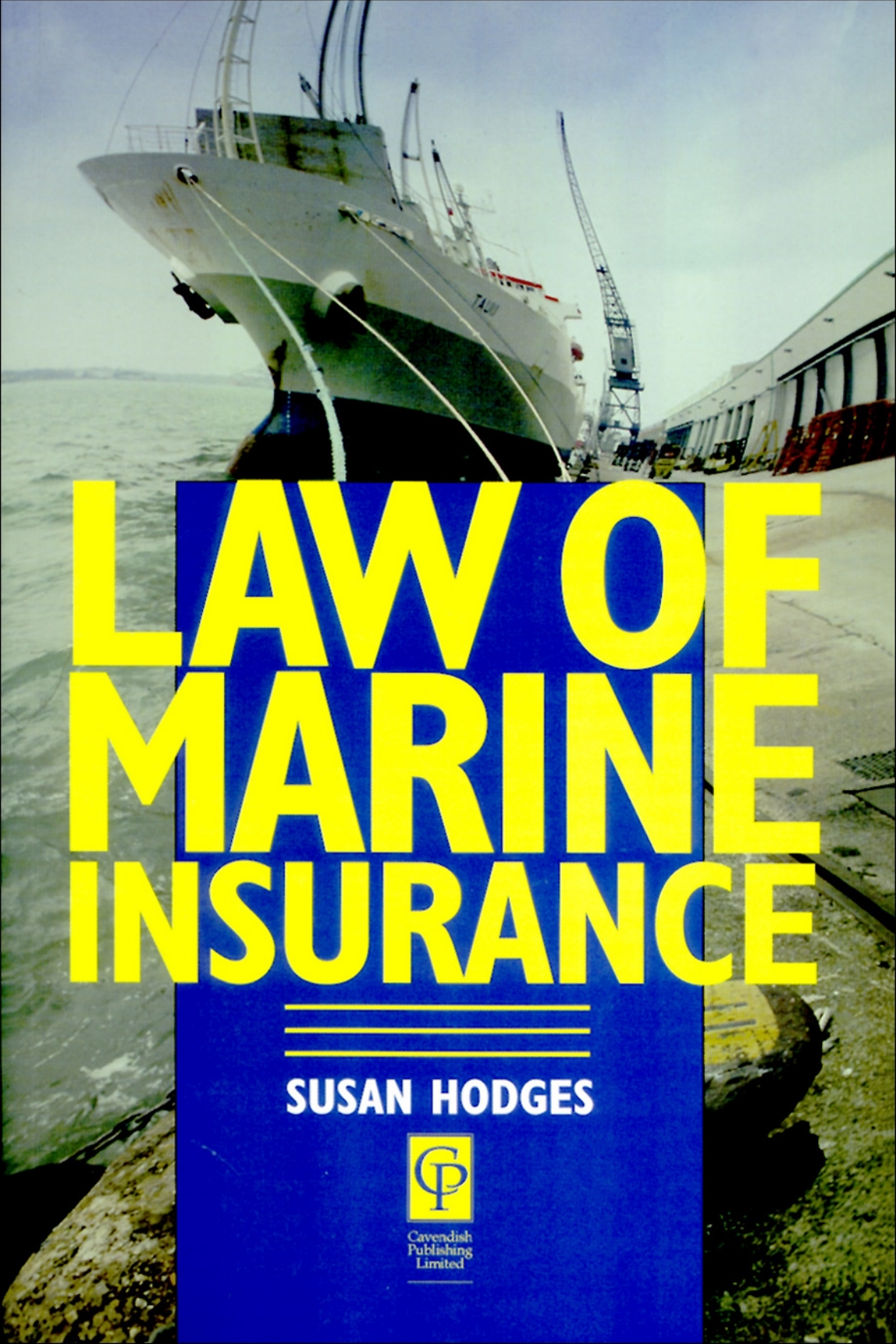

LAW OF MARINE INSURANCE

SUSAN HODGES

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CHAPTER 17

SALVAGE, GENERAL AVERAGE, AND SUE AND LABOUR

INTRODUCTION

Salvage or salvage charges, general average losses, and sue and labour charges are all partial losses which are incurred during rescue operations where either the subject-matter insured and/or other property, as the case may be, are at risk from loss by a peril insured against. The nature of the service performed, the rights of parties against each other, and the incidence of the loss depend on the circumstances of the case. Salvage charges, for example, where properly incurred may, according to the circumstances under which they were incurred, be recovered as a particular charge or as a general average loss. Each of these losses is distinct, but it is not always easy to distinguish one from the other.

Before proceeding to examine the characteristics of each of these losses, it is necessary, first, to determine whether they are affected by particular average warranties.

Particular average warranties

It is to be noted that salvage charges, though they are in fact particular average losses, are, nevertheless, recoverable, even if the subject-matter insured is 'warranted free from particular average, either wholly or under a certain percentage'.[1] This concession is made clear in s 76(2).[2] As general average and particular charges are not particular average losses,[3] they are not, strictly speaking, affected by a particular average warranty. As such, there is no real need for the Act to clarify or confirm that they are recoverable even in a policy containing a particular average warranty. In relation to general average, this is clarified by s 76(1) which states that 'a loss incurred by a general average sacrifice' is not affected by a particular average warranty.[4] And in the case of particular charges (and 'other expenses properly incurred pursuant to the

1 It has frequently been said that in marine insurance, particular average warranties are clauses excepting the insurer from liability for 'partial losses': see s 76(1) where it is stated that this means that 'the assured cannot recover for a loss of part'; and r 13 of the Rules for Construction in reference to the expression 'average unless general' states that it means a 'partial loss of the subject-matter insured other than a general average loss, and does not include "particular charges"'. To be precise, the term 'particular average' in the warranty excepts the insurer from liability only for 'particular average' losses. This means that general average losses and particular charges, as they are not particular average losses, are not affected by the exception: see s 64(1) and (2). This reinforces the point made above regarding the use of terms 'partial loss' and 'particular average loss': see Chapter 16.

2 Note the use of the word 'nevertheless' in s 76(2).

3 Section 64.

4 The use of the word 'sacrifice', not 'loss', is liable to cause confusion, suggesting that only a general average sacrifice, and not a general expenditure, is recoverable. *Cf* s 76(3) where 'general average loss' is used.

provisions of the sue and labour clause in order to avert a loss insured against') ss 76(2) and 78(1) confirm that they are recoverable.

A – SALVAGE CHARGES

INTRODUCTION

The law of salvage, like general average, originated and developed independently of marine insurance. Though it cannot claim a lineage as old as that for general average, nevertheless its ancestry still precedes that of marine insurance. The origin of salvage and general average was in *Aitchison v Lohre*[5] traced by Lord Blackburn as follows:

> '... the liability of the articles saved to contribute proportionally with the rest to general average and salvage, in no way depends on the policy of insurance. It is a consequence of the perils of the sea, first imposed, as regards general average, by the Rhodian Law many centuries before insurance was known at all, and, as regards salvage, by the maritime law, not so early, but at least long before any policies of insurance in the present form were thought of.'

There is no statutory definition of 'salvage'. Under common law, the word 'salvage' is used in two senses: it could refer either to the 'reward' earned by salvors or the 'service' they render.[6] In the law of marine insurance, the former is described as a 'salvage charge'. Though the focus of this chapter is on the insurance aspects of salvage, nevertheless, it is necessary for a proper understanding of the subject briefly to mention the essential ingredients of salvage.

First, the right to salvage arises only if maritime property, namely, ship, apparel, cargo or wreckage is salved. Secondly, the service has to be voluntarily rendered, meaning that the salvor must not be under a pre-existing duty to come to the aid of the vessel in distress. Thirdly, the maritime property or lives must be rescued from danger. This means that the salvage operation has to be successful before the salvors would be entitled to an award. Unless all these requirements are met, there can be no salvage award under the common law.[7]

The whole basis of salvage was summed up by Chief Justice Eyre in *Nicholson v Chapman*[8] as follows:

> '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.'

In the context of marine insurance, the problem lies not so much as in determining what constitutes salvage, but in distinguishing salvage from two

5 (1879) 4 App Cas 755 at p 760.

6 See s 60(2)(ii) where the term 'salvage operations' is used.

7 For a complete study of the law of salvage, reference should be made to classic works such as W R Kennedy, *Law of Salvage* (1985, 5th edn); and Brice, *Maritime Law of Salvage* (1993).

8 (1793) 2 H Bl 254.

other kindred forms of extraordinary losses, namely, general average and sue and labour. Section 65(2), first, sets out to define 'salvage charges' and then proceeds to distinguish it from other contractual forms of salvage services, which could be mistaken for maritime salvage, rendered by way of general average or sue and labour.

Section 65(1) declares that '… salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils'. That salvage charges are recoverable under the ITCH(95) and the IVCH(95) is made clear by cl 10.1 and cl 8, respectively. These clauses simply state: 'This insurance covers the vessel's proportion of salvage, salvage charges … reduced in respect of any under-insurance …'. A similar provision can be found in cl 2 of the ICC (A), (B) and (C).

DEFINITION OF 'SALVAGE CHARGES'

Section 65(1) defines 'salvage charges' to mean 'the charges recoverable under maritime law by a salvor independently of contract'. 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 arrangement. These words 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.

For a picturesque account of what maritime salvage entails, reference should be made to the remarks of Lord Hatherley in *Aitchison v Lohre*:[9]

> 'But ... where the salvage seems to have been an ordinary sort of salvage, namely, a ship perceiving another at a distance and in a state of distress comes to the rescue *no bargain being made*. We were expressly told in the case that no bargain was made as to any remuneration which should be given, but it was rescued upon the simple and common principle for salvage.'

Life salvage

Prior to 1846, a claim for salvage of life could not be maintained under the maritime law or the common law of England. Salvage was never awarded for the saving of life alone, and the reason for this being that it is of no benefit whatever to the owner of either ship or cargo.

In 1846, life salvage was created by the Merchant Shipping Act, and this later raised the question as to whether such a loss imposed upon the shipowner by statute could be claimed for under the ordinary form of a Lloyd's policy. This issue first came before the court in *Nourse v Liverpool Sailing Ship Owners' Mutual Protection and Indemnity Association*,[10] where the Court of Appeal had to

9 (1879) 4 App Cas 755 at p 768. Emphasis added.

10 [1896] 2 QB 16.

determine whether the standard form Lloyd's policy covered a life salvage which the plaintiff had become liable to pay under the statute.

Lord Esher MR was adamant that '... there could be no question of recovering in respect of such salvage under a Lloyd's policy'. For fear of turning an ordinary Lloyd's policy on ship into an insurance on the master and crew, Lord Justice Rigby held that the plaintiffs' claim was not recoverable. It was thought that as life salvage only came into existence in 1846, it could not have been in the contemplation of those who framed the ordinary form of Lloyd's policy which had existed much earlier.

However, the argument today should be based along the line that s 65(2) envisages only awards 'recoverable under maritime law' – and as a pure life salvage is a creation of statute, it does not fit within the traditional understanding of the term.

An enhanced award for saving of life

The Admiralty Court has never been averse to the making of an enhanced salvage award if lives were *also* saved in the process of the salving of property. To take into account the saving of the lives of the persons on board the ship when she was in peril, an increased amount may be awarded as salvage.[11] The whole of the enhanced award has always been regarded as maritime salvage. But whether the whole sum is recoverable as salvage charges under a Lloyd's policy is another separate matter.

This question was considered in *The Bosworth (No 3)*[12] which held that the award was recoverable under the terms of a standard marine policy. Mr Justice McNair, who felt somewhat uneasy in having to force the language of s 65(1), said:

> 'It needs possibly a little stretching of the language to say that a salvage award in so far as it reflects an element of life salvage gives rise to a charge incurred in preventing a loss by peril insured against.'

However, he found comfort in the fact that 'by the practice of the Admiralty Court an award made in these circumstance is treated as being, and is in fact, an award for service rendered to the ship and cargo'. As such, an enhanced award is 'recoverable under maritime law' as maritime salvage, it follows that it would also be recoverable, by reason of s 65(2), under a standard policy of insurance.

An enhanced award for preventing or minimising damage to the environment

Amidst the exclusions in cl 10, cl 10.6 of the ITCH(95) has made a special effort to clarify that any salvage reward which has taken art 13(1)(b) of the International Convention on Salvage 1989 into consideration is covered by the insurance. Clause 10.6 has made it clear that the exclusions stated in cl 10.5 shall

11 See art 13(1)(e) of the International Convention on Salvage, 1989. The relevant articles of this Convention can be found in the LOF 1995: see Appendix 25.

12 *Grand Union Shipping Ltd v London SS Owners' Mutual Insurance Assocn Ltd* [1962] 1 Lloyd's Rep 483 at p 490, QBD.

not affect a claim for salvage in respect of a reward where the skill and efforts of the salvors in preventing or minimising damage to the environment have been taken into account. Though a salvage reward may have been enhanced by reason of art 13(1)(b), it is still recoverable under the insurance as salvage or salvage charges. Unlike the exclusions spelt out in cl 10.5 of the ITCH(95), such an award, though enhanced is still for salvage services rendered.

Meaning of 'independently of contract'

The above words are somewhat ambiguous, especially when read in modern day context. It is now almost the invariable practice amongst professional salvors to use the Lloyd's Open Form (LOF) 1995, 'no cure, no pay' agreement.[13] It has been argued that because of this, such a form of salvage is not independent of contract and, accordingly, cannot be recovered as a 'salvage charge'.[14] There is, however, another point of view, held by Arnould, Carver and Lowndes, which is not so concerned with the fact that a contract has been entered into but more realistically, with its terms.

LOF agreement

The LOF agreement does not stipulate the amount payable for the service rendered;[15] as such, it has preserved one of the most basic of the attributes of maritime salvage. The 'no cure, no pay' basis of the agreement indelibly stamps it with the hallmark of maritime salvage. As no fixed amount is stated in the LOF agreement, the salvor has to submit to maritime law for his remuneration. In this sense, the payment is 'recoverable under maritime law' and not by contract. Though the liability to pay salvage may be under contract, the nature and quantification of the claim are not recoverable by way of contract. Provided that the salvor's remuneration is not pre-determined, but has to be assessed subsequently (whether by arbitration or court of law) according to the rules of maritime law, the fact that an agreement has been entered into is quite immaterial.

If one wishes to be pedantic, one has to acknowledge the fact that there is a contractual element even in the case of a maritime salvage or salvage properly so called: the fact that the salved vessel has (whether expressly or impliedly) accepted the service offered by the salvor is, in itself, sufficient to create a contract. Thus, provided that the fundamental characteristics or elements of a salvage proper remain intact, namely, that a salvage award is payable only upon a successful completion of the operation, and in accordance with the principles of maritime law, the fact that an LOF agreement has been entered into should not change the character of the service rendered.

13 See Appendix 25.

14 See Templeman, p 371: '… if the services were rendered under the terms of Lloyd's Standard Form of Salvage agreement, the amount awarded thereunder would not come within the definition of 'salvage charges' in s 65(2) of the Marine Insurance Act, as the parties to that agreement are clearly in a contractual relationship'.

15 See cl 1(c) of the LOF 1995.

The question as to whether salvage paid by an assured pursuant to an LOF agreement is recoverable under a policy of insurance as a 'salvage charge' has never been directly considered in the law of marine insurance. The case which comes closest to the subject is *The Raisby*[16] which, though not an insurance case, is nevertheless relevant to the present discussion. Here, the master of *The Raisby* had, when she was in distress, entered into a contract with the master of *The Gironde* which had agreed to tow *The Raisby* to the nearest port for repairs. It was also agreed that 'the matter of compensation to be left to arbitrators at home'. The contract is similar to an LOF agreement. Paying very little regard to the agreement, the judge said that it:[17]

> '... in no way alters the position of the matter from what it would have been if the captain of the *Raisby* had simply accepted the services of the *Gironde*, in which case it has not been contended that a claim could have been maintained against the ship or its owners for salvage of the cargo. The only agreement contained in the document is that "the matter of compensation"... is to be left to arbitrators at home. This, however, was valueless as an agreement.'

The court had no doubt that this was salvage proper and not general average. In spite of the contract entered into by the parties, the service rendered was treated as maritime, and not as contractual salvage.

Salvage and general average

The similarities between salvage and general average need not concern us here, for what is significant in relation to marine insurance are the features which differentiate them, and this can be found in the last limb of s 65(2). As this section is also crucial for the purpose of comparing salvage with sue and labour, the relevant part of the subsection will be cited here in full. Section 65(2) states that 'salvage charges':

> '... 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 objective of s 65(2) is to stress the fact that a general average loss (and particular charges), even if it takes the form of salvage, is not an expense incurred 'independently of contract': it is, therefore, not recoverable as a 'salvage charge'. The fundamental difference between salvage and general average is that in the case of the former, the salvage service is performed by a person who intervenes voluntarily, whereas in the latter, it is performed by a person who is specially hired or employed by the shipowner, on a *quantum meruit* basis, to save the whole adventure from a common danger. The service may be in the nature of salvage, but the circumstances under which it is rendered and the method of payment are quite different from salvage proper.

16 (1885) 10 PD 114. In *The Kryiaki* [1993] 1 Lloyd's Rep 137, the matter was not argued, as it was settled by the insurers: the salvage under an LOF agreement, payable only if the vessel is successfully towed to port.

17 *Ibid*, at p 117.

This special quality of salvage was referred to by the Lord Chancellor in *Aitchison v Lohre* as follows:[18]

> '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.'

Another distinguishing feature between salvage and general average came to light in *The Raisby*,[19] the facts of which have already been referred to. It is necessary to add that the plaintiffs (salvors) had successfully brought an action against *The Raisby* for the salvage of the ship and freight, but failed in their claim against the cargo owners. They then brought this action against the owners of *The Raisby* personally to recover from them remuneration for the salvage of the cargo, or damages for not obtaining a proper average bond. The plaintiffs contended that the defendants were liable in the first instance to pay salvage in respect of freight and cargo, and to recover a proportion of it back from the cargo owners. By this argument, they were in effect proposing that the loss was recoverable as general average.

The nature of, and the liability to pay, salvage were in this case called into question. As the service was considered by the court as maritime, and not contractual, salvage, it held that 'no primary liability rests on the ship or its owners to pay for the salvage of the cargo'. The liability of the interests which had benefited from the salvage was described as follows:

> 'As the liability both as to the parties responsible and as to the amount is left at large to be determined in due course of law ... the plaintiffs must seek their remedy for salvage of cargo, as distinct from ship, from those who have had the benefit of that salvage.'

This remark has clarified that the liability for salvage is not joint, but several. Unlike general average, each interest is individually or severally liable to the salvor for the value of the salvage services rendered. Each party whose property has been salved is liable to settle *directly* with the salvors for their own individual share of any award. There is not, as in the case of general average, a common purse, from which funds could be drawn by the salvors.[20]

Salvage remuneration: The York-Antwerp Rules

The distinction between salvage and general average, though subtle, is nowadays, for all commercial and practical purposes, not of great importance, as is the distinction between salvage and sue and labour. Even though both the Act and the common law have drawn a clear line between salvage and general

18 (1879) 4 App Cas 755 at pp 766–767.

19 (1885) 10 PD 114; 5 Asp MLC 473.

20 In contrast, *Anderson, Tritton & Co v Ocean SS Co* (1884) 10 App Cas 107 has held that where the owners of a salved vessel had entered into a binding agreement with the salvors to pay, and had paid a particular sum for salvage of ship and cargo, they might recover such portion of it from the owners of cargo as general average.

average, they are now in practice treated in the same way. This can be seen in the Institute Clauses: cl 10 of the ITCH(95),[21] cl 8 of the IVCH(95), and cl 2 (general average clause) of all the ICC apply to both general average and salvage.

Moreover, r VI of the York-Antwerp Rules 1994, in declaring that 'expenditure incurred by the parties to the adventure in the nature of salvage, whether under contract or otherwise, shall be allowed in general average', has also brought salvage under the same umbrella as general average. However, it is observed that the said rule has chosen a more neutral term, 'salvage remuneration', to describe the loss. This, together with the words 'under contract or otherwise', is meant to clarify that both contractual and maritime salvage are, provided that they are 'carried out for the purpose of preserving from the peril the property involved in the common maritime adventure', to be allowed as general average. By reason of this practice, the difference between salvage and general average has paled into insignificance.

It has to be borne in mind that the York-Antwerp Rules 1994 are applicable only if the 'contract of affreightment so provides that the adjustment be according to the York-Antwerp Rules'.[22] In the unlikely event that the contract of affreightment does not so provide, then the above-mentioned differences between salvage and general average would become important. Moreover, it is to be remembered that only the 'adjustment' of the loss is governed by the York-Antwerp Rules. Thus, an assured has still to identify the nature of his loss as one falling within the terms of his policy.

Salvage and sue and labour

The distinction between salvage and sue and labour is of critical importance. This is clearly illustrated in *Aitchison v Lohre*,[23] the principles of which are now embodied in s 65(2). In a policy containing a sue and labour clause, the ship was insured with the defendant for £1,200, being valued at £2,600. During the voyage, she encountered very severe weather and was in grave danger of sinking when she was rescued by a steamer. The salvors were afterwards awarded £800 for salvage by the Admiralty Court. The owners did not abandon the vessel, but chose to have her repaired. That the insurers were under the policy liable to pay the assured the sum of up to £1,200 for the repairs was never in dispute. The controversy was whether the assured was also entitled to recover from the insurer the £800 which they had paid to the salvors. Naturally, as sue and labour is recoverable in *addition* to the sum insured, it is not surprising that counsel for the assured argued that the amount was recoverable, if not as general average, as a sue and labour charge.

The actual decision of the House is contained in the following remark made by Lock Blackburn:[24]

21 Previously, cl 11 of the ITCH(83).

22 Clause 10.2 of the ITCH(95) and cl 8.2 of the IVCH(95).

23 (1879) 4 App Cas 755.

24 *Ibid*, at p 765.

> 'The amount of such salvage occasioned by a peril has always been recovered, without dispute, under an averment that there was a loss by that peril … and I have not been able to find any case in which it was recovered under a count for suing and labouring.'

Indeed, it was a golden opportunity for the House to elicit the fundamental differences between salvage and sue and labour. A distinguishing feature which the House had pointed out was in relation to the capacity in which the salvors were employed: as the salvors in this case were not labouring as agents of the assured, but were acting as salvors in the maritime law, the award was held not recoverable as sue and labour. The criterion is stated by the said Law Lord as follows:[25]

> '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.'

Another distinguishing mark was noted by The Lord Chancellor:[26]

> '... if any expenses were to be recoverable under the suing and labouring clause, they must be expenses assessed upon the *quantum meruit* principle … If the payment were to be assessed and made under the suing and labouring clause it would be payment for services rendered, *whether the service had succeeded* in bringing the ship into port or not.'

The rule in *Aitchson v Lohre* was applied to a different set of circumstances in *Dixon v Whitworth*.[27] In this instance, the plaintiff (the assured) having paid the sum of £2,000 awarded to the salvors, sought to recover the same from his own insurers with whom he had taken up a policy containing a sue and labour clause, but against a total loss *only*. As the sum paid by the plaintiff for salvage was a partial loss, it was held not recoverable. Were it sue and labour, the loss would have been recoverable, notwithstanding that the fact that the policy was for a total loss only.[28] This decision has reinforced the rule that a salvage charge may be recovered only as a loss by a peril insured against, and not as an additional or supplementary payment.[29]

A PERIL INSURED AGAINST

Like general average and sue and labour, a salvage charge is, according to s 65(2), recoverable only if it is 'incurred in preventing a loss by perils insured against'. This point is also stressed by cl 10.4 of the ITCH(95) and cl 8.4 of the IVCH(95).[30] The Court of Appeal decision in *Ballantyne v Mackinnon*[31] clearly

25 *Ibid*.

26 *Ibid*, at p 766. Emphasis added.

27 (1880) 4 Asp MLC 327 CA; 43 LT 365.

28 See s 78(1).

29 Section 78(1) states that sue and labour is 'supplementary to the contract of insurance …'.

30 Clause 2 of the ICC (A), (B) and (C).

31 (1896) 2 QB 455, CA.

illustrates the need to satisfy this requirement.[32] The plaintiffs (the assured) were ordered by the Admiralty Court to pay the owner of a trawler a sum of money for salvage services performed by a trawler in towing the plaintiffs' vessel to safety when she ran short of coal during a voyage. The plaintiffs then brought this action against their insurers to recover the salvage they had incurred. As the unseaworthiness of the ship, and not an insured peril, had engendered the need for the salvage aid, the plaintiffs failed in their claim. It was also held that the defendants were not precluded, by the judgment of the Admiralty Court, from setting up the defence that the loss did not arise from any of the perils insured against.

Another aspect of s 65(1), which complements the above requirement, is the rule that salvage charges may be 'recovered as a loss by those perils' meaning the perils insured against which brought about the need for salvage aid. This rule was described by Lord Blackburn in *Aitchison v Lohre* as thus: 'The amount of such salvage occasioned by a peril has always been recovered without dispute, under an averment that there was a loss by that peril'.[33]

EXCLUSIONS

The ITCH (95) has, through its new cl 10.5, clarified that, though the insurance covers 'the vessels proportion of salvage, salvage charges and/or general average', no claim is allowed for or in respect of:

- special compensation payable to a salvor under art 14 of the International Convention on Salvage 1989,[34] 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 pollutants substances from the vessel.

The reason for these exclusions is that they relate to environmental risks which are not insured perils under a standard policy of insurance.

As was seen, an enhanced award made under art 13(1)(b) is not affected by the above exclusions. Clause 10.6 of the ITCH(95) has specifically noted that any salvage remuneration which, by reason of Article 13(1)(b) of the International Convention on Salvage 1989, has taken into account 'the skill and efforts of the salvors in preventing or minimising damage to the environment' is not affected by the above exclusions. Clause 10.6 clarifies that the whole of the salvage reward is recoverable, even though one of the criteria used in fixing the reward may relate to an environmental issue.

32 *Pyman SS Co v Lords Commissioners of the Admiralty* [1919] 1 KB 49, CA, is another authority which vividly illustrates the point that the salvage has to be incurred in preventing a loss by a peril insured against. Though the litigation was not in relation to marine insurance, the points raised are, nevertheless, indirectly relevant. If the same issue were to arise in a dispute in marine insurance, the court would probably have to determine the proportion of the salvage charge which is occasioned by the consequence of hostilities or warlike operations, and that, by marine risks.

33 (1879) 4 App Cas 755 at p 765.

34 See Appendix 25.

It is to be noted that by cl 8.4.5 of the ITCH(95), any sum which the assured shall pay for or in respect of salvage remuneration made under Article 13(1)(b), as in the case cl 10.6, is not excluded in a claim made under the 3/4ths collision liability clause. Such an enhanced award is specifically excluded from the exclusions clause to the 3/4ths collision liability clause.[35]

Special compensation

Article 14 (and art 13(1)(b)) is concerned with rewarding and compensating a salvor for steps taken by him to prevent or minimise damage to the environment. A salvor who has failed to earn an award under art 13 'shall be entitled' to a special compensation from the owner of the vessel under art 14.[36] By art 14,[37] he is entitled to special compensation from the owner of the vessel of an amount 'equivalent to his expenses' as defined by art 14(1). Further, by art 14(2), if the salvor by his salvage operations has 'prevented or minimised damage to the environment', the special compensation 'payable by the owner to the salvor, may be increased up to a maximum of 30% of the expenses incurred by the salvor. Such special compensation payable by the owner to the salvor is not, by reason of cl 10.5 of the ITCH(95), recoverable by the assured from his insurer as salvage, salvage charges, general average or sue and labour.[38]

Expenses or liabilities incurred by the assured

Clause 10.5.2 of the ITCH(95), which excludes claims for 'expenses or liabilities incurred in respect of damage to the environment, or the threat to such damage, or as a consequence of the escape of pollutants substances from the vessel, or the threat of such escape or release', is, strictly speaking, a separate provision which may or may not be connected with the subject of salvage.[39] The said expenses or liabilities could, but need not necessarily arise as a result of a salvage operation. The expenses or liabilities are not payable to the salvors as a salvage award or as a special compensation. As in the case of the special compensation, such expenses or liabilities are neither recoverable from the insurer as salvage, salvage charges, general average nor as sue and labour.[40]

35 Discussed in Chapter 13.

36 A special compensation under art 14 may be made to a salvor where no award is made under art 13 (because the salvage services were unsuccessful) or as a supplement to an art 13 award in certain circumstances.

37 'Expenses' is defined in art 14(3) to mean 'out-of-pocket expenses reasonably incurred by the salvor ... and a fair rate for equipment ... actually and reasonably used in the salvage operation ...'. See *Semco Salvage & Marine Pte Ltd v Lancer Navigation Co Ltd, The Nagasaki Spirit* [1995] 2 Lloyd's Rep 44, QBD, for a discussion of the meaning of 'fair rate' and arts 13 and 14 of the said Convention.

38 See new cl 11.2 of the ITCH(95).

39 Neither the word 'salvage' nor 'salvor' appear in cl 10.5.2 of the ITCH(95).

40 A shipowner may take out the Institute General Average – Pollution Expenditure Clause to cover such expenses and liabilities.

B – GENERAL AVERAGE

INTRODUCTION

The law of general average exists as an independent branch of the law of maritime distinct from carriage of goods by sea and marine insurance. In *The Brigella*, Lord Gorell Barnes said that:[41]

> '... 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.'

In *Simonds v White*,[42] it was pointed out that the origin of the principle of general average is of 'very ancient date' and the obligation to contribute depends 'not so much upon the terms of any particular instrument as upon a general rule of maritime law.' The fact that it 'had existed for ages before the practice of insurance was known'[43] explains why it does not depend on insurance (or any other branch of law) for sustenance or for its existence.[44]

In relation to marine insurance, the legal position was summarised by Mr Justice Bailhache in *Brandeis Goldschmidt and Co v Economic Insurance Co Ltd* as follows:[45] 'The liability in general average before 1906 arose at common law, and since the Act of 1906 by statute. It did not arise under the policy, but the policy might contain express provisions modifying or excluding it.'

There is a vast body of case law on the subject with litigation pertaining not just to basic principles of the law of general average, but also to its application in relation to contracts of affreightment and marine insurance. This chapter will, as far as it is possible so to do, focus on only the legal problems relating to general average when applied to marine insurance[46] and, as and when necessary, the general principles of the law of general average will only be briefly mentioned.[47]

41 (1893) P 189 at p 195.

42 (1824) 2 B & C 805 at p 811.

43 *Price v Noble* (1811) 4 Taunt 123 at p 126.

44 Lord Blackburn in *Anderson, Tritton, and Co v Ocean SS Co* (1884) 5 Asp MLC 401 at p 403, HL, said: 'No more contribution is exigible from the owner of a parcel of goods that are insured than from the owner of a parcel that is not insured'.

45 (1922) 38 TLR 609 at p 610.

46 Obviously, scientific and mathematical adjustments and calculations as to how general average is to be apportioned is outside the scope of this work.

47 It is not possible in this work to engage in any in-depth study of general legal principles, or the rules relating to adjustment, of general average. For a complete study of the subject, reference should be made to classic works on the subject such as R Lowndes and G R Rudolf, *The Law of General Average and the York-Antwerp Rules* (1990, 11th edn). *Burton v English* (1883) 12 QBD 218, CA, contains a good account of the basis and origin of the law of general average.

DEFINITIONS OF A 'GENERAL AVERAGE ACT'

In marine insurance, the law of general average is regulated by the Act, the Institute Clauses and, the York-Antwerp Rules 1994[48] as envisaged by all the Institute Clauses for Hulls,[49] and Cargo,[50] if the contract of affreightment so provides. Even though the obligation to contribute does not really arise from contract, but from 'the old Rhodian laws' which have 'become incorporated into the law of England as the law of the ocean',[51] nevertheless, the law is tolerant enough to allow for the obligation to be 'limited, qualified or even excluded by the special terms of a contract'.[52]

As the Act has its own definition of general average, it would be more appropriate to begin this study with the statutory, rather than the common law definition of the term. A 'general average act' is defined by s 66(2) as follows:

> '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.'

Mr Justice Roche in *Green Star Shipping Co v The London Assurance, The Andree*[53] was correct when he said that: 'Subsections (1) to (3) define or formulate the rules of general average as between the parties to the contract of affreightment. The rest of the subsections deal with the rights of the assured or liabilities of insurers'.

The principles underlying the statutory definition are derived from cases,[54] the most notable of which is *Birkley v Presgrave*.[55] It would appear that no work on the subject of general average can be complete without citation of the well-accepted definition enunciated therein by Mr Justice Lawrence:

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

Another comprehensive and illustrative definition was delivered by Lord Blackburn of the House of Lords in *Kemp v Halliday*:[56]

48 The 1994 Rules have replaced the 1974 Rules (as amended 1990). To bring cl 10.3 of the ITCH(95) up to date, 'York-Antwerp Rules 1994' has been substituted for 'York-Antwerp Rules 1974': see Appendix 24.

49 Clause 10.2 of the ITCH(95) (previously cl 11.2 of the ITCH(83)) and cl 9.2 of the IVCH(95) state: '... but where the contract of affreightment so provides the adjustment shall be according to the York-Antwerp Rules'. But if the contract of affreightment does not so provide, 'the law and practice obtaining at the place where the adventure ends' would apply.

50 Clause 2 of the ICC (A), (B) and (C).

51 *Per* Brett MR *Burton v English* (1883) 12 QBD 218 at p 223.

52 *Per* Abbott CJ in *Simonds v White* (1824) 2 B & C 805 at p 811.

53 [1933] 1 KB 378 at p 387.

54 Eg *Hallett v Wigram* (1850) 9 CB 580; *Burton v English* (1883) 12 QBD 218; *Atwood v Sellar & Co* (1880) 5 QBD 286; and *Svendsen v Wallace Brothers* (1885) 10 App Cas 404.

55 (1801) 1 East 220 at p 228.

56 (1865) 6 B & S 723 at pp 746–747.

> '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 one exposed to a common jeopardy as if, instead of money being expended for the purpose, money's worth were thrown away. It is immaterial whether the 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.'

It has to be pointed out that these definitions are supplemented by the York-Antwerp Rules 1994 which has its own definition of a 'general average act'. Rule A states: '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.'

However defined, the single common golden thread is the 'for the sake of all'[57] principle, the cardinal rule of the law of general average, proposed by Lord Denning MR in *Australian Shipping Commission v Green and Others*,[58] in which he said that 'general average arises when the master of a vessel gives something for the sake of all (*quod pro omnibus datum est*).' He then proceeded to simplify matters in the following way: 'It arises when a ship, laden with cargo, is in peril on the sea, such peril indeed that the whole adventure, both ship and cargo, is in danger of being lost'.

The word 'general' has been defined in *Harris v Scaramanga*[59] to mean that the loss is to be 'generally distributed, or the contribution to be generally made by all. In this sense, it is distinguished from a 'particular' average loss.

That there are two aspects to general average is also clear. Section 66(1) states that: 'It includes a general average expenditure as well as a general average sacrifice.' As this distinction is of importance, especially in relation to s 66(4) and the Institute Hulls Clauses,[60] it is necessary to say something about it. The two classic examples of a general average sacrifice are the cutting away of a mast[61] and the throwing overboard of cargo in order that the whole venture may be saved from a common peril. [62] But when a ship has, as a result of an insured peril, to be towed into a port of refuge for the safety of the whole venture, the cost for this service and for other necessary collateral operations,

57 In *Power v Whitmore* (1815) 4 M & S 141 at p 149, Lord Ellenborough CJ said that 'general average must lay its foundation in a sacrifice of part for the sake of the rest …' *Cf* whereas the 'stitch in time' applies to sue and labour, the notion of the 'for the sake of all' applies to general average.

58 [1971] 1 All ER 353 at p 355, CA.

59 (1872) LR 7 CP 481 at p 496.

60 The relevant part of s 66(4) states: ' ... 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 other parties liable to contribute'. The same principle is applied in cl 10.1 of the ITCH(95) and cl 8.1 of the IVCH(95).

61 In *Plummer v Wildman* (1815) 3 M & S 482, the master was compelled to cut away his rigging in order to preserve the ship; *Austin Friars SS Co Ltd v Spillers & Bakers Ltd* [1915] 3 KB 586; *Whitecross Wire Co Ltd v Savill* (1882) 8 QBD 653, CA; and *The Bona* [1895] P 125, CA.

62 Eg *Dickenson v Jardine* (1868) LR 3 CP 639; *Gregson v Gilbert* (1783) Doug KB 232; *Entwistle v Ellis* (1857) 2 H & N 549; *Stewart v West India & Pacific SS Co* (1873) LR 8 QB 362, Ex Ch; *Robinson v Price* (1877) 2 QBD 295, CA; and *The Gratitudine* (1801) 3 Ch Rob 240.

such as for unloading, landing, warehousing and re-shipping the cargo, are general average expenditures.[63]

General average contribution

The whole foundation of general average is contribution: the owner of the interest which has been saved has to make a contribution to the party who has sacrificed his property or expended money to save the whole venture. The liability of the interested parties to make a contribution is declared in s 66(3):

> '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 liability of the insurer is embodied in ss 66 (4) and (5): an assured who 'has paid, or is liable to pay, a general average contribution in respect of the subject insured ... may recover therefor from the insurer'. The insurer is also liable to reimburse the assured who has himself expended money or sacrificed the subject-matter insured to save the whole adventure from a common peril.

Certain requirements have to satisfied before a loss can be classified as to be by way of general average. Four of its main features are expressly stated in s 66(2). First, the sacrifice or expenditure has to be 'extraordinary'; secondly, it has to be 'voluntarily and reasonably' made; thirdly, it has to be incurred in time of 'peril'; and finally, the sacrifice or expenditure has to be incurred for the purpose of preserving the property 'imperilled in the common adventure'. To understand fully these attributes, references to cases have to be made.

Extraordinary sacrifice or expenditure

A sacrifice or expenditure has to be extraordinary before it would be classed as general average. Surprisingly, it has not always been easy to discern the ordinary from the extraordinary; and this is evident from the number of suits which have been brought before the courts for adjudication as to whether a particular expense incurred was or was not extraordinary. As to be expected, most of the actions seem to revolve around cases relating to contracts of affreightment. For example, in *Wilson v Bank of Victoria*,[64] due to a collision with an iceberg, a sailing vessel sustained so much damage to her masts that she had to resort to the use her steam power in order to continue with her voyage. The dispute between the parties, the shipowner and the shippers, concerned the cost incurred for the purchase of extra coal consumed, for which the shippers were called upon to make a contribution. The court held that the fact that the engine was used to a much greater extent than would generally occur on such a voyage, and so caused the disbursement for coals to be extraordinarily heavy,

63 See *Job v Langton* (1856) 6 E & B 779; and *Svendsen v Wallace Brothers* (1885) 10 App Cas 404, HL.

64 (1867) LR 2 QB 203. See also *The Bona* [1895] P 125 where extra costs incurred for coal used in order to accelerate the speed of a vessel was held not be a general average act.

did not render it an extraordinary disbursement.[65] A factor which greatly influenced the court's decision is that the shipowners were, by the contract of affreightment on such a ship, bound to give the services of the auxiliary screw and to make all the necessary disbursement for fuel. As such an expenditure was expected of them, there was nothing extraordinary about it, for when they were incurred, the owners were merely carrying out their obligation under the contract of carriage.

In *Hingston v Wendt*,[66] the owner of a ship which, having gone ashore with cargo on board, had, for the benefit of all concerned, to expend money to discharge the cargo in order to bring it to a place of safety. Mr Justice Blackburn held that as the expenditure was incurred for the purpose of saving the whole venture, ship as well as cargo, it constituted general average. He was clear that the 'expenditure was not incurred on behalf of the master as agent of the shipowner, performing his contract to carry on the cargo to its destination and earn freight, but was an extraordinary expenditure for the purpose of saving the property at risk'. As such, the owners of each part of the property saved were required to contribute rateably.

A clearer illustration can be found in a more recent case, *Societe Nouvelle D'Armement v Spillers & Bakers Ltd*,[67] where for fear of being attacked by enemies during the war, the master hired a tug to tow the vessel to port. One of the issues which the court had to decide was whether the cost for the hiring of the tug qualified as an 'extraordinary' expenditure. Relying on an earlier authority,[68] the court expressed the opinion that: 'General average expenditure must be incurred to avoid extraordinary and abnormal peril as distinguished from the ordinary and normal perils of the sea …'. And as 'the risk of being attacked or destroyed by the King's enemies was not an extraordinary and abnormal peril' in the circumstances of the case, the loss was not recoverable as general average.[69]

Using much simpler language, Lord Blackburn in *Kemp v Halliday* summarised the legal position as follows:[70]

> 'It is quite true that so long as the expenditure by the shipowner is merely such as he would incur in the fulfilment of his ordinary duty as shipowner, it cannot be general average.'

65 See also *Harrison v Bank of Australasia* (1872) LR 7 Ex 39; 1 Asp MLC 198, where it was held that there was no right to general average contribution in respect of costs incurred to purchase further supplies of coals to pump the vessel; the burning of spars and ship's stores was held an extraordinary sacrifice.

66 (1876) 1 QBD 367 at p 370.

67 [1917] 1 KB 865.

68 *Taylor v Curtis* (1816) 6 Taunt 608 at p 624, where in similar circumstances, the losses were held to fall 'where the fortune of war cast them'.

69 [1917] 1 KB 865 at p 872.

70 (1866) 6 B & S 723 at pp 746–747. See also *Anderson, Tritton & Co v Ocean SS Co* [1884] 15 Asp MLC 401.

Voluntarily and reasonably made

According to s 66(2), to constitute a general average loss, the sacrifice or expenditure has to be 'voluntarily and reasonably' made in time of peril. In r A of the York-Antwerp Rules 1994, the terms 'intentionally and reasonably' are used. There is very little English authority on the subject. However, *Athel Line v Liverpool and London War Risks Association Ltd*[71] has given an insight into the meaning of the word 'intentionally'. In this case, an expenditure was incurred for the purchase of fuel and stores consumed during the course of a voyage, when a vessel sailing in convoy was ordered by the naval officer in charge to return to the port from which she had sailed. As the expenditure was incurred as a result of 'the blind and unreasoning obedience of a subordinate to the lawful orders of a superior authority', it was held not recoverable as general average.[72]

Properly charged

The fact that an expenditure or sacrifice has been 'reasonably' made in order to save the adventure from a common peril does not necessarily mean that the whole of the loss is automatically allowable as general average. The sum which is 'properly' chargeable to general average for which a contribution may be claimed has to be ascertained.

In *Anderson, Tritton & Co v Ocean Steamship Co*,[73] the House of Lords pointed out that the mere fact that an expenditure may have been 'reasonably' made does not necessarily mean that the 'whole' of such sum is chargeable as general average against the other interested parties. It was stressed that 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'.

Peril or danger

Joseph Watson & Son Ltd v Firemen's Fund Insurance Co of San Francisco[74] is, of course, the classic authority on this aspect of the law relating to general average. It held that to constitute a general average act, a peril must in fact exist and any situation which 'looks as if there was a peril' was not good enough. In this case, cargo was damaged when the master caused steam to be turned into the hold of the ship in order to extinguish a supposed fire. The court had no doubt whatsoever that general average 'does not touch losses incurred in a mistaken attempt to avoid a peril in fact non-existent'.

This does not, however, mean that the peril has to be 'immediate' before the master can take action. In *Vlassopoulos v British and Foreign Marine Insurance Co, The Makis*, the matter was taken further by Mr Justice Roche when he explained that:[75]

71 [1944] 1 KB 87.

72 See also *Papayanni & Jeromia v Grampian SS Co Ltd* (1896) 1 Com Cas 448 which, though not an insurance case, is relevant for the purpose of illustrating the meaning of the word 'voluntary'.

73 (1884) 10 App Cas 107.

74 [1922] 2 KB 355.

75 [1929] 1 KB 187 at p 199.

> 'It is not necessary that the ship should be actually in the grip, or even nearly in the grip, of the disaster that may raise from a danger. It would be a very bad thing if shipmasters had to wait until that state of things arose in order to justify them do an act which would be a general average act.'

The judge drew attention to the fact that both the Act and the York-Antwerp Rules use the word 'peril', not 'immediate peril', and 'peril' means the same thing as 'danger'. He concluded that 'the peril must be real and not imaginary, that it must be substantial and not merely slight or negatory. In short, it must be a real danger'.

In very similar terms, Mr Justice Sankey in *Societe Nouvelle D'Armement v Spillers & Bakers Ltd*[76] pointed out that even though the word 'peril' is not qualified, it has always been understood to mean that it has to be 'imminent', and that implies that 'it must be substantial and threatening and something more than the ordinary perils of the seas …'.

Common adventure

The requirement that the sacrifice or expenditure has to be incurred for the purpose of preserving the property 'imperilled in the *common* adventure' is an important one, for it distinguishes general average from sue and labour. If only one interest is at risk, the loss is not general average and any extraordinary expenditure incurred to avert or minimise the loss would fall within the realm of sue and labour. It is to be noted that this feature is stressed throughout the York-Antwerp Rules. The word 'common' is used in relation to safety, the maritime adventure and appears in almost all the rules. That the sacrifice or expenditure has to be incurred for the joint or common benefit of ship, cargo and freight[77] is a well-established principle under common law.[78] In *Oppenhein v Fry*,[79] Mr Justice Blackburn observed that 'any expenditure incurred entirely and exclusively for saving the whole subject of insurance should for the purpose of adjusting the loss on this policy, be treated as general average …'.

Ballast voyages not under charter

A sacrifice or expenditure incurred to prevent a loss during a voyage in which no cargo was carried on board at the time of loss can hardly be described as having been incurred for common benefit: there being no common adventure, such a loss would not be recoverable by way of general average. If it were not for cl 10.3 of the ITCH(95) and cl 8.3 of the IVCH(95), such a loss would not be recovered by way of general averages, there being no common adventure. The essential parts of the said clause state:

76 [1917] 1 KB 865 at p 871.

77 See *Carisbrook SS Co Ltd v London & Provincial Marine & General Insurance Co Ltd* [1902] 2 KB 681.

78 See *Kemp v Halliday* (1866) 6 B & S 723.

79 (1864) 3 B & S 873 at p 884. Perhaps, a better choice of words would be 'the whole adventure' rather than 'the whole subject of insurance'.

> 'When the vessel sails in ballast, not under charter, the provisions of the York-Antwerp Rules, 1994 ... 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 ...'

The purpose of this clause is to deem a ballast voyage, not under charter, as if she were proceeding under a contract of affeightment containing the York-Antwerp Rules, 1994: an artificial voyage has been created for the benefit of the assured.

Ballast voyages under charter

To illustrate the case of a ballast voyage made whilst the ship is under charter, *Carisbrook SS Co Ltd v London and Provincial Marine and General Insurance Co Ltd*[80] has to be discussed. In this case, a sacrifice of ship's materials was made during a voyage when the ship was in ballast. The court held this to be a general average loss to which chartered freight was made to contribute, even though cargo was not board the vessel at the time of loss. It has to be emphasised that the circumstances of the case were rather special in the sense that the voyage charterparty was for one indivisible out-and-home voyage under which the ship was to fetch a cargo and bring it home. Thus, though the loss was sustained during the outward voyage, when no cargo was on board, the homeward freight was held liable to contribute to a general average sacrifice. In each case, the terms of the charterparty would have to be closely examined.[81]

Avoidance of a peril insured against

Another very important feature of general average relevant only to marine insurance is contained in s 66(6) which states that: '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 connection with the avoidance of, a peril insured against'. The same principle is enunciated in simpler terms in cl 10.4 of the ITCH(95) as follows: '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.' Thus, for example, in a policy subject to a war exclusion clause, the assured would not be able to recover for any loss incurred arising from a war peril.

The Institute Cargo Clauses

In this regard, it is observed that the ICC are more generous in its application of general average: cl 2 states that general average '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 elsewhere in this insurance' is recoverable. This means that provided that the event does not fall within any of the exceptions listed, the loss would be recoverable, even though it may not have arisen from a peril

80 [1902] 2 KB 681.

81 The outcome of the case would have been different if the loss was sustained during a preliminary voyage, which was not part of the charterparty.

insured against. In so far as general average is concerned, the ICC(B) and (C) are treated as if they are for 'all risks'.[82]

Success

The element of success is implicit in the doctrine of general average (and also of salvage); and yet neither the Act, the Institute Clauses nor the York-Antwerp Rules 1994 has made provision for this. Interestingly enough, though there is no authority on the subject, there seems to be an understanding that if the act (whether a sacrifice or expenditure) completely fails and nothing is saved, there can be no contribution, for 'there is nothing left to contribute'[83] and, consequently, the loss has to fall where it lies.

In the case where there is some measure of success, such as when only cargo has been saved, the legal position is less clear, as there are two schools of thought on the subject,[84] but the great masters such as Arnould, Carver and Lowndes seem to favour the view that, if some of the property be saved, there must be contribution. In such a circumstance, there is, in a manner of speech, a 'fund' or a 'value' upon which average adjustment could be made, and it is expected of a party whose property has been saved to make a contribution.

Clause 11.5 of the ITCH(95)

By virtue of cl 11.2, cl 11.5 of the ITCH(95)[85] is made to apply to general average (and salvage charges) even though the clause is entitled 'duty of the assured (sue and labour)'.[86] The effect of the cl 11.5 is to allow an assured, when a claim for a total loss of the vessel is admitted, the right to recover expenses incurred for 'saving or attempting to save the vessel and other property', even though 'there are no proceeds, or the expenses exceed the proceeds'. The words 'and other property' seem to suggest that it applies to general average, and not sue and labour which arises when only one interest is at risk. Though the word 'proceeds' could be given a wide interpretation to include both 'the vessel and other property' (cargo?), in the context that the policy relates only to hull, it would not be unreasonable to assume that it applies only to the proceeds of the 'vessel' and not of 'the other property', which is not part of the ship.[87]

The objective of cl 11.5 is to allow an assured the right of recovery, even though the expenditure incurred for common good is abortive, and no real benefit has been derived by the vessel from the general average act. In the absence of this clause, the assured would not be in a position to recover any of

82 The opening words of s 66(6) – 'In the absence of express stipulation' – allow exceptions to be made to the general rule.

83 This is Arnould's view, see para 919.

84 For a survey of the rules employed in different countries, see Arnould at para 977.

85 Clause 11.5 of the ITCH(95) has been updated to incorporate the exclusion of special compensations and expenses referred to in cl 10.5. This update need not concern us here and will be discussed below.

86 See cl 19.2 read with cl 9.5 of the IVCH(95).

87 See Arnould at paras 919 and 978; O'May, pp 340 and 351. It is noted that there is no equivalent to cl 11.5 in any of the ICC. Clause 11.5 of the ITCH(95) is not happily worded.

the expenses so incurred as general average because the act has proved to be unsuccessful: there is no value upon which a contribution could be apportioned.

The extent of the *insurer's liability* is also spelt out in cl 11.5. It is limited to 'a *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 ...'. In this calculation, the proportion of under-insurance has to be taken into account.[88]

Another rather thorny problem which has to be addressed is if the ship and/or cargo are damaged or destroyed in a separate and unrelated accident arising after they have been saved from a common peril by an earlier general average act. Should an interest which had derived benefit from an earlier general average act be made liable to contribute to the general average loss when the property no longer exists *in specie* or, is of no value 'at the termination of the adventure'?[89]

It is fair to say that no contribution is expected of a party whose property fails to survive the voyage in any shape or form: there is simply nothing left to contribute. But if some value could be placed on the remains of the property, then it would not be so unreasonable to extract contribution from that 'fund'. Arnould, applying the principle that 'without such previous sacrifice nothing would have been saved at all',[90] would be amenable to hold that 'the wreck must make good that which was previously sacrificed'. The legal position is unclear, as there is no authority on the subject.

Owned by the same assured

Contribution being the essence of general average, it was at one time thought that there could never be a general average contribution unless the various interests in the maritime adventure were owned by different parties.[91] This myth was dispelled by *Montgomery & Co v Indemity Mutual Marine Insurance Co Ltd* when the Court of Appeal expressed its opinion on the matter as follows:[92]

> '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 ... such a sacrifice is a general average act, quite independently of unity or diversity of ownership.'

The above principle is adopted by s 66(7): regardless of the ownership of the interests concerned, the liability of the insurer is to be determined 'as if those

88 See s 73(1) and *Balmoral SS Co Ltd v Marten* (1902) AC 511 upon which s 73(1) is based. If the subject-matter is not insured for its full contributory value, the indemnity payable by the insurer must be reduced in proportion to the under insurance.

89 See r 17 York-Antwerp Rules 1994.

90 Arnould, para 978.

91 See *The Brigella* [1893] P 187, overruled by *Montgomery v Indemnity Mutual Marine Insurance Co* [1902] 1 KB 734.

92 [1902] 1 KB 734 at p 740.

subjects were owned by different persons'.[93] Of course, the word 'subjects' has to be read to mean 'interests'.

LIABILITY OF THE INSURER

Distinction between sacrifice and expenditure

The distinction between a general average sacrifice and a general average expenditure is of considerable importance in so far as the procedure for a claim under the policy is concerned. This is made clear in s 66(4) and cl 10.1 of the ITCH(95).[94] To illustrate this distinction in relation to an assured's right to be reimbursed, it would be more convenient to discuss the principles as regards a general average sacrifice first.

General average sacrifice

The relevant part of s 66(4) on general average *sacrifice* lays down the rule that an assured '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'.[95] This principle of full and direct recovery is derived from *Dickenson v Jardine*[96] where an owner of goods, which had been sacrificed in a time of danger for the benefit of all the interests concerned, was allowed recovery for the full insured value of the goods even though he was in a position, by reason of the loss being for general average, to recover from the other interests which had benefited from the sacrifice. In the words of Mr Justice Willes, the procedure is as follows:[97]

> 'If the assured proceeds against the underwriters in the first instance, the latter cannot avail themselves by way of plea of the fact that the assured has a distinct right against some other person. They must pay the amount claimed in the first instance, and will then be entitled to use the name of the assured, and proceed against the other parties who are liable ...'

By s 66(4), an assured is able to recover directly from his insurer the full amount of the loss.[98] Naturally, he cannot retain the proceeds of both, so as to be repaid the value of his loss twice over.

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93 See *Carisbrook SS Co Ltd v London & Provincial Marine & General Insurance Co Ltd* [1902] 2 KB 681; and *Oppenhein and Others v Fry* (1864) 3 B & S 873 at p 884, *per* Blackburn J: '... where a voluntary sacrifice is made for the benefit of the whole adventure, it is general average; whether the ship and cargo and freight belong to one only or to different adventurers, or whether they are partially interested ...'.

94 Clause 8.1 of the IVCH(95).

95 The same principle is reiterated in cl 10.1 of the ITCH(95) as: '… the assured may recover in respect of the whole loss without first enforcing their right of contribution from other parties.'

96 (1868) LR 3 CP 639.

97 *Ibid*, at p 644.

98 He would, of course, have to give credit for contributions related to any other interests vested in him which has benefited from the sacrifice: see s 66(7).

General average expenditure

The above rule as regards general average sacrifice does not apply to a general average expenditure. The reason for making of this distinction, according to Arnould, is that expenditures 'do not involve the loss or destruction of any part of any particular interest, so as to make the underwriters on that interest directly liable in respect of the whole thereof'.[99]

As regards general average expenditure, the material part of s 66(4) states that an assured 'may recover from the insurer in respect of the whole proportion of the loss which falls upon him'. *The Mary Thomas*[100] is said to be responsible for the formulation of this rule; the decision of the court was based on the ground that the English courts would not allow a shipowner to go behind a foreign adjustment and recover from their own hull underwriters what they had failed to recover from the cargo owners their share of contribution.

'The proportion of the loss'

Indeed, the above words are important for they define the amount which an assured may recover from his insurer. After expending a sum of money in order to save the whole adventure from a common peril, a shipowner could well find himself out of pocket, should he fail to recover from the cargo owners their share of the general average contribution. In such a circumstance he would, of course, like to look to his own insurer for indemnity for the loss which he had sustained. Without a doubt, he would be able to claim, by virtue of s 66(5), his *own* share of the contribution. But whether he would always be in a position to recover from his own insurer any outstanding amount of the expenses which he had incurred for the sake of all concerned is another matter.

Green Star Shipping Co Ltd v The London Assurance and Others, The Andree[101] has dealt with one aspect of this problem. The relevant facts may be summarised as follows. The Andree was insured for a voyage during the course of which a fire and, later, a collision took place in respect of which two sets of general average expenses were incurred. After making the necessary deductions for the plaintiffs' own share of contribution (on the salved value of the ship) and the cargo owners' proportion (on the salved value of the cargo), the plaintiffs found themselves still out of pocket. The issue the court had to consider was whether this amount, which remained unsatisfied, was recoverable from the plaintiffs' own hull insurer. It has to be said that the deficit arose because the value of the salved cargo was greatly reduced by the collision.

Mr Justice Roche, relying heavily on the wording of s 66(4), held the insurer responsible for this loss. His reasoning was stated 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

99 Arnould, para 1003.

100 (1894) P 108.

101 [1933] 1 KB 378.

> proportion of the loss which falls upon the assured, the shipowner, and is within the meaning of those words in the Marine Insurance Act, section 66(4).'

The shipowner was able to recover the whole amount of his expenses, including the amount which he would have been able to recover from the cargo owners had the value of the cargo not been reduced between the date of the expenditure and the 'termination of the adventure'. The phrase 'the proportion of the loss which falls upon him' is by no means free from ambiguity. However, it does not mean that an assured is entitled to be indemnified only for his share of contribution in respect of the ship. These words were interpreted as being wide enough to enable him to recover *any* outstanding amount which he was not able to recover from the cargo interests.

As the net result appears to be the same as that in the case of a sacrifice, one could be tempted to argue that there is hardly any difference between them. The difference lies in the fact that as regards a sacrifice the assured may proceed directly against his own insurer without first having to make any attempt to seek recovery from the other contributory interests. Whereas in the case of an expenditure, the assured would have to exhaust his right of claim against the other interested parties first, before he could proceed against his own insurer. The difference was noted in *Brandeis Goldschmidt and Co v Economic Insurance Co Ltd* by Mr Justice Bailhache as thus:[102]

> 'A general sacrifice was different from general average expenditure, and if there had been a sacrifice here, the underwriters would have been immediately liable ... But this was a claim for general average expenditure, and ... could only be enforced when there had been an adjustment.'

By reason of the diminution or extinction of the value of the cargo before the termination of the adventure, the shipowner was in this case unable to recover the cargo's share of general average contribution. Where there are no proceeds or the expenses exceed the proceeds, the general rule is that a general average claim cannot be levied.[103] Whether the rule laid down in *Green Star Shipping Co Ltd v The London Assurance and Others, The Andree*[104] is to be restricted to the facts of the case is unclear. But there does not appear to be any reason why it cannot be applied to other situations, such as when an assured who, for some other reason or other (for example, bankruptcy) is unable to recover contribution from any of the other interested parties. As worded, s 66(4) is wide enough to allow an assured to recover 'the proportion of the loss which falls upon him'. If parliament had intended to limit the extent of his claim only to his share of general average contribution in respect of the subject insured, it could have easily said so. It could have stipulated that he may recover only in respect of the 'vessel's' proportion of general average, as in the case of cl 10.1 of the ITCH(95) and cl 8.1 of the IVCH(95). But as worded, s 66(4) refers to the proportion of loss which falls upon 'him', meaning the 'assured'. Provided that he has made all reasonable attempts to enforce his right of contribution from the other parties liable to contribute, an assured should be able to look to his own

102 (1922) 38 TLR 609 at p 610.

103 *Cf* cl 11.5 of the ITCH(95) and cl 9.5 of the IVCH(95).

104 [1933] 1 KB 378.

insurer for indemnity for 'the *whole* proportion of the loss which falls upon him'.

AVERAGE ADJUSTMENT

It is observed that as early as 1824, it was already recognised that shipowners have the freedom to stipulate the law and practice that is to govern the adjustment of general average. In *Simonds v White*,[105] the esteemed Chief Justice Abbott noted that the obligation to contribute may be 'limited, qualified or even excluded by the special terms of a contract, as between the parties to the contract'. This necessarily means that in relation to marine insurance, the adjustment of general average is in each case to be determined by the terms of the policy.

Before any claim for reimbursement for general average could be made by an assured against his insurer, the assured is required to obtain an adjustment.[106] The rules relating to adjustment are contained in cl 10.2 of the ITCH(95). There are two distinct parts to this clause, and general average may be adjusted according to either:

- 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, or
- the York-Antwerp Rules, if the contract of affreightment so provides.

Only two possibilities are envisaged by this provision. Thus, an insurer is not bound by an adjustment which does not fall within either one of the above alternatives. For example, an adjustment obtained from a place, other than 'the place where the adventure ends' would not be acceptable. The second alternative should not pose any problem, as the York-Antwerp Rules are a well-known and established regime.

Foreign adjustment

Under common law, it was generally accepted that 'the place at which the average shall be adjusted is the place of the ship's destination or delivery of her cargo'. Even though different words are used in cl 10.2 of the ITCH(95),[107] the effect is the same as under common law, for an adventure could end either at the port of final destination named in the contract of carriage or, prematurely, at an intermediate port where the cargo, whether by necessity or consent, had to be discharged. As worded, it is wide enough to embrace both situations. Due to a common peril, an adventure could suddenly terminate in a country not within

105 (1824) 2 B & C 805 at p 811. See also *Brandeis Goldschmidt & Co v Economic Insurance Co Ltd* (1922) 38 TLR 609 at p 610.

106 See *Brandeis Goldschmidt & Co v Economic Insurance Co Ltd*, *ibid*. A cargo owner has, therefore, first to obtain an adjustment from the shipowner before he proceeds against his insurer. The initial responsibility to take the necessary steps to secure an adjustment and payment of the general average lies with the shipowner: see *Crooks v Allan* (1879) 5 QBD 36. The shipowner is not, however, according to *Wavertree Sailing Ship Co Ltd v Love and Another* [1897] AC 373, bound to employ an average stater to make out his average statement. He may do this himself. But the usual practice is to appoint a professional average adjuster to do the job.

107 Clause 8.2 of the IVCH(95).

the contemplation of the parties. Thus, by this clause an adjustment could be made according to a foreign system of law, the principles of which might well be contrary to British law and practice. The adjustment so made is called a foreign adjustment. That raises the question as to how far insurers are bound by a general average adjustment issued abroad.

In *Simonds v White*,[108] the plaintiffs, the owners of certain goods carried on board the defendant's ship, were compelled under Russian law to pay the defendants a sum of money as general average contribution, before they were allowed delivery of their cargo. As a large part of this sum would not have been charged to them as general average according to English law, the plaintiffs brought this action to recover the excess paid. The court held that, whether the terms of adjustment be beneficial or disadvantageous, the parties, were bound by it.[109]

It has, of course, to be noted that the dispute between the parties was in relation to a contract of affreightment. Whether an insurer would also by cl 10.2 be conclusively bound by a foreign adjustment made at 'the place where the adventure ends' is another matter. There is no case law on cl 10.2 and, therefore, one should be excused for referring to common law for guidance.

It is interesting to note that in *Simonds v White*,[110] the plaintiffs, in support of their cases, cited *Power v Whitemore*,[111] a marine insurance case, as authority for the proposition that a foreign adjustment was not conclusive. Naturally, counsel on the other side argued that *Power v Whitemore* was irrelevant, as the dispute in question was in relation to a contract of carriage. But as *Power v Whitemore* is an insurance case, it is necessary to examine it here.

In *Power v Whitemore*, the assured was compelled under a foreign adjustment made in Lisbon to pay contribution for a loss which under English law does not belong to general average. The issue was whether this foreign adjustment was binding upon the insurer. Lord Ellenborough held that it was not binding, but the true basis of his judgment is, regrettably, not easy to fathom. It would appear that had the plaintiffs tendered sufficient proof to show that the adjustment was made in accordance with the laws and usages of Lisbon, the adjustment would have been upheld.

Understandably, in view of the ambiguous language found in Lord Ellenborough's judgment, the case was sometimes cited as authority for laying down the principle that a foreign adjustment is not conclusive. This, however, is clearly not an accurate account of the legal position: the plaintiffs had failed in their action not because a foreign adjustment is not binding, but because of the want of proof.

108 (1824) 2 B & C 811.

109 *Ibid*, at p 813, in the words of Abbot CJ: '... by assenting to general average, he must be understood to assent also to its adjustment ... according to the usage and law of the place at which the adjustment is to be made.'

110 (1824) 2 B & C 805.

111 (1815) 4 M & S 141.

The legal position was eventually clarified in the celebrated case of *Harris v Scramanga*, where Mr Justice Brett, in a forthright and succinct speech, observed that:[112]

> 'Now I think that it is clearly established that, upon such a policy [referring to an "ordinary English policy", one without a special foreign adjustment clause], English underwriters are bound by the foreign adjustment as an adjustment, if made according to the law of the country in which it was made. They are bound although contributions are apportioned between the different interests in a manner different from the English mode, or though matters are brought into or omitted from general average which would not be so treated in England.'

However unpalatable a foreign adjustment may be, the parties are, as a general rule, bound by it.[113] There is, however, an exception to this rule.

Exception to the general rule

In *Harris v Scaramanga*,[114] Mr Justice Brett warned that 'if the general average loss be not incurred, or the general average contribution be not made, in order to avert the loss by a peril insured against', the adjustment is not be binding. This necessarily means that a loss incurred to save the adventure from a peril which is not insured against, or which is expressly excluded by the policy, is not recoverable. Needless to say, this is the case whether the loss be general or particular. This is fair enough: it has to borne in mind that only a 'general average loss' requires adjustment and, by s 66(6), a loss can only be claimed as general average loss if it is incurred for the purpose of 'avoiding, or in connection with the avoidance of, a peril insured against'.[115] As the insurer had taken pains to exclude certain losses, it would seem only fair that, as between him and the assured, the exception clause has to be respected. If this matter be overlooked, the whole foundation of the law of marine insurance could be at risk. It is submitted that the whole subject has to be thoroughly re-examined in the context of cl 10.2 of the ITCH(95).[116]

Foreign adjustment clause

Right up to the earlier part of the 20th century, foreign adjustment clauses, by which insurers agreed to pay general average, 'as *per* foreign statement, if so made up' or, 'according to foreign statement',[117] were commonly used. As they have now fallen into disuse – having been replaced by cl 10.2 – it is unnecessary

112 (1872) LR 7 CP 481 at p 496.

113 Later, this principle was followed in *Mavro v Ocean Marine Insurance Co* (1874) LR 7 CP 481.

114 *Ibid*, at p 496.

115 See also *Power v Whitemore* (1815) 4 M & S 141.

116 See Arnould, para 999, does not feel comfortable at all with the present uncertain state of the law in this regard.

117 See *Harris v Scaramanga* (1872) LR 7 CP 481; *Mavro v The Ocean Marine Insurance Co* (1874) LR 9 CP 595; *The Brigella* (1893) P 189; *The Mary Thomas* (1893) P 108, CA; *Hick v The Governor & Co of The London Assurance* (1895) 1 Com Cas 244; and *De Hart v Compania Anonima de Seguros, The Aurora* [1903] 2 KB 503, which appears to be the last reported case on the subject of foreign adjustment clause.

to raise the problems which these clauses had generated. However, for the purpose of comparing a foreign adjustment clause with cl 10.2, it is necessary to refer to certain remarks made by Mr Justice Roche in *Green Star Shipping Co v The London Assurance*[118] regarding an older version of a clause which differs slightly, but not materially, from cl 10.2. A group of authorities, comprising of *Harris v Scaramanga*,[119] *De Hart v Compania Anominma de Seguros, The Aurora*[120] and *The Mary Thomas*[121] have conclusively ruled that foreign adjustments were binding. And according to Mr Justice Roche, the foreign adjustments were only binding because the 'contracts provided that general average was payable according to (or *per*) foreign statements'. And as these words do not appear in cl 10.2, he contended that it should not be treated in the same way. The pertinent part of his judgment read follows:[122]

> 'Here there is no such stipulation [foreign adjustment clause] but merely cl 9 [now cl 10.2 of the ITCH(95)] of the Institute Clauses, and it seems clear from the language of Romer LJ in *De Hart's case* that had the Institute Clauses stood alone the foreign adjustments would not have been held to be binding. In my judgment there is nothing in the present case making the New York adjusters' view or statement binding upon the parties ...'

The judge, it would appear, was advocating that an adjustment made under cl 10.2 is open to review.

As can be seen from the above remarks, Mr Justice Roche drew support from the observations made by Mr Justice Romer in *The De Hart Case*,[123] where the policy contained two clauses: a foreign adjustment clause – worded as 'General average according to foreign statement if so made up' – and a corresponding clause in the Institute Time Clauses, but without the words 'if so made up'. Lord Justice Romer was of the opinion that, even though the parties have in effect agreed to be bound by the foreign statement, if so made up, nonetheless it is open to challenge on two grounds. First, to bind the parties, 'the statement so made up must have been made up in good faith':[124] nothing more need be said about this. Secondly, he said that:[125]

> '... if the statement were made according to the law of the port which recognised the special terms of the contract of affreightment, I doubt if the parties to the policy of insurance in a case like the present be bound by the statement if the contract of affreightment imported terms as to general average of a special and unusual character, which could not reasonably have been contemplated by the parties to the policy of insurance.'

Insurers were clearly not prepared to pay general average in accordance with provisions that might appear in the contract of affreightment. As the case

118 [1933] 1 KB 378.

119 (1872) LR 7 CP 481.

120 [1903] 2 KB 503.

121 (1893) P 108, CA.

122 [1933] 1 KB 378 at p 389.

123 [1903] 2 KB 503.

124 *See Harris v Scaramanga* (1872) LR 7 CP 481 at p 495, where Brett J pointed out that until the contrary is proved, a foreign adjustment is deemed to have been made in good faith.

125 [1903] 2 KB 503 at p 509.

has demonstrated, an insurer could well be placed in a disadvantageous position by an express clause in a charterparty.[126] This warning issued by Lord Justice Romer had caused the insertion of the phrase 'as if the contract of affreightment contained no special terms upon the subject' to be made in cl 10.2. One gap in the law has thus been plugged.

C – SUE AND LABOUR

INTRODUCTION

The subject of sue and labour is governed by both the Act and the Institute Clauses. Each of the Institute Clauses for hulls and cargo has its own provision on sue and labour.[127] In the ITCH(95), and cl 9.2 of the IVCH(95), it is named as the 'duty of assured (sue and labour)' clause, whilst in all the ICC, as the 'minimising losses' clause. They amplify the terms of the Act, restating in modern language the principles of the old SG policy.

That sue and labour is an extraordinary expense and a type of 'particular charges'[128] distinct from other forms of partial losses, such as general average and salvage charges (which are also extraordinary expenses), have been repeatedly stressed not only by the Act but also by the Clauses.[129] Besides general average and salvage charges, legal costs incurred to institute or defend a collision action[130] are also expressly excluded from sue and labour by the Institute Hulls Clauses.[131] The distinction between the different types of partial losses can be more conveniently discussed elsewhere.[132]

126 The Court of Appeal, which affirmed the decision of Kennedy J decided that the insurers were bound by the foreign statement.

127 As such, unless the clause has been struck off, the conflict between the decision of the Australian case, *Emperor Goldmining Co v Switzerland General Insurance Co* [1964] 1 Lloyd's Rep 348, which decided that there was a right of recovery even in the absence of a sue and labour clause; and the opposing view held by Neill J at first instance in *Integrated Contained Service Inc v British Traders Insurance Co* [1981] 2 Lloyd's Rep 460, does not arise. The preponderant British view appears to be the latter: see Arnould, para 914, and Ivamy, p 451. The fact that a party may by agreement delete the sue and labour clause appearing in a standard policy goes some way to support the view that recovery for sue and labour expenses is only possible, if there is a clause in the policy authorising reimbursement for such expenses: see *Western Assurance Co of Toronto v Poole* [1903] 1KB 376, where the letters 'No s/c' ('No salvage charges') meaning in the language of re-insurers that sue and labour charges are not covered by the policy.

128 See s 64(2) and Arnould, para 1132.

129 See ss 64(2), 65(2), 76(2) and 78(2); and cl 11.2 of the ITCH(95) (previously cl 13 of the ITCH(83)) and cl 9.2 of the IVCH(95).

130 See *Xenos v Fox* (1868) LR 3 CP 630; 4 CP 665; and cl 8.3 of the ITCH(95) and cl 6.3 of the IVCH(83).

131 See cll 11.2 of the ITCH(95) and cl 9.2 of the IVCH(95). Note that under the new cl 11.2 of the ITCH(95), 'special compensation and expenses as referred to in clause 10.5' are also not recoverable under cl 11 as sue and labour. Clause 10.5 of the ITCH(95) also refers to special compensation payable to a salvor.

132 See Chapter 16.

For a proper understanding of the subject, it may be helpful to initiate this study with a brief comment on the rationale for the principle of sue and labour. In *Aitchison v Lohre*, Lord Blackburn said:[133]

> '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.'

Reference should also be made to a passage made by McArthur, whose remarks, though on an ancient version of the clause, are nonetheless informative and succinct:[134]

> '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.'

Any such apprehension or reservation is now specially taken care of by the waiver clause, which ensures that any steps taken or effort made to sue and labour will not prejudice the rights of either party.[135]

ASSURED AND THEIR SERVANTS OR AGENTS

Section 78(4) states: '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.' All the Institute Clauses, however, have added the words 'their servants' to the clause.[136] This means that a duty to sue and labour is now imposed not only on the assured and their agents but also upon the master and crew.

In *The Gold Sky*,[137]Mr Justice Mocatta had to interpret the scope of the words 'the assured and his agents'. It is suffice to mention here that he was of the view that the master and crew were not included within the term 'agents' in s 78(4), unless they were specially instructed by the assured to sue and labour.[138] But now that the 'servants' of the assured are expressly included in the clause, it would be extremely difficult to support this interpretation of the clause.[139]

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133 (1879) 4 App Cas 755 at p 765. In similar terms, Lord Hatherley (at p 768) said: '... 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'.

134 *The Policy of Marine Insurance* (1875, 2nd edn), p 57.

135 See cl 11.3 of the ITCH(95) and cl 9.3 of the IVCH(95), and cl 17 of the ICC.

136 Under the old SG policy, the wording was 'the assured, their factors, servants and assigns'.

137 [1972] 2 Lloyd's Rep 187.

138 It has to be said that the endeavour of the trial judge was to reconcile the apparent conflict between ss 55(2)(a) and 78(4) of the Act.

139 See O'May, p 328.

That the person who has incurred the expense for suing and labouring has to fall within the description of one of the classes listed is well illustrated in *Uzielli v Boston Marine Insurance Co*.[140] The party ('A') who had incurred the expenses of floating of the ship was not the plaintiff, but a re-insurer with whom the plaintiff had taken out a policy. As 'A' was neither a factor, servant, nor an assign of the plaintiff, who was himself a re-insurer, but an assured in a policy of reinsurance upon a reinsurance with the defendants, he was unable to seek reimbursement for the suing and labouring expenses incurred. A strict interpretation was adopted by the Court of Appeal. Likewise, in *Aitchison v Lohre*[141] the House of Lords ruled that salvors, when acting on the maritime law, were not labouring as agents of the assured.

An insurer who has taken upon himself the initiative to sue and labour would not be able to claim (or counterclaim) for such expenses incurred from the assured. The reason for this being, said Mr Justice Kennedy in *Crouan v Stanier*[142] that '... the underwriters did what the assured might have done himself, and the cost of which, if he had done it, he would have been entitled to recover from the underwriters ...'.[143]

It has to be pointed out that the word 'assured' (not shipowner) used in s 78(4) would include a mortgagee who has taken up a policy of his own (as opposed to an assignment) to protect his interest. As such, unless the policy otherwise provides, it would seem that he also has a duty to sue and labour.

TO AVERT OR MINIMISE A LOSS

The whole concept of sue and labour is based on the 'stitch in time' approach.[144] The word 'minimise'[145] implies that some damage (caused by an insured peril) has already been sustained by the subject-matter insured. In such a situation, the assured, their servants or agents would have to take action to prevent the partial loss from turning into a total loss.[146] The word 'avert', however, means to prevent (or ward off) a loss from happening, thus an assured does not have to wait for damage to occur to take action.

But in either event, the subject-matter has to be in danger of loss (of a type which is covered by the policy). There has to be an anticipation of a 'loss or misfortune'. These words, which appeared in the SG policy, have been adopted by cl 11.1 of the ITCH(95) and cl 9.1 of the IVCH(95). A casualty or accident

140 (1884) 15 QBD 11, CA. For criticisms of this decision, see *British Dominions General Insurance Co v Duder* [1915] 2 KB 394, and *Western Assurance Co of Toronto v Poole* [1903] 1 KB 376.

141 (1879) 4 App Cas 755.

142 [1904] 1 KB 87 at 91.

143 See also *Buchanan v London & Provincial Marine Insurance Co* (1895) 65 LJ QB 92.

144 *Per* Lord Justice Dillion's in *Integrated Container Service Inc v British Traders Insurance Co Ltd* [1984] 1 Lloyd's Rep 154 at p163, CA.

145 It is observed that s 78(4) uses the terms 'averting or minimising', whereas s 78(3), 'averting or diminishing'. Whether anything could be made of this is doubtful. Unless a different meaning is intended, it would be better for consistency if the same term was used for both subsections.

146 A failure so to do might disentitle them of the right to claim for the loss.

must have arisen whereby the insured property is exposed to damage or loss by a peril insured against.

If illustrations are needed to show what sue and labour entails, the facts of *The Pomerian*[147] and *Kidston v The Empire Marine Insurance Co*[148] are particularly suitable. In both cases the expenses incurred were held recoverable. In the former, the policy was on live cattle for 'all risks of shipping and until safely landed'. During the course of the voyage, the plaintiffs had to pay for extra fodder supplied to the cattle whilst the vessel in which they were shipped was detained in a port of refuge for necessary repairs. In the second case, goods wetted in a storm which, if not dried out when the damage was slight, would decay and become even more damaged. *Irvin v Hine*,[149] however, affords a good contrast to the above cases. The plaintiff, who had refused to have a survey in dry dock, was held not to have been in breach of any duty laid down on him by s 78(4). Such a survey, said the judge, 'would not avert or minimise the loss but would merely ascertain its extent'.

The Institute Cargo Clauses contain an additional provision connected with carriage: by cl 16.2 the assured, their servants and agents have to ensure that 'all rights against carriers, bailees or other third parties are properly preserved and exercised'.

LOSS COVERED BY THE POLICY

Section 78(3) declares in negative terms that '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'. The same principle is reiterated in the Clauses, but couched in more positive language. Clause 11.1 of the ITCH(95) states that measures need only be taken to avert or minimise a loss which 'would be recoverable under this insurance', and cl 16 of the Cargo Clauses, 'in respect of loss recoverable hereunder'.

There are clearly two aspects to this rule. First, the effort made must be to avert or minimise a loss caused by a peril insured against. Secondly, and less obvious, the type or nature of loss (whether total or partial) has to be one covered by the policy.

Loss caused by insured peril

Naturally, any expense incurred to avert or minimise a loss caused by inherent vice or nature of the subject-matter insured, which is not a peril insured against, would not be recoverable. The authority for this is *Berk v Style*,[150] where the cost for rebagging a cargo of kieselguhr, packed in paper bags, which broke and

147 [1895] P 349.

148 (1866) LR 1 CP 535; 2 CP 357 (Ex Ch), hereinafter referred to as *The Kidston Case*.

149 [1950] 1 KB 555.

150 [1956] 1 QB 180.

burst during the voyage, was held not recoverable. Any costs expended to avert or minimise a loss occasioned by delay would suffer the same fate.[151]

In an 'all risks' policy, however, the scope to sue and labour is naturally greater. This is demonstrated in *Integrated Container Service Inc v British Traders Insurance Co Ltd*,[152] where extraordinary costs were incurred by the assured in order to retrieve his containers, the subject-matter insured, which he had leased to a third party who later became a bankrupt. As the containers were abandoned – scattered at various places over the Far East – they were at risk of theft, misuse, enforcement of a lien, and of loss or damage from some cause or another. The insurers' defence was that the risk of a lawful sale of the containers by a person who has, under local law, a power of sale to recover unpaid port, harbour dues or warehouse charges was not a risk covered by the policy. This contention was roundly rejected by Lord Justice Dillion who could see no reason why, as the policy was for 'all risks', the risk of lawful sale by a third party should be excluded. He went so far to say that:[153] 'The plaintiffs effectively lose their containers whether the sale is lawful under a lien – port regulations or a process of judicial execution – or unlawful'. The 'all risks' policy saved the day.

Type of loss

Unless the policy otherwise provides, both partial and total losses are insured in a standard form policy. An insurance against a total loss only can be achieved by the insertion of the 'warranted free from particular average' clause. Whether such a clause can affect the right of the assured to recover expenses for sue and labour has to be considered.

'Warranted free from particular average'

In marine insurance, the term 'particular average' is often loosely used to refer to a partial loss. Its nature is clarified by s 64(1) as follows: 'A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss'. In marine insurance, the expression 'warranted free from ...' denotes an exception of liability. Though the word 'warranted' is used, it is not a promissory warranty in the sense of a contractual term which has to be strictly complied with.[154] Read together, it means that (with the exception of general average) the insurer is not liable for a partial loss, or more accurately a particular average loss.

A degree of confusion is evident in this area of law. First, it was at one time thought that any expenses incurred for suing and labouring, regardless of whether the action taken was to mitigate a partial or total loss, is excluded if a

151 See s 55(2)(b); *Weissburg v Lamb* (1950) 84 Ll L Rep 509; and *Meyer v Ralli* (1876) CPD 358.

152 [1984] 1 Lloyd's Rep 154, CA.

153 *Ibid*, at p 162

154 For a discussion on warranties, see Chapter 7.

policy contains a 'free from particular average' warranty.[155] Secondly, it has been argued that in a policy containing a 'warranted free from particular average' clause, suing and labouring expenses is recoverable only if the effort expended was to avert or minimise a 'total' loss; any costs incurred to avert or minimise a 'partial' loss would not be recoverable by reason of the fact that the loss is not one 'covered by the policy'. As the answer to both these questions revolves around the same cases, namely, *The Great Indian Peninsular Railway Co v Saunders*,[156] *Booth v Gair*,[157] *The Kidston Case*,[158] and *Wilson Brothers Bobbin Co Ltd v Green*[159] it is best that they be discussed together. In each of these cases, the expenses fell within what may be described as the 'travel'[160] part of the old clause where, by reason of a peril insured against, insured cargo left stranded at a foreign port had to be transported (to 'travel') to its proper destination.

With the exception of the fact that in one case the subject-matter insured was iron rails and in the other, bacon, the events occurring in the first pair cases are remarkably similar. In both cases, the policy contained a sue and labour clause and a 'free from particular average' warranty. As a result of exceptional weather, the insured cargo had to be landed, warehoused and reshipped to its proper destination. In each case, the extra costs (freight and ancillary expenses) incurred by the assured were the subject of the claim. The plaintiffs claimed that as the loss incurred was for suing and labouring, they were entitled to be reimbursed by the insurer. In both actions, the loss was held not recoverable. As the same judge, Chief Justice Erle, presided in both cases, it is not surprising that their outcome was also the same.

Both *The Great Indian Peninsular Railway Co v Saunders*[161] and *Booth v Gair*,[162] it is noticed, have been cited as authority for laying down the proposition that the presence of a 'free from particular average' warranty in a policy would render the sue and labour clause otiose. Curiously enough, Mr Justice Bray in *Wilson Brothers Bobbin Co Ltd v Green*[163] took the view that the former was 'decided upon the ground that the loss was a particular average loss, and the policy contained a warranty that it was 'free from particular average'.[164] This remark gives the impression that because a sue and labour expense is a type of partial loss, the assured is prevented from recovery by the warranty. He felt that

155 In *The Kidston Case* (1866) LR 1 CP 535; 2 CP 357 (Ex Ch), this issue was framed with admirable clarity by Willes J, who delivered the judgment of the court as follows: 'And this depends upon whether the expression "particular average" ... includes expenses which fall within the suing and labouring clause, so that in effect the suing and labouring clause is expunged by the warranty'.

156 (1862) 2 B & S 266. See also *Meyer v Ralli* (1876) CPD 358.

157 (1863) 33 LJCP 99.

158 (1866) LR 1 CP 535.

159 [1917] 1 KB 860.

160 Read as: '... to sue, labour, and travel for …'.

161 (1862) 2 B & S 266.

162 (1863) 33 LJCP 99.

163 [1917] 1 KB 860.

164 Similarly, in *Booth v Gair* (1863) 33 LJCP 99, counsel for the plaintiffs, citing *The Great Indian Peninsular Railway Co v Saunders* (1862) 2 B & S 266 as authority argued that the warranty exempted the underwriters from liability.

as the policy which he had to consider did not contain the warranty, he was able to distinguish them, and, accordingly, decide in favour of the assured.[165] If this is the only ground on which Mr Justice Bray had based his decision it would clearly, for more than one reason, be insupportable.

First, even if one were to assume that the basis of the decision of *The Great Indian Peninsular Railway Co v Saunders*[166] (and *Booth v Gair*[167]) was as described by Mr Justice Bray, it is no longer good law.[168] It cannot now stand in the light of the later decision of *The Kidston Case*,[169] where, in an endeavour to reconcile the warranty and the sue and labour clause, Mr Justice Willes held that the former 'does no more than limit the insurance to total loss of the freight by the perils insured against, without reference to extraordinary labour or expense which may be incurred by the assured in preserving the freight from loss ...'. The principle enunciated therein is now encapsulated in ss 76(2) and 78(1):[170] notwithstanding the warranty, expenses for suing and labouring are now clearly recoverable.

Secondly, with due respect, it is contended that Mr Justice Bray's interpretation of the judgment of *The Great Indian Peninsular Railway Co v Saunders* does not bear scrutiny. Closer examination will reveal that the said case was decided in favour of the insurer, not on the ground that the warranty excluded the operation of the sue and labour clause, but that the insured property was never at risk or in danger of loss when the expenses were incurred.[171] Whether this ground is itself sustainable is another matter which will be considered shortly.[172] But for the present, it is suffice to mention that Chief Justice Erle had in fact refused to consider the question whether sue and labour expenses fell within the scope of 'particular average', as he was of the view that the expense in question had 'nothing to do with the labour and travel clause'.[173] In *Booth v Gair*,[174] he expressed himself more clearly when he said that

165 He concluded that as there was no warranty in the policy, there was nothing to exclude the operation of the sue and labour clause.

166 (1862) 2 B & S 266.

167 (1863) 33 LJCP 99.

168 Arnould, at para 909 (in a footnote), wondered whether this point was appreciated in W*ilson Bros Bobbin Co Ltd v Green* [1917] 1 KB 860,which it is noted was decided after the passing of the Act.

169 (1886) LR 1 CP 535.

170 Section 76(2) states: 'Where the subject-matter insured is warranted free from particular average ... the insurer is nevertheless liable for ... expenses properly incurred pursuant to the provisions of the suing and labouring clause …'. Section 78(1): '... the assured may recover from the insurer any expenses properly incurred ... notwithstanding that the ... subject-matter may have been warranted free from particular average …'.

171 This was the interpretation given to the case and *Booth v Gair* (1863) 33 LJCP 99 by Willes J in *Kidston v Empire Insurance Co* (1866) LR 1 CP 535; and by Gorell Barnes J, in *The Pomerian* [1895] P 349 at p 353, even though he felt some unease about the finding of fact in *Booth v Gair*. Thus, Arnould's remarks, at para 909 in fn 20, that: 'The explanation of these decisions is that in neither case were the goods, at the time when the expenditure was incurred, in danger of any loss, total or partial, from an insured peril' is correct.

172 See below.

173 *Ibid*, at p 274, he said: 'But all this is beside the question now before us, as these expenses have nothing to do with the labour and travel.'

174 (1863) 33 LJCP 99 at p 101.

there was 'no peril creating a risk of a total loss from which the underwriter was saved by the expenses in question'.

The real principle of law handed down by both *The Great Indian Peninsular Railway Co v Saunders*[175] and *Booth v Gair*[176] is that in relation to sue and labour, the warranty is relevant only for the purpose of defining the type of loss which the assured has to avert or minimise. As the warranty renders the insurance for liability for a total loss only, it follows that only expenses incurred to prevent the risk of a total (not partial) loss would be covered. 'The question,' said the Chief Justice, 'is, were these expenses incurred to prevent a total loss?'

Cargo insurance

Risk of loss of the adventure

The decision in both the above cases was based on the finding that, as the cargo was safely landed *in specie* and in the hands of the assured, they were no longer physically in danger of an impending loss. In *Wilson Brothers Bobbin Co Ltd v Green*,[177] counsel for the plaintiffs raised an interesting argument which regrettably was not given deeper and more serious consideration by the court. It was argued that *The Great Indian Peninsular Railway Co v Saunders*[178] was wrongly decided because it ignored the principle laid down in *The Sanday Case*[179] that what is insured is not only cargo, but also the venture. Mr Justice Bray had very little to say about *The Sanday Case*[180] except that nothing new was proposed in the case, and that, 'it was the law long before the passing of the Marine Insurance Act 1906 that what was insured in a policy of this kind on goods was their safe arrival at the port of destination.'[181] This can hardly be a helpful reply.

It is submitted that there is merit and substance in the argument raised by counsel. The principle, whether new or old at the time, should have been considered, if not applied, in the two cases. It cannot be denied that the venture would almost certainly be at risk of loss, if the cargo was left behind and not forwarded to its proper destination.

It is worthwhile remembering that a policy on cargo is not just to insure for its physical well-being, but also for its safe arrival at the proper destination. In this regard, an analogy can perhaps be drawn from a policy on freight. The nature of freight is such that it is itself physically incapable of being at risk, but the cargo to which the freight is 'attached' or dependent upon could be at risk. As such, if the cargo is not conveyed to its proper destination the freight would be lost.

175 (1862) 2 B & S 266.
176 (1863) 33 LJCP 99.
177 [1917] 1 KB 860.
178 (1862) 2 B & S 266.
179 [1916] 2 KB 156, HL.
180 *Ibid*.
181 [1917] 1 KB 860 at p 865.

In *The Kidston Case*,[182] the policy was for chartered freight. During the course of the voyage, the ship encountered severe weather and was so badly damaged as not to be worth repairing. The cargo of guano, having been safely landed and warehoused, was later forwarded to its proper destination, for which the plaintiffs had to pay freight, landing, warehousing and reloading charges. When the cargo finally arrived at its proper destination, the plaintiffs (the assured) were paid the chartered freight. They brought this action to recover from the freight-insurers the expenses of transhipment and forwarding. As they did not suffer any loss (partial or total) of freight, the claim was preferred as a 'particular charge'. Mr Justice Willes held that the loss was recoverable as sue and labour because:

> '... they represented so much labour beyond and besides the ordinary labour of the voyage, rendered necessary for the salvation of the subject-matter of insurance, by reason of a damage and loss within the scope of the policy, the immediate effect of which was that the subject-matter insured would also be lost, or rather would never come into existence, unless such labour was bestowed.'

Like an assured of any other insurable property, an assured of freight is also under a duty to take reasonable steps to avert or minimise a loss. In fact, if it is possible and reasonable so to do, he has no option but to tranship and forward the cargo to its proper destination in order that freight be earned. He can then charge the insurer with the expenses he had incurred. It cannot be denied that the actions taken by the plaintiffs did prevent a loss of adventure of the cargo which in turn prevented a loss of freight. Viewed in this light, the decision of the first pair of cases is surely open to question.

Effect of transhipment

The liability of the insurer is in such a case specifically preserved by s 59 and cl 12 (the forwarding charges clause) of all the ICC. Furthermore, the transit clause (cl 8) of all the ICC provides that the insurance shall remain in force during 'forced discharge, reshipment or transhipment ...'.

REASONABLE MEASURES

Section 78(4) states that the measures taken by the assured for the purpose of suing and labouring must be 'reasonable'. This means that he would have to take into account all the circumstances of the case when assessing not only whether he ought to take any action, but also the course of action, if any is to be taken, for the purpose of averting or minimising a loss.[183] In *The ICS*,[184] it was queried whether the test of probability was to be applied.[185] This issue was

182 (1866) LR 1 CP 535.

183 See *Meyer v Ralli* (1876) CPD 358, where charges incurred in order to warehouse a cargo of rye for more than a year was not recoverable.

184 [1984] 1 Lloyd's Rep 154 at p 158, CA.

185 This notion was taken from a remark made by Brett LJ, in *Lohre v Aitchison* (1878) 3 QBD 558 at p 566, where he said that: 'If by perils insured against the subject-matter is brought into such danger that without unusual or extraordinary labour or expense a loss will *very probably* fall on the underwriters …' [emphasis added].

swiftly dismissed by Lord Justice Eveleigh who was clear that: '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.'[186] The criterion, he said, was to be found in the wording of s 78(4) which imposed:

> '... a duty to act in circumstances where a reasonable man intent upon preserving his property, as opposed to claiming 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.'

In *Stringer and Others v The English and Scottish Marine Insurance Co Ltd*,[187] the plaintiffs could have prevented the sale of their cargo ordered by the Prize Court by depositing the full value of the goods. The court was of the view that it can seldom be reasonable to require an assured to adopt such a course of action, especially in a foreign court and country Thus, it was held that their refusal to make the payment did not constitute a breach of their duty to sue and labour.

ADDITIONAL COVERAGE

That sue and labour expenses are recoverable 'in addition' to any claims recoverable under the policy is clarified not only by the Institute Clauses, but also by s 78(1), which stresses that the engagement to sue and labour is 'supplementary to the contract of insurance' and that '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.'[188] The same holds true even if no loss whatsoever is sustained by the subject-matter insured. This is demonstrated in *The Kidston Case*[189] where, even though full freight was earned, as the cargo was forwarded to its proper destination in another vessel, the costs incurred to land, warehouse and forward the cargo was held recoverable under the suing and labouring clause.

There is, however, under the Institute Hulls Clauses an express limit as to the amount which may be recovered as sue and labour. The ceiling prescribed by cl 11.6 of the ITCH(95) and cl 9.6 of the IVCH(95) is that, 'in no circumstances' should it 'exceed the amount insured under this insurance in respect of the vessel'. Even without a fixed limit, it would indeed be difficult to argue that an expense in excess of the insured value of the vessel is 'reasonably incurred'. In the event of a total loss, the maximum amount which an insurer can be made liable, taking into account sue and labour charges, is twice the insured value of the vessel. But having said this, it has to be noted that the liability of the insurer has to be apportioned according to the normal rule of marine insurance: the

186 [1984] 1 Lloyd's Rep 154 at p 158, CA.

187 (1869) LR 4 QB 691; (1870) LR 5 QB 599, CA.

188 See s 78(1) and *Dixon v Whitworth* (1879) 40 LT (NS) 365; 4 Asp MLC 327 (CA): *per* Lindley LJ: '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'.

189 (1866) LR 1 CP 535.

share he has to bear is proportionate to the amount which he has underwritten to the whole value of the property or interest insured.[190]

As no fixed limit is set by the ICC, the test of reasonableness must apply. In *Lee and Another v The Southern Insurance Co*,[191] a cargo of palm oil was landed at an intermediate port when the ship in which it was carried stranded. The assured could have re-shipped the cargo to its proper destination in another ship for £70, but instead chose rail as the means of transport at three times the cost. The court held that, as the reasonable course to adopt was to have them re-shipped in another vessel, the proper measure of liability of the underwriters was £70. Similarly, in *Wilson Brothers Bobbin v Green*,[192] the assured was only allowed recovery for a lower freight rate, the amount they would have paid if the cargo was reshipped earlier.

BREACH OF DUTY TO SUE AND LABOUR

It is indeed unfortunate that neither the Act nor the Clauses has spelt out the legal consequences for a breach of the duty to sue and labour. There are two aspects to this problem which require separate attention. The position where the assured is himself guilty of negligence will first be examined, followed with a discussion of the case where the master or crew has failed to take action to avert or minimise a loss.

Negligence of the assured

An assured may be guilty of negligence (or even wilful misconduct depending on the facts of the case) should he instruct his servants or agents not to sue and labour, or prevent them from so doing, when the circumstances clearly warrant that such action be taken. Whether an assured may recover for the loss in such a case largely depends upon what the court regards as the proximate cause of loss. If a judge were to find negligence or the wilful misconduct of the assured as the proximate cause the loss would not be recoverable, as neither causes of loss is insured against.[193]

To illustrate this point, reference should be made to the facts of two rather ancient cases, namely, *Currie and Co v The Bombay Native Insurance Co*[194] and *Tanner v Bernett*,[195] which are particularly relevant for this purpose. In the former, the cargo policy was for a total loss only. The ship in which the cargo was carried was wrecked and the master (who was an uninsured part-owner but was left in control of everything by the assured) was advised by various

190 See cl 11.5 of the ITCH(95) and cl 9.5 of the IVCH(95). Note the addition of the exclusion of special compensation and expenses referred to in cl 10.5 of the ITCH(95).

191 (1870) LR 5 CP 397.

192 [1917] 1 KB 860.

193 If a loss would have happened in any event, regardless of whether suing and labouring measures were or were not taken by the assured, then, any negligence committed by the assured in not taking action is unlikely to be held as the proximate cause of loss.

194 (1869) 6 Moo PC (NS) 302.

195 (1825) Ry & M 182.

surveyors to take steps to save the cargo. He refused to take heed of this advice and consequently the wreck of the vessel and her cargo were auctioned. The assured brought an action to recover for a total loss of the cargo but failed in his claim because he was unable to prove a loss by an insured peril.

After taking note of the fact that the captain, acting for the assured, had chosen not to make the slightest attempt to save the cargo, whose exertions might have saved a portion of it, the court asked: '... how can the assured recover from the underwriters a loss which was made total by their own negligence?' The crux of the decision lies in the following statement delivered by the court:[196]

> 'This omission of the captain to take any steps towards saving the cargo, at a time when it was probable that his endeavours would be successful, in their Lordships' judgment, precludes the assured from claiming for a total loss of the cargo into whatever condition it might have been brought afterwards.'

The decision could be interpreted in two ways. First, it could be said that, as the servants of the assured had blatantly and without cause refused to take preventive measures to save the cargo, the assured had committed a breach of their duty to sue and labour, and this in itself was sufficient to disentitle them of the right of recovery. In effect, the breach of duty to sue and labour was used by the insurer as a defence to resist the plaintiff's claim. Secondly, though not said in so many words, it could also rest on the ground of causation: the careless behaviour of the master had not only converted what would otherwise have been only a partial loss into a total loss, but had also rendered negligence as the proximate cause of loss. And as neither the negligence of the assured nor that of the master or crew operating as the proximate cause of loss was a peril insured against under the policy, the loss was not recoverable.

Similarly in *Tanner v Bennett*,[197] the master of the ship should have had her repaired after she had received damage by striking on a rock. However, because of the negligence of the master and the resident agents of the owners, she was not repaired and had to be sold as fire-wood. From the somewhat brief and vague report, it would appear that, due to the negligence of these persons, the assured was not allowed to claim under the policy for a total loss. They were, however, offered indemnity for a partial loss by the court; but as they were unable to show its extent, they were awarded only nominal damages.

In both cases, it is to be noted that crew negligence was not an insured peril. Such cases would now have to be considered in the light of s 55(2)(a) and cl 6.2.2 of the ITCH(95) and cl 4.2.2 of the IVCH(95). The question is: would a failure by the master to take such measures as may be reasonable to avert or minimise a loss militate against his owner's claim against his insurers? Whether an insurer has the right to sue for damages, counterclaim, or raise the breach of

196 (1869) 6 Moo PC (NS) 302 at p 317.

197 (1825) Ry & M 182.

the duty to sue and labour as a (complete or partial) defence[198] to a plaintiff's claim is unclear.[199] The best account of the legal position can be found in *The ICS*, where Lord Justice Eveleigh said that:[200]

> 'While it is not possible to state with certainty all the adverse consequences which will be suffered by an assured who fails to perform his duty under the sue and labour clause, there is no doubt that he incurs a risk of his claim for loss or damage being rejected in whole or in part if it can be show that he failed to act when he should have done.'

As the legal position is uncertain it would be advisable for an insurer to plead the breach of the duty to sue and labour in the alternative, as a defence or counterclaim.[201]

It is necessary here to be reminded of the doctrine of utmost good faith, which underlines every contract of insurance. An assured who unashamedly without good cause refuses to sue and labour when the circumstances of the case cries out for preventive measures to be taken can hardly be described as having acted in good faith. If the utmost good faith be not observed, an insurer may avoid the contract.[202] Furthermore, his conduct, though passive, is no better than that of conniving to scuttle the ship. A court could well be persuaded to hold that such an act constitutes wilful misconduct. By s 55(2)(a), an insurer is not liable for any loss 'attributable' to the wilful misconduct of the assured.

Negligence of the crew

The inter-relationship between all these provisions is indeed complex. The inconsistency, it would appear, lies in the fact that on the one hand, s 78(4) and cl 11.1 of the ITCH(95) and cl 9.1 of the IVCH(95) have imposed a duty to sue and labour on the assured, their servants and agents, and on the other, s 55(2)(a) and cl 6.2.2 of the ITCH(95) and cl 4.2.2 of the IVCH(95) have provided coverage for a loss which 'would not have happened but for the misconduct or negligence of the master or crew' and for a loss (proximately) 'caused by negligence of master

198 In *Currie v Bombay Native Insurance Co* (1869) LR 3 PC 72, if proper measures for preventive action were taken, the partial loss would not have become a total loss. The insurer's plea of negligence was held a complete defence to the plaintiff's claim: as they could not be made liable for a partial loss by reason of the 'free from particular average' warranty, there can be no question of a set-off. See also *Meyer v Ralli* (1876) 1 CPD 358. *Cf Tanner v Bennett* (1825) Ry & M 182 where, on similar facts, the insurers were held liable for a partial loss: the court was able to make this order because there was no 'free from particular average' warranty in this case. The same defence proved to be only partially effective.

199 Arnould, at para 770 in fn 96, states that 'there can be very few cases where it matters whether the insurer's right is one of defence or of counterclaim'. In *The Gold Sky* [1972] 2 Lloyd's Rep 187 at p 221, Mocatta J, by way of *obiter*, expressed the view that a breach of s 78(4) gives a right to set-off or counterclaim. In the final analysis, it would operate as a complete defence: for if the plaintiff is liable to pay to the defendant damages, it would most probably be the amount which they would have to indemnify the plaintiffs for the damage or loss sustained by the subject-matter insured.

200 (1984) 1 Lloyd's Rep 154 at p 157, CA.

201 As was done in *The Gold Sky* [1972] 2 Lloyd's Rep 187.

202 Section 17. For a discussion on good faith, see Chapter 6.

officers crew or pilots' respectively. Are they reconcilable?[203] Various suggestions have been put forward to resolve this anomaly.

First, in *The Gaunt Case*,[204] the relationship between cl 6.2.3 of the ITCH(83) (now cl 6.2.2 of the ITCH(95)) and s 78(4) was raised by counsel, but was dismissed without much discussion. The insurers had pleaded that they were not liable by reason of s 78(4), because the assured had neglected to take precautions to protect the goods from the wet. Needless to say, this line of reasoning, if upheld by the court, would negate the scope of not only cl 6.2.3 of the ITCH(83), but also s 55(2)(a). Lord Sumner was the only judge who was prepared to express his thoughts on the subject. He said:

> '[s 78(4)] 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 contribute.'

In *Lind v Mitchell*,[205] even though s 78(4) was not pleaded as a ground of defence, Lord Justice Scrutton nevertheless felt that he had to comment on the unreasonable conduct of the master. After expressing his approval for the above remarks, he added that:

> 'There has been negligence of the master, not negligence of the assured. There has been negligence of the master which has resulted in the *continuing action of a previously existing peril* of the sea. Now, in my view, that is covered, if it were necessary to cover it, by cl 8 of the Institute Time Clauses[206]... Now if it were true – and I do not think it is – that under the existing law but for that clause you would treat the direct cause of the loss as being the premature abandonment and not the entry of sea water from a *previously existing peril*, in my view that clause requires the underwriters to pay where the negligence of the master has caused the loss of the ship.'

These remarks may initially appear to be somewhat obscure, but there are clearly two sides to it. First, Lord Justice Scrutton was of the view that even though the master had acted negligently and unreasonably in abandoning the ship prematurely the proximate cause of the loss was, nonetheless, contrary to the then popular opinion, still a peril of the seas and, as such, was recoverable. In this sense, it was unnecessary to invoke the negligence clause. Secondly, if perils of the seas was not the proximate cause of loss, there was cl 8 (now cl 6.2.2 of the ITCH(95)) to rely on in order to render the insurer liable for the loss. Fortunately for the assured, he was covered on both counts. This necessarily means that, so long as the 'previously existing peril' continues to operate at the time of loss, the loss is recoverable in spite of the fact that the assured may have acted negligently in his response to the casualty. But how s 78(4) fits within this scheme of things, the judge, regrettably, did not explain.

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203 In *The Gold Sky* [1972] 2 Lloyd's Rep 187 at p 218, the problem was framed as follows: 'It is extremely difficult to give effect to s 78(4) if "the assured and his agents" is to include the master or other members of the crew, without negativing much of the cover given by s 55(2)(a) …'.

204 [1972] 2 Lloyd's Rep 187.

205 (1928) 45 TLR 54 at p 57, CA. Emphasis added.

206 Clause 6.2.3 of the ITCH(83) and now cl 6.2.2 of the ITCH(95).

In *The Gold Sky*,[207] counsel for the insurers argued that the master's refusal to accept salvage assistance from a tug standing nearby constituted a breach of duty to sue and labour. It was contended that s 78(4) imposed a general duty to take care throughout the risk. Such a construction of s 78(4) is clearly repugnant to s 55(2)(a). Mr Justice Mocatta found himself in difficulty when he took it upon himself (as it was unnecessary for him to do, having reached a decision on another ground) to answer the question as to how s 78(4) was to be reconciled with s 55(2)(a).

He found it 'difficult to believe that it [s 78(4)] was intended to cut down the effect of s 55(2)(a)'. One cannot help but feel that he had somehow forced his own hand into taking the stand which he did by holding that the word 'agents' did not include the master or crew. In actual fact, his true feelings and sentiments on the subject are contained in the following passage:[208]

> 'If a loss is recoverable by a shipowner owing to his master having unreasonably and negligently set a risky course whereby the ship has suffered a gash in her plating from a rock which should have been given a wide berth, why should the shipowner be unable to recover in respect of subsequent loss, whether total or partial, due to subsequent unreasonable and negligent conduct by the master such as, for example, continuing to his destination relying on the pumps coupled, perhaps with welding and the tightness of bulkheads, rather than putting into a nearby port of refuge for repairs?'

From this and an earlier remark he had made to the effect that it would be 'irrational' to nullify s 55(2)(a), all of which are *obiter*, it is clear that he felt strongly about the s 55(2)(a) and would go as far as he could to uphold its cover.[209]

Negligence before and after a casualty

Sections 78(4) and 55(2)(a)

Another way to resolve the conflict, proposed by Arnould, is to distinguish between negligence committed before and after a casualty. If effect is to be given to both ss 55(2)(a) and 78(4), it may be necessary to draw this line. He states: 'Another possible view is that s 55(2)(a) in the relevant part is concerned only with conduct before a casualty, and therefore does not conflict with s 78(4) which is concerned with conduct in response to a casualty'.[210] The purpose for making this distinction is to give each section its own respective sphere of coverage. This necessarily means that the moment a casualty arises, s 78(4) begins to operate and would prevail over s 55(2)(a): the assured would only be able to rely on s 55(2)(a) for negligence committed before a casualty arises, but

207 [1972] 2 Lloyd's Rep 187.

208 *Ibid*, at p 221.

209 As discussed earlier, it is now difficult to sustain this interpretation in the light of the current wording of cl 11.1 Moreover, unease is felt in several quarters as regards this ruling, as it has always been known both in the context of marine insurance and in contract of affreightment that a master has the duty to take proper measures after a casualty: see Arnould, para 770 and O'May, p 328.

210 In para 770 fn 85, Arnould criticised Scrutton LJ for having overlooked this distinction.

not after. Can the same divide be applied to the conflict between s 78(4) and the negligence cover of cl 6.2.2 of the ITCH(95) and cl 4.2.2 of the IVCH(95)?

Section 78(4) and the negligence cover (clause 6.2.2)

Surprisingly, Arnould states that this problem can be 'more easily resolved'. The problem, he said, would disappear 'if one applies the principle that the duty to sue and labour only arises when a casualty occurs'. He proceeded to say that: 'If negligent conduct takes place in response to a marine casualty, the underwriter is unable to rely on s 78(4) in answer to a claim for loss caused by such conduct, when it constitutes an insured peril.' But the point is, it is an insured peril regardless of when the negligent conduct took place. There is nothing in the wording of cl 6.2.2 to restrict its application one way or the other. Negligent conduct, whether it be committed in response to a marine casualty or not, is an insured peril under cl 6.2.2. Arnould, though not quite so explicit, is in effect advocating that the negligence cover of cl 6.2.2 prevails over s 78(4).

Neither s 55(2)(a) nor cl 6.2.2, however, contemplates a before and after casualty divide. In all fairness, it has to be said that Arnould notes that there is no solution which is 'wholly free from difficulty', and that 's 55(2)(a) does not admit of such a construction'.[211] The terms of both provisions are wide and general enough to cover all forms of negligence committed before and after the commencement of a casualty by master or crew.

Proximate cause of loss

Another method which has been canvassed to circumvent this conflict is to apply the rule of causation. Of all the suggestions, Arnould finds this the most 'satisfactory', but again warns that it is also not free from objection.[212] As crew negligence is now an insured peril, there should not be any problems in so far as the assured is concerned: if a negligent response to a casualty is held the proximate cause of loss, the assured is covered by cl 6.2.2; and if it is held as a remote cause of loss, s 55(2)(a) would render it inconsequential. In either case the assured is protected. In fact, the legal position as described by Lord Justice Scrutton in *Lind v Mitchell*[213] is not far from the truth. He demonstrated in his speech, cited earlier, that the assured has nothing to lose. Thus, whether the 'previously existing peril' or the subsequent act of neglect is the proximate cause of loss, the assured is covered. The only obstacle placed in the way of the assured is the due diligence proviso to the negligence cover. In the case of cl 4.2 of the IVCH(95), the assured would be denied the right of recovery if the loss or damage had resulted from the want of due diligence on his part, as the 'assured' or of the 'owners or managers'. The ITCH(95), however, has extended 'due diligence' to include also, 'superintendents or any of their onshore management.'[214]

211 See Arnould, para 770.

212 Arnould, para 770, footnote 96.

213 (1928) 45 TLR 54, CA.

214 The due diligence proviso is discussed in Chapter 12.

If the proximate cause of loss is not an insured peril, there is also no problem, as then the negligent response of the master or crew to the casualty is irrelevant, for there is no duty to avert or minimise a loss which is not covered by the policy.

Returning to the subject of the proviso, there is, however, another problem which has to be mentioned. As discussed earlier, it is not unknown for an assured, especially a shipowner, to act as master or crew of his ship.[215] But unlike the issue relating to negligent navigation where the nature of the assured's conduct – whether acting in the capacity as owner or master – can be more easily identified, it is not possible here to draw such a distinction. Even though he (the assured) may, whilst acting as master or crew, be protected by the negligence cover of cl 6.2.2, he would, as the 'assured' have difficulty in satisfying the terms of proviso.

These 'extremely interesting and difficult matter of law arising under s 78(4)'[216] have to be addressed. That there is no simple solution is obvious. But now that all the issues have been aired, it is up to the insurance market, if it wishes to resolve the conflict, to decide which course of action to take. The insertion of a clause, similar to a paramount clause, declaring the provision which is to prevail would be helpful. The matter would one day have to go to court to be resolved.

215 See Chapter 9.

216 *Per* Mocatta J in *The Gold Sky* [1972] 2 Lloyd's Rep 187 at p 217.