubs have endorsed the scheme in paragraph 2 of Article 14 albeit after some tough negotiations with the salvage industry.[43] Be that as it may, the formula is an incongruous and inconsistent product of compromise. In one breath it is said that the maximum increase is 30% and in the very next breath there is provision for a 100% maximum increase. In the *Nagasaki Spirit* case, Lord Mustill in the House of Lords described it as a "strange formula".[44] In the Court of Appeal, Staughton L.J. remarked that paragraph 2 of Article 14 was "a plain example of compromise emerging from a smoke-filled room as one could wish for".[45]

Paragraph 3 of Article 14 contains the definition of "salvor's expenses". It basically consists of "out of pocket expenses reasonably incurred", and in addition, "a fair rate for equipment and personnel actually and reasonably used..." In computing this latter amount, consideration must be taken of the criteria mentioned in paragraph 1(h), (i) and (j). In summary, these criteria consist of promptness of service, availability and use of vessels or other equipment and the state of readiness and efficiency of equipment and their value. The question of what constitutes fair rate has been the subject of a major piece of litigation in the English courts, which will be discussed in detail shortly. The first element, *i.e.*, out of pocket expenses is easily quantifiable. These are disbursements which the salvor would not have otherwise incurred but for the salvage operation. Thus, regular operational overheads such as normal crew's wages, cost of stores and bunkers would not be included, but items such as overtime of crew, engagement of specialists and extra

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43 *Supra*, note 2 at p. 596.

44 [1997] 1 Lloyd's Rep. 323 at p. 330. This case will be discussed in detail later.

45 [1996] 1 Lloyd's Rep. 449 at p. 455.

bunkers would.[46] At any rate, the out of pocket expenses would have to be reasonably incurred.

Paragraph 4 of Article 14 simply states that special compensation is only payable to the extent that it is greater than any reward recoverable under Article 13. The gist of it is that amounts under Article 13 and Article 14 have to be calculated separately. If the latter amount is higher than the former, all other things being equal, special compensation will be payable to the extent of the difference between them.[47] In other words, in computing the two amounts in parallel, the arbitrator may, in his mind, make a cross check. As Clark J. stated, "the expenses of a salvage operation are a relevant consideration in assessing the appropriate amount of salvage remuneration".[48] In this context it should be noted that the salved value of the property does not have to be depleted before special compensation becomes payable.[49]

It is notable that the 1989 Convention entered into force in July 1996. Meanwhile, the Committee of Lloyd's took the obvious step of revising the LOF to reflect the regime of the new convention. The revised version came to be known as LOF 1990 and it incorporated the core environmental provisions, *i.e.,* Articles 1(a) to (e), 8, 13.1, first sentence of 13.2, 13.3 and 14. Thus, before the convention came into force, these provisions became contractually effective through the LOF 1990. A further revision of the LOF took place in 1995 when the Merchant Shipping Act 1995 of the United Kingdom was enacted which made the 1989 Convention part of English law before it entered into force internationally. Adjustments to the form had to be made to make it compatible with the new statutory regime. The salient environmental provisions of the convention continue to feature in the form, but they are reproduced for information only. In essence, the terms of the LOF 1995 do not exclude or modify any convention provisions. Rather, the form is cast in a way that makes it apparent that the whole convention is now part of the law of the land.[50]

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46 *Supra*, note 1 at p. 430.

47 For an excellent exposition of the special compensation scheme, see Clark J.'s High Court judgement in the *Nagasaki Spirit*, [1995] 2 Lloyd's Rep. 44 at p. 48.

48 *Ibid.* at p.61.

49 This is confirmed by the Common Understanding reached at the Diplomatic Conference and recorded as Attachment 1 to the Convention.

50 *Supra*, note 2 pp. 576 – 577.

As noted earlier, the convention, and consequently, LOF 1995 and 2000 have geographical limitations on the scope of application of the special compensation regime. Thus, for a salvage operation carried out on the high seas, salvors would favour the use of the LOF 1980. Such was the case of the salvage of the *ABT Summer*, a Liberian tanker carrying 260,000 tons of Iranian crude which caught fire in the South Atlantic Ocean 900 miles away from the Angolan coast. Dutch salvors Smit Tak BV mobilised substantial equipment and expertise, proceeded to the location but were unable to find the vessel. It was presumed to have sunk. The salvors made a special compensation claim under LOF 1990 for the mobilisation expenses which was rejected because of the geographical location of the incident.[51] Under LOF 1980, there would have been payment in such a case. On the other hand, under LOF 1990, 1995 and 2000 salvors have the potential for earning a higher incremental compensation. As much as salvors would like to have the best of both worlds, their desires are limited by the rules of the P&I Club in which the vessel is entered. It is the prerogative of the Club whether its rules will allow safety net payments under LOF 1980 separately from payments made under the special compensation regime pursuant to the 1989 Convention.[52]

5. THE POSITION OF INSURERS

In the real world of maritime affairs, whenever there are questions of liability and compensation involved, it is the voice of the insurance industry that is heard most loudly and clearly, and it is their opinion that, at the end of the day, holds sway. The influence of the insurance industry and the dictates of the English law of marine insurance usually end up being the order of the day at the waning end of a diplomatic conference deliberating to adopt a convention. In some liability conventions, there is provision for channeling liability through the shipowner and for direct action against insurers for compensation. (The CLC and HNS Convention are examples). In most cases, such liability cover is provided by the P&I Clubs. The Clubs are the ones who usually provide security for claims in respect of their members. As in the case of coastal states who would rather have a badly polluting ship taken to the high seas and sunk, than allow it to enter its vulnerable

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[51] Reported in Lloyd's Casualty Reports, 28 May to 5 June, 1991. See also W.A. Bishop, "Current Developments in Lloyd's Form – Article 14, Special Compensation" I.T.S Conference Paper, 1994.

[52] *Supra*, note 2 in footnote 62 at p. 573.

waters, sometimes the interests of P&I Clubs are better served in a similar way. In such cases they are not so keen on providing security as the owners of the ship and cargo benefit much more from a successful salvage operation than do the Clubs.[53]

Needless to say, without the support of the marine insurance industry, the 1989 Convention would not have come into existence. As in the past with regard to LOF 1980, a financial arrangement had to be concluded between the hull and machinery underwriters on the one hand and the P&I insurers on the other to apportion the indemnification of salvage awards and special compensation. The Funding Agreement of 1980 was reviewed at the time that LOF 1990 was being developed in a way so that its provisions would be compatible with the 1989 Convention. The Agreement recognised that LOF 1990 was created to incorporate the 1989 Convention and declared that the International Group of P&I Clubs, the Institute of London Underwriters and Lloyd's Underwriters' Association had likewise reviewed the 1980 Funding Agreement and agreed as follows -

> The P&I Clubs will provide security for, and will indemnify the shipowner against any award of special compensation under Article 14 of the Salvage Convention. The underwriters will accept that salvage awards made under Article 13 of the Salvage Convention are recoverable from them by ship, cargo and freight interests under the form of policy insuring those interests notwithstanding that such awards have been determined after taking them into account, *inter alia*, the skill and efforts of the salvor in preventing or minimising damage to the environment in accordance with Article 13.1(b).
>
> The foregoing general agreements are made subject to the terms of the relevant policy/terms of entry, and to the applicable deductible, and shall continue until any party shall give reasonable notice to the others that there has been a material change in circumstances.[54]

The irony is that the above agreement does not really benefit the shipowners or the salvors because neither is a party to it. Although under the Funding Agreements, the P&I Clubs are supposed to provide security for the safety net or special compensation payments, often they do not do so for a variety of reasons. The Club may be in dispute with the member concerned or in a particular instance it may take the position that under its rules it is not obliged to provide security. The salvor therefore cannot always place reliance on obtaining security from the shipowner's P&I Club. He will often seek

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53 *Ibid.* at p. 582.

54 *Ibid.* at p. 576.

compensation through a regime other than that of salvage. It is notable in this context that under the 1996 Protocol to the Limitation of Liability for Maritime Claims Convention of 1976, the shipowner's right to limit liability is excluded in respect of "claims for salvage, including, if applicable, any claim for special compensation under Article 14 of the International Convention on Salvage, 1989, as amended, or contribution in general average.

The purpose of the Funding Agreement is simply to clarify which insurer, the hull and machinery, or the P&I Club is responsible. This is mainly to ensure that the hull and machinery underwriter does not get saddled with the responsibility of indemnifying the shipowner.[55] For example, clause 10.5 of the Institute Time Clauses – Hull (1995) and clause 8.5 of the International Hull Clauses (2003) provide expressly that special compensation payable by the owner to the salvor is not recoverable by the assured from his insurer as salvage or general average. The clauses provide that no claim is allowed for or in respect of special compensation payable to a salvor under Article 14 of the International Convention on Salvage, 1989, and expenses or liabilities incurred in respect of damage (actual or threatened) to the environment, or due to the escape or release (actual or threatened) of pollutant substances from the vessel.[56]

The above are excluded because they concern environmental risks, which are not insured perils under a standard policy of marine insurance. However, an enhanced award made under Article 13(1)(b) would not be caught by the above clause. The separation of an award under Article 13 and special compensation under Article 14 is thus recognised in the Institute Clauses as well as the IHC 2003. In clause 10.6 of the Institute Time Clauses – Hull (1995) and clause 8.6 of the International Hull Clauses 2003 (IHC 2003) it is provided that any salvage award, which has taken into consideration the "skill and efforts of the salvors in preventing or minimising damage to the environment" is not affected by the above exclusions. Thus clause 10.6 of ITC-Hulls (1995) and clause 8.6 of

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55 *Ibid.* at p. 597.

56 O'May states that where no P & I cover is available, it is possible that in some situations this compensation may be recoverable under clauses 13.2 or 13.5 (Sue and Labour) of the Institute Time Clauses – Hull (1983). He also notes that if the compensation claim were to be included in a shipowner's claim for collision damages, it is likely that the compensation element of the claim would not be payable by the hull insurers under clause 8.1.3 of the Institute Time Clauses – Hull (1983). See *Supra,* note 15 at p. 408.

IHC 2003 both clarify that the whole salvage award is indemnifiable even if an environmental criteria may have been used in determining the award.[57]

It is to be noted in the present context that most of the contemporary liability conventions provide for direct action against the shipowner's P&I Club. This is coupled with the requirement for compulsory insurance. In contrast, there is no right of direct action, which the salvor can enjoy against the P&I Club of the shipowner to recover special compensation under the 1989 Salvage Convention. Under English law, a claimant's rights against an insurer can not be greater than the corresponding rights of the shipowner under his insurance contract. Consequently, the same defences which the insurer has at his disposal *vis a vis* the assured shipowner, can be used by the insurer against a salvor in an action brought by the latter.[58] By comparison, under the strict liability regimes of liability conventions such as the CLC or the HNS Convention, the P&I Clubs have little or no defences.[59]

6. THE NAGASAKI SPIRIT AND "FAIR RATE"

It is generally agreed that so far on the whole, the experience of the salvage industry with the special compensation regime has been less than satisfactory. From the salvor's perspective, the turn of events evoked sentiments of disappointment which brought the interested parties back to the drawing board. Salvors have not readily succeeded in obtaining special compensation for a variety of reasons.[60] Some of these reasons can be attributed to limitations in the instruments involved, *i.e.*, the differing versions of the recent LOF 1980 and the LOF 1990 or 1995 and the new 1989 Salvage Convention itself.[61]. Other reasons are differing perceptions of the special compensation regime by different actors on the scene, and by extension, different interpretations of the relevant provisions of the convention by lawyers, arbitrators and the English judiciary. While it is recognised that the 1989 Convention is not exactly a model of clarity in drafting and is admittedly the outcome of a compromise involving multifarious shipping

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57 Susan Hodges, *Law of Marine Insurance*, London: Cavendish Publishing Ltd., 1996 at pp.436-437.

58 Most P & I Clubs being United Kingdom based, their rules are governed by English law.

59 *Supra*, note 2 at p. 599.

60 See Lars Landelius, "Salvage Review" in The Swedish Club Letter No.2/1999 at p. 8.

61 See *e.g.*, the case of the *ABT Summer, supra*, note 51.

interests, both public and private, it is now in force and is here to stay. Prospects of amendments to the convention, if any, can only be expected in the distant future.[62]

Against the background of the scenario described above, the decision of the House of Lords, and indeed of each of the tribunals below, in *The Nagasaki Spirit*[63] represents a landmark in contemporary salvage jurisprudence in terms of both English as well as international law on the subject. As lead counsel for *Semco,* the late eminent Mr. Geoffrey Brice pointed out, it is "a test case of international importance on a point which has not so far been considered elsewhere."[64]

Before delving into an analysis of this case it is important to make a few observations. First of all, the incident occurred before the Salvage Convention of 1989 was incorporated into English statute and before it entered into force internationally. However, the operative instrument in the case was LOF 1990 which incorporated the environmental provisions of the convention including the special compensation provisions. As Lord Mustill stated in his speech –

> So far as English domestic law is concerned the Convention was given the force of law in the United Kingdom by the Merchant Shipping Act 1995 s. 224. But the Act did not affect rights and liabilities arising out of operations started before Jan. 1, 1996. Accordingly, the claim now under consideration is a private law claim, based on LOF 1990. The Convention is relevant only because having partly been inspired by LOF 1980 it is now incorporated by reference into LOF 1990.[65]

Secondly, it is important always to remember and acknowledge the crucial role and interest of the insurance industry in this particular field of inquiry. Even Lord Mustill, in referring to "professional salvors who waited for an opportunity to provide assistance and earn a large reward" remarked that the arrangement "served the maritime community and its insurers well". In describing the developments that eventually led up to the adoption of a new convention, he alluded to the long and hard-fought negotiations between the shipowning and cargo interests and their insurers on the one hand and

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62 Lars Landelius, *supra*, note 60.

63 *Semco Salvage & Marine Pte Ltd.* v. *Lancer Navigation Co. Ltd.*, [1997] 1 Lloyd's Rep. 323 (H.L.)

64 See Stephen Girvin, Case and Comment "Special Compensation Under the Salvage Convention 1989: A Fair Rate?" in [1997] *L.M.C.L.Q.* 321.

65 *The Nagasaki Spirit, supra*, note 63 at p. 328.

representatives of salvors on the other, with participation by governmental and other agencies.

Furthermore, the statement by His Lordship that "the amount of the special compensation is due to the salvor from the shipowner alone" points exclusively to the P&I insurer as the sole payor of the bill. One commentator has remarked that the contentions advanced by the shipowners in this case were more particularly, those of the P&I insurers standing behind them.[66]

6.1 Factual Situation

The facts of this case have not only been adequately reported in the relevant open literature, but it has been admirably presented in detail by Lord Mustill as the preambular backdrop to his substantive speech.[67] In the circumstances, it is not necessary to reiterate the factual situation in detail. Suffice it to say that the oil tanker *Nagasaki Spirit* collided with the container ship *Ocean Blessing* in the Malacca Straits. At that time, the tanker was part laden with over 40,000 tons of crude oil, of which about 12,000 escaped into the sea and caught fire. All the crew of the container ship died and only two of the oil tanker's crew survived. Semco agreed to salve the *Nagasaki Spirit* under LOF 1990 and later agreed to salve the *Ocean Blessing* under the same terms. Eventually the *Nagasaki Spirit's* remaining cargo was transferred to the *Pacific Diamond* at an anchorage off Belawan in Indonesia. About six weeks later, the salved tanker was redelivered to her owners in Singapore.

6.2 Fair Rate

The matter in dispute and the issues involved were clearly articulated by Lord Mustill in the following words-

> The principal issue in the present appeal concerns the definition of "expenses" in art. 14.3, and in particular that part of it which includes in the expenses "a fair rate for equipment and personnel actually and reasonably used in the salvage operation." Four elements have been identified as possible components of "fair rate." The direct costs to the

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[66] *Supra*, note 2 at p. 591.

[67] His Lordship, at p. 327 of the decision, acknowledges that the facts were summarized by Clarke J. in the Commercial Court in terms which he is glad to adopt.

> salvor of performing the service; the additional costs of keeping the vessels and equipment on standby; a further element to bring the recoverable "expenses" up to a rate capable of including an element of profit; and, a final element bringing the recovery up to the level of a salvage award.

As stated by His Lordship, the dispute revolved around the third element; the question of whether "fair rate" included an element of profit. Semco contended that it did; the shipowners backed by their P&I insurers denied.[68]

At arbitration, Semco was awarded a 65% increment over the calculated expenses of $7,658,117 which brought the enhanced expenses figure up to $12,635,893 which exceeded the salvage award made under Article 13 by $3,135,893 and was the special compensation payable under Article 14.[69] The appeal arbitrator increased the award under Article 13 and decreased the expenses under Article 14.3 as a consequence of which the salvage award became higher than the expenses and therefore, no special compensation was payable. His objection to the manner in which fair rate was dealt with by the arbitrator is described in Lord Mustill's judgement as follows-

> Although the definition of expenses may be broad, it is still a definition of expenses. It does not support the finding of a fair rate at such a level as by itself to lead to an encouraging profit for the salvors, still less anything which would be regarded as akin to salvage remuneration. The addition of an increment under Art 14.2 could all too easily lead to a figure which went well beyond compensation and became salvage remuneration by the back door. [70]

On appeal to the Commercial Court, Clarke J. upheld the general principles applied by the appeal arbitrator but disagreed with the manner in which he arrived at the quantum of the award and the figure for the expenses. He sent the matter back to the appeal arbitrator for a reconsideration of the quantum of salvage. In the Court of Appeal, Staughton L.J. speaking for the majority added his own interpretation of fair rate. He held-

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68 See *ibid.* at p. 330.

69 All figures are in Singapore dollars.

70 *Supra,* note 63 at p. 331.

> a fair rate means a rate of expense, which is to be comprehensive of indirect or overhead expenses and take into account the additional cost of having resources instantly available. Remuneration or uplift or profits is to be provided, if at all, under art. 14.2. Beyond that, what is a fair rate is a matter of judgment for the tribunal(s) of fact.[71]

In the House of Lords Lord Mustill then proceeded to outline the two contradictory approaches to the meaning of fair rate adopted by the parties to the dispute. Semco contended that it was a rate which, taking into consideration the circumstances of the case, including the type of work required and the type of craft actually used, acts as an incentive to the salvor. This means that it would normally include a profit element but without amounting to a salvage reward. The shipowners, on the other hand, contended that "fair rate" meant a fair rate of expense which is comprehensive of indirect or overhead expenses and which is to include the additional cost of having resources instantly available.[72]

After acknowledging that salvage assessment has never been an exact science and that the "embellishment added by art. 14.3 is well known to have been an uneasy compromise", Lord Mustill went on to rule as follows-

> The concept of "expenses" permeates the first three paragraphs of art 14. In its ordinary meaning this word denotes amounts either disbursed or borne, not earned as profit. Again, the computation prescribed by art.14.3 requires the fair rate to be added to the out-of-pocket" expenses, as clear an instance as one could find of a quantification which contains no element of profit; and it surely cannot have been intended that the "salvors' expenses" should contain two disparate elements. It is moreover highly significant that art 14.2 twice makes use of the expression "expenses incurred" by the salvor, for in ordinary speech the salvor would not "incur" something which yields him a profit. The idea of an award of expenses as a recompense, not a source of profit, is further reinforced by the general description of the recovery as "compensation", which normally has a flavour of reimbursement.[73]

The above quoted passage represents the *ratio decidendi* of Lord Mustill's judgment and of the case itself. Needless to say, the ruling of the highest court was not in

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71 *Supra*, note 45.

72 *Ibid.* at pp. 331- 332.

73 *Ibid.* at p. 332.

favour of the salvors. In this context it is worthwhile noting that Evans L.J. who dissented in the Court of Appeal was of the view that a profit element in the computation of fair rate was not to be discarded altogether. He agreed with the appeal arbitrator that regard must be had to commercial, or where relevant, market factors in addition to the salvor's cost. He held that "fair" meant "fair to both parties and that a fair rate for services provided should be computed by taking into account the commercial value of those services. The learned judge went on to say -

> If the intended meaning was "a commercial rate for the particular service, taking account of market rates when those may apply", then the chosen formula "a fair rate" comes close to expressing it, in a context where a straightforward reference to market rates was not possible, as both parties agreed.[74]

Lord Mustill, of course, rejected this opinion of Evans L.J. and remarked that the latter had placed undue importance to the word "rate". His Lordship was of the view that that word had sent the enquiry in the wrong direction and held that "... in the context of art.14 it simply denotes an amount attributable to the equipment and personnel used, just as the expenses include an amount attributable to out-of-pockets."[75]

6.3 Threat to the Environment

The other issue, quite apart from "fair rate", concerns the submission of the shipowners backed by their P&I Club that only those expenses which were incurred during the times when there was a threat to the environment were to be taken into account. Lord Mustill, in rejecting the proposition adopted the view of Clarke J. in the Commercial Court. The position is summarized in the following words -

> The submission would be rejected that the Clubs could not be expected to pay expenses in respect of any part of the service during which there was no threat to the environment. The Clubs' interests were served by the overall element of encouragement of professional salvors to intervene in cases involving a threat to the environment. At the time of his intervention the contractor would commit himself to the expenses of the whole salvage operation, and not merely to expenses incurred whilst the threat existed. The Club was protected to the extent that only reasonable expenses were to

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74 *Supra*, note 45 at pp. 457, 459.

75 *Supra*, note 63 at p. 332.

be taken into account, and that a profit element would be payable to the salvor only where the services were in fact of benefit to the environment.[76]

6.4 An Evaluation

It is submitted that this case is as much about treaty interpretation in international law as it is about commercial policy dictated by the courts. One of the basic principles of treaty interpretation is for a tribunal to discern the intentions of the framers of the convention, in other words, to get into their minds. This is the subjective approach to treaty interpretation, but it is tempered by resort to the *travaux preparatoires,* which in this case, was done at all levels.[77] But the conclusions reached by the English judges, it seems, was based on the so-called plain meaning rule, which is characteristically, an English rule of statutory construction.[78]

In contrast, the purposive or teleological approach to treaty interpretation is objective in scope and is the preferred method. It would call for an appreciation of the object and purpose of the treaty as a whole which can be gleaned largely from its preambular statements.[79] This is precisely what was espoused by Mr. Brice on behalf of the salvors. But his Lordship was not persuaded by learned counsel's resort to this teleological method, that it allowed profit to be included as an element of fair rate. This conclusion of His Lordship was rather unfortunate. The tenor of the convention as a whole is to provide adequate incentives to salvors to protect the environment in addition to salving vessels and property in danger. This object and purpose of the Convention, it is submitted, is plainly and unequivocally reflected in the Preamble, in the face of which, any plain meaning construction must give way.

The upshot of this decision, it is further submitted, is that the courts by attributing plain meanings to the words in issue have, in essence, spoken on commercial policy. They have done so in a manner which appears to run contrary to the perceptions of those, including

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[76] *Supra*, note 47 at p. 58. See Colin de la Rue, *supra*, note 2 at p. 591.

[77] Since the decision of the House of Lords in *Fothergill* v. *Monarch Airlines Ltd.*, [1980] 2 Lloyd's Rep. 295; [1981] A.C. 251, English courts may now look at *travaux preparatoires* to assist them in treaty interpretation.

[78] *Supra*, note 34 at pp. 84 – 87.

[79] *Ibid.* at p. 134.

insurers, involved in the deliberations leading up to the revisions of the LOF and the new Salvage Convention. In this context Lord Mustill held-

> the promoters of the Convention did not choose, as they might have done, to create an entirely new and distinct category of environmental salvage, which would finance the owners of vessels and gear to keep them in readiness simply for the purpose of preventing damage to the environment.[80]

It is submitted that the promoters of the convention did create the notion of environmental salvage, albeit incidental to traditional salvage. If that had not been the case, there would have been no need for a new convention. The 1910 Convention would have sufficed. This is further borne out by the fact that as a result of the plain meaning interpretation adopted by the English courts, the principal players have come to the conclusion that the Convention is not serving its intended purpose to the satisfaction of all concerned. As such, a new Supplementary to the LOF has been developed to deal with the problem outside the scope of the Convention.

This will be elaborated later in this chapter. In this context, another noteworthy point is that Lord Mustill, in disagreeing with Evans L.J.'s dissenting opinion in the Court of Appeal made reference to the French version of Article 14.3 (cited as 14.4 presumably in error) in support of his view. Geoffrey Brice has pointed out in his text book on salvage law that at least one eminent French Professor of Law, Pierre Bonassies does not share the view of Lord Mustill.[81]

Finally, on a positive note, reference is made to a statement of Arnold White, former President of the International Salvage Union (ISU) that the House of Lords decision had "something for everyone". This was said after a spurt of overreaction to the Commercial Court's judgment by the ISU. It is perhaps fair to say that at the end of the day the salvors have not come away totally empty-handed.[82] Nevertheless, the fact that there is ample cause for concern from at least some quarters of the shipping industry, is

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80 Lord Mustill's judgement in *supra*, note 63 at p. 332.

81 *Supra*, note 1 at p. 433.

82 *Supra*, note 64 at p. 327.

evidenced by the new development with regard to the LOF, among the initiators not the least of which is the International Group of P&I Clubs.

7. DEVELOPMENT OF SCOPIC

7.1 Background

As stated earlier, even though there is no mention of the insurer in the Salvage Convention of 1989, it is in fact the P&I Club who, in almost all cases, provides the security and indemnifies the assured shipowner for special compensation. It is therefore virtually impossible for any compensation regime to exist without the support and co-operation of the P&I Clubs. The outcome of the *Nagasaki Spirit* decision, perceived by the salvage industry to be unsatisfactory, thus led to another coming together of the salvors and the P&I Clubs. The main concerns of salvors, aside from the ruling of the House of Lords that "fair rate" did not include profit, extended to the application of Article 14 only if there was a threat to the environment and also its restricted geographical application. The threat to the environment had to be proven, and outside of coastal or inland waters or areas adjacent thereto, the special compensation regime did not apply. The dissatisfaction of the P&I Clubs with this state of affairs has emanated from arbitrations involving special compensation being long, arduous and costly and the costs being borne largely by the Clubs.[83]

As such, it became abundantly clear that an alternative mechanism had to be designed which would serve the interests of all parties concerned. The principal parties were salvors, shipowners, other property owners, property insurers and liability insurers, *i.e.*, the P&I Clubs. A system was sought which would provide an adequate incentive to salvors to undertake operations regardless of whether there was a threat of environmental damage. The system would have to ensure that the salvors were remunerated on a commercial basis that made commercial sense and not just as a reimbursement for expenses incurred[84]. Initial negotiations took place between the P&I Clubs and salvors; later property insurers joined in. The objective was to come up with a framework which would encourage expeditious responses to casualties by salvors, provide for prompt

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[83] "SCOPIC Amendment to Lloyd's Open Form: Part 1" published by West of England Association in *P&I International*, November 1999 at p. 258.

[84] See Geoffrey Brice,"Salvage and the Role of the Insurer" in [2000] *LMCLQ.* Part 1 at p. 30.

payments to salvors and thus minimise the potential for disputes and litigation.[85] As pointed out by Brice, "A committee of interested parties could not change the law; but it could give effect to its intentions by contract."[86]

As a consequence of these negotiations, the so-called "SCOPIC Clause" has been developed as an alternative mechanism to deal with special compensation outside the ambit of Article 14 of the Salvage Convention of 1989. The underlying essence and philosophy of this clause is distinctively different from that of Article 14 as interpreted by the *Nagasaki Spirit* decision. The medium for the manifestation of this mechanism is a supplement to the LOF. SCOPIC is the acronym for "Special Compensation Protection and Indemnity Clause". It came into force formally in August 1999.[87] SCOPIC has essentially been designed as a special kind of accounting arrangement that has received the approval of all the members of the International Group of P & I Clubs (the Group). After the clause came into force there was a trial period of two years during which time it was incorporated into LOF agreements between shipowners entered in a member club of the Group and members of the ISU. Before the end of trial period, a number of amendments were made to the clause. The following discussion takes into account these amendments.[88]

7.2 The Scheme of SCOPIC

SCOPIC consists of 15 sub-clauses together with Appendices A, B and C and two Codes of Practice. One is "Between International Group of P&I Clubs and London Property Underwriters Regarding the Payment of the Fees and Expenses of the SCR Under SCOPIC".[89] The other is "Between International Salvage Union and International Group of P & I Clubs". It is important to note at the outset that special compensation in the context of SCOPIC is fundamentally different from the notion of special

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85 *Supra,* note 83.

86 Brice, *supra*, note 84 at p. 30.

87 *Ibid.*

88 Some amendments have been made to the SCOPIC tariff in Appendix A as well. See Edgar Gold, Aldo Chircop, Hugh Kindred, *Maritime Law*, Toronto: Irwin Law, 2003 at pp. 616- 617.

89 SCR is the abbreviation for Shipowner's Casualty Representative.

compensation under Article 14 of the Salvage Convention of 1989. The salient features of SCOPIC are set out below.

Sub-clause 1 confirms that SCOPIC is supplementary to the LOF, referred to as the "Main Agreement". Once invoked, SCOPIC will override any provision in the Main Agreement that may be inconsistent with it, to the extent necessary to give the agreement business efficacy. The Article 14 method of assessing special compensation will be replaced by the method set out in SCOPIC. This sub- clause clarifies that where a salvage operation is under taken pursuant to LOF incorporating SCOPIC, no claim can be made by the salvor under Article 14 of the Salvage Convention even if SCOPIC has not been invoked except where sub- clause 4 is applicable.

Under sub-clause 2, the salvor has the option of invoking SCOPIC, in writing, at any time he chooses. The assessment of SCOPIC remuneration starts at the time of the written notice. Prior to that time, any salvage performed is subject to "no cure no pay" without any safety net. Under SCOPIC, there is no requirement that there be a threat of damage to the environment for the special compensation regime to operate. As pointed out by Brice, the decision to invoke SCOPIC must be taken by the salvor after due thought and consideration; otherwise he may be faced with adverse consequences.[90]

Under sub-clause 3, the shipowner must provide security in the amount of USD 3 million within two working days of receiving the salvor's notice of invoking SCOPIC. If the shipowner estimates the security to be too high or the salvor thinks it to be too low, one party is entitled to require the other to reduce or increase the security, as the case may be.

Sub-clause 4 provides that if security is not provided as required under sub-clause 3 the salvor can revert back to his rights under Article 14 of the Salvage Convention. The salvor's right of withdrawal from SCOPIC by reason of the shipowners failure to provide security within the required two working days does not apply if the security is provided before the salvor gives notice of withdrawal.

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[90] *Supra*, note 84 at p. 31.

The essence of SCOPIC is that it is a kind of remuneration payable to the salvor by the shipowner and guaranteed by the latter's P&I Club. The remuneration is in the form of tariff rates provided in Appendix A of SCOPIC together with a standard bonus of 25% of those rates. The bonus, in certain instances, is subject to modifications provided for in SCOPIC. In addition, the salvor's out of pocket expenses are reimbursable. All this is provided for in sub-clause 5. According to one of the P&I Clubs, it is not possible to determine whether the tariff rates for tugs are higher or lower than Article 14 rates assessed under the *Nagasaki Spirit* method which depends on how much a tug is used in a particular year.[91]

Under sub-clause 6, salvage services will continue to be assessed according to Article 13 of the Salvage Convention which means that property insurers will still have a role to play even if SCOPIC is invoked. SCOPIC payment will only be made to the extent that the assessed remuneration exceeds the total of the salvage award made under Article 13 regardless of whether such an award is in fact made. Further more there are clarifications in this class relating to currency adjustments where the currency applying to the main agreement may be different from the currency applying to SCOPIC.

Under sub-clause 7, if the salvage reward turns out to be higher than the SCOPIC remuneration, the salvage reward will be discounted by 25% of the difference. For the salvor this is an adverse situation which he should take into account before invoking SCOPIC. Viewed from the opposite perspective, it is a deterrent for salvors invoking SCOPIC blindly if there is a reasonable expectation of an adequate salvage award.[92]

Under sub-clause 8, if there is no potential salvage award, the shipowner is obliged to pay the undisputed amount of SCOPIC remuneration within one month of presentation of the claim. If there is a potential salvage award, 75% of the amount by which the assessed SCOPIC remuneration exceeds the security amount assessed for the salvage award must be paid by the shipowner within one month. These provisions have been designed to ensure speedy recovery by salvors.

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91 *Supra*, note 83 at p. 259.

92 *Supra,* note 84 at pp. 31-32.

Under sub-clause 9, the salvor can terminate his services if he reasonably anticipates that the total cost of all his past and future services will be in excess of the value of the salvable property plus his SCOPIC entitlement. The shipowner can terminate after giving five days notice.

Once SCOPIC is invoked, under sub-clause 11, the shipowner can appoint a person known as the Shipowner's Casualty Representative (SCR) to attend the salvage operation in accordance with the provisions of Appendix B. The SCR must be selected from a panel appointed by the SCR Committee consisting of three representatives each from the ISU, the International Group of P&I Clubs, the International Chamber of Shipping (ICS) and the IUMI.

Under sub-clause 12 the hull and machinery and the cargo underwriters are each entitled to send a special representative on board. It is obvious from these provisions that in cases where SCOPIC is applicable, marine insurers of all persuasions have the opportunity to be involved in salvage operations in some practical terms.[93]

Under sub-clause 13, SCOPIC remuneration will include consideration of both prevention as well as removal of pollution in the immediate vicinity of the vessel, but only to the extent it is necessary for carrying out the salvage properly.

Sub-clause 14 provides that SCOPIC remuneration is not to be treated as a general average expenditure to the extent that it exceeds the salvage award. SCOPIC liability is that of the shipowner alone and no reimbursement of this liability can be claimed as general average or under the vessel's hull and machinery policy.

Sub-clause 15 provides that any dispute involving SCOPIC is to be referred to arbitration under the relevant LOF.

Since basically the liability is that of the shipowner there remains the question of whether the salvor will always actually get paid. In this context, the ISU and the International Group of P&I Clubs have agreed to a Code of Practice which will

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93 *Ibid.* at p. 32.

henceforth govern all salvage carried out by a ISU member regardless of whether Article 14 of the Salvage Convention is applicable, or SCOPIC is invoked. It is notable that under Clause 4 of the Code of Practice, although the P&I Clubs confirm that they expect to provide security, it is not automatic. In this context it is noteworthy that there is now in place a "Salvage Guarantee Form ISU 5". In the context of SCOPIC and the Code of Practice referred to above, this document is of significance given the fact that a P&I Club is not a party to any LOF with or without SCOPIC.[94]

7.3 Critique of SCOPIC

It needs no reiteration that SCOPIC is a relatively new phenomenon in the laws of salvage and marine insurance. The West of England Association, in a series of articles on SCOPIC published in *P&I International* enumerates the *pros* and *cons* from the perspectives of shipowners and P&I Clubs on the one hand, and salvors on the other. These are reproduced below.

> The advantages for shipowners and clubs in the new SCOPIC provisions are as follows :-
>
> 1 There should be little need for arbitrations in future on special compensation awards. The problem areas (environmental threat, geographical restriction, tug rates and uplift) have all been settled.
>
> 2 Owners/clubs have much more control or at least knowledge over what happens during salvage.
>
> 3 The shipowners' right to terminate under clause 9 of SCOPIC is clearer than the right under clause 4 of LOF.
>
> 4 The uplift is capped at 25%.
>
> The disadvantages for shipowner/clubs are as follows:

[94] Copies of the latest version of SCOPIC (currently SCOPIC 2005) complete with the three Appendices, the two Codes of Practice referred to above and the Salvage Guarantee Form ISU 5 can be obtained on line at the website www.lloydsagency.com .

1 The salvors may recover more for the agreed tug rates than they would under the *Nagasaki Spirit* decision, but this is not certain because of the different utilisation factors.

Shipowners/clubs have given up the environmental threat and and geographical restriction defences.

The advantages for salvors are as follows:

1 It is no longer necessary for salvors to prove environmental threat and to overcome any geographical restriction defence.

2 Salvors will be paid profitable tug rates.

3 Cashflow problems will be eased.

4 Security is more certain.

The disadvantages are:

Salvors can never recover more than a 25% uplift.

There is a risk that the owner terminates.[95]

It would appear from the above summary that on balance the SCOPIC deal is a good one for all parties concerned despite a few of its setbacks. For one thing, there is some imprecise wording in some of the provisions which can be tidied up without too much trouble by the time the end of the trial period comes around. The main factor is the willingness of all parties involved to expend every effort to make the scheme effective in practical terms. Shortly after SCOPIC was formally adopted, one practitioner commented as follows:

> ...as long as all involved are determined to make the clause work, and refuse to take 'negative' points, drafting deficiencies are unlikely to cause problems. If however a salvor, owner, hull under-writer or P&I Club feels he has been unjustly served at any point, expensive legal debate of the

[95] *Supra,* note 83 at p. 259.

kind which eventually made Article 14 unworkable could quickly re-emerge.[96]

While there appear to be no significant practical problems, only experience with it will indicate its usefulness. Criticisms of SCOPIC have been expressed; some constructive, others not. Some comments are on the lighter side, of esoteric significance at best. One is "SCOPIC could be said to be the ultimate triumph of optimism over pessimism, or ...of hope over experience"; another, "it might have been better to make a few reforms to the old system...rather than to tear it up and start again from scratch."[97]

The Department of Environment, Transport and the Regions (DETR), responsible for formulating the shipping policy of the United Kingdom is of the view that SCOPIC does not serve the public interest. Unlike the salvors, the Department would prefer the regime under Article 14 of the Salvage Convention because it gave the salvors an incentive to succeed. Under SCOPIC, salvors may not be inclined to do any more what was necessary to earn the 25% guaranteed.[98] Another expressed fear is that given the difficulties involved in valuation of salved property, salvors may invoke SCOPIC in needless cases and P&I Clubs might object to providing security repeatedly. Lord Donaldson has apparently suggested that for safety reasons only one individual representing the triumvirate, namely, the owners, the P&I Club and the property underwriters, should be allowed on board. This suggestion did not sit well with the property underwriters.[99]

In some quarters there is concern about Clause 4 of the Code of Practice between the ISU and the International Group of P&I Clubs pursuant to which the provision of security by the P&I Clubs is not automatic. The special adviser to the ISU, Mike Lacey has said that "(T)he ISU would have liked some binding, enforceable commitment incorporated into SCOPIC, but you have to be realistic."[100] The property underwriters

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96 Richard Olsen in *Fairplay*, December 16, 1999.

97 *Fairplay*, November 18, 1999, at p. 28. Comments attributed to Richard Olsen of Constant & Constant.

98 *Ibid.*

99 *Ibid.* at p.29

100 *Ibid.* at p. 28.

agree as well that such a proposition would not be practicable. Even they recognise that the P&I Clubs, under their rules, are not obliged to give such blanket covers. They must preserve their right to withhold cover when there is a breach of the terms or when a shipowner has defaulted in paying his calls. The P&I Clubs have in fact been as forthcoming as may be expected. At least the salvors know that under normal circumstances they can have security within two working days. Under the Article 14 regime, this could take months. On the whole most people are happy with SCOPIC. As stated in one report-

SCOPIC is a fair solution when a fair owner is involved and a fair P&I Club. Where low-value ships and questionable insurers involved, SCOPIC becomes useless, and protecting the environment becomes the duty of the government.[101]

The current concern in relation to SCOPIC is that since its inception in 1999, the tariff rates have not been increased in line with inflation. The salvage industry, expressing its views through the ISU is concerned with the downturn in business and attributes this state of affairs partly to the refusal of the shipping industry to raise the SCOPIC tariff rates. One suggestion that may be mooted is that in addition to SCOPIC, consideration should be given to adding a new tier of remuneration, namely, a pollution prevention reward, in cases where salvors intervene to prevent a potentially disastrous, major oil spill. The ISU will have to work closely with its industry partners in particular the P& I Clubs.[102]

It appears that SCOPIC, the up to date version of which is supplementary to and is part of the documentation of LOF 2000, represents a marked improvement from the perspectives of both the salvage as well as the marine insurance industries.[103]

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[101] *Ibid.* at p. 30.

[102] See David Hooper, "Win Some Lose Some" in *Fairplay*, Volume 351, Issue 6280, 10 June 2004 at p. 37 where statements made by ISU President Joop Timmermans are cited.

[103] Richard Shaw, "Places of Refuge International Law in the Making?" in *CMI Yearbook 2003*, Documents of the Vancouver Conference at p. 342.

CHAPTER 4

GENERAL AVERAGE AND ITS INDEMNIFICATION

1. INTRODUCTION

The starting point of this discussion is that in the first instance we are talking about losses, and in the second, their indemnifiability. Losses are either total or partial. In the law of marine insurance, total losses are characterised as either actual or constructive. Actual total loss is based on irretrievable deprivation of the *res* or where the *res* has undergone a complete change *in specie*. Constructive total loss is based on the unlikelihood of recovery of the *res* or even if there is such likelihood, it is financially unfeasible. Constructive total loss is associated with the related doctrine of abandonment. Partial losses are of two kinds, general and particular; usually such losses are characterised as "average" losses. We shall see that the word "average" has somewhat varied but related connotations and has come down to us through the maritime traditions of the Mediterranean region. Thus we have general average which is a partial loss arising out of a voluntary act, and particular average which is a fortuitous partial loss. The distinction is well articulated in the following words-

> A general average differs from a particular average in its nature and incidence. The former is a partial loss, voluntarily incurred for safety, and made good proportionably by all parties concerned in the adventure; the latter is a partial loss, fortuitously caused by a maritime peril, and which has to be borne by the party upon whom it falls.[1]

Thus the principal attribute of a general average loss as distinguished from a particular average loss is that the former is the intended consequence of a human act, not the fortuitous consequences of a peril against which the ship is insured. A general average loss arises from damage effected deliberately and not by the chance intervention of the elements to which the ship has been exposed. It is stated by Arnould that-

> Although the act must be deliberate and it may according to the circumstances be desirable that it should be resorted to only after due

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[1] C. MacArthur, *The Contract of Marine Insurance*(2nd.Edition; 1890), p.163 cited in E.R.Hardy Ivamy, *Chalmers' Marine Insurance Act*, 10th Edition , London : Butterworths, 1993 at pp.106-107 in footnote 3.

> deliberation and consultation among those on board the vessel, it is not a rule of law that the act must result from a measured decision in order to give rise to a claim in general average.[2]

Furthermore, it has been held that the purport of the word "general" in this context connotes a general distribution of the loss among the co-adventurers, and consequently, it warrants contribution from all the participants.[3] Thus, general average operates to the common benefit of all interests in the adventure in contradistinction to particular average where the loss lies where it falls.

General average and particular average are both defined terms in the Marine Insurance Act 1906. The former is found in s.66(1) and the latter in s.64(1) of that Act. These provisions are discussed in appropriate detail later in this chapter. It is to be noted at the outset that although general average is connected to the law of marine insurance in terms of the indemnifiability of general average losses, it exists independently within the domain of international maritime law.[4] A leading author on the subject of general average has stated that "it is only accidentally associated" with marine insurance.[5] In *The Brigella*, Lord Gorell Barnes held-

> The obligation to contribute in general average exists between the parties to the adventure whether they are insured or not. The circumstances of a party being insured can have no influence upon the adjustment of general average, the rules of which are entirely independent of insurance.[6]

Some are even of the view that despite the connection, in order to thoroughly grasp the essence and purport of general average, at least initially, one needs to divorce it from the law of marine insurance. It is stated, *e.g,* that " [I]n considering the subject of

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2 *Arnould's Law of Marine Insurance and Average*, hereafter referred to as "Arnould", Vol. II at p. 803 and footnote 18 of that page citing 1 Emerigon, c.12, s.39. p. 588.

3 *Harris* v. *Scaramanga* (1872), L.R. 7 C.P. 481 at p. 496.

4 Donald O'May, *Marine Insurance Law and Policy* (hereafter referred to as "O'May"), London: Sweet & Maxwell 1993, at p.347.

5 See Alex Parks, *The Law of Marine Insurance and Average*, 1987 at p.480.

6 (1893), P.189 at p. 195.

general average it is necessary for the present to dismiss altogether the question of marine insurance."[7]

However, like salvage, general average is concerned with recompense or reimbursement for saving maritime property. In that sense there is a common thread linking these concepts to marine insurance which deals with indemnification for losses. Indeed, in this context it is instructive to note the connection between the two branches of law in that general average liability arises and remains pursuant to the customary international law, but that the liability is indemnifiable through marine insurance.[8] That is not to say, as stated by Susan Hodges, that "[S]ince the introduction of the Marine Insurance Act 1906, the liability for general average, under the common law of the sea, has been replaced by statute".[9] This proposition warrants clarification and discussion.

There is English common law and there is customary maritime law which has historically been in international usage. The law of general average belongs to this latter domain. Even though it is perhaps fair to say that the customary maritime law of general average has by evolution been incorporated into the English admiralty law, general average is not a species of "law of the sea", common or otherwise. Be that as it may, the expression "common law of the sea" has been used to describe the *lex maritima.*[10]. Furthermore, the Marine Insurance Act is not exactly a statutory replacement of any common law of general average. The Act does not create any new concept of general average liability; but rather, implicitly acknowledges its existence in the general maritime law, and creates a regime of indemnity for such liability. However, it is said that although the application of the Act is confined to marine insurance, it codifies the law of general average and is therefore of wider application.[11]

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7 See R.J.Lambeth, *Templeman on Marine Insurance*, (hereafter referred to as "Templeman") 6th Edition, London: Pitman Publishing Ltd; at p.287.

8 *Simonds.* v. *White* (1824), 2 B & C 805.

9 Susan Hodges, *Cases and Materials on Marine Insurance Law*, London: Cavendish Publishing Ltd., 1999, at p.735. The author cites Bailhache J. in *Brandeis Goldschmidt and Co.* v. *Economic Insurance Co.Ltd.* (1922), 38 TLR 609) in support of her proposition.

10 Scott L.J. in *The Cheldale*, ([1945] P.10 at p.14.

11 D J. Wilson and J. H. S. Cook, *Lowndes and Rudolf*: *General Average and The York- Antwerp Rules,* 12th Edition, London: Sweet & Maxwell, 1997 at p. 77 (This text is hereafter referred to as "Lowndes and Rudolf").

What we shall see in the discussion which follows is that general average is not only intimately connected to marine insurance but also to carriage of goods by sea even though each is an independent area of law in its own respective right. We shall see that global uniformity in the adjustment of average is achieved through the application of a non-convention, international, private law instrument known as the York-Antwerp Rules.[12] While the law of general average is basically customary law, its tenets, in so far as English law is concerned, are reflected in the Marine Insurance Act 1906. The law of marine insurance itself is both statutory as well as contractual in scope. The law of carriage of goods by sea consists of two branches. One, the law relating to bills of lading is, in essence, contractual in scope but governed by international convention given effect through national legislation. The other, the law of charterparties, is purely contractual and belongs to the domain of private law. The York-Antwerp Rules are effectuated by incorporating them in marine insurance contracts and contracts of carriage or affreightment. In some civil law jurisdictions, the York-Antwerp Rules have been made part of the national law by incorporation into legislation.[13]

2. HISTORICAL EVOLUTION

General average is probably the most ancient rule of maritime law and practice. Its origins are lost in antiquity, but it is possible that the Phoenicians who were among the great seafarers of ancient history may have been the enunciators of this practice.[14]. It is said that the Rhodians who were the inhabitants of the island of Rhodes in the eastern Mediterranean Sea were the first people to develop a code of maritime law. In this code, often referred to as the Rhodian Sea Law, there was mention of the principle of general average. Evidence of this is found in the Justinian Digests, part of the codified Roman law which dates back to periods before and after Christ. The Roman law still serves as the foundation for much of modern maritime law. The following extract appears in the fourteenth book of the Justinian Digests under the heading *De lege Rhodia de Jactu*, which means "of the Rhodian law of jettison".

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[12] See section 4 *infra*, of this chapter where these Rules are discussed.

[13] See for example, the Maritime Code of Latvia and the new Maritime Law of Oman which are quite similar.

[14] See, *supra*, note 5 at p. 480.

> By the Rhodian law it is provided that if, for the sake of lightening a ship, a jettison of goods has been made, what has been given for all shall be made up by the contribution of all.[15]

Thus, it is evident that in antiquated times, cargo owners travelled on board ships with their merchandise from port to port like peddlars. The vessels mostly sailed around the Mediterranean and Aegean Seas where storms sprang up quickly and subsided soon thereafter as they do even to this day. Often the only way shipwreck could be avoided would be to lighten the ship by throwing the cargo overboard. Such act of jettison would benefit all the participants of the maritime adventure except the owner of the jettisoned goods. His consent to the jettison would first be bought with a promise that if the ship arrived safely at its destination port, all who benefited from his loss would pay a respective share to make good his loss. The consent of the owner of the cargo to be jettisoned was first expressly obtained; subsequently it became customary and came to be taken for granted. This custom, in time, became a part of the body of international maritime law.[16]

The principle having been so developed in Roman law became part of many maritime regimes during the middle ages including the Consolato del Mare of Barcelona and the famous Roles d'Oleron. The tiny island of Oleron in the Bay of Biscay was an English territory during the era of the Crusades. The Roles eventually found its way into the Black Book of Admiralty into which was copied many of its judgements.[17] It is the Black Book of Admiralty from which much of English maritime law is derived. The concept of general average was further extended and embodied in the majority of the European maritime codes.

When in the face of a storm, shipwreck could only be avoided by jettisoning cargo, the practice developed whereby only the master could declare and carry out a general average act. During the middle ages, particularly in the 14th and 15th centuries,

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[15] See Proshanto K.Mukherjee, *Maritime Legislation,* Malmo: WMU Publications, 2002 at p. 15 where at footnote 18 is cited, *inter alia*, the translation of the Digest of Justinian by Monroe, 1909. *See* Lowndes and Rudolf, where at p.1 the latin text is stated as *"Lege Rhodia cavetur ut si levandae navis gratia jactus mercium factus est, omnium contributione sarciature quod pro omnibus datum est."*

[16] *Supra*, note 11 at p. 2.

[17] *Supra*, note 5 at p. 481.

when the Italian port cities as independent republics were at the peak of maritime commerce, wealthy merchants no longer travelled on ships with their cargo. Gradually it became a universal practice for the master to be delegated the power and responsibility for making unilateral decisions regarding jettisoning of cargo to save the adventure.[18] Thus, even today, it is the master who decides whether a sacrifice or expenditure must be made because the conduct of the maritime adventure and the care of the ship and the cargo are entrusted to him. In *Ralli* v. *Troop*,[19] it was held by the United States Supreme Court that general average could only be triggered by the voluntary act of the master and no one else. The only objective of the act must be the safety of the common interests entrusted to the master's care. It was held to be doubtful that even a pilot in command had the power to decide on jettisoning cargo; much less the crew.

If, however, an emergency arose in the absence of the master, or if the master, for some reason or another, was incapable of taking action, the decision to make a sacrifice or expenditure could be taken by the officer discharging the master's duties for the time being. As will be discussed later, so long as the act was carried out voluntarily or intentionally and reasonably, in such cases it would qualify as a general average act. Indeed, even a person who was not an officer of the ship could order a general average act to be committed provided such order was sanctioned or ratified by the master. In *Papayanni and Jeromia* v. *Grampian Steamship Co.*,[20] a fire broke out on board a ship and the master proceeded towards a port. The port captain seeing the fire getting worse ordered the ship to be scuttled. The master believing that to be the best course of action made no objection. It was held that the scuttling was a general average act as the master had sanctioned the order of the port captain.

By historical evolution, there was implied in the act a promise by the shipowner to the owner of the jettisoned cargo, that when the ship came safely into port and the adventure was saved, those who profited from the loss would pay their fair share to make good the loss. In return for the implied promise, the owner of the jettisoned cargo impliedly consented to the sacrifice of his property. Although the Rhodian law speaks

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18 *Supra,* note 11 at p. 6.

19 (1894), 157 U.S. 386.

20 (1896), 1 Com. Cas. 448.

only of jettison, the principle has, over the years, been expanded to include all other cases of voluntary sacrifices made and expenditures incurred, for the benefit of all.

3. PRINCIPLES OF GENERAL AVERAGE

3.1 Definitions

Definitions of general average are crucial to a case in question. There are three kinds of definitions; those uttered judicially, the one contained in the Marine Insurance Act and one found in the York-Antwerp Rules.

3.1.1 Judicial Definitions

The classic judicial exposition of general average is the one attributed to Lawrence J. in *Birkley* v. *Presgrave*. It is as follows-

> All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all who are interested.[21]

However, in English jurisprudence, as early as in 1285, a dispute involving contribution towards a jettison was reported.[22] There were other cases in subsequent years in which average contributions were referred to.[23] It seems that eventually in the case of *The Copenhagen,*[24] the term "general average" was used. In this case Lord Stowell held-

> General average is for a loss incurred, towards which the whole concern is bound to contribute pro rata, because it was under gone for the general benefit and preservation of the whole. General average is that loss to which contribution must be made by both ship and cargo; the loss, or expense which the loss creates, being incurred for the common benefit of both.

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[21] (1801), 1 East 220 at p. 228.

[22] Sayles, "Select Cases in the Court of King's Bench, Vol 1, Selden Society Publications, Vol. 55, 1936, cited in Alex Parks, *supra,* note 5 at p. 482.

[23] *Hicks* v. *Palington* (1590), 72 E.R.590; *Sheppard* v. *Wright* (1698), 1 E.R. 13(H.L.)

[24] (1799), 165 E.R. 180.

In several European jurisdictions, the linguistic equivalents of the English words "common" or "gross" were used to describe "general" as in general average.[25] For example, in the *Guidon de la Mer*, the celebrated French maritime treatise of the 16th century, it is stated that an insurer must indemnify his assured merchant for "expenses, losses (*mises*), average and damage". The treatise then goes on to say that the word "average" comprises the whole of these and has several divisions. The divisions are then described as follows -

> The first is called common or gross average, that which arises by jettison, for ransom or composition, for cables, sails, or mast cut for the saving of the ship and merchandise, the compensation for which is levied upon (se prend sur) the ship and merchandise; for which reason it is called common.[26]

The Ordinance of Bilbao states that "[A] gross average is that which arises from the means interposed to free the ship and its lading from shipwreck or loss".[27]. As is evident, one of the connotations of the word "average" is loss or damage. For example, in the Ordinance of Louis XIV dated 1681, a definition of "general average" is stated as follows-

> Every extraordinary expense which is made for the ship and merchandise conjointly or separately, and every damage that shall occur to them from their loading and departure until their return and discharge, shall be reputed *average*. Extraordinary expenses for the ship alone, or for the merchandise alone, and damage which occurs to them in particular, are simple and particular average; and extraordinary expenses incurred and damage suffered, for the common good and safety of the merchandise and the vessel, are gross and common average.[28]

However, in common Italian, the word "avere" has been used to denote the basis of contribution or contributory value and also to describe property. In the Italian City Code of Pisa, the *Constitutum Usus* dated around 1160, these meanings are evident. It is said in that Code that the jettison and damage by jettison shall be equalised over "*totum*

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25 *Supra,* note 5 at p. 482.

26 2 Pard. 387 cited in Lowndes and Rudolf at p. 8.

27 2 Mag. 396 cited in Lowndes and Rudolf at p. 9.

28 Ordonnance. Tit. 7, Arts. 2, 3 : 4. Pard. 380 cited in Lowndes and Rudolf, *supra*, note 11 at pp. 8 to 9.

avere", all the property, remaining in the ship.[29] Other learned authorities have stated that the word "average" is of uncertain Mediterranean maritime origin.[30]

A comprehensive definition of general average is found in the decision of the House of Lords in *Kemp* v. *Halliday*. In this case Lord Blackburn held as follows-

> ...In order to give rise to a charge as general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than exposed to a common jeopardy; but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if, instead of money been expended for the purpose, money's worth were thrown away. It is immaterial whether the ship owner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off. It is quite true, that so long as the expenditure by the shipowner is merely such as he should incur in the fulfilment of his ordinary duties as shipowner, it cannot be general average; but the expenditure in raising a submerged vessel with cargo is extraordinary expenditure, and is, if incurred to save the cargo as well as the ship (which, prima facie, is the object of such an expenditure), chargeable against all the subjects in jeopardy saved by this expenditure.[31]

3.1.2 Statutory Definitions

The Marine Insurance Act 1906 contains definitions of "general average loss" and "general average act" in s.66 as follows-

> (1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well a general average sacrifice.
>
> (2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in the time of peril for the purpose of preserving the property imperilled in the common adventure.

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29 *Ibid.* at p. 7.

30 See *Ibid.* at p.8, footnote 31 at that page.

31 (1865), LJQB 233. at p.242.

It has been held, and it is quite apparent, that the above statutory definitions are of a wider application than simply to marine insurance.[32] They represent codifications of customary law notions of general average.

3.1.3 York-Antwerp Rules Definitions

In Rule A of the York-Antwerp Rules there is a definition of general average stated 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.

In *Australian Coastal Shipping Commission* v. *Green*,[33] it was held that the York-Antwerp Rules definition must be applied exclusively where the parties to a contract of carriage or of marine insurance have agreed to the application of the Rules. Where the York-Antwerp Rules are applicable under a marine insurance contract, the definition of general average in the Rules as well as those contained in the Marine Insurance Act have to be considered. Notably, there is no conflict in substance between these definitions, but in the context of a particular case, every relevant element of a definition needs to be given detailed consideration. In such a situation the words "voluntarily and reasonably" in the Marine Insurance Act definition as distinguished from "intentionally and reasonably" in the York-Antwerp Rules definition are of some significance and this is examined later in this chapter.

3.2 Legal Basis of Right to General Average

While the antiquity of general average is acknowledged as possibly being of Rhodian origin, there are different opinions regarding the legal basis on which it is founded. Some are of the view that it is based simply on the notion of equity or natural justice. Others would rationalise it on the basis of some form of implied contract or agency. The latter view would be consonant with English common law thinking. The natural justice based rationale has been expressed in the following words.

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32 *Australian Shipping Commission* v. *Green* [1971] 1 Q.B. 456 at p. 478.

33 *Ibid.*

> This obligation is founded on the great principle of distributive justice; for it would be hard that one man should suffer by an act which the common safety rendered necessary, and that those who received a benefit from that act should make no satisfaction to him who had sustained the loss.[34]

In *Burton* v. *English*[35] Burton L.J. said-

> ...the question is in most cases one merely of words, nevertheless in some cases it may be one of practical importance. The best view supported by judicial authority in this country is that the right arises not out of contract, but from the old Rhodian laws, and has thence become incorporated into the laws of England as part of the law maritime.[36]

It can perhaps be conceived that the cargo owners and the shipowner would have, at the time of entering into a carriage contract, also impliedly agreed with each other to grant to the master the ostensible power to make all necessary sacrifices in the event of an emergency. Whatever the legal basis may have been there is no argument that general average evolved as custom and practice from time immemorial. As such it is of little practical importance. Where, however, the right is tempered by the application of statutory rules or a contract, the basis of the right is pertinent especially with regard to limitation periods. [37]

The connection of general average with marine insurance is historically traceable to at least the 16th century. In the *Guidon de la Mer*, a French treatise dating back to the period between 1556 and 1584, there is mention of general average in the context of marine insurance. This text is a digest of the law of marine insurance written for the consular court of the port of Rouen. As reported by the eminent French maritime historian, Pardessus, the relevant passage reads as follows-

> The insurer is bound to indemnify his merchant for the expenses, losses (*mises*), average, and damage which occur to the merchandise from the

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[34] Alex L. Parks, *Insurance* (8th ed.), p. 277 cited in Lowndes and Rudolf, *supra*, note 11 p. 12 at footnote 47.

[35] (1883), 12 Q.B.D. 218 at p. 223.

[36] For contrary or other views, see cases cited by Lowndes and Rudolf, *supra*, note 11 at pp. 13 to 18.

[37] *Ibid.* at pp. 12-13. See also pp. 13 to 19 for further judicial opinions.

time of loading, the whole of which is comprised in this word *average,* which receives several divisions.[38]

3.3 Ingredients and Elements

The ingredients of general average may be described as its fundamental characteristics. These can be traced historically to the origins of the law of jettison. In contrast, the elements of general average are those which appear in the definitions referred to above. It is notable that the fundamental ingredients have in some shape or form been built into the definitions. All these will be discussed in detail shortly. For the time being suffice it to say that the fundamental ingredients of general average have a striking similarity to their counterparts in the customary law of salvage. This commonality is inevitable given the historical roots of both these branches of the law and that both in essence relate to savings of maritime property. The three ingredients of a general average act can be described as follows-

- the act must have been made in a time of peril;
- the act must be voluntary;
- the adventure as a whole must be saved in the special sense of it being successfully completed.

The above ingredients are reflective of danger, voluntariness and success in the law of salvage. Before entering into a detailed discussion of the ingredients and elements, it would be pertinent to first examine the York-Antwerp Rules which are intimately connected to them.

4. YORK-ANTWERP RULES

Though the principles of general average were commonly accepted in virtually all maritime countries, there were differences in the way average contributions were determined. In the 18th century the law and practice of general average in England and that in the United States and continental Europe became increasingly divergent. This state

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[38] 2 Pard. 387 cited in *ibid.* at p. 8, footnote 33.

of affairs naturally resulted in uncertainties and gave rise to problems of conflict of laws in the international maritime arena. Attempts were therefore made from time to time to create international uniformity through a set of Rules. In 1860, a conference was held in Glasgow with the objective of establishing a uniform codification of the law of general average. The conference was instigated by a number of commercial bodies with maritime interests including the Underwriters' Association of Liverpool. A circular letter was then sent out to all the maritime countries of Europe as well as to the United States. At the Glasgow conference it was decided to proceed with the reform through the enactment of legislation rather than by voluntary agreement.[39] In its aftermath, some two years later a draft bill was produced. It was eventually discussed at a congress held in York in 1864. At this congress eleven Rules were developed and it was recommended that these Rules be incorporated in the national legislation of countries as well as in contracts of affreightment; *i.e.,* bills of lading and charterparties. Mainly due to the lack of co-operation and initiative on the part of Lloyds, the idea of a legislative basis for the Rules gradually dissipated.[40]

In 1877, a meeting was convened in Antwerp with the object of again seeking international uniformity on the subject of general average. The York Rules were adopted with some modifications and a twelfth Rule was added. Gradually, the Rules began to be incorporated in bills of lading and charterparties. Numerous mutual insurance associations adopted the Rules and underwriters in general agreed to insert foreign general average clauses in policies without charging an additional premium. Decisions of English courts endorsing the principles embodied in the Rules assisted immensely in this progressive development. Eventually in 1890, at a conference in Liverpool, some amendments to the existing Rules were effected and the York-Antwerp Rules were adopted.[41]

Major amendments have been effected several times since then, notably in 1924, 1950 and 1974. An important amendment was made in 1990 to harmonise the Rules with

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[39] See *supra*, note 11 at pp. 40 to 42 for further details including the exact contents of the circular letter which set out the problems in a comprehensive fashion.

[40] *Ibid.* at p. 46.

[41] See Richard Cornah, "The Road to Vancouver – the Development of the York-Antwerp Rules", *JIML* 10 [2004] 2 at p. 155.

the International Salvage Convention, 1989, in particular, the special compensation regime. At the CMI Conference of 1994 held in Sydney a resolution was adopted to the effect that the 1974 Rules as amended in 1990 be renamed the York-Antwerp Rules 1994. This was only the fourth time in the whole of the twentieth century that a new edition of the York-Antwerp Rules was promulgated.[42] The Rules have been revised again under the auspices of the CMI and following the deliberations at the Vancouver Conference held in May-June 2004, a new version of the Rules has been introduced referred to as the York-Antwerp Rules 2004.[43] The scheme of the York-Antwerp Rules as they have evolved historically is described below.

Prior to 1994, there was first a Rule of interpretation; second, there were seven Rules that were identified by the capital letters A to G known as the lettered Rules; and third, there was a set of numbered Rules. In the 1924 version of the Rules there were twenty-three numbered Rules. In the 1950 revision, they were reduced to twenty-two.[44] The architects of the 1924 Rules clearly intended the lettered Rules to set out the general principles and all cases provided for by the numbered Rules to be considered as general average. The general principles embodied in the lettered Rules were intended to apply to those particular cases which fell outside the scope of the numbered Rules.[45]

It is noteworthy that the perceived intention of the framers of the 1924 Rules as described above was given a different colour in the English jurisdiction in the leading case of *Vlassopoulos* v. *British and Foreign Marine Insurance Co. (The Makis)*[46] It was held in that case that the lettered rules embodied a code of general average and that the numbered Rules were only specific examples. As such, the numbered Rules were held to be subordinate and subject to the general principles set out in the lettered Rules. In other words, there could be no general average even if the situation came under one of the numbered Rules, if the case did not also fit into one of the lettered Rules. The facts of *The Makis* were as follows.

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42 See N. Geoffrey Hudson, "The York-Antwerp Rules: Background to the Changes of 1994", (1996) 27 *JMLC* at p. 469.

43 See CMI Yearbook 2003, Part II Documents for the Vancouver Conference at pp. 274-311 containing the Report of the CMI Sub-Committee on General Average.

44 *Supra,* note 7 at p. 335.

45 *Supra*, note 11 at p. 54.

46 [1928], 31 Ll.L.R. 313.

The foremast of the vessel *Makis* broke while cargo was being loaded at Bordeaux causing damage to the vessel. As a result, repairs were undertaken in port before the vessel could safely sail. Besides the cost of repairs, other related expenditures such as crew wages, provisions, cargo handling etc. were incurred by the plaintiff shipowner. While *en route* to Cardiff the vessel's propeller suffered damage as a result of which repairs had to be effected at Cherbourg where similar related expenses were again incurred. Under the charterparty general average was to be adjusted according to the York-Antwerp Rules 1924 and the vessel's insurers were similarly bound by such adjustment. In virtually all jurisdictions, the expenses other than the cost of repairs, would have been treated as general average under the 1890 Rules. Roche J., however, declined to allow any expenses incurred in Bordeaux as general average because the ship and cargo were at no time in peril while the vessel was in that port. The decision led to widespread dissatisfaction in the shipping community as a consequence of which leading shipowners and underwriters in the United Kingdom entered into the so-called Makis Agreement. It was expressed as follows-

> In consequence of the *Makis* decision, questions have arisen as to the intention of the parties in framing the York-Antwerp Rules, 1924, and it is desirable to set doubt at rest by agreeing that the Rules shall be construed as if they contained the following provisions: 'Except as provided in the Numbered Rules 1 to 23 inclusive, the Adjustment shall be drawn up in accordance with the Lettered Rules A to G inclusive.'

Eventually, in the 1950 revision of the Rules, the following new Rule of Interpretation was adopted which has its genesis in the Makis Agreement.

> In the adjustment of general average the following lettered and numbered Rules shall apply to the exclusion of any Law and Practice inconsistent therewith. Except as provided by the numbered Rules, general average shall be adjusted according to the lettered Rules.[47]

The salient changes to the 1974 Rules which resulted from the CMI Conference of 1994 held in Sydney, Australia, are set out succinctly by N. Geoffrey Hudson. They are summarised below-

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47 *Supra,* note 7 at pp. 335 to 336; *supra,* note 11 at pp. 54 to 55 and 64 to 68.

a) a rule paramount has been introduced which provides that in no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred;

b) a composite amendment has been made to Rule C to exclude any allowance for "losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutants from the property involved in the common maritime adventure;

c) a new Rule XI(D) has been added which provides for the allowance of the cost of measures undertaken to prevent or minimise damage to the environment when incurred as part of certain specified general average operations;

d) a new Rule B has been inserted to deal with general average situations involving convoys of tug and tow or push-boat and barges;

e) two new paragraphs have been added to Rule E with the objective of reducing delays in the preparation of adjustments;

f) some amendments have been made to the wording of Rule G to keep general average liabilities as constant as possible in cases where cargo is forwarded to its destination from a port of refuge;

g) amendments have been made to Rules II, V and VIII to clarify that allowances made under these Rules for loss or damage are confined to the property involved in the common maritime adventure;

h) an amendment has been made to Rule IX to deal with cases where cargo is used as fuel for the common safety;

i) in Rule XVII, mail and private automobiles accompanying passengers have been added to the list of interests exempted from contribution; and

j) the period during which general average interest will continue to run has been extended to three months after issue of the adjustment.[48]

It is beyond the scope of the present section of this Chapter to enter into a detailed analysis of the contents of each Rule. Nonetheless, it should be apparent that, by and large, the principles embodied in the Rules are consonant with the provisions of s.66 of the Marine Insurance Act 1906, which in turn represent a codification of the general principles of the customary law of general average that has evolved over time. In the following section of this Chapter these principles will be discussed in detail together with appropriate references to the relevant case law. In that discussion, cross references will be made to the corresponding provisions in the York-Antwerp Rules. It will serve to illustrate the compatibility of the regimes and the practical usefulness of the Rules, being as they are, incorporated into bills of lading, charterparties and marine insurance contracts.

The new York-Antwerp Rules 2004 contain a number of significant changes. Essentially, the final product is a compromise between the position taken by the IUMI advocating a drastic reduction of general average allowances and the position largely taken by the average adjusters to maintain the *status quo*. The details of the debate leading up to the revision of the 2004 Rules are discussed later in this Chapter.[49] The references to the Rules in this chapter are references to the 1994 Rules which continue to be the Rules in effect at the time of writing of this chapter.

5. GENERAL AVERAGE AS A MARINE RISK

5.1 Loss and Act

A loss in general average arises from a general average act and such an act may be in the nature of a sacrifice or expenditure. In some instances a sacrifice manifests itself as an immediate loss whereas in others there is no immediate loss but there is a future

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[48] *Supra*, note 42 at pp. 476 to 477.

[49] See generally CMI documents of the Vancouver Conference available on the CMI website www.comitemaritime.org See also Richard Cornah, *supra*, note 41; Richard Cornah, "The Changes Introduced by the York-Antwerp Rules 2004", *JIML* 10 [2004] 5 at p. 403 and John MacDonald, "General Average and the York-Antwerp Rules: Common Safety and Other Considerations", *JIML* 9 [2003] 5 at p. 439.

expenditure. For example, the act of putting a ship into a port of refuge is an extraordinary measure which is an act of sacrifice and which entails an extraordinary expenditure even though it may be incurred in the future.[50] However, generally speaking, in the first category fall those losses which arise out of sacrifices of parts of the ship or cargo made deliberately to save both from perishing. The second category consists of costs and expenses incurred as a result of extraordinary measures taken to preserve the ship and cargo. Although there are no differences in principle between the two categories of losses, the distinction lies in the different practical consequences which occur from the application of the basic principle. A divergence in the application and practice of the law of general average was thus evident in various maritime jurisdictions.[51] In terms of the background to the two categories of losses, Arnould has this to say-

> Losses of the first class are alone mentioned in the text of the Rhodian law which is generally regarded as the foundation of the whole doctrine of general average; but it is evident that expenses incurred by the owners of a part, owing to extra-ordinary measures adopted for the preservation of the whole, give just as valid a claim to contribution in general average as any other species of intentionally incurred for the same purpose; and they have been accordingly admitted to give such a claim by the law and practice of all maritime states.[52]

The Marine Insurance Act recognises that general average losses are insurable. The indemnification of the losses is subject to the relevant provisions in the marine insurance contract which will usually incorporate the York-Antwerp Rules. For the Rules to apply to the marine insurance contract, whether it is in respect of hull or cargo, they have to be incorporated in the contract of affreightment.

In s. 66(1) of the Marine Insurance Act 1906, a general average loss is defined as follows-

> (1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

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[50] See *supra*, note 2 at p. 798. See in particular the reference in footnote 4 of that page to the case of *Svendsen* v. *Wallace* (1883), 11 Q.B.D. 616 where at p. 617 Lopes J. said "The putting into a port of refuge ... is an act of voluntary sacrifice."

[51] *Ibid.* at pp. 798 - 799.

[52] *Ibid.* at p. 799.

The term "general average act" is defined in subsection (2) of that section. It reads-

> (2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

There is little doubt that Rule A of the York-Antwerp Rules describing a general average act closely follows the statutory definition provided in s.66(2) of the Marine Insurance Act cited above. The only substantive differences in wording seem to be that in the York-Antwerp Rules, "intentionally" is used instead of "voluntarily" and "common safety" is used in place of "time of peril"[53]. What emerges out of these two virtually identical definitions is a number of essential elements which can be listed as follows.

(a) the act, whether it is a sacrifice or an expenditure must be "extraordinary";

(b) it must be made "voluntarily" or "intentionally";

(c) it must be "reasonable";

(d) it must be made in "time of peril", in other words, for the "common safety"; and

(e) it must preserve property from peril in a "common maritime adventure"; in other words, the voyage must be successfully completed.

As far as the English statutory definition is concerned, the elements can be said to be a codification of principles set out judicially.[54]

5.2 Sacrifice and Expenditure

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[53] In Lowndes and Rudolf, *supra,* note 11 at p. 77, the two definitions are set out expression by expression for ease of comparison.

[54] See *supra*, note 9 at pp.736 to 738 for summaries of relevant cases some of which have been cited above in this Chapter.

As expressed in the statutory as well as the York-Antwerp Rules definition, there are two types of general average losses, namely, sacrifices and expenditures. Sacrifices may be made of cargo, ship or freight. We have already referred to jettison as the classic example of sacrifice of cargo which has come down to us from the Rhodian law. If the jettison is deliberate and is made for the purpose of saving the whole adventure from a real and imminent peril, it is a proper general average act. However, it is important to note that in the case of deck cargo, unless the cargo was loaded on deck in accordance with the custom or practice of the trade, its jettison will not give rise to general average contribution.[55] This is contained in Rule I of the York-Antwerp Rules.

Damage to cargo caused by attempts to extinguish fire on board is a general average sacrifice. Thus in *Whitecross Wire Co.* v. *Savill* [56] water damage to cargo was allowed as general average. Rule III of the York-Antwerp Rules provides for this as well as for damage by beaching or scuttling of a burning ship. However, damage caused by smoke or heat is not compensable as a general average sacrifice.

Similar principles as those referred to above apply with respect to sacrifice of a ship or parts of a ship. Thus, damage to a ship caused by an attempt to extinguish a fire on board or a deliberate stranding for the preserving of common safety are allowed in general average. These are contained in Rules III and V, respectively. As regards parts of a ship such as stores, anchors, tackle or apparel are concerned, again, so long as they are sacrificed for the common safety in a time of peril, they can be allowed as general average. Rules IV and IX cover these provisions.

A sacrifice of the ship or of its cargo may result in the loss of freight. Besides the shipowner, a charterer may have also suffered a loss of freight from such sacrifice. There have been cases where freight has been lost because the cargo had to be sold at a port of refuge to raise finances for the continuation of the adventure. A loss of a ship may also result in the loss of freight. However, a claimant must show that at the time the ship or cargo was sacrificed, freight was being earned and that the earning of freight was dependent on the safety of the ship or cargo. Rule XV only covers loss of freight arising

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55 *Strong* v. *Scott* (1889), 14 App. Cas. 601 at 609.

56 (1881), 8 Q.B.D. 653

from loss of cargo. It is suggested, however, that loss of freight resulting from loss of the ship may be made good under the lettered Rules.

Common examples of general average expenditure are costs of salvage covered by Rule VI, and expenses incurred as a result of going to a port of refuge covered by Rules X and XI. Again, the expenses must be incurred in consequence of "accidents, sacrifice or other extraordinary circumstances" necessary for the common safety. Cargo handling costs are also included; as are costs of storage, insurance, fuel, stores and wages and maintenance of the master, officers and crew.

5.2.1 The Insurer's Position *Vis a Vis* a Sacrifice and an Expenditure

The first notable characteristic of a sacrifice is that it is finite. Since the loss is physical it is easily quantifiable. Thus, the insurer's liability to the assured in respect of a sacrifice is relatively clear in that it is for the whole loss regardless of whether or not there is contribution from the other parties concerned. In other words, the assured can claim from the insurer directly and in full for his loss. In contrast, for a general average expenditure, the insurer is only liable for a proportion of the whole loss; that proportion which falls to be the contribution of the assured. Because a general average expenditure is not a physical loss of the insured *res* it is quite different from a general average sacrifice. This distinction between the two types of general average losses and the consequential difference in their treatment as regards indemnification is clearly reflected in s. 66(4) of the Marine Insurance Act which reads as follows-

> Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.[57]

It is notable that in the case of a general average sacrifice, where the insurer has paid in full, he is then entitled to recover by way of subrogated rights, the contributions

[57] A corresponding provision is found in the Institute Clauses which will be dealt with in a subsequent section of this Chapter.

payable by other participants in the maritime adventure. In *Dickinson* v. *Jardine*,[58] the vessel *Canute* after striking a reef jettisoned part of its cargo of tea in chests. After refloating, the vessel continued on its voyage and discharged the remaining cargo. Upon a claim being made by the plaintiff shippers for a general average loss in full, the insurers indemnified them only for their contribution of the loss contending that they could recover the balance from the other parties liable to contribute. The Court held that the plaintiffs were entitled to recover the whole of the general average loss claimed by them and that the insurers, for their part, would then be entitled by subrogation to recover from the other parties liable to contribute. Bovill C.J.'s opinion was expressed as follows-

> In this case, the goods were insured against jettison, amongst other risks, and the goods were jettisoned, and I think the plaintiffs are entitled, therefore, to recover the sum insured. It is true that there is a remedy against the owners of the ship and the remainder of the cargo, if they ultimately arrive safely at their destination, for part of the loss. But this does not affect the plaintiff's right against the underwriters, who will then be entitled to stand in their place, and recover contributions from the other parties who are liable.[59]

Section 66(4) of the Marine Insurance Act is quite clear that in the case of a general average sacrifice, the assured is entitled to indemnification for the whole loss even if his right of contribution from other parties has not been enforced. In contrast, it is provided in that subsection that for a general average expenditure, the assured can only be indemnified for *the proportion of the loss which falls upon him. (emphasis added)* The question is what do these words really mean. Do they mean only the contribution allocated to the assured, or can they accommodate a wider meaning to include the unpaid contributions of other parties concerned? In *Green Star Shipping Co. Ltd.* v. *London Assurance and Others*,[60] the plaintiff assured's vessel *Andree* was insured under two hull policies. As well, under the P&I cover there was indemnity available for cargo's proportion of general average if that was not recoverable. The question before the court was which policy was liable for the unpaid cargo contributions where the cargo owners only paid the salved value of the cargo leaving a shortfall bearing on the shipowners. The

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58 (1868), LR 3 CP 639.

59 *Ibid.* at p. 642.

60 [1933] 1 K.B. 378.

court held that the P&I Club was liable. In expanding on the meaning of s. 66(4) of the Marine Insurance Act 1906, Roche J. held as follows-

> if a shipowner, being the assured under a policy in the present form, incurs expenditure for general average and the cargo's contribution falls short of what is hoped or expected by reason of the diminution or extinction of its value before the adventure terminates, then I think that loss falls into the category of the proportion of the loss which falls upon the assured, the shipowner, and is within the meaning of those words in s. 66(4) of the Marine Insurance Act.

In the case of *The Mary Thomas,*[61] the plaintiff shipowners took out a hull and machinery and a freight policy on the vessel. The hull policy had a foreign adjustment clause as an alternative to the application of the York-Antwerp Rules if the contract of affreightment so provided. While *en route* to Rotterdam, the vessel stranded on a reef near Malta. After removal of part of the cargo for lightening the vessel, the remainder of the cargo was unloaded in Valletta where the vessel was repaired. After repairs, the cargo was reloaded and eventually discharged in Rotterdam where average was adjusted under Dutch law. The defendant insurers paid the shipowners' proportion of hull and freight. The Dutch Court held that the shipowner was not entitled to contribution from the cargo owners by reason of the master's negligence. The plaintiff shipowners then sought to recover the unpaid cargo contributions from the defendant hull insurers. In upholding the decision of the court below, the Court of Appeal held that because of the express foreign adjustment clause in the policy, the Dutch average adjustment was conclusive. As such, the defendants were only liable for the proportion of the general average expenditure allocated to the shipowners and not the unpaid contributions which may have been recoverable from the cargo owners.

The court in the *Green Star Shipping* case distinguished *The Mary Thomas* by pointing to the existence of the foreign adjustment clause in that case. But it must be noted that *The Mary Thomas* was decided prior to the enactment of the Marine Insurance Act 1906. The question remains as to how it might be decided under s. 66(4) of the Marine Insurance Act today.[62] As far as the decision in *Green Star Shipping* is

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[61] [1894] P. 108 (C.A.)

[62] See the contrary decisions in *Harris* v. *Scaramanga, infra*, and *Power* v. *Whitmore, infra*, both of which were pre-1906 cases.

concerned, it is this writer's view that the words of the statute were stretched too far by the court. By application of any rule of statutory construction it would appear that the words "proportion of the loss which falls upon him" in s. 66(4) of the Marine Insurance Act refer to that proportion which falls upon the assured following average adjustment and not his whole loss. If it were otherwise, the distinction made in that subsection between expenditure and sacrifice in terms of the assured's recoverability from his insurer, would be meaningless.

5.3 Contribution and Adjustment

Contribution is the core element in the notion of general average. Arnould defines general average contribution as -

> a contribution by all parties to a maritime adventure, to make good the loss which has been sustained by one or more of their co-adventurers from sacrifices made, or expenses incurred, for the preservation of the whole.[63]

The fundamental precept is that those who have benefited from the sacrifice or expenditure must contribute towards those who have suffered the loss for the sake of the common adventure. This is characterised as a statement of law in s. 66(3) of the Marine Insurance Act 1906 which provides as follows-

> Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

The cardinal rule regarding contribution is that a person who has suffered a loss cannot claim a general average contribution if the peril which caused the sacrifice or expenditure was due to his own fault or neglect. Thus, if a shipowner in breach of his contract of carriage fails to make the ship seaworthy and the unseaworthiness causes the peril, then he cannot claim general average contribution. This was illustrated in the case of *The Eisenerz*,[64] In this case it was also held that the duty of the carrier under the law of

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63 *Supra,* note 2 at p. 801.

64 [1974] S.C.R. 1125 (Can.).

carriage of goods by sea is to exercise due diligence to make the ship seaworthy at the commencement of the voyage.

The fault in question must be an actionable wrong, *i.e.,* a wrong for which there is a remedy in law. In other words, if a vessel becomes unseaworthy after the shipowner has fulfilled his duty at the commencement of the voyage, contribution will be claimable by him. If, for example, the shipowner is excepted from liability, as it is in the case of the Hague and the Hague-Visby Rules, or liability is otherwise excluded by contract, it is not an actionable wrong. Therefore, general average contribution claimed by the shipowner would be allowed even if there was negligent navigation. Notably, while this notion of fault is consonant with English law, the United States courts at one time viewed this matter differently. In *The Irrawady*,[65] the question was whether section 3 of the relevant U.S. legislation, the Harter Act, which relieved the shipowner from liability for damage caused by navigational error, allowed him to claim general average contribution where there was negligent navigation. The Supreme Court of the United States held that he could not. To counteract this and other subsequent decisions, the Jason Clause was created, which in its amended form is called the New Jason Clause. It was named after the case known as *The Jason*[66] in which the validity of the clause was first upheld. This clause is now almost invariably inserted in bills of lading and charterparties of ships trading to and from the United States.

In general average, contributions are in proportion to the respective values of the interests saved. The process of determining the respective contributions is known as average adjustment and is carried out by professionals known as average adjusters. Average adjustment itself has its own historical background. According to Lowndes and Rudolf, the first statutory recognition of an average adjuster as a professional is contained in section 8 of the Compensation (Defence) Act 1939. Under that provision, the third member of the Shipping Claims Tribunal must be "a person appearing to the Lord Chancellor to have special qualifications as an average adjuster or accountant. It is noted by the authors that this statutory recognition of an average adjuster as an individual

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65 (1897), 171 U.S. 187.

66 (1912), 225 U.S. 32.

appeared some 140 years after the concept of general average was recognised by Lord Stowell in *The Copenhagen.*[67]

Under a contract of carriage, the shipper and the shipowner agree that in the event of a general average loss, adjustment will take place according to the law and practice as specified by the shipowner. Under customary law, the adjustment is carried out in the destination port or the place of delivery of the cargo. This customary law principle was exemplified in the case of *Simmonds* v. *White*.[68] In this case, Abbott C.J. held as follows-

> There are, however, many variations in the laws and usages of different nations as to the losses that are considered to fall within this principle [general average]. But in one point all agree; namely, the place at which the average shall be adjusted, which is the place of the ship's destination or delivery of her cargo.[69]

In this case, the cargo owner was compelled to accept average adjustment based on Russian law since the destination port was in that country. After referring to the tacit assent of the shipper to general average as a known maritime usage, the learned judge went on to say-

> And, by assenting to general average he must be understood to assent also to its adjustment, and to its adjustment at the usual and proper place; and to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made.[70]

In *Harris* v. *Scaramanga*[71], the issue before the court was whether in circumstances where average adjustment is made in the destination port pursuant to its laws, underwriters of an English policy containing no foreign adjustment clause would be liable. In this case, the vessel suffered damage from bad weather during a voyage to Bremen from a Black Sea port and went into a port of refuge on two occasions to effect repairs. The master raised money on bottomry bonds on ship, cargo and freight. In Bremen, following average adjustment, the master was unable to pay to the bond holders

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67 (1799), 1 C. Rob. 289.

68 (1824), 2 B&C 805.

69 *Ibid.* at p.811.

70 *Ibid.* at p.813.

71 (1872), L.R. 7 C.P. 481.

the ship and freight contributions and added the outstanding amounts to the cargo contribution. The cargo owners claimed indemnity from their insurers which was refused. The Court, per Brett J., found in favour of the plaintiff cargo owners and citing both text and case law authority held -

> when a general average is *fairly stated in a foreign port* [emphasis added], and the assured is obliged to pay his proportion of it, he may recover the amount from the insurer, *though the average may have been settled differently from what it would have been at the home port.*[72]

It is notable, however, that in an earlier case, *Power* v. *Whitmore.*[73] it was held that average adjustment according to a foreign law need not be binding in all cases. In this case defendant insurers contested the claim of the plaintiff who was a Portuguese merchant. The plaintiff claimed indemnity from the defendant for the cost of his contribution. The ship suffered damage on a voyage from London to Lisbon and put into Cowes for repairs. An average statement was prepared upon the vessel's arrival in Lisbon. The court found for the insurers (per Lord Ellenborough) and held that "general average to which their indemnity is confined, is general average as it is understood in England where this contract of indemnity was formed."[74]

In the United States, general average adjustments are often sent to the Committee on Adjustments of the American Institute of Marine Underwriters to be examined. The examination is primarily directed towards the accuracy of the adjustment calculations. Nevertheless, the Committee may consider it appropriate to provide its views on substantive matters as well.[75]

5.4 Time of Peril

The words "in time of peril" in s.66(2) of the Marine Insurance Act signify the presence of danger. It is notable that in Rule A, which is the corresponding provision in the York-Antwerp Rules, there is no express equivalent to this phrase although the presence of danger is implied in the words "common safety" and "preserving from

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72 *Ibid.* at p. 495.

73 (1815), 4 M&S 141.

74 *Ibid.* at p.150.

75 Buglass, "Ground for Refusal to Contribute in General Average" (1975) 4 *LMCLQ* 390.

peril"[76]. It has been an established requirement that the danger or peril must be real and imminent and not merely an apprehension. Furthermore, there must be danger of physical damage to the insured property or destruction or deprivation thereof. It is not enough that there is an economic or commercial loss by way of devaluation of the property.[77] The eminent Emerigon, author and historian, has emphasised this point in the following words-

> In order to give a claim to a general average contribution, it is not enough that a jettison has been made: that measure must have been forced upon those resorting to it by the fear of perishing. (*par la crainte de perir*) ... A panic terror will not excuse the captain who has had recourse to a jettison without being forced to it by real danger.[78]

Arnould states-

> I am not bound to make good to another a loss he has intentionally incurred, with a view to my benefit, if such loss was one which a man of ordinary firmness and sound judgment would not, under the circumstances, have submitted to. The sacrifice must have been resorted to as the sole means of escaping destruction.[79]

In other words, even if the sacrifice is made in good faith no contribution is claimable unless there was real danger. In *Joseph Watson* v. *Firemen Funds Insurance Co.,*[80] the master using reasonable judgement turned on the steam fire extinguishing system into the cargo hold in the mistaken belief that there was a fire. The court rejected this as a general average act. But in an American case, *The Wordsworth*[81] it was held that a master's reasonable but mistaken act may be allowed in general average. In that case a situation of imminent danger to the adventure as a whole was thought to exist for which the sacrifice was considered necessary. In fact there was no imminent danger but the court treated the sacrifice as general average. In an old English case, *Nesbitt* v. *Lushington*[82] it was held that the peril must be a threat to the whole adventure and not only to a part of it.

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76 See the comparative analysis of corresponding texts of s.66(2) and Rule A presented in Lowndes and Rudolf at p. 77.

77 See the decision of the arbitrator in *The Barge J. Whitney* (1968), A.M.C. 995.

78 1 Emerigon, c.12, s.39, at pp. 587 and 588 cited in Arnould, *supra,* note 2 at p.807.

79 Arnould, *ibid.* at p. 806.

80 [1922] 2 K.B. 355.

81 (1898), 88 Fed. Rep., 313.

82 (1792), 4 T.R. 893.

In that case, an angry mob forced the master of a stranded ship to sell its cargo of wheat at three quarters of its invoiced price. The court recognised that it was a time of scarcity and that the persons who took the cargo intended any harm or damage to be caused to the ship or any other part of the cargo. The court held that given the circumstances the whole adventure was never in jeopardy and rejected the act as a general average loss. In *Whitecross Wire Co.* v. *Savill*,[83] however, where part of the cargo had been discharged, and afterwards a danger arose which threatened the ship and all of the cargo that remained on board, general average was allowed.

In *Vlassopoulos* v. *British and Foreign Marine Insurance Co.*,[84] Roche J. held that although the peril must be real it is not necessary that the ship must actually be in the grip or even nearly in the grip of the peril. In other words, the danger must be impending but not necessarily immediate.[85] The learned judge continued that if it were so, ship masters would have to wait until a situation developed where the ship would have to be in the midst of a disaster before a general average act could be legally justified. From the practical perspective of good seamanship, it is not at all desirable that a master should have to wait that long before he can take the requisite action in the interest of safety of the ship. In *Societe Nouvelle d'Armement* v. *Spillers and Bakers Ltd.*,[86] Sankey J. held that no definition can be provided of the degree of danger or amount of peril necessary to give rise to a general average contribution. That is a question of fact left to each judge to decide based on the circumstances of the case. It appears that the two above-mentioned decisions have led one author to opine that "[I]t is now well established that a loss may be a general average loss even when the peril insured against is neither imminent nor immediate.[87] Support for this opinion is not borne out by other eminent text writers.[88] Indeed, in the last mentioned case, Sankey J. states that it is not desirable to define the degree of danger or amount of peril especially where it impossible to do so. But he acknowledges that there is authority for the requirement that "the peril must be imminent,

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83 (1882), 8 Q.B.D. 653.

84 *Supra*, note 46 at p. 199 to 200.

85 See *supra*, note 2 p. 806 at note 32 of that page.

86 [1917] 1 K.B. 865.

87 *Supra,* note 9 at p. 747.

88 See for example *supra,* note 7 at pp. 288 –289.

which means that it must be substantial and threatening and something more than the ordinary peril of the seas".

In the context of the factual situations in some of the cases mentioned above, Rule III of the York-Antwerp Rules which deals with extinguishing fire on board a ship is relevant. In essence the Rule states that damage to ship or cargo from water used to extinguish a shipboard fire is allowable as general average. It is notable that Rule VII deals with damage caused to the machinery and boilers of a ship as a result of the ship running aground. If the ship being in such peril is attempting to refloat, then such damage will be allowed in general average if the damage is shown to have arisen from an actual intention to refloat the ship for the common safety.

5.5 Voluntariness: Intentional Act

To constitute a general average act, under s.66(2) of the Marine Insurance Act, 1906 the sacrifice or expenditure in question must be made voluntarily and reasonably. Under Rule A of the York-Antwerp Rules, the sacrifice or expenditure, as the case may be, must be made intentionally and reasonably. As pointed out earlier, in the York-Antwerp Rules, the word "intentionally" is substituted for "voluntarily". For all practical purposes, in the present context, the two alternative words should be construed in the same way, although in one case it was argued that the scuttling of the vessel, although an intentional act, was not done voluntarily.

In *Papayanni and Jeromia* v. *Grampian Steamship Co. Ltd.*[89] the vessel *Birkhall* caught fire and was taken into the port of Philippeville. As the fire got worse the ship's crew were unable to extinguish it by themselves. In the interests of safety, the vessel was ordered by the port captain to be scuttled. The master subsequently stated that in his opinion it was the best course of action, but that he was simply complying with the port captain's orders. In other words, the scuttling was not a voluntary act on his part. The cargo was shipped under bills of lading incorporating the York-Antwerp Rules of 1890, Rule III of which provided for damage to ship or cargo being made good as general average in the event of fire on board being extinguished by water or otherwise. In an action by the cargo owners for a general average contribution, the shipowners contended

[89] (1896), 1 Com. Cas. 448.

that it was not a general average act because the scuttling was not voluntary. The court held that the act was intentional and amounted to a voluntary act as it was done for the benefit of all concerned. It was therefore a general average act which attracted contribution. Mathew J. held as follows-

> This evidence shows that what was done was in the interest of ship and cargo. There is no evidence that there was any other motive for scuttling the ship. The captain, who had not parted with the possession of his ship, did not object. There seems to be clear evidence that he sanctioned what was done. The loss must be adjusted as a general average sacrifice.[90]

Thus, the voluntary stranding of a vessel or the deliberate scuttling of a vessel on fire for the purpose of extinguishing the fire and saving the vessel and its cargo, are both examples of voluntary sacrifices intentionally made for the common safety. As stated above, Rule III of the York-Antwerp Rules provides for general average is such situations. Express mention is made in that Rule of extinguishing a fire on board by water and scuttling a burning ship.

If the ship was already lost or abandoned due to an accident, it cannot be considered as a voluntary sacrifice. Thus, under Rule IV of the York-Antwerp Rules loss or damage sustained by cutting away wreck or parts of the ship which have been effectively lost by accident cannot be claimed as general average. In *Shepherd* v. *Kottgen*,[91] Brett L.J. stated this general rule in the following words-

> If anything on board a ship, which is cut or cast away because it is endangering the whole adventure, is in such a state or condition that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average.

In this case, the barque *Rollo* was in the midst of a heavy gale. The main mast started lurching as a result of which parts of the vessel's rigging gave way. There was fear among the crew that the decks would get ripped up and put the ship's safety and that of all on board in danger. The master at first tried to secure the mast, failing which, he had it cut away. At trial, the jury found that the mast at the time it was cut away was hopelessly

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90 *Ibid.* at p. 452.

91 (1877), 2 C.P.D. 578.

lost and was therefore, in effect, a wreck. On that basis, a claim for general average was rejected. The Divisional Court, on appeal, set aside the trial decision which was subsequently restored by the Court of Appeal.

However, in *Johnson* v. *Chapman*,[92] on a voyage from Quebec to London, deck cargo had broken loose in a storm as a result of which the ship's pumps could not be operated. The cargo was jettisoned and the cargo owner claimed general average contribution. The shipowner refused to contribute contending that the cargo was already in a state of wreck at the time it was jettisoned. The court held that the cargo had been scattered around on the deck but because it had not actually been lost, its jettison amounted to a sacrifice for the purposes of general average. Willes J. observed that the cargo had not become valueless even though it was a little wet with salt water and if the weather was fine, it could easily have been restowed during the voyage. Thus, if the property in question is already in a state of wreck, *i.e.,* in such a state that if it is not deliberately dislocated it will, in the ordinary course, perish anyway and is therefore already valueless, then its sacrifice does not give rise to a general average.

5.6 Reasonableness

The requirement for reasonableness in the conduct of a general average act is entrenched both in s. 66(2) of the Marine Insurance Act as well as in the York-Antwerp Rules. The words "reasonably made or incurred" in relation to a sacrifice or expenditure appears in both these instruments. While reasonableness is an objective parameter. Lowndes and Rudolf states that "[I]n practice, the word 'reasonably' is probably used more as an earnest hope, rather than as a mandatory expectation"[93]. If a sacrifice is to be made of cargo, a decision has to be made as to which cargo stowed in which hold or deck is to be selected. Sometimes the more valuable cargo may be the one selected for jettisoning because it is stowed in a place which is more easily accessible. Naturally, in the agony of the moment it is the master who is the best judge. Hence the norm which has developed since ancient times calls for the master's decision in such a situation. As

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92 (1865), 19 C.B. (N.S.) 563.

93 *Supra*, note 11 at p. 114.

Lowndes and Rudolf states, "hindsight and the superior wisdom of the desk-bound operative should be ignored".[94]

In the case of a physical act, the test is whether a prudent master applying the principles of good seamanship, otherwise referred to as "the ordinary practice of seamen",[95] would have carried out the act in those circumstances. *The Seapool*[96] is illustrative of the kind of good seamanship that meets the test of reasonableness. In that case, a ship loaded with coal was anchored off a pier when suddenly a severe storm broke out and the ship lost its port cable and started to drag anchor. The master, sensing that the ship was likely to lose its propeller and also break its back, manoeuvred the vessel into a position broadside against the pier. By doing this he was able to use the pier as a lever for steaming ahead out to sea. The manoeuvre resulted in substantial damage to the ship and pier but the adventure as a whole was saved. The court held that the master's action was reasonable in the circumstances and allowed the expenditures incurred in general average. Good seamanship is thus the very essence of reasonableness when it comes to a general average act. A master's prudent action consistent with the ordinary practice of seamen can often result in much being saved even if some damage is suffered in the process.

In *Corry* v. *Coulthard*,[97] amidst gale force winds and heavy seas, the main mast of the vessel being subjected to rolling stresses settled into the ship by several inches causing the rigging to become slack. The mast started to roll about dangerously and there was fear that it would pierce through the bottom of the vessel. The master ordered the main mast to be cut away. The loss was allowed in general average. At the Court of Appeal, Cockburn C.J. held- "It is not necessary that the judgment of the master should be borne out by the facts when they come to be examined into." He also stated- "The question in all this case is, not whether the event shows the wisdom of what was done, but whether, under all the circumstances, it was the exercise of a reasonable, prudent sound judgment."

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94 *Ibid.*

95 See Convention on the International Regulations for Preventing Collisions at Sea (COLREGS), 1972.

96 [1934] P. 53.

97 Unreported decision, of C.A. dated January 17, 1877.

While in the context of a physical act, the notion of reasonableness is tied into the master's good seamanship, in the context of expenditures, reasonableness may have a different connotation. Even then, the test to be applied to determine reasonableness would have to be an objective one. Often, expenditures claimed are high because suppliers of labour and services take undue advantage of an unfortunate situation. Parties contesting the claim for contribution may contend that the quantum of expenditures in a particular instance was unreasonable. If the master agrees to pay an amount much higher than what is considered to be the reasonable cost in the circumstances, then contribution will be adjudged on the basis of what should reasonably have been paid, and not on the basis of the excess payment.

In *Anderson, Triton and Co.* v. *Ocean Steamship Co.*,[98] cargo owners contested the full amount of contribution claimed for towage charges contending that the amount paid by the shipowner was exorbitant and that whatever was in excess of a reasonable sum was not chargeable to cargo. The facts of this case are as follows. The Ocean Steamship Company and the China Navigation Company, both operating in the River Yangtze entered into an arrangement whereby in the event a ship of one company needed assistance, the other would provide it for an agreed fixed sum. When the *Achilles* belonging to Ocean Steamship ran aground in the river, the *Shanghai* owned by China Navigation assisted by towing it to safety and charged the agreed fixed amount for the services. Ocean Steamship then claimed general average contribution from the cargo owners. In the House of Lords, Lord Blackburn held-

> I think there is neither reason nor authority for saying that the whole amount which the owners of the ship choose to pay is, as a matter of law, to be charged to general average. And though I quite agree that there is some evidence here that the *Achilles* and her cargo were both in danger, and were both saved by the services of the *Shanghai*, and though I also agree that it is not a question of law whether the amount of the sum charged as a disbursement was exorbitant or not, still I cannot find that any question as to the amount was submitted to the jury. It seems to me that if such a question had been submitted to a jury, there is much in the evidence that might make it very doubtful whether the jury would think this sum properly chargeable against the owners of the goods if uninsured.[99]

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98 (1884), 10 A.C. 107 (H.L.)

99 *Ibid.* at p. 117.

In *Australian Shipping Commission* v. *Green*,[100] Lord Denning M.R. referring to this aspect of the *Anderson* case stated as follows-

> If the master of the Achilles agreed to pay an exorbitant charge, such that he ought never, in justice to the cargo owners, to have agreed to, then the excess of the charge (over and above a reasonable charge) would not flow from the general average act, The only amount allowable as a 'general average loss' would be a reasonable charge.

Notably, in *The Gratitudine*,[101] the master, in the particular circumstances had no viable option but to hypothecate the ship and cargo to a moneylender on extremely onerous terms. The court held the loss to be general average. In addressing the question of what is a reasonable charge for purposes of general average in such cases, regard should be had to the extenuating circumstances under which the master or shipowner made the expenditure. It is not proper to consider the conduct of the contractor or supplier and it is irrelevant whether under different circumstances the charges for those services may have been less.[102]

As described earlier, in the 1994 version of the York-Antwerp Rules, a Rule Paramount has been added which categorically states that no allowance will be made for a sacrifice or an expenditure unless it is made or incurred reasonably. This new provision read in conjunction with the Rule of Interpretation would indicate that the requirement for reasonableness applies in respect of the numbered Rules as well. It is notable in this context that in *Corfu Navigation Co. and Bain Clarkson Ltd.* v. *Mobil Shipping Company*,[103] Hobhouse J. had upheld the shipowner's claim for contribution even though the master's conduct in attempting to refloat the vessel was unreasonable. His decision was based on the premise that the test of reasonableness did not apply to the numbered Rules. In this case it was Rule VII in question. The Rule Paramount has now clearly superseded this ruling.

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100 [1971] 1 Q.B. 456 at p. 483.

101 3 Ch. Rob. 240.

102 *Supra,* note 11 at p. 115.

103 [1991] 2 Lloyd's Rep. 515.

5.7 Success

Contribution in general average can only be demanded if the general average act is successful. In other words, the adventure as a whole must be saved, otherwise, the loss "lies where it falls" and it becomes a case of particular average. The underlying doctrine of general average from the pre-historic days has been that, only those whose properties have been saved are liable to contribute. If there is no saving of property, there is no contribution in general average. Even if the general average act is successful, but subsequently, due to new causes the ship and cargo are lost, then there is no general average contribution. This is akin to the inherent requirement in salvage law of success followed by ultimate preservation of the *res*. In *Chellew* v. *Royal Commission on the Sugar Supply,*[104] Scrutton L.J. in the Court of Appeal made reference to the "analogies of liabilities for salvage, both maritime and by agreement...."[105] In s.66(1) of the Marine Insurance Act 1906, the words "preserving the property imperilled" and in Rule A of the York-Antwerp Rules, the words "preserving from peril the property" implicitly reflect the requirement for success. This is also tied in to the requirement in Rule XVII that "[T]he contribution to a general average shall be made upon the actual net value of the property at the termination of the adventure." The essence of it all is that if the general average act does not yield any success, *i.e.,* no property is saved, then there is no basis for general average contribution.

In *Chellew* v. *Royal Commission on the Sugar Supply,*[106] the vessel *Penlee*, on a voyage from Cuba to the United Kingdom with a cargo of sugar suffered hurricane damage and sort refuge in the port of Horta in the Azores. After repairs were undertaken in port, the vessel continued on its voyage. Some days later at sea, a fire broke out on board. The ship and all its cargo were lost. It was held that no contribution was claimable from the cargo owners. At arbitration, the Arbitrator (who later became MacKinnon L.J.) stated that-

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[104] [1922] 1 K.B. 1 (C.A.)

[105] This issue will be explored further in the comparative analysis between general average and salvage in chapter 6 of this thesis following discussions both under the Marine Insurance Act 1906 as well as under the York-Antwerp Rules.

[106] [1921] 2 K.B. 627; [1922] 1 K.B. 12 (C.A.)

> if the property of any party who is called upon to contribute in general average has no value at the port of adjustment, either by its arriving in a worthless condition or by its not arriving at all, that party cannot be made to contribute.

In the Court of Appeal, Scrutton L.J. stated that " [T]he person incurring the expenditure runs a risk of loss which he can cover by insurance of his interest in the arrival of the interests on which he has a lien for contribution to his expenditure." In other words, the party to the adventure who has paid for the general average expenditure previous to the total loss must bear the loss himself and can only look to his own insurer for reimbursement. Thus, no contribution can be exacted from an interest whose property at the end of the adventure bears no value.[107]. This proposition is consistent with the notion that general average contribution cannot exceed the contributory value of the property.[108] It stems from the statement in Rule XVII of the York-Antwerp Rules, as stated above, that the contribution is to be calculated on the actual value of the saved property at the termination of the adventure. If no property is ultimately saved, then, obviously, the value of that property at the end of the adventure is nil, and no contribution is due.

5.8 Directly Consequential

The Marine Insurance Act 1906 defines a general average loss in s.66(1) as "a loss caused by or directly consequential on a general average act". Similarly, Rule C of the York-Antwerp Rules provides that "[O]nly such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average". The requirement for the loss being directly consequential to the act is, in English common law terms, an issue of remoteness or proximity. In other words, the question is whether the general average act was the proximate cause of the loss, damage or expense.

The issue arises when a loss is incurred as a result of an intervening act, which loss would not have otherwise been incurred but for the intervention. Not every such loss is subject to contribution but only that which the master ought reasonably to have

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[107] *Supra,* note 11 at p. 560.

[108] See the judgement of Roche J. in *Green Star Shipping Co.* v. *The London Assurance* [1933] 1 K.B. 378 at p. 383. Lowndes and Rudolf states that this decision may have been based on the law of Philadelphia and that this is expressly provided for in the laws of several countries. Even if it were not so specifically provided, it is doubtful that any other conclusion could be logically reached. See *supra,* note 11 at p. 561.

foreseen at the time he committed the general average act. In *McCall* v. *Houlder Bros*,[109] it was contended by those contesting contribution that the loss in question was only a particular average loss because it was not foreseen and was not therefore a voluntary sacrifice. Mathew J. held otherwise.[110]. One notable observation, in this context, is that the underlying rationale for the requirement of direct consequence is the fundamental ingredient of voluntariness in a general average act. Thus, if the chain of causation is not broken then the loss can be said to be directly consequential to the general average act. If, for example, while jettisoning cargo, water enters the ship's hold and damages the cargo, that loss is allowable in general average together with the loss resulting from the jettison. The likelihood of cargo damage by seawater would have been reasonably foreseen by the master who made the decision to sacrifice by jettison.[111] In contrast, if, in the face of danger a ship's mast is cut off resulting in a loss of speed, as a consequence of which the ship is captured by the enemy, "it could hardly be contended that the loss by capture should be replaced by contribution as a consequence of cutting away the mast".[112]

Susan Hodges cites the same example and states that the loss is not the direct consequence of the general average act but is due to the intervening capture. This is the same conclusion reached by Lowndes and Rudolf to which this writer subscribes. Dr. Hodges also cites an example given by Lord Tenterden (no citation provided) where a ship to avoid an impending storm makes for a port of refuge. It cannot enter the port without lightening and employs barges for that purpose. A part of the cargo is lost while being transported ashore. It is said by Lord Tenterden that "this loss also, being occasioned by the removal of the goods for the *general benefit*,(emphasis added) must be repaired by general contribution". Dr. Hodges, having already agreed to the opinion of Lowndes and Rudolf in the first example mentioned above, then makes an unclear conclusion. In referring to both examples, namely, that given by Lowndes and Rudolf and the one of Lord Tenterden, she states-

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109 (1897), 2 Com. Cas. 129 at p. 1320.

110 The learned judge held "But it is not necessary that a particular loss should have been contemplated, if it be incidental to the general average act". Although no express mention was made, Mathew J. seems to have based his reasoning on the view of Lowndes in this matter. A detailed discussion of Lowndes' view appears later in this section.

111 *Supra,* note 7 at p. 292.

112 *Supra,* note 11 at p. 133.

> In both cases before us, the master, when he engaged the tug, should have envisaged that it was distinctly possible that the towline might break and foul the propeller. When it happened, therefore, it did not break the chain of causation.[113]

It is apparent that Lord Tenterden's statement is based on the view of Ulrich which is in contrast to that of Lowndes and Rudolf. This is discussed in detail below. In English cases, much of the dispute relating to the issue of remoteness has occurred in cases dealing with expenses at a port of refuge. This is addressed in Rule X of the York-Antwerp Rules, a detailed treatment of which is beyond the scope of the present section in this chapter. It is, however, noteworthy that in the leading case of *Svensden* v. *Wallace*,[114] Bowen L.J. held in the Court of Appeal that the object of general average contribution was- "to indemnify the person making the general average sacrifice against so much of the loss caused directly thereby as does fall to his proportionate share".

As mentioned earlier, it is held that the Marine Insurance Act enacted in1906, codified the law of general average as practised in England. As such, the statutory provisions apply with respect to parties to a marine insurance contract as well as to participants in a maritime adventure. The words "caused by or directly consequential on" in s.66(1), no doubt, reflect the antecedent English case law. The "direct consequence" test, introduced in Rule C of the York-Antwerp Rules in 1924, was largely influenced by the wording in the Marine Insurance Act 1906.[115] It is apparent that the origins of the test are to be found in the writings of Richard Lowndes and the renowned German writer Ulrich to which English decisions have continued to accord due regard.[116] Richard Lowndes states-

> Since giving must always imply an intention to give, what we have here to ascertain must be, what loss has in fact occurred, likewise must be regarded as the natural and reasonable result of the act of sacrifice? or, in other words, what the shipmaster would naturally, or might reasonably, have intended to give for all when he resolved upon the act? If, then, upon the act of sacrifice any loss ensues which the master did not in fact bring

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[113] *Supra*, note 9 at p. 740; Abbott on Shipping, 5th ed., at p. 346; 14th ed. at p. 757, cited in *supra*, note 2, at p. 828.

[114] [1884] 13 Q.B.D. 69 at p. 84.

[115] *Supra*, note 11 at pp. 133 to 135.

[116] *Ibid.* at p.135.

> before his mind at the time of making the sacrifice, it would have to be considered whether it were such a loss as he naturally might, or reasonably ought, to have taken account of. [117]

Arnould states that the item of expenditure for which contribution is sought must flow from the sacrifice in the way effect flows from cause and refers, in this context, to the decision in *Svendsen* v. *Wallace.* This notion, it seems flows from the opinion of Ulrich.[118] Ulrich's view seems to be in contrast with that of Lowndes. According to Ulrich,

> General average comprises not only the damage purposely done to ship and cargo, but also to (1) all damage or expense which was to be foreseen as the natural (immediate) consequence of the first sacrifice, since this unmistakably forms part of that which was *given* for the common safety; (2) general all damage or expense which, though not to be foreseen, stands to the sacrifice in relation of effect to cause, or, in other words, was its *necessary* consequence. Not so, however, those losses or expenses which, though they would not have occurred but for the sacrifice, yet, likewise, would not have occurred but for some subsequent accident.[119]

It is notable that the Ulrich view is not only espoused by Lord Tenterden, as mentioned above, but is also cited with approval by Bigham J. in *Anglo-Argentine Live Stock Agency* v. *Temperley Shipping Co.*[120] It is also cited by Bailhaiche J. in *Austin Friars SS Co.* v. *Spillers & Bakers.*[121] In the *Anglo- Argentine* case, the vessel was carrying a cargo of cattle from Buenos Aires to London. It sprang a leak in heavy weather and was forced to put into Bahia in Brazil for repairs. The contract of carriage prohibited calling into any Brazilian or continental port because under a United Kingdom Order in Council, if it did, the cattle would not be allowed to land in a British port. As a result of the forced deviation, the cattle were eventually landed in Antwerp where they were sold for a lower price than that which could have been obtained in London. The cattle owners sued the shipowners for general average contribution. Bigham J. referred to the tests of Lowndes and Ulrich and allowed the loss resulting from the sale in Antwerp in general

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[117] Richard Lowndes, The Law of General Average, 5th. Edition. at p. 40; 10th. Edition. at para 93 published by Stevens and Co., cited in *supra,* note 7 at pp. 292- 293. Also cited by the authors of the 12th Edition of Lowndes and Rudolf at p. 135.

[118] *Supra,* note 2 at p. 828.

[119] Ulrich, *Grosse Haverei*, at p. 5 cited in *Lowndes and Rudolf* at p. 116. Also cited in Arnould at p. 828.

[120] [1899] 2 Q.B. 403 at p. 410.

[121] [1915] 1 K.B. at p. 836.

average. He held that the loss was a direct and immediate consequence of the general average act of the ship putting into Bahia and that the master knew, or ought to have known, that the cargo owners would be put at a disadvantage as a result of that act.

It appears from the decisions discussed above that an unequivocal rule regarding remoteness in the context of general average is yet to be developed in English law. The decided cases have relied on both the Lowndes as well as the Ulrich tests. There is no definitive statement on which one is preferable even though the two approaches are distinctively in contrast. Lowndes dwells on an objective test in respect of the master's actions and Ulrich emphasises the absence of an intervening cause. The relevant provision in the Marine Insurance Act 1906 seems not to have resolved the issue. The courts, while recognising that the Act is a codification of the English law hitherto in vogue, draw on or both the Lowndes and Ulrich approaches, as in the *Austin Friars* case or on one of them as in the *Anglo-Argentine* case.[122]

It is noted that the only case in which Rule C of the York-Antwerp Rules has been considered is *Australian Coastal Shipping Commission* v. *Green.*[123] This case dealt two separate subject matters in that the actions were based on two separate towage contracts. However, two vessels owned by the same shipowners were involved. The towage contracts concerned were the same standard form, *i.e.,* the United Kingdom Standard Towage Conditions, and also, the actions were against the same insurer. The facts involved two vessels, the *Bulwarra* and *Wangara* which were in distress.

The *Bulwarra* was in a port in New South Wales when it was hit by a storm. The services of a tug were engaged to tow the *Bulwarra.* During the towage operation, a towrope parted and got entangled about the tug's propeller. As a result, it went adrift, ran aground and became a total loss. The owners of the tug claimed damages under the indemnity provisions of the towage contract which failed. The shipowners claimed their legal costs for defending the action from their hull underwriters as a general average expenditure. The *Wangara* stranded during a voyage from Melbourne to Auckland. Two tugs were employed for the towage operation. The towrope of one of the tugs parted and

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122 *Supra,* note 120 and *ibid.*

123 [1971] 1 Q.B. 456. See *supra,* note 2 at p.123.

fouled its propeller. The ship and the injured tug were rescued. A local pilot vessel towed the tug to safety and successfully claimed a salvage reward. The owners of the tug then sought to claim damages from the shipowners under the indemnity clause of the towage contract. The action was successful, whereupon the shipowners sought to be indemnified by their hull insurers. In both cases the policies provided for general average adjustment pursuant to the York-Antwerp Rules of 1950.

At trial, Mocatta J. held that the liability of the shipowners toward the tug owners caused by the parting of the tow ropes was a direct consequence of the general average act within the meaning of Rule C. The Court of Appeal upheld the decision of the trial court. Lord Denning retraced the origins of the direct consequence test in the York-Antwerp Rules, referred to the displacement of directness with foreseeability in English jurisprudence and rejected the Ulrich approach. In a fine exposition of Rule C he stated-

> In these circumstances I propose to go back to the concept, as I understood it in 1924, when the York- Antwerp Rules were made. Direct consequences denote those consequences which flow in an unbroken sequence from the act: whereas indirect consequences are those in which the sequence is broken by an intervening or extraneous cause. I realise that this is not very helpful because the metaphor of breaking the chain of causation means one thing to one man and another thing to another. But still we have to do the best we can with it.

Lord Denning then went on to say-

> If the master, when he does 'the general average act, ought reasonably to have foreseen that a subsequent accident of the kind might occur – or even that there was a distinct possibility of it - then the subsequent accident does not break the chain of causation. ... If, however, there is a subsequent incident which was only a remote possibility, it would be different.[124]

It should be apparent from the above discussion that the direct consequence test is of crucial importance to general average both in terms of the York-Antwerp Rules as well as the Marine Insurance Act under which the question of indemnity arises.

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[124] *Ibid.* at pp. 481, 482.

5.9 Extraordinary

It is explicitly provided in both the Marine Insurance Act, 1906 as well as the York-Antwerp Rules that the sacrifice or expenditure in question must be of an extraordinary nature. Indeed, historically speaking, the Ordinance of Louis XIV, 1681 contained references to "extraordinary expenses".[125]

The question arises as to what is the meaning of the term "extraordinary" in the present context. In *Societe Nouvelle d'Armement* v. *Spillers and Bakers Ltd*, [126] Sankey J. stated that "...there must be expenditure abnormal in kind or degree, and it must have been incurred on an abnormal occasion for the preservation of property." In other words, the extraordinary act must have a qualitative or a quantitative dimension. It might be added that frequently, in the face of danger, both the qualitative as well as the quantitative dimensions will be present. This is borne out by the facts of the relevant cases. Thus, the sacrifice or expenditure, in character or in extent or in both of those, must be extraordinary. Another noteworthy point of observation in the above-mentioned quotation is the use of the word "abnormal". Often in attempting to interpret statutory words and expressions one seeks to find synonyms. It is submitted that in this quest the use of the word "abnormal" throws ample light on what is meant by "extraordinary" in the context of a general average act.

The second aspect of this analysis raises the question as to whether it is sufficient that the act, *i.e.,* the sacrifice or expenditure, is extraordinary; or, is it necessary that the circumstances giving rise to that act must also be extraordinary? Lowndes and Rudolf refer to "a risk greater than ordinary", "exposure to extraordinary risk", and to a risk beyond that which is common to the entire adventure; and, therefore, in case of exposure to any risk greater than ordinary. It is apparent that what is contemplated by the use of the word "extraordinary" is that the circumstances under which the sacrifice or expenditure is made are also beyond the ordinary.

Two factors arise out of this submission. First, it would rarely be the case that a sacrifice or expenditure would amount to an extraordinary act if it were not committed

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[125] *Supra,* note 11 at p. 8.

[126] [1917] 1 K.B. 865.

under extraordinary circumstances. Lowndes and Rudolf refer to "the simple truism that the sacrifice or expenditure must have been made on an extraordinary occasion" and point out that greater emphasis was placed on this factor in previous editions of their text.[127] As Sankey J. remarked in the *Societe Nouvelle* case [128] -

> Extraordinary expenditure must to some extent be connected with an *extraordinary occasion.* For example, an abnormal user of the engines and an abnormal consumption of coal in endeavouring to refloat a steamship stranded in a *position of peril* is an extraordinary sacrifice and an extraordinary expenditure. (emphasis added)

In this case, the French vessel *Ernest Legouve* fearing the risk of attack by enemy submarines, engaged a tug to tow it from Queenstown to Sharpness. The shipowners sought to recover from cargo owners as general average contribution, part of the costs of the towage. The court rejected the claim on the grounds that in wartime, a possible submarine attack was not an extraordinary or abnormal risk.

The other factor arises from the observation that certain parts of the ship such as masts and rigging, and in bygone times, sails, are always, at least to some extent, exposed to a risk greater than ordinary. As such, these parts of a ship are susceptible to damage or destruction in any circumstances as compared to other parts of the ship. In such situations, the sacrifice of such parts or equipment would be considered as falling within the scope of the normal operations of a ship and not compensable by way of general average.[129]

It is sometimes not an easy task to distinguish between what constitutes an extraordinary sacrifice or expenditure and one that may be simply ordinary. Perhaps this is best illustrated by the facts of a rather old case reported by the eminent maritime historian Emerigon. The master of a French ship, being pursued by an enemy ship which was rapidly coming up, deliberately outfitted his long boat with a mast, sail and a masthead lantern and set it adrift. Meanwhile, he lowered the ships lights and altered course. The enemy ship, gave chase to the long boat while the French ship escaped. The

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127 *Supra*, note 11 at p. 101, footnote 75.

128 *Supra,* note 126 at p. 870.

129 *Supra,* note 11 at p. 101.

loss of the long boat in these circumstances was held to be an extraordinary sacrifice, and therefore, a general average loss.[130]

What, if any, is the distinction between a sacrifice and an expenditure in the context of an extraordinary act? A sacrifice refers to the loss of something tangible caused by the deliberate act of the master. In *Birkley* v. *Presgrave*,[131] the master of the *Argo* while entering the port of Sunderland, encountered a sudden storm and dropped anchor. He then cut the anchor cable fearing the possibility of another ship coming adrift onto the *Argo*. The court, per Lord Kenyon admitted the loss of the cable as an extraordinary sacrifice. There are numerous such examples of sacrifices of parts or equipment of a ship including anchors, cables, masts, and of course, the classic example of jettisoning of cargo.

In contrast, an extraordinary expenditure is a financial loss which may or may not be incidental to an extraordinary sacrifice. If, for example, the mast or the rudder of a ship is lost in an emergency, either fortuitously, or by deliberate sacrifice, and a jury rig is constructed by using other materials on board, the cost of replacing these materials may well amount to an extraordinary expenditure. For a general average claim to succeed, the materials, namely, ropes, chains, spars, dunnage, *etc.,* must be put to a different use than that which was originally intended.[132]

In *Wilson* v. *Bank of Victoria*, [133] a clipper ship fitted with an auxiliary screw, after suffering damage by allision with an iceberg, made it to Rio de Janeiro under auxiliary steam power, but in the process, exhausted all its bunker coal reserves. The master, in order to save the exorbitant repair costs, effected only temporary repairs, bought coal at Rio and again at Fayal, and arrived at its destination in England under steam power. Blackburn J. rejected the shipowners' claim for general average contribution in respect of the costs of the coal. He held-

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130 1 Emerigon, c.12, s.41, at p. 606, cited in Arnould, *supra*, note 2 at p. 923.

131 *Supra,* note 21.

132 *Supra,* note 11 at p. 109.

133 (1867), L.R. 2 Q.B. 203.

> 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 coal to be extraordinarily heavy; but it did not render it an extraordinary disbursement.

In *Robinson* v. *Price*,[134] a vessel sprung a leak while being exposed to heavy weather continuously for many days. It was fitted with a donkey engine for which there was an adequate supply of bunker coal but which got depleted at the pumps. As a result, some part of the cargo and spare spars were used as fuel to raise steam for the pumps, the cost of which was allowed as an extraordinary expenditure. In an identical earlier case, *Harrison* v. *Bank of Australasia,*[135] the court allowed a claim for general average contribution in respect of the spars and stores consumed which were considered to be an extraordinary sacrifice. But not the cost of the coals or repairs done to the donkey engine were not so allowed.

The interrelationship between an extraordinary sacrifice and an extraordinary expenditure is perhaps best exemplified in the following passage from Blackburn J's judgement in *Kemp* v. *Halliday* [136] -

> An extraordinary expenditure incurred is as much a sacrifice as if, instead of money being expended for the purpose, money's worth were thrown away. It is immaterial whether a shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off.

Finally, it is instructive to note the comments of Lowndes and Rudolf that a strict interpretation of the term "extraordinary" has not always found favour with shipowners and the relevant commercial interests. It seems that in practice, the express terms of some of the numbered Rules of the York-Antwerp Rules, which by virtue of the Rule of Interpretation override the lettered Rules, may allow the term "extraordinary" to be given a more liberal interpretation. However, that will only be possible if the particular

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[134] (1876), 2 Q.B.D. 91.

[135] (1872), L.R. 7 Ex. 39.

[136] (1865), 6 B.&S. 723 at p. 746.

circumstances lend themselves to such interpretation within the parameters of the numbered Rule in question. In all other cases, *i.e.,* where the claim falls only under the lettered Rules, the word "extraordinary" must be given "full force"[137]. As a final point it might be noted that even if the term "extraordinary" is construed liberally pursuant to a numbered Rule, the sacrifice or expenditure must pass the test of reasonableness as required by the Rule Paramount.

5.10 Common Adventure

The notion of the common adventure or, perhaps more appropriately, the common maritime adventure, has its roots in maritime history. Thus, while it may be so that the term appears expressly only in the relevant instruments pertaining to general average, *i.e.,* the Marine Insurance Act 1906 and the York-Antwerp Rules, the notion itself is not unique to general average.[138] Shipping has always been and continues to be a common maritime adventure in which common interests are at stake. This has been true since the days of bottomry and respondentia and the evolution of marine insurance. In general average, the saving act must benefit all the parties to the maritime adventure and not just one.

The requirement for a common maritime adventure for the subsistence of general average has two elements to the proposition. The adventure in question must be of maritime character and the sacrifice or expenditure must inure to the common benefit of all. Let us consider the first element. Unless the risk encountered is a maritime risk, as distinguished from a land based risk, general average will not apply. Thus, saving of property on land, even if it is cargo situated in a warehouse in the docks will not be subject to general average.[139] In *Morrison S.S. Co.* v. *Greystoke Castle*,[140] it was held by Lord Uthwatt that "[T]he principle involved in general average contribution is peculiar to the law of the sea and extends only to sea risks".[141] The learned Lord Justice in reference not only to salvage but also to general average and contribution, held that "[N]o similar

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137 *Supra,* note 11 at p. 104.

138 As suggested by Susan Hodges in *supra*, note 9 at p.748.

139 *Supra*, note 11 at p. 98.

140 [1947] A.C. 265 at p.310.

141 See also Bowen L.J.'s dictum in *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234 at p. 248.

doctrine applies to things lost upon land, nor to anything except ships and goods in peril at sea."

The second element is the commonality of the maritime adventure which means that there must be more than one party involved in the adventure. But the question is whether the sacrifice or expenditure must have benefited more than one party. The principle at Rhodian law, the original source of the law of general average, is expressed by the maxim *ut omnium contributione sarciatur quod pro omnibus datum est.*[142] A co-adventurer is entitled to contribution from all others when his loss is suffered for the sake of all. This principle of commonality also finds expression in the *Roles d'Oleron* where it is stated "*Pour saufver leurs corps, la neef, et les darrees*"[143] In the Rolls is revealed the ancient practice whereby the master, before he could claim a general average contribution, had to swear that the sacrifice was being made for saving the ship, cargo and the lives of the crew; a clear example of the entrenchment of the commonality factor.[144] Even in the Laws of Wisby there was mention of "*Tho beholden ihr Liff, Schiff und Gut*".[145] Similar expressions are found in the *Consolato del Mare* where reference is made to *"Les personnes, et le haver, et tot quant aci ha*"[146].

It would appear that this historical principle has been largely preserved although not unequivocally. The case of *Hingston* v. *Wendt*[147] illustrates a straightforward instance of how in the law of general average the sacrifice or expenditure must be for the common benefit of the adventure. If it is for the benefit of only one interest in the adventure, it is not general average and contribution is not due from the other interests. In this case, an agent of the master of a sunken wreck salved the cargo. It was held, although the agent had a lien on the cargo, it was not general average because the expenditure sued for was not for "the purpose of saving the whole venture, ship as well as cargo...". In *Nesbitt* v.

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142 Dig. Lib 14, tit. 2 f. 1 cited in *supra,* note 2 at p. 804.

143 *Jugemens d'Oleron,* art. 8: Pardessus, *Lois Mar.*, Vol. 1, p. 328 cited in *supra,* note 2 at p. 804 at footnote 22 of that page.

144 See Arnould, *ibid.*

145 Pardessus, *Lois Mar.*, Vol. 1, p. 476 cited in Arnould, *ibid.*

146 Chapter 54 of the original Catalan of the *Consolato* in Pardessus, *Lois Mar.*, Vol. 2, p. 104; c.97 of the Italian translation cited in Arnould, *ibid.*

147 (1876), 1 Q.B.D. 367.

Lushington,[148] the facts of which have been stated earlier, Lord Kenyon held that the sacrifice of cargo made by the master was only for the benefit of the cargo interests because the other interests were not in peril at any time. Thus, Arnould is of the view that "...where the general safety is not imperilled, a loss incurred for the safety of a part thereof cannot give a claim to contribution in general average".[149]

In both the above-mentioned cases, there were in fact different interests vested in different ownerships. What is the position when there is only one interest involved, *e.g.,* where a ship is under ballast? In *The Brigella,*[150] the vessel was in ballast bound for its loading port when it had to pull into a port of refuge. Gorell Barnes J. held that the expenses did not fall within general average as there could be no contribution because of the singularity of interest, namely, that of the shipowner. Thus, Lowndes and Rudolf have this to say:

> it is submitted that in the United Kingdom and under the York-Antwerp Rules, more than one interest must be imperilled if there is to be a general average act. The many definitions of a general average act found in the judgments of the courts, the statutory definition contained in the Marine Insurance Act, as well as the York-Antwerp Rule A definition, all indicate that an essential element of general average is that the act shall be done for the preservation of more than one interest,[151] ...

It is submitted that the learned authors' view cited above stating essentially that for general average to exist, more than one interest must be imperilled, is perhaps not as categorical as it may sound. As we shall see, the issue is fraught with difficulties. What is the situation when the owner of the ship and cargo is the same person? In other words, there is diversity of interest but unity of ownership. In such cases, is there a common adventure so that general average is applicable? The issue is squarely addressed in the case of *Montgomery and Co.* v. *Indemnity Mutual Marine Insurance Co.*[152]

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148 *Supra,* note 82.

149 *Supra,* note 2 at p. 804.

150 [1893] P. 189.

151 *Supra,* note 11 at p. 100.

152 [1902] 1 K.B. 734.

In this case, the owners of the sailing vessel *Airlie* also owned the cargo of nitrate on board. On a voyage from South America to the United Kingdom, the vessel encountered perils and the mainmast was cut away. The Court of Appeal in upholding the trial decision of Matthew J. held, *inter alia*, that-

> whether contribution is of the essence of a general average loss or a mere incident of it, must depend upon the occasion which is a condition of such an act. If there be one owner of ship, freight and cargo he will bear it all. If there be several, each will contribute according to the value of his interest. The object of this maritime law seems to be to give the master of the ship absolute freedom to make whatever sacrifice he thinks best to avert the perils of the sea, without any regard whatsoever to the ownership of the property sacrificed; and, in our judgment, such a sacrifice is a general average act, quite independently of unity or diversity of ownership.[153]

In rendering the above decision, the Court of Appeal expressly overruled the decision of *The Brigella*. It is to be noted that the *Montgomery* case involved unity of ownership but there were two interests, that of ship and cargo. In contrast, in *The Brigilla*, there was only one interest at stake, that of the shipowner, as the ship was in ballast and there was no cargo on board. If the ship is under a charter, even if it is in ballast, there are two interests involved. In such a situation, as was the case in *Carisbrook SS Co. Ltd.* v. *London and Provincial Marine and General Insurance Co. Ltd.*,[154] there will be general average. The question as to whether general average is payable when there is only one interest at stake remains unresolved in so far as English law is concerned; or it may be that the *The Brigilla* is still good law in circumstances such as where the ship is under ballast and there is no charterer involved. Arnould states-

> The question has not been definitely before the English courts, but it is understood that it is the practice of most English adjusters and underwriters to treat such sacrifices as general average, though ship be in ballast and not chartered.[155]

Without considering the insurance implications, it is perhaps a fair summation in view of the *Montgomery* decision, that under English law, contribution is not an essential

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153 *Ibid.* at p. 740 per Vaughan Williams L.J.

154 (1901), 6 Com. Cas. 291.

155 *Supra,* note 2 at p. 882; see footnote 43 at that page.

element in general average. But there must be more than one interest even if there is unity of ownership in respect of those interests.[156]

It is important to note, however, that the existence of insurance has an important bearing on the analysis. Where there is singularity of both interest and ownership, it makes little difference whether or not the interest is insured. If there is no insurance, the loss lies where it falls. If there is insurance, all other things being equal, there will be indemnification, but there is no question of general average contribution or adjustment. Where there are different interests but a common owner and there is no insurance in respect of any interest, an average adjustment to determine contribution is of little practical consequence because the payor and the recipient of all contributions is the same person. In contrast, adjustment and contribution become issues when the different interests in the same ownership are insured, especially if the insurers are different persons, which is often the case. In such a case, the assured has an action against the underwriter of a particular interest for a loss pertaining to that interest alone. In other words, in recovering from his underwriter, the assured must give credit for the contributions of his other interests, for it is deemed that he already has those contributions in his pocket.[157]

The position in American jurisprudence seems to be that in situations where there is a single interest such as where a ship is in ballast, and that interest is insured, there is a right to general average. This view is founded on the premise that the underwriter is a stakeholder and his interest is to be taken into consideration. By that token, more than one interest is benefited in the situation described above, namely that of the shipowner as well as the underwriter. The leading authority on this position is the decision of the eminent Story J. in *Potter* v. *Ocean Assurance Co.*[158] which was followed in *Dollar* v. *La Fonciere Co.*[159] afirmed in (1910), 181 Fed. R. 945). As far as English law is concerned, Lowndes and Rudolf are of the view that "it is hard to see how the interest of underwriters can be included for this purpose".[160] After commenting that in practice,

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156 *Supra*, note 11 at pp. 99-100.

157 See *supra,* note 2 at p. 882 and *supra*, note 7 at p. 317.

158 (1837), 3 Sumner 27.

159 (1908), 162 Fed. R. 563.

160 *Supra,* note 11 at p. 100.

general average contributions are frequently fought out by the insurers of the respective interests, Arnould has this to say-

> But, nevertheless, any question as to the right to contribution must always be determined by the courts, without regard to any question of insurance, and as if the contest were in reality, as it is in form, one between the owners themselves.[161]

In *The Brigella,*[162] Gorell Barnes J. held that there could be no general average contribution in the case of one person owning all the interests at risk, and as such, there could be no claim against the insurer of one of those interests for contribution. But this point of the decision was subsequently overruled by the *Montgomery* decision where it was held as follows-

> Suppose a person to be owner of the ship and cargo, and, of course, ultimately of the freight also; and he should insure the ship, cargo, and freight in three different policies, by different offices; if a jettison should be made, or a mast cut away, or any other sacrifice be made for the common benefit of all concerned in the voyage; there can be no doubt that this would be a case of general average, and the underwriters on ship, cargo, and freight must all contribute as for a general average. What possible difference in such a case could it make, that the same underwriters were underwriters in one policy on the ship, cargo and freight? ... To be sure, if the owner stands as his own insurer throughout, the question degenerates into a mere distinction, for it is a pure speculative inquiry. Not so, when there is an insurance; for in such a case, the underwriters are *pro tanto* benefited by the sacrifice or other act done; and they are in a just sense bound to contribute towards it.[163]

Thus, for the purposes of marine insurance, it is not necessary that the different interests involved in a common maritime adventure be vested in separate owners for a claim to subsist. In other words, the interests concerned may be in the same ownership. Indemnification will be available for a general average loss even if the owner of the ship and the cargo is the same person. Unity of ownership of different interests will not bar recovery from an insurer. This principle propounded by the *Montgomery* case, is reflected in s.66(7) of the Marine Insurance Act 1906 which provides as follows-

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161 *Supra,* note 2 at p. 882.

162 *Supra,* note 150.

163 *Montgomery* case, *supra,* note 152 at p.743 per Vaughan Williams L.J.

> Where ship, freight and cargo, or any two of those interests are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.

It is interesting to note that the Court of Appeal in the *Montgomery* case cited with approval part of the judgment of Story J. in *Potter* v. *Ocean Insurance Co.*[164] The *Potter* case clearly states that even where there is singularity of interest, general average is payable, and the *La Fonciere*,[165] which followed the *Potter* case would seem to consolidate the American view that insurance is a relevant interest in this context. Consideration of the position of underwriters as a party to the adventure, among others, was affirmed by Scrutton L.J. in *Foscolo Mango* v. *Stag Line Ltd.*[166] in the context of reasonable deviation. In *Oppenheim* v. *Fry*,[167] where hull and machinery was insured under separate valuation with a clause expressly treating them as separate covers, the court considered them as two interests for general average purposes. Given all of the above, and Arnould's statement regarding the practice of most English adjusters and underwriters, referred to earlier, it is submitted that in practical terms the answer to whether more than one interest must be imperilled, should be in the negative. This submission is borne out by the express provisions on this point contained in the relevant Institute clauses which will be explored in detail in another section.[168]

6. OTHER MARINE INSURANCE ASPECTS OF GENERAL AVERAGE

As is apparent from the discussion so far, general average is a significant part of the law of marine insurance and marine insurance aspects are germane to the practice of general average. Indeed, the very essence of general average, that is, the notion of proportionate sharing of losses by parties to a common maritime adventure, is a rudimentary form of mutual insurance in respect of maritime risks[169]. As such, when

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164 *Supra*, note 158.

165 *Supra*, note 159

166 [1931] 2 K.B. at p. 60.

167 (1863), 3 B& S. 873.

168 See chapter 2, section 6.

169 *Supra,* note 11 at p. 683.

indemnification of general average as a maritime risk evolved naturally in early marine insurance policies, one can say it was analogous to re-insurance, considering that general average had already been in existence for over two millenia. The general average implications for marine insurance relating to sacrifices and expenditures have already been discussed in a fair amount of detail. Issues relating to contribution and recoverability in situations of single ownership of multiple insurable interests have also been addressed. In the discussion following, other marine insurance aspects of general average will be examined.

The first point to note is that the insurer's liability for indemnifying a general average loss is assessed in the same manner as the measure of indemnity for a total or partial loss. In essence, it will depend on whether the policy in question is valued or unvalued. Usually, in the case of cargo under a valued policy, indemnification will be on the basis of the insured value, or in some instances, where the policy so dictates, on replacement cost. Similarly, in the case of freight, it will be based on the insured or insurable value. In the case of partial sacrifice of a ship, it will be the reasonable cost of repairs, possibly on the basis of "new for old" deductions, although in practice this is often not the case as specific Institute clauses may provide otherwise.[170]

There is no obligation on the insurer to indemnify the entire amount of the sacrifice or the contribution even if the interest in question is fully insured. The quantum of indemnification is that proportion of the loss or contribution which the insurable value of the interest bears to its estimated value for contribution purposes. This value, for purposes of indemnification of contribution must be the value of the ship or other property according to the contractual arrangement between the assured and the insurer. It must be the value stated in the policy; or if it is an unvalued policy, it must be the value at the time and place at the beginning of the voyage. This leads to an anomaly because in general average practice, the contributory value is the net value of the property in the hands of the owner at the place of adjustment, referred to as the arrived value.[171] If the contributory value is higher than the insured value, it is only the latter amount that is

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[170] See *supra,* note 7 at pp. 318-319 for further details relating to the practice of average adjusters on these matters.

[171] Strictly speaking, the contributory value is the arrived value plus the amount made good. See Arnould, *supra,* note 2 at p. 883, in particular, footnote 46 at that page.

recoverable from the insurer. But if the contributory value is lower, then the assured may recover the whole amount of his assesed loss or contribution.[172] This is expressed by the following rule written by Magens as far back as in 1755-

> Whatever is paid in contribution, by the excess of the contributory value over the value in the policy, is paid by the assured; but for whatever is paid on a contributory value not exceeding the value in the policy, the assured is indemnified on the proportion insured.[173]

In *Balmoral Steamship Co. Ltd.* v. *Marten*,[174] the vessel *Balmoral* was valued at pounds sterling 33,000 and insured for that amount. Its salved value and contributory value was fixed at pounds sterling 40,000 after the vessel received salvage services and incurred certain general average expenditures. The House of Lords affirming the decisions of the courts below held that the shipowners were entitled to indemnification for only 33/40ths of the general average expenditures and salvage costs.

It is noteworthy in this context that the law in the United States on this point is different with respect to insurance on ship where the ratio between insured value and contributory value is ignored and the insurer is liable to pay the whole of ship's contribution to general average.[175] It is notable, however, that express terms are inserted in American ship insurance policies to get around the American case law position.[176] In contrast, with regard to cargo insurance, the American law is the same as English law.[177] Two points should be mentioned in relation to the above discussion. First, the *Balmoral* as well as the *International Navigation* Cases predate the Marine Insurance Act, 1906; and second, Rule B33 of the Rules of Practice adopted by the Association of Average Adjusters provides as follows-

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172 *Ibid.*

173 *Ibid.* at footnote 47 of that page reference is made to 1 Magens, 245, case xix; and Phillips, *Insurance*, s.1410.

174 [1902] A.C. 511 (H.L.)

175 See *International Navigation Co.* v. *Atlantic Mutual Insurance Co.* (1901), 108 Fed. R. 988.

176 *Supra,* note 11 at p. 694, particularly footnote 17 at that page; *Templeman, supra,* note 7 at p. 323, in particular, footnote 11 at that page.

177 See e.g., *Gulf Refining Company* v. *Atlantic Mutual Insurance Co. (The Gunflight)*, (1929), 35 Ll.L.R. 21 (U.S.S.C.)

> If the ship or cargo be insured for more than its contributory value, the underwriter pays what is assessed on the contributory value. But where insured for less than the contributory value, the underwriter pays on the insured value; and when there has been a particular average for damage which forms a deduction from the contributory value of the ship that must be deducted from the insured value to find upon what the underwriter contributes. This rule does not apply to foreign adjustments, when the basis of contribution is something other than the net value of the thing insured.[178]

The above is a British Rule of Practice, the origin of which goes back to 1876. The rule, no doubt, is consistent with the statement of Magens dating back to 1755 which has been quoted earlier in this discussion. At this point it is worth examining the relevant provision of the Marine Insurance Act 1906 which deals with this issue. Section 73(1) of the Act, it would seem, squarely reflects the principles discussed above. The provision reads as follows-

> Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject-matter liable to contribution is insured for its full contributory value; but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute.

The word "full" in the term "full contributory value" quoted above is not without its difficulties, particularly so, because the expression "contributory value" also appears in the provision. Arnould is of the view that a distinction must exist between the two expressions otherwise the term "full" is superfluous. In his opinion, the former expression means the sound value of the ship, *i.e.,* the maximum potential contributory value, whereas the latter refers to the value arrived at after deductions are made from the sound value for damage and expenses for which the insurer is not liable. In other words, in his opinion, "contributory value", as the expression appears in the last instance in the provision, clearly means the gross value. In contrast, therefore, the expression "full

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[178] The full text of the Rules of Practice are found in Appendix 3 to Lowndes and Rudolf. The text of Rule B33 and discussion on it appear at p. 694.

contributory value" must mean something more than simply "contributory value"[179]. In support of this position, he has this to say-

> This view is reinforced by a consideration of the object of section 73(1), which is to ensure that the assured shall receive a full, but no more than a full indemnity; in other words, that underwriters' liability shall in no case exceed the agreed or insurable value, as the case may be, of the subject-matter insured. If the provisions as to under-insurance were not to be applied in cases where the insured value, though greater than the value on which the subject-matter in fact contributed, was less than its maximum potential contributory value, this object would not necessarily be achieved.[180]

Let us examine the following numerical example which is a modified version of the one provided in Arnould's text.[181]

• Sound value of ship	$100,000
• Deductions for which insurer is not liable (i.e., damage, deterioration, expenses)	$ 20,000
• Contributory value	$ 80,000
• Ship's contribution to G.A. (20%)	$ 16,000
• Ship insured for and valued at	$ 90,000

In the above numerical example, the underwriter's liability depends on what interpretation is given to the term "full contributory value", *i.e.,* whether it is the sound value or the value arrived at after the deduction for cost of repairs, meaning, the contributory value. If it means the same thing as the contributory value, then the payment made by the underwriters is relatively more since the ship is insured for more than its "full contributory value". In the example given it is $16,000. If it means the sound value, as Arnould suggests, then in the example given, the ship is under-insured, and consequently, the payment made by the underwriter is relatively less. In the example

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[179] This is a paraphrase of what is stated by Arnould, *supra,* note 2 at p. 884. It is submitted that the word "gross" in this context is misleading. If the sound value is the higher amount being the "maximum potential contribution", then that must be the gross amount. The contributory value being the lower amount, that is, the amount arrived at after the cost of damage, *etc.* are deducted, must then be the net amount.

[180] *Ibid.*

[181] *Ibid.* at footnote 50.

given it is 90% of the full contributory value. Thus the underwriters will pay 90% of $16,000, that is $14,400.

The editors of Lowndes and Rudolf are clearly of the opposite view to that of Arnould. They submit, in reference to Arnould's numerical example that it leads to "exceedingly harsh results which seemingly penalise the assured twice for any under-insurance, and are demonstrably in error." They point to the original objective of the Marine Insurance Act 1906, which was to codify the existing law and practice and not to create a new regime in the subject area. In support of their position, the authors provide their own numerical examples in relation to both ship and freight.[182] However, in the case of insurance of freight, it is virtually always through an unvalued policy that cover is provided. And, in this connection, the final section of Rule B33 of the Rules of Practice provides as follows-

> In adjusting the liability of underwriters on freight for general average contribution and salvage charges, effect shall be given to Section 73 of the Marine Insurance Act 1906, by comparing the gross and not the net amount of freight at risk with the insured value in the case of a valued policy or the insurable value in the case of an unvalued policy.

In the opinion of Lowndes and Rudolf, the wording of the above provision is imperfect, to say the least, in respect of unvalued policies. The editors state furthermore, that if the wording is clear with regard to valued policies, it is inconsistent with the practice that prevails on ship policies, and it supports and encourages "the erroneous views on the matter expounded in Arnould".[183]

At this juncture and in the context of this debate and discussion, it is perhaps instructive to focus on the latter part of s.73(1) of the Marine Insurance Act. For the sake of clarity of comprehension, the relevant extract of the provision is revisited. The words are-

> and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable,

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[182] *Supra*, note 11 at pp. 695-697.

[183] *Ibid.* at pp. 698-699.

> that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute.

The acknowledgement that the Marine Insurance Act 1906 is a codification of the law and practice that existed hitherto is exemplified by the old Custom of Lloyd's which also only referred to the deduction of particular average from the insured value. However, the insurer may be liable for other expenses which, in the calculation of net contributory value, would be deductions. An example of such a deduction would be salvage when treated separately and not as general average. To clarify the position, the second section of Rule B33 of the Rules of Practice substitutes the words "particular average" as it appears in s.73(1) of the Act with the words "all losses and charges" which have a much wider scope and are capable of accommodating the other expenses referred to above. The second section of Rule B33 provides as follows-

> That in practice, in applying the above rule for the purpose of ascertaining the liability of underwriters for contribution to general average and salvage charges, deduction shall be made from the insured value of all losses and charges for which underwriters are liable and which have been deducted in arriving at the contributory value.

Lastly, with regard to the debate between the authorities over the true meaning of "full contributory value" in s.73(1) of the Marine insurance Act 1906, the view of this writer is as follows. The words "contributory value" appear in the last segment of the provision in the context of "a particular average loss which constitutes a deduction..." As such, those words are used in the sense that refers back to the expression "full contributory value" used in the earlier parts of the provision, without repeating the whole expression. In other words, in the final leg of the provision, the words "contributory value" must bear the meaning as depicted in the earlier use of the expression in the provision, namely, as "full contributory value". From the viewpoint of statutory interpretation, there is nothing in the provision to suggest that "contributory value" must be construed as something less than "full contributory value" within the meaning of s.73(1) taken as a whole. This writer is therefore not in agreement with the position of Arnould on this matter.

7. PERIL

Finally, this discussion on marine insurance implications will not be complete without a mention of how, in the context of general average, the notion of peril pertains to indemnifiability. The element of peril has already been addressed in terms of the definition of general average both under the York-Antwerp Rules as well as the Marine Insurance Act 1906. We know that peril is a necessary element for general average to subsist. We also know that in that sense the two definitions are virtually identical. The York-Antwerp Rules refers to a general average act committed for preserving from peril property involved in a common maritime adventure. The Marine Insurance Act refers to such an act committed in time of peril for preserving property imperilled in a common adventure. In substance and in principle there is no distinction between the two definitions in their treatment of peril. This is exemplified by the case law discussed earlier in this Chapter.

It is, however, important to take cognisance of the fact that whereas a general average act will subsist regardless of the source of the peril, it may not necessarily be indemnifiable unless that peril is provided for in the policy. In other words, the marine insurance policy must provide cover for risk of loss or damage in respect of the insured property arising from that peril. It may well be that the initial incident giving rise to the peril, such as a storm, is expressly covered or excluded, or is not even mentioned in the policy. Similarly, the peril thus created which the general average act seeks to counter, such as a grounding, may be expressly included or excluded, or the policy may be silent. In this regard, the relevant provision in the Marine Insurance Act 1906 needs to be carefully examined. It is provided in s.66(6) as follows-

> In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connexion with the avoidance of, a peril insured against.

It is apparent from the above provision that in seeking to establish whether or not there is a valid claim for indemnification of general average under a marine insurance policy, it is necessary to determine what was the peril which the general average act attempted to avoid. In many instances, the peril creating the incident is the same as the

peril which necessitated the general average act, such as the outbreak of a fire on board. In such cases, if fire is a peril against which the property is insured, the fire damage as well as sacrifices and expenditures made to quell the fire would be indemnifiable under the policy.

But there may be cases where the initial incident is a peril which is different from the peril which instigated the general average act. An example of this would be the incidence of a storm causing a ship to be disabled, which in turn, leads to the ship being grounded. There may be cases even more complex than this. Suppose a ship were to become disabled due to failure of the steering gear attributable to ordinary wear and tear. The cost of repairs to the steering gear will probably not be indemnifiable under the ship's hull and machinery policy. However, if the loss of the steering gear were to cause the ship to drift on to a shoal, or if due to adverse weather conditions, the ship suffered other damage, the general average losses and expenditures would likely be indemnifiable if those causes were insured perils.

In a case where a claim for general average expenditure together with a claim for damage to the ship caused by a mine was settled under a war risk policy, a subsequent damage reasonably attributable to the same cause but not immediately apparent was treated differently. After the mine struck the vessel and repairs were effected, a year later the crankshaft of the vessel's main engine suffered a breakdown and general average expenses were incurred to avoid the peril of the vessel running aground in adverse weather. The war risk insurers covered the cost of repairs to the crankshaft but the general average expenses were charged to the hull insurers who held the standard risks at the time the engine broke down.[184]

Another example is the case of *Pyman S.S. Co. Ltd.* v. *Admiralty*[185] which occurred after World War I. In that case, the propeller shaft of a vessel broke during a heavy gale in the North Sea and the ship ran the risk of drifting on to an enemy minefield.

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[184] This factual situation, without a case name, is described in Lowndes and Rudolf at p. 686.

[185] [1918] 1 K.B. 49; 14 Asp. M.L.C. 171.

Following a salvage operation, the salvage arbitrators attributed 75% of the award to hull and machinery insurers and 25% to the war risk insurers. The award was upheld in the Court of Queen's Bench as well as the Court of Appeal. In so deciding, the tribunals viewed the breaking of the shaft and general average liability as two separate issues, one not being relevant to the other, for the purposes of indemnifiability.

8. EXPRESS COVER

As mentioned previously, the contractual terms of marine insurance pertaining to indemnification of general average are contained in the policy and they are derived from the relevant Institute Clauses or the International Hull Clauses 2003 (IHC 2003). It was mentioned in Chapter 2 that the Institute Clauses and the IHC 2003 are designed in such a way as to address both salvage and general average together in the same clause. In that chapter the relevant clauses were discussed in detail and it would serve no purpose to repeat that discussion in this chapter. However, in the context of the IHC 2003, there are two clauses to which attention must be drawn.

It will be recalled that Rule XI(d) of the York-Antwerp Rules, added in 1994, provides for the allowance of the cost of measures undertaken to prevent or minimise damage to the environment when incurred as part of certain specified general average operations. Clause 8.6.2 of IHC 2003 provides that the exclusion of underwriters' liability mentioned in clause 8.5 relating to special compensation payable to the salvor and expenses or liabilities incurred in respect of damage to the environment, will not apply to any sum payable by the assured as general average expenditure allowable under Rule XI(d) referred to above.

The IHC 2003 also provides for General Average Absorption in clause 40. It consists of ten sub-clauses. Sub-clause 40.1 states that clause 40 applies subject to the provisions of clause 8 which addresses salvage and general average and only when underwriters have expressly agreed in writing. Clause 40 also applies only in the event of an accident or occurrence giving rise to a general average act under the York-Antwerp Rules or under the general average clause in a contract of affreightment. Pursuant to this clause, the assured has the option of exercising "general average absorption" up to an amount expressly agreed by the underwriters. This clause essentially allows the assured to

claim from underwriters general average, salvage and special charges without claiming the same from cargo, freight, bunkers, containers or any property on board not owned by the assured.

9. REFORM OF GENERAL AVERAGE

9.1 York –Antwerp Rules 2004

As mentioned earlier, the law and practice of general average is almost universally governed by the York-Antwerp Rules. The Rules are incorporated by reference in marine insurance and carriage contracts. The Comite Maritime International (CMI) is the custodian of the Rules and they are exemplary of universality and uniformity in a well-established area of maritime law without being an international convention or treaty instrument.[186]

Following the Vancouver Conference of CMI held in April-May 2004, the new York-Antwerp Rules 2004 have now been introduced. These Rules reflect the negotiated compromises that emerged from the deliberations at Vancouver as well as the debates that persisted prior to the Conference at least since Sydney 1994. The changes effectuated in the 2004 Rules are summarized below.[187]

1. Rule VI is amended to exclude salvage from general average, although credit is given for salvage paid by one party (usually ship) on behalf of the others.[188]

2. Rule XI is amended so that crew wages will no longer be allowed during the vessel's stay at a port of refuge.

3. Rule XIV is amended so that savings to ship resulting from temporary repairs to accidental damage at a port of refuge are first taken into account before any allowance in general average is considered.

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[186] John MacDonald, *supra,* note 49 at p. 439.

[187] See Richard Cornah, *supra*, note 49 at p. 405.

[188] See Chapter 6 of this thesis for more details of this development.

4. The rate of interest currently set at 7% will be reviewed annually by the CMI through an established procedure.

5. A time bar provision is introduced which will be effective where national jurisdictions so permit.

9.2 Background to the Reform

For quite some time concerns have been raised periodically regarding the continued usefulness of the general average notion itself. Its pre-eminence is well recorded by maritime historians over past millennia although not all are in agreement with respect to its precise origin. Some contend without reservation that it has its roots in the Rhodian law of jettison; others refute that contention emphatically.[189] There is nothing quite like it in any sphere of law. However, as unique as it may be in terms of a maritime phenomenon, its usefulness in contemporary ocean-based commerce is questionable to say the least. Indeed, doubts in this regard were raised even while the York Rules were at the proposal stage in 1864.[190]

It has mostly been the spokesmen for the marine insurance industry who have consistently advocated the abolishment of general average. One academic, Professor Knut Selmer is of the view that general average can quite conveniently be replaced by a suitably adjusted system of marine insurance.[191] This viewpoint seems quite reasonable given the sophistication of marine insurance as it has developed including the regime of re-insurance. The ones who are opposed to abolishing general average are mainly the practitioners of the trade, namely, the average adjusters; and the reasons are obvious. It is notable, at any rate, that total abolishment of general average no longer seems to be an issue. Rather, the parties for and against this unique phenomenon appear to have reached a major stop on the road to compromise.

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[189] See Proshanto K. Mukherjee, *Maritime Legislation*, Malmö: WMU Publications, 2002 at pp. 12-14 for an account of this interesting debate. See also pp. 22-23 where it is stated that the Malaccan Sea Code of the 13th. century also contained a law of jettison.

[190] *Supra,* note 11 in Appendix 5 at p.705.

[191] Knut Selmer, *The Survival of General Average*, Oslo: Institute of Maritime Law, University of Oslo, 1958 at p. 289.

9.3 Recent Developments at CMI

Since the revision of the York-Antwerp Rules in 1994 following the Sydney Conference, there have been further calls for revision of the Rules. In effect, changes to the Rules, which in essence codify and dictate practice, especially in relation to average adjustment, signify changes to the legal regime itself. It is therefore important in the context of this thesis, to touch upon the recent developments at the CMI in this regard. Issues of fundamental importance have been raised and there are clearly two opposite schools of thought in relation to the changes although a compromise was finally reached at the Vancouver Conference.

At the centre of the debate was the issue of whether there should be allowances for both "common safety" as well as "common benefit", or whether the notion of "common benefit" should be discarded altogether. If the latter proposal were to be adopted it would signify a radical change in the Rules, and consequently, in the law and practice of general average.[192] The main protagonist of this radical change was the IUMI whose constituency includes cargo insurers and hull insurers. The latter appeared to support the proposal at least to some degree. In addition, there was support from the delegations of Ireland and Norway to the CMI. The shipowners and their P&I Clubs seemed to be in opposition and so were the delegations of Brazil, Denmark, France, the Netherlands, United States and Venezuela. The delegations of Canada, Germany, Italy, Japan and the United Kingdom seemed to adopt a neutral stance or would have preferred a compromise between the two opposing positions.[193] As an alternative to the "radical" change, the proponents put forward an alternative set of proposals consisting of changes to certain specific rules. This was viewed as the compromise. The path taken by the CMI at and following its Vancouver Conference is a modified alternative approach.[194]

The IUMI has for some time advocated the restriction of categories of losses and expenses being allowed in general average. Correspondingly it favours allowing more losses to lie where they fall.[195] The IUMI makes no bones about this stance simply

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[192] *Ibid.* at p. 440; see also Richard Cornah, *supra*, note 41 at p. 156.

[193] MacDonald, *supra,* note 49 at p. 440.

[194] See Richard Cornah, *supra,* note 49 and the CMI website www.comitemaritime.org for details of the 2004 changes.

[195] *Supra*, note 41 at p.155.

because it represents the property insurance market that is the main if not the sole provider of insurance in respect of general average losses and expenditures. It apparently did not fortify its position in this regard adequately ahead of the Sydney Conference and was reluctant to set the ball rolling for another round of changes soon after the 1994 revision of the Rules.[196] Thus, the IUMI, following its own 1998 conference in Berlin where a paper entitled "General Average – How Should it be Changed?" was presented, subsequently made a formal request to CMI to consider revisiting the York-Antwerp Rules on an urgent basis on the ground that the concept of general average as reflected in those Rules was outmoded and was in need of further revision. The so-called radical proposal was articulated and floated for debate at the CMI meeting in Toledo in 2000 and at the Singapore Conference in 2001.[197] In essence the proposal was based on the premise that recoverability in general average should be limited to expenses incurred only in time of peril so that when the ship reaches a port of refuge and the peril in question has passed, no further expenses would be allowed.[198] The proposal is adequately summarized in the following words:

> The 1994 Rules should be radically amended to give effect to the requirement that GA allowances (1) should be made only when costs have been incurred to preserve the immediate physical safety of the common property ('common safety' allowances), and (2) should exclude any cost which has been incurred only for the purpose of bringing the voyage to a safe conclusion ('common benefit' allowances).[199]

The proponents argued that expenses and sacrifices should only be allowed in general average if they are incurred or made when the ship and cargo are in the grip of peril. The peril in question should only be considered as continuing until the ship and cargo have reached a position of reasonable safety. By this token, after the ship has arrived at a port or place of refuge, the peril has ceased for the purposes of general average.[200] The basis for the proposal was rooted in the classical principle of general average that has evolved historically from classical times, the pristine purity of which has

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196 Eamonn Magee, "General Average Reform – The IUMI Position" in *CMI Yearbook 2000* at p. 294. This Yearbook contains the Documents of the Singapore Conference held in 2001.

197 *Supra*, note 41 at p. 156.

198 Eamonn Magee, *supra*, note 196 at p. 295.

199 MacDonald, *Supra*, note 49 at p. 440.

200 See "General Average – Report by the CMI International Sub-Committee" in *CMI Yearbook 2003* Documents for the Vancouver Conference, Part II at p. 280.

been adulterated gradually by a shift from "common safety" to "common benefit" as the premise. Compromises were effectuated through the instrumentality of the York-Antwerp Rules in the interest of international uniformity.[201] English law recognized only "common safety" as a basis for general average since the early part of the 19th century but the notion of "common benefit" was largely prevalent in the United States and in continental Europe.[202] But even the English courts went through phases of change from a conservative to a liberal and back to a conservative mindset.

The conservative English practice prevailed during most of the 19th century. It was different from the American and European continental practices and was unfavourable to merchant interests. Contrary to that practice, the Court of Appeal in *Atwood* v. *Sellar* [203] adopted a rather liberal approach. It seems Thesiger L.J. put English law on a level playing field consistent with practices in other mercantile jurisdictions. Apparently, the eminent Richard Lowndes was greatly encouraged by this decision and started to follow the liberal practice in his general average adjustments.[204] However, not long afterwards, in *Svendsen* v. *Wallace*,[205] although the trial court followed the precedent established in *Atwood* v. *Sellar*, the Court of Appeal refused to do so and reversed the trial decision.[206] Brett M.R. confirmed that under English law expenses incurred for entering port, unloading cargo and carrying out repairs to save ship and cargo, were for general average except where unloading of cargo was not necessitated by such cause. Similarly, warehousing, reloading and port exit expenses were not general average expenses. The learned master of the Rolls, it seems, did not feel it was expedient for English law to bend to the laws of other countries that were nearly not as commercially adventurous as England. On appeal to the House of Lords some aspects of the Court of Appeal decision were confirmed, others were left undecided.[207]

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201 *Ibid.* at p. 441.

202 Richard Cornah, *Supra*, note 41 at pp. 156-157.

203 (1880), 5 Q.B.D. 286.

204 *Supra*, note 41 at p. 159.

205 (1883), 11 Q.B.D. 61.

206 (1884), 13 A.C. 69 (C.A.)

207 (1885), 10 HL 404.

As an alternative to the radical proposal of totally discarding "common safety" in favour of "common benefit" the IUMI proposed the following individual, piecemeal changes to the York-Antwerp Rules 1994:[208]

1. Rules X (b) and (c), and XII – The costs of discharging, storage and reloading of cargo at ports of refuge (as well as any loss of or damage to cargo resulting from these operations) should be excluded from GA when required only to allow the effecting of accidental damage repairs necessary for the safe prosecution of the voyage.

2. Rule XI (b) - Allowances for costs of wages, fuel and port charges during the extra period of detention at a port of refuge which is required for the vessel to effect repairs necessary for the safe prosecution of the voyage should be excluded from the GA.

3. Rule XIV - Costs of temporary repairs effected at a port of refuge should in future be allowed only when those temporary repairs were required for the common safety, or when they were in respect of general average sacrifice damage.

4. Rule F - Allowances in GA based on the notion of 'substituted expenditure' should in future be excluded.

5. Rule VI - Payments made by the owners of the salved property to salvors, under salvage awards or agreements, should no longer be reapportioned as general average allowances.

6. New Rule - It is suggested that a new Rule be included to deal with questions of time bar.

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[208] These are set out in summary form in MacDonald, *supra*, note 49 at pp.441-442.

7. Rule XXI - This Rule should be amended, either to reduce the present fixed rate of seven per cent interest on GA allowances, or to incorporate a system which would reflect fluctuations in interest rates.

8. Rule XX - Commission on GA allowances should be abolished.

9. General - The text of the Rules should generally be tidied up.

At the Vancouver Conference of the CMI support for the radical IUMI proposal to limit general average to the "common safety" concept was sparse. Most delegations were of the opinion that the present regime in the Rules extending to the "common benefit" notion, under which the costs at a port of refuge were divided, was more advantageous. The framework was well understood so that prompt action could be taken without being bogged down with contentious legal issues. The system was time-tested, it worked well and changes to it would likely precipitate disputes and increases in attendant costs. However, delegates did express considerable support for several of the piecemeal, incremental changes proposed by the IUMI. The new York-Antwerp Rules 2004 reflect these accepted changes that emerged from the deliberations of the Vancouver Conference

10. CONCLUSION

In concluding the discussion on the latest developments on general average at CMI, it is perhaps worth noting that for the first time new Rules are being put into place without obtaining a consensus between shipowners and other interested parties. Incidentally, the shipowners were opposed to any changes at all being effectuated within only ten years of the last revision. They were of the view that absorption clauses in hull policies, pursuant to which hull underwriters paid all expenses average up to a specified limit, in effect removed about half of the general average cases, so that several of the issues raised by the IUMI were no longer of any consequence. Hull underwriters may be moved to insert clauses in their policies limiting liability to those allowable under the new Rules. Much will depend, of course, on the state of the market which is very competitive. Cargo interests will also have to consider to what extent the new Rules will feature in

their contracts of affreightment which again will depend on negotiability of freight with carriers.[209]

As a final note to this chapter, one cannot help but observe that those who are opposed to the abolishment of general average or even to any changes to the existing regime are the ones who stand to lose the most in terms of their trade or calling; and they are the average adjusters. The arguments they put forward in support of their cause are relatively shallow in substance. Insurers, on the other hand, stand to gain in circumstances where the market is more dependent on the insurance industry than it would be otherwise. All said and done, however, it is virtually impossible to think of the maritime world surviving without marine insurance. It can hardly be said that average adjustment enjoys the same level of indispensability.

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[209] Cornah, *supra,* note 49 at p. 412.

CHAPTER 5

RECOVERY UNDER SUE AND LABOUR

1. INTRODUCTION AND HISTORICAL BACKGROUND

It is well recognised as a general principle, that the contract of marine insurance is a contract of indemnity. By providing indemnity in consideration of the premium, the insurer in effect assures the assured that the latter will not suffer loss by reason of an insured adventure or peril. While the insurer undertakes to indemnify the assured against marine losses, in a manner and to the extent agreed, the assured also has to perform certain duties towards the insurer.[1] Mostly these obligations are included in the doctrine of *uberrimae fidei* or "utmost good faith". The overriding duty of utmost good faith is owed by both parties, the assured and the insurer, to each other mutually.[2] On the one hand the assured is satisfied that in case of any loss of an insured peril he will be indemnified by the insurer, but on the other hand, he also owes a legal responsibility to make every effort to minimise his losses. Furthermore, in consideration of his efforts to minimise or avert the loss or damage in question the insurer will remunerate him.

In bygone eras, from the earliest of times, when communications at sea and between ship and shore were virtually non-existent and communication between different ports were in a rudimentary stage, cargo owners and carriers relied heavily on the element of mutual trust which rested on the need for preservation of their respective properties. Similarly, the position of the insurer *vis a vis* the assured required not only the mutual disclosure of material facts, but also, both parties agreed that in the event of any misfortune, it would be the duty of the assured or his representative on board the ship to use all his affordable means to protect the insured property from danger and further damage or loss. The assured and his representative were to exercise all reasonable

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1 R.J. Lambeth, *Templeman on Marine Insurance*, 6th. Edition, London: Pitman Publishing Ltd., 1986, (hereafter referred to as "Templeman") at p.1.

2 See section 17 of the Marine Insurance Act 1906 where it is provided that "A contract of marine insurance is a contract based on the utmost good faith, ..." See also Robert Grime, "Counterclaims by Marine Insurers" in D. Rhidian. Thomas (Ed.) *The Modern Law of Marine Insurance*, Volume Two, 2002, London: Lloyd's of London Press Ltd., at pp. 267-269 for a clear and concise account of the evolution of the doctrine of *uberrimae fidei* in English marine insurance law. See also Templeman at pp. 20-23 and *Arnould's Law of Marine Insurance and Average*, Vol. II, 16th Edition, 1996, London: Sweet & Maxwell, hereafter referred to as "Arnould" at pp. 475-520.

measures to minimise the losses, as an uninsured owner would exercise in this situation.[3] It appears this is how the sue and labour clause originated.[4]

It is submitted that the principle of sue and labour embraces the general notion of equity or fairness in a commercial relationship, contractual or otherwise. Stated succinctly, this means that in time of peril in a maritime adventure if the assured makes an extraordinary effort in the form of a sacrifice or expenditure to save maritime property or mitigate its loss, he deserves to be reimbursed by the insurer.

In relative terms, the sue and labour clause has not been in vogue as much as the other two saving acts under discussion in this thesis. It is notable that to sue and labour is a duty of the assured, whereas salvage and general average are voluntary acts.[5] As already mentioned in the preliminary chapter, all three constitute acts done to save maritime property in a maritime adventure.

Of historical interest is the fact that the sue and labour clause was traditionally inserted in the Lloyd's S.G. form of policy in English marine insurance contracts. The text read as follows:

> In case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises, and ship, etc., or any part thereof, without prejudice to this insurance, to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured.[6]

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[3] W.D. Winter, *Marine Insurance*, 3rd. Ed., 1952, New York, at p. 195. See also Gotthard Gauci, "The Obligation to Sue and Labour in the Law of Marine Insurance – Time to Amend the Statutory Provisions", [2000] *IJOSL,* Part 1 at p.3.

[4] Brendan P. O'Sullivan, "The Scope of the Sue & Labour Clause" (1990), 21 *JMLC* 4 545 at p. 551.

[5] The duty may exist by virtue of contract or even in the absence of a contractual obligation. This is discussed in detail later in this chapter.

[6] The Lloyd's S.G. form of policy was formulated, after several iterations, in 1779. In an early case, *Brough* v. *Whitmore* (1791), 4 T.R. at p. 210, Buller J. described it as "a strange and incoherent instrument". See Robert Grime, *supra*, note 2 at p. 262 in footnote 63 at that page. One of its unique characteristics is that even though it was essentially a private law contractual instrument, it was appended verbatim as Schedule 1 to the Marine Insurance Act 1906. See Proshanto K. Mukherjee, *Maritime Legislation*, Malmo: W.M.U. Publications, 2002 at p. 40.

An almost similar sue and labour clause is found in the American Institute Clauses which reads as follows:

> And in case of any Loss or Misfortune, it shall be lawful and necessary for the Assured, their Factors, Servants and Assigns, to sue, labor and travel for, in and about the defence, safeguard and recovery of the Vessel, or any part thereof, without prejudice to this insurance, to the charges whereof the Underwriters will contribute their proportion as provided below. And it is expressly declared and agreed that no act of the Underwriters or Assured in recovering, saving or preserving the vessel shall be considered as a waiver or acceptance of abandonment.[7]

The historical root of the clause as it appears in the First Schedule to the Marine Insurance Act 1906 incorporating the above-mentioned S.G. form of policy, is of great antiquity. According to O'May, the clause was first considered judicially in the 1669 case of *Goramt* v. *Sweeting,*[8] but such formulation of wording apparently existed in policies on ships predating that case.[9] Although W.D. Winter makes the point that the origin of the sue and labour clause is difficult to trace in definitive terms, there is evidence to suggest that the clause first appeared in a policy dated 1613 on the ship *The Tiger of London.* The policy itself is to be found in the Bodlein Library at Oxford.[10] A precursor to the sue and labour clause is apparently to be found in a policy prescribed under the legislation of Florence on insurance dated 1523.[11] In English law, the duty to sue and labour first arose in the context of abandonment which is a doctrine associated with constructive total loss in the law of marine insurance. It was doubtful at one time as to whether an assured could attempt to recover or mitigate the loss of maritime property without giving up his right to abandon, which would entitle him to indemnification. The sue and labour clause was apparently created to overcome this uncertainty.[12]

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7 American Institute Time (Hull) Policy, June 2, 1977.

8 (1669) 2 Saund.200.

9 Donald O'May and Julian Hill, *Marine Insurance Law and Policy*, London: Sweet & Maxwell, 1993, (hereafter referred to as "O'May") at p. 324.

10 Winter, *supra*, note 3 at p. 195.

11 See J.P. Van Niekerk, in "Suing, Labouring and the Insured's Duty to Avert or Minimise Loss", *Modern Business Law*, 1987 at p.144 cited also in Gauci, *supra*, note 3 at p.3.

12 Victor Dover, *A Handbook to Marine Insurance*, London: Witherby & Co. Ltd., 1975 at p. 302. See also *State of Netherlands* v. *Youell,* [1998] 1 Lloyd's Rep. 236 at p. 242. See as well footnote 23, *infra.*

However, by the time the Marine Insurance Act was enacted in 1906, the duty to sue and labour had extended to applications other than casualties giving rise to abandonment.[13] In the recent case of *Kuwait Airways Corporation and Another* v. *Kuwait Insurance Company S.A.K. and Others,*[14] a case involving an aviation insurance policy, Lord Hobhouse stated that "[T]he law was worked out in various 19th. century decisions and codified in the Marine Insurance Act 1906 in section 78."[15]

The meaning and significance of the expression "sue, travel and labour" also has an interesting background. It is explained by O'May that "to sue" has nothing to do with bringing suit, *i.e.*, commencing judicial proceedings, but rather, it is an abbreviation for the notion "to pursue". The term "travel" actually has the same meaning as "labour". It is the English corruption of the French word "travail" which means "work" or "labour".[16] In *Royal Boskalis* v. *Mountain,*[17] Stuart-Smith L.J. in the Court of Appeal in perusing the origins of the expression "sue, labour and travel" referred to the writings of Machlachlan, the editor of the sixth edition of Arnould who apparently characterized the phrase as "an idiomatic description of exertions which extended beyond physical labour and comprehended attempts to procure a result by supplication, persuasion or expenditure of money."[18]

2. CONCEPT OF SUE AND LABOUR AND ITS RATIONALE

2.1 Purpose of the Sue and Labour Clause

The purpose of sue and labour as a functional concept of mitigative action was aptly summarized in *Kidston* v. *Empire Marine Insurance Co. Ltd.*[19] by Willes J. in the following words:

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13 See decision of Phillips L.J. in *State of Netherlands* v. *Youell*, [1998] 1 Lloyd's Rep. 236 at p. 242 citing *Kidston* v. *Empire Marine Insurance Co. Ltd.* (1866), L.R. 1 C.P. 535 where the question of whether sue and labour could be used in a freight policy for costs of transshipment expended to avoid loss of freight, was in issue.

14 [1999] 1 Lloyd's Rep. 803.

15 *Ibid.* at p.816.

16 O'May, *supra,* note 9 at p. 324.

17 [1997] 2 All. E.R. 929.

18 *Ibid.* at p. 949.

19 (1866), LR 1 CP 535, at p. 543.

> The meaning [of the sue and labour clause] is obvious, that, if an occasion should occur in which by reason of a peril insured against unusual labour and expense are rendered necessary to prevent a loss for which the underwriters would be answerable, and such labour and expense is incurred accordingly, the underwriters will contribute, not as part of the sum insured in case of loss or damage, because it may be that a loss or damage for which they would be liable is averted by the labour bestowed, but as a contribution on their part as persons who have avoided detriment by the result in proportion to what they would have had to pay if such detriment had come to a head for want of timely care.

In essence, the purpose of the clause is to appreciate and encourage the assured's efforts to avoid or reduce and minimise an insured loss for the benefit of the insurer. The clause therefore provides an opportunity to the assured to "sue and labour" and to recover his expenses for the said labour from the insurer. In the *Kuwait* case,[20] Lord Hobhouse stated that the central or ordinary purpose and understanding of the sue and labour clause was to authorise the assured "to take reasonable steps to recover the insured property or reduce the extent of the insured damage or loss."[21] More simply and particularly in the context of the original clause, therefore, it can be said that it is "lawful" for the assured to sue, labour and travel for the defence, safeguard and recovery of the insured property in case of any loss, and more importantly, the insurer will contribute to the charges incurred in doing so.[22]

In *American Merchant Marine Insurance Co.* v. *Liberty Sand and Gravel Co.*[23], the purpose of the sue and labour clause was stated in the following words:

> The original purpose of the suing and labouring clause in a policy of marine insurance was to permit the insured to take every measure in preserving his vessel without waiving his right later to tender abandonment and claim a total loss.

In that judgement it was further explained that the insurer derived a corresponding benefit from the mitigative action of the assured. As such, in order to encourage the

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20 *Supra,* note 14.

21 *Ibid.* at p. 816.

22 Although suing and labouring is essentially obligatory on the part of the assured, originally the use of the term "lawful" may have implied that the act was permissive rather than mandatory.

23 282 Fed. Rep. 514.

assured to sue and labour, the insurer assumed liability for a proportion of any reasonable expenses incurred for the preservation of the *res* from the perils against which it was insured.[24] Thus, the assured can claim indemnification upon operation of the clause, which becomes active only after the occurrence of the loss or misfortune.

2.2 Conceptual Rationale

The concept of sue and labour has been idiomatically described by Dillon L.J. in *Integrated Container Service Inc* v. *British Traders Insurance Co. Ltd.*[25] as a "stitch in time". In this context McArthur, a noted text writer, makes the following significant comments:

> This clause was inserted in the policy to counteract an apprehension likely to suggest itself to the assured, that any interference on the part of himself or his agents to avert an impending danger or rescue damaged property from total destruction might invalidate or otherwise operate to the prejudice of the insurance. The underwriters, on grounds of interest as well as principle, guarantee that this shall not be the case, and authorise the assured, in case of need, to make every exertion, either in person or by deputy, to avert or alleviate misfortune.[26]

Given that the assured's "stitch in time" can save the insurer's "nine" and that it is the lawful duty of the assured to sue and labour with the intention of minimising or averting his losses, there is a corresponding legal obligation on the part of the insurer to indemnify the assured. The *quid pro quo* indeed makes perfect sense. The rationale underlying the concept of sue and labour is thus adequately expressed by Lord Blackburn in *Aitchison* v. *Lohre*, in the following words:

> And the object of this is to encourage and induce the assured to exert themselves, and therefore the insurers bind themselves to pay in proportion any expense incurred, whenever such expense is reasonably incurred for the preservation of the thing from loss, in consequence of the efforts of the assured or their agents.[27]

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24 *Ibid.*

25 [1984] 1 Lloyd's Rep. 154, at p. 163, (C.A.)

26 McArthur, *The Policy of Marine Insurance* (1875), 2nd Ed. at p. 57.

27 (1879), 4 App. Cas. 755 at p.765.

This means that the assured has to satisfy the insurer that he has performed the duties of saving and preserving the maritime property. The expenses claimed in respect of sue and labour must be those reasonably incurred by the assured with the intention of minimising or averting a loss for which the underwriters would have been liable under the policy. Also, to qualify for indemnification, the assured must have engaged in an extraordinary effort to give effect to that intention.

Reference can also be made to Lord Hatherley's judgment in that case where he stated that-

> the suing and labouring clause was inserted by the underwriters for the purpose of securing the benefit of any pains that the shipowner might be inclined to take in preserving, for their benefit, as much as he possibly could preserve.[28]

2.3 The Notion of Supplementary Contract

It is said that the sue and labour clause represents an indemnity contract separate from the insurance contract itself so that the assured may recover under the clause in addition to his full entitlement under the insurance contract.[29] This was observed long before the Marine Insurance Act 1906 was enacted. In *Dixon* v. *Whitworth*[30] Lindley L.J. held-

> It is now clearly established that this clause is a distinct and independent agreement which, although occurring in and forming part of the policy, may entitle the assured to recover more than the amount underwritten.

The above-mentioned judicial statement was subsequently entrenched in legislation through a segment of section 78(1) of the Marine Insurance Act 1906 in the following words:

> Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, *etc.*

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28 *Ibid.* at p. 768.

29 *Lohre* v. *Aitchison* (1878), 3 Q.B.D. 553, 567.

30 (1879), 40 L.T. (N.S.) 718; 4 C.P.D.

The notion that reimbursement by the insurer for sue and labour expenses is supplementary to the main contract also finds support in the Institute Cargo Clauses in the following provision:

> the underwriters will, in addition to any loss recoverable hereunder, reimburse the assured for any charges properly and reasonably incurred in pursuance of these duties.[31]

Similarly, in the Institute Time Clauses-Hulls and International Hull Clauses 2003 it is provided that-

> The sum recoverable under this Clause_ shall be in addition to the loss otherwise recoverable under this insurance but shall in no circumstances exceed the insured value of the vessel[32]

In the American case *White Star SS Co.* v. *North British and Mercantile Insurance Co. Ltd.,*[33] the position in Anglo-American case law regarding the proposition that the sue and labour clause generates a supplementary contract, was considered and summarized by the court as follows:

> The law is well settled that the sue and labor clause is a separate insurance and is supplementary to the contract of the underwriter to pay a particular sum in respect to damage sustained by the subject matter of the insurance.[34]

The supplementary character of the sue and labour clause is exemplified in *Crouan* v. *Stanier* [35] where it was held that expenses were recoverable under the sue and labour clause even where the policy provided for total loss only and there was no total loss. In *Wilson Brothers Bobbin Co. Ltd.* v. *Green* [36] it was held that rights under the sue

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31 See Institute Cargo Clauses, Clause 16. The words "these duties" in this clause allude to the obligation to sue and labour.

32 See ITC-Hulls (1995) sub-clause 11.6 and IHC 2003 sub-clause 9.5.

33 (1943), A.M.C. 399.

34 *Ibid.* at p. 408.

35 [1904] 1 K.B. 87.

36 [1917] 1 K.B. 860 at pp. 862-863.

and labour clause were not affected by an exception for loss arising from delay contained in the main part of the policy.

Despite the pronouncements made in the above-noted cases, there is prevailing view that the sue and labour clause cannot be regarded as a "wholly separate engagement".[37] In an American case,[38] an insurer who required the assured to incur salvage expenses to preserve the insured vessel, knowing fully that there was already a breach of warranty was estopped from disputing liability for sue and labour expenses incurred in the process. The act of suing and labouring through incurring salvage expenses was presumably not considered to be an engagement separate from the contract of insurance of which a breach had already occurred. In addition, the insurer was precluded from pleading breach of warranty as a defence to the assured's claim generally.

The depiction of the sue and labour clause as a supplementary engagement has generated differences of opinion regarding its precise characterization as illustrated above. The proposition that the clause is an agreement independent of the main contract, as described in *Lohre* v. *Aitchison*[39] has attracted some harsh criticism. Professor Rose states -

> This is both misleading and potentially nonsensical (its purpose being the aversion and minimisation of losses under the "main" contract), as well as potentially dangerous (if, say, an insurer of subject-matter under a void or unenforceable contract with one assured attempted to claim damages from that assured for its liability to an assured under a second, valid contract).[40]

As far-fetched in reality as the above illustration may seem, in theory at least, the "separate engagement" argument could generate a serious anomaly. Depending on the circumstances, either the insurer or the assured could stand to be disadvantaged if the actual contract of insurance was somehow void or voidable, but the sue and labour clause was still alive and effective because of its "separate" characteristic. If the parties to the contract intended the duty of the assured to be an engagement separate from the terms of

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37 Arnould, *supra,* note 2 at p.780.

38 *Reliance Insurance Co.* v. *Yacht Escapade* (1961), A.M.C. 2410.

39 *Supra,* note 29.

40 See F.D. Rose, "Aversion and Minimisation of Loss" in D. Rhidian Thomas (Ed.) *The Modern Law of Marine Insurance*, 1996, London: Lloyd's of London Press Ltd., in footnote 129 at p. 236.

the insurance contract, they could have entered into a supplementary agreement to clarify that intent. At any rate, an independent sue and labour clause would be futile because being supplementary it could not have an existence of its own without the main contract covering the insured risk.

3. DUTY OF ASSURED TO SUE AND LABOUR

3.1 Statutory Duty Under Marine Insurance Act

Under the above caption in this chapter we are concerned with the statutory provisions contained in section 78 of the Act which reads as follows:

(1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

(2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

(3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

(4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

3.1.1 Analysis of the Statutory Provisions

The salient features of this section are summarized below.

3.1.1.1 Section 78(1)

In the first subsection it is notable that the statutory provision contemplates the existence of a contractual term pertaining to sue and labour. While in practical terms the insertion in the policy of a typical institute clause to that effect would be the norm, at least in theory it is arguable that the statutory provision is of relevance only if in fact a sue and labour clause exists in the contract. As we explore in detail this branch of marine insurance law we shall observe the unfolding of a different norm. The segment of the provision deeming the sue and labour engagement to be supplementary to the insurance contract has already been addressed. The next segment of the provision permits the assured to recover from the insurer any expenses properly incurred pursuant to the provisions of the sue and labour clause. Such expenses are otherwise referred to as particular charges in section 64(2) of the Marine Insurance Act.[41] The question of what are expenses "properly" incurred will also be addressed in the context of reasonableness of expenses. The notion of the supplementary contract status of the sue and labour clause is further accentuated by the final segment of subsection (1) which provides for the recoverability of properly incurred expenses even if the insurer has paid for a total loss or where there is a particular average warranty in the policy whether for the whole property or below a certain percentage of it.

3.1.1.2 Section 78(2)

Subsection (2) simply reaffirms or clarifies the distinction in treatment under the Marine Insurance Act between indemnification for salvage charges and general average losses and contributions on the one hand, and particular charges on the other. Only the latter are recoverable under the sue and labour clause. As discussed earlier, this distinction is important because of the way the terms "general average losses", "general average contributions" and "salvage charges" are statutorily defined. Furthermore, as has been elaborated in previous chapters on salvage and general average, this provision, i.e., section 78(2) codifies the principle established by Lord Blackburn in *Aitchison* v. *Lohre*, where he held that general average and salvage (referred to as "customary salvage" in this thesis) did not fall within the scope of the sue and labour clause either in terms of the words of the clause or their purported object. The central core of this thesis concerns the

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41 See Templeman, *supra,* note 1 statement in footnote 3 at p. 379.

indemnification of losses incurred from acts of saving property at sea which fall under the three rubrics of salvage, general average and sue and labour. The importance of understanding the distinction among these three phenomena reflected in section 78(2) is naturally of prime importance.

3.1.1.3 Section 78(3)

Under subsection (3), the sue and labour expenses must have been incurred to avert or diminish a loss covered by the policy.[42] A loss not so covered is not recoverable under the clause. First, of course, the peril related to the loss must be covered by the policy. Secondly, if the policy provided cover for a total loss or contained an average warranty specifying a percentage, and there was danger of only a partial loss in the case of a total loss policy, or a loss under the specified percentage where there was an average warranty, there would be no recovery for the assured under the sue and labour clause.[43] In other words, for the sue and labour clause to apply in favour of the assured, the loss must be of a type covered by the policy. This principle was established in two cases that pre-dated the Marine Insurance Act 1906, namely, *Great Indian Peninsular Railway Co.* v. *Saunders* [44] and *Booth* v. *Gair.*[45]

3.1.1.4 Section 78(4)

Subsection (4) ostensibly imposes a duty on the assured and his agents to take reasonable measures to avert or minimise an impending loss. Whereas subsection (1) enables the assured to recover properly incurred sue and labour expenses, pursuant to the sue and labour clause in the policy, if there be any, subsection (4) places a corresponding obligation on him to avert or minimize a loss. In *Royal Boskalis* v. *Mountain*,[46] Phillips L.J. stated that section 78(4) codified a principle of common law. It is submitted that apart from the jurisprudential development of the duty of the assured mentioned in that subsection, in the context of the law of marine insurance, there is also the common law duty to mitigate losses. This is discussed below under the next sub-heading.

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42 See *The Wondrous* [1992] 2 Lloyd's Rep. 566.

43 Arnould, *supra*, note 2 at pp. 777-778.

44 (1861), 1 B. & S. 41.

45 (1863), 15 C.B. (N.S.) 291.

46 *Supra*, note 17 at p.969.

The measures to be taken under section 78(4) by the assured must be reasonable which is essentially an objective standard. In *Integrated Container Service Inc.* v. *British Traders Insurance Co. Ltd.*[47] Eveleigh L.J. stated in reference to this subsection that it imposed-

> a duty to act in circumstances where a reasonable man intent upon preserving his property, as opposed to claiming upon insurers, would act [and] that it would be wholly unreasonable to penalize an assured upon the basis that, while he has shown that a reasonable man would have done as he did, yet in the light of all that has transpired the loss would not, as we now know, have been probable.[48]

The above-noted dictum illustrates that there is recovery for reasonable action taken by the assured to preserve his property, notwithstanding that having taken the action, it may turn out that the loss would probably not have occurred if he had not taken the action that he did. In such circumstances it would be unreasonable to refuse recovery.

Finally it is important to appreciate that section 78(4) applies to all policies regardless of whether there is a sue and labour clause. In contrast, section 78(1) applies only to policies that do contain such a clause. In *King* v. *Brandywine Reinsurance Co. (U.K.) Ltd.,*[49] Colman J. pointed out these two quite distinct aspects to the duty to sue and labour. First, he said, section 78(4) contained the substantive duty of the assured to take reasonable measures to avert or minimize a loss. Second, he said, with reference to section 78(1), where there is a sue and labour clause in the policy there will be implied into it a supplementary engagement whereby the insurer would pay properly incurred expenses of the assured pursuant to the clause. He went on to say-

> It is clear that the supplementary engagement will not arise in a marine policy regardless of whether there is an express term of the policy to that effect. Where there is no sue and labour clause as such, there will be no such implied supplementary engagement.[50]

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47 [1984] 1 Lloyd's Rep. 154.

48 *Ibid.* at p.158.

49 [2004] 2 Lloyd's Rep. 670

50 *Ibid.* at p. 695.

This contradistinction between section 78(1) and section 78(4) will be developed further later in the Chapter particularly with regard to the controversial decision in the Australian case of *Emperor Goldmining Co. Ltd.* v. *Switzerland General Insurance Co. Ltd.*[51]

3.1.2 Duty of Mitigation

The duty of the assured to sue and labour is akin to the common law duty pertaining to mitigation of losses for which damages are payable.[52] At common law, one who seeks to recover damages by reason of a breach of contract or another person's tort must exercise reasonable care and diligence so that the damage suffered is not aggravated and the damages are thereby not inflated. Thus one who is wronged must act reasonably to avoid, avert or limit his losses because he cannot recover for damage that could reasonably have been avoided.[53] Indeed, an uninsured property owner would be under a common law duty to exert all reasonable efforts to avert or minimise his losses, in other words, to take mitigative action in relation to any claim he may have against the person whose wrong caused the loss or damage. Conversely, an insured property owner is as much duty bound to mitigate his losses as one who is uninsured and therefore must not act in a different manner.[54] Thus, under the common law concept of mitigation as applied to contracts, it is the victim of a breach who is duty bound to mitigate his loss.[55]

It is well established, however, that even though mitigation is characterised as a duty, it is not an obligation, contractual or otherwise, but is rather a liberty or privilege, albeit one that is not to be enjoyed by the innocent party at the expense of the party in

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51 [1964] 1 Lloyd's Rep. 348.

52 See M.A. Clarke, *The Law of Insurance Contracts*, 2nd. Edition, 1994 at pp. 742-743.

53 *Karas* v. *Rowlett*, [1944] S.C.R. 1 at pp. 7-8.

54 Templeman, *supra*, note 1 at p. 379.

55 G.H. Treitel, *An Outline of the Law of Contract*, 4th. Edition, London: Butterworths, 1989 at p. 337. See also P.S. Atiyah, An Introduction to the Law of Contract, 4th. Edition, Oxford: Clarendon Press, 1989, where at p. 473 the author states that "[T]he plaintiff is required to take reasonable steps to protect his interests when the defendant breaks the contract,...". In the context of sue and labour, it is not a breach of contract by the insurer that gives rise to the assured's duty, but rather it is his loss occasioned by an insured peril for which the insurer may be liable.

breach.[56] As distinguished from a duty, mitigation is rather a condition attached to the right to claim damages.[57]

The common denominator between the common law duty to mitigate and the assured's duty to sue and labour under statute or contract is that in both cases, no claim subsists for a loss that could have been avoided had reasonable action been taken.[58] Thus, as Professor Rose puts it, the duty to act is more of practical than legal significance. In other words, it is a matter of practical necessity. The action is taken primarily to avoid the loss, not simply to enable the assured to make a claim that is recoverable at law.[59] As stated by Bennett, the common law doctrine of mitigation encapsulates a collateral bargain implied by operation of law similar to the supplementary engagement under section 78(1) of the Marine Insurance Act. The sue and labour clause is simply an articulate expression of the implied mitigation doctrine given that an insured loss is akin to a breach of contract by the insurer, and section 78(4) may be viewed as a statutory part-endorsement of this implied bargain.[60] Nevertheless, there is a subtle distinction, at least in theory, between the two concepts of mitigation and sue and labour. A defendant is liable for mitigation expenses incurred by the plaintiff which is factored in to the damages payable.[61] In contrast, an insurer is not liable for sue and labour expenses under the main insurance policy. Indeed, sue and labour action by the assured may well avert the loss for which the insurer would be otherwise liable. That being said, in practical terms, both mitigation at common law and sue and labour have the effect of relieving a degree of liability that would otherwise accrue. As such, under both concepts reimbursement is justifiable on equitable grounds on the basis of *quantum meruit* or restitution.[62]

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56 Howard Bennett, *The Law of Marine Insurance*, 1996, Oxford: Clarendon Press at p. 387.

57 *The Solholt*, [1981] 2 Lloyd's Rep 574 per Staughton J. at p. 580. affd. [1983] 1 Lloyd's Rep. 605 at p. 608.

58 See Treitel, *supra*, note 55, where the author states that "...the victim is not entitled to recover damages for a loss that he should have avoided: not that he is liable for failing to avoid it."

59 *Supra*, note 40 at p. 227.

60 Bennet, *supra,* note 56 at p. 391.

61 Atiyah, *supra*, note 55 at p.450 where the author states that "a plaintiff must 'mitigate his damage', that is to say, must act reasonably so as to reduce his losses, and hence the damages.

62 *Supra*, note 40 at p.227. See in particular footnote 83 at that page where the author also cites the case of *The Mammoth Pine*, [1986] 3 All E.R. 767 in support of these propositions.

3.2 Express Contractual Duty

It should be apparent from the discussion so far that the statutory provisions relating to sue and labour are inextricably linked to the sue and labour clause which is essentially a contractual term of a marine insurance policy. It is therefore necessary to examine not only the standardized express term which is typically an Institute Clause, but also the relevant case law pertaining to the contractual provision for sue and labour action.

It must be recalled that in the S.G. Form of the sue and labour clause originally appended as a Schedule to the Marine Insurance Act 1906, the clause is framed in permissive terms. Before examining the development of the modern sue and labour clauses as manifested in the Institute Clauses, it is instructive to revisit the early American clause set out earlier in this chapter wherein the word "necessary" is used in addition to the word "lawful". This formulation, arguably, depicts an obligatory rather than a permissive characterization of the clause. One commentator has expressed the view that the use of the word "necessary" in the American clauses imposed on the assured "a duty and responsibility apparently considerably exceeding the common law responsibility of the English assured".[63] In light of the statutory provision in section 78(4) of the Marine Insurance Act 1906, as well as the current wording in the Institute Clauses, there is now no doubt that the assured is under a duty to sue and labour.[64]

The modern sue and labour clause is depicted as a contractual duty in the various Institute Clauses. As stated above, traditionally in the SG form, the assured was not obliged to avert or minimise the loss. The clause simply states that it is "lawful" for the assured to act (sue, labour and travel). In all present Institute Clauses, which are incorporated in marine policies, sue and labour is clearly a duty of the assured. The clause allows recovery from the insurer to that extent as the labour of the assured has been expended.

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[63] Gow, *Sea Insurance According to British Statute*, 1914 at p. 181 cited in *supra*, note 40 at p.229. See footnote 94 at that page.

[64] Gauci, *supra*, note. 3 Part 1 at p. 4; *State of Netherlands* v. *Youell,* [1998] 1 Lloyd's Rep. 236 at p.242 per Phillips L.J.

3.2.1 The Institute Time Clauses – Hulls and International Hull Clauses 2003

In the Institute Time Clauses - Hulls (ITCH) the provision relating to sue and labour is contained in Clause 11. It is virtually identical to the corresponding sue and labour clause appearing in the Institute Voyage Clauses – Hulls (IVCH). Clause 11 of the ITCH is set out below:

11 ITCH - DUTY OF ASSURED (SUE AND LABOUR)

11.1 In case of any loss or misfortune it is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance.

11.2 Subject to the provisions below and to Clause 12 the Underwriters will contribute to charges properly and reasonably incurred by the Assured their servants or agents for such measures. General average, Salvage charges (except as provided for in Clause 11.5), special compensation and expenses as referred to in Clause 10.5 and collision defence or attack costs are not recoverable under this Clause 11.

11.3 Measures taken by the Assured or the Underwriters with the object of saving, protecting or recovering the subject- matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

11.3.1 When expenses are incurred pursuant to this Clause 11 the liability under this insurance shall not exceed the proportion of such expenses that the amount insured hereunder bears to the value of the Vessel as stated herein, or to the sound value of the Vessel at the time of the occurrence giving rise to the expenditure if the sound value exceeds that value. Where the underwriters have admitted a claim for total loss and property insured by

this insurance is saved, the foregoing provisions shall not apply unless the expenses of suing and labouring exceed the value of such property saved and then shall apply only to the amount of the expenses which is in excess of such value

11.3.2 When a claim for total loss of the Vessel is admitted under this insurance and expenses have been reasonably incurred in saving or attempting to save the Vessel and other property and there are no proceeds, or the expenses exceed the proceeds, then this insurance shall bear its pro rata share of such proportion of the expenses, or of the expenses in excess of the proceeds, as the case may be, as may reasonably be regarded as having been incurred in respect of the Vessel, excluding all special compensation and expenses as referred to in Clause 10.5; but if the Vessel be insured for less than its sound value at the time of occurrence giving rise to the expenditure, the amount recoverable under this clause shall be reduced in proportion to the under-insurance.

11.4 The sum recoverable under this Clause 11 shall be in addition to the loss otherwise recoverable under this insurance but shall in no circumstances exceed the amount insured under this insurance in respect of the Vessel.[65]

It should be mentioned at this point that Clause 9 is the corresponding sue and labour clause in the IHC 2003. Sub-clauses 9.1 to 9.3 of the IHC 2003 are virtually identical to sub-clauses 11.1 to 11.3 in the ITCH. Sub-clause 9.4 of the IHC 2003 corresponds almost entirely to sub-clause 11.3.2 of the ITCH. There is no equivalent of ITCH sub-clause 11.3.1 in the IHC 2003. Sub-clause 9.5 of the IHC 2003 is virtually identical to sub-clause 11.4 of the ITCH.

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[65] See generally *Reference Book of Marine Insurance Clauses*, 75th Edition, London: Whitherby Publishing, 2004.

The salient features of Clause 11 of the ITCH will now be discussed in appropriate detail.

3.2.1.1 Insured Peril or Recoverability Under Policy

The first point to note about Clause 11.1 is that the contractual provisions only apply where there is a "loss or misfortune" threatened by an insured peril. The words "which would be recoverable under this insurance" are indicative of this requirement. Cast in inverse formulation, the same sentiment is reflected in section 78(3) of the Marine Insurance Act 1906 which provides that sue and labour expenses incurred in respect of "any loss not covered by the policy are not recoverable."[66] This statutory provision has been discussed earlier. Suffice it to say in this context that sue and labour expenses were recoverable only in respect of losses for which the underwriters would be liable.[67]

3.2.1.2 Reasonableness

As mentioned earlier, whereas section 78(1) of the Marine Insurance Act 1906 refers to "expenses properly incurred", Clause 11.2 above refers to "charges properly and reasonably incurred". The view of R.J. Lambeth is that "[e]ven without those additional words ... the principle of reasonableness would apply".[68] In support of his view, he cites section 78(4) of the Marine Insurance Act 1906 and the case of *Integrated Container Service Inc.* v. *British Traders Insurance Co. Ltd.*[69] in which this statutory provision is considered. With respect it is submitted that the statutory provision is not a definitive authority for the view expressed by the distinguished author. It will be recalled that section 78(4) refers to the duty of the assured to take "such measures as may be reasonable". In the interrelationship between those words in subsection (4) and the words "expenses properly incurred" in subsection (1), it is possible to conceive of a situation where the measures taken physically may be reasonable under subsection (4), but the

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[66] *Supra*, note 40 at p. 237; Templeman, *supra*, note 1 at p. 378. See *The Mandarin Star*, [1969] 2 Q.B. 449; *The Salem*, [1983] 2 A.C. 375; *MacMillan Bloedel Ltd.* v. *Youell* (1993), B.C.L.R. (2d) 326 at pp.341-342.

[67] See *Kidston* v. *Empire Marine Insurance Co. Ltd.* (1866), L.R. 1 C.P. 535 and other cases cited in Arnould, *supra,* note 2 at pp. 777-779.

[68] Templeman, *supra*, note 1 at p. 382. Presumably, the additional words referred to are "and reasonably" in the clause.

[69] [1984] 1 Lloyd's Rep. 154.

expenses relating to those measures may not have been properly incurred under subsection (1). Reasonable measures may not always translate into expenses properly incurred. In other words, measures that may be considered reasonable in a particular set of circumstances may result in expenses being incurred that may otherwise be considered unreasonable or improper. On the other hand, if the expenses incurred end up being unreasonable or improper, then the measures taken may, in retrospect, be considered to have been unreasonable. The measures taken and the expenses incurred therfor are obviously interlinked. The test in all cases must be an objective one.

In the *Integrated Container* case the measures taken by the assured were held by the Court of Appeal to be reasonable in the circumstances. All that was required of the assured was to show that it was probable that a loss would have occurred if the actions resulting in the claimed sue and labour expenses had not been taken. The Court of Appeal elaborated on reasonableness in the context of section 78(4) of the Marine Insurance Act 1906 in the following words:

> The nature and degree of this risk will of course vary. It will determine what measures are reasonable to avert it ... the sue and labour clause entitles the assured to recover the cost of such measures as were reasonably taken for the purpose of averting or minimising a loss where there was a risk that the insurers might have to bear that loss. I do not think it is open to insurers by searching enquiries and detailed analysis to assert that as a matter of ultimate truth they would never have been liable. Section 78(4) would in such circumstances place an intolerable strain upon the assured.[70]

The authority for implying the principle of reasonableness in a sue and labour clause even if the word "reasonably" is not expressly stated may, however, be found in other case law. In *Lee* v. *Southern Insurance Co.*,[71] a case involving freight insurance, the policy did not contain the additional words "and reasonably". After a stranding incident, the assured shipowner had discharged the cargo and then forwarded it to its destination by rail thereby earning freight. The court held that the expenses could have been more reasonably and prudently incurred by the shipowner had he re-shipped the cargo in the vessel after it was refloated and repaired. Thus, the court held the freight insurer liable

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[70] *Ibid.* at p. 158.

[71] (1870), L.R. 5 C.P. 397. Incidentally, this case is well explained in Arnould, *supra*, note 2 at pp. 382 – 383.

only for so much of the expenses as would have been incurred if the cargo had been so re-shipped. In fact the vessel was refloated and repaired afterwards, and reshipping the cargo would doubtless have been far more economical.

Two cases where expenses were held to be unrecoverable are *Meyer* v. *Ralli and Wilson Bros Bobbin* v. *Green.* [72] The facts of both cases indicate that the expenses were not incurred properly and reasonably. In the first case, a cargo of rye insured free of particular average suffered damage by perils of the sea. Some of the cargo was sold immediately due to the degree of damage. The remainder could have been reconditioned and forwarded to its destination but the master neglected to do so and it remained warehoused for over a year. The court held that the underwriters were not liable for the charges as they were not properly or reasonably incurred. In the second case after cargo was damaged and discharged, the cargo could have been re-shipped earlier at a lower freight rate which the assured failed to do. Thus the underwriters were not held liable for the extra freight and storage charges incurred by the assured.[73]

Returning to the provision in section 78(1) of the Act, it is notable that the extended words are "expenses properly incurred *pursuant to the clause*" (emphasis added). As such it is submitted that if the sue and labour clause in question contains the words "and reasonably" (which is the case in Clause 11.2 above), then reasonableness should be implied in the construction of the statutory formulation in section 78(1). A similar statutory construction should be given, in light of the above discussion, even if the clause does not contain the words "and reasonably" (which is most unlikely given the formulation in the Institute Clauses).

The second segment of Clause 11.2 reflects the statutory provision of section 78(2). In addition, special compensation and expenses for mitigation of pollution damage under the salvage regime and collision costs whether for defence or attack costs are not recoverable under the sue and labour clause. The exclusion of salvage charges and general average losses and contributions is understandable as provision is made for claims relating to these matters elsewhere in the Marine Insurance Act as well as under the main

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[72] (1876), 3 Asp. M.L.C. 324 and (1917), 14 Asp. M.L.C. 119, respectively.

[73] See O'May, *supra*, note 9 at p.332 and Arnould, *supra,* note 2 at pp.787-788.

insurance contract itself. These pertain to the other saving acts addressed in detail in other parts of this thesis. Collision costs are dealt with under the 3/4ths collision liability clause. Notably, Clause 12 which is cross- referred to in Clause 11.2 provides for the application of a deductible to claims where the sue and labour clause is invoked. The deductible does not apply where the claim arises from the same event as a total loss claim.[74]

3.2.1.3 Servants and Agents.

In Clause 11.1 as well as in Clause 11.2, servants and agents are mentioned. In the first instance, the duty of the assured is extended to his servants and agents. In the second instance, the assured, his servants or agents are the entities who can incur charges to which the underwriters will contribute. No doubt, the two aspects of duty and reimbursement of expenses are inter-related, particularly, as we shall see, in the context of the S.G. Form of the clause. Nevertheless they need to be examined separately.

Strictly in terms of contract law, the imposition on servants and agents of the duty to sue and labour will be contingent upon the existence of privity of contract between the insurer on the one hand, and servants and agents on the other. In the absence of express terms to that effect, such privity is unlikely to exist. However, in construing Clause 11.1 it may be implied that the duty of the assured extends to ensuring that his servants and agents discharge their respective duties to him under the contractual arrangement between them.[75] Under this analysis, of course, only those duties of servants and agents would be relevant that impinge upon the duty of the assured under the sue and labour clause. It must also be noted, however, that regardless of how the sue and labour clause is construed in this respect, the statutory provision in section 78(4) of the Marine Insurance Act 1906 cannot be ignored. Under that provision, there is ostensibly a duty imposed on agents of the assured to sue and labour.[76]

It is instructive to examine a recent case relating to the duty of an agent to sue and labour under section 78(4) of the Marine Insurance Act, which, of course, would also be

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74 Templeman, *supra*, note 1 at p. 382.

75 *Supra*, note 40 at pp. 233-234.

76 See *ibid.* at p. 234 for the opinion of the author on the possibility of an insurer claiming damages from unspecified agents of the assured for a loss suffered by the insurer attributable to the agent's breach of duty.

in the context of the relevant sue and labour clause. In *State of Netherlands* v. *Youell,*[77] the plaintiffs, the Dutch Navy had ordered the building of two submarines with a Dutch shipyard. Insurance policies covering builders' risks were taken out naming both the plaintiffs as well as the shipyard as assureds but the policies were not considered to be joint policies. In the event of damage caused by debonding and cracking of the paintwork carried out by the shipyard, the plaintiffs claimed indemnification from the underwriters who invoked section 78(4) of the Marine Insurance Act 1906 in defence asserting that the damage had been caused by an agent of the assured. The trial judge Rix J. rejected the argument of the defendant underwriters and held that-

> 'agents' within s.78(4) can only refer to agents to sue and labour, that is to say agents who have either been instructed by the assured to take steps to preserve the property insured, or who are such agents by necessity.[78]

On appeal Phillips L.J. stated in essence that the principle of sue and labour only applied to a maritime adventure and that section 78(4) was articulated in that vein. He held-

> The duty of agents to sue and labour referred to in section 78(4) is a duty that arises in relation to a maritime adventure by reason of the delegation to master, crew and other agents of the conduct of that adventure. I can see no scope for the application of such a duty to an assured who insures as the purchaser of ships under a shipbuilding contract.[79]

He thus held that the duty to sue and labour under section 78(4) of the Marine Insurance Act 1906 applied neither to the Navy as assured, nor the ship builders, who in any event, he held in unison with Buxton L.J., were not agents of the Navy. Buxton L.J. did not consider the builders to be agents of the Navy within the scope of section 78(4) or regardless of it.[80]

> Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, so far as applicable,

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77 [1997] 2 Lloyd's Rep. 440.

78 *Ibid.* at p. 459.

79 [1998] 1 Lloyd's Rep. 236 at p. 245.

80 *Ibid.* at pp. 245-246. It is pertinent to observe what section 2(2) of the Marine Insurance Act provides in the context of policies covering builders' risks.

> shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.

Notably, Phillips L.J. held that the application of section 78(4) did not extend to shipbuilders by virtue of section 2(2) of the Marine Insurance Act 1906, and as such, the builders were not agents of the Navy in terms of the duty to sue and labour. In his turn, Buxton L.J. held that whether by application of the definition of an agent under the law of agency or on the facts of the case at bar, the shipbuilders were not agents of the Navy in the context of the building contract.[81]

To conclude the discussion on agents, it is worth observing that whereas Clause 11.1 and Clause 11.2 of the ITCH refer to assured, servants and agents, no doubt implied in the term "assured" is the inclusion of its *alter ego*, but in addition, the assured's servants and agents are included.[82]

With regard to the recoverability of expenses incurred by servants and agents under Clause 11.2, it is to be noted, first that the terminology used in the Lloyd's S.G. policy was "the assured, their factors, agents and assigns". In the leading case of *Aitchison* v. *Lohre*[83] it was held that these words were to be narrowly construed. Lord Blackburn stated;

> It is all one whether the labour is by the assured or their agents themselves, or by persons whom they have hired for the purpose, but the object was to encourage exertion on the part of the assured; not to provide an additional remedy for the recovery, by the assured, of indemnity for a loss which was, by the maritime law, a consequence of the peril. In some cases the agents of the assured hire persons to render services on the terms that they shall be paid for their work and labour, ... I do not say that such hire may not come within the suing and labouring clause.

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81 *Ibid.* at pp 248-249.

82 Where the assured is a corporate entity, which is more often the case than not, the duty of the "assured" would be imputed to the *alter ego* of the company, namely, the directors or officers at the executive decision making level. See comments in O'May, *supra*, note 9 at p. 329.

83 *Supra*, note 27.

However, the learned judge did not consider that a heavier charge incurred for the same services rendered by salvors could fall within the scope of the sue and labour clause.[84]

The Court of Appeal in another leading case, *Uzielli & Co.* v. *Boston Marine Insurance Co.*[85] adopted a similar approach in principle in its narrow view of the expression "factors, servants and assigns". In that case a ship insured with Lloyd's underwriters was reinsured with a French company who in turn reinsured with the defendants. The vessel suffered a constructive total loss. The Lloyd's underwriters incurred expenses for refloating the vessel which they were able to recover as sue and labour charges from the French company. But the French company, in its turn, failed to recover the same from the defendant reinsurers by way of sue and labour charges because the Court of Appeal held that the Lloyd's underwriters were not factors servants or assigns of the French company.[86] In the opinion of this writer, the *ratio decidendi* in that case may be technically and theoretically sound but is perplexing from a practical and equitable point of view, particularly since the defendants had agreed to pay as the French company would have paid the Lloyd's underwriters.[87]

3.2.1.4 Waiver Clause

Clause 11.3 of the ITCH is referred to as the Waiver Clause. It is there for the benefit of both the assured as well as the underwriter. What it means essentially is that any measures taken by one of the parties concerned will not prejudice the rights of the other under the policy. In practical terms, if the underwriter refuses to accept a notice of abandonment given by the assured, any sue and labour action taken by the latter, specifically to save, protect or recover the insured property will not constitute a waiver or withdrawal of the notice by the assured. Conversely, no similar act by the underwriter

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[84] *Ibid.* at p.765. The law relating to the indemnifiability of salvage charges as settled by this case was later codified in section 65 of the Marine Insurance Act 1906. It is discussed in detail in chapter 2 of this thesis.

[85] (1884) 15 Q.B.D. 11.

[86] See Arnould, *supra,* note 2 at p. 911. See also F.D. Rose, *supra*, note 40 at p. 245 for further commentaries. In the view of that author had the word "agents" been used, the court would probably have come to the same conclusion. See in particular footnote 200 at that page where critiques of the *Uzielli* decision by the courts in *Western Assurance Co. of Toronto* v. *Poole,* [1903] 1 K.B. 376 at p. 387 and *British Dominions General Insurance Co. Ltd.* v. *Duder*, [1915] 2 K.B. 39 are mentioned.

[87] See Rose, *ibid.*

will be considered as an acceptance of the abandonment which the underwriter had initially refused.[88]

In *Crouan* v. *Stanier*,[89] following the stranding of a vessel on rocks in the Amazon River, the assured gave notice of abandonment which the underwriters declined. Subsequently, the underwriters engaged ship repairers who successfully refloated the vessel and took it to port. As a result, the assured failed in an action against the underwriters for constructive total loss. By way of counterclaim the underwriters then attempted to recover the expenses incurred under the sue and labour clause, which failed. Kennedy J. held that the underwriters could not recover under any implied contract by taking the action that they did and preventing a total loss of the vessel, because the assured would have been able to claim the same amount from the underwriters under the sue and labour clause. Thus, if an insurer takes measures which, if undertaken by the assured would have entitled the latter to recover the expenses as sue and labour charges, the insurer cannot recover his expenses for such measures from the assured.

Incidentally, in the context of abandonment, attention must be drawn to section 62(5) of the Marine Insurance Act 1906 under which there is no compulsion for express acceptance of a notice of abandonment; acceptance may be implied from the conduct of the insurer. Finally, the provision that measures taken by one party will not prejudice the rights of another relates not only to waiver or acceptance of abandonment, but extends to any rights under the policy. This is apparent from the use of the word "otherwise" in that provision.[90]

3.2.1.5 Under-insurance

Clause 11.3.1 basically deals with under-insurance. It provides that the assured must assume that proportion of any sue and labour expenses as may be connected to any under-insurance of the insured property. But even then, the underwriters will pay the whole expenses up to a maximum amount of the salvage value to which they are entitled

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88 Templeman, *supra,* note 1 at p. 384; O'May, *supra,* note 9 at. 335.

89 [1904] 1 K.B. 87.

90 O'May, *supra*, note 9 at p. 335.

in the event of a valid claim for a total loss.[91] Incidentally, where there is no such clause, the underwriters' liability will be for the whole of the sue and labour charges without the benefit of any deduction for the under-insurance.[92]

3.2.1.6 Expenditures Otherwise Not Recoverable Under Marine Insurance Act

The effect of Clause 11.3.2 is perhaps best understood by examining what the situation would be in practical terms if the clause were not there.[93] One could conceive of a situation where the assured shipowner acting in the best interests of saving both ship and cargo from a casualty incurs expenses. But for one reason or another due to the technicalities of relevant statutory provisions, no proceeds are available to the assured.[94] By virtue of this clause, the assured may be able to recover at least the proportion of the expenses incurred in respect of saving the vessel. However, the amount recoverable will be proportionately reduced if the vessel is under-insured.[95]

3.2.1.7 Limit on Recoverable Expenses

Clause 11.4 places a limit on recoverable sue and labour expenses, which is the insured value of the vessel. It stipulates that the amount recoverable from the insurer under the sue and labour clause will under no circumstances be in excess of the amount for which the vessel is insured under the contract. The net effect is that although sue and labour expenses are recoverable in addition to the insured value of the vessel, the total amount recoverable for the loss cannot exceed twice that value. In case there is any doubt regarding the maximum limitation, the amount is usually stipulated in clause 13.6 of the

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91 Templeman, *supra*, note 1 at p. 386.

92 *Dixon* v. *Whitworth*, (1879, 4 Asp. M.L.C. 138. It is important to observe that with respect to salvage charges and general average contribution, section 73 of the Marine Insurance Act 1906 provides for a proportionate reduction of indemnification where the property is under-insured. In relation to sue and labour charges there is no similar provision in the Act.

93 See Templeman, *supra,* note 1 at p. 386.

94 In Templeman, *ibid.* this is illustrated by a hypothetical factual situation where the saving acts undertaken by the assured do not qualify as sue and labour expenses under the Marine Insurance Act 1906. Neither is recovery possible as general average expenditures or as salvage charges under the Act. Note also that according to O'May, "proceeds" refers only to proceeds of the vessel, not to the proceeds of sale of cargo. Also, it is the net and not the gross proceeds amount that is relevant. See O'May, *supra,* note 9 at p. 340.

95 O'May states that in the process of calculating the net proceeds, all items that may diminish the value of the proceeds in the shipowner's hands must be reduced. The author also states that the adjuster has the flexibility of adopting an equitable approach to the calculation rather than applying a rigid mathematical apportionment.

Institute Hull Clauses. Incidentally, the Institute Cargo Clauses do not contain any such limitations although the amount in question must, in any event, be reasonable.[96]

Notably under the SG Form of the sue and labour clause no such limitation was provided. It can therefore be surmised that unless the policy provided otherwise, no limit could be imposed on the amount of recovery. In *White Star SS. Co.* v. *North British & Mercantile Insurance Co. Ltd.*,[97] the court summarized the effect of the decided cases in both the English and American jurisdictions of the sue and labour clause. The English version of the clause was the SG Form and the American version was similar. In that case the court held that –

> Under this clause the assured recovers the whole of the sue and labour expense which he has incurred, subject to the expense having been proper and reasonable in amount under all the circumstances, and without regard to the amount of the loss .[98]

3.2.2 The Institute Cargo Clauses (A)(B)(C)

The general principles of sue and labour as found in the context of hull insurance are applicable to cargo insurance in much the same way but with some differences. Indeed the first significant point is the use of different terminology to describe the same concept. The act of suing and labouring is referred to as minimising losses. The relevant provision in the Institute Cargo Clauses (ICC) (A)(B)(C) relating to minimising losses are set out below:

MINIMISING LOSSES

16. It is the duty of the Assured and their servants and agents in respect of loss recoverable hereunder:

    16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss, and

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96 O'May, *supra*, note 9 at p.336.

97 (1943), A.M.C. 399 at p. 408.

98 See also Arnould, *supra,* note 2 at p. 780.

16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised

and the Underwriters will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties.

17. Measures taken by the Assured or the Underwriters with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.[99]

3.2.2.1 Limitation of Recoverable Amount and Reasonableness

Although the above clauses are identical in substance to their corresponding clauses in the ITCH, it is notable that there is no provision in the ICC similar to Clause 11.4 in the ITCH. Thus, expenses for minimising losses, so long as they are properly incurred by the assured or his servants or agents, must be paid in full by the cargo underwriters. No deductions can be made for any under-insurance. Furthermore, no limitation is applicable to the amount payable by the underwriters other than the requirement that the charges incurred by the assured must be proper and reasonable.[100] In terms of what is reasonable in the circumstances, the insured value and the expected actual value of the cargo at its destination will be a relevant concern for both underwriter and assured. In cases where it would be better to forward goods to the intended destination than to return it to its port of origin, cognisance must be taken of where, under the insurance contract, is the termination of the insured transit. Depending on what is anticipated by the assured, suitable terms can be negotiated by the parties through use of the ICC Change of Voyage Clause. Under this clause the conditions of the insurance and the related premium can be rearranged if the assured changes the destination of the cargo

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[99] See generally *Reference Book of Marine Insurance Clauses,* 68th Edition, London: Whitherby Publishing, 1996, pp. 6,8,10.

[100] However, see Templeman, *supra,* note 1 at p. 389 for a discussion on how under-insurance is treated in respect of cargo. In the example given in that text, for which the authority cited is the *obiter dictum* of Walton J. in *Cunard S.S. Co.* v. *Marten,* [1902] 9 Asp. M.L.C. 342, the amount of the sue and labour charges that are recoverable is reduced by half where the policy is for half the value stated in the policy but the actual value is higher.

during the currency of the insurance. This is a useful device available for situations which cannot by itself be viably met by Clause 12, the Forwarding Charges Clause.[101]

3.2.2.2 Bailee Clause

It is notable that clause 16.2 provides that the assured will be required "to ensure that all rights against carriers, bailees or other third parties are properly preserved or exercised". This is the so-called "Bailee Clause" the object of which is to preserve the subrogation rights of the insurer on the assumption that the claim will in due course be paid by him.[102] To that end the assured and his servants and agents are required to take the necessary steps. These would include giving notice of claim or initiating proceedings expeditiously, as may be appropriate. If the assured fails or neglects to take reasonable measures and the underwriters' rights of subrogation, *etc.* are, as a result, detrimentally affected, then the underwriters would have a counterclaim against the assured for the amount that they would have recovered from the third party had the assured taken the appropriate actions in a timely fashion.[103]

3.2.2.3 Insurance of Adventure

Since the middle ages, the principle has prevailed that where goods are insured for a voyage, all risks pertaining to the voyage or adventure that may affect the safe carriage and delivery of the cargo to its destination at the end of the voyage, are covered along with the insurance of the cargo itself.[104] In *Barque Robert S. Besnard Co.* v. *Murton,*[105] the cargo underwriters purchased the ship so that the voyage could be completed and the cargo delivered. In *Nishina Trading Company Ltd.* v. *Chiyoda Fire and Marine Insurance Co. Ltd. The Mandarin Star,*[106] the shipowner and time charterers encumbered the cargo by pledging it as security to raise money. The cargo owners incurred expenses to redeem the cargo by taking legal proceedings and also to transport the cargo to its destination.

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101 O'May, *supra*, note 9 at p. 344.

102 Peter MacDonald Eggers, "Sue and Labour and Beyond: The Assured's Duty of Mitigation" (1998), *L.M.C.L.Q.* 228 at p. 231.

103 O'May, *supra*, note 9 at pp. 341-342.

104 *Ibid.* at p. 342.

105 (1909) 14 Com. Cas. 267; 11 Asp. M.L.C.299.

106 [1969] 1 Lloyd's Rep. 293 (C.A.)

The expenses were held to be recoverable under the sue and labour clause.[107] Thus, expenses incurred as a result of action taken to ensure that the cargo is not prevented from reaching the destination to which there is insurance cover, should be recoverable.[108]

3.2.2.4 Forwarding Charges

On the question of forwarding charges similar to those cited above as examples, there are conflicting views on whether they are recoverable, and if so, in what kinds of situations and to what extent. The matter is now settled by the inclusion of the so-called "Forwarding Charges Clause" found in the ICC (A), (B) and (C). It should be noted in this context that forwarding charges are recoverable as sue and labour expenses provided the requirements of Clause 12 and other related clauses are satisfied.[109] The text of Clause 12 is set out below:

> 12. Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter is covered under this insurance, the Underwriters will reimburse the Assured for any extra charges properly and reasonably incurred in unloading storing and forwarding the subject-matter to the destination to which it is insured hereunder. This Clause 12, which does not apply to general average or salvage charges, shall be subject to the exclusions contained in Clauses 4, 5, 6 and 7 above, and shall not include charges arising from the fault, negligence, insolvency or financial default of the Assured or their servants.

As provided above, this clause expressly excludes underwriters' liability for forwarding charges arising out of fault, negligence, insolvency or financial default on the part of the assured or his servants. Also, the clause is subject to Clauses 4, 5, 6 and 7. In this context it should be noted that in Clause 4.6 it is provided that in no circumstances will there be coverage under the insurance for loss, damage or expense resulting from insolvency or financial default of the vessel's owners, managers, charterers or operators. The overall effect of exclusions of underwriters' liability for forwarding charges is

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[107] Note however, that the finding regarding the peril in this case, namely, "takings at sea" under the S.G. Form, was subsequently held by the House of Lords in *The Salem* [1983] 1 Lloyd's Rep. 342, to be wrongly decided. Templeman, *supra,* note 1 at p. 390.

[108] Templeman *ibid.* at pp. 389-390.

[109] *Ibid.* at p. 390.

therefore quite wide.[110] Even so, if termination of the insured transit is attributable to insolvency or financial default of an inland carrier or a forwarding agent, the exclusion will be inapplicable. The express retention of the exclusions of Clauses 5, 6 and 7 in the Forwarding Clause together with the exclusion relating to the fault, negligence, etc., of the assured or his servants, is a feature that is not found in the Duty of Assured Clause in the ITCH. Thus under the final words of the Forwarding Clause in the ICC, if the assured cargo owner or his agent fail to pay freight due to the carrier as a result of which the insured transit cannot continue, the underwriters can avoid reimbursement of any extra charges incurred.[111]

A general observation regarding Clause 12 is that reimbursement for extra charges is available from the underwriters in respect of "unloading, storing and forwarding". The question arises as to whether all three elements must be present for reimbursement to be successfully invoked. It is suggested that that is not necessary. Suppose a situation where extra charges are reasonably and properly incurred for unloading and, perhaps, storing as well; but the goods are not forwarded to the destination. The assured does not consider it to be economically viable to incur the costs of forwarding the goods because of the degraded condition of the cargo and its consequent reduction in value. Instead he sells the cargo. In such circumstances the extra charges actually incurred may still be reimbursable under the Forwarding Charges Clause.[112]

Unless the risk in respect of which the forwarding charges are being claimed is one that is covered by the insurance, and it in fact operates to result in the insured transit terminating at a port or place than the one to which the insurance cover extends, there will be no reimbursement. It is not sufficient that there is only an apprehension of a peril.[113] The point is illustrated in two cases. In *Great Indian Peninsular Railway* v. *Saunders*,[114] a cargo of iron rails was insured on terms "warranted free from particular average unless the vessel be stranded or burnt". The vessel being unfit to proceed to sea when put into

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110 *Ibid.* at p. 190.

111 Note that Clause 5 is the Unseaworthiness and Unfitness Exclusion Clause, Clause 6 is the War Exclusion Clause and Clause 7 is the Strikes Exclusion Clause. See O'May, *supra,* note 9 at p. 346 for a detailed discussion of these issues.

112 O'May, *ibid.* at p. 346.

113 *Ibid.* at p. 342.

114 (1862), 2 B. & S. 266.

Plymouth, the cargo was landed and forwarded by another ship to Bombay, the destination of the cargo, at an additional freight. The court held that the costs of forwarding the cargo were not recoverable as sue and labour charges or on any other basis, because the cargo was not at risk of becoming a total loss in the port of Plymouth. In *Booth* v. *Gair*,[115] a cargo of bacon in boxes insured on F.P.A. terms was transhipped and forwarded. The court held that the underwriters were not liable for the costs as they were not incurred for averting a total loss after abandonment of the voyage.[116]

There are two other aspects of the issue of forwarding charges that are worth mentioning. It is notable that the clause contemplates the situation where the insured transit may terminate at a place that is not a port, *i.e.*, somewhere inland. In such event, regard must be had to Clause 9 which provides that the insurance contract comes to an end when the insured transit is terminated before the goods are delivered. There is provision for the giving of prompt notice to the underwriters in which case cover can continue for which the underwriters may charge an additional premium for cover extending to the intended destination. If, during the process, the goods suffer damage or loss, the underwriters may consider giving additional reimbursement apart from the extra charges.[117] The clause, however, operates independently and should not affect the recoverability of extra charges incurred by the assured for unloading, storing and forwarding the cargo to that destination. The expenses, of course, must be incurred properly and reasonably. The charging of an additional premium for extended cover would raise a presumption of acceptance by the underwriters that the additional expenses were properly and reasonably incurred as a consequence of the operation of a risk that was initially covered by the insurance.[118]

Another point worth mentioning is that "extra charges" is a phraseology deemed preferable to the use of "special charges" to signify a degree of specificity so that settlements can be reached based on invoiced expenses. In other words, amounts saved

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[115] (1863), 33 L.J.C.P. 99.

[116] The somewhat harsh effect of these cases was subsequently alleviated in the ICC (F.P.A.). See O'May, *supra,* note 9 at p. 343.

[117] O'May makes the point that a literal construction of the Forwarding Clause may indicate that physical damage is a pre-requisite although such an interpretation was not intended. See *supra*, note 9 at p. 344, footnote 47.

[118] *Ibid.* at pp. 343-344.

from the expenses normally incurred can be deducted in calculating a settlement amount. Again, the extra charges must be properly and reasonably incurred by the assured who seeks recovery of the expenses.[119]

4. ABSENCE OF SUE AND LABOUR CLAUSE

4.1 General Observations

A question arises as to whether or not an assured can recover for suing and labouring expenses under any general principles where there is no express sue and labour clause in the marine insurance contract. One view is that in the absence of a sue and labour clause, the assured should still be able to recover for particular charges.[120] The decisions on this point are conflicting to say the least as will be seen in the discussion below. At any rate, strictly in terms of the statutory provisions in the Marine Insurance Act, it is arguable that without an express sue and labour clause in the contract there is no recovery. This position is borne out by the difference in the texts of subsections (1) and (4) of section 78 of the Act. The provision in subsection (1) provides for recoverability of expenses where there is a sue and labour clause in the contract, and where the expenses are properly incurred pursuant to that clause. In contrast, subsection (4) imposes a duty on the assured to avert or minimise losses in all cases, *i.e.,* regardless of whether or not there is a sue and labour clause in the contract.[121] This position, of course needs to be read in light of the leading case law decisions on the subject.

4.2 Business Efficacy

Essentially the question is – can a sue and labour clause be implied in the marine insurance contract? The issue rests on the well-established principle in the law of contracts that a term may be implied where it is necessary to give "business efficacy" to the contract. It was so held by Bowen L.J. in *The Moorcock.*[122] Lord Pearson in *Trollope* v. *North West Metropolitan Hospital Board*[123] reiterated that principle albeit with a

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119 *Ibid.* at p.344.

120 See generally P. MacDonald Eggers, *supra*, note 102 and in particular pp.231-238.

121 See Gauci, *supra*, note 3.

122 (1889), 14 P. D. 64.

123 [1973] 1 W.L.R. 601.

conditional focus, *i.e.*, emphasizing exactly and only under what circumstances a term can be implied into a contract. He said-

> An unexpressed term can be implied if and only if the Court finds that the parties must have intended that term to form part of their contract: it is not enough for the Court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.

As can be easily discerned from the above statement, His Lordship adopted a clearly narrow and strict view of the issue. Only when an absent term is necessary to give business efficacy to the contract, can it be implied. In other words, the term although absent is tacitly implied but only under the circumstances mentioned. A similar view was taken by Neill J. in an *obiter dictum* in *Integrated Container Service Inc.* v. *British Traders Insurance Co. Ltd.*[124] who cited Lord Pearson's statement in the *Trollope* case noted above. This case involved a clause in an insurance contract which only referred to a duty to sue and labour but did not provide for an entitlement to recovery of expenses incurred in that regard. Neill J. was of the view that a term entitling the assured to recover expenses could not be implied on the basis of business efficacy, and in doing so he declined to follow the opposite view advanced in *Emperor Goldmining Co. Ltd.* v. *Switzerland General Insurance Co. Ltd.*[125] In that case where the policy did not contain a sue and labour clause, Manning J. of the Supreme Court of New South Wales, in dealing with the provision in the Australian legislation corresponding to section 78(4) of the U.K. Marine Insurance Act stated that he was "unable to read this provision as a duty to be carried out by the assured at his own expense, in the absence of a suing and labouring clause." As will be seen later in the discussion, the Australian decision rested on the premise that expenses incurred by the assured in such instances were recoverable as particular charges.[126]

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[124] [1981] 2 Lloyd's Rep. 460 at p. 465.

[125] [1964] 1 Lloyd's Rep. 348.

[126] *Ibid.* at p. 354. The relevant provision in the Australian legislation was section 84(4) which was identical to section 78(4) of the U.K. Marine Insurance Act 1906.

A leading case in this field is *The Mammoth Pine*,[127] a decision of the Privy Council. This case involved a contract of cargo insurance in which the sue and labour clause was worded in the old form providing as follows:

> and in any case of Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants and Assigns, to sue, labour and travel for, in and about The Defence, Safeguard and Recovery of the said Goods and Merchandises or any Part thereof with-out prejudice to this Assurance and to be reimbursed the Charges whereof by the Assurers.

The policy also contained a bailee clause worded as follows;

> It is the duty of the Assured and their Agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss and to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised.

The clause, formulated as set out above, had no express provision for reimbursement of expenses incurred for taking of measures which, pursuant to the clause, were obligatory. The principal issue before the court, which it characterized as "crucial", was whether, under the bailee clause, the assured and his agents enjoyed the right to be indemnified. The appellant insurers took the position that a term giving such a right could only be implied in the contract if it was needed for business efficacy. They also submitted that business efficacy as a basis took precedence over reasonableness.[128] In the opinion of the Privy Council, if the submission of the appellants were to be accepted it would mean that the respondents would be deprived from recovering all pre-indemnification litigation expenses because the appellants could choose to delay indemnification. In other words, the insurer would enjoy that benefit at the assured's expense. The insurer also argued that reimbursement should not be implied in the bailee clause in light of the express provision for reimbursement in the sue and labour clause. The difference in wording of the two clauses was deliberate, so to say. The Privy Council rejected the submissions of the insurer. While the court did not accept as a general proposition that where in a contract an obligation is imposed on one party for the other's benefit, there is automatically a term

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127 *Netherlands Insurance Co.* v. *Ljungberg & Co.* [1986] 3 All E.R. 767 (P.C.)

128 *Ibid.* at p. 770.

implied under which the party on whom the benefit is conferred must reimburse the other for his costs, in this case the court held that-

> expenses incurred by an assured in performing his obligations under the second limb of the bailee clause shall be recoverable by him from the insurers in so far as they relate to the preservation or exercise of rights in respect of loss or damage for which the insurers are liable under the policy.[129]

The decision of the Privy Council in *The Mammoth Pine* stating that there was no general proposition that an express obligation always led to an implied right of reimbursement was referred to in two other relevant cases. In *Baker* v. *Black Sea and Baltic General Insurance Co. Ltd.,*[130] the plaintiffs were members of a Lloyd's syndicate. The case involved an obligation of underwriters to re-insure according to respective proportions of cover. The plaintiffs submitted that legal costs of investigation of claims should be recoverable under a term that should be implied into the contract as both reinsurer and reinsured benefited from the costs incurred for the investigation. Millet L.J. rejected this proposition citing the judgement in *The Mammoth Pine* and reiterating that the mere imposition of an obligation on one party for the benefit of the other in a contract does not *per se* entitle the latter to reimbursement pursuant to an implied term.[131] At the final appeal level the House of Lords declined to accept that the syndicate could succeed on the basis of a term in the contract implied by law and stated that the weight of authorities did not support the syndicate's position. However, the House of Lords opined that established usage or trade practice could be a valid basis for implying a term into the contract and reverted the case back to the lowest court for adjudication on the matter.[132]

Another case in point is the decision of the Court of Appeal in *Yorkshire Water* v. *Sun Alliance*,[133] which involved public liability insurance covered by non-marine policies. In that case the assured had incurred expenses in relation to works for the alleviation of flood. The question before the court was whether these expenses were recoverable

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129 *Ibid.* at p. 771.

130 [1996] L.R.L.R. 353.

131 Staughten and Otton LL.J. expressed similar views. See *ibid.* pp. 363-364.

132 [1998] L.R.L.R. 353 at pp. 339 and 342. (H.L.). See in particular the decision of Lord Lloyd.

133 [1997] 2 Lloyd's Rep. 21.

pursuant to a term implied in the policy. In reference to the decision in *The Mammoth Pine*, the court made two points. First, Stuart Smith L.J. reiterated the statement that the mere fact that the policy imposes an obligation on one party for the benefit of another, is not enough for a term to be implied that reimbursement is due to the party conferring the benefit.[134] In his turn he referred to the terms of the policy itself which expressly provided that the assured must take reasonable precautions to prevent any circumstances/ occurrence or to cease any activity that may give rise to liability under the policy, and must bear those expenses himself. If a term were to be implied in the contract as requested by the assured, it would run contrary to the express provisions.[135] Hence the court rejected the submission of the assured.

4.3 Concluding Remarks

Finally, in the context of *The Mammoth Pine*, it is notable that the decision of the Privy Council was in relation to a bailee clause. Essentially the court held that where the assured discharged his duty under the bailee clause, a corresponding duty rested on the insured to reimburse the assured and a term to that effect could be implied into the contract. More decisively, in the *Emperor Goldmining* case it was held that in the absence of a sue and labour clause, where an assured discharged his statutory obligations to sue and labour, reimbursement must be forthcoming from the insurer. Even though subsequent English cases declined to follow that Australian decision, as indicated in the foregoing discussion, it is submitted that the view of the Privy Council in *The Mammoth Pine*, reiterated above should apply *mutatis mutandis* to obligations pursuant to a sue and labour clause as much as it does in respect of bailees and other third parties.[136] It may be noted that the bailee clause as presently formulated in the ICC Clause 16.2 may be characterised as a special sub-clause imposing an added duty to sue and labour. Even though there is no express provision giving the assured a right of reimbursement, in light of the authorities referred to above, it can be stated in conclusion that such reimbursement is payable by the insurer.

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134 *Ibid.* at p. 31. Otton L J.

135 *Ibid.* at p. 33. The relevant express clauses are reported at pp. 25 and 26.

136 This opinion is expressed by F.D. Rose. *See supra*, note 40 at p. 230.

5. OPERATIVE TIME FRAME OF SUE AND LABOUR OBLIGATIONS

It is instructive at this juncture to examine the temporal limitations in the application of the duty to sue and labour and the corresponding right to recovery of expenses in that regard. It is notable that section 78(4) of the Marine Insurance Act provides that the duty to sue and labour applies "in all cases". This might imply that the duty applies all through the duration of the insurance. But under the old Lloyd's S.G. policy as well as in the ITCH Duty of Assured Clause, the duty to sue and labour arises "in case of any loss or misfortune". The matter has been settled by case law and it is now well established that the duty arises when the property is "in the grip of a peril".[137] In other words, the duty becomes effective when peril is imminent. So it was held by Rix J. in the recent case of *State of Netherlands* v. *Youell*,[138] in the following words, *viz.* "the duty to sue and labour does not arise until a peril is at any rate imminent: it is a duty that arises in response to a casualty, actual or imminent."

In regard to this issue, Hobhouse J. made a statement in *The Vasso*,[139] which is likely to be misleading. He stated in reference to ICC Clause 16 and section 78 of the Marine Insurance Act 1906 that the situation dealt with in both those provisions was one where the liability of the insurer to indemnify the assured had already accrued. And, as such, the duty of the assured to minimise or even eliminate the amount of the liability had therefore arisen.[140] This statement if literally construed would mean, as pointed out by F.D. Rose, that the assured's duty to sue and labour and consequently to claim reimbursement, would only include the action taken by him after the insurer's liability had accrued simply to reduce that liability. The assured's duty would not extend to averting the occurrence of a peril or to prevent a loss entirely. Certainly this is not the result that would be desirable and it is unlikely that the learned judge meant it to be so. It

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[137] *British and Foreign Marine Insurance Co. Ltd.* v. *Gaunt* [1921] 2 A.C. 41 at p. 65. See comments of F.D. Rose, *supra,* note 40 at p. 243 where in footnote 180 at that page he refers to a comment by Mustill in (1988) L.M.C.L.Q. at pp. 356-357 that "exact identification of the relevant point of time may not be easy."

[138] [1997] 2 Llyod's Rep. 440, at p. 458.

[139] *Noble Resources Ltd.* v. *Greenwood* [1993] 2 Lloyd's Rep. 309.

[140] *Ibid.* at p. 313.

is probable that the statement was simply meant to embrace a situation where peril was imminent and the insurer was thus exposed to potential liability.[141]

In *Integrated Container Service Inc.* v. *British Traders Insurance Co. Ltd. (No. 2)*[142] Eveleigh J., after stating that the duty under section 78(1) of the Marine Insurance Act was "to take such measures as may be reasonable for the purpose of averting or minimising a loss" then went on to opine as follows-

> Those words seem to me to impose a duty to act in circumstances where a reasonable man intent upon preserving his property, as opposed to claim upon insurers, would act. Whether or not the assured can recover should depend upon the reasonableness of his assessment of the situation and the action taken by him. It should not be possible for insurers to be able to contend that, upon an ultimate investigation and analysis of the facts, a loss, while possible or even probable, was not 'very probable'. As the right to recover expenses is a corollary to the duty to act, in my opinion the assured should be entitled to recover all extraordinary expenses reasonably incurred by him where he can demonstrate that a prudent assured person, mindful of an obligation to prevent a loss, would incur expense of an unusual kind.[143]

In this case the plaintiffs were a container leasing company and the insurance policy in question was an all-risks policy. A lessee of the plaintiff company became insolvent. The plaintiffs then commenced an operation to rescue their containers. Eventually all except two containers were recovered. The claims were in respect of, *inter alia*, customs charges, legal costs, transhipment costs and travelling expenses of personnel engaged in the recovery operation. The policy contained a suing and labouring clause which provided as follows:

> It shall be lawful to the Assured, their Factors Servants and Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard and Recovery of the said Goods and Merchandises, or any part thereof, without prejudice to this Assurance; to the charges whereof the Assurers will contribute ...

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[141] *Supra,* note 40 at p. 243. See in particular, the author's comments in footnote 182 at that page where he refers to a passage from Arnould at para 770 which was cited by Hobhouse J. in his judgement in *The Vasso* at p. 314.

[142] [1984] 1 Lloyd's Rep. 154. (C.A.) The facts of this case are relevant and are presented below.

[143] *Ibid.* at p. 158.

The insurers submitted that once the containers had been located, their liability ceased because the movements of the containers were no longer out of control. In the alternative they submitted that their liability ceased once the containers reached the depot of the lessees and therefore the cost of transporting the containers from there to the depot of the plaintiffs should not be recoverable. In rejecting the insurers' submission Eveleigh L.J. held as follows:

> The fact that the location of the containers were [*sic*] known did not in many cases remove them from the threat of sale by those who asserted a lien. That it was asserted rightly or wrongly does not matter, for the threat was there. In order that the suing and labouring clause should cease to apply it is necessary in my opinion for the goods to be restored to the custody and control of the assured to the extent that it could now be said that they were no longer threatened by perils for which the assured were not responsible, or, to put it another way, where it could be said that they were now free from all the calamities engendered by the event which gave rise to their partial loss.[144]

The Court of Appeal further held that where there existed liens of third parties on the insured property during the period of the policy, it was sufficient to cause a partial loss during that period. That was regardless of when the actual or constructive total loss occurred.[145] Eveleigh L.J. stressed the point that the true test in this case was whether the assured acted reasonably in all circumstances to avert a loss when there was the risk of the insurers having to otherwise bear it.[146]

For his part Dillon L.J. did not think that the sue and labour charges would include costs incurred within the duration of the policy for protecting the goods against a threatened loss which would only be likely to occur after the policy year had expired. He took this view even if it was inevitable that the loss would eventually occur if no preventive action were taken. But, in his view, if expenses were incurred after the policy expired for the recovery of goods that were the subject of an actual total loss or a partial loss that took place during the period of the policy, those expenses would be reimbursable as sue and labour charges.[147] In this case the plaintiffs first intervened during the policy

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144 *Ibid.* at p. 160.

145 *Ibid.* at pp. 160 and 162-163.

146 *Ibid.* at pp. 159-160.

147 *Ibid.* at p. 162.

year at a time when they were denied possession of the containers that were the subject matter of the policies. This was considered to be a partial loss and the expenses incurred for intervening were held to be reimbursable. In any event, the general principle that the sue and labour clause is only applicable in respect of insured perils and that loss must be imminent during the period of the policy remains intact.[148]

It has also been held that the duty of the assured to sue and labour, whether statutory or contractual, is not a continuous duty. It arises only "after an insured peril has struck".[149] Lord Sumner held that if the agents of the assured failed to be reasonably careful throughout the voyage, it did not mean that there would be no recovery for anything to which that want of care contributed. It has also been held that the assured can recover for sue and labour expenses up to the time of abandonment of the insured property, but any expenses incurred thereafter are not recoverable.[150] It is notable in this context that as per section 63(1) of the Marine Insurance Act 1906, there is no compulsion on the insurer to assume the interests of the assured once notice of abandonment is given. Where the insurer does not take over those interests, the property does not necessarily become *res nullius*.[151] It appears that the date on which a writ for a constructive total loss is issued is the date when the duty to sue and labour comes to an end. In *Kuwait Airways Corporation* v. *Kuwait Insurance Co.*,[152] a case of aviation insurance, Rix J. held at trial that-

> The date of issue of a writ for a constructive loss is a familiar date in the case of marine insurance. Up to that date any recovery by an assured goes to reduce his claim, even though notice of abandonment has already been given; after that date any recovery does not reduce the claim.[153]

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148 Gauci, *supra*, note 3 at p. 10.

149 per Phillips J. in *State of Netherlands* v.*Youell* [1998] 1 Lloyd's Rep. 236 at p. 241. In *British and Foreign Marine Insurance Co. Ltd.* v. *Gaunt*, [(1921), 2 App. Cas. 41 at p. 65.

150 *Mansell* v. *Hoade* (1903), 20 T.L.R.150 at p.152.

151 See *e.g., Dee Conservancy Board* v. *McConnell* [1928] 2 K.B. 159.

152 [1996] 1 Lloyd's Rep. 664.

153 *Ibid.* at p. 697. It is interesting to note that in the Court of Appeal while Staughton L. J. did not comment specifically on this point, he stated that on the basis of section 78(3) of the Marine Insurance Act 1906, after a claim of $300 million was admitted, the insurer would not be liable for any additional claims if the assured made further attempts to recover property. In other words, such action would no longer fall within the scope of sue and labour. See [1997] 2 Lloyd's Rep. 687 at p. 689.

6. CONSEQUENCES OF BREACH OF DUTY TO SUE AND LABOUR

6.1 General Observations

The starting point of this discussion is the observation that neither the Marine Insurance Act 1906 in section 78(4) nor the corresponding Institute Clauses provide for the consequences of a breach of the duty mandated in those provisions. In contrast to the legislation and the Institute Clauses, the Rulebooks of Protection and Indemnity Clubs do address the issue of breach of sue and labour obligations. For example, the following is found in rule 7(3) of the current version of the West of England P& I Rulebook:

> If a member commits any breach of this obligation [i.e. the obligation to sue and labour], the Committee may determine to reject any claim by him against the Association arising out of the casualty, dispute, event or matter, or reduce the sum payable by the Association in respect thereof by such amount as it may determine.

A similar provision is found in rule 22 of the 1997/1998 edition of the Standard P& I Club Rulebook. In the 1997 version of the Norwegian Marine Insurance Plan 1996 (which is akin to a statute), paragraph 3.3 provides that if the assured fails to comply with his sue and labour obligations, either intentionally or by gross negligence, the insurer will not be liable for a loss greater than that he would have been liable for had the assured fulfilled his obligation. It would appear then that the insurer's liability is to be limited, if at all liable, to the same extent as he would have been if the assured had carried out his duty. At any rate, there is provision in the Norwegian "legislation" for the consequences of a breach of the duty to sue and labour unlike the Marine Insurance Act 1906.[154]

It is to be noted that in *The Vasso*,[155] Hobhouse J. held that a breach of Clause 16 Minimisation of Losses, in the ICC did not result in a breach of warranty. And, in *State of Netherlands* v. *Youell*,[156] Phillips L.J. made the point that section 78(4) of the Marine Insurance Act 1906 had so far not been invoked with success as a partial or total defence. Both the above-noted dicta are relevant as they point to judicial consideration of the consequences of a breach of the sue and labour clause. *In British and Foreign Marine*

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[154] See generally Gotthard Gauci, "Obligation to Sue and Labour in the Law of Marine Insurance – Time to Amend the Statutory Provisions", Part 2 in June 2000 of *I JO S L,* at p. 87.

[155] [1993] 2 Lloyd's Rep. 309 at pp.313-314.

[156] [1998] 1 Lloyd's Rep. 236 at p. 238.

Insurance Co. v. *Gaunt*,[157] Lord Sumner rejected a contention of the insurers that an action for damages could lie by way of counterclaim based on section 78(4) of the Marine Insurance Act 1906. In this case, a cargo of wool under an all risks policy was damaged by seawater due to the possible negligence of persons for whom the assured may have been responsible. However, in *The Gold Sky*,[158] in deference to Lord Sumner's dictum in the *Gaunt* case, Mocatta J. held *obiter* that recourse was available to the insurer by counterclaim where the assured failed his duty to sue and labour. In that case, the salvage award would have been taken into consideration in the quantification of the counterclaim, had salvage assistance been accepted by the master and crew of the ship.[159] In obvious support of Mocatta J. on this point and in disagreement with Lord Sumner's decision in *Gaunt*, Professor Grime has this to say:

> There is no reason in principle why an insurer might not claim or counterclaim against the assured for breach of an express "duty of the assured" clause whenever the assured or his agents or servants fails to take reasonable steps to avert or minimise losses, or, in cargo cover fails to preserve subrogation rights.[160]

O'May states that the relevant Institute Clauses are essentially a restatement of section 78(4) of the Marine Insurance Act 1906. Thus the duty provided for in the Institute Clauses co-exists with the statutory provision virtually as a statutory duty, and the breach of that duty could give rise either to a valid defence under the insurance or a counterclaim by the insurer against the assured. The effect of such action would result in a cancellation or reduction of the reimbursement available under the policy. In practical terms, whether the underwriter proceeds on the basis of a defence under the insurance contract or advances a counterclaim is of little significance except that the amount of a counterclaim may be less than the amount recoverable under the policy. As suggested by

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157 [1921] 2 A.C. 41 at p. 65 (H.L.)

158 [1972] 2 Lloyd's Rep. 187.

159 The case related to a claim for a total loss pursuant to a policy in the Lloyd's S.G. form and subject to the ITCH. One of the defences of the underwriters against the assured's claim was an alleged breach by the assured's agents of section 78(4) based on the fact that the vessel refused to accept assistance from vessels standing by. See *ibid.* at pp. 191, 217-218.

160 Robert Grime, "Counterclaims by Marine Insurers", *supra*, note 2 at p.267.

O'May, it may therefore be prudent for the underwriter to plead in the alternative; that is, invoke a defence under the policy and/or file a counterclaim.[161]

6.2 Breach Resulting from Negligence of Assured or his Agents

In *British and Foreign Marine Insurance Co.* v. *Gaunt*,[162] it was argued by the underwriters that section 78(4) of the Marine Insurance Act 1906 in effect required the assured or his agents to be reasonably careful throughout the voyage or the duration of the policy, including the period prior to the event of the casualty. Lord Sumner in the House of Lords referred to this argument as "very novel" and flatly rejected it. He held-

> It is one of the disadvantages of codification that new terms used or even unfamiliar sequences of propositions suggest that the law has been changed where those familiar with the old decisions would not have suspected it. The argument affords a striking instance of this. The section obviously refers to suing and labouring. It cannot possibly be read as meaning that, if the agents of the assured are not reasonably careful throughout the transit, he cannot recover for anything to which their want of care contributes.[163]

In support of this dictum, Professor Grime states-

> The duty of the assured must not be allowed a general application throughout the currency of the cover, for that would allow the underwriter to resist the very cover he has afforded in the policy – and has been paid for. This provides not only a clear explanation of the decided cases, without straining interpretations, it may also provide a principle upon which cases can be decided.[164]

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[161] O'May, *supra*, note 9 at p. 329. O'May refers in footnote 17 at that page to a discussion in para. 770 of Arnould relating to the two options, namely, right of defence under the policy and a counterclaim.

[162] (1921), 2 A.C. 41 (H.L.)

[163] *Ibid.* at p. 65.

[164] Robert Grime, *supra,* note 2 at p. 267. However, earlier he makes the point that unreasonable failure by the assured to sue and labour or preserve subrogation rights is simply a breach of contract for which damages should be payable. In this vein, he notes critically, that judicial policy tends to refrain from placing on the assured a continuing duty of care so the insurer can avoid payment of claims. He questions why it should be so. He calls it "unacceptable" and "irrational" and questions whether the "circle can be squared". Professor Grime obviously does not favour the "assured friendly" approach of the courts. His proposed solution which he characterises as "some assistance" is to adopt the causation route as exemplified in *Currie* v. *Bombay Native Assurance* (1869), L.R. 3 P.C. 72 and *Lind* v. *Mitchell* (1928), 31 Ll.L.R. 262; (1928), 32 Ll.L.R. 70 (C.A.). See pp. 263-265.

O'May makes the point that in instances such as described above, the assured is protected by section 55(2)(a) of the Marine Insurance Act 1906.[165] The paragraph provides as follows:

> [t]he insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy provides otherwise, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew.

It is to be noted that in the above-mentioned provision a conscious distinction is made between "wilful misconduct" and "misconduct or negligence". The former relates to the assured himself whereas the latter relates to the master or crew. For the former the insurer is not liable but for the latter he is, provided the loss is proximately caused by an insured peril.

Against the above background, it would appear to be somewhat difficult to reconcile section 55(2)(a) with section 78(4). Indeed, it was suggested by the plaintiffs in *The Gold Sky*,[166] that section 78(4) was an error in drafting. The argument did not find favour with Mocatta J. and was rejected.[167] The central question is – can the assured recover in a situation where a loss is not averted or minimised because the master failed to sue and labour? If section 78(4) is applied to the question without heed to section 55(2)(a), the answer must be in the negative. Conversely, if section 55(2)(a) is applied, the answer is in the affirmative, all other things being equal as regards the particular elements in that provision. As rightly pointed out by O'May, a wide construction of section 78(4) can negate the protection afforded to the assured by section 55(2)(a).

In *The Gold Sky*, while he found in favour of the underwriters, Mocatta J. obviously dealt with the issue under section 55(2)(a). He accepted the underwriters' contention that the assured (the plaintiff shipowners) had failed to prove that the loss was caused by an insured peril, in that they had not succeeded in proving on a balance of probabilities that it was the fortuitous entry of seawater that caused the ship to sink. In

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[165] O'May, *supra,* note 9 at p. 327.

[166] [1972] 2 Lloyd's Rep. 187 at p. 218.

[167] See *ibid.* at pp. 220-221.

effect Mocatta J. held that the assured had not established fortuitous loss, but neither had the underwriters been able to prove that the ship had been deliberately cast away. Therefore, a claim for loss by an insured peril could not be upheld.

However, the underwriters had argued in the alternative that the master and crew having wilfully refused assistance from a salvage tug standing by to offer such assistance, was in effect a breach of section 78(4) of the Marine Insurance Act 1906 which requires the assured and his agents to take reasonable measures to avert or minimise a loss.[168] How exactly Mocatta J. dealt with this alternative argument is explained below.

O'May states further that the duty to sue and labour under section 78(4) can only arise after the "casualty" in question has taken place. The casualty, of course, must result from an insured peril that causes or threatens a loss which the assured must avert or minimise. In support of that contention, the author cites the relevant ITCH Clause, which starts with the words "In case of any loss or misfortune". The distinguished author notes that even though the corresponding clause in the ICC, *i.e.* Clause 16, does not contain those words, no difference in treatment with regard to cargo is intended. It is noteworthy that there are no similar words contained in section 78(4) of the Marine Insurance Act 1906.[169]

6.3 Negligence of Master and Crew

It is recognised that the interaction between section 55(2)(a) and section 78(4) of the Marine Insurance Act 1906 centres around the role of the master or crew. In attempting to reconcile the apparent anomaly between the two provisions Mocatta J. in *The Gold Sky,* first perused the relevant authorities including the *Gaunt* case and *Lind* v. *Mitchell.*[170] He then held, albeit *obiter dictum*, that in the words "assured and his agents" in section 78(4) the inclusion of master or crew is not contemplated in the absence of

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[168] See [1972] 2 Lloyd's Rep. at pp. 216-217. See also O'May, *supra*, note 9 at p. 328.

[169] O'May, *ibid.* at p. 327-328. See comment in footnote 9 at pp. 328. Note also that Arnould, *supra*, note 2 at para. 770 also states that "... the duty to sue and labour only arises when a casualty arises".

[170] (1928), 32 Ll.L.R.70 (C.A.) This case involved the insurance of a mortgage on a rum runner which suffered damage by ice. The master abandoned the vessel which subsequently sank. The Court of Appeal per Scrutton L.J. upheld Wright J.'s finding at trial that in the absence of any evidence of wilful misconduct on the part of the assured, the loss was caused by an insured peril, namely, ice damage, although it might have been exacerbated by the acts of the master and crew. Wright J. distinguished on the facts, the case of *Samuel* v. *Dumas* [1924] A.C. 431, a leading case that also involved the position of an innocent mortgagee.

express instructions of the assured to the master and crew regarding their sue and labour obligations. He said-

> I think the words "his agents" should in the context and to avoid an acute conflict between two sub-sections of the Act be read as inapplicable to the master or crew, unless expressly instructed by the assured in relation to what to do or not in respect of suing and labouring.

He then went on to say-

> On my construction of section 78(4) the master here was not the agent of the plaintiffs since there is no evidence that he was instructed by them to refuse salvage assistance.[171]

With respect, the rationale of the above conclusion, if there be any, is rather tenuous. First of all, it cannot be that in the context of the factual situation cited, the master is not an agent of the assured, but in another scenario, he may well be so. Surely the provision was not drafted in contemplation of different interpretations being given to the word "agent" as it applies to the master or crew of a ship. When the ship is in the throes of a peril at sea it may not be prudent seamanship for a master to dwell on the instructions of the assured, express or otherwise. The master makes decisions at sea in the interests of the assured, and in that capacity surely he is the assured's agent. If he acts negligently in the circumstances then he is in breach of the duty to sue and labour required by section 78(4) of the Act. In reference to the passage of Mocatta J. cited above, Professor Grime has this to say:

> This is not an easy interpretation. The master and the crew are generally servants, or employees, of the insured shipowner. Servants commonly have some authority as agents with regard to the protection of their employer's property, and the shipmaster certainly has.[172]

After citing the case of *Poland* v. *Parr*[173] as authority for his view he goes on to say-

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171 [1972] 2 Lloyd's Rep. 187 at p. 221.

172 Robert Grime, *supra,* note 2 at p. 259.

173 [1927] 1 K.B. 236. He also cites *Abbott's Law of Merchant Shipping and Seamen*, Chapter 3.

> That "agents" should not include those very agents who most usually do act in this particular matter is, shall we say, rather counter-intuitive. Nor would it be easy to apply in practice. Mocatta J. himself allows for one exception, when the owners have issued instructions.[174]

The analysis of Mocatta J. seems to be akin to the notion of owner's privity in relation to breakability of limits in the old regime of limitation of liability. There, the owner could plead absence of privity of the master's negligence to invoke the privilege of limitation. Whether there, or here in the context of a master's failure to sue and labour, the "express instructions" approach clearly overlooks what O'May refers to as "shut eye" knowledge.[175] Thus, the statement by Mocatta J. while made in *obiter*, is subjective and arbitrary, particularly as he acknowledges, virtually in the same breath, that the master of a ship is "primarily the servant of the owner".[176] It is notable, in this context, that in the Institute Clauses, the corresponding words are "the Assured and their servants and agents". As O'May mentions, the use of the word "servants" in the Institute Clauses makes for an even weaker case as far as the dictum of Mocatta J. is concerned.

It is notable, nevertheless, that the express clauses follow the tenor of section 78(4) of the Marine Insurance Act 1906. As such, the substance of that provision is in effect a contractual obligation, a question then arises on the flip side as to why should any unreasonable failure of the assured to sue and labour or, in the case of cargo insurance, to preserve subrogation rights not be treated like any other breach of contract for which damages are payable. Professor Grime addresses this issue analytically and concludes, for reasons explained earlier in the discussion, that no favourable treatment is warranted in respect of an assured who is in breach of his duty.[177]

The crux of the issue is actually quite simple. If an owner has insurance cover for negligent acts of the master or crew for which he may be vicariously liable, he should be able to recover. Otherwise there would be no reason for the assured shipowner to insure against the risk of his master or crew failing to carry out their statutory and contractual

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174 Robert Grime, *supra*, note 2 at p. 259.

175 O'May, *supra*, note 9 at p. 328.

176 [1972] 2 Lloyd's Rep. 187 at p. 221.

177 Robert Grime, *supra,* note 2 at pp. 263-264.

duty to sue and labour. O'May expresses this sentiment admirably in the following words-

> The principal argument is that there is no good commercial reason why an assured, who is covered for negligence of crew, should not be able to recover in the one case of breach of the duty imposed by section 78(4). If a master negligently strikes a reef, for which damage the assured could recover, why should he not also be able to recover for subsequent partial or total loss, if the master negligently continues the voyage rather than puts into a port of refuge for repairs?[178]

6.4 The Causation Approach

Perhaps the better, or at least another, approach to the resolution of the apparent anomaly is to enquire whether the negligence of the master or crew is an intervening proximate cause of the loss in question. If the answer is in the affirmative, the assured should not be able to recover. The underwriter would have a valid defence to an assured's claim under section 78(4). But if the negligence of the master or crew as an intervening act is only a remote cause, where the proximate cause of the loss is an insured peril, the loss is recoverable. It was so held by Rix J. in *State of Netherlands* v. *Youell* in the following words-

> a loss proximately caused by perils of the seas, but remotely caused ... or merely contributed to by the negligence of the master or crew, is recoverable; but a loss which ought to have been averted or minimised and was proximately caused by a master's failure to take reasonable steps in the face of a casualty could not be made the basis of recovery.[179]

The facts of this case have been described in summary previously. Suffice it to say that the judicial pronouncements on this issue were inspired by an authoritative statement found in Arnould aptly cited by Phillips L.J. in the following words in the *Youell* case-

> The most satisfactory approach to this problem is, in our opinion, to treat the issue as one of causation; if a negligent response to a casualty is the proximate cause of loss, or converts a partial into a total loss under a policy against total loss only, the underwriter has a complete defence, and if the negligent conduct is the proximate cause of part of the loss under a policy covering particular average losses, the underwriter has a defence

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[178] O'May, *supra,* note 9 at pp. 328-329.

[179] [1997] 2 Lloyd's Rep. 440 at pp. 458-459.

> pro tanto, unless in either case the negligence itself constitutes an insured peril. This approach would at least afford a means of resolving the apparent conflict between section 78(4) and section 55(2)(a) of the Marine Insurance Act 1906, although it too is not free from objection.[180]

Clearly there is no support in the foregoing words for the view held in *obiter* by Mocatta J. in *The Gold Sky*. But the suggested approach is not without its difficulties as is evident from the final words in the passage cited above. O'May, after expressing support for the proposition that the anomaly between section 78(4) and section 55(2)(a) can be resolved by application of the intervening proximate cause test, then goes on to add that where negligence of the crew is covered by insurance-

> it cannot be said there has been a breach of the duty to avert or minimise loss for which the assured is liable, committed by the very acts of the crew which underwriters have agreed to insure.

This is an important comment although not as clearly expressed as it might have been. It seems what the learned author is saying in essence is that even if crew negligence is characterized as an intervening proximate cause, the insurer is still liable to pay if crew negligence is an insured risk in the policy. The two successive statements made by O'May referred to above effectively lead to different results. If the intervening proximate cause argument is advanced with respect to crew negligence to reconcile the anomaly between sections 55(2)(a) and 78(4), and the outcome favours the position of the underwriters, that outcome is reversed if crew negligence is an insured peril. In other words, the outcome then favours the assured.[181] O'May refers to these "uncertainties" and makes the point that they have not yet been laid to rest even by adding "servants" in the relevant Institute Clauses. In his view, that addition simply clarifies that the term "assured" not only extends to the *alter ego* but also covers servants and agents, but probably not independent contractors such as ship repairers and salvors.[182]

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[180] [1998] 1 Lloyd's Rep. 236 at p. 244. Note also that this passage was cited with approval by Colman J. in another relatively recent case, *National Oilwell (U.K.) Ltd.* v. *Davy Offshore Ltd.* [1993] 2 Lloyd's Rep. 582 at p. 619. The view that underwriters would have a complete defence if intervening negligence of the master or crew is the proximate cause of the loss or it converts a partial loss into a total loss where the policy is only one which is for total loss, is endorsed by O'May as well. See O'May, *supra*, note 9 at p. 329.

[181] Note that the same is true in respect of barratry as in the case of negligence of the master and crew. This is discussed below in more detail.

[182] O'May, *supra,* note 9 at p. 329. The last point has been made earlier in this Chapter.

The difficulty or uncertainty of the "intervening proximate cause" approach is exemplified in the case of *Lind* v. *Mitchell.*[183] It will be recalled that in that case Scrutton L.J. held that the loss in question was caused exclusively by perils of the sea. Regardless of the fact that subsequent to the perilous incident the master had abandoned the vessel which was considered to be an unreasonable act, the chain of causation had not been broken. His Lordship flatly rejected the underwriters' defence based on section 78(4) of the Marine Insurance Act.[184] His decision on this point obviously rested on the principles applicable in situations involving *novus actus interveniens*. Be that as it may, under the approach adopted in that case it would be virtually impossible for the insurer to ever invoke section 78(4) as a defence. Failure by the master or crew to comply with section 78(4) would have little consequence, so that in effect, section 55(2)(a) would always hold sway where the two provisions were in potential conflict.[185] Professor Grime is of the view that there is no reason why the application of a sue and labour clause should be restricted only to events following a loss, i.e., the clause should apply to actions taken to prevent a loss from happening.[186]

In *The Fritz Thyssen,*[187] a case involving collision damage, the Court of Appeal concluded that there were two separate causes, the second being an intervening cause. One commentator suggests that an analogous view may be adopted in sue and labour cases to resolve the anomaly between sections 55(2)(a) and 78(4). The situation may be characterized in terms of two losses, one caused by an insured peril, and the other caused by a failure to sue and labour.[188] In light of the detailed discussion presented above, in the view of this writer it is still uncertain whether the suggested "two losses two causes" approach will work to arrive at a reasonable and meaningful resolution of the anomaly.

6.5 Barratry of Master and Crew

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183 [1928] Ll.L.R. 70. The facts of this case have been presented in summary earlier in this discussion.

184 *Ibid.* at pp. 74, 75.

185 See Gotthard Gauci, *supra,* note 154 at p.89.

186 Robert Grime, *supra*, note 2 at p.267.

187 [1967] 2 Lloyd's Rep. 199.

188 See Gotthard Gauci, *supra*, note 154 at p. 89.

As indicated in the previous discussion, the elements relating to negligence of master and crew can easily apply *mutatis mutandis* to cases of barratry. Where barratry is an insured peril under relevant ITCH or ICC clauses, the same outcome can be expected as in the case of crew negligence. Arnould deals with this commonality in the following passage which flows from the previously cited passage of Arnould regarding the use of proximate causation as the mechanism for resolving the apparent conflict between sections 55(2)(a) and 78(4) of the Marine Insurance Act 1906. He says-

> The problem of reconciling section 78(4) with the existence of cover against barratry and crew-negligence is more easily resolved. It is submitted that this problem disappears if one applies the principle that the duty to sue and labour only arises when a casualty occurs. If barratrous or negligent conduct takes place in response to a marine casualty, the underwriter is unable to rely on section 78(4) in answer to a claim for loss caused by such conduct, when it constitutes an insured peril. The casualty, so far as the insured perils of barratry and negligence are concerned, is the operation of those perils, and while the conduct is continuing, it is a logical impossibility to assert that there has been a breach of duty to avert or minimise loss for which the assured is liable committed by the very acts of those on board against which the underwriters have agreed to insure.[189]

It will be recalled that O'May endorses the substance of the above passage in his text after expressing his support for the intervening proximate cause approach to the resolution of the anomaly between sections 55(2)(a) and 78(4). Arnould's submission cited above, in this writer's view, is not without its difficulties in terms of the application of section 78(4) where barratry is an insured peril under the policy. Virtually the same problem arises as in the case of crew negligence. On the positive side it can be said that just like any other insured peril, barratry can be considered to become effective only when it is imminent, that is, immediately before the effectuation of sue and labour obligations, whether under section 78(4) or pursuant to the relevant clause in the policy. Such an argument can be rationalized by the fact that whereas section 55(2)(a) operates throughout the currency of the insurance contract, section 78(4) does not; it only takes effect, as we have seen, when a casualty occurs, although according to Professor Grime, as indicated earlier, there is no reason why the sue and labour clause could not apply before the event.

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[189] Arnould, *supra,* note 2 at para. 770. In *State of Netherlands* v. *Youell,* [1997] 2 Lloyd's Rep. 440, Rix J. cited this passage at p. 458. Philips L.J. in [1998] 1 Lloyd's Rep. 236 at p. 246 adopted the same approach.

In *The Gold Sky*, the insurers conceded, in the first instance, that by virtue of section 55(2)(a) the assured would be deprived of recovery even if the initial casualty by an insured peril may not have occurred, had it not been for the negligence of the master and crew. But even so, if after the occurrence of the casualty, the master and crew then failed to take reasonable measures to avert or minimise the loss, the insurers would have a complete defence under section 78(4) or be entitled to counterclaim. Counsel for the insurers submitted that "[T]he failure to take measures as required by section 78(4) was not necessarily negligence", presumably under section 55(2)(a).[190]

In the case of barratry as well, whether it is in respect of the ship insured under a hull policy, or in respect of cargo under an all risks policy, the relevant clause should not be applicable at the stage when the sue and labour clause becomes operative. Thus, although underwriters may be liable to indemnify for barratry, they should have a complete defence if the assured fails to sue and labour whether under statute or contract. In essence, the net effect is that where there are two proximate causes, under the first (crew negligence or barratry as initial cause) the underwriter is liable, but under the second (failure to sue and labour) which is an intervening cause, the underwriter may have a complete defence. Although the situation is far from crystal clear, in the last analysis it would mean that section 78(4) and corresponding sue and labour clauses in the relevant policies on the one hand, can co-exist with section 55(2)(a) and contractual cover against barratry as an insured peril on the other.

It may be noted finally that the above rationalization attempting to reconcile the apparent anomalies between sections 55(2)(a) and 78(4) of the Marine Insurance Act, or barratry cover versus failure to sue and labour can be negated by the *Lind* v. *Mitchell* type of approach discussed earlier. Amendment of the legislation to remove the anomaly and clarify the situation is no doubt desirable.[191] In carrying out such an exercise care must be taken to ensure that the statutory amendment does not attempt to codify the decisions, which have simply attempted to rationalise the anomaly, and have failed. A fresh uncluttered view must be adopted that will take into account the existing difficulties and

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[190] [1972] 2 Lloyd's Rep. 187 at p. 219.

[191] See generally Gotthard Gauci, *supra*, note 154 at p. 90.

resolve them by introducing substantive changes to the Marine Insurance Act 1906; changes that will reflect clarity and decisiveness as to what is what, so that statutory construction does not turn into an exercise of judicial second-guessing.

7. DUTY OF THE UNDERWRITER

7.1 Underwriters' Obligations Under Statute and Contract

While the discussion so far has focused primarily on the duty of the assured to sue and labour, the intention here is to examine the duty of the underwriter to reimburse the assured for expenses reasonably incurred. The duty of the assured subsists despite the fact that the text of the original "sue and labour" clause in the Lloyd's S.G. policy was couched in permissive rather than mandatory terms. This is further borne out by the wording of the titles to the Institute Clauses which clearly depicts a duty on the part of the assured. In contrast, starting from the clause in the Lloyd's S.G. policy down to the formulations of the current Institute Clauses on suing and labouring, there has always been a clear expression of the duty of the underwriter to reimburse the assured for sue and labour expenses properly incurred.[192] It can be said that the underwriter's duty to reimburse is corollary to, or arises as a consequence of the assured's right to recover for sue and labour under the policy. The preliminary question then is – what exactly is the nature of the underwriter's duty? It must first be appreciated, in this context, that the duty of the underwriter is not of itself an obligation to indemnify the assured as is the case with the insurance contract as a whole. In other words, the liability of the insurer does not extend to payments in respect of third party claims against the assured.[193] In *Johnston* v. *Salvage Association*,[194] it was held with regard to the sue and labour clause that it-

> is not a contract of indemnity in any proper sense; it is a contract to pay the assured expenses which he may incur in preventing a loss which, if it occurred, would fall on the underwriter under the other clauses in the policy, but not to indemnify him against any claim made by other people against him.

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192 F.D. Rose, *supra*, note 40 at p. 234.

193 *Ibid.* at p. 241.

194 (1887), 19 Q.B.D. 458 at p. 460.

The follow-up questions are – what is the position when there is no express compulsion on the insurer to reimburse although there is an express duty imposed on the assured to sue and labour; and what happens when there is no sue and labour clause at all, which, of course is most unlikely nowadays. The second question has been discussed in detail earlier with regard to the duty of the assured in the absence of a sue and labour clause. The corollary issue of the corresponding duty of the underwriter to reimburse in those same circumstances is to be addressed now. The issues must be examined in terms of the statutory position and its impact on the contractual relationship between the insurer and the assured.

It is stated in section 78(1) of the Marine Insurance Act 1906, that the assured may recover for suing and labouring expenses, properly incurred, where there is a suing and labouring clause in the policy. In other words, in the circumstances described above, there is a statutory duty incumbent on the underwriter to reimburse the assured. It follows, therefore, that where there is no suing and labouring clause, regardless of what actions the assured may have taken, he is not entitled to recover, *i.e.,* the underwriter is not duty bound to pay, despite the fact that the assured has carried out a statutory duty under section 78(4). On the other hand, if there is a suing and labouring clause, whether it imposes a duty on the assured or is simply couched in permissive terms as in old Lloyd's S.G. policy, but the clause is silent as to the underwriter's duty to reimburse, under section 78(1) of the Act the assured still has a right to recover and the underwriter is correspondingly obliged to pay.

As discussed earlier, the courts have taken a somewhat tangential approach to the analysis of the statutory position presented above. For example, in *Emperor Goldmining Co. Ltd.* v. *Switzerland General Insurance Co. Ltd.*[195] the Supreme Court of New South Wales held that where a policy did not contain a sue and labour clause, there was nevertheless a right of recovery by the assured (and a corresponding duty of the underwriter to reimburse) which was justified as a necessary corollary to the statutory duty of the assured to sue and labour. As mentioned earlier, Neill J., the trial judge in *Integrated Container Service Inc.* v. *British Traders Insurance Co.*[196] declined to accept

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[195] [1964] 1 Lloyd's Rep. 348 at p. 354 per Manning J. cited earlier in this Chapter.

[196] [1981] 2 Lloyd's Rep. 460.

the Australian position and expressed his view in *obiter* that no such duty on the underwriter to reimburse can be implied. The editors of Arnould and others have expressed the view that if such duty is implied the clause is "mere surplusage" which surely cannot be the case, given that the assured's entitlement to recover can be excluded by express agreement in the contract.[197] Arnould suggests that while there is merit in implying a term in the policy as held in the *Emperor Goldmining* case, a narrower view is preferred whereby in the absence of a sue and labour clause in the policy, only where it is plausibly justified that the expense was necessitated as a "direct and natural result of the casualty" should there be a duty implied on the insurer for reimbursing the assured. There would be other instances where the right to reimbursement of the assured and the corollary duty of the underwriter, would not exist.[198] But as stated by F.D. Rose, the approach suggested by Arnould may also distort the correlation between the two complementary duties of the assured and the underwriter. The matter should be left to freedom to contract and nothing should be implied.[199]

The position where there is a contractual obligation imposed on the assured but there is no corresponding duty of the underwriter expressed in the policy, is exemplified in the decision of the Privy Council in *The Mammoth Pine*[200] discussed earlier. It will be recalled in that case, there was a sue and labour clause in the Lloyd's S.G. form which permitted the assured to sue and labour and imposed a duty on the underwriter to reimburse. There was also a bailee clause that imposed a duty on the assured to ensure that the rights of bailees and other third parties are preserved. But there was no corresponding duty expressly imposed on the underwriter to reimburse the assured. The Privy Council, nevertheless, without characterizing it as a general proposition, held that in the circumstances a duty of the underwriter to reimburse could be enforced as an implied term.[201]

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197 See Arnould, *supra,* note 2 at para. 914A at p. 795. See also O'May, *supra,* note 9 at p.330 in footnote 18 at that page and F.D. Rose, *supra*, note 40 at p. 235 in footnote 124 at that page.

198 Arnould, *ibid.*

199 F.D. Rose, *supra,* note 40.

200 [1986] 3 ALL E. R. 767 (P.C.)

201 *Ibid.* at p. 771.

The question of implying terms into a contract and the legal principles relating thereto have been discussed in relative detail earlier. Suffice it to say in the present context that the Privy Council's approach in *The Mammoth Pine* is better rationalised compared to the decision of the Australian court in *Emperor Goldmining*. It is submitted that the law relating to when a term can or cannot be implied into a contract must essentially be only in connection with a contract, not any other kind of instrument. In *The Mammoth Pine* the court rightly dealt with the issue in the context of a contract. In contrast, the court in *Emperor Goldmining,* was implying something, not into a contract, but into a statutory provision. This is borne out by Manning J.'s statement in reference to section 84(4) (the Australian provision corresponding to section 78(4) of the Marine Insurance Act 1906) – "I am unable to read this provision as a duty to be carried out by the assured at his own expense, in the absence of a suing and labouring clause". In effect the court was carrying out an exercise in statutory construction, but it is not clear under what rule it reached that conclusion. Also, the learned authors referred to above, who have commented on the Australian decision, seem to have simply considered the merits or demerits of implying a duty of the underwriter in the policy.[202] In contrast, Professor Grime attempts to clarify the *Emperor Goldmining* decision in the following way. He says - "it was held that in the absence of an express clause, the statutory duty imported an implied obligation on the insurer to meet the costs of performing that duty".[203]

The point is, that quite apart from the statutory duty imposed on the assured to sue and labour, where there is no sue and labour clause at all, *i.e.*, where there is not even a contractual duty on the assured to sue and labour how can there be implied a right to recovery or a corollary duty on the underwriter to reimburse? One would have to imply a whole sue and labour clause into the contract where the parties chose not to have one. However, as has been said earlier, the point is rather academic since in practical terms, marine insurance policies without sue and labour clauses are few and far between.

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[202] See Arnould, *supra*, note 2 para 914A at p. 975 where it is stated - "There is much to be said for implying a term in the policy to this effect, ..." in reference to Manning J.'s statement cited above.

[203] Robert Grime, *supra*, note 2 at p. 257 in footnote 24 at that page.

7.2 Underwriters' Position on Reimbursement of Illegal Payments

Arnould's text contains a brief and complete consideration of the fundamentals of this issue, Essentially, if the assured is, by illegal means deployed by the perpetrator, deprived of the possession or control of his insured property, he is entitled to recover from the insurer. Indeed, it matters not whether the deprivation was carried out by legal or illegal means so long as there is cover for it in the policy. In most standard policies there are no limitations placed in this regard. However, in relation to the application of a sue and labour clause, if the assured himself deploys any illegal means in terms of the actions he takes, that would be a different matter.[204] It is instructive, at any rate, to examine in this context, the recent case of *Royal Boskalis* v. *Mountain*[205] where the salient points of Arnould have been adequately cited with approval by Stuart-Smith L.J. in the Court of Appeal.

The case is about what is characterised as ransom payments made by the assured shipowner to free a fleet of dredgers. The facts in brief are as follows:

The plaintiffs, five in number, were Dutch companies who had formed a joint venture to enter into a contract in October 1989 with an arm of the Government of Iraq to provide dredging services in an Iraqi port using the plaintiff's dredgers. The contract was governed by Iraqi law and provided for arbitration in Paris in the event the Government defaulted in accepting claims of additional payments claimed by the plaintiffs under the contract. The plaintiffs insured the dredging fleet against war risks with the defendant underwriter Rex Mountain *et al.* English law governed the insurance contracts.

War broke out in August 1990 while the plaintiffs were still carrying out the dredging operations, the completion date of which was scheduled to be in September of that year. Under a law promulgated by the High Command of Iraq, in effect the dredgers were seized by the Government. The way out for the joint venture to enter into a "Finalisation Agreement" under the terms of which the Iraqi Government would be prepared to demobilise and release the dredgers provided certain conditions were met. The two main conditions were that the joint venture would have to relinquish all claims

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[204] Arnould *supra*, note 2 at para. 914A, pp. 791-792.

[205] [1997] 2 ALL E. R. 929.

that it might have had under the dredging contract, and to pay back the balance of deposit monies paid by the Government. The joint venture complied, following which the dredging fleet was released and the personnel of the joint venture were able to leave Iraq safely.

The plaintiffs sought to claim under the sue and labour clause of the insurance policies, the value of the extra payment under the dredging contract which was waived pursuant to the Finalisation Agreement. The trial court decision was appealed. The defendant insurers appealed. They argued, *inter alia,* citing the judgement of Earl Cairns L.C. in *Lohre* v. *Aitchison,*[206] that the sue and labour had to be of a kind that was assessable on a *quantum meruit* basis. After an extensive review of that case, Stuart-Smith L.J. rejected the argument and accepted the submission of the assured. In his view, Earl Cairns had expressed in *obiter,* and in support of this conclusion, Stuart-Smith L.J. cited the works of all the major authors of text books on marine insurance and made the point that "[I]n fact the Lord Chancellor's dictum seems to have been studiously ignored by the text book authors"[207] Instead he relied entirely on the relevant parts of the speech of Lord Blackburn who delivered the principal judgement in that case.

In the course of his decision, Stuart-Smith L.J. cited with approval the following passage of Arnould which is an elaboration of the statements referred to earlier in the present discussion.

> No difficulty arises where the payment of ransom or similar demands is illegal under the proper law of the policy, or the law of the forum where the case is brought. In such cases, it is plain that the assured cannot recover the expenditure under the suing and labouring clause. Thus at one the ransom of British ships captured by the enemy was made illegal.
>
> There appears to be little doubt that where a payment which itself is not illegal under any relevant law is made to secure the release of property, this can be recovered even though the persons demanding the payment are not acting lawfully in so doing. Thus, for example, payment to recover property from pirates or hi-jackers must, it is submitted, in general be recoverable. Similarly, where payment is made to the authorities in a country to obtain the release of property detained by them

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206 (1879) 4 App. Cas. 755.

207 *Royal Boskalis, supra,* note 205 at p. 939.

> it can generally make no difference whether or not the laws there in force have been properly applied.[208]

The above text undoubtedly fits squarely into the factual situation of the *Royal Boskalis* case.

The other major issue that the Court of Appeal dealt with was whether a waiver of claims pursuant to an agreement (the Finalisation Agreement), could constitute a sue and labour expense. The defendant insurers submitted that it could not. Stuart-Smith L.J. stated that the Finalisation Agreement was in effect the price which the plaintiffs had to pay as a ransom to obtain release of the dredgers and the personnel. He also pointed out that at trial it was conceded by the insurers that payment of a ransom to procure the return of insured property was recoverable as a sue and labour expense. But the defendants argued that while under section 78(4) of the Marine Insurance Act 1906 a ransom payment was recoverable as a sue and labour expense, the waiver of claims being a sacrifice, was not. At trial Rix J. had rejected this argument. On appeal, the defendants withdrew their concession that a ransom payment could be a sue and labour charge and went back to the *quantum meruit* argument which Stuart-Smith L.J. unequivocally rejected.

In concluding this discussion it is interesting that according to Professor Grime, *Kidston* v. *The Empire Marine Insurance Co.*[209] and *Aitchison* v. *Lohre*[210] were the two cases which represented the common law on sue and labour until the *Royal Boskalis* came along and re-opened debate on the fundamental premises.[211]

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208 Arnould, *supra*, note 2 at para. 913A, p. 791.

209 (1867), L.R.2C.P. 357.

210 (1879), 4 App. Cas. 755.

211 Robert Grime, *supra,* note 2 at p. 256 in footnote 22 at that page.

CHAPTER 6

COMPARATIVE ANALYSIS OF SAVING ACTS

1. INTRODUCTION

The three saving acts in maritime law, namely, salvage, general average and sue and labour have been discussed as three separate subject matters, albeit in the context of their indemnifiability or recovery under the law of marine insurance. The discussion so far has inevitably produced some overlaps and interfaces among the three saving acts due to the obvious common denominator. All the subject matters involve saving of maritime property, and in all of them, some party or another seeks indemnification or recovery for incurring a cost or expenditure in carrying out the saving act. Within this framework, it is intended in this chapter to compare and contrast the three saving acts *inter se* by examining their commonalities and differences. It is anticipated that this examination will reveal not only attributes common and different as among the three subject matters as independent institutions, but also in terms of their co-relation within the law of marine insurance.

Perhaps the ideal starting point of this discussion is a revisit to the classic case of *Aitchison* v. *Lohre* in which all these three subject matters were considered. In this case, it will be recalled, the vessel *Crimea* was insured by the defendant for pounds sterling 1,200. It was valued at pounds sterling 2,600 in the policy. Upon encountering severely adverse weather conditions, the vessel was in danger of sinking when it was rescued by a steamer. In the Irish Court of Admiralty, the owners of the steamer were awarded pounds sterling 800 as salvage. The owners of the *Crimea* elected not to abandon the vessel but to carry out repairs. After a deduction of one third old for new, the defendant insurer's proportion of the expenses for repair came to pounds sterling 1,200 which was the amount of the insurance and for that he was held liable. The plaintiff owner of the *Crimea* also contended that his salvage expenses were recoverable from the defendant insurer under the sue and labour clause. The Court of Appeal held for the plaintiff but the House of Lords reversed that decision.

In the Court of Appeal, Brett L.J. supported by Bramwell and Cotton L.JJ, held that the sue and labour clause was applicable to unusual and extraordinary labour expended and expenses incurred to avert an insured loss. As well, it applied where the assured was liable to such expenses "in or for efforts" leading to the same end objective.[1] Such efforts could obviously extend to salvage and general average acts, but Lord Blackburn in the House of Lords categorically denied that those acts could fall within the objectives of the sue and labour clause.[2]

While noting that this case was cited extensively in the recent case of *Royal Boskalelis et al* v. *Mountain*[3] it is an essential observation in the above context that the debate, whatever shape it takes in the final analysis, is not about ordinary expenses or costs for which the insurer would generally not be liable under the policy. Here, we are concerned only with unusual and extraordinary acts carried out to avert, escape or minimise loss or damage for which the insurer is, in the absence of other mitigating factors, liable in the first instance.[4] One is immediately led to the three types of saving acts, namely, salvage, general average and sue and labour, to enter into a meaningful appreciation of what is or is not indemnifiable or recoverable.

To recapitulate, in the first instance, an assured's liability for payment of salvage under customary law is indemnifiable under section 65(2) of the Marine Insurance Act 1906 where such liability is referred to as "salvage charges". Customary salvage, as discussed in detail in Chapter 2, constitutes salvage that is not rendered under any contractual arrangement and embodies the three ingredients of danger, voluntariness and success. Where salvage services are rendered under a contract, otherwise referred to as "contract salvage", the payment of salvage remuneration is governed by the contract. In contrast, where salvage services are rendered in the absence of a contractual arrangement,

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1 (1878), 3 Q.B.D. 558 at p. 566.

2 (1879), 4 App.Cas. 755 at p. 764.

3 [1997] 2 All E.R. 929.

4 It is necessary to look at sections 65(1), 66(6) and 78(3) of the Marine Insurance Act 1906 to determine whether liability impinges on the insurer.

a tribunal adjudicates on the salvage liability of the beneficiary of those services on principles of customary salvage law. [5]

In the second instance, the assured may have suffered a general average loss for which he seeks to be indemnified. This subject is treated substantively in considerable detail in Chapter 4. A general average loss, it will be recalled, can be a loss directly resulting from an extraordinary sacrifice or expenditure made reasonably and voluntarily, or incurred in the face of danger for the preservation of imperilled common interests of co-adventurers in a maritime adventure. The precise statutory definition of a general average loss is provided in section 66(1) and (2) of the Marine Insurance Act 1906. Under the age-old customary rules of general average now entrenched in statute and the York-Antwerp Rules, beneficiaries of a sacrifice or expenditure made by others must contribute rateably according to the respective values of their interests to those who suffered the loss. This is provided for in section 66(3) of the Marine Insurance Act 1906.

In the context of a marine insurance contract, an assured who has made a sacrifice or expenditure may, in addition to receiving indemnification from his insurer, be entitled to general average contribution from the parties whose interests have been benefited.[6] In his turn the insurer, under the doctrine of subrogation, can look to recover from parties whose general average contributions are due and outstanding. Furthermore, where the assured has benefited from a sacrifice or expenditure made by another co-adventurer and is therefore obliged to contribute, he may seek indemnification for such contribution from his insurer under section 66(5) of the Marine Insurance Act 1906.[7]

In the third instance, an assured, under section 78(1) of the Marine Insurance Act 1906 relating to sue and labour, would be entitled to recover from the insurer, expenses incurred for taking measures to avert or minimise loss so long as the measures taken were reasonable. Usually, the right to such recovery would be pursuant to the sue and labour clause in the policy. This subject, on its merits, has been discussed at length in Chapter 5.

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5 See discussion on this point in Francis D.Rose, "Aversion and Minimisation of Loss", in D. Rhidian Thomas (Ed.) *The Modern Law of Marine Insurance*, London: Lloyd's of London Press Ltd., 1996, at p.216, in particular the explanation given in footnote 8 at that page, and at p. 222. In the view of this writer, expressed in detail in Chapter 2, the popular term "common law salvage" used by Professor Rose and others is a misnomer, and the explanations given in the pages cited above are not entirely free of ambiguity and inconsistency.

6 This is pursuant to section 66(4) of the Marine Insurance Act.

7 See *supra,* note 5 at pp. 216-217.

Suffice it to re-iterate that originally the concept of sue and labour was characterised in the policy simply as a right of the assured without the imposition of a corresponding obligation. That position has been changed in the Institute Clauses and the International Hull Clauses 2003 as well as in section 78(4) of the Marine Insurance Act 1906, pursuant to which the assured has a positive duty to sue and labour.

Most notably and importantly, amounts paid by an assured for salvage services rendered under a salvage contract are not salvage charges within the meaning of that expression in section 65(1) of the Marine Insurance Act 1906, but rather, are recoverable as sue and labour expenses under section 78 of the Act. In contrast, salvage charges incurred under customary salvage law and general average losses and contributions are not recoverable as sue and labour expenses. As discussed earlier, this position was enunciated in *Aitchison* v. *Lohre* and was subsequently codified by statute in the Marine Insurance Act 1906.

The rationale for this position can be explained by a case earlier than the *Aitchison* case. A perusal of *Currie & Co.* v. *Bombay Native Insurance Co.*[8] would indicate that unlike liability for customary salvage and general average which are direct consequences of an insured peril giving rise to entitlement to indemnification in the normal course, sue and labour expenses are incurred to avert a loss. Thus, if a loss did occur it would be attributable to failure of the assured to avert the loss, and not directly as a result of an insured peril.[9] However, as noted by Professor Rose, the distinction as so articulated is not quite satisfactory as it is dependent on how rules relating to the notion of causation which have evolved over time, are perceived and applied. There is an obvious element of subjectivity that leads to a lack of uniformity in the application of causation rules. As Professor Rose rightly points out, the decision to make a general average sacrifice of a ship or part thereof is at the master's discretion as much as it is the assured shipowner's choice, which may or may not be exercised through the agency of the master, to enter into a salvage contract. In any event, salvage charges as statutorily defined and general average liability, regardless of whether or not it is pursuant to the York-Antwerp Rules incorporated contractually, are insured losses. Even salvage pursuant to a contract can be

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8 (1869), L.R 3 P.C. 72 at pp. 82-83.

9 *Supra*, note 5 at p.217.

characterised as a general average expenditure if it benefits all co-adventurers, and as such can be an insured loss as opposed to sue and labour expenses.[10] Thus, the rationale for a statutory separation of customary salvage and general average on the one hand and sue and labour on the other, characterised respectively in terms of indemnifiability and recovery, is largely without logical foundation.

As a final word in these introductory remarks of this chapter, the codification of the *Aitchison* decision in the Marine Insurance Act 1906 represents the established law in this area. It is further exemplified by the extensive reference to the *Aitchison* decision in the recent case of *Royal Boskalis* v. *Rex*, referred to earlier. Nevertheless, more concentrated thought should perhaps be given to reform in this area of the law with a clear, pragmatic and practical approach and less attention to archaic precedent that is more subjective than reasonable.

2. SALVAGE AND GENERAL AVERAGE

In terms of their origins, salvage and general average are both products of customary law even though in modern times the rights and duties under each of these two institutions can emanate from contractual instruments. In the case of salvage, the Marine Insurance Act 1906 recognises a distinction between contract based salvage and salvage performed pursuant to "maritime law", but in the case of general average, the legislation simply provides for recoverability on the basis of proportionality for a general average sacrifice, expenditure or contribution, subject to whatever may be expressly provided in the marine insurance policy.[11]

Perhaps the most notable observation regarding salvage and general average is that for purposes of indemnifiability under the Marine Insurance Act 1906, salvage as a whole, in practical terms, can be treated as general average where there are contributing interests. It will be recalled that under Rule VI of the York-Antwerp Rules, even though salvage in essence is not general average, it is treated as such regardless of whether or not

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[10] *Ibid.* at pp. 217-218.

[11] See section 64(4) and (5) of the Marine Insurance Act 1906 and comments of Francis Rose, *ibid.* at p. 221. Note that the term "maritime law" in the context in which it is used in the Act is what is referred to as customary law in this thesis. In the view of this writer, the latter is the more appropriate and accurate term as explained earlier in Chapter 2.

the services are provided pursuant to a contract. Furthermore, the relevant Rule of Practice, *i.e.*, Rule C1 of the Association of Average Adjusters also expressly provides for such treatment.[12] Thus, practically speaking, the distinction between customary salvage expenses characterised as "salvage charges" in the Act and expenses of salvage performed under contract, is obliterated where there are contributing interests.[13] It is almost inevitably the case that there are multiple interests who enjoy the benefits of salvage services regardless of whether they are rendered under contract or otherwise, and they are liable for salvage in proportion to their respective interests.[14] The distinction, if any, between the two types of salvage in these circumstances, is superficial at best and without any meaningful consequence, at least in so far as it concerns the assured who is seeking indemnification.[15]

However, the distinction may still be valid and important in a number of instances. In the first instance, the distinction can perhaps be rationalised in the context of general average when it is considered that customary salvage is typically rendered voluntarily by the salvor to the co-adventurers. This arguably prevents the salvage liability of the co-adventurer from meeting the statutory definition of a general average loss that requires it to be an extraordinary sacrifice or expenditure voluntarily made or incurred. It would seem that the definition would be met if the salvage liability arose out of a contractual obligation on the part of the co-adventurer. It would then fall squarely within the scope of a general average expenditure.[16]

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[12] Rule C1 provides – "Expenses for salvage services rendered by or accepted under agreement shall in practice be treated as general average provided that such expenses were incurred for the common safety within the meaning of Rule 'A' of the York-Antwerp Rules 1924 or York-Antwerp Rules 1950."

[13] Donald O' May and Julian Hill, *Marine Insurance Law and Policy*, (hereafter referred to as "O' May") London: Sweet & Maxwell, 1993, at p. 338.

[14] *Supra*, note 5 at p.223.

[15] Professor Rose states that "[T]he practical effect of the distinction(s) drawn in *Aitchison* v. *Lohre* and the MIA 1906 between 'common law' salvage charges and contractual salvage liability is unclear". He does not expressly limit his remark to cases where there are contributory interests. He simply refers to the historical transition from salvage rendered on *ad hoc* terms to the present day LOF type of contractual basis for professionally rendered salvage services and remarks that the latter is far from what the Law Lords in the *Aitchison* case might have contemplated as salvage done under contract and most likely would not have considered salvage under LOF as falling within the scope of "salvage charges". See Francis Rose, *supra*, note 5 at pp. 221-222.

[16] See section 66(2) of the Marine Insurance Act 1906 and discussion in Lowndes and Rudolf, etc. 10th. Edition, 1975, para. 244.

However, regardless of whether the salvage service is rendered under a contract, there is nothing to prevent one benefited interest from paying the share of the reward of another such interest and subsequently claiming reimbursement. This would seem to be a claim akin to one for general average contribution. But in the opinion of Professor Rose, such a claim would not fall under the principles of general average but rather under the law of restitution. In contrast, as stated above, if the salvage services are rendered under contract, the salvage liability would clearly be considered a general average expenditure, and in the scenario described above where one beneficiary pays for another and claims reimbursement, it would qualify as general average contribution.[17] Be that as it may, in view of the provision of Rule VI of the York-Antwerp Rules and the corresponding Rule of Practice C1 discussed above, in the last analysis the point is moot.[18]

The second instance is where contributing interests enter into separate salvage agreements with the same salvor or different salvors. If it is the same salvor, the contract governing salvage liability of all the parties concerned makes each benefiting party liable to contribute its share of the salvage reward in proportion to its salved interest.

Third, the distinction will come into play if Rule VI of the York Antwerp Rules is not applicable; in other words, if there is only a single interest at stake at the time the salvage services are provided such as where there is no cargo on board the vessel or the vessel is a derelict. In such a situation the claim of the assured may well be recoverable as "salvage charges" under section 65 of the Marine Insurance Act 1906 or as sue and labour expenses under section 78, according to the circumstances prevailing.[19]

Fourth, the distinction is relevant where special compensation or SCOPIC payment is claimed or payable to the salvor under the current LOF pursuant to Article 14 of the International Salvage Convention, 1989 or the SCOPIC, as the case may be. Clearly under Rule VI of the York-Antwerp Rules 1994 these payments are not subject to general average and cannot be treated as such. On the other hand, special compensation

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17 *Supra*, note 5 at p. 223.

18 *Supra*, note 13 at p. 391

19 *Ibid.* at p. 338

and SCOPIC payments may well be recoverable from the insurer under the sue and labour clause.[20]

Some of the above-noted observations may now be redundant in view of changes to the York-Antwerp Rules approved at the Vancouver Conference of the CMI resulting in the promulgation of the York-Antwerp Rules 2004.[21] The I.U.M.I. has for sometime advocated the position that salvage payments should lie where they fall and not be brought into general average except for payments made by one party on behalf of another from whom salvage payment is due. The reapportionment of salvage settlements in general is a costly and time-consuming process and given that salved and contributory values are more or less the same, there is no need for all payments to be thrown into the "melting pot" of general average.[22]

The proposition to exclude salvage payments was debated and defeated at the Sydney Conference of the CMI which approved the promulgation of the York-Antwerp Rules 1994 without the proposed change. Arguments for maintaining the *status quo* at the time included the view that retaining salvage in general average produced a result that was more equitable, and leaving salvage to where it fell would cause serious injustice to some parties.[23]

By the time of the Vancouver Conference of May 2004, although the views of the opponents had held sway in Sydney, the situation was to change. The majority of the delegations supported the exclusion of salvage from general average as a result of which Rule VI (a) was amended as follows:

> Salvage payments, including interest thereon and legal fees associated with such payments, shall lie where they fall and shall not be allowed in General Average, save only that if one party to the salvage shall have paid all or any of the proportion of salvage (including interest and legal fees) due from another party (calculated on the basis of salved values and not

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20 *Ibid.* at pp. 338-339.

21 See discussion in Chapter 4 on changes to the York-Antwerp Rules in other contexts.

22 Eamonn Magee, "General Average Reform – The IUMI Position" in *CMI Yearbook 2000* Documents for the Singapore Conference, at p. 296.

23 For summary of arguments *pro* and *con* see "General Average – Report by the CMI International Sub-Committee" in *CMI Yearbook 2003*, Part II – Documents for the Vancouver Conference at pp.290-292.

> General Average contributory values), the unpaid contribution to salvage due from that other party shall be credited in the adjustment to the party that has paid it, and debited to the party on whose behalf the payment was made.[24]

Another issue in the context of this discussion is the comparative consideration of general average losses that are subject to relevant provisions of a contract and those that are simply subject to the customary law. In any case recovery from an insurer would be under the relevant provisions of the Marine Insurance Act 1906. In this consideration no heed should be paid to the relative distinction, superficial or otherwise, that has been discussed above with regard to recovery of salvage expenses. Some general average losses, mainly sacrifices, are incurred outside the scope of any contract. On the other hand, the assured may incur general average expenditures that are subject to some contractual arrangement. In either case, there is nothing in the Marine Insurance Act 1906 or under the customary law of general average that provides for any distinction or different treatment as regards the right to be indemnified by the insurer. Nor is any distinction to be made with regard to an assured's liability to pay general average contribution to another co-adventurer, regardless of whether the liability arises by virtue of contract or otherwise.[25]

3. SALVAGE AND SUE AND LABOUR

As discussed earlier, the interaction between salvage and sue and labour originally surfaced in the case of *Aitchison* v. *Lohre*.[26] and was considered again in detail recently in *Royal Boskalis* v. *Mountain*[27] The leading authors have also opined extensively on this subject. The pertinent issues are addressed in this section.

A good way to start the discussion would be to revisit the case of *Aitchison* v. *Lohre*. It will be recalled that the *Crimea,* insured by the defendant insurers for less than the amount valued in the policy encountered extremely adverse weather conditions at sea.

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[24] See Richard Cornah, "The changes introduced by the York-Antwerp Rules 2004" *JIML* 10 [2004] 5 at p.407.

[25] *Supra,* note 5 at pp. 223-224.

[26] (1878) 3 Q. B. D. 553, 567

[27] [1997] 2 All E.R. 929.

The *Texas* rescued the *Crimea* from possibly sinking and was awarded salvage by the Admiralty Court which the plaintiff paid and subsequently sought to recover from the defendant insurer under the sue and labour clause. The plaintiff assured failed to succeed at trial. The Court of Queen's Bench decided that a salvage or general average claim did not fall within the scope of the sue and labour clause. The Court of Appeal upheld the plaintiff's claim. Brett L.J. disagreed with the court below and held -

> the general construction of the clause is that if, by perils insured against, the subject matter of insurance is brought into such danger that, without unusual or extraordinary labour or expense, a loss will very probably fall on the underwriter, and if the assured or his agents or servants exert unusual or extraordinary labour, or if the assured is made liable to unusual or extraordinary expense in or for efforts to avert a loss, which, if it occurs, will fall on the underwriters...etc. then, in essence, recovery will be due to the assured under the sue and labour clause.[28]

The House of Lords overturned the decision of the Court of Appeal. Lord Blackburn who delivered the principal judgement agreed that salvage and general average expenses were of an unusual character for which, in the appropriate circumstances where efforts were expended to avert a loss, the insurer could be liable. But that liability did not fall within "...either the words of or the object of the suing and labouring clause, and there is no authority for saying that they do."[29]

Lord Blackburn referred to the edition of Arnould then current, where it was stated that salvage was recoverable by virtue of an express clause, known as the sue and labour clause, inserted in the policy for such situations. But His Lordship also noted that no authority for this proposition was cited by the editor of Arnould, and held that even though the Court of Appeal agreed with that view, he was unable to concur. In Lord Blackburn's view, the objective of the words of the sue and labour clause was to encourage the assured to exert himself or to induce him to make every effort to preserve the insured property. It did not matter whether the assured did that himself or whether he

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[28] (1877-79), 3 Q.B.D. 558 at p. 566. It will also be recalled that the clause in question was in the old form of the sue and labour clause which was the standard form prior to the enactment of the Marine Insurance Act 1906 which provided that "In any case of misfortune it shall be lawful for the assured, their factors, servants, and assigns, to sue, labour, and travel for, in and about the defence, safeguard and recovery of the said goods ...etc., without prejudice to this insurance, to the charges whereof we the insurers will contribute."

[29] (1879), 4 App. Cas. 755 at p.764.

achieved it through the agency of others such as salvors who he hired for the job. As long as the expenses were incurred reasonably to preserve the property and prevent its loss, the insurer was bound to pay under that clause, albeit in proportion to the expenses incurred. What is not the object of the clause or contemplated by it is "to provide an additional remedy for the recovery, by the assured, of indemnity for a loss which was, by the maritime law, a consequence of the peril".[30]

In his judgement Lord Blackburn obliquely differentiates between expenses incurred for customary salvage recoverable as a loss by an insured peril, and expenses incurred for contract salvage recoverable under the sue and labour clause. He states-

> In some cases the agents of the assured hire persons to render services on the terms that they shall be paid for their work and labour, and thus obviate the necessity of incurring the much heavier charge which would be incurred if the same services were rendered by salvors, who are to be paid nothing in case of failure, and a large remuneration proportional to the value of what is being saved in the event of success. I do not say that such hire may not come within the suing and labouring clause. But that is not this case. The owners of the *Texas* did the labour here, not as agents of the assured and being paid by them wages for their labour, but as salvors acting on the maritime law.[31]

His Lordship then points out salvors acting under the maritime law (customary law) have a maritime lien against the saved property regardless of whether or not the property is insured, or if it is whether or not there is a sue and labour clause in the policy.[32] It is implied that these attributes are absent where salvage services are rendered under a contract.

The point is made in *Arnould* that in order to recover salvage charges, as that term is defined in section 65(2) of the Marine Insurance Act 1906, the assured should not claim for a loss incurred through payment of salvage, but rather "for that species of loss which occasioned the payment of salvage", for example, a loss occasioned by perils of the sea if there is a ship wreck, or for loss resulting from capture if the salvage constitutes remuneration paid for recapture of the vessel. To summarise-

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30 *Ibid.*

31 *Ibid.*

32 *Ibid.*

> The liability of the underwriter for such charges depends not on his having engaged to indemnify against them by any express words in the policy, but upon there being made by the law of the land, or the general maritime law, a direct and immediate consequence of perils against which he does insure.[33]

Thus, "salvage charges" as contemplated by statute in a strict and narrow sense does not fall within the scope of the sue and labour clause. The question remains, however, as to how much does the distinction really matter in practice. As we have seen, at least where the York-Antwerp Rules come into play, the distinction is innocuous at best.

It is a significant observation that the parts of Lord Blackburn's judgement quoted directly or summarised in the above discussion were cited extensively in the *Royal Boskalis* case. Stuart-Smith L.J. after citing the long relevant passage concluded that the *ratio decidendi* of Lord Blackburn's judgement was that "...a salvor acting pursuant to maritime law and not under contract with the shipowner, was not the agent of the insured and the expenses recoverable were in respect of the exertions of the insured or his agent to safeguard the vessel from the peril insured against."[34]

There is another interesting observation regarding the division of salvage into two categories. According to section 65(2) of the Marine Insurance Act 1906, which codifies the decision of the House of Lords in the *Aitchison* case, salvage services provided pursuant to maritime law qualify as "salvage charges" under the Act and contract salvage expenses characterised as particular charges fall under the sue and labour clause.[35] In other words, while the latter is excluded from qualifying as salvage charges, pursuant to the definition of "salvage charges" in section 65(2), the exclusion applies expressly to services provided "for the purpose of averting an insured peril". At the risk of sounding pedantic it may be argued that the exclusion does not apply to sue and labour expenses

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[33] *Arnould's Law of Marine Insurance and Average*, hereafter referred to as "Arnould", Vol II, at p.783.

[34] A reduced part of the same passage in Lord Blackburn's judgement is quoted by the editor of the sixteenth edition of Arnould (See *ibid*, at pp. 781-782).

[35] As observed by Arnould, *supra*, note 33 at p.794 in footnote 2 at that page, section 76(2) of the Marine Insurance Act 1906 refers to "particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause"; and "particular charges" and "sue and labour expenses" are usually synonymous.

incurred in respect of services that diminish or minimise a loss. As Professor Rose states, "it is not clear that this difference in terminology was intended to make this distinction or that, as a matter of construction, aversion of an insured peril does not include minimising its consequences."[36] Furthermore, in reference to the words "service in the nature of salvage" in section 65(2) raises an apparent anomaly. There can be services like towage that are similar to salvage but are not salvage; there can also be services like contract salvage that are not just "in the nature of", but are indeed salvage, but do not qualify for "salvage charges".

Finally, there are two other observations to be made without which this discussion on comparison between salvage and sue and labour would remain incomplete. First, it is to be noted that in the House of Lords decision in *Aitchison* v. *Lohre,* Earl Cairns L.C. pointed to a significant distinction between salvage in the maritime law (customary salvage) sense and sue and labour charges. He stated that sue and labour charges were payable on a *quantum meruit* basis whereas the assessment of salvage awards were very liberal albeit only payable if the operation met with success. He stated-

> It appears to me to be quite clear that if any expenses were to be recoverable under the suing and labouring clause, they must be expenses assessed upon the *quantum meruit* principle. Now salvage expenses are not assessed upon the *quantum meruit* principle; they are assessed upon the general principle of maritime law, which gives to the persons who bring in the ship a sum quite out of proportion to the actual expense incurred and the actual service rendered, the largeness of the sum being based upon this consideration that if the effort to save the ship (however laborious in itself, and dangerous in its circumstances) had not been successful, nothing whatever would have been paid. If the payment were to be assessed and made under the suing and labouring clause, it would be payment for service rendered, whether the service had succeeded in bringing the ship into port or not.[37]

Even though the regime of customary salvage is at least partially based on the doctrine of *quantum meruit*, as elaborated in Chapter Two of this thesis, as a matter of public policy, it is true that salvage awards have traditionally been assessed quite generously to encourage salvors to engage in an activity that is rather perilous. Furthermore, the salvor earns an award only if his endeavours are successful and there is ultimate preservation of the saved property. In contrast, sue and labour charges are

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36 *Supra*, note 5 at p. 222.

37 *Supra,* note 5 at pp. 766-767.

payable purely on the basis of *quantum meruit* regardless of success of the activity in question but the test of reasonableness must be met. The possibility of the insurer being exposed to limitless liability resulting from extravagant or futile expenditures made by the assured is tempered by the rules of the regime, statutory and contractual.[38]

The second observation is in the context of a claim for special compensation made by a salvor for preventing or mitigating environmental damage. As discussed earlier, the payment of special compensation would fall outside the scope of the statutory definition of "salvage charges", but should clearly be recoverable as sue and labour charges provided the requirements of the sue and labour regime are met.[39] The point is all the more relevant in the context of payment pursuant to the SCOPIC clause in the current version of the Lloyd's Open Form.[40]

4. GENERAL AVERAGE AND SUE AND LABOUR

The interaction between general average and sue and labour is in one particular respect exemplified by the distinction, if any, between sacrifice and expenditure. In the *Royal Boskalis* case, counsel for the underwriters contended that while expenditure could be recovered under the sue and labour clause, the cost of a sacrifice could not. The arguments advanced in support of that contention can be summarised as follows:

First, "charges" for which underwriters assume liability under the sue and labour clause are the same thing as "expenses". Second, this contention is reflected in section 78(1) of the Marine Insurance Act 1906 by the right to "recover from the insurer any expenses properly incurred" pursuant to the sue and labour clause. Third, the statutory recognition of the distinction between sacrifice and expenditure is manifested in section 66(2) which provides that "there is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure". Finally,

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38 *Supra*, note 5 at p.242.

39 *Supra*, note 13 at p.339.

40 While this writer has expressed the view that *prima facie* salvage performed under LOF is customary salvage and the expenses incurred by the assured should qualify as "salvage charges", the advent of SCOPIC has brought the LOF almost definitively within the purview of contract salvage. As such recovery by the assured under LOF is now quite firmly anchored on the premise of sue and labour.

neither the relevant statutory provision nor the sue and labour clause provides for recovery by the assured of the cost of unquantifiable sacrifices.[41]

The underwriters' submission was rejected by Rix J. at trial, and that decision was upheld by Stuart-Smith L.J. in the Court of Appeal. It is pertinent to observe how the Court of Appeal rationalised its decision.

Phillips L.J. acknowledged that the submission of the underwriters could draw support from the dictum of Lord Denning M.R. in the case of *Australian Coastal Shipping Commission* v. *Green*,[42] where the Master of the Rolls affirmed Mocatta J.'s decision at trial that certain costs claimed by assured shipowners were recoverable in general average. In that case, shipowners' vessels being in distress had engaged the services of tugs under the U.K. Standard Towing Conditions which entitled the tugowners to indemnities for losses suffered in the performance of the towage services. In fact the tugowners did suffer losses and claimed indemnities under the contract which the shipowners attempted to resist. In the process, the shipowners incurred expenses including a case where they were held liable to indemnify the tugowners for a salvage award made against them. The shipowners claimed that the expenses incurred were general average expenditures and sought to recover the same in respect of the ship's proportion of the costs. In the alternative they contended that the costs were recoverable from the insurers under the sue and labour clause. Lord Denning M.R. after affirming that the shipowners' costs as claimed were recoverable in general average then went on to say-

> If the plaintiffs were not entitled to recover their expenditure as a general average loss, they would have sought to recover it under the suing and labouring clause. As we hold that it is a general average loss, this point does not arise, see sect. 78(2) of the Marine Insurance Act 1906. But I may say that in any case I do not think this expenditure was 'charges' within the clause.[43]

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41 *Supra*, note 27 at p. 972.

42 [1971] 1 Lloyd's Rep. 16.

43 *Ibid.* at p.22.

In *Royal Boskalis*, Stuart-Smith L.J. declined to follow Lord Denning's above-noted dictum given in obiter. In referring to the underwriters' submission, Stuart-Smith L.J. remarked that it provoked a significant distinction between acts capable of being characterised as general average acts on the one hand, and acts essentially constituting particular charges. The former would be recoverable under section 66 of the Marine Insurance Act 1906, and the latter under section 65 and the sue and labour clause in the policy. He then added-

> Thus the right to recovery in respect of acts designed to preserve the insured property could depend upon the fortuity of whether or not the vessel was carrying cargo when the insured peril struck or even on whether or not, if in ballast, she was on her way to the loading port under a voyage charterparty, so that there was freight at risk.[44]

It is thus obvious that there are various factors that come into play if the acts referred to above are rigidly distinguished. However, Stuart-Smith L.J. recognised the possibility of such distinction existing since the source of the right to recover in general average and the right to recover under sue and labour are different even though the basic rationale for both modes of recovery may be similar. In the final analysis he decided to give the words "charges...incurred" in the sue and labour clause a wide and generous construction to cover both expenditures as well as the quantified loss resulting from sacrifice. He thus rejected the rigid distinction between expenditure and sacrifice as advocated by the underwriters' counsel.

Phillips L.J.'s wide construction appears to find support in Willes J.'s decision in the classic case of *Kidston* v. *Empire Insurance*[45] referred to earlier on several occasions. It will be recalled in that case, after the voyage had been interrupted by an insured peril, the cargo was transhipped and forwarded to its destination by another ship. The expenditures so incurred were held to be recoverable under the sue and labour clause of the freight policy. Willes J. held as follows-

> It can make no difference whether the shipowner happens to have at the port of distress a vessel of his own which he can employ in this service, in which case the labour of forwarding would be strictly that of himself, or

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44 *Supra*, note 27 at p. 972.

45 (1867), L.R.2 C.P.357.

> whether he forwards in the vessel of another shipowner, paying for his labour and that of his servants.[46]

In *Royal Boskalis*, Phillips L.J. in referring to the above-mentioned dictum of Willes J. cited it as an example of a sacrifice in respect of which the shipowner would have the right to recover on a *quantum meruit* basis the charges so incurred.[47]

5. OTHER COMPARATIVE ASPECTS

5.1 Under-insurance

This is an aspect which touches on all three saving acts under discussion in this thesis and the core of the consideration of this issue is Clause 13.4 of the Institute Time Clauses) - Hulls (ITCH). Under this clause the assured must bear only that proportion of the sue and labour expenses that attach to any under-insurance. In *Cunard Steamship* v. *Marten*[48] it was noted by Walton J. that-

> the suing and labouring clause undoubtedly contemplates and implies that, whilst the underwriters are to bear their share of any suing and labouring expenses, they are to bear such share only in the proportion of the amount underwritten to the whole value of the property or interest insured. If the assured has insured himself or goods to the extent of one half only of the value of his property or interest in the goods insured, he, in respect of each and every item of suing and labouring expense, recovers one-half and bears one-half himself. This is the perfectly well established basis of every adjustment of suing and labouring expenses.

Where there is no sue and labour clause, of course, the underwriters would pay for sue and labour expenses without making any deduction for under-insurance.[49] The underwriters will also be proportionately liable for all of the expenses attaching to and up to and including any salvage value to which they are entitled, in the event of a valid claim for total loss. In this context it is notable that in the Marine Insurance Act 1906 there is provision in section 73 for proportionate reduction in indemnity in cases of under-insurance with respect to general average contribution and salvage charges. No such

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46 *Ibid.* at p. 542.

47 *Supra*, note 27 at p. 973.

48 [1902] 2 K.B. 624 at p. 629.

49 *Dixon* v. *Whitworth,* (1879), 4 Asp. M.L.C. 138.

reduction is available under the Act in respect of sue and labour charges.[50] It is useful to examine Clause 13.4 of the ITCH to appreciate this comparative feature of the three saving acts in question. The clause provides as follows-

> 13.4 When expenses are incurred pursuant to this Clause 13 the liability under this insurance shall not exceed the proportion of such expenses that the amount insured hereunder bears to the value of the vessel as stated herein, or to the sound value of the Vessel at the time of the occurrence giving rise to the expenditure if the sound value exceeds that value. Where the Underwriters have admitted a claim for total loss and property insured by this insurance is saved, the foregoing provisions shall not apply unless the expenses of suing and labouring exceed the value of such property saved and then shall apply only to the amount of the expenses which is in excess of such value.

What we see here is that Clause 13.4 places sue and labour expenses on a similar footing to what is provided for by statute in respect of general average and salvage. The measure of indemnity is arrived at by means of a comparison made between the insured amount as stated in the policy and the insured value. However, if the sound value of the vessel at the time of the event that gave rise to the expenditure is higher than the insured value, the sound value is taken for comparison with the insured value. The latter part of the clause has a significant counterbalancing effect where insured property has been saved and underwriters admit to a claim for total loss. In such a situation the proportionate reduction will only apply to the extent that the sue and labour expenses exceed the value of the saved property, and only to the amount of the excess.[51] As noted by Phillips L.J. in the *Royal Boskalis* case-

> I do not believe there to be any doubt that where ship or cargo is under-insured, sue and labour expenses will only be recoverable in the same proportion that insured value bears to actual value. In such circumstances, it is possible arithmetically to apportion the expenses and thus identify, with only a modest degree of artificiality, that portion of the expenses incurred for the benefit of the insured, as opposed to the un-insured property.[52]

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50 R. J. Lambeth, *Templeman on Marine Insurance,* 6th Edition, London: Pitman Publishing Ltd., 1986, at p. 386.

51 See *O'May, supra*, note 13 at pp. 339-340.

52 *Supra*, note 27 at p. 989.

5.2 Unjust Enrichment and Restitution

This topic has been addressed in some detail in Chapter 2 in the context of salvage. There, the inter-relationship between the doctrines of unjust enrichment and restitution on the one hand and customary salvage on the other were examined. Discussed in particular, was the application of the doctrine of *quantum meruit* to salvage and the notion of whether customary salvage could be characterised as a quasi-contractual arrangement or whether indeed it constituted an implied contract obliging the beneficiary of the salvage service to make payment to the salvor. It is worth reiterating that forcing liability subjectively is repugnant to the basic principles of equity, particularly where a person seeks to make another liable for an act which the first person has carried out for his own benefit.[53] In the ordinary course, an insurer, therefore, is precluded from setting off against an assured's contractual claim for salvage payments, what the insurer may have paid on his own account towards the salvage operation.[54] However, under the law of restitution and unjust enrichment it may be possible in certain circumstances for one who confers a benefit without any contractual arrangement, to extract payment from the beneficiary for his beneficial service.[55] Professor Rose notes that "[I]t is arguable that measures taken by an assured to prevent or confine an insured loss should be recoverable on restitutionary principles."[56] In this context it is noteworthy that in *Aitchison* v. *Lohre*, Earl Cairns L.C. stated that "if any expenses were to be recoverable under the suing and labouring clause, they must be expenses assessed upon the *quantum meruit* principle."[57] However, in the opinion of Professor Rose this statement of Earl Cairns L.C. is not entirely clear because *quantum meruit* is as much a question of quantification as it is of liability.[58] The point made here by Professor Rose is important since liability has to do with the quality of conduct whereas quantum relates to quantity, i.e., the amount of compensation payable for being held liable.

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53 *Supra*, note 5 at p. 225 where in footnote 72 the author cites Goff and Jones, pp.16-28.

54 *Crouan* v. *Stanier* [1904] 1 K.B. 87; *Buchanan* v. *London and Provincial Marine Insurance Co. Ltd.* (1895), 1 Com. Cas. 165. In *Cunard Steamships Co. Ltd.* v. *Marten,* [1902] 2 K.B. 624 at 630 affirmed by [1903] 2 K.B. 511, it was pointed out that in circumstances where the assured's act partially benefits the insurer, it may be necessary to apportion the expenses.

55 *Supra*, note 5 at p. 226 where in footnote 74 is cited the work by Birks, *An Introduction to the Law of Restitution* (1989, Revised Edition).

56 *Ibid.* Professor Rose in footnote 75 at p. 226 makes reference to an anonymous author in (1971), 71 Col. L.R. 1309 and Clarke, *The Law of Insurance Contracts* (2nd. Edition, 1994).

57 *Supra,* note 29 at p. 766.

58 *Supra,* note 5 at p. 226, the comment in footnote 75 at that page.

The restitutionary principles mentioned by Professor Rose consist of three elements. According to Birks, there would be liability if the *defendant was enriched* at the *expense of the plaintiff* and it would be *unjust* for the defendant to be so enriched without restitution.[59] In terms of the relationship between the insurer and the assured, the enrichment in the context of sue and labour would be the reduction or contraction of the insurer's liability at the expense of the assured's suing and labouring which would be unjust for the assured unless the insurer made restitution. However, the application of restitutionary principles may not come by as easily as may be contemplated. As stated by Professor Rose, it is not enough that the first two elements are satisfied. Meeting the third element, that is, showing that the enrichment was unjust, is subject to various limitations in English law under which there is no general concept of injustice. The application of it is confined to certain established categories such as actions taken in situations of pressure or duress which confer a benefit. Recoverability in such situations is dictated by certain criteria which most likely would not be met in suing and labouring cases. In other words, it would not be considered a case of injustice for an insurer to receive an obligation that is already due to him contractually.[60]

On the other hand, when we examine the basic premise on which rests the rationale for recoverability in sue and labour cases, we discover that the principles embedded in the law of marine insurance are, in essence, no different from those prevailing in the realm of restitution. The discussion below attempts to explain and elaborate on this commonality.

It is generally considered nowadays that liability to provide restitution does not necessarily depend on there being an implied contract.[61] Where a contract exists, the relationship between the parties is subject to its express terms, and not the common law. The corollary to this statement is that a right to restitution at common law may well be characterised as an implied term in a contract. Under the law of sue and labour, the

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[59] The three elements are italicised. See Birks, *An Introduction to the Law of Restitution* (Revised Edition, 1989) at p. 21 cited in Rose, *ibid.* at p. 226.

[60] *Supra,* note 5 at p. 226.

[61] *Ibid.* where reference is made in footnote 79 to Goff and Jones, *supra*, note 5 at pp. 5-11, and to an anonymous source, "Allocation of the Costs of Preventing an Insured Loss" in (1971), 71 *Col. L.R.* 1308.

liability of the insurer to pay the assured for suing and labouring may be pursuant to an express contractual obligation, or it may a correlative obligation imposed on the insurer as an implied term regardless of the existence or absence of an expressly stated obligation on the part of the insurer in the sue and labour clause.[62] Furthermore, even if there is no sue and labour clause in the policy, which is quite unlikely nowadays, and the assured has taken sue and labour action, a correlative duty of the insurer to reimburse the assured may be enforced as an implied term of the contract.[63]

To summarise and conclude this discussion, it is fair to say that the law of marine insurance, as regards sue and labour, is not inconsistent with the theoretical principles of restitutionary liability under the common law based on the concept of an implied contract. Added to that, in any event, regardless of a contractual obligation, a party (the insurer) who benefits from the actions of another (the assured), preventing or minimising a loss, is bound to pay for that benefit under the doctrine of unjust enrichment.[64]

6. SUMMARY AND CONCLUDING REMARKS

Some of the peculiarities that link all three saving acts are presented as remarks concluding this chapter. First of all, salvage charges as defined by statute are, strictly speaking, *sui generis*. They do not fall within the ambit of sue and labour or general average. Nevertheless, as pointed out on more than one occasion, in so far as the York-Antwerp Rules are concerned, under Rule VI, any kind of salvage whether carried out under contract or otherwise, is treated as general average so long as the salvage operations fit within its required parameters.[65]

Secondly, in the Institute Hull Clauses, for example the ITCH, it would appear that expenses incurred in respect of salvage, whether of the customary variety or which is treated as general average, are not recoverable under a policy that is for "total loss only".

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62 There is also a statutory right of the assured to recovery in such case by virtue of s. 78(1) of the Marine Insurance Act 1906, which amounts to a correlative obligation on the part of the insurer.

63 See *Emperor Goldmining Co. Ltd.* v. *Switzerland General Insurance Co. Ltd.*, [1964] 1 Lloyd's Rep. 348 and *The Mammoth Pine*, [1986] 3 All E.R. 767. Both these cases have been discussed in the previous chapter of this thesis.

64 *Supra*, note 5 at p. 227.

65 *Supra,* note 33 at pp. 783-784.

But in appropriate cases, such expenses would be recoverable under the Duty of Assured (Sue and Labour) Clause, i.e., Clause 13 of the ITCH in a total loss policy.[66] Also, where indemnification has been made on a partial loss basis for the full sum insured, there will be no payment additional to the amount insured which was the case in *Aitchison* v. *Lohre*. As we have seen, both salvage charges in the statutory sense as well as salvage that is treated as general average, are considered to be partial losses. That is the reason why they are excluded from the scope of total loss policies.[67]

Finally, the perennial distinction between salvage charges as statutorily defined as salvage that is residually treated as general average may be of significance in certain rare and isolated circumstances where there is no sue and labour clause in the policy. In such circumstances, expenses which do not qualify as "salvage charges" or general average expenditures, or do not fall within the sister-ship clause in the policy, may remain unrecoverable.[68]

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66 *Crouan* v. *Stanier*, [1904] 1 K.B. 87. See *ibid.* at pp. 784-785 and *O'May*, *supra,* note 13 at p. 339.

67 Arnould, *ibid.*

68 Where salvage services are rendered by and to vessels under the same ownership and a common insurer, under the sister-ship clause the assured enjoys the same rights as he would have, had the other vessel been the property of other owners with no interest in the insured vessel. There is provision for determining by arbitration the amount so payable. See *ibid.* at p.784, explanation in footnote 47.

CHAPTER 7

CONCLUSION

The safety and preservation of life and property at sea has been a matter of grave concern in the maritime world since time immemorial. In recent years, since the advent of the *Torrey Canyon* in 1967, protection of the marine environment has assumed an important position in the forefront of international awareness and attention. These two concerns are exemplified by the motto of the International Maritime Organization, "safer ships and cleaner seas". Today there is the added concern of maritime security, representing the third pillar of the current mandate of that Organization (IMO). It is ironical that the international regime of maritime safety, in virtually all of its facets, has been reactive rather than proactive. This is borne out by the adoption, in relatively recent times, of numerous conventions and other treaty instruments concluded under the auspices of the IMO. The International Salvage Convention, 1910, the only maritime safety convention in the private law domain, was simply a codification of the customary law of salvage prevailing at the time. In contrast, while the International Salvage Convention, 1989 is also reflective of customary law, its provisions relating to the marine environment are clearly of a reactive nature.

This thesis, of course, deals only with safety and preservation of maritime property. Indeed, it focuses on the so-called saving acts in maritime law and their indemnifiability or recoverability under the law of marine insurance. As such, the thesis has a relatively narrow thrust. It is concerned only with three subject matters, namely, salvage, general average and sue and labour in the contexts stated above. All of these three subject matters fall within the domain of private maritime law, although it is recognized that the regulatory regimes touching on maritime safety and marine environmental protection are inextricably linked to the private laws relating to these saving acts. Another notable factor in this context is that all of these pertain to acts carried out at sea associated with a maritime adventure, and largely involve the same actors.

Against the above background, this thesis has attempted to discuss salvage, general average and sue and labour, first briefly as legal regimes in their own right, and then as comparative and contrasting elements of the wider notion of saving acts,

particularly within the context of their indemnifiability or recoverability under the law of marine insurance. First, the various characteristics of maritime property and the jurisprudence surrounding that peculiar yet fundamental aspect of maritime law, have been addressed. This discussion has provided the backdrop for the more detailed subsequent examination of each of the three subjects comprising savings of maritime property. It cannot be emphasised enough that maritime property is the very essence and substance of salvage, general average and sue and labour. In terms of all these three elements, the discussion includes not only the safety aspect but also the preservation of the property saved. Finally, the law relating to the indemnifiablity or recoverability of these saving acts provides the common denominator and co-relationship on which rests the *raison d'etre* of this thesis.

In the discussion on salvage, the historical evolution of this phenomenal branch of maritime law has been traced. The roots of salvage law are at once in the ancient maritime laws of Roman antiquity, as well as in the English law manifested through the merger of the common law with the law of equity and its subsequent progression. It is thus submitted that there has always been a customary regime of international salvage law which since the early part of the twentieth century has been codified through convention. Its treatment, however, in terms of indemnifiability under the law of marine insurance has been modified and tempered, through the decision of the House of Lords in *Aitchison* v. *Lohre*[1] and subsequent statutory codification in the form of the Marine Insurance Act 1906. The basic ingredients of salvage law, salvage as a marine risk and the notions of salvage contract and contract salvage in terms of their distinctions have been discussed. The Lloyd's open Form (LOF) as the most significant standard form of salvage agreement has been examined including its historical evolution.

The environmental dimension of salvage law has been accorded special treatment in the thesis given its contemporary importance and the emergence of the special compensation regime in the International Convention on Salvage, 1989. The dissatisfaction of the salvage industry with the decision of the House of Lords in *The Nagasaki Spirit*[2] and the eventual emergence of SCOPIC in the new LOF has been

1 (1879) 4 App. Cas. 755 (H.L.)

2 [1997] 1 Lloyd's Rep. 323

addressed in detail. It is illustrated that when the judiciary fails to give adequate credence to the teleology of a convention when interpreting it, industry does not hesitate to circumvent the convention regime by seeking a contractual solution to the problem it perceives.

Perhaps the most dramatic development in the context of salvage law is the advent of SCOPIC in the new LOF regime. As mentioned earlier, this clause came about in response to the salvage industry's dissatisfaction with the decision in *The Nagasaki Spirit* case. It appears that within the brief period since the inception of this clause, the system provoked by it is working reasonably well. It may well be that in the future, the maritime community at large will witness a slow but steady proactive movement away from traditional judicial solutions to pragmatic commercial ones. There is little doubt that in an increasingly complex maritime world, problems will be on the rise and the demand for speedy and effective resolutions will correspondingly increase. Law reform and law review in the maritime field will be more challenging than ever before.

In the next chapter of the thesis, the discussion is about general average which, in historical terms, is the oldest of the three saving acts. The evolution of general average from its inception under the Rhodian Sea Law has been traced and its principles have been examined in detail. Again, it is submitted that general average is part of the domain of customary maritime law although it enjoys certain distinctive features under English law which is evidenced by the leading cases on the subject. General average, like salvage, is primarily concerned with recompense or reimbursement for saving maritime property. However, unlike salvage, where the salvor is a third party to the maritime adventure, general average, in the first instance, only involves parties to a common maritime adventure. The principle of sharing of the risk by the co-adventurers is at the heart of general average. Of course, in the second instance, there is the question of indemnifiability. In English law, this is addressed through statutory provisions, namely, the relevant provisions of the Marine Insurance Act 1906. Needless to say, at this stage, the principle of spreading of risk among premium payers, which is the very essence of insurance, comes into play.

It is explained at the outset of the discussion that losses are either total or partial and that partial losses are either general or particular. The categorization of losses are then

compared and contrasted before moving into the specifics of the law of general average. The basic principles of general average are addressed in detail, both in terms of the customary law as expounded by English case law, as well as the relevant provisions of the York-Antwerp Rules, also interpreted through decisions of the English courts.

The various definitions, such as general average act, general average sacrifice, general average expenditure and general average contribution are examined in detail both under the Marine Insurance Act 1906 as well as the York-Antwerp Rules. General average as a marine risk is discussed in terms of the relevant Institute clauses. General average loss and act, sacrifice and expenditure and contribution and adjustment are discussed analytically by reference to the relevant case law. The position of the insurer in the context of sacrifice and expenditure is addressed and the law relating to what is the legal notion of the time of peril is analysed.

Other essential factors such as whether a general average act is voluntary or intentional as matter of substance and terminology, the notion of reasonableness and the requirement of ultimate success are addressed in detail. Also, the requirement that the loss must be directly consequential to the act and that the sacrifice or expenditure must be extraordinary before it can qualify as general average are discussed in adequate detail. The notion of what is a common adventure and various aspects of marine insurance law related to general average, particularly practices regarding evaluation of losses and expenditures, are addressed.

The rationale for the existence of general average continues to be questioned, and as events unfold, particularly in relation to marine environmental issues, the viability and commercial effectiveness of retaining general average simply for the sake of tradition, will no doubt be under serious re-consideration. It is submitted in unison with the views of others that marine insurance as a system has matured to a level of sophistication that can hold and contain any problems and issues relating to losses and sharing of risks. In that vein, and given the time it takes for general average to take its course through to finality, it is perhaps fair to say that it is a spent force. Redistribution of risks and liabilities can take other shapes and forms in maritime commerce. At any rate, compromises have been made at the last conference of the CMI in Vancouver and the 2004 version of the York-Antwerp Rules are ready for promulgation reflecting the

compromised changes. What that means essentially is that the regime of general average is here to stay, albeit in a modified fashion, at least for the time being.

In the next chapter of the thesis, the third principal subject matter that constitutes a saving act, namely, sue and labour has been discussed. As mentioned earlier, sue and labour falls squarely under the law of marine insurance, and in that context, there is a strong comparative element in the relevant provisions of the Marine Insurance Act 1906, with salvage and general average. In that chapter, first the historical background to sue and labour as a concept and its rationale are explored. Perhaps the most striking characteristic of sue and labour is that it is largely a contractual duty. However, the duty may exist even in the absence of an express suing and labouring clause in the policy. This is adequately examined in the thesis. There is the fine line argument that it is a contract supplementary to the main policy. The effect of this position is analysed through the relevant case law. The duty to sue and labour is also a statutory duty under the Marine Insurance Act 1906 and the relevant statutory provisions in this respect are carefully analysed. Essentially sue and labour in marine insurance law is akin to the common law duty of mitigation in the event of losses. This aspect is explored on a comparative basis.

As the duty of the assured to sue and labour is basically contractual, the express provisions in the relevant Institute Clauses and the International Hull Clauses 2003 are identified and the Institute Clauses are examined in detail accompanied by the corresponding case law. The position of servants and agents is examined. Also, other salient features such as the relationship of sue and labour with the waiver clause, the bailee clause, forwarding charges and the position with regard to under-insurance of the *res, etc.* are discussed in relative detail by reference to the hull as well as cargo clauses.

The operative time frame of sue and labour obligations and the consequences of a breach of the duty to sue and labour are dealt with in adequate detail as well. A breach could result from the negligence of the assured himself, or his agent, or the master and crew as servants of the assured. The consequences of barratry of the master and crew are also pertinent to the discussion. All these matters are addressed as necessary. The corresponding duty of the insurer is important to the discussion as well. The duty as such exists under both statute as well as contract. The position of the underwriter in the event of indemnification being claimed by the assured for an act committed by him that is

contrary to the law is an important consideration. This is explored in relative detail particularly by reference to the recent case of *Royal Boskalis* v. *Mountain.*[3]

The penultimate chapter consists of a comparative analysis of the three saving acts which form the backbone of the thesis. In this comparative treatment of these major areas of the law, the three saving acts are compared one to another. First salvage and general average are compared, then salvage and sue and labour, and finally, general average and sue and labour. The common thread running through all three of these is the question of indemnifiability or recoverability under the law of marine insurance. Some other comparative elements are also discussed such as under-insurance, unjust enrichment, and restitution.

Whatever may or may not happen by way of changes to the regimes of salvage, general average and sue and labour, or even perhaps other aspects of the Marine Insurance Act 1906, commercial activity will continue to thrive in a perpetual effort to grapple with the load of regulatory maritime thrust upon the shipping industry. Against the backdrop of this emerging scenario, it is hoped that this work will provoke further thoughts on the subject matters addressed and challenge a new generation of legal minds of the new century, even if some old wine is presented in new casks.

3 [1997] 2 All E.R. 929.

BIBLIOGRAPHY

Books

Ashburner, The Rhodian Sea Law. Oxford University Press, 1909, Reprint Clarendon Press, Oxford, 1976.

Atiyah, P.S. An Introduction to The Law of Contract, 4th Edition. Clarendon Law Series.

Beatson, J Anson's Law of Contract, 28th Edition, Oxford University Press.

Bennett, H. The Law of Marine Insurance, 1996, Oxford: Clarendon Press.

Brice, G. Reeder J. (Editor), Brice on Maritime Law of Salvage 4th ed. 2002. London: Sweet & Maxwell.

Clarke, M.A. (1994). The Law of Insurance Contracts. (2nd ed.)

De la Rue, C. & Anderson. C.B. (1998). Shipping and the Environment. London & Hong Kong: Lloyds of London Press.

Gaskell, N.J.J. *et. al.* (1988). Chorley & Giles' Shipping Law. (8th ed.). London: Pitman Publishing Ltd.

Gilmore F. & Black C., (1975). The Law of Admiralty. 2nd ed. New York: The Fountain Press Inc.

Gold, E. (1981). Maritime Transport: The Evolution of International Marine Policy and Shipping Law. Toronto: Lexington Books.

Gold, E., Chircop, A., & Kindred, H. (2003). Maritime Law. Toronto: Irwin Law Inc.

Griggs, P. & Williams, R. (1998). Limitation of Liability for Maritime Claims. (3rd ed.). London: LLP.

Hazelwood, S.J. (2000). P & I Clubs Law and Practice, London: Lloyd's of London Press.

Healy, N.J. & Sharpe, D.J. (1986). Cases and Materials on Admiralty. (2nd ed.). St. Paul, Minn.: West Publishing Co.

Hill, Christopher, Robertson B. and Hazelwood, S. J. Introduction to P & I., 2nd Edition, London: L.L.P., 1996.

Hill, Christopher, Maritime Law, (4th ed.) Lloyd's of London Press Ltd.

Hodges, S. (1996). Law of Marine Insurance. London: Cavendish Publishing Ltd.

Hodges,S. (1999). Cases and Materials on Marine Insurance Law. London: Cavendish Publishing Ltd.

Hudson, N. G & Allen, C. J. (1999) The Institute Clauses, 3rd. Ed., London: L.L.P.

Ivamy, E.R.H. (1993). Chalmers' Marine Insurance Act. (10th ed.). London: Butterworths.

Lambeth, R.J. (1986). Templeman on Marine Insurance. (6th ed.). London: Pitman Publishing Ltd.

Lowndes, R. The Law of General Average. (5th ed.). London: Stevens & Sons.

Maine, H. Ancient Law, Oxford University Press, London: Humphrey Milford, 1931, "The World's Classics.

McArthur. (1875). The Policy of Marine Insurance. (2nd. ed.).

Merkin, R. (1997). Annotated Marine Insurance Legislation. London: Lloyd's of London Press

Mukherjee, P.K. (2002). Maritime Legislation, Malmo: WMU Publications.

Mustill, M.J. & Gilman, J.C.B. (1996). Arnould on the Law of Marine Insurance and Average. (16th ed.). London: Sweet & Maxwell.

O'May, D. & Hill, J. (1993). Marine Insurance Law and Policy. London: Sweet & Maxwell.

Parks, A.L. (1987). The Law and Practice of Marine Insurance and Average. (Vol. I). Maryland: Cornell Maritime Press.

Reddie J. (1841). Historical View of the Law of Maritime Commerce. Edinburgh & London: William Blackwood & Sons.

Rose, F. Kennedy, R. W, *Kennedy and Rose on the Law of Salvage*, 6th Edition, 2001, London: Sweet & Maxwell.

Schoenbaum, T.J. (1994). Admiralty and Maritime Law. (2nd ed., Vol. 1). St. Paul, Minn., West Publishing Co.

Schoenbaum, T.J. (2004). Admiralty and Maritime Law. (4th ed.) West Group.

Steel, D.W. & Rose, F.D. (1985). Kennedy's Law of Salvage. (5th ed.). London: Stevens & Sons.

Tetley, W. (1989). Maritime Liens and Claims. Montreal: International Shipping Publications.

Thomas, D.R. (Ed.). (1996). The Modern Law of Marine Insurance. London: Lloyd's of London Press Ltd.

Thomas, D.R. (Ed.). (2002). The Modern Law of Marine Insurance. (Vol. 2). London: Lloyd's of London Press Ltd.

Thomas, M. & Steel, D. (1976). The Merchant Shipping Acts (Temperley) British Shipping Laws Series. (7th ed., Vol. 11). London: Stevens & Sons.

Treitel, G.H. An Outline of The Law of Contract 4th Edition, Butterworths.

Wilson, D.J. & Cooke, J.H.S., Lowndes & Rudolf (1997). The Law of General Average and the York-Antwerp Rules. (12th ed.). London: Sweet & Maxwell.

Winter, W.D. (1952). Marine Insurance. (3rd ed.). New York.

Wiswall, F.L. Jr. (1970).The Development of Admiralty Jurisdiction and Practice since 1800. Cambridge University Press.

Articles

Benedict, R.D. (1909). The Historical Position of the Rhodian Law. 18 Yale Law Journal

Bishop, W.A. (1994). Current Developments in Lloyd's Form – Article 14, Special Compensation. *I.T.S* Conference Paper.

Brice, G. (2000). Salvage and the Role of the Insurer. 1 *L.M.C.L.Q.*

Buglass. (1975). Ground for Refusal to Contribute in General Average. 4 *L.M.C.L.Q.*

Cadwallader, F.J.J. (1973). The Salvor's Duty of Care. *1 Marit. Stud. Mgmt 3.*
Cornah, R. "The Road to Vancouver – the Development of the York-Antwerp Rules", *JIML* 10 [2004] 2

Cornah, R."The Changes Introduced by the York-Antwerp Rules 2004", *JIML* 10[2004] 5

Eggers, P.M. (1998). Sue and Labour and Beyond: The Assured's Duty of Mitigation. 2 *L.M.C.L.Q.*

Gauci, G. (2000). The Obligation to Sue and Labour in the Law of Marine Insurance – Time to Amend the Statutory Provisions. 1 *IJOSL* 2.

Gauci, G. (2000). The Obligation to Sue and Labour in the Law of Marine Insurance – Time to Amend the Statutory Provisions. 1 *IJOSL.*

Girvin, S. (1997)Case and Comment "Special Compensation Under the Salvage Convention 1989: A Fair Rate?" *L.M C.L.Q.*

Gold, E. (1989, October). Marine Salvage: Towards a New Regime for Marine Salvage. 20 *JMLC.*

Hastings, W.K. (1988, October). Non-tidal Salvage in the United Kingdom: Going, Going, Gone. 19 *JMLC.*

Hooper , D. "Win Some Lose Some" in Fairplay, Volume 351, 10 June 2004.

Hudson, N. G. "The York-Antwerp Rules: Background to the Changes of 1994", (1996) 27 *JMLC.*

Lobingier, C.S. (1930). The Cradle of Western Law. United States Law Review.

Lobingier, C.S. (1935). The Maritime Law of Rome. Judicial Review.

MacDonald, J. "General Average and the York-Antwerp Rules: Common Safety and Other Considerations", JIML 9 [2003] 5.

O'Sullivan, B.P. (1990). The Scope of the Sue & Labour Clause. 21 *JMLC.*

Olsen Richard (1999). Comments, Nov & December, *Fairplay.*

Selmer, K. (1958). The Survival of General Average. Institute of Maritime Law, University of Oslo.

Thomas, D.R. (1977). Salvorial Negligence and its Consequences ***2*** *L.M.C.L.Q.*

Wright, L. (1939). Legal Essays and Addresses.

Documents, etc.

Bishop, W.A. IMLI, Salvage Lecture 1 (1995) (unpublished).

Johnson, C.H. (1925, February 11). General Average: Abolition, International Codification or Reform. Paper read before the Insurance Institute of Liverpool.

Institute Hull Clauses including, Institute Cargo Clauses A, B and C.

International Hull Clauses 2003.

Lloyd's Casualty Reports. (1991, 28 May to 05 June).

LOF 1980, LOF 1990 and LOF 1995.

LOF 2000 Including SCOPIC

P&I International. (1999, November). SCOPIC Amendment to Lloyd's Open Form. (Part 1). West of England Association.

P & I International. (2000, January). (Part 3). West of England publication.

Reference Book of Marine Insurance Clauses, 68th ed. (1996) London: Whitherby Publishing.

Reference Book of Marine Insurance Clauses, 75th ed. (2004) London: Whitherby Publishing.

Rules & Bye-Laws, UK P & I CLUB.

Magee, E. "General Average Reform – The IUMI Position" in CMI Yearbook 2000.

Shaw, R . "Places of Refuge International Law in the Making?" in CMI Yearbook 2003, Documents of the Vancouver Conference.

Willmer J.Q.C. (1997, June). Salvage and Current Problems, Public lecture at London Shipping Law Centre.

York-Antwerp Rules: 1974, 1994 and 2004.

Conventions

Convention on the International Regulations for Preventing Collisions at Sea 1972. IMO. (1972).

Convention on Limitation of Liability for Maritime Claims, (1976).

International Convention on Salvage 1989. IMO. (1989).

Statutes

Marine Insurance Act 1906.

Merchant Shipping Act 1894.

Merchant Shipping Act 1995

APPENDICES

LOF 2000

Appendix I

LLOYD'S

LLOYD'S STANDARD FORM OF SALVAGE AGREEMENT

(APPROVED AND PUBLISHED BY THE COUNCIL OF LLOYD'S)

NO CURE - NO PAY

1. Name of the salvage Contractors: (referred to in this agreement as "the Contractors")	2. Property to be salved: The vessel: her cargo freight bunkers stores and any other property thereon but excluding the personal effects or baggage of passengers master or crew (referred to in this agreement as "the property")
3. Agreed place of safety:	4. Agreed currency of any arbitral award and security (if other than United States dollars)
5. Date of this agreement	6. Place of agreement
7. Is the Scopic Clause incorporated into this agreement? State alternative : Yes/No	
8. Person signing for and on behalf of the Contractors Signature:	9. Captain or other person signing for and on behalf of the property Signature:

A. Contractors' basic obligation: The Contractors identified in Box 1 hereby agree to use their best endeavours to salve the property specified in Box 2 and to take the property to the place stated in Box 3 or to such other place as may hereafter be agreed. If no place is inserted in Box 3 and in the absence of any subsequent agreement as to the place where the property is to be taken the Contractors shall take the property to a place of safety.

B. Environmental protection: While performing the salvage services the Contractors shall also use their best endeavours to prevent or minimise damage to the environment.

(continued on the reverse side)

C. **Scopic Clause:** Unless the word "No" in Box 7 has been deleted this agreement shall be deemed to have been made on the basis that the Scopic Clause is not incorporated and forms no part of this agreement. If the word "No" is deleted in Box 7 this shall not of itself be construed as a notice invoking the Scopic Clause within the meaning of sub-clause 2 thereof.

D. **Effect of other remedies:** Subject to the provisions of the International Convention on Salvage 1989 as incorporated into English law ("the Convention") relating to special compensation and to the Scopic Clause if incorporated the Contractors services shall be rendered and accepted as salvage services upon the principle of "no cure - no pay" and any salvage remuneration to which the Contractors become entitled shall not be diminished by reason of the exception to the principle of "no cure - no pay" in the form of special compensation or remuneration payable to the Contractors under a Scopic Clause.

E. **Prior services:** Any salvage services rendered by the Contractors to the property before and up to the date of this agreement shall be deemed to be covered by this agreement.

F. **Duties of property owners:** Each of the owners of the property shall cooperate fully with the Contractors. In particular:

(i) the Contractors may make reasonable use of the vessel's machinery gear and equipment free of expense provided that the Contractors shall not unnecessarily damage abandon or sacrifice any property on board;

(ii) the Contractors shall be entitled to all such information as they may reasonably require relating to the vessel or the remainder of the property provided such information is relevant to the performance of the services and is capable of being provided without undue difficulty or delay;

(iii) the owners of the property shall co-operate fully with the Contractors in obtaining entry to the place of safety stated in Box 3 or agreed or determined in accordance with Clause A.

G. **Rights of termination:** When there is no longer any reasonable prospect of a useful result leading to a salvage reward in accordance with Convention Articles 12 and/or 13 either the owners of the vessel or the Contractors shall be entitled to terminate the services hereunder by giving reasonable prior written notice to the other.

H. **Deemed performance:** The Contractors' services shall be deemed to have been performed when the property is in a safe condition in the place of safety stated in Box 3 or agreed or determined in accordance with clause A. For the purpose of this provision the property shall be regarded as being in safe condition notwithstanding that the property (or part thereof) is damaged or in need of maintenance if (i) the Contractors are not obliged to remain in attendance to satisfy the requirements of any port or habour authority, governmental agency or similar authority and (ii) the continuation of skilled salvage services from the Contractors or other salvors is no longer necessary to avoid the property becoming lost or significantly further damaged or delayed.

I. **Arbitration and the LSSA Clauses:** The Contractors remuneration and/or special compensation shall be determined by arbitration in London in the manner prescribed by Lloyds Standard Salvage and Arbitration Clauses ("the LSSA Clauses") and Lloyd's Procedural Rules. The provisions of the LSSA Clauses and Lloyd's Procedural Rules are deemed to be incorporated in this agreement and form an integral part hereof. Any other difference arising out of this agreement or the operations hereunder shall be referred to arbitration in the same way.

J. **Governing law:** This agreement and any arbitration hereunder shall be governed by English law.

K. **Scope of authority:** The Master or other person signing this agreement on behalf of the property identified in Box 2 enters into this agreement as agent for the respective owners thereof and binds each (but not the one for the other or himself personally) to the due performance thereof.

L. **Inducements prohibited:** No person signing this agreement or any party on whose behalf it is signed shall at any time or in any manner whatsoever offer provide make give or promise to provide or demand or take any form of inducement for entering into this agreement.

IMPORTANT NOTICES :

1. **Salvage security.** As soon as possible the owners of the vessel should notify the owners of other property on board that this agreement has been made. If the Contractors are successful the owners of such property should note that it will become necessary to provide the Contractors with salvage security promptly in accordance with Clause 4 of the LSSA Clauses referred to in Clause I. The provision of General Average security does not relieve the salved interests of their separate obligation to provide salvage security to the Contractors.

2. **Incorporated provisons.** Copies of the Scopic Clause; the LSSA Clauses and Lloyd's Procedural Rules may be obtained from (i) the Contractors or (ii) the Salvage Arbitration Branch at Lloyd's, One Lime Street, London EC3M 7HA.

Tel.No. + 44(0)20 7327 5408

Fax No. +44(0)20 7327 6827

E-mail: lloyds-salvage@lloyds.com.

www.lloydsoflondon.com

LLOYD'S

LLOYD'S

LLOYD'S STANDARD FORM OF SALVAGE AGREEMENT

(APPROVED AND PUBLISHED BY THE COUNCIL OF LLOYD'S)

LLOYD'S STANDARD SALVAGE AND ARBITRATION CLAUSES

1. INTRODUCTION

1.1. These clauses ("the LSSA Clauses") or any revision thereof which may be published with the approval of the Council of Lloyd's are incorporated into and form an integral part of every contract for the performance of salvage services undertaken on the terms of Lloyd's Standard Form of Salvage Agreement as published by the Council of Lloyd's and known as LOF 2000 ("the Agreement" which expression includes the LSSA clauses and Lloyd's Procedural Rules referred to in Clause 6).

1.2. All notices communications and other documents required to be sent to the Council of Lloyd's should be sent to:

Salvage Arbitration Branch
Lloyd's
One Lime Street
London EC3M 7HA

Tel: +44 (0) 20 7327 5408/5407/5849
Fax: +44 (0) 20 7327 6827/5252
E-mail: lloyds-salvage@lloyds.com

2. OVERRIDING OBJECTIVE

In construing the Agreement or on the making of any arbitral order or award regard shall be had to the overriding purposes of the Agreement namely:

(a) to seek to promote safety of life at sea and the preservation of property at sea and during the salvage operations to prevent or minimise damage to the environment;

(b) to ensure that its provisions are operated in good faith and that it is read and understood to operate in a reasonably businesslike manner;

(c) to encourage cooperation between the parties and with relevant authorities;

(d) to ensure that the reasonable expectations of salvors and owners of salved property are met and

(e) to ensure that it leads to a fair and efficient disposal of disputes between the parties whether amicably, by mediation or by arbitration within a reasonable time and at a reasonable cost.

3. DEFINITIONS

In the Agreement and unless there is an express provision to the contrary:

3.1. "award" includes an interim or provisional award and "appeal award" means any award including any interim or provisional award made by the Appeal Arbitrator appointed under clause 10.2.

3.2. "personal effects or baggage" as referred to in Box 2 of the Agreement means those which the passenger, Master and crew member have in their cabin or are otherwise in their possession, custody or control and shall include any private motor vehicle accompanying a passenger and any personal effects or baggage in or on such vehicle.

3.3. "Convention" means the International Convention on Salvage 1989 as enacted by section 224, Schedule II of the Merchant Shipping Act 1995 (and any amendment of either) and any term or expression in the Convention has the same meaning when used in the Agreement.

3.4. "Council" means the Council of Lloyd's

3.5. "days" means calendar days

3.6. "Owners" means the owners of the property referred to in box 2 of the Agreement

3.7. "owners of the vessel" includes the demise or bareboat charterers of that vessel.

3.8. "special compensation" refers to the compensation payable to salvors under Article 14 of the Convention.

3.9. "Scopic Clause" refers to the agreement made between (1) members of the International Salvage Union (2) the International Group of P&I Clubs and (3) certain property underwriters which first became effective on 1st August 1999 and includes any replacement or revision thereof. All references to the Scopic Clause in the Agreement shall be deemed to refer to the version of the Scopic Clause current at the date the Agreement is made.

4. PROVISIONS AS TO SECURITY, MARITIME LIEN AND RIGHT TO ARREST

4.1. The Contractors shall immediately after the termination of the services or sooner notify the Council and where practicable the Owners of the amount for which they demand salvage security (inclusive of costs expenses and interest) from each of the respective Owners.

4.2. Where a claim is made or may be made for special compensation the owners of the vessel shall on the demand of the Contractors whenever made provide security for the Contractors claim for special compensation provided always that such demand is made within 2 years of the date of termination of the services.

4.3. The security referred to in clauses 4.1. and 4.2. above shall be demanded and provided in the currency specified in Box 4 or in United States Dollars if no such alternative currency has been agreed.

4.4. The amount of any such security shall be reasonable in the light of the knowledge available to the Contractors at the time when the demand is made and any further facts which come to the Contractors' attention before security is provided. The arbitrator appointed under clause 5 hereof may, at any stage of the proceedings, order that the amount of security be reduced or increased as the case may be.

4.5. Unless otherwise agreed such security shall be provided (i) to the Council (ii) in a form approved by the Council and (iii) by persons firms or corporations either acceptable to the Contractors or resident in the United Kingdom and acceptable to the Council. The Council shall not be responsible for the sufficiency (whether in amount or otherwise) of any security which shall be provided nor the default or insolvency of any person firm or corporation providing the same.

4.6. The owners of the vessel including their servants and agents shall use their best endeavours to ensure that none of the property salved is released until security has been provided in respect of that property in accordance with clause 4.5.

4.7. Until security has been provided as aforesaid the Contractors shall have a maritime lien on the property salved for their remuneration.

4.8. Until security has been provided the property salved shall not without the consent in writing of the Contractors (which shall not be unreasonably withheld) be removed from the place to which it has been taken by the Contractors under clause A. Where such consent is given by the Contractors on condition that they are provided with temporary security pending completion of the voyage the Contractors maritime lien on the property salved shall remain in force to the extent necessary to enable the Contractors to compel the provision of security in accordance with clause 4.5.

4.9. The Contractors shall not arrest or detain the property salved unless:

(i) security is not provided within 21 days after the date of the termination of the services or

(ii) they have reason to believe that the removal of the property salved is contemplated contrary to clause 4.8. or

(iii) any attempt is made to remove the property salved contrary to clause 4.8.

5. APPOINTMENT OF ARBITRATOR

5.1. Whether or not security has been provided the Council shall appoint an arbitrator ("the Arbitrator") upon receipt of a written request provided that any party requesting such appointment shall if required by the Council undertake to pay the reasonable fees and expenses of the Council including those of the Arbitrator and the Appeal Arbitrator.

5.2. The Arbitrator and the Council may charge reasonable fees and expenses for their services whether the arbitration proceeds to a hearing or not and all such fees and expenses shall be treated as part of the costs of the arbitration.

6. ARBITRATION PROCEDURE AND ARBITRATORS POWERS

6.1. The arbitration shall be conducted in accordance with the Procedural Rules approved by the Council ("Lloyd's Procedural Rules") in force at the time the Arbitrator is appointed.

6.2. The arbitration shall take place in London unless (i) all represented parties agree to some other place for the whole or part of the arbitration and (ii) any such agreement is approved by the Council on such terms as to the payment of the Arbitrator's travel and accommodation expenses as it may see fit to impose.

6.3. The Arbitrator shall have power in his absolute discretion to include in the amount awarded to the Contractors the whole or part of any expenses reasonably incurred by the Contractors in:
(i) ascertaining demanding and obtaining the amount of security reasonably required in accordance with clause 4.5
(ii) enforcing and/or protecting by insurance or otherwise or taking reasonable steps to enforce and/or protect their lien

6.4. The Arbitrator shall have power to make but shall not be bound to make a consent award between such parties as so consent with or without full arbitral reasons

6.5. The Arbitrator shall have power to make a provisional or interim award or awards including payments on account on such terms as may be fair and just

6.6. Awards in respect of salvage remuneration or special compensation (including payments on account) shall be made in the currency specified in Box 4 or in United States dollars if no such alternative currency has been agreed.

6.7. The Arbitrator's award shall (subject to appeal as provided in clause 10) be final and binding on all the parties concerned whether they were represented at the arbitration or not and shall be published by the Council in London.

7. REPRESENTATION OF PARTIES

7.1. Any party to the Agreement who wishes to be heard or to adduce evidence shall appoint an agent or representative ordinarily resident in the United Kingdom to receive correspondence and notices for and on behalf of that party and shall give written notice of such appointment to the Council.

7.2. Service on such agent or representative by post or facsimile shall be deemed to be good service on the party which has appointed that agent or representative.

7.3. Any party who fails to appoint an agent or representative as aforesaid shall be deemed to have renounced his right to be heard or adduce evidence.

8. INTEREST

8.1. Unless the Arbitrator in his discretion otherwise decides the Contractors shall be entitled to interest on any sums awarded in respect of salvage remuneration or special compensation (after taking into consideration any sums already paid to the Contractors on account) from the date of termination of the services until the date on which the award is published by the Council and at a rate to be determined by the Arbitrator.

8.2. In ordinary circumstances the Contractors' interest entitlement shall be limited to simple interest but the Arbitrator may exercise his statutory power to make an award of compound interest if the Contractors have been deprived of their salvage remuneration or special compensation for an excessive period as a result of the Owners gross misconduct or in other exceptional circumstances.

8.3. If the sum(s) awarded to the Contractors (including the fees and expenses referred to in clause 5.2) are not paid to the Contractors or to the Council by the payment date specified in clause 11.1 the Contractors shall be entitled to additional interest on such outstanding sums from the payment date until the date payment is received by the Contractors or the Council both dates inclusive and at a rate which the Arbitrator shall in his absolute discretion determine in his award.

9. CURRENCY CORRECTION

In considering what sums of money have been expended by the Contractors in rendering the services and/or in fixing the amount of the award and/or appeal award the Arbitrator or Appeal Arbitrator shall to such an extent and insofar as it may be fair and just in all the circumstances give effect to the consequences of any change or changes in the relevant rates of exchange which may have occurred between the date of termination of the services and the date on which the award or appeal award is made.

10. APPEALS AND CROSS APPEALS

10.1. Any party may appeal from an award by giving written Notice of Appeal to the Council provided such notice is received by the Council no later than 21 days after the date on which the award was published by the Council.

10.2. On receipt of a Notice of Appeal the Council shall refer the appeal to the hearing and determination of an appeal arbitrator of its choice ("the Appeal Arbitrator").

10.3. Any party who has not already given Notice of Appeal under clause 10.1 may give a Notice of Cross Appeal to the Council within 21 days of that party having been notified that the Council has received Notice of Appeal from another party.

10.4. Notice of Appeal or Cross Appeal shall be given to the Council by letter telex facsimile or in any other permanent form. Such notification if sent by post shall be deemed received on the working day following the day of posting.

10.5. If any Notice of Appeal or Notice of Cross Appeal is withdrawn prior to the hearing of the appeal arbitration, that appeal arbitration shall nevertheless proceed for the purpose of determining any matters which remain outstanding.

10.6. The Appeal Arbitrator shall conduct the appeal arbitration in accordance with Lloyd's Procedural Rules so far as applicable to an appeal.

10.7. In addition to the powers conferred on the Arbitrator by English law and the Agreement, the Appeal Arbitrator shall have power to:
(i) admit the evidence or information which was before the Arbitrator together with the Arbitrator's Notes and Reasons for his award, any transcript of evidence and such additional evidence or information as he may think fit;
(ii) confirm increase or reduce the sum(s) awarded by the Arbitrator and to make such order as to the payment of interest on such sum(s) as he may think fit;
(iii) confirm revoke or vary any order and/or declaratory award made by the Arbitrator;
(iv) award interest on any fees and expenses charged under clause 10.8 from the expiration of 28 days after the date of publication by the Council of the Appeal Arbitrator's award until the date payment is received by the Council both dates inclusive.

10.8. The Appeal Arbitrator and the Council may charge reasonable fees and expenses for their services in connection with the appeal arbitration whether it proceeds to a hearing or not and all such fees and expenses shall be treated as part of the costs of the appeal arbitration.

10.9. The Appeal Arbitrator's award shall be published by the Council in London.

11. PROVISIONS AS TO PAYMENT

11.1. When publishing the award the Council shall call upon the party or parties concerned to pay all sums due from them which are quantified in the award (including the fees and expenses referred to in clause 5.2) not later than 28 days after the date of publication of the award ("the payment date")

11.2. If the sums referred to in clause 11.1 (or any part thereof) are not paid within 56 days after the date of publication of the award (or such longer period as the Contractors may allow) and provided the Council has not received Notice of Appeal or Notice of Cross Appeal the Council shall realise or enforce the security given to the Council under clause 4.5 by or on behalf of the defaulting party or parties subject to the Contractors providing the Council with any indemnity the Council may require in respect of the costs the Council may incur in that regard.

11.3. In the event of an appeal and upon publication by the Council of the appeal award the Council shall call upon the party or parties concerned to pay the sum(s) awarded. In the event of non-payment and subject to the Contractors providing the Council with any costs indemnity required as referred to in clause 11.2 the Council shall realise or enforce the security given to the Council under clause 4.5 by or on behalf of the defaulting party.

11.4. If any sum(s) shall become payable to the Contractors in respect of salvage remuneration or special compensation (including interest and/or costs) as the result of an agreement made between the Contractors and the Owners or any of them, the Council shall, if called upon to do so and subject to the Contractors providing to the Council any costs indemnity required as referred to in clause 11.2 realise or enforce the security given to the Council under clause 4.5 by or on behalf of that party.

11.5. Where (i) no security has been provided to the Council in accordance with clause 4.5 or (ii) no award is made by the Arbitrator or the Appeal Arbitrator (as the case may be) because the parties have been able to settle all matters in issue between them by agreement the Contractors shall be responsible for payment of the fees and expenses referred to in clause 5.2 and (if applicable) clause 10.8. Payment of such fees and expenses shall be made to the Council within 28 days of the Contractors or their representatives receiving the Council's invoice failing which the Council shall be entitled to interest on any sum outstanding at UK Base Rate prevailing on the date of the invoice plus 2% per annum until payment is received by the Council.

11.6. If an award or appeal award directs the Contractors to pay any sum to any other party or parties including the whole or any part of the costs of the arbitration and/or appeal arbitration the Council may deduct from sums received by the Council on behalf of the Contractors the amount(s) so payable by the Contractors unless the Contractors provide the Council with satisfactory security to meet their liability.

11.7. Save as aforesaid all sums received by the Council pursuant to this clause shall be paid by the Council to the Contractors or their representatives whose receipt shall be a good discharge to it.

11.8. Without prejudice to the provisions of clause 4.5 the liability of the Council shall be limited to the amount of security provided to it.

GENERAL PROVISIONS

12. Lloyd's documents: Any award notice authority order or other document signed by the Chairman of Lloyd's or any person authorised by the Council for the purpose shall be deemed to have been duly made or given by the Council and shall have the same force and effect in all respects as if it had been signed by every member of the Council.

13. Contractors personnel and subcontractors.

13.1. The Contractors may claim salvage on behalf of their employees and any other servants or agents who participate in the services and shall upon request provide the owners with a reasonably satisfactory indemnity against all claims by or liabilities to such employees servants or agents.

13.2. The Contractors may engage the services of subcontractors for the purpose of fulfilling their obligations under clauses A and B of the Agreement but the Contractors shall nevertheless remain liable to the Owners for the due performance of those obligations.

13.3. In the event that subcontractors are engaged as aforesaid the Contractors may claim salvage on behalf of the subcontractors including their employees servants or agents and shall, if called upon so to do provide the Owners with a reasonably satisfactory indemnity against all claims by or liabilities to such subcontractors their employees servants or agents.

14. Disputes under Scopic Clause.

Any dispute arising out of the Scopic Clause (including as to its incorporation or invocation) or the operations thereunder shall be referred for determination to the Arbitrator appointed under clause 5 hereof whose award shall be final and binding subject to appeal as provided in clause 10 hereof.

15. Lloyd's Publications.

Any guidance published by or on behalf of the Council relating to matters such as the Convention the workings and implementation of the Agreement is for information only and forms no part of the Agreement.

LLOYD'S

LLOYD'S STANDARD FORM OF SALVAGE AGREEMENT

(APPROVED AND PUBLISHED BY THE COUNCIL OF LLOYD'S)

PROCEDURAL RULES

(pursuant to Clause I of LOF 2000)

1. Arbitrators Powers

In addition to all powers conferred by the Arbitration Act 1996 (or any amendment thereof) the Arbitrator shall have power:

(a) to admit such oral or documentary evidence or information as he may think fit;

(b) to conduct the arbitration in such manner in all respects as he may think fit subject to these Procedural Rules and any amendments thereto as may from time to time be approved by the Council of Lloyd's ("the Council");

(c) to make such orders as to costs, fees and expenses including those of the Council charged under clauses 5.2 and 10.8 of the Lloyd's Standard Salvage and Arbitration Clauses ("the LSSA clauses") as may be fair and just;

(d) to direct that the recoverable costs of the arbitration or of any part of the proceedings shall be limited to a specified amount;

(e) to make any orders required to ensure that the arbitration is conducted in a fair and efficient manner consistent with the aim to minimise delay and expense and to arrange such meetings and determine all applications made by the parties as may be necessary for that purpose;

(f) to conduct all such meetings by means of a conference telephone call if the parties agree;

(g) on his own initiative or on the application of a party to correct any award (whether interim provisional or final) or to make an additional award in order to rectify any mistake error or omission provided that (i) any such correction is made within 28 days of the date of publication of the relevant award by the Council (ii) any additional award required is made within 56 days of the said date of publication or, in either case, such longer period as the Arbitrator may in his discretion allow.

2. Preliminary Meeting

(a) Within 6 weeks of being appointed or so soon thereafter as may be reasonable in the circumstances, the Arbitrator shall convene a preliminary meeting with the represented parties for the purpose of giving directions as to the manner in which the arbitration is to be conducted.

(b) The Arbitrator may dispense with the requirement for a preliminary meeting if the represented parties agree a consent order for directions which the Arbitrator is willing to approve. For the purpose of obtaining such approval, the Arbitrator must be provided by the contractors or their representatives with a brief summary of the case in the form of a check list, any other party providing such comments as they deem appropriate so that the Arbitrator is placed in a position to decide whether to approve the consent order.

(c) In determining the manner in which the arbitration is to be conducted, the Arbitrator shall have regard to:

(i) the interests of unrepresented parties;

(ii) whether some form of shortened and/or simplified procedure is appropriate including whether the arbitration may be conducted on documents only with concise written submissions;

(iii) the overriding objectives set out in clause 2 of the LSSA clauses.

3. Order for Directions

Unless there are special reasons, the initial order for directions shall include:-

(a) a date for disclosure of documents including witness statements (see Rule 4);

(b) a date for proof of values;

(c) a date by which any party must identify any issue(s) in the case which are likely to necessitate the service of pleadings;

(d) a date for a progress meeting or additional progress meetings unless all represented parties with reasonable notice agree that the same is unnecessary;

(e) unless agreed by all represented parties to be premature, a date for the hearing and estimates for the time likely to be required by the Arbitrator to read evidence in advance and for the length of the hearing;

(f) any other matters deemed by the Arbitrator or any party to be appropriate to be included in the initial order.

4. Disclosure of documents

Unless otherwise agreed or ordered, disclosure shall be limited to the following classes of document:

(a) logs and any other contemporaneous records maintained by the shipowners personnel and personnel employed by the Contractors (including any subcontractors) and their respective surveyors or consultants in attendance during all or part of the salvage services;

(b) working charts, photographs, video or film records;

(c) contemporaneous reports including telexes, facsimile messages or prints of e- mail messages;

(d) survey reports;

(e) documents relevant to the proof of:

(i) out of pocket expenses
(ii) salved values
(iii) the particulars and values of all relevant salving tugs or other craft and equipment

(f) statements of witnesses of fact or other privileged documents on which the party wishes to rely.

5. Expert Evidence

(a) No expert evidence shall be adduced in the arbitration without the Arbitrators permission.

(b) The Arbitrator shall not give such permission unless satisfied that expert evidence is reasonably necessary for the proper determination of an issue arising in the arbitration.

(c) No party shall be given permission to adduce evidence from more than one expert in each field requiring expert evidence save in exceptional circumstances.

(d) Any application for permission to adduce expert evidence must be made at the latest within 14 days after disclosure of relevant documents has been effected.

6. Mediation

The Arbitrator shall ensure that in all cases the represented parties are informed of the benefit which might be derived from the use of mediation.

7. Hearing of Arbitration

(a) In fixing or agreeing to a date for the hearing of an arbitration, the Arbitrator shall not unless agreed by all represented parties fix or accept a date unless the Arbitrator can allow time to read the principal evidence in advance, hear the arbitration and produce the award to the Council for publication in not more than 1 month from conclusion of the hearing.

(b) The date fixed for the hearing shall be maintained unless application to alter the date is made to the Arbitrator within 14 days of the completion of discovery or unless the Arbitrator in the exercise of his discretion determines at a later time that an adjournment is necessary or desirable in the interests of justice or fairness.

(c) Unless all parties represented in the arbitration agree otherwise the Arbitrator shall relinquish his appointment if a hearing date cannot be agreed, fixed or maintained in accordance with rule 7(a) and/or (b) above due to the Arbitrator's commitments. In that event the Council shall appoint in his stead another arbitrator who is able to meet the requirements of those rules.

8. Appeals

(a) All references in these Rules to the Arbitrator shall include the Arbitrator on Appeal where the circumstances so permit.

(b) In any case in which a party giving notice of appeal intends to contend that the Arbitrator's findings on the salved value of all or any of the salved property were erroneous, or that the Arbitrator has erred in any finding as to the person whose property was at risk, a statement of such grounds of appeal shall be given in or accompanying the notice of appeal.

(c) In all cases grounds of appeal or cross-appeal will be given to the Arbitrator on Appeal within 21 days of the notice of appeal or cross- appeal unless an extension of time is agreed.

(d) Any respondent to an appeal who intends to contend that the award of the Original Arbitrator should be affirmed on grounds other than those relied upon by the Original Arbitrator shall give notice to that effect specifying the grounds of his contention within 14 days of receipt of the grounds of appeal mentioned in (c) above unless an extension of time is agreed.

SCOPIC CLAUSE

1. **General**
This SCOPIC clause is supplementary to any Lloyd's Form Salvage Agreement "No Cure - No Pay" ("Main Agreement") which incorporates the provisions of Article 14 of the International Convention on Salvage 1989 ("Article 14"). The definitions in the Main Agreement are incorporated into this SCOPIC clause. If the SCOPIC clause is inconsistent with any provisions of the Main Agreement or inconsistent with the law applicable hereto, the SCOPIC clause, once invoked under sub-clause 2 hereof, shall override such other provisions to the extent necessary to give business efficacy to the agreement. Subject to the provisions of sub-clause 4 hereof, the method of assessing Special Compensation under Convention Article 14(1) to 14(4) inclusive shall be substituted by the method of assessment set out hereinafter. If this Scopic clause has been incorporated into the Main Agreement the Contractor may make no claim pursuant to Article 14 except in the circumstances described in sub-clause 4 hereof. For the purposes of liens and time limits the services hereunder will be treated in the same manner as salvage.

2. **Invoking the SCOPIC Clause**
The Contractor shall have the option to invoke by written notice to the owners of the vessel the SCOPIC clause set out hereafter at any time of his choosing regardless of the circumstances and, in particular, regardless of whether or not there is a "threat of damage to the environment." The assessment of SCOPIC remuneration shall commence from the time the written notice is given to the owners of the vessel and services rendered before the said written notice shall not be remunerated under this SCOPIC clause at all but in accordance with Convention Article 13 as incorporated into the Main Agreement ("Article 13").

3. **Security for SCOPIC Remuneration**
(i) The owners of the vessel shall provide to the Contractor within 2 working days (excluding Saturdays and Sundays and holidays usually observed at Lloyd's) after receiving written notice from the contractor invoking the SCOPIC clause, a bank guarantee or P&I Club letter (hereinafter called "the Initial Security") in a form reasonably satisfactory to the Contractor providing security for his claim for SCOPIC remuneration in the sum of US$3 million, inclusive of interest and costs.
(ii) If, at any time after the provision of the Initial Security the owners of the vessel reasonably assess the SCOPIC remuneration plus interest and costs due hereunder to be less than the security in place, the owners of the vessel shall be entitled to require the Contractor to reduce the security to a reasonable sum and the Contractor shall be obliged to do so once a reasonable sum has been agreed.
(iii) If at any time after the provision of the Initial Security the Contractor reasonably assesses the SCOPIC remuneration plus interest and costs due hereunder to be greater than the security in place, the Contractor shall be entitled to require the owners of the vessel to increase the security to a reasonable sum and the owners of the vessel shall be obliged to do so once a reasonable sum has been agreed.
(iv) In the absence of agreement, any dispute concerning the proposed Guarantor, the form of the security or the amount of any reduction or increase in the security in place shall be resolved by the Arbitrator.

4. **Withdrawal**
If the owners of the vessel do not provide the Initial Security within the said 2 working days, the Contractor, at his option, and on giving notice to the owners of the vessel, shall be entitled to withdraw from all the provisions of the SCOPIC clause and revert to his rights under the Main Agreement including Article 14 which shall apply as if the SCOPIC clause had not existed. PROVIDED THAT this right of withdrawal may only be exercised if, at the time of giving the said notice of withdrawal the owners of the vessel have still not provided the Initilal Security or any alternative security which the owners of the vessel and the Contractor may agree will be sufficient.

5. **Tariff Rates.**
(i) SCOPIC remuneration shall mean the total of the tariff rates of personnel; tugs and other craft; portable salvage equipment; out of pocket expenses; and bonus due.
(ii) SCOPIC remuneration in respect of all personnel; tugs and other craft; and portable salvage equipment shall be assessed on a time and materials basis in accordance with the Tariff set out in Appendix "A" This tariff will apply until reviewed and amended by the SCR Committee in accordance with Appendix B(1)(b). The tariff rates which will be used to calculate SCOPIC remuneration are those in force at the time the salvage services take place.
(iii) "Out of pocket" expenses shall mean all those monies reasonably paid by or for and on behalf of the Contractor to any third party and in particular includes the hire of men, tugs, other craft and equipment used and other expenses reasonably necessary for the operation. They will be agreed at cost, PROVIDED THAT:
  (a) If the expenses relate to the hire of men, tugs, other craft and equipment from another ISU member or their affiliate(s), the amount due will be calculated on the tariff rates set out in Appendix "A" regardless of the actual cost.
  (b) If men, tugs, other craft and equipment are hired from any party who is not an ISU member and the hire rate is greater than the tariff rates referred to in Appendix "A" the actual cost will be allowed in full, subject to the Shipowner's Casualty Representative ("SCR") being satisfied that in the particular circumstances of the case, it was reasonable for the Contractor to hire such items at that cost. If an SCR is not appointed or if there is a dispute, then the Arbitrator shall decide whether the expense was reasonable in all in the circumstances.
  (c) Any out of pocket expense incurred during the course of the service in a currency other than US dollars shall for the purpose of the SCOPIC clause be converted to US dollars at the rate prevailing at the termination of the services.
(iv) In addition to the rates set out above and any out of pocket expenses, the Contractor shall be entitled to a standard bonus of 25% of those rates except that if the out of pocket expenses described in sub-paragraph 5(iii)(b) exceed the applicable tariff rates in Appendix "A" the Contractor shall be entitled to a bonus such that he shall receive in total
  (a) The actual cost of such men, tugs, other craft and equipment plus 10% of the cost, or
  (b) The tariff rate for such men, tugs, other craft and equipment plus 25% of the tariff rate
  whichever is the greater.

6. **Article 13 Award**
(i) The salvage services under the Main Agreement shall continue to be assessed in accordance with Article 13, even if the Contractor has invoked the SCOPIC clause. SCOPIC remuneration as assessed under sub-clause 5 above will be payable only by the owners of the vessel and only to the extent that it exceeds the total Article 13 Award (or, if none, any

potential Article 13 Award) payable by all salved interests (including cargo, bunkers, lubricating oil and stores) before currency adjustment and before interest and costs even if the Article 13 Award or any part of it is not recovered.

(ii) In the event of the Article 13 Award or settlement being in a currency other than United States dollars it shall, for the purposes of the SCOPIC clause, be exchanged at the rate of exchange prevailing at the termination of the services under the Main Agreement.

(iii) The salvage Award under Article 13 shall not be deminished by reason of the exception to the principle of "No Cure - No Pay" in the form of SCOPIC remuneration.

7. Discount

If the SCOPIC clause is invoked under sub-clause 2 hereof and the Article 13 Award or settlement (before currency adjustment and before interest and costs) under the Main Agreement is greater than the assessed SCOPIC remuneration then, notwithstanding the actual date on which the SCOPIC remuneration provisions were invoked, the said Article 13 Award or settlement shall be discounted by 25% of the difference between the said Article 13 Award or settlement and the amount of SCOPIC remuneration that would have been assessed had the SCOPIC remuneration provisions been invoked on the first day of the services.

8. Payment of SCOPIC Remuneration

(i) The date for payment of any SCOPIC remuneration which may be due hereunder will vary according to the circumstances.

a) If there is no potential salvage award within the meaning of Article 13 as incorporated into the Main Agreement then, subject to Appendix B(5)(c)(iv), the undisputed amount of SCOPIC remuneration due hereunder will be paid by the owners of the vessel within 1 month of the presentation of the claim. Interest on sums due will accrue from the date of termination of the services until the date of payment at US prime rate plus 1%.

(b) If there is a claim for an Article 13 salvage award as well as a claim for SCOPIC remuneration, subject to Appendix B(5)(c)(iv), 75% of the amount by which the assessed SCOPIC remuneration exceeds the total Article 13 security demanded from ship and cargo will be paid by the owners of the vessel within 1 month and any undisputed balance paid when the Article 13 salvage award has been assessed and falls due. Interest will accrue from the date of termination of the services until the date of payment at the US prime rate plus 1%.

(ii) The Contractor hereby agrees to give an indemnity in a form acceptable to the owners of the vessel in respect of any overpayment in the event that the SCOPIC remuneration due ultimately proves to be less than the sum paid on account.

9. Termination

(i) The Contractor shall be entitled to terminate the services under the SCOPIC clause and the Main Agreement by written notice to owners of the vessel with a copy to the SCR (if any) and any Special Representative appointed if the total cost of his services to date and the services that will be needed to fulfil his obligations hereunder to the property (calculated by means of the tariff rate but before the bonus conferred by sub-clause 5(iii) hereof) will exceed the sum of:-

(a) The value of the property capable of being salved; and

(b) All sums to which he will be entitled as SCOPIC remuneration

(ii) The owners of the vessel may at any time terminate the obligation to pay SCOPIC remuneration after the SCOPIC clause has been invoked under sub-clause 2 hereof provided that the Contractor shall be entitled to at least 5 clear days' notice of such termination. In the event of such termination the assessment of SCOPIC remuneration shall take into account all monies due under the tariff rates set out in Appendix A hereof including time for demobilisation to the extent that such time did reasonably exceed the 5 days' notice of termination.

(iii) The termination provisions contained in sub-clause 9(i) and 9(ii) above shall only apply if the Contractor is not restrained from demobilising his equipment by Government, Local or Port Authorities or any other officially recognised body having jurisdiction over the area where the services are being rendered.

10. Duties of Contractor

The duties and liabilities of the Contractor shall remain the same as under the Main Agreement, namely to use his best endeavours to salve the vessel and property thereon and in so doing to prevent or minimise damage to the environment.

11. Special Casualty Representative ("SCR")

Once this SCOPIC clause has been invoked in accordance with sub-clause 2 hereof the owners of the vessel may at their sole option appoint an SCR to attend the salvage operation in accordance with the terms and conditions set out in Appendix B. Any SCR so appointed shall not be called upon by any of the parties hereto to give evidence relating to non-salvage issues.

12. Special Representatives

At any time after the SCOPIC clause has been invoked the Hull and Machinery underwriter (or, if more than one, the lead underwriter) and one owner or underwriter of all or part of any cargo on board the vessel may each appoint one special representative (hereinafter called respectively the "Special Hull Representative" and the "Special Cargo Representative" and collectively called the "Special Representatives") at the sole expense of the appointor to attend the casualty to observe and report upon the salvage operation on the terms and conditions set out in Appendix C hereof. Such Special Representatives shall be technical men and not practising lawyers.

13. Pollution Prevention

The assessment of SCOPIC remuneration shall include the prevention of pollution as well as the removal of pollution in the immediate vicinity of the vessel insofar as this is necessary for the proper execution of the salvage but not otherwise.

14. General Average

SCOPIC remuneration shall not be a General Average expense to the extent that it exceeds the Article 13 Award; any liability to pay such SCOPIC remuneration shall be that of the Shipowner alone and no claim whether direct, indirect, by way of indemnity or recourse or otherwise relating to SCOPIC remuneration in excess of the Article 13 Award shall be made in General Average or under the vessel's Hull and Machinery Policy by the owners of the vessel.

15. Any dispute arising out of this SCOPIC clause or the operations thereunder shall be referred to Arbitration as provided for under the Main Agreement.

APPENDIX A (SCOPIC)

1. **PERSONNEL**

(a) The daily tariff rate, or pro rata for part thereof, for personnel reasonably engaged on the contract, including any necessary time in proceeding to and returning from the casualty, shall be as follows:

Office administration, including communications	US$1,000
Salvage Master	US$1,500
Naval Architect or Salvage Officer/Engineer	US$1,250
Assistant Salvage Officer/Engineer	US$1,000
Diving Supervisor	US$1,000
HSE qualified diver or his equivalent but excluding saturation or mixed gas divers (whose rate should be agreed with the SCR or determined by the Arbitrator)	US$ 900
Salvage Foreman	US$ 750
Riggers, Fitters, Equipment Operators	US$ 600
Specialist Advisors – Fire Fighters, Chemicals, Pollution Control	US$1,000

(b) The crews of tugs, and other craft, normally aboard that tug or craft for the purpose of its customary work are included in the tariff rate for that tug or craft but when because of the nature and/or location of the services to be rendered, it is a legal requirement for an additional crew member or members to be aboard the tug or craft, the cost of such additional crew will be paid.

(c) The rates for any personnel not set out above shall be agreed with the SCR or, failing agreement, be determined by the Arbitrator.

(d) For the avoidance of doubt, personnel are "reasonably engaged on the contract" within the meaning of Appendix A sub-clause 1(a) hereof if, in addition to working, they are eating, sleeping or otherwise resting on site or travelling to or from the site; personnel who fall ill or are injured while reasonably engaged on the contract shall be charged for at the appropriate daily tariff rate until they are demobilised but only if it was reasonable to mobilise them in the first place.

(e) SCOPIC remuneration shall cease to accrue in respect of personnel who die on site from the date of death.

2. **TUGS AND OTHER CRAFT**

(a) (i) Tugs, which shall include salvage tugs, harbour tugs, anchor handling tugs, coastal/ocean towing tugs, off-shore support craft, and any other work boat in excess of 500 b.h.p., shall be charged at the following rates, exclusive of fuel or lubricating oil, for each day, or pro rata for part thereof, that they are reasonably engaged in the services, including proceeding towards the casualty from the tugs location when SCOPIC is invoked or when the tugs are mobilised (whichever is the later) and from the tugs position when their involvement in the services terminates to a reasonable location having due regard to their employment immediately prior to their involvement in the services and standing by on the basis of their certificated b.h.p.:

For each b.h.p. up to 5,000 b.h.p.	US$ 2.00
For each b.h.p. between 5,001 & 10,000 b.h.p.	US$ 1.50
For each b.h.p. between 10,001 & 20,000 b.h.p.	US$ 1.00
For each b.h.p. over 20,000 b.h.p.	US$ 0.50

(ii) Any tug which has aboard certified fire fighting equipment shall, in addition to the above rates, be paid:

US$500 per day, or pro rata for part thereof, if equipped with Fi Fi 0.5
US$1,000 per day, or pro rata for part thereof, if equipped with Fi Fi 1.0

for that period in which the tug is engaged in fire fighting necessitating the use of the certified fire fighting equipment.

(iii) Any tug which is certified as "Ice Class" shall, in addition to the above, be paid US$1,000 per day, or pro rata for part thereof, when forcing or breaking ice during the course of services including proceeding to and returning from the casualty.

(iv) For the purposes of paragraph 2(a)(i) hereof tugs shall be remunerated for any reasonable delay or deviation for the purposes of taking on board essential salvage equipment, provisions or personnel which the Contractor reasonably anticipates he shall require in rendering the services which would not normally be found on vessels of the tugs size and type.

(b) Any launch or work boat of less than 500 b.h.p. shall, exclusive of fuel and lubricating oil, be charged at a rate of US$3.00 for each b.h.p.

(c) Any other craft, not falling within the above definitions, shall be charged out at a market rate for that craft, exclusive of fuel and lubricating oil, such rate to be agreed with the SCR or, failing agreement, determined by the Arbitrator.

(d) All fuel and lubricating oil consumed during the services shall be paid at cost of replacement and shall be treated as an out of pocket expense.

(e) For the avoidance of doubt, the above rates shall not include any portable salvage equipment normally aboard the tug or craft and such equipment shall be treated in the same manner as portable salvage equipment and the Contactors shall be reimbursed in respect thereof in accordance with Appendix paragraphs 3 and 4 (i) and (ii) hereof.

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(f) SCOPIC remuneration shall cease to accure in respect of tugs and other craft which become a commercial total loss from the date they stop being engaged in the services plus a reasonable period for demobilisation (if appropriate) PROVIDED that such SCOPIC remuneration in respect of demobilisation shall only be payable if the commercial total loss arises whilst engaged in the services and through no fault of the Contractors, their servants, agents or sub-contractors.

3. **PORTABLE SALVAGE EQUIPMENT**

(a) The daily tariff, or pro rata for part thereof, for all portable salvage equipment reasonably engaged during the services, including any time necessary for mobilisation and demobilisation, shall be as follows:

Generators	Rate – US$.
Up to 50 kW	60
51 to 100 kW	125
101 to 300 kW	200
Over 301 kW	350
Portable Inert Gas Systems	
1,000m /hour	1,200
1,500m /hour	1,400
Compressors	
High Pressure	100
185 Cfm	150
600 Cfm	250
1200 Cfm	400
Air Manifold	10
Blower; 1,500m /min.	850
Pumping Equipment	
Air	
2"	75
Diesel	
2"	50
4"	90
6"	120
Electrical Submersible	
2"	50
4"	150
6"	500
Hydraulic	
6"	600
8"	1,000

Hoses		
Air Hose		
¾"per	30 metres or 100 feet	20
2"per	30 metres or 100 feet	40
Layflat		
2"	per 6 metres or 20 feet	10
4"	per 6 metres or 20 feet	15
6"	per 6 metres or 20 feet	20
Rigid		
2"	per 6 metres or 20 feet	15
4"	per 6 metres or 20 feet	20
6"	per 6 metres or 20 feet	25
8"	per 6 metres or 20 feet	30

Fenders	
Yokohama	
1.00m. x 2.00m.	75
2.50m. x 5.50m.	150
3.50m. x 6.50m.	250
Low Pressure Inflatable	
3 metres	70
6 metres	70
9 metres	150
12 metres	250
16 metres	250

Welding & Cutting Equipment	Rate – US$.
Bolt Gun	300
Gas Detector	100
Hot Tap Machine, including supporting equipment	1,000
Oxy-acetylene Surface Cutting Gear	25
Underwater Cutting Gear	50
Underwater Welding Kit	50
250 Amp Welder	150
400 Amp Welder	200
Pollution Control Equipment	
Oil Boom, 24", per 10 metres	30
Oil Boom, 36", per 10 metres	100
Oil Boom, 48", per 10 metres	195
Lighting Systems	
Lighting String, per 50 feet	25
Light Tower	50
Underwater Lighting System, 1,000 watts	75
Winches	
Up to 20 tons, including 50 metres of wire	200
Storage Equipment	
10' Container	25
20' Container	40

Miscellaneous Equipment		
Air Bags, less than 5 tons lift		40
5 to 15 tons lift		200
Air Lift 4"		100
6"		200
8"		300
Air Tugger, up to 3 tons		75
Ballast/Fuel Oil Storage Bins, 50,000 litres		100
Chain Saw		20
Damage Stability Computer and Software		250
Echo Sounder, portable		25
Extension Ladder		20
Hydraulic Jack, up to 100 tons		75
Hydraulic Powerpack		75
Pressure washer,	water	250
	steam	450
Rigging Package,	heavy	400
	Light	200
Rock,	Drill	50
	Splitter	400
Steel Saw		20
Tirfors, up to 5 tonnes		10
Thermal Imaging Camera		250
Tool Package, per set		175
Ventilation Package		20
VHF Radio		10
Z Boat, including outboard up to 14 feet		200
	over 14 feet	350

Shackles	Rate – US$.
Up to 50 tonnes	10
51 to 100 tonnes	20
101 to 200 tonnes	30
Over 200 tonnes	50
Distribution Boards	
Up to 50 kW	60
51 to 100 kW	125
101 to 300 kW	200
Over 301 kW	350

Protective Clothing	Rate – US$.
Breathing Gear.	50
Hazardous Environment Suit	100
Diving Equipment	
Decompression Chamber,	
2 man, including compressor	500
4 man, including compressor	700
Hot Water Diving Assembly	250
Underwater Magnets	20
Underwater Drill	20
Shallow Water Dive Spread	225

(b) Any portable salvage equipment engaged but not set out above shall be charged at a rate to be agreed with the SCR or, failing agreement, determined by the Arbitrator.

(c) The total charge (before bonus) for each item of portable salvage equipment, owned by the contractor, shall not exceed the manufacturer's recommended retail price on the last day of the services multiplied by 1.5.

(d) Compensation for any portable salvage equipment lost or destroyed during the services shall be paid provided that the total of such compensation and the daily tariff rate (before bonus) in respect of that item do not exceed the actual cost of replacing the item at the Contractors base with the most similar equivalent new item multiplied by 1.5.

(e) All consumables such as welding rods, boiler suits, small ropes etc. shall be charged at cost and shall be treated as an out of pocket expenses.

(f) The Contractor shall be entitled to remuneration at a stand-by rate of 50% of the full tariff rate plus bonus for any portable salvage equipment reasonably mobilised but not used during the salvage operation provided

(i) It has been mobilised with the prior agreement of the owner of the vessel or its mobilisation was reasonable in the circumstances of the casualty, or

(ii) It comprises portable salvage equipment normally aboard the tug or craft that would have been reasonably mobilised had it not already been aboard the tug or craft.

(g) SCOPIC remuneration shall cease to accrue in respect of portable salvage equipment which becomes a commercial total loss from the date it ceases to be useable plus a reasonable period for demobilisation (if appropriate) PROVIDED that such SCOPIC remuneration in respect of demobilisation shall only be payable if the commercial total loss arises while it is engaged in the services and through no fault of the Contractors, their servants, agents or sub-contractors.

4. DOWNTIME

If a tug or piece of portable salvage equipment breaks down or is damaged without fault on the part of the Contractor, his servants, agents or sub-contractors and as a direct result of performing the services it should be paid for during the repair while on site at the stand-by rate of 50% of the tariff rate plus uplift pursuant to sub-clause 5(iv) of the SCOPIC clause.
If a tug or piece of portable salvage equipment breaks down or otherwise becomes inoperable without fault on the part of the Contractor, his servants, agents or sub-contractors and as a direct result of performing the services and cannot be repaired on site then:

(i) If it is not used thereafter but remains on site then no SCOPIC remuneration is payable in respect of that tug or piece of portable salvage equipment from the time of the breakdown.

(ii) If it is removed from site, repaired and reasonably returned to the site for use SCOPIC remuneration at the standby rate of 50% of the tariff rate plus bonus pursuant to sub-clause 5(iv) of the SCOPIC clause shall be payable from the breakdown to the date it is returned to the site.

(iii) If it is removed from the site and not returned SCOPIC remuneration ceases from the breakdown but is, in addition, payable for the period that it takes to return it directly to base at the stand-by rate of 50% of the tariff rate plus bonus pursuant to sub-clause 5(iv) of the SCOPIC clause

APPENDIX B (SCOPIC)

1. (a) The SCR shall be selected from a panel (the "SCR Panel") appointed by a Committee (the "SCR Committee") comprising of representatives appointed by the following:

    3 representatives from the International Group of P and I Clubs
    3 representatives from the ISU
    3 representatives from the IUMI
    3 representatives from the International Chamber of Shipping

    (b) The SCR Committee shall be responsible for an annual review of the tariff rates as set out in Appendix A.

    (c) The SCR Committee shall meet once a year in London to review, confirm, reconfirm or remove SCR Panel members.

    (d) Any individual may be proposed for membership of the SCR Panel by any member of the SCR Committee and shall be accepted for inclusion on the SCR Panel unless at least four votes are cast against his inclusion.

    (e) The SCR Committee shall also set and approve the rates of remuneration for the SCRs for the next year.

    (f) Members of the SCR Committee shall serve without compensation.

    (g) The SCR Committee's meetings and business shall be organised and administered by the Salvage Arbitration Branch of the Corporation of Lloyd's (hereinafter called "Lloyds") who will keep the current list of SCR Panel members and make it available to any person with a bona fide interest.

    (h) The SCR Committee shall be entitled to decide its own administrative rules as to procedural matters (such as quorums, the identity and power of the Chairman etc.)

2. The primary duty of the SCR shall be the same as the Contractor, namely to use his best endeavours to assist in the salvage of the vessel and the property thereon and in so doing to prevent and minimise damage to the environment.

3. The Salvage Master shall at all times remain in overall charge of the operation, make all final decisions as to what he thinks is best and remain responsible for the operation.

4. The SCR shall be entitled to be kept informed by or on behalf of the Salvage Master or (if none) the principal contractors' representative on site (hereinafter called "the Salvage Master"). The Salvage Master shall consult with the SCR during the operation if circumstances allow and the SCR, once on site, shall be entitled to offer the Salvage Master advice.

5. (a) Once the SCOPIC clause is invoked the Salvage Master shall send daily reports (hereinafter called the "Daily Salvage Reports") setting out:-

    - the salvage plan (followed by any changes thereto as they arise)
    - the condition of the casualty and the surrounding area (followed by any changes thereto as they arise)
    - the progress of the operation
    - the personnel, equipment, tugs and other craft used in the operation that day.

    (b) Pending the arrival of the SCR on site the Daily Salvage Reports shall be sent to Lloyd's and the owners of the vessel. Once the SCR has been appointed and is on site the Daily Salvage Reports shall be delivered to him.

(c) The SCR shall upon receipt of each Daily Salvage Report:-

(i) Transmit a copy of the Daily Salvage Report by the quickest method reasonably available to Lloyd's, the owners of the vessel, their liability insurers and (if any) to the Special Hull Representative and Special Cargo Representative (appointed under clause 12 of the SCOPIC clause and Appendix C) if they are on site; and if a Special Hull Representative is not on site the SCR shall likewise send copies of the Daily Salvage Reports direct to the leading Hull Underwriter or his agent (if known to the SCR) and if a Special Cargo Representative is not on site the SCR shall likewise send copies of the Daily Salvage Reports to such cargo underwriters or their agent or agents as are known to the SCR (hereinafter in this Appendix B such Hull and Cargo property underwriters shall be called "Known Property Underwriters").

(ii) If circumstances reasonably permit consult with the Salvage Master and endorse his Daily Salvage Report whether or not he is satisfied and

(iii) If not satisfied with the Daily Salvage Report, prepare a dissenting report setting out any objection or contrary view and deliver it to the Salvage Master and transmit it to Lloyd's, the owners of the vessel, their liability insurers and to any Special Representatives (appointed under clause 12 of the SCOPIC clause and Appendix C) or, if one or both Special Representatives has not been appointed, to the appropriate Known Property Underwriter.

(iv) If the SCR gives a dissenting report to the Salvage Master in accordance with Appendix B(5)(c)(iii) to the SCOPIC clause, any initial payment due for SCOPIC remuneration shall be at the tariff rate applicable to what is in the SCR's view the appropriate equipment or procedure until any dispute is resolved by agreement or arbitration.

(d) Upon receipt of the Daily Salvage Reports and any dissenting reports of the SCR, Lloyd's shall distribute upon request the said reports to any parties to this contract and any of their property insurers of whom they are notified (hereinafter called "the Interested Persons") and to the vessel's liability insurers.

(e) As soon as reasonably possible after the Salvage services terminate the SCR shall issue a report (hereinafter call the "SCR's Final Salvage Report") setting out:

- the facts and circumstances of the casualty and the salvage operation insofar as they are known to him.
- the tugs, personnel and equipment employed by the Contractor in performing the operation.
- A calculation of the SCOPIC remuneration to which the contractor may be entitled by virtue of this SCOPIC clause.

The SCR's Final Salvage Report shall be sent to the owners of the vessel and their liability insurers and to Lloyd's who shall forthwith distribute it to the Interested Persons.

6. (a) The SCR may be replaced by the owner of the vessel if either:
   (i) the SCR makes a written request for a replacement to the owner of the vessel (however the SCR should expect to remain on site throughout the services and should only expect to be substituted in exceptional circumstances); or
   (ii) the SCR is physically or mentally unable or unfit to perform his duties; or
   (iii) all salved interests or their representatives agree to the SCR being replaced.

(b) Any person who is appointed to replace the SCR may only be chosen from the SCR Panel.

(c) The SCR shall remain on site throughout the services while he remains in that appointment and until the arrival of any substitute so far as practicable and shall hand over his file and all other correspondence, computer data and papers concerning the salvage services to any substitute SCR and fully brief him before leaving the site.

(d) The SCR acting in that role when the services terminate shall be responsible for preparing the Final Salvage Report and shall be entitled to full co-operation from any previous SCR's or substitute SCR's in performing his functions hereunder.

7. The owners of the vessel shall be primarily responsible for paying the fees and expenses of the SCR. The Arbitrator shall have jurisdiction to apportion the fees and expenses of the SCR and include them in his award under the Main Agreement and, in doing so, shall have regard to the principles set out in any market agreement in force from time to time.

APPENDIX C (SCOPIC)

The Special Representatives

1. The Salvage Master, the owners of the vessel and the SCR shall co-operate with the Special Representatives and shall permit them to have full access to the vessel to observe the salvage operation and to inspect such of the ship's documents as are relevant to the salvage operation.

2. The Special Representative shall have the right to be informed of all material facts concerning the salvage operation as the circumstances reasonably allow.

3. If an SCR has been appointed the SCR shall keep the Special Representatives (if any and if circumstances permit) fully informed and shall consult with the said Special Representatives. The Special Representatives shall also be entitled to receive a copy of the Daily Salvage Reports direct from the Salvage Master or, if appointed, from the SCR.

4. The appointment of any Special Representatives shall not affect any right that the respondent ship and cargo interests may have (whether or not they have appointed a Special Representative) to send other experts or surveyors to the vessel to survey ship or cargo and inspect the ship's documentation or for any other lawful purpose.

5. If an SCR or Special Representative is appointed the Contractor shall be entitled to limit access to any surveyor or representative (other than the said SCR and Special Representative or Representatives) if he reasonably feels their presence will substantially impede or endanger the salvage operation.

CODE OF PRACTICE BETWEEN INTERNATIONAL GROUP OF P&I CLUBS AND LONDON PROPERTY UNDERWRITERS REGARDING THE PAYMENT OF THE FEES AND EXPENSES OF THE SCR UNDER SCOPIC.

The following understanding has been reached between the International Group of P&I Clubs (hereinafter called "Liability Underwriters") and members of the Lloyd's Underwriters' Association and the International Underwriters Association of London (hereinafter called "Property Underwriters") in relation to all future salvage services under Lloyd's Form where the Special Compensation P&I Clubs (SCOPIC) Clause has been invoked by the Contractor.

1. Whereas the primary liability for paying the fees and disbursements of the Shipowner's Casualty Representative ("SCR") rests upon the owner of the vessel, it is agreed that the owner of the vessel shall be reimbursed such fees and disbursements, subject always to the Club Rules and the terms and conditions of Club cover and the terms of any insurance policy or policies covering the salved property, in the following proportions:-

   - 50% by Liability Underwriters;

   - 50% by Property Underwriters (subject to Clause 2 hereof).

2. (a) Property Underwriters shall pay for 50% of the SCR's fees and disbursements in proportion to the salved value of the subject matter insured.

   (b) Should 50% of the SCR's fees and disbursements exceed the salved value of the ship and cargo less the Article 13 award, Liability Underwriters agree to reimburse such excess proportion of the said SCR's fees and disbursements to the owners of the vessel.

3. This is a Code of Practice which Liability Underwriters and Property Underwriters shall recommend to their Members and it is not intended that it should have any legal effect.

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CODE OF PRACTICE BETWEEN INTERNATIONAL SALVAGE UNION AND INTERNATIONAL GROUP OF P&I CLUBS

In the spirit of co-operation, the following Code of Practice is agreed between the International Salvage Union and the International Group of P&I Clubs in relation to all future salvage services to which Article 14 of the 1989 Salvage Convention is applicable or under Lloyd's Form where the Special Compensation P&I Club's (SCOPIC) Clause has been invoked by the Contractor.

1. The salvor will advise the relevant P&I Club at the commencement of the salvage services, or as soon thereafter as is practicable, if they consider that there is a possibility of a Special Compensation claim arising.

2. In the event of the SCR not being appointed under the SCOPIC clause, the P&I Club may appoint an observer to attend the salvage and the salvors agree to keep him and/or the P&I Club fully informed of the salvage activities and their plans. However, any decision on the conduct of the salvage services remains with the salvor.

3. The P&I Club, when reasonably requested by the salvor, will immediately advise the salvor whether the particular Member is covered, subject to the Rules of the P&I Club, for any liability which he may have for Special Compensation or SCOPIC Remuneration.

4. The P&I Clubs confirm that, whilst they expect to provide security in the form of a Club Letter either in respect of claims for special compensation (under Article 14 of the 1989 Salvage Convention) or SCOPIC remuneration (under the SCOPIC Clause), as appropriate, it is not automatic. Specific reasons for refusal to give security to the Contractor will be non-payment of calls, breach of warranty rules relating to classification and flag state requirements or any other breach of the rules allowing the Club to deny cover. The Clubs will not refuse to give security solely because the Contractors cannot obtain security in any other way.

5. In the event that security is required by a port authority or other competent authority for potential P&I liabilities in order to permit the ship to enter a port of refuge or other place of safety, the P&I Clubs confirm that they would be willing to consider the provision of such security subject to the aforementioned provisos referred to in para. 4 above and subject to the reasonableness of the demand.

6. The Contractors will accept security for either special compensation or SCOPIC remuneration by way of a P&I Club letter of undertaking in the attached form - "Salvage Guarantee form – ISU 5" - and they will not insist on the provision of security at Lloyd's.

7. The P&I Club concerned will reply to any request by the salvors regarding security as quickly as reasonably possible. In the event that salvage services are being performed under Lloyd's Form incorporating the SCOPIC clause, the P&I Club concerned will advise the Contractor within two (2) working days of his invoking the SCOPIC Clause whether or not they will provide security to the Contractor by way of a Club Letter referred to in para. 6 above.

8. In the event that salvage services are being performed under Lloyd's Form incorporating the SCOPIC clause, the P&I Clubs will advise the owners of the vessel not to exercise the right to terminate the contract under SCOPIC Clause 9(ii) without reasonable cause.

9. It is recognised that any liability to pay SCOPIC remuneration is a potential liability of the shipowner and covered by his liability insurers subject to the Club Rules and terms of entry. Accordingly, in the event of such payment of SCOPIC remuneration in excess of the Article 13 award, neither the shipowner not his liability insurers will seek to make a claim in General Average against the other interests to the common maritime adventure whether in their own name or otherwise and whether directly or by way of recourse or indemnity or in any other manner whatsoever.

10. The P&I Clubs, if consulted, and the ISU will recommend to their respective Members the incorporation of the SCOPIC clause in any LOF.

11. This is a Code of Practice which the ISU and the International Group of P&I Clubs will recommend to their Members and it is not intended that it should have any legal effect.

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To:

Dear Sirs,

"....." Salvage
Lloyd's Standard Form of Salvage Agreement incorporating the
SCOPIC Clause dated .....(the "LOF")

1. In consideration of, and upon condition that, you refrain from arresting or otherwise detaining the ..... or any other ship or property in the same beneficial or associated ownership or management in connection with your claim for SCOPIC remuneration for services rendered to the ..... under the terms of the LOF, we hereby undertake to pay to you on demand any liability on the part of the owners for SCOPIC remuneration, together with interest thereon and costs in relation thereto, which may be agreed in writing between you, ourselves and the owners of the vessel in respect of which this undertaking is given or as may be finally (in each case after the exhaustion of any appeals) found or adjudged to be due to you from the owners pursuant to the arbitration provision contained in the LOF and any appeals therefrom to the Courts.

2. Any monies paid by the undersigned hereunder shall be deemed to have been paid by the undersigned as surety for the party or parties by whom your remuneration shall be payable provided that, notwithstanding anything hereinbefore contained, the liability of the undersigned, as between the undersigned on the one hand and you on the other hand, shall be that of a principal debtor and the undersigned shall not be released by time being given or other indulgence shown to the party or parties hereby guaranteed or by any other act, matter or thing whereby the undersigned, if liable as a surety only, would or might have been released.

3. This undertaking shall be governed and construed in accordance with English law and we undertake, when called upon to do so, to give irrevocable instructions to English solicitors to accept service of proceedings issued on your behalf against us in relation to this undertaking.

4. Provided always that our liability hereunder shall not in any circumstances exceed (including interest and costs) the sum of US$.....

Signed this .....day of .....

Appendix 2

IMO MARITIME LAW INSTITUTE, MALTA,
10TH APRIL 1995

SALVAGE - LECTURE 1

ENGLISH LAW - GENERAL PRINCIPLES

by

Mr. W.A. Bishop, Senior Partner,
Holman, Fenwick & Willan

1. History and Sources

1.1 "Salvage" refers both to the service performed by salvors and to the reward made to them. It must be distinguished from contractual towage to which it has factual similarities. Most maritime jurisdictions have laws equating to a greater or lesser extent to the English modern law of salvage. In many instances these laws or principles will be of ancient origin.

1.2 Under English law the principles applicable to the salvage of property at sea differ markedly to those which apply, for instance, to saving property on land. There is a strong underlying policy to encourage seafarers to go to the assistance of those in distress at sea. Less important now, but significant historically, was also the need to establish a basis for remuneration where none might have led to extortion, piracy and theft.

1.3 The general principles of English Salvage Law were adopted and laid down in the **1910 Brussels Salvage Convention.** As this Convention basically .adopted English common law only its provisions relating to time bars were specifically incorporated by statute (in the **Maritime Conventions Act 1911).** Until recently therefore the sources of English salvage law have largely been the reported decisions of the English Admiralty Court. As will be seen, the **Lloyd's Open Form (LOF)** salvage agreement has also had a significant influence upon the development of English salvage law.

1.4 In 1989 the 1MO agreed the **1989 London Salvage Convention** and this has now been incorporated into the **Merchant Shipping (Salvage and Pollution) Act 1994** which

entered into force in the UK with effect from 1st January 1995. The 1989 London Salvage Convention ("1989 LSC") effectively codifies the law of salvage and pre-existing English salvage law must now be read in the light of the new convention The existence of the 1989 LSC heavily influenced the 1990 and 1995 Lloyd's Open Form contracts.

1.5 There is no doubt that the 1989 LSC was driven both by environmental concern and the perceived need to encourage salvors to maintain personnel and equipment in constant readiness. Accordingly, it is both "pro-salvor" and "pro-environment".

2. Contract or Common Law?

2.1 It is important to appreciate that the existence of a person's right to claim salvage is not dependent upon the existence of a contract. Where no contract is agreed the salvor must claim salvage under the common law and^ since 1st January 1995, the 1989 LSC. Under common law and the 1989 LSC the salvor, upon the property being salved and brought to a place of safety, is entitled to remuneration not exceeding the value of the property salved assessed as at the date and place of the termination of the salvage services.

2.2 In England on the termination of the service - generally at a port of refuge - the salvor will issue a writ and arrest the salved property to secure his claim for salvage. Unless agreement can be reached, the claim will then be pursued in the Admiralty division of the High Court and the value of any Judgment obtained will be recovered from the salved property under arrest (or, more commonly, from any security put in place by the owners of the salved property to obtain the release of such property from arrest).

2.3 In many cases the salvor will reach agreement with the Master/Owners of the vessel as to the basis upon which the salvor should be remunerated. Subject to 2.4, the parties are free to agree any basis for the provision of services including a daily rate or a lump sum (although strictly contracts providing for payment to the salvor whether he succeeds or not are not in the nature of "salvage" contracts). More usually, however, the parties will not try and fix the level of the salvor's remuneration at the outset - rather they will agree

how the salvor's claim is to be assessed in the future if the operation is a success - in the case of LOF, by a Lloyds arbitrator in London. LOF represents the most widely used salvage agreement - in effect it is simply an agreement to arbitrate on certain terms.

2.4 Generally the Court will not re-open an agreement reached between parties unless some degree of physical duress, abuse of a special relationship or operative mistake, The nature of the circumstances giving rise to the provision of salvage services and the scope for extortion has however resulted in a jurisdiction to intervene, strike down or amend unfair contracts in certain circumstances. It is a jurisdiction that will only rarely be exercised and practically never in the case of a standard form agreement such as LOF.

Appendix 3

These clauses are purely Illustrative. Different policy conditions may be agreed. The specimen clauses are available to any interested person upon request In particular:

(a) In relation to any clause which excludes losses from the cover, Insurers may agree a separate Insurance policy covering such losses or may extend the clause to cover such events;
(b) In relation to clauses making cover of certain risks subject to specific conditions each Insurer may alter the said conditions."

(FOR USE WITH THE CURRENT MAR POLICY FORM)

INTERNATIONAL HULL CLAUSES (01/11/03)

PART 1 - PRINCIPAL INSURING CONDITIONS

1 GENERAL

1.1 Part 1, Clauses 32-36 of Part 2 and Part 3 apply to this insurance. Parts 2 and 3 shall be those current at the date of inception of this insurance. Clauses 37-41 of Part 2 shall only apply where the Underwriters have expressly so agreed in writing.

1.2 This insurance is subject to English law and practice.

1.3 This insurance is subject to the exclusive jurisdiction of the English High Court of Justice, except as may be expressly provided herein to the contrary.

1.4 If any provision of this insurance is held to be invalid or unenforceable, such invalidity or unenforceability will not affect the other provisions of this insurance which shall remain in full force and effect.

2 PERILS

2.1 This insurance covers loss of or damage to the subject-matter insured caused by

2.1.1 perils of the seas, rivers, lakes or other navigable waters

2.1.2 fire, explosion

2.1.3 violent theft by persons from outside the vessel

2.1.4 jettison

2.1.5 piracy

2.1.6 contact with land conveyance, dock or harbour equipment or installation

2.1.7 earthquake, volcanic eruption or lightning

2.1.8 accidents in loading, discharging or shifting cargo, fuel, stores or parts

2.1.9 contact with satellites, aircraft, helicopters or similar objects, or objects falling therefrom.

2.2 This insurance covers loss of or damage to the subject-matter insured caused by

2.2.1 bursting of boilers or breakage of shafts but does not cover any of the costs of repairing or replacing the boiler which bursts or the shaft which breaks

2.2.2 any latent defect in the machinery or hull but does not cover any of the costs of correcting the latent defect

2.2.3 negligence of Master, Officers, Crew or Pilots

2.2.4 negligence of repairers or charterers provided such repairers or charterers are not an Assured under this insurance

2.2.5 barratry of Master, Officers or Crew

provided that such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers.

2.3 Where there is a claim recoverable under Clause 2.2.1, this insurance shall also cover one half of the costs common to the repair of the burst boiler or the broken shaft and to the repair of the loss or damage caused thereby.

2.4 Where there is a claim recoverable under Clause 2.2.2, this insurance shall also cover one half of the costs common to the correction of the latent defect and to the repair of the loss or damage caused thereby.

2.5 Master, Officers, Crew or Pilots shall not be considered Owners within the meaning of Clause 2.2 should they hold shares in the vessel.

3 LEASED EQUIPMENT

3.1 This insurance covers loss of or damage to equipment and apparatus not owned by the Assured but installed for use on the vessel and for which the Assured has assumed contractual liability, where such loss or damage is caused by a peril insured under this insurance.

3.2 The liability of the Underwriters shall not exceed the lesser of the contractual liability of the Assured for loss of or damage to such equipment or apparatus or the reasonable cost of their repair or their replacement value. All such equipment and apparatus are included in the insured value of the vessel.

4 PARTS TAKEN OFF

4.1 This insurance covers loss of or damage to parts taken off the vessel, where such loss or damage is caused by a peril insured under this insurance.

4.2 Where the parts taken off the vessel are not owned by the Assured but where the Assured has assumed contractual liability for such parts, the liability of the Underwriters for such parts taken off shall not exceed the lesser of the contractual liability of the Assured for loss of or damage to such parts or the reasonable cost of their repair or their replacement value.

4.3 If at the time of loss of or damage to the parts taken off the vessel, such parts are covered by any other insurance or would be so covered but for this Clause 4, then this insurance shall only be excess of such other insurance.

4.4 Cover in respect of parts taken off the vessel shall be limited to 60 days whilst not on board the vessel. Periods in excess of 60 days shall be held covered provided notice is given to the Underwriters prior to the expiry of the 60 day period and any amended terms of cover and any additional premium required are agreed.

4.5 In no case shall the total liability of the Underwriters under this Clause 4 exceed 5% of the insured value of the vessel.

5 POLLUTION HAZARD

This insurance covers loss of or damage to the vessel caused by any governmental authority acting under the powers vested in it to prevent or mitigate a pollution hazard or damage to the environment or threat thereof, resulting directly from damage to the vessel for which the Underwriters are liable under this insurance, provided that such act of governmental authority has not resulted from want of due diligence by the Assured, Owners or Managers to prevent or mitigate such hazard or damage or threat thereof. Master, Officers, Crew or Pilots shall not be considered Owners within the meaning of this Clause 5 should they hold shares in the vessel.

6 3/4THS COLLISION LIABILITY

6.1 The Underwriters agree to indemnify the Assured for three fourths of any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for

6.1.1 loss of or damage to any other vessel or property thereon

6.1.2 delay to or loss of use of any such other vessel or property thereon

6.1.3 general average of, salvage of, or salvage under contract of, any such other vessel or property thereon,

where such payment by the Assured is in consequence of the insured vessel coming into collision with any other vessel.

6.2 The indemnity provided by this Clause 6 shall be in addition to the indemnity provided by the other terms and conditions of this insurance and shall be subject to the following provisions

6.2.1 where the insured vessel is in collision with another vessel and both vessels are to blame then, unless the liability of one or both vessels becomes limited by law, the indemnity under this Clause 6 shall be calculated on the principle of cross-liabilities as if the respective Owners had been compelled to pay to each other such proportion of each other's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of the collision

6.2.2 in no case shall the total liability of the Underwriters under Clauses 6.1 and 6.2 exceed their proportionate part of three fourths of the insured value of the insured vessel in respect of any one collision.

6.3 The Underwriters shall also pay three fourths of the legal costs incurred by the Assured or which the Assured may be compelled to pay in contesting liability or taking proceedings to limit liability, provided always that their prior written consent to the incurring of such costs shall have been obtained and that the total liability of the Underwriters under this Clause 6.3 shall not (unless the Underwriters' specific written agreement shall have been obtained) exceed 25% of the insured value of the insured vessel.

EXCLUSIONS

6.4 In no case shall the Underwriters indemnify the Assured under this Clause 6 for any sum which the Assured shall pay for or in respect of

6.4.1 removal or disposal of obstructions, wrecks, cargoes or any other thing whatsoever

6.4.2 any real or personal property or thing whatsoever except other vessels or property on other vessels

6.4.3 the cargo or other property on, or the engagements of, the insured vessel

6.4.4 loss of life, personal injury or illness

6.4.5 pollution or contamination, or threats thereof, of any real or personal property or thing whatsoever (except other vessels with which the insured vessel is in collision or property on such other vessels) or damage to the environment, or threat thereof, save that this exclusion shall not exclude any sum which the Assured shall pay for or in respect of salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment as referred to in Article 13 paragraph 1(b) of the International Convention on Salvage, 1989 have been taken into account.

7 SISTERSHIP

Should the insured vessel come into collision with or receive salvage services from another vessel belonging wholly or in part to the same Owners or under the same management, the Assured shall have the same rights under this insurance as they would have were the other vessel entirely the property of owners not interested in the insured vessel; but in such cases the liability for the collision or the amount payable for the services rendered shall be referred to a sole arbitrator to be agreed upon between the Underwriters and the Assured.

8 GENERAL AVERAGE AND SALVAGE

8.1 This insurance covers the vessel's proportion of salvage, salvage charges and/or general average, without reduction in respect of any under-insurance, but in case of general average sacrifice of the vessel the Assured may recover in respect of the whole loss without first enforcing their right of contribution from other parties.

8.2 General average shall be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; but where the contract of affreightment so provides the adjustment shall be according to the York-Antwerp Rules.

8.3 When the vessel sails in ballast, not under charter, the provisions of the York-Antwerp Rules, 1994 (excluding Rules XX and XXI) shall be applicable, and the voyage for this purpose shall be deemed to continue from the port or place of departure until the arrival of the vessel at the first port or place thereafter other than a port or place of refuge or a port or place of call for bunkering only. If at any such intermediate port or place there is an abandonment of the adventure originally contemplated, the voyage shall thereupon be deemed to be terminated.

8.4 The Underwriters shall not be liable under this Clause 8 where the loss was not incurred to avoid or in connection with the avoidance of a peril insured under this insurance.

8.5 The Underwriters shall not be liable under this Clause 8 for or in respect of

8.5.1 special compensation payable to a salvor under Article 14 of the International Convention on Salvage, 1989 or under any other provision in any statute, rule, law or contract which is similar in substance

8.5.2 expenses or liabilities incurred in respect of damage to the environment, or the threat of such damage, or as a consequence of the escape or release of pollutant substances from the vessel, or the threat of such escape or release.

8.6 Clause 8.5 shall not however exclude any sum which the Assured shall pay

8.6.1 to salvors for or in respect of salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment as referred to in Article 13 paragraph 1(b) of the International Convention on Salvage, 1989 have been taken into account

8.6.2 as general average expenditure allowable under Rule XI(d) of the York-Antwerp Rules 1994, but only where the contract of affreightment provides for adjustment according to the York-Antwerp Rules 1994.

9 DUTY OF THE ASSURED (SUE AND LABOUR)

9.1 In case of any loss or misfortune it is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance.

9.2 Subject to the provisions below and to Clause 15, the Underwriters shall contribute to charges properly and reasonably incurred by the Assured their servants or agents for such measures. General average, salvage charges (except as provided for in Clause 9.4), special compensation and expenses as referred to in Clause 8.5 and collision defence or attack costs are not

recoverable under this Clause 9.

9.3 Measures taken by the Assured or the Underwriters with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

9.4 When the Underwriters have admitted a claim for total loss of the vessel under this insurance and expenses have been reasonably incurred in saving or attempting to save the vessel and other property and there are no proceeds, or the expenses exceed the proceeds, then this insurance shall bear its pro rata share of such proportion of the expenses, or of the expenses in excess of the proceeds, as the case may be, as may reasonably be regarded as having been incurred in respect of the vessel, excluding all special compensation and expenses as referred to in Clause 8.5.

9.5 The sum recoverable under this Clause 9 shall be in addition to the loss otherwise recoverable under this insurance but shall in no circumstances exceed the insured value of the vessel.

10 NAVIGATION PROVISIONS

Unless and to the extent otherwise agreed by the Underwriters in accordance with Clause 11

10.1 the vessel shall not breach any provisions of this insurance as to cargo, trade or locality (including, but not limited to, Clause 32)

10.2 the vessel may navigate with or without pilots, go on trial trips and assist and tow vessels or craft in distress, but shall not be towed, except as is customary (including customary towage in connection with loading or discharging) or to the first safe port or place when in need of assistance, or undertake towage or salvage services under a contract previously arranged by the Assured and/or Owners and/or Managers and/or Charterers

10.3 the Assured shall not enter into any contract with pilots or for customary towage which limits or exempts the liability of the pilots and/or tugs and/or towboats and/or their owners except where the Assured or their agents accept or are compelled to accept such contracts in accordance with established local law or practice

10.4 the vessel shall not be employed in trading operations which entail cargo loading or discharging at sea from or into another vessel (not being a harbour or inshore craft).

11 BREACH OF NAVIGATION PROVISIONS

In the event of any breach of any of the provisions of Clause 10, the Underwriters shall not be liable for any loss, damage, liability or expense arising out of or resulting from an accident or occurrence during the period of breach, unless notice is given to the Underwriters immediately after receipt of advices of such breach and any amended terms of cover and any additional premium required by them are agreed.

12 CONTINUATION

Should the vessel at the expiration of this insurance be at sea and in distress or missing, she shall be held covered until arrival at the next port in good safety, or if in port and in distress until the vessel is made safe, at a pro rata monthly premium, provided that notice be given to the Underwriters as soon as possible.

These Clauses 13 and 14 shall prevail notwithstanding any provision whether written typed or printed in this insurance inconsistent therewith.

13 CLASSIFICATION AND ISM

13.1 At the inception of and throughout the period of this insurance and any extension thereof

13.1.1 the vessel shall be classed with a Classification Society agreed by the Underwriters

13.1.2 there shall be no change, suspension, discontinuance, withdrawal or expiry of the

vessel's class with the Classification Society

13.1.3 any recommendations, requirements or restrictions imposed by the vessel's Classification Society which relate to the vessel's seaworthiness or to her maintenance in a seaworthy condition shall be complied with by the dates required by that Society

13.1.4 the Owners or the party assuming responsibility for operation of the vessel from the Owners shall hold a valid Document of Compliance in respect of the vessel as required by chapter IX of the International Convention for the Safety of Life at Sea (SOLAS) 1974 as amended and any modification thereof

13.1.5 the vessel shall have in force a valid Safety Management Certificate as required by chapter IX of the International Convention for the Safety of Life at Sea (SOLAS) 1974 as amended and any modification thereof.

13.2 Unless the Underwriters agree to the contrary in writing, in the event of any breach of any of the provisions of Clause 13.1, this insurance shall terminate automatically at the time of such breach, provided

13.2.1 that if the vessel is at sea at such date, such automatic termination shall be deferred until arrival at her next port

13.2.2 where such change, suspension, discontinuance or withdrawal of her class under Clause 13.1.2 has resulted from loss or damage covered by Clause 2 or by Clause 5 or by Clause 41.1.3 (if applicable) or which would be covered by an insurance of the vessel subject to current Institute War and Strikes Clauses Hulls-Time, such automatic termination shall only operate should the vessel sail from her next port without the prior approval of the Classification Society.

A pro rata daily net return of premium shall be made provided that a total loss of the vessel, whether by perils insured under this insurance or otherwise, has not occurred during the period of this insurance or any extension thereof.

14 MANAGEMENT

14.1 Unless the Underwriters agree to the contrary in writing, this insurance shall terminate automatically at the time of

14.1.1 any change, voluntary or otherwise, in the ownership or flag of the vessel

14.1.2 transfer of the vessel to new management

14.1.3 charter of the vessel on a bareboat basis

14.1.4 requisition of the vessel for title or use

provided that, if the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, such automatic termination shall if required be deferred whilst the vessel continues her planned voyage, until arrival at final port of discharge if with cargo or at port of destination if in ballast. However, in the event of requisition for title or use without the prior execution of a written agreement by the Assured, such automatic termination shall occur fifteen days after such requisition whether the vessel is at sea or in port.

14.2 Unless the Underwriters agree to the contrary in writing, this insurance shall terminate automatically at the time of the vessel sailing (with or without cargo) with an intention of being broken up, or being sold for breaking up.

14.3 In the event of termination under Clause 14.1 or Clause 14.2, a pro rata daily net return of premium shall be made provided that a total loss of the vessel, whether by perils insured under this insurance or otherwise, has not occurred during the period of this insurance or any extension thereof.

14.4 It is the duty of the Assured, Owners and Managers at the inception of and throughout the period of this insurance and any extension thereof to

14.4.1 comply with all statutory requirements of the vessel's flag state relating to construction, adaptation, condition, fitment, equipment, operation and manning of the vessel

14.4.2 comply with all requirements of the vessel's Classification Society regarding the reporting to the Classification Society of accidents to and defects in the vessel.

In the event of any breach of any of the duties in this Clause 14.4, the Underwriters shall not be liable for any loss, damage, liability or expense attributable to such breach.

15 DEDUCTIBLE(S)

15.1 Subject to Clause 15.2, no claim arising from a peril insured under this insurance shall be payable under this insurance unless the aggregate of all such claims arising out of each separate accident or occurrence (including claims under Clauses 2, 3, 4, 5, 6 (including, if applicable, Clause 6 as amended by Clauses 37 or 38), Clauses 8 and 9 and, if applicable, Clause 41) exceeds the deductible amount agreed in which case that amount shall be deducted. Nevertheless the expense of sighting the bottom after stranding, if reasonably incurred specially for that purpose, shall be paid even if no damage is found.

15.2 No claim for loss of or damage to any machinery, shaft, electrical equipment or wiring, boiler, condenser, heating coil or associated pipework, arising under Clauses 2.2.1 to 2.2.5 and Clause 41 (if applicable) or from fire or explosion when either has originated in a machinery space, shall be payable under this insurance unless the aggregate of all such claims arising out of each separate accident or occurrence exceeds the additional machinery damage deductible amount agreed (if any) in which case that amount shall be deducted. Any balance remaining, after application of this deductible, with any other claim arising from the same accident or occurrence, shall then be subject to the deductible referred to in Clause 15.1.

15.3 Clauses 15.1 and 15.2 shall not apply to a claim for total or constructive total loss of the vessel or, in the event of such a claim, to any associated claim under Clause 9 arising from the same accident or occurrence.

15.4 Claims for damage by heavy weather occurring during a single sea passage between two successive ports shall be treated as being due to one accident. In the case of such heavy weather extending over a period not wholly covered by this insurance the deductible to be applied to the claim recoverable under this insurance shall be the proportion of the deductible in Clause 15.1 that the number of days of such heavy weather falling within the period of this insurance and any extension thereof bears to the number of days of heavy weather during the single sea passage. The expression "heavy weather" in this Clause 15.4 shall be deemed to include contact with floating ice.

15.5 Claims for damage occurring during each separate lightening operation and/or each separate cargo loading or discharging operation from or into another vessel at sea, where recoverable under this insurance, shall be treated as being due to one accident.

16 NEW FOR OLD

Claims recoverable under this insurance shall be payable without deduction on the basis of new for old.

17 BOTTOM TREATMENT

The Underwriters shall not be liable in respect of scraping, gritblasting and/or other surface preparation or painting of the vessel's bottom except that

17.1 gritblasting and/or other surface preparation of new bottom plates ashore and supplying and applying any "shop" primer thereto

17.2 gritblasting and/or other surface preparation of

17.2.1 the butts or area of plating immediately adjacent to any renewed or refitted plating damaged during the course of welding and/or repairs

17.2.2 areas of plating damaged during the course of fairing, either in place or ashore

17.3 supplying and applying the first coat of primer/anti-corrosive to those particular areas mentioned in Clauses 17.1 and 17.2

17.4 supplying and applying anti-fouling coatings to those particular areas mentioned in Clauses 17.1 and 17.2,

shall be included as part of the reasonable cost of repairs in respect of damage to bottom plating caused by a peril insured under this insurance.

18 WAGES AND MAINTENANCE

Other than in general average, the Underwriters shall not be liable for wages and maintenance of the Master, Officers and Crew or any member thereof, except when incurred solely for the necessary removal of the vessel from one port to another for the repair of damage covered by the Underwriters, or for trial trips for such repairs, and then only for such wages and maintenance as are incurred whilst the vessel is under way.

19 AGENCY COMMISSION

No sum shall be recoverable under this insurance either by way of remuneration of the Assured for time and trouble taken to obtain and supply information or documents or in respect of the commission or charges of any manager, agent, managing or agency company or the like, appointed by or on behalf of the Assured to perform such services.

20 UNREPAIRED DAMAGE

20.1 The measure of indemnity in respect of claims for unrepaired damage shall be the reasonable depreciation in the market value of the vessel at the time this insurance terminates arising from such unrepaired damage, but not exceeding the reasonable cost of repairs.

20.2 In no case shall the Underwriters be liable for unrepaired damage in the event of a subsequent total loss of the vessel (whether by perils insured under this insurance or otherwise) sustained during the period of this insurance or any extension thereof.

20.3 The Underwriters shall not be liable in respect of unrepaired damage for more than the insured value of the vessel at the time this insurance terminates.

21 CONSTRUCTIVE TOTAL LOSS

21.1 In ascertaining whether the vessel is a constructive total loss, 80% of the insured value of the vessel shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

21.2 No claim for constructive total loss of the vessel based upon the cost of recovery and/or repair of the vessel shall be recoverable hereunder unless such cost would exceed 80% of the insured value of the vessel. In making this determination, only the cost relating to a single accident or sequence of damages arising from the same accident shall be taken into account.

22 FREIGHT WAIVER

If a total or constructive total loss of the vessel has been admitted by the Underwriters, they shall make no claim for freight whether notice of abandonment has been given or not.

23 ASSIGNMENT

No assignment of or interest in this insurance or in any moneys which may be or become payable under this insurance is to be binding on or recognised by the Underwriters unless a dated notice of such

assignment or interest signed by the Assured, and by the assignor in the case of subsequent assignment, is endorsed on the policy and the policy with such endorsement is produced before payment of any claim or return of premium under this insurance.

24 DISBURSEMENTS WARRANTY

24.1 Additional insurances as follows are permitted by the Underwriters:

24.1.1 *Disbursements, Managers' Commissions, Profits or Excess or Increased Value of Hull and Machinery.* A sum not exceeding 25% of the value stated herein.

24.1.2 *Freight, Chartered Freight or Anticipated Freight, insured for time.* A sum not exceeding 25% of the value as stated herein less any sum insured, however described, under Clause 24.1.1.

24.1.3 *Freight or Hire, under contracts for voyage.* A sum not exceeding the gross freight or hire for the current cargo passage and next succeeding cargo passage (such insurance to include, if required, a preliminary and an intermediate ballast passage) plus the charges of insurance. In the case of a voyage charter where payment is made on a time basis, the sum permitted for insurance shall be calculated on the estimated duration of the voyage, subject to the limitation of two cargo passages as laid down herein. Any sum insured under Clause 24.1.2 to be taken into account and only the excess thereof may be insured, which excess shall be reduced as the freight or hire is advanced or earned by the gross amount so advanced or earned.

24.1.4 *Anticipated Freight if the vessel sails in ballast and not under Charter.* A sum not exceeding the anticipated gross freight on next cargo passage, such sum to be reasonably estimated on the basis of the current rate of freight at time of insurance plus the charges of insurance. Any sum insured under Clause 24.1.2 to be taken into account and only the excess thereof may be insured.

24.1.5 *Time Charter Hire or Charter Hire for Series of Voyages.* A sum not exceeding 50% of the gross hire which is to be earned under the charter in a period not exceeding 18 months. Any sum insured under Clause 24.1.2 to be taken into account and only the excess thereof may be insured, which excess shall be reduced as the hire is advanced or earned under the charter by 50% of the gross amount so advanced or earned but the sum insured need not be reduced while the total of the sums insured under Clause 24.1.2 and Clause 24.1.5 does not exceed 50% of the gross hire still to be earned under the charter. An insurance under this Clause may begin on the signing of the charter.

24.1.6 *Premiums.* A sum not exceeding the actual premiums of all interests insured for a period not exceeding 12 months (excluding premiums insured under the foregoing sections but including, if required, the premium or estimated calls on any Club or War etc. Risk insurance) reducing pro rata monthly.

24.1.7 *Returns of Premium.* A sum not exceeding the actual returns which are allowable under any insurance but which would not be recoverable thereunder in the event of a total loss of the vessel whether by perils insured under this insurance or otherwise.

24.1.8 *Insurance irrespective of amount against:* Any risks excluded by Clauses 29, 30 and 31.

24.2 It is warranted that no insurance on any interests enumerated in the foregoing Clauses 24.1.1 to 24.1.7 in excess of the amounts permitted therein and no other insurance which includes total loss of the vessel P.P.I., F.I.A., or subject to any other like term, is or shall be effected to operate during the period of this insurance or any extension thereof by or for account of the Assured, Owners, Managers or Mortgagees. Provided always that a breach of this warranty shall not afford the Underwriters any defence to a claim by a Mortgagee who has accepted this insurance without knowledge of such breach.

25 CANCELLING RETURNS

If this insurance shall be cancelled by agreement, the Underwriters shall pay a pro rata monthly net return of premium for each uncommenced month, provided always that a total loss of the vessel, whether by perils insured under this insurance or otherwise, has not occurred during the period of this insurance or any extension thereof.

26 SEPARATE INSURANCES

If more than one vessel is insured under this insurance, each vessel insured is deemed to be separately insured, as if a separate policy had been issued in respect of each vessel.

27 SEVERAL LIABILITY

The Underwriters' obligations are several and not joint and are limited solely to the extent of their individual subscriptions. The Underwriters are not responsible for the subscription of any co-subscribing Underwriter who for any reason does not satisfy all or part of its obligations.

28 AFFILIATED COMPANIES

In the event of the vessel being chartered by an associated, subsidiary or affiliated company of the Assured, and in the event of loss of or damage to the vessel by perils insured under this insurance, the Underwriters waive their rights of subrogation against such charterers, except to the extent that any such charterer has the benefit of liability cover for such loss or damage.

These Clauses 29, 30 and 31 shall be paramount and shall override anything contained in this insurance inconsistent therewith.

29 WAR AND STRIKES EXCLUSION

In no case shall this insurance cover loss, damage, liability or expense caused by

29.1 war, civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power

29.2 capture, seizure, arrest, restraint or detainment (barratry and piracy excepted), and the consequences thereof or any attempt thereat

29.3 derelict mines, torpedoes, bombs or other derelict weapons of war

29.4 strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions.

30 TERRORIST, POLITICAL MOTIVE AND MALICIOUS ACTS EXCLUSION

In no case shall this insurance cover loss, damage, liability or expense arising from

30.1 any terrorist

30.2 any person acting from a political motive

30.3 the use of any weapon or the detonation of an explosive by any person acting maliciously or from a political motive.

31 RADIOACTIVE CONTAMINATION, CHEMICAL, BIOLOGICAL, BIO-CHEMICAL AND ELECTROMAGNETIC WEAPONS EXCLUSION

In no case shall this insurance cover loss, damage, liability or expense directly or indirectly caused by or contributed to by or arising from

31.1 ionising radiations from or contamination by radioactivity from any nuclear fuel or from any

nuclear waste or from the combustion of nuclear fuel

31.2 the radioactive, toxic, explosive or other hazardous or contaminating properties of any nuclear installation, reactor or other nuclear assembly or nuclear component thereof

31.3 any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter

31.4 the radioactive, toxic, explosive or other hazardous or contaminating properties of any radioactive matter. The exclusion in this Clause 31.4 does not extend to radioactive isotopes, other than nuclear fuel, when such isotopes are being prepared, carried, stored, or used for commercial, agricultural, medical, scientific or other similar peaceful purposes

31.5 any chemical, biological, bio-chemical or electromagnetic weapon.

PART 2 – ADDITIONAL CLAUSES (01/11/03)

32 NAVIGATING LIMITS

Unless and to the extent otherwise agreed by the Underwriters in accordance with Clause 33, the vessel shall not enter, navigate or remain in the areas specified below at any time or, where applicable, between the dates specified below (both days inclusive):

Area 1 - Arctic

(a) North of 70°N. Lat.

(b) Barents Sea

except for calls at Kola Bay, Murmansk or any port or place in Norway, provided that the vessel does not enter, navigate or remain north of 72°30′ N. Lat. or east of 35° E. Long.

Area 2 – Northern Seas

(a) White Sea.

(b) Chukchi Sea.

Area 3 - Baltic

(a) Gulf of Bothnia north of a line between Umea (63° 50′ N. Lat.) and Vasa (63° 06′ N. Lat.) between 10th December and 25th May.

(b) Where the vessel is equal to or less than 90,000 DWT, Gulf of Finland east of 28° 45′ E. Long. between 15th December and 15th May.

(c) Vessels greater than 90,000 DWT may not enter, navigate or remain in the Gulf of Finland east of 28° 45′ E. Long. at any time.

(d) Gulf of Bothnia, Gulf of Finland and adjacent waters north of 59° 24′ N. Lat. between 8th January and 5th May, except for calls at Stockholm, Tallinn or Helsinki.

(e) Gulf of Riga and adjacent waters east of 22° E. Long. and south of 59° N. Lat. between 28th December and 5th May.

Area 4 - Greenland

Greenland territorial waters.

Area 5 – North America (east)

(a) North of 52° 10′ N. Lat. and between 50° W. Long. and 100° W. Long.

(b) Gulf of St. Lawrence, St. Lawrence River and its tributaries (east of Les Escoumins), Strait of Belle Isle (west of Belle Isle), Cabot Strait (west of a line between Cape Ray and Cape North) and Strait of Canso (north of the Canso Causeway), between 21st December and 30th April.

(c) St. Lawrence River and its tributaries (west of Les Escoumins) between 1st December and 30th April.

(d) St. Lawrence Seaway.

(e) Great Lakes.

Area 6 – North America (west)

(a) North of 54° 30′ N. Lat. and between 100° W. Long. and 170° W. Long.

(b) Any port or place in the Queen Charlotte Islands or the Aleutian Islands.

Area 7 – Southern Ocean
South of 50°S. Lat. except within the triangular area formed by rhumb lines drawn between the following points

(a) 50° S. Lat.; 50° W. Long.

(b) 57° S. Lat.; 67° 30′ W. Long.

(c) 50° S Lat.; 160° W. Long.

Area 8 – Kerguelen/Crozet
Territorial waters of Kerguelen Islands and Crozet Islands.

Area 9 – East Asia
(a) Sea of Okhotsk north of 55° N. Lat. and east of 140° E. Long. between 1st November and 1st June.

(b) Sea of Okhotsk north of 53° N. Lat. and west of 140° E. Long. between 1st November and 1st June.

(c) East Asian waters north of 46°N. Lat. and west of the Kurile Islands and west of the Kamchatka Peninsula between 1st December and 1st May.

Area 10 – Bering Sea
Bering Sea except on through voyages and provided that

(a) the vessel does not enter, navigate or remain north of 54° 30′ N. Lat.; and

(b) the vessel enters and exits west of Buldir Island or through the Amchitka, Amukta or Unimak Passes; and

(c) the vessel is equipped and properly fitted with two independent marine radar sets, a global positioning system receiver (or Loran-C radio positioning receiver), a radio transceiver and GMDSS, a weather facsimile recorder (or alternative equipment for the receipt of weather and routeing information) and a gyrocompass, in each case to be fully operational and manned by qualified personnel; and

(d) the vessel is in possession of appropriate navigational charts corrected up to date, sailing directions and pilot books.

33 PERMISSION FOR AREAS SPECIFIED IN NAVIGATING LIMITS

The vessel may breach Clause 32 and Clause 11 shall not apply, provided always that the Underwriters' prior permission shall have been obtained and any amended terms of cover and any additional premium required by the Underwriters are agreed.

34 RECOMMISSIONING CONDITION

As a condition precedent to the liability of the Underwriters, the vessel shall not leave her lay-up berth under her own power or navigate following a lay-up period of more than 180 consecutive days unless the Assured has arranged for the Classification Society or a surveyor agreed by the Underwriters to examine the vessel and has carried out any repairs or requirements recommended by the Classification Society or such surveyor.

35 PREMIUM PAYMENT

35.1 The Assured undertakes that the premium shall be paid

35.1.1 in full to the Underwriters within 45 days (or such other period as may be agreed) of inception of this insurance; or

35.1.2 where payment by instalment premiums has been agreed

(a) the first instalment premium shall be paid within 45 days (or such other period as may be agreed) of inception of this insurance, and

(b) the second and subsequent instalments shall be paid by the date they are due.

35.2 If the premium (or the first instalment premium) has not been so paid to the Underwriters by the 46th day (or the day after such period as may have been agreed) from the inception of this insurance (and, in respect of the second and subsequent instalment premiums, by the date they are due), the Underwriters shall have the right to cancel this insurance by notifying the Assured via the broker in writing.

35.3 The Underwriters shall give not less than 15 days prior notice of cancellation to the Assured via the broker. If the premium or instalment premium due is paid in full to the Underwriters before the notice period expires, notice of cancellation shall automatically be revoked. If not, this insurance shall automatically terminate at the end of the notice period.

35.4 In the event of cancellation under this Clause 35, premium is due to the Underwriters on a pro rata basis for the period that the Underwriters are on risk but the full premium shall be payable to the Underwriters in the event of loss, damage, liability or expense arising out of or resulting from an accident or occurrence prior to the date of termination which gives rise to a recoverable claim under this insurance.

35.5 Unless otherwise agreed, the Leading Underwriter(s) designated in the slip or policy are authorised to exercise rights under this Clause 35 on their own behalf and on behalf of all co-subscribing Underwriters. Nothing in this Clause 35.5 shall, however, prevent any co-subscribing Underwriter from exercising rights under this Clause 35 on its own behalf.

35.6 Where the premium is to be paid through a Market Bureau, payment to the Underwriters will be deemed to occur on the day of delivery of a premium advice note to the Bureau.

36 CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

36.1 No benefit of this insurance is intended to be conferred on or enforceable by any party other than the Assured, save as may be expressly provided herein to the contrary.

36.2 This insurance may by agreement between the Assured and the Underwriters be rescinded or varied without the consent of any third party to whom the enforcement of any terms has been expressly provided for.

37 FIXED AND FLOATING OBJECTS

If the Underwriters have expressly agreed in writing, then Clauses 6 and 7 are amended to read as follows

6.1 The Underwriters agree to indemnify the Assured for three fourths of any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for

6.1.1 loss of or damage to any other vessel or fixed or floating object or property thereon

6.1.2 delay to or loss of use of any such other vessel or fixed or floating object or property thereon

6.1.3 general average of, salvage of, or salvage under contract of, any such other vessel or property thereon,

where such payment by the Assured is in consequence of the insured vessel coming into collision with any other vessel or striking any fixed or floating object.

6.2 The indemnity provided by this Clause 6 shall be in addition to the indemnity provided by the other terms and conditions of this insurance and shall be subject to the following provisions

6.2.1 where the insured vessel is in collision with another vessel and both vessels are to blame then, unless the liability of one or both vessels becomes limited by law, the indemnity under this Clause 6 shall be calculated on the principle of cross-liabilities as if the respective Owners had been compelled to pay to each other such proportion of each other's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of the collision

6.2.2 in no case shall the total liability of the Underwriters under Clauses 6.1 and 6.2 exceed their proportionate part of three fourths of the insured value of the insured vessel in respect of any one collision.

6.3 The Underwriters shall also pay three fourths of the legal costs incurred by the Assured or which the Assured may be compelled to pay in contesting liability or taking proceedings to limit liability, provided always that their prior written consent to the incurring of such costs shall have been obtained and that the total liability of the Underwriters under this Clause 6.3 shall not (unless the Underwriters' specific written agreement shall have been obtained) exceed 25% of the insured value of the insured vessel.

EXCLUSIONS

6.4 In no case shall the Underwriters indemnify the Assured under this Clause 6 for any sum which the Assured shall pay for or in respect of

6.4.1 removal or disposal of obstructions, wrecks, cargoes or any other thing whatsoever

6.4.2 any real or personal property or thing whatsoever except other vessels or any fixed or floating object struck by the insured vessel or property on other vessels or any such fixed or floating object

6.4.3 the cargo or other property on, or the engagements of, the insured vessel

6.4.4 loss of life, personal injury or illness

6.4.5 pollution or contamination, or threats thereof, of any real or personal property or thing whatsoever (except other vessels with which the insured vessel is in collision or property on such other vessels) or damage to the environment, or threat thereof, save that this exclusion shall not exclude any sum which the Assured shall pay for or in respect of salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment as referred to in Article 13 paragraph 1(b) of the International Convention on Salvage, 1989 have been taken into account.

7 Should the insured vessel come into collision with another vessel or fixed or floating object belonging wholly or in part to the same Owners or under the same management or receive salvage services from another vessel belonging wholly or in part to the same Owners or under the same management, the Assured shall have the same rights under this insurance as they would have were the other vessel or the fixed or floating object entirely the property of owners not interested in the insured vessel; but in such cases the liability for the collision or the amount payable for the services rendered shall be referred to a sole arbitrator to be agreed upon between the Underwriters and the Assured.

38 4/4THS COLLISION LIABILITY

If the Underwriters have expressly agreed in writing, then Clause 6 is amended such that the words "three fourths of" are deleted on each occasion in which they appear in Clause 6.

39 RETURNS FOR LAY-UP

39.1 If the Underwriters have expressly agreed in writing, such percentage of the net premium as agreed by the Underwriters shall be returned for each period of 30 consecutive days the vessel may be laid up, not under repair, in a port or in a lay-up area provided such port or lay-up area is approved by the Underwriters.

39.2 The vessel shall not be considered to be under repair when work is undertaken in respect of ordinary wear and tear of the vessel and/or following recommendations in the vessel's Classification Society survey, but in the case of any repairs following loss of or damage to the vessel or involving structural alterations, whether covered by this insurance or otherwise, the vessel shall be considered as under repair.

39.3 PROVIDED ALWAYS THAT

39.3.1 a total loss of the vessel, whether by perils insured under this insurance or otherwise, has not occurred during the period of this insurance or any extension thereof

39.3.2 a return of premium shall not be allowed when the vessel is lying in exposed or unprotected waters, or in a port or lay-up area not approved by the Underwriters

39.3.3 loading or discharging operations or the presence of cargo on board shall not debar a return of premium but no return shall be allowed for any period during which the vessel is being used for the storage of cargo or for lightering purposes

39.3.4 in the event of any return of premium recoverable under this Clause 39 being based on 30 consecutive days which fall on successive insurances effected for the same Assured, this insurance shall only be liable for an amount calculated at pro rata of the agreed percentage net for the number of days which come within the period of this insurance or any extension thereof and to which a return is actually applicable. Such overlapping period shall run, at the option of the Assured, either from the first day on which the vessel is laid up or the first day of a period of 30 consecutive days as provided under Clause 39.1.

40 GENERAL AVERAGE ABSORPTION

40.1 If the Underwriters have expressly agreed in writing and subject to the provisions of Clause 8, the following shall apply in the event of an accident or occurrence giving rise to a general average act under the York-Antwerp Rules 1994 or under the provisions of the general average clause in the contract of affreightment.

40.2 The Assured shall have the option of claiming the total general average, salvage and special charges up to the amount expressly agreed by the Underwriters, without claiming general average, salvage or special charges from cargo, freight, bunkers, containers or any property not owned by the Assured on board the vessel (hereinafter the "Property Interests").

40.3 The Underwriters shall also pay the reasonable fees and expenses of the average adjuster for calculating claims under this Clause 40, in addition to any payment made under Clause 40.2.

40.4 If the Assured claims under this Clause 40, the Assured shall not claim general average, salvage or special charges against the Property Interests.

40.5 Claims under this Clause 40 shall be adjusted in accordance with the York-Antwerp Rules 1994, excluding the first paragraph of Rule XX and Rule XXI, relating to commission and interest.

40.6 Claims under this Clause 40 shall be payable without the application of the deductible(s) in Clause 15.

40.7 Without prejudice to any other defences that the Underwriters may have under this insurance or at law, the Underwriters waive any defences to payment under this Clause 40 which would have been available to the Property Interests, if the Assured had claimed general average, salvage or special charges from the Property Interests.

40.8 In respect of payments made under this Clause 40, the Underwriters waive their rights of subrogation against the Property Interests, save where the accident or occurrence giving rise to such payment is attributable to fault on the part of the Property Interests or any of them.

40.9 Claims under this Clause 40 shall be payable without reduction in respect of any under-

insurance.

40.10 For the purposes of this Clause 40, special charges shall mean charges incurred by the Assured on behalf of or for the benefit of a particular interest to the adventure, for which charges the Assured is not responsible under the contract of affreightment.

41 ADDITIONAL PERILS

41.1 If the Underwriters have expressly agreed in writing, this insurance covers

41.1.1 the costs of repairing or replacing any boiler which bursts or shaft which breaks, where such bursting or breakage has caused loss of or damage to the subject-matter insured covered by Clause 2.2.1, and that half of the costs common to the repair of the burst boiler or the broken shaft and to the repair of the loss or damage caused thereby which is not covered by Clause 2.3

41.1.2 the costs of correcting a latent defect where such latent defect has caused loss of or damage to the subject-matter insured covered by Clause 2.2.2, and that half of the costs common to the correction of the latent defect and to the repair of the loss or damage caused thereby which is not covered by Clause 2.4

41.1.3 loss of or damage to the vessel caused by any accident or by negligence, incompetence or error of judgment of any person whatsoever

provided that such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers.

41.2 Master, Officers, Crew or Pilots shall not be considered Owners within the meaning of Clause 41.1 should they hold shares in the vessel.

PART 3 – CLAIMS PROVISIONS (01/11/03)

42 LEADING UNDERWRITER(S)

42.1 Where there is co-insurance in respect of this insurance, all subscribing Underwriters agree that the Leading Underwriter(s) designated in the slip or policy may act on their behalves so as to bind them for their respective several proportions in respect of the following matters (in addition to Clause 35.5)

42.1.1 the appointment of surveyors, experts, average adjusters and lawyers, in relation to matters which may give rise to a claim under this insurance

42.1.2 the duties and obligations to be undertaken by the Underwriters including, but not limited to, the provision of security

42.1.3 claims procedures, the handling of any claim (including, but not limited to, agreements under Clause 43.2) and the pursuit of recoveries

42.1.4 all payments or settlements to the Assured or to third parties under this insurance other than those agreed on an 'ex-gratia' basis.

Notwithstanding the above, the Leading Underwriter(s), or any of them, may require any such matters to be referred to the co-subscribing Underwriters.

42.2 The co-subscribing Underwriters shall, to the extent of their respective several proportions, indemnify and hold harmless the Leading Underwriter(s) in respect of all liabilities, costs or expenses incurred by the Leading Underwriter(s) in respect of the matters in Clause 42.1.

42.3 If the Leading Underwriter(s) require expenses incurred for or on behalf of the Underwriters to be collected for a party instructed by the Leading Underwriter(s), the collecting party shall be entitled to charge 5% of the amount collected for this service or such other amount as may be agreed in advance by the Leading Underwriter(s), such fee to be paid by the Underwriters.

42.4 The agreement in this Clause 42 between the Leading Underwriter(s) and co-subscribing Underwriters is subject to the exclusive jurisdiction of the English High Court of Justice and is subject to English law and practice.

43 NOTICE OF CLAIMS

43.1 In the event of an accident or occurrence whereby loss, damage, liability or expense may result in a claim under this insurance, notice must be given to the Leading Underwriter(s) as soon as possible after the date on which the Assured, Owners or Managers become aware of such loss, damage, liability or expense so that a surveyor may be appointed if the Leading Underwriter(s) so desire.

43.2 If notice is not given to the Leading Underwriter(s) within 180 days of the Assured, Owners or Managers becoming aware of such loss, damage, liability or expense, no claim shall be recoverable under this insurance in respect of such loss, damage, liability or expense, unless the Leading Underwriter(s) agree to the contrary in writing.

44 TENDER PROVISIONS

44.1 The Leading Underwriter(s) shall be entitled to decide the port to which the vessel shall proceed for docking or repair (the actual additional expense of the voyage arising from compliance with the Leading Underwriter(s)' requirements being refunded to the Assured) and shall have a right of veto concerning a place of repair or a repairing firm.

44.2 The Leading Underwriter(s) may also take tenders or may require further tenders to be taken for the repair of the vessel. Where such a tender has been taken and a tender is accepted with the approval of the Leading Underwriter(s), an allowance shall be made at the rate of 30% per annum on the insured value for the time lost between the despatch of the invitations to tender

required by the Underwriters and the acceptance of a tender to the extent that such time is lost solely as the result of tenders having been taken and provided that the tender is accepted without delay after receipt of the Leading Underwriter(s)' approval.

44.3 Due credit shall be given against the allowance in Clause 44.2 for any amounts recovered in respect of fuel, stores, wages and maintenance of the Master, Officers and Crew or any member thereof, including amounts allowed in general average, and for any amounts recovered from third parties in respect of damages for detention and/or loss of profit and/or running expenses, for the period covered by the tender allowance or any part thereof.

44.4 Where a part of the cost of the repair of damage other than a fixed deductible is not recoverable from the Underwriters the allowance shall be reduced by a similar proportion.

44.5 If the Assured fails to comply with this Clause 44, a deduction of 15% shall be made from the amount of the ascertained net claim.

45 DUTIES OF THE ASSURED

45.1 The Assured shall, upon request and at their own expense, provide the Leading Underwriter(s) with all relevant documents and information that they might reasonably require to consider any claim.

45.2 Upon reasonable request, the Assured shall also assist the Leading Underwriter(s) or their authorised agents in the investigation of any claim, including, but not limited to

45.2.1 interview(s) of any employee, ex-employee or agent of the Assured

45.2.2 interview(s) of any third party whom the Leading Underwriter(s) consider may have knowledge of matters relevant to the claim

45.2.3 survey(s) of the subject-matter insured

45.2.4 inspection(s) of the classification records of the vessel.

45.3 It shall be a condition precedent to the liability of the Underwriters that the Assured shall not at any stage prior to the commencement of legal proceedings knowingly or recklessly

45.3.1 mislead or attempt to mislead the Underwriters in the proper consideration of a claim or the settlement thereof by relying on any evidence which is false

45.3.2 conceal any circumstance or matter from the Underwriters material to the proper consideration of a claim or a defence to such a claim.

45.4 Clause 45.3 does not require the Assured at any stage to disclose to the Underwriters any document or matter which under English law is protected from disclosure by legal advice privilege or by litigation privilege.

46 DUTIES OF THE UNDERWRITERS IN RELATION TO CLAIMS

46.1 The Leading Underwriter(s) may, at their sole discretion, upon the notification of loss, damage, liability or expense arising from an accident or occurrence which may result in a claim under this insurance

46.1.1 instruct a surveyor who shall report to the Leading Underwriter(s) concerning the cause and extent of damage, the necessary repairs and the fair and reasonable cost thereof and any other matter which the Leading Underwriter(s) or the surveyor consider relevant

46.1.2 confirm the appointment of an independent average adjuster to assist the Assured in the preparation of the claim. If not already agreed, the Assured shall propose the average adjuster to be appointed who may be a Fellow of the Association of Average Adjusters of the United Kingdom or any other average adjuster mutually

acceptable to the Assured and the Leading Underwriter(s).

46.2 Where such appointments are made, the Underwriters shall be responsible for payment of reasonable fees directly to the surveyor and the average adjuster irrespective of whether a claim ultimately arises under this insurance. However, the Underwriters' liability for the fees of the appointed average adjuster shall cease no later than at such time as the Underwriters pay, settle, or communicate their intention to deny, the claim under this insurance or when it becomes apparent that any claim is unlikely to exceed the relevant deductible(s) in Clause 15.

46.3 The making of such appointments is not an admission by the Underwriters that the accident, occurrence or resulting claim is covered under this insurance or a waiver of any rights or defences that the Underwriters may have under this insurance or at law.

46.4 The reports of the surveyor shall, subject to no conflict of interest being identified by the Leading Underwriter(s), be released without delay to the Assured and the appointed average adjuster.

46.5 The Leading Underwriter(s) shall be entitled to request the appointed average adjuster to provide status reports at any stage.

46.6 The Leading Underwriter(s) shall give prompt consideration to the making of a payment on account upon the recommendation of the appointed average adjuster or, if no adjuster is appointed, upon the request of the Assured supported by appropriate documentation.

46.7 The Leading Underwriter(s) shall make a decision in respect of any claim within 28 days of receipt by them of the appointed average adjuster's final adjustment or, if no adjuster is appointed, a fully documented claim presentation sufficient to enable the Underwriters to determine their liability in relation to coverage and quantum. If the Leading Underwriter(s) request additional documentation or information to make a decision, they shall make a decision within a reasonable time after receipt of the additional documents or information requested, or of a satisfactory explanation as to why such documents and information are not available.

47 PROVISION OF SECURITY

If the Assured is obliged to provide security to a third party in order to prevent the arrest of, or to obtain the release of, the vessel, due to an accident or occurrence giving rise to a claim alleged to be covered under this insurance, the Underwriters shall give due consideration to assisting the Assured by providing security on behalf of the Assured or counter-security, in a form to be determined by the Leading Underwriter(s).

48 PAYMENT OF CLAIMS

Claims payable under this insurance shall, subject to the terms of any assignment, be paid to the loss payee or, if no loss payee has been agreed, to the Assured or as they may direct in writing. Such payment, whether in account or otherwise, when made shall be a complete discharge of the Underwriters' obligations under this insurance in respect of the amount so paid.

49 RECOVERIES

49.1 The Assured shall, whether or not the Underwriters have paid a claim or agreed to pay a claim or potential claim under this insurance, take reasonable steps to

49.1.1 assess as soon as possible whether there are any prospects of a recovery from third parties in respect of matters giving rise to a claim or to a potential claim under this insurance

49.1.2 protect any claims against such third parties if necessary by the commencement of proceedings and the taking of appropriate steps to obtain security for the claim from third parties

49.1.3 keep the Leading Underwriter(s) and the appointed average adjuster (if any) advised of the recovery prospects and any action taken against third parties

49.1.4 co-operate with the Leading Underwriter(s) in the taking of such steps as may be reasonably required to pursue any claims against third parties.

49.2 Underwriters shall pay the reasonable costs incurred by the Assured pursuant to this Clause 49 in the same proportion as the insured losses bear to the total of the insured and uninsured losses (as defined in Clause 49.4.2).

49.3 Where the Assured have incurred reasonable costs pursuant to Clause 49.1.2 and where no claim is recoverable under this insurance, provided always that the Underwriters' written agreement to the reimbursement of such costs shall have been obtained prior to the incurring of such costs, the Underwriters shall reimburse such costs to the extent agreed, notwithstanding that no claim is recoverable under this insurance.

49.4 In the event of recoveries from third parties in respect of claims which have been paid in whole or in part under this insurance, such recoveries shall be distributed between the Underwriters and the Assured as follows

49.4.1 the reasonable costs and expenses incurred in making such recoveries from the third party shall be deducted first and returned to the paying party

49.4.2 the balance shall be apportioned between the Underwriters and the Assured in the same proportion that the insured losses and uninsured losses bear to the total of the insured and uninsured losses. For the purposes of Clause 49.2 and this Clause 49.4.2, uninsured losses shall mean loss of or damage to the subject-matter insured and any liability or expense which would have been recoverable under this insurance, but for the application of deductible(s) under Clause 15 and the limits of this insurance.

49.5 In the event that under this insurance coverage is not provided in accordance with Clause 6, the following shall apply

49.5.1 Where the insured vessel is in collision with another vessel and both vessels are to blame then, unless the liability of one or both vessels becomes limited by law, any recovery due to the Underwriters shall be calculated on the principle of cross-liabilities as if the respective Owners had been compelled to pay to each other such proportion of each other's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of the collision.

50 DISPUTE RESOLUTION

Subject to the overriding provisions of Clause 1.3, disputes between the Assured and the Underwriters may, if not settled amicably by negotiation, be referred at the request of the Assured or the Underwriters to mediation or other form of alternative dispute resolution and, in default of agreement as to the procedure to be adopted, any such mediation or other form of alternative dispute resolution shall be in accordance with the current CEDR Solve model procedures.