



An introduction to

Hull Claims

Foreword

The purpose of this booklet is to give an initial introduction to marine hull claims, and the role that average adjusters play in these. It assumes some knowledge of general insurance terminology but is intended for those encountering the marine hull side of the business for the first time.

The booklet can also be used as a first stage of study for the Associate level examinations of the Association of Average Adjusters, further details of which can be found on the website at www.average-adjusters.com.

Additional material on marine insurance and shipping topics can be found in the “Publications” section of our website at www.rhlg.com

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June 2018

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Introduction

The nature of ships and the trades they ply gives rise to a wide variety of risks and exposes both the ship itself and those that run them to a multitude of different types of losses.

Marine hull insurance, possibly the oldest type of insurance, steps in to combat the effect of these losses, and is a means by which shipowners can manage their risk.

The law and practice of marine insurance has developed over centuries in order to meet the requirements and expectations of those engaged in shipping.

The subject matter of these insurances (ships, commodities, liabilities and other related financial losses), require detailed knowledge of the history and development of the various types of insurance, as well as a good commercial understanding of the business in which the ships are engaged.

Average adjusters are well versed in all aspects of marine insurance and as such are well placed to understand the issues that might require consideration when a casualty occurs, and the principles that are to be applied in order to quantify the claims that subsequently arise.

This booklet is designed to give an introductory insight into shipping generally, the various types of insurances available in relation to ships and lastly the adjusting of claims and the general claims process.

For a more in-depth introduction to general average, etc. reference is requested to the other publications available on our website.

Ship types and trades

1. General

During the 20th Century ships became increasingly specialised. In order to achieve the maximum economy and efficiency in operation the ship had to be designed to meet the needs of a particular trade.

2. Tonnage

The number of different ways to describe the size of a vessel can be confusing. The main terms used are as follows:

Gross/Net Tonnage (GRT, NRT):

Nothing to do with weight as such, these tonnages reflect the internal volume of a vessel. Gross tonnage relates to the total internal volume of the vessel, whereas net tonnage relates to the volume actually available for cargo. In this context, 1 ton equals 100 cubic feet.

Deadweight Tonnage (DWT):

This refers to the weight a vessel can carry and may be refined as DWAT meaning Deadweight All-Told, i.e. including not only cargo, but fuel, water, stores and equipment or DWCC (deadweight cargo capacity) which deals with the cargo lifting capacity only.

Light Displacement Tonnage (LDT):

This is the physical weight of the vessel and is the measurement used when a vessel is sold for scrapping.

3. Types of Vessel

a) Tankers

Oil is generally carried between the main centres of production and consumption in VLCC's (very large crude carrier) or ULCC's (ultra large cargo crude carrier) the largest of which is some 458 metres long. A VLCC has a DWT capacity of between 150,000 to 320,000 tonnes, with ULCC's going up to 555,000 tonnes. The older single hull tankers have now been phased out in favour of double hull tankers, which are less likely to cause environmental damage in the event of a casualty.

b) Bulk carriers

Bulk carriers are the real work-horses of international trade, providing raw materials in large quantities at low unit costs. They are often referred to by size, and set out below are a few examples of the different sizes of bulk carrier:

Handysize/ Handymax	up to 60,000 DWT
Panamax	previously the largest size able to pass through the Panama Canal, about 65,000 DWT.
Neopanamax	Largest size that can now pass through the Panama Canal following major works to widen the locks etc., about 120,000 DWT.
Capesize	150,000 DWT upwards
Valemax	380,000 DWT upwards

The largest bulk carrier in service has a deadweight capacity of around 564,000 tonnes and a length of 458 metres.

c) Container Ships

Container ships are usually described by reference to the number of 20 foot containers they can carry or “TEU”, which stands for twenty foot equivalent unit. Thus a 11,000 TEU container ship is a large vessel with about 155,000 tonnes DWT capacity that will be used between major ports. Containers may then be carried on by smaller feeder vessels. Containers come in a variety of different types and sizes, the most common being the 40 foot dry van (FEU).

Much of the container trade is dominated by consortia of owners who pool their vessels to improve economies of scale and service frequency. Under slot charter agreements, each consortium member is allocated a number of container spaces or “slots” for each sailing.

The largest container ships currently sailing have a capacity of approximately 21,000 TEU.

d) Gas Carriers

There are two main types:

- *Liquefied natural gas (LNG) - methane, ethane and ethylene.*

Cargo tanks are heavily insulated to reduce boil off of the product, which is carried at around -160oC. Generally powered by steam turbines which use the boil off as part of their fuel supply.

- *Liquefied petroleum gas (LPG) - propane, propylene, butane and butylenes.*
LPG is carried in a refrigerated or pressurised condition in heavily insulated tanks.

Gas carriers are expensive vessels to build and, particularly with LNG ships, the investment is usually only undertaken with a specific long term contract in mind.

These ships have an excellent safety record, but when repairs are required they are often very expensive because of the materials used in their construction.

e) Products/Chemical Tankers

These are used for carrying cargoes such as naphtha and a host of other chemicals, many of which can be highly aggressive and/or toxic, so that specially coated or stainless steel tanks are required.

f) General Cargo

Once the work – horse of international trade, much of the general cargo vessel's work has been taken by the container ships. The holds of a general cargo vessel are often subdivided into "tween decks" so that the type is often referred to as a "tween decker". Such vessels are still used for bagged commodities and items not suitable for containerisation, or in areas where port infrastructure is less sophisticated.

g) Specialist vessels

The list is almost endless and includes everything from tugs, dredgers and other port related craft, to fishing vessels, heavy lift, and energy industry vessels such as pipe layers and seismic survey craft.

Commercial operations

1. General

The shipping industry is often cited as an example of a pure market that is driven by supply and demand. As demand increases, freight and hire rates improve, encouraging owners to invest in new tonnage. If too much new tonnage becomes available, demand weakens and earnings fall. When earnings fall far enough, owners may scrap vessels or lay them up, thus reducing supply and strengthening demand again.

The cycle also creates rapid changes in the second hand values of ships, and over the years many owners have made more money by shrewd “asset play” (buying and selling their ships to best advantage) than ordinary trading in indifferent freight markets.

2. Types of Charter

Some terminology:

Hire: is the amount paid on a daily basis for a specified period.

Freight: is the amount paid for carrying a particular cargo from A to B.

Passage money: the amount paid by a passenger for transport from A to B or for a cruise.

Time Charter: under a time charter, the charterer hires the vessel (and its crew) for a period of time, for which he pays an agreed amount per day - i.e. time charter hire, and also supplies the vessel's fuel or “bunkers”. These kind of contracts can vary in the periods they cover but are often for one year and then renewed.

Voyage charter: under a voyage charter, the charterer hires the vessel and its crew for a specific voyage or possibly series of voyages. Under a voyage charter the shipowners earnings are voyage freight, which is usually based upon the quantity of cargo carried and not on a daily hire figure. It may be earned on loading or it may be payable on right and true delivery.

Sub-charter: a vessel may be time chartered by one person who may in turn sub charter her to another for a voyage. In other words, there is one contractual relationship between the shipowners and the time charterer and another

between the time charterer and the voyage charterer. In some cases there may be several layers of sub-charter on time or voyage terms.

Bareboat charter: under a bareboat charter the owner simply hires out the vessel and nothing else. The charterer is responsible for manning, insurance and all operating costs. These types of charter tend to be for longer periods, and are often in excess of 10 years.

The overall position could therefore be as follows:

A = shipowner.

A bareboat charters to B for 5 years.

B (bareboat charterer) time charters to C for one year.

C (time charterer) voyage charters to D for single voyage.

3. Bills of Lading

This is a document used in the majority of cases for carriage of goods by sea and has three main functions:

- i. It acts as a receipt for the cargo which is issued by the carrier. If the goods are not received in good condition the Bill of Lading may be “claused” to reflect this.
- ii. It is evidence of the terms of the contract of carriage.
- iii. It is (to a limited extent) a document of title that also gives the right to claim possession of the cargo at destination and the right to sue under its terms.

Prior to 1924, the shipowner’s liability for any damage that occurred to cargo was often very limited, since he was free to include wide exclusion clauses in his Bill of Lading. Since that date, a series of international conventions - the Hague Rules, Hague-Visby Rules, Hamburg Rules and the Rotterdam Rules have been introduced to provide more uniformity, and a more equitable balance between ship and cargo’s rights and liabilities.

Risks and insurance

The areas of risk that a shipowner is exposed to can be dealt with under the following main headings.

1. Hull and Machinery

The shipowner will want to protect the basic value of the vessel on his company balance sheet against total loss, and any bank financing a vessel will insist on this - Hull and Machinery cover of some kind is therefore essential.

With premium rates generally low, the shipowner will usually wish to insure against partial losses which could be detrimental to his cash flow and profitability. Some owners choose to retain a significant portion of this risk by opting for high "each accident" deductibles or by using an annual aggregate fleet deductible.

The policy conditions under which shipowners insure their vessels vary greatly, but the most common insurance conditions in use today are the Institute Time Clauses - Hull 1/10/83, American Institute Hull Clauses and the Nordic Marine Insurance Plan.

2. War Risks

Shipowners can supplement their conventional hull and machinery cover with a policy insuring against damage caused by war risks. As the name of the cover suggests, this insurance responds to loss of or damage to the vessel caused by war and extends to perils such as piracy, capture, seizure, riots, etc. Importantly, the traditional war risks clauses also cover damage caused by terrorism or people acting from a political motive.

The Institute War and Strikes Clauses also include a 'detainment' clause which effectively provides that insurers will pay for a total loss in the event that the vessel has been captured, seized, arrested, detained, etc. for a period of 12 months.

3. Loss of Earnings

Any serious physical damage to a vessel may mean that it is unable to earn hire or freight for an extended period of time. Although the cost is relatively high compared to Hull and Machinery premiums, many owners take out 'Loss of Hire' insurance (LOH). After a deductible period (typically 10-14 days) the policy

usually pays a fixed daily amount while the vessel is under repair.

The two most common forms of LOH cover are:

- ABS Clauses 1.10.83.
- Nordic Marine Insurance Plan.

Although the basic principles are straightforward, LOH claims can in practice be complex, particularly when damage repairs are carried out simultaneously with Owners' work.

Specialist vessels might take out more specific forms of financial loss cover, for example cruise ships will invariably insure against loss of passage money (from paying customers).

4. Liabilities

Generally, shipowners' operating liabilities are insured by Protection & Indemnity Clubs which are mutual insurers.

Mutuals insure groups who have a more or less similar interest, and who bring a similar risk to the group. In the case of P&I Clubs, the group is made up of shipowners, and they bring to the mutual the risk of liability to third parties. In a mutual each party contributes to a pot of money, which is used to pay the insured claims. The same principle lies behind commercial insurance, but in the case of mutuals, any excess funds are returned to the pot for the benefit of the policyholders, rather than being paid out as profit to the shareholders.

Many mutuals are managed by separate organisations to which the mutual pays a fee. The managers undertake all the functions of the mutual, underwriting, debiting, documentation and claims handling, and report to a Board made up of senior shipowner members of the Club, who have ultimate control over the affairs of the club.

P&I cover relates to the shipowner's legal liability. This liability can arise under statute, in tort or in contract. Club cover can be divided into various categories. The highest cost category, in terms of the amount of money spent, is personal injury. This covers the member's liability for death, sickness or injury to crewmembers, stevedores, passengers and any other person, such as superintendents, surveyors, officials, and persons on shore or on board other ships, who may be harmed as a result of the member's negligence.

Cargo cover is provided for the member's liability for loss of or damage to the cargo, usually as a result of a breach of the contract of carriage. The Club also covers cargo's proportion of general average or salvage unpaid by reason of a breach of the contract of carriage.

Pollution cover is provided in respect of a member's liability for damage caused as a result of pollution from the entered ship, including clean-up costs. Clubs also cover liability which a member may have for damages or clean-up costs resulting from pollution from a source other than the entered ship, where the pollution is caused by the member's negligence, for instance, when a pipeline is damaged by the anchor of an entered ship. The Club also covers a member's liability for pollution from a colliding ship if the member is liable for the collision.

The Club generally covers liability for property damage, e.g. dock damage (although this can sometimes be included in the hull and machinery cover). These claims are also known as FFO claims, which stands for Fixed and Floating Objects, to distinguish them from collision claims, which are only in respect of damage by collision with other ships.

The Club covers the member for his liability arising out of the presence of the wreck of an entered ship. Claims are usually for costs of wreck removal, but cover includes claims by any person for damage done as a result of pollution from or contact with the wreck. The most common cause of claims is when a wreck must be removed because it is a danger to navigation or by order of the relevant authority.

The Club also provides cover for certain miscellaneous claims, such as "life salvage". The Club also covers certain categories of fines on the member, including fines in respect of immigration, customs, and pollution.

In addition to traditional P&I Clubs, different types of vessels may have liability cover incorporated into their hull and machinery insurance, for example the Institute Fishing Vessel Clauses include some limited liability cover.

Invariably local and state authorities will require that any vessel trading in their national waters will have some form of liability cover.

Global markets

The main international marine hull markets are in London, Norway, Japan, Singapore, Germany, France and Italy. Historically, London has been the most international, with the other markets concentrating on their national fleets, but competition is now much more open and it is impossible to predict where vessels may be insured from their flag or operating base. Single vessels and fleets may have their insurances split between several markets in order to secure the most favourable rates. Behind the direct placing lies

the complex web of re-insurance contracts, and in many developing countries risks may be re-insured 100%, with claims control being held by the re-insurer.

Competition between international markets results in a downward pressure on premiums that has resulted in the world hull markets suffering loss ratios of more than 100% for most of the last two decades. This has resulted in a consolidation of the number of hull insurers, particularly in the London Market, with fewer companies taking larger lines on risks. Despite this, there remains an excess of capacity.

Basic principles of insurance

1. General

In dealing with Hull claims it is important to appreciate that any given situation in a claim is likely to be governed by more than one set of rules or requirements.

It may help to think in terms of a series of building blocks.

The base is **statute law**; when English law is applicable that means the Marine Insurance Act 1906, and depending on the particular issue, the Insurance Act 2015. On top of that comes **case law**, i.e. the judgements in law cases before and after the Act. Next comes the wording of the contract itself - **the policy** - which will usually be based on a standard wording but may include special terms. Above that are the Association of Average Adjusters **Rules of Practice** which provide an agreed (although not necessarily legally binding) formula for dealing with certain aspects of claims. Beyond that there are the **recognised practices** that may exist in the market in question, and finally there is the **commercial relationship** between a particular Assured and Insurer.

All these elements must be kept in mind when considering a claim.

2. Definition of Marine Insurance

Section 1 of the M.I.A. defines Marine Insurance as follows:

“A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.”

“**Indemnify**” means putting the Assured back into the same position as he was prior to the loss. However the Assured should not be put in a better position than that, and he should not profit from the fact that he is insured.

An insurance policy is a contract that exists in a commercial world so the indemnity may not always be perfect, merely “**in the manner agreed**”. The search for perfect indemnity often has to take second place to expediency and commercial realities.

3. What can you Insure?

The Marine Insurance Act (M.I.A.) s. 3 reads as follows:

- (1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.*
- (2) In particular there is a marine adventure where:-*
 - (a) Any ship goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as "insurable property";*
 - (b) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;*
 - (c) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.*

You can also insure property against land risks that are incidental to a sea voyage and (see MIA S2) the building or launch of a ship or "any adventure analogous to a marine adventure".

4. Who can Insure?

M.I.A. s. 5 reads:

- "(1) Subject to the provisions of this act, every person has an insurable interest who is interested in a marine adventure.*
- (2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof."*

Anyone who stands to gain or lose by their involvement in a marine adventure has an insurable interest.

5. How much can you Insure?

M.I.A. s. 16:

“Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows:

(1) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen’s wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole:

The insurable value, in the case of a steamship, includes also the machinery, boilers and coals and engine stores if owned by the assured, and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade:

(2) In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance:

(3) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of an incidental to shipping and charges of insurance upon the whole:

(4) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attached, plus the charges of insurance.”

M.I.A. s. 25 (in part):

*“1) Where the contract is to insure the subject-matter at and from, or from one place to another or others, the policy is called a **“voyage policy”** and where the contract is to insure the subject-matter for a definite period of time the policy is called a **“time policy”**. A contract for both voyage and time may be included in the same policy.”*

Whilst the Marine Insurance Act makes reference to valued and unvalued policies and also to both voyage and time policies, unvalued policies on hull and machinery are virtually unheard of, and voyage policies on ship are relatively rare.

M.I.A. s. 27:

“(3) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial.

Under many non marine policies the insured value may be reviewed in the event of a claim, and a reduction in respect of any under-insurance may be applied. However, MIA S.27.3 makes it clear that the value is fixed for claims purposes, except where the policy provides otherwise.

6. Proximate Cause and Insured Perils

Section 55 of the M.I.A. states:

*“(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for **any loss proximately caused** by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.”*

“Proximately” means the cause nearest in effect, which is not necessarily the nearest in time.

Pawsey v. Scottish Union (1907)

“the proximate cause means the active, efficient cause which sets in motion a train of events which brings about a result without the intervention of any force started and working from a new independent source”.

Further examples are given below.

Section 55 continues with regard to losses not usually covered:

“(2) In particular:-

*(a) The insurer is not liable for any loss attributable to the **wilful misconduct** of the assured, but, unless the policy otherwise provides, he is liable for **any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;***

*(b) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by **delay**, although the delay be caused by a peril insured against;*

*(c) Unless the policy otherwise provides, the insurer is not liable for **ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured**, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils."*

An element of misconduct or negligence by the crew is no bar to a claim when the loss is proximately caused by a peril insured against and negligence, error of judgement, incompetence etc., may also be specified as insured perils.

Barratry is specifically insured against even though it is "intentional". The term "barratry" includes every wrongful act willfully committed by the Master or Crew to the prejudice of the Owner, or, as the case may be, the Charterer.

It is important to note that (with the exception of willful misconduct) the policy may "**otherwise provide**". For example, a Loss of Earnings policy provides cover for losses arising from delay, and latent defect, which is covered under most Hull Clauses, is a type of inherent vice.

The effect of M.I.A. s. 55 in practical terms is as follows:

(a) Where the peril insured against is not the last cause but a preceding cause:-

- i. Where no break in sequence of causes - the peril is the cause of loss.

(Reicher v. Borwick 1894)

(France Fenwick v. Merchants Marine 1915).

- ii. Where there is a break in causation - the intervening event is the cause of the loss.

(b) Where the causes are not successive, but concurrent in their operation, and both proximate in efficiency:-

If one of the causes is a peril insured against there is a claim on the policy, provided that the other cause is not expressly excluded by the policy. (Dudgeon v. Pembroke 1877, Wayne Tank and Pump Co. v Employers Liability Assurance 1974).

The following law cases also offer useful examples:

Ionides v. Universal Marine Inc. Ass. 1863.

Policy on cargo warranted “free from all consequences of hostilities”. During the American Civil War the Confederates extinguished the light on Cape Hatteras. Owing to the absence of the light, the ship runs on to the rocks and is wrecked. The proximate cause of loss is the perils of the seas (running on to the rocks), as opposed to the act of extinguishing the light, and the insurer is liable.

Hamilton v. Pandorf 1887

Policy on cargo of rice. Rats gnaw a hole in a pipe which passes through the cargo, and sea water enters through the hole and damages the rice. The sea damage is the proximate cause of the loss, not the rats.

Leyland v. Norwich Union 1918

Policy on ship, “Warranted free from all consequences of hostilities”. During the First World War the ship was off Le Havre when she was struck by an enemy torpedo, and badly damaged. She managed to limp into port alongside a quay, however a gale caused the vessel to range heavily against the quayside and the authorities ordered the ship to move to the outer harbour. As a result of the continuing bad weather and touching bottom at low tide because she was down by the head, the vessel became a total loss. It was held that the proximate cause of the loss was the torpedo as the vessel was never out of imminent danger as a result of the damage sustained by it, and therefore the hull and machinery insurer was not liable.

Samuel v. Dumas 1924

A ship is intentionally sunk by the Master who opens a valve. The proximate cause of the loss is the act of the Master, and not the inrush of the water. This is not a loss by perils of the seas.

Soya v. White 1983

Policy on goods. Soya beans insured for voyage from Surabaya, Indonesia, to Belgium and the Netherlands “against the risks of heat, sweat and combustion only”. When shipped in bulk it was a natural characteristic that soya beans would deteriorate if the moisture content exceeded 14 per cent. Beans, in fact, shipped with moisture content of between 12 and 13 per cent, thus exposing them to risk of deterioration. Cargo deteriorated and insurers repudiated liability on ground of inherent vice. Held, insurers were liable because the policy “otherwise provided”.

7. Good Faith

Section 17 of the M.I.A. says that the “**utmost good faith**” must be exercised by each party, otherwise the contract may be avoided by the aggrieved party. This emphasis on good faith is largely due to the long history of marine insurance that goes back to the days when communications and information were generally unreliable. The insurer in particular had to rely largely on the information given to him when accepting the risk. There have been a number of complex law cases dealing with these issues

All insurance contracts entered into after August 2016, and which are subject to English Law, are now governed by the Insurance Act 2015 (I.A) Amongst other things, the I.A amended the doctrine of good faith (section 14) so that avoidance is no longer the only remedy available for not exercising good faith.

The I.A was used as an opportunity to overhaul this area of the law generally, at which time the concept of ‘fair presentation’ was introduced. The relevant provisions of the I.A are:

Section 3

A fair presentation of the risk is one:

- a) Which makes the disclosure as required by the Act.
- b) Which makes the disclosure in a manner which would be reasonably clear and accessible to a prudent insurer.
- c) In which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith.

The disclosure required is:

- i) Every material circumstance which the insured knows or ought to know.
- ii) Failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.

The Assured need not disclose anything which:

- a) Diminishes the risk.
- b) Is known to the insurer.
- c) Ought to be known by the insurer.
- d) Is something to which the insurer waives information.

Section 4 of the I.A provides, in some detail, what the insured is deemed to know or ought to know. In particular this section details what knowledge is prescribed to specific personnel at the insured's company or alternatively their agent's (brokers).

In turn, Section 5 provides what knowledge the insurer is deemed to know or ought to know.

Section 7

A circumstance or representation is material if it would influence the judgement of a prudent insurer in determining whether to take the risk and, if so, on what terms.

A material representation is substantially correct if a prudent insurer would not consider the difference between what is represented and what is actually correct to be material.

The remedies for breach of the duty of fair presentation are set out in Schedule 1 of the I.A, and range from avoidance of the contract without return of the premium, to amendment of the terms of the contract including pro rata amendment of the premium. The severity of the remedy is dependent on the nature of the breach, as determined under section 8 of the I.A.

8. Warranties.

Under the M.I.A, the remedies for breach were considered quite draconian insomuch as the only remedy available was effectively to rescind the contract as at the date of the breach. Therefore, even if there was no causal link between the breach and a subsequent loss, the insurer could still avoid the claim.

The effect of a breach of warranty under the M.IA was severe. For example, if a vessel breaches a warranty regarding cargo to be carried and the vessel later grounds for wholly unrelated reasons, the breach is still fatal to the grounding claim. For this reason, most policies have "held covered" provisions in case of a breach of warranty, and the International Hull Clauses 2003 have gone even further and adopted a new graduated approach to breaches of warranty.

The I.A changed the position as to warranties under the M.I.A and introduced a 'sliding scale' of remedies depending on the nature of the breach.

The definition of a warranty is still contained within section 33 of the M.I.A, which provides:

“(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not.

In addition M.I.A. s. 39 (5) reads:

*“(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, **with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.**”*

It will be noted that under a time policy it is not sufficient simply for the vessel to be unseaworthy for the warranty to have been breached. In addition, the loss must be **attributable to unseaworthiness** and importantly, the vessel must have been sent to sea in an unseaworthy state with the **privity** of the top management of the assured. Not surprisingly, it is quite unusual for hull insurers to invoke this section of M.I.A. as a defence to a claim.

A warranty which commonly appears in hull cover is the “Class Maintained Warranty”. When this warranty applies it is necessary for the assured to obtain a certificate from the relevant Classification Society evidencing that her class within the Society has been maintained from the inception of the policy until the date of the casualty.

Under the I.A the position is as follows:

Section 10

An insurer has no liability under a contract of insurance in respect of any loss occurring, or attributable to something happening, after a warranty (express or implied) in the contract has been breached but before the breach has been remedied.

However, the above does not apply if:

- a) because of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract,
- b) compliance with the warranty is rendered unlawful by any subsequent law, or
- c) the insurer waives the breach of warranty.

Further, the insurer cannot rely on the breach of warranty in respect of losses:

- a) before the breach of warranty, or
- b) if the breach can be remedied, after it has been remedied.

The I.A also introduced the concept of terms which do not define the risk as a whole, but which previously might have been treated in the same way as warranties under the M.I.A regime:

Section 11

This section applies to a term (express or implied) of a contract of insurance, other than a term defining the risk as a whole, if compliance with it would tend to reduce the risk of one or more of the following:

- a) Loss of a particular kind.
- b) Loss at a particular location.
- c) Loss at a particular time.

If a loss occurs, and the term has not been complied with, the insurer may not rely on the non-compliance to exclude, limit or discharge its liability under the contract for the loss if the insured shows that the non-compliance with the term could not have increased the risk of the loss which actually occurred in the circumstances in which it occurred.

9. Onus of Proof

The responsibility for proving that the loss has been proximately caused by a peril insured against, lies upon the party making the claim. In order to discharge the burden of proof, the assured does not have to exclude all possibilities as to how the particular damage has occurred. However, he is required to demonstrate that the **balance of probabilities** is in favour of the loss being proximately caused by a peril insured against. If a particular loss is equally likely to have been caused by a peril not covered by the policy, then the assured will have failed to discharge the burden of proof and will therefore be unable to sustain a claim against his underwriters.

In the case of *Rhesa Shipping Company S.A. v. Edmunds* (The “Popi M”) an aperture suddenly opened in the ship’s shell plating in calm seas, causing her to sink in deep water. In the absence of evidence as to the cause of the aperture, the Shipowners advanced the theory that the vessel had been struck by a submarine, constituting a loss by perils of the seas. The underwriters of the ship pleaded that the aperture was not caused by an insured peril but by wear and tear. The wear and tear theory left doubt as to the mechanism by which it could have operated, and so was regarded as extremely improbable or even virtually impossible, whilst the submarine theory was also extremely improbable.

Nevertheless, despite the improbability of the submarine theory, the Court of Appeal upheld Mr. Justice Bingham’s findings that the vessel was, on a balance of probabilities, lost by perils of the seas. The House of Lords, however, reversed this decision as not being in accord with common sense and held that the shipowners had failed to discharge the burden of proof of loss by an insured peril, as the true cause of the loss was in doubt and the judge was not compelled to choose between theories that were improbable.

Once the assured has made out a *prima facie* case that the loss or damage has occurred as a result of a peril insured against, the burden of proof then shifts to the underwriters to set up a counter argument that the loss or damage resulted from a peril not insured against or is otherwise excluded.

Hull clauses

1. General

Certain types of clauses are generally associated with particular markets and may involve different approaches to identifying risks covered. The English law approach has long been based on a list of **named perils** whereas, for example, the Scandinavian markets cover **all risks** and then list named exclusions. In recent years most markets have begun to write business on “foreign” clauses if so requested by valuable assureds. Nonetheless, the characteristic way of thinking in a particular market may colour their interpretation of other clauses.

2. Institute Time Clauses

At present the most widely used clauses are Institute Time Clauses – Hull 1.10.83 and the majority of our comments are based on this version. Reference is requested to our Commentary on the newer International Hull Clauses 1.11.03 for details of the changes brought in under this very thorough and worthwhile revision.

ITC Hulls lists the perils under clause 6 in two sub sections. Clause 6.1 deals mainly with the traditional marine perils.

6.1.1 perils of the seas

(There is no complete definition for this expression. Grounding, heavy weather, collisions are covered, as are all fortuitous or accidental losses, or damages which can be said to be “of the seas”.)

6.1.2 fire, explosion

6.1.3 violent theft

6.1.4 jettison

6.1.5 piracy

6.1.6 breakdown of or accident to nuclear installations or reactors

6.1.7 contact with aircraft or similar objects, or objects falling therefrom, land conveyance, dock or harbour equipment or installation

6.1.8 earthquake volcanic eruption or lightning

It should be noted that piracy is frequently deleted from the hull cover, and instead included under the war risks cover.

Sub-section 2 deals with perils more closely associated with machinery claims - these are still sometimes referred to as the “Inchmaree” perils after a law case concerning a ship of that name.

- 6.2.1 accidents in loading discharging or shifting cargo or fuel
- 6.2.2 bursting of boilers breakage of shafts or any latent defect in the machinery or hull
- 6.2.3 negligence of Master Officers Crew or Pilots
- 6.2.4 negligence of repairers or charterers provided such repairers or charterers are not an Assured hereunder
- 6.2.5 barratry of Master Officers or Crew

Claims for loss or damage caused by any of the perils listed in 6.2 are subject to the proviso that they should not have resulted from want of due diligence by the Assured, Owners or Managers. In this context, to exclude a claim, the lack of due diligence has to be on the part of the top levels of management of a company – a failure by a superintendent would not count.

For payment of an additional premium, many Assureds are able to broaden their cover by adding to their policy the Institute Additional Perils Clauses which provide:

- 1. In consideration of an additional premium this insurance is extended to cover
 - 1.1 the cost of repairing or replacing
 - 1.1.1 any boiler which bursts or shaft which breaks
 - 1.1.2 any defective part which has caused loss or damage to the Vessel covered by Clause 6.2.2 of the Institute Time Clauses – Hulls 01.10.1983.
 - 1.2 loss of or damage to the Vessel caused by an accident or by negligence, incompetence or error of judgement of any person whatsoever.
- 2. Except as provided in 1.1.1 and 1.1.2, nothing in these Additional Perils Clauses shall allow any claim for the cost of repairing or replacing any part found to be defective as a result of a fault or error in design or construction and which has not caused loss of or damage to the Vessel.

The inclusion of “any accident” as an insured peril effectively results in “All Risks” coverage.

These clauses include a similar “due diligence” proviso.

Total loss

1. General

Total loss falls into two categories - either an actual loss or a constructive total loss. Section 56 of M.I.A. reads as follows: (in part)

“(1) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.

(2) A total loss may be either an actual total loss, or a constructive total loss.

(4) Where the assured brings an action for a total loss and the evidence provides only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.”

Section 68 of M.I.A. also reads:

“Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured:-

(1) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy:

(2) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured.”

2. Actual Total Loss (ATL)

M.I.A. s. 57.

“(1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof there is an actual total loss.

(2) In the case of an actual total loss no notice of abandonment need be given.”

M.I.A. s. 58.

“Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.”

3. Constructive Total Loss (CTL)

Section 60 of M.I.A. states:

- There is a C.T.L. where the subject matter insured is reasonably abandoned to the insurer, because:
 - a) Actual Total Loss appears to be unavoidable
 - b) it cannot be saved without an expenditure exceeding its (commercial) value.

In particular a Ship is a C.T.L.

- Where the assured is deprived of possession of his ship and
 - a) it is unlikely that he can recover it, or
 - b) the cost of recovery would exceed its value when recovered.
- Where it is so damaged by a peril insured against that cost of repairs exceeds value.

In determining the cost of repairs, no deduction is made for any general average contributions to those repairs (e.g. by cargo, see section M below) but account is taken of any future general average contributions payable by the ship, and of any future salvage operations.

4. Notice of Abandonment

The assured is not obliged to claim for a C.T.L. He can, if he wishes, repair the damage and claim up to 100% of the sum insured (less deductible) thereby retaining the property. However, if he claims a C.T.L. it is necessary for him to tender Notice of Abandonment to his Underwriters.

M.I.A 62(part):

"(1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.

(3) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.

(4) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refused to accept the abandonment.

(6) Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.

(7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(8) Notice of abandonment may be waived by the insurer.

(9) Where an insurer has re-insured his risk, no notice of abandonment need be given by him."

The reason for the requirement of a Notice of Abandonment is that it puts underwriters on notice that a very serious casualty has occurred and gives them the opportunity to take steps to protect the property.

Where there is a valid abandonment the underwriter is entitled to take over full proprietary rights in the vessel, however this would also mean acquiring any potential liabilities, and so they invariably do not. The notice is usually therefore declined but the underwriter agrees to put the assured in the same position as if a claim form had been issued. Notwithstanding the refusal of the notice, and on the basis that the policy is a contract of indemnity, the underwriters are customarily credited with any net proceeds of sale of the wreck, since the assured would be over- indemnified if he received the full insured value and also retained the proceeds.

Partial losses

1. General

A partial loss is usually referred to in Hull claims as a Particular Average loss.

The Marine Insurance Act 1906 s. 64 gives a concise definition of Particular Average.

“(1) 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.”

Should an insured peril operate and give rise to a claim for Particular Average what can the assured claim or what is the Measure of Indemnity? The M.I.A. s. 69 gives us guidance on this aspect:

“Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows:-

*(1) Where the ship has been repaired, the assured is entitled to the **reasonable cost of the repairs**, less the customary deductions, but not exceeding the sum insured in respect of any one casualty:*

*(2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for **the reasonable depreciation, if any, arising from the unrepaired damage**, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above:*

*(3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for **the reasonable depreciation arising from the unrepaired damage**, but not exceeding the reasonable cost of repairing such damage, computed as above.”*

2. Reasonable cost of repairs

The interpretation of the word “reasonable” in M.I.A. s. 69 is a key part of adjusting claims. The Act does not tell us from whose view it should be reasonable - the assureds or the insurers. Whereas from the insurers’ side “reasonable” may be closely connected with “cheapest”, this will probably not be what it means from the assured’s view point. The shipowner is not only concerned with the direct cost, but also with speed of repairs and other factors.

In most cases, the cost of repairs is not a single item. It is made up of numerous individual aspects. A normal particular average claim is likely to include some or all of the following:

- Costs of shifting vessel to suitable repair port - “removal expenses”.
- Cost of tank cleaning.
- Cost of drydocking.
- Cost of general services.
- Repair yards charges.
- Specialist technicians/engineers.
- Spare parts (incl. transport, customs charges, etc.).
- Survey and supervisory fees.
- Incidental charges.

When quantifying the claim, it has to be borne in mind that, in a policy covering hull and machinery, the subject-matter insured is the ship as a physical entity, and the measure of indemnity is therefore confined to the reasonable cost of repairs to the ship. It does not extend to the other financial consequences that a casualty may give rise to. For example, if the ship’s derrick collapses due to an insured peril, the claim is for the cost of repairing it. If the shipowner has to hire a shore crane to complete discharge of the hold in question, this may be a consequence of the casualty, but it does not form part of the claim on the hull policy.

The shipowner is not only concerned with the direct cost but also with speed of repairs and other factors. This therefore raises questions with regard to a number of issues, e.g.

Overtime costs

Temporary repairs

Deferred repairs

Overtime is usually worked to save time and, as hull and machinery insurers are not concerned with loss of time, it follows that they should not pay extra charges to have the repairs completed more quickly. While this is a basic doctrine, it does not mean that overtime never forms part of the reasonable cost of repairs. For instance, if repairs that require drydocking are completed more quickly by working overtime, then drydock dues are saved. If those savings are greater

than the overtime costs, then the latter become part of the reasonable costs. In some instances the working of overtime is compulsory because of the repair yard's insistence, in which case, as the shipowner has no choice, the cost would be allowable.

Similar considerations also apply to temporary repairs. If they are effected solely to get the ship back trading as quickly as possible, insurers will take the view that there is no reason why they should pay. However, there are a variety of reasons why the effecting of temporary repairs may be of a benefit to insurers, e.g. the vessel may be in a location of high repair costs and by effecting temporary repairs the vessel could delay effecting permanent repairs until she reaches a cheaper location. The permanent repairs could require drydocking and if repairs were effected immediately, insurers would be liable for the full cost of drydocking; but if, by effecting temporary repairs, the permanent repairs could be deferred until a routine drydocking, then insurers would only be liable for a proportion of the drydock charges. These savings may be greater than the cost of the temporary repairs themselves, in which case the repairs would be allowed in full or up to the savings realised.

There are two main exceptions to the "savings" basis for allowing temporary repairs and overtime:

- i) "Liner" vessels - if a vessel sails to a fixed and advertised schedule (e.g. ferries and containerships) it is customary to allow overtime and temporary repairs in full.
- ii) If there is an inordinate (i.e. measured in weeks rather than days) and unavoidable delay before permanent repairs can be carried out (e.g. awaiting spare parts) and the vessel therefore cannot sail, the cost of temporary repairs to enable her to re-enter service may be allowed in full.

The principles applying to the allowance for the expenses of removing a vessel for repair are detailed in the Rule of Practice D1, which only applies where the vessel is necessarily or reasonably removed to some other port for the purpose of repairs.

What constitutes expenses of removal depends on whether (a) the vessel returns to the port from which she was removed (b) loaded a new cargo at the port of repair or

- (c) proceeded to another port to load cargo after completion of repairs.

The expenses of removal include the cost of any necessary temporary repairs, wages and maintenance of crew, port charges and fuel and stores, etc.

Examples:

- 1) Vessel is necessarily removed from port A to port B to effect damage repairs and thereafter returns to port A.

Underwriters are liable for:-

- Cost of necessary temporary repairs
- Pilotage, towage, port charges, wages and maintenance of crew, fuel & stores for passage from A to B and return to A.

- 2) Vessel is removed from port A to port B to effect damage repairs and thereafter loads new cargo at B.

Underwriters are only liable for any additional costs in excess of those which would have been incurred in steaming from A to B. (But see 4) below).

- 3) Vessel is removed from port A to port B to effect damage repairs and thereafter proceeds to port C to load a new cargo.

Removal expenses are allowed for the additional steaming/expenses (but see 4) below).

- 4) Owners may nevertheless have the option to claim for the single passage A to B if the vessel was removed immediately, or at the end of the current voyage, solely to enable damage repairs to be effected.

The removal expenses are apportionable (over cost of repairs) between owners and underwriters where the vessel is removed for routine overhaul and repairs effected for both owners' and underwriters' account. In this case, where the reason for removal is two-fold (damage repairs and owners' work), the crew wages element is often excluded by provisions in the insurance conditions.

Where the vessel is removed especially to effect damage repairs and no owners' immediately necessary work was effected concurrently, underwriters are liable for the total cost of removal.

Where the vessel is removed for owners' purposes or as an immediate consequence of damage for which Underwriters are not liable, underwriters are not liable for any part of the removal expenses even though repairs for which they are liable are effected concurrently.

3. Drydock expenses

Drydock expenses are divided in accordance with Rule of Practice D5 of the Association of Average Adjusters. In summary, where a damage requires the use of a drydock, the costs of docking and undocking the vessel together with the dock dues for the relevant period form a claim against insurers in full, except when such repairs are effected concurrently with owners' repairs which also require the use of the drydock and which are:

- a) either immediately necessary for the seaworthiness of the vessel or
- b) effected on the occasion of a routine drydocking.

In the case of a) or b), the costs of docking and undocking the vessel are halved, together with the dock dues for the common period. In all other cases, an owner can take advantage of the situation to carry out his own repairs in drydock and the drydock expenses will nevertheless be paid by the insurers.

For example, assume that a vessel is specially dry-docked for particular average damage repairs that required 10 days in drydock, no owners' work effected concurrently.

		PA
Docking/undocking	£8,000	£8,000
Dock dues, 10 days @ £1,000	£10,000	£10,000
		£18,000

Similarly, if owners' repairs requiring 12 days in drydock were effected concurrently but were not immediately necessary the allocation would be:

		PA	Owners
Docking/undocking	£8,000	£8,000	-
Dock dues, 10 days @ £1,000	£10,000	£10,000	-
2 days @ £1,000	£2,000	-	£2,000
		£18,000	£2,000

As an example of a situation in which a division is required, assume that, at a routine drydocking, repairs are carried out in drydock to the following:

Particular average damage requiring 10 days in drydock. Owners' work requiring 12 days.

		PA	Owners
Docking/undocking	£8,000	£4,000	£4,000
Dock dues, 10 days @ £1,000	£10,000	£5,000	£5,000
2 days @ £1,000	£2,000	-	£2,000
£20,000		£9,000	£11,000

In the event that two damages (each arising from a separate accident or occurrence) were effected concurrently with owners' scheduled repairs, the allocation of drydock expenses would be as follows, assuming that PA 1 required 6 days, PA 2 required 8 days and owners' work took 10 days:

		PA 1	PA 2	Owners
Docking/undocking	£8,000	£2,000	£2,000	£4,000
Dock dues, 6 days @ £1,000	£6,000	£1,500	£1,500	£3,000
Dock dues, 2 days @ £1,000	£2,000	-	£1,000	£1,000
Dock dues, 2 days @ £1,000	£2,000	-	-	£2,000
£18,000		£3,500	£4,500	£10,000

It is important to note that the division is always 50/50 between damage and owners, irrespective of the number of separate damages.

The similar principle of division (sometimes referred to as the "common user" principle) is usually also applied to expenses such as the following:

- Tank cleaning/gas freeing (see Rule of Practice D6).
- Superintendent's charges.
- Watchmen, firelines and other general expenses charged on a daily basis.

4. Deductible

The application of the usual “each separate accident or occurrence” deductible wording can give rise to difficulties in practice and each case has to be considered on the particular facts. However, the following general guidelines may be useful:

Apply one deductible

- Where there is only one accident or occurrence
- Where, even though there may be several accidents or occurrences, they are not separate and form a connected set of events or incidents from which the claim arises.

Apply more than one deductible.

- Where a new cause gives rise to one or more of the incidents and which is not directly connected with previous events.

Shortly after the introduction of the deductible clause in 1970 a special committee was formed including representatives of insurers, shipowners and average adjusters. The committee report provides useful general guidelines and specific examples.

Where a claim arises regarding damage to machinery, a further deductible over and above the policy deductible referred to above may be applied, depending on the particular clauses incorporated in the policy.

In the event of a total loss (actual or constructive), it is often the case that the insurer will pay the assured the full insured value of the vessel, without the application of any deductible. However, this is dependent on the particular clauses on which the insurance is placed.

5. Unrepaired damage

If a damage is unrepaired at the expiry of a policy, the Assured has the option of claiming on a depreciation basis. Under ITC Hulls, such claims are based on the lower of the depreciation in the market value of the vessel (by reason of the damage) or the estimated cost of repairs.

Sue and labour

1. General

The term “Sue and Labour” has been in use since the earliest days of marine insurance and it was referred to in the early Lloyd’s policies:

“...and in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns to sue, labour and travel for, in and about the defence, safeguard and recovery of”

The origin of the word Sue is obscure and is thought to derive from the Anglo Norman “suer”, itself a derivative of the Latin “sequere” meaning to follow or go after.

The purpose of a Sue and Labour Clause is simple - if the assured incurs expenditure when averting or minimising a loss, the insurer will reimburse him. In the current Institute Clauses the Sue and Labour Clause is given the title “Duty of Assured”, but the older term remains in regular use.

2. M.I.A. Provisions.

s.78 of M.I.A. reads as follows:

“(1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

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

(3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

(4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.”

M.I.A. s.78(1) says that a Sue and Labour Clause is supplementary, which means that the Assured can claim sue and labour expenses in addition to a Total Loss. The concept of sue and labour operates when only the subject matter insured is involved. If other property is being safeguarded or is involved the expenses are likely to be General Average - see section L.

3. ITC Hulls

The relevant Clause in Institute Time Clauses (Hulls) 1.10.83 is as follows:

“13.1 In case of any loss or misfortune it is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance.”

The clause only takes effect if the loss would be recoverable on the policy. If something happened to a ship, and the cause of the loss was not a peril insured against, then an assured cannot expect the insurers to pay for measures taken to try and avert or minimise such a loss.

*“13.2 Subject to the provisions below and to Clause 12 the Underwriters will contribute to charges **properly and reasonably incurred** by the Assured their servants or agents for such measures. General average, salvage charges (except as provided for in Clause 13.5 and collision defence or attack costs are not recoverable under this Clause 13.”*

What is reasonable is usually a question of fact and again, what might be reasonable to the assured may not necessarily be reasonable to the insurer. In *Lee v. Southern Insurance Company* (1870) an insurance was taken out on freight. The vessel stranded and the cargo was saved and forwarded to destination by rail. Underwriters contended that the cargo could have been sent to destination by another ship at a much reduced cost and the courts held that it was the cost of forwarding the cargo by ship that formed the claim for sue and labour charges, and not the higher cost of sending it by rail.

“13.3 Measures taken by the Assured or the Underwriters with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.”

This sub-clause relates to a legal technicality concerning total loss claims.

“13.4 When expenses are incurred pursuant to this Clause 13 the liability under this insurance shall not exceed the proportion of such expenses that the amount insured hereunder bears to the value of the Vessel as stated herein, or to the sound value of the Vessel at the time of the occurrence giving rise to the expenditure if the sound value exceeds that value. Where the Underwriters have admitted a claim for total loss and property insured by this insurance is saved, the foregoing provisions shall not apply unless the expenses of suing and labouring exceed the value of such property saved and then shall apply only to the amount of the expenses which is in excess of such value.”

Clause 13.4 deals with the issue of under-insurance. Unlike general average or salvage charges, the Marine Insurance Act 1906 made no provision for the reduction of the sue and labour amount recoverable in the event of under insurance. Insurers did not think this was reasonable and, therefore, introduced this provision. If the amount insured is less than the insured value or the sound value is higher than the insured value, then the amount payable is reduced pro-rata.

“13.5 When a claim for total loss of the Vessel is admitted under this insurance and expenses have been reasonably incurred in saving or attempting to save the Vessel and other property and there are no proceeds, or the expenses exceed the proceeds, then this insurance shall bear its pro rata share of such proportion of the expenses, or of the expenses in excess of the proceeds, as the case may be, as may reasonably be regarded as having been incurred in respect of the Vessel; but if the Vessel be insured for less than its sound value at the time of the occurrence giving rise to the expenditure, the amount recoverable under this clause shall be reduced in proportion to the under- insurance.”

This subsection of clause 13 deals with any expenses that are not, strictly speaking, sue and labour. As explained before, some expenditure will not be classified as sue and labour but as either general average or salvage charges. The Marine Insurance Act specifies that only sue and labour charges are recoverable in addition to a total loss. Consequently, without any special provisions being included in the policy, if general average expenditure or salvage charges had been incurred but the vessel proved to be a constructive total loss, the assured would not be able to recover such costs in addition to the insured value.

Clause 13.5 deals with such total loss situations. The assured may still recover costs of saving or attempting to save the vessel, even though such costs are not true sue and labour costs but fall to be general average or salvage charges. The same provisions relating to under insurance apply to these charges as they did for the costs dealt with under clause 13.4. There is one important point to note, in that if cargo was on board the vessel when the costs were incurred, then only the ship's proportion of such costs are recoverable under this clause.

The following examples of the application of clause 13.5 assume a vessel insured for US\$10,000,000, so valued, and there is no cargo aboard:

Sound market value	US\$12,000,000
Sue and labour expenses	US\$2,000,000
Sale proceeds	US\$4,000,000
Underwriters pay total loss	US\$10,000,000

are entitled to:

Sale proceeds	US\$4,000,000
Less sue and labour expenses	-US\$2,000,000
	US\$2,000,000

Assume the figures are as above but the sue & labour expenses amount to US\$4,000,000 and sale proceeds US\$2,000,000.

On payment of the total loss Underwriters are entitled to sale proceeds but in this case the proceeds do not cover the expenses, leaving a balance of US\$2,000,000. If the vessel had been fully insured (i.e. sound value was more than insured value) Underwriters would be liable for US\$2,000,000. However, since the vessel was underinsured, Underwriters' liability is limited to:

$$\frac{10,000,000}{12,000,000} \times \text{US\$2,000,000} = \text{US\$1,666,667}$$

i.e. **US\$1,666,667**

If the vessel had cargo on board which had also been saved, the expenses cannot be treated as sue & labour (because cargo is involved) and cannot be

recovered as general average (because G.A. is not payable in addition to a total loss), so then the assured has to rely on clause 13.5.

The expenses must be divided to reach a figure than can “reasonably be regarded as having been incurred in respect of the vessel”. Depending on the circumstances, the division may be over the remaining value of each, say:

Ship	US\$2,000,000	pays	US\$1,000,000
Cargo	2,000,000		1,000,000
	US\$4,000,000		US\$2,000,000

The shipowner can therefore recover US\$1,000,000 from hull underwriters under clause 13.5 but remains out of pocket in respect of the balance.

“13.6 The sum recoverable under this Clause 13 shall be in addition to the loss otherwise recoverable under this insurance but shall in no circumstances exceed the amount insured under this insurance in respect of the Vessel.”

This clause states that amounts recoverable under clause 13 shall be in addition to the loss otherwise recoverable under this insurance, but not exceeding the sum insured.

To summarise, the key features of a valid sue and labour charge are as follows:

- Expense incurred by the assured or his agents must be reasonable.
- Loss avoided must be covered by the policy.
- Relates to the insured property alone and general average can therefore not be recovered under the sue and labour clause.
- Supplementary and can be recovered in addition to a total loss.
- Subject to underinsurance deduction.

Salvage

1. General

In 1898 the English Admiralty Court, in the classic case of the “Glengyle”, summarised for the first time the principle of public policy that the salvor, and in particular the professional salvor, ought to be encouraged by generous awards to maintain tugs and other salvage equipment in constant readiness:-

“The maintenance of salvage steamers is for the general benefit of owners and underwriters and others interested in seagoing vessels and their cargoes and the crews and passengers of those vessels and the Admiralty Court will be liberal in its awards in respect of services rendered by salvage steamers even though the awards may fall somewhat heavily on individual owners. The owners of salvage steamers invest a large amount of capital in them and maintain them and their crews divers and appliances and have no remuneration to look forward to except that which may be earned by occasional salvage services.”

The 1989 Salvage Convention defines a salvage operation as:

“any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.”

2. The Elements of Salvage

Salvage applies where: There is a subject of salvage.

AND It has come into a position of danger so that it needs some action to preserve it from loss or damage.

AND A person who falls within a special class of possible rescuers (traditionally those people called volunteers) gives assistance.

AND This person is successful in saving the subject or meritoriously contributes to success in saving the subject from danger.

All four must exist together at the same time for the service to be called salvage, however the requirement for success has been modified by the more recent versions of Lloyds Open Form and the 1989 Salvage Convention. Special compensation may now be received by salvors for work done to protect the environment, where the conventional award is insufficient due to unfavourable circumstances in a particular case.

The mechanism for the payment of special compensation is set out in Article 14 of the Convention. In many cases the parties agree to be bound by the Special Compensation P & I Club clause (SCOPIC) which regulates in detail how the general words of Article 14 are applied in practice.

3. Reward

When the services of the salvor are completed, he is entitled to a reward for those services.

The amount awarded to him includes three elements:

1. A reasonable payment for his work.
2. Reimbursement of the expenses and any losses he has incurred.
3. An additional element which is designed as a bonus, to encourage people to give salvage services to property in danger at sea.

The general principle is that salvage is paid by the various salvaged interests in proportion to their salvaged value, which is usually their value at the completion of the salvage service.

It is therefore essential in any given case to know what the individual salvaged interests are and what their salvaged values are.

4. Remedies

The law gives salvors rights to enforce their claim directly against each interest of the salvaged property. The interests are severally liable for their individual proportions of salvage. In English law, a salvor has a maritime lien and can proceed in court against the salvaged property itself, (an action in rem) or against its owners (an action in personam). There are recognised procedures whereby the salvor will release the property when services have terminated in exchange for security in an agreed format.

Salvage claims may be made through the courts in most countries of the world, but are usually settled by arbitration.

5. Salvage Agreement

A salvage agreement might be defined as an agreement to give services to a ship or cargo in peril on terms which make the requirement of success a condition of payment for the services. On Lloyd's Open Form big letters at the top "No cure - no pay" make it clear that success is a fundamental requirement for the contractor to receive a reward.

The fact that a contract at the same time provides for the payment of some expenses even if the services are not completely successful (as LOF does), does not prevent it from being a salvage agreement.

6. Lloyd's Open Form

Salvage agreements, such as LOF, do not breach the general principle that salvors must be volunteers. The duties which LOF sets out do not come into effect until the contract is signed; there is no pre-existing contractual relationship between the ship and the salvor which would exclude the salvor from the definition of a volunteer. The main purposes of salvage agreements like LOF are:

1. To clarify the terms on which the services are given.
2. To define the duties of each party.
3. To set up agreed procedures for the provision of security and the settlement and payment of the salvage award.

In the absence of any agreement, these matters would depend entirely on English or the relevant law.

General average

1. Basic Principle

That which has been sacrificed for the benefit of all shall be made good by the contribution of all.

The principle of general average was first formulated by the ancient Greeks in a maxim dealing with the question of jettison, but it is probable that the idea itself was of still more ancient origin. As the doctrine developed, various types of losses were added to that of jettison; perhaps the most important step was the recognition that expenditure of money was in principle no different from the sacrifice of property, if it was incurred in similar circumstances and for the same purpose.

Most countries have a concept of general average either in common law or enshrined in legislation. However, in modern times, general average tends to be governed by specific provisions within the contracts of carriage, which usually incorporate a particular version of what are known as the York-Antwerp Rules.

There are four essential features:-

i) The sacrifice or expenditure must be **extraordinary**.

Thus ordinary expenses incurred or losses suffered by the shipowner in fulfilment of his contract of affreightment are not admitted as general average. A specific example of the application of this principle can be seen in Rule VII of the rules, which deals with damage to a vessel's machinery. Under that rule a distinction is drawn between damage to machinery where the vessel is aground and in peril and damage which occurs when the vessel is afloat. Working the engines of a ship ashore is considered to be an 'abuse' of the machinery and therefore extraordinary, whereas working the engines when the vessel is afloat, however much the adventure may have been in peril, is considered as part of the normal function of the machinery and any resultant damage is not admitted as general average.

ii) The act must be **intentional or voluntary** and not inevitable.

Property cannot in reality be said to have been 'sacrificed' if it was already lost at the time of the so-called sacrifice. Rule IV illustrates that principle in its application to the cutting away of wreck.

iii) There must be **peril**.

This need not be imminent but it must be real and substantial. The distinction between action taken for the common safety in time of peril and a measure which, however reasonable, is purely precautionary, is a very fine one. A vessel adrift without motive power in mid-ocean would be held to be in peril for this purpose, even though the weather might be calm at the time and there was no immediate risk of further loss or damage. On the other hand if a master decides, quite prudently, to seek shelter for a sound vessel in an anchorage because of reports of an approaching cyclone, this would not normally be regarded as giving rise to general average.

iv) The action must be for the **common safety** and not merely for the safety of part of the property involved.

Suppose a vessel is carrying some refrigerated cargo and the refrigerating machinery breaks down whilst she is proceeding through the tropics, making it imperative for her to put into a port to effect repairs. In such a case any threat of loss or damage would be limited to the refrigerated cargo and so far as the ship and the remaining cargo were concerned, the voyage could quite safely continue. Thus the deviation to the port of repair would not give rise to general average.

2. Example

A ship carrying a valuable cargo consigned to a number of different receivers strands on a reef. By order of the master a part of the cargo is jettisoned and as a result the vessel refloats and, after repairs at a port of refuge, is able to complete her voyage with the rest of her cargo.

From the facts above there would obviously have been other alternatives open to the master. He might have engaged tug assistance to tow the vessel off the reef, risking additional damage to the vessel's bottom and consequently to the cargo through leakage. He might, on the other hand, have tried forcing her off using the main engine and ground tackle, with similar risks as well as probable damage to such machinery and equipment. Each of these alternatives might have given rise to loss or prejudice to different owners of property involved in the adventure.

In situations of peril following marine casualties, a conflict of interest will often arise naturally from the need to choose a means for saving the situation. The owner of the cargo jettisoned in the example might well have preferred the master to choose another alternative or that some cargo other than his own had been selected for sacrifice. General average owes its origin to that conflict

of interest and is a device whereby, so far as possible, the conflict is eliminated. Through general average the owner of the cargo jettisoned has his loss shared by all the other interests involved; the owner of the property sacrificed is placed as nearly as possible in the same financial position as the owners of the property saved by that sacrifice.

3. Extent of allowances

When the vessel reaches the port of refuge a number of complex problems can arise, particularly if it is necessary to discharge all or part cargo from the vessel in order to do repairs to enable it to complete the voyage. Historically, English law took a narrow view of general average, confining it to situations in which the vessel was in immediate danger - the so called “common safety approach”. Essentially, once measures had been taken to alleviate the danger, i.e. once the ship and cargo were no longer in peril, no further allowances could be made in general average.

European and American law took the logical step of realising that attaining a position of safety was only a first stage in completing the original aim of the common adventure, which was not merely that of achieving safety at an intermediate place, but of reaching destination. To the merchant it is the completion of the voyage that is important; cargo that is safe but thousands of miles away from the intended market is as good as lost. It was therefore considered that general average should continue after immediate safety had been achieved, while expenses were being incurred to get ship and cargo to destination - the “common benefit” approach. At the time of the Glasgow Resolutions in 1860 when the groundwork for the first York-Antwerp Rules was prepared the vote was 24 to 5 in favour of setting aside the English law approach and since that time the York- Antwerp Rules have included “common benefit” expenses.

The agreed framework for dealing with common benefit expenditure increases the likelihood that the voyage will be prosecuted without lengthy legal wrangling and delay; the ability to allow transshipment costs, for example, as substituted expenses will often bring the cargo forward very rapidly indeed. When a very serious casualty has occurred, the existence of a system for sharing certain costs (i.e. discharging, storing and re-loading cargo in order to effect repairs) often prevents the premature and disputed abandonment of the voyage, without prejudicing the parties’ rights and liabilities under the contract of affreightment.

An International conference held in York in 1864 produced the York Rules, which were revised at Antwerp in 1877 to become the first set of York-Antwerp Rules.

Subsequently, the rules have been periodically reviewed with new versions issued every twenty years or so. The most recent set of the York-Antwerp Rules was published in 2016.

It is important to appreciate that the York-Antwerp Rules do not have the status of an international convention. They take effect only by being incorporated into contracts of affreightment.

Rule A of the York-Antwerp Rules defines a general average act as follows:

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

4. Events giving rise to general average

The following are simple examples of general average situations:

Casualty	Type of sacrifice or expenditure
Stranding	Damage to vessel and machinery through efforts to refloat. Loss of or damage to cargo through jettison or forced discharge. Cost of discharging, storing and reloading any cargo so discharged. Port of refuge expenses.
Fire	Damage to ship or cargo due to efforts to extinguish the fire. Port of refuge expenses.
Shifting of cargo in heavy weather	Jettison of cargo. Port of refuge expenses.
Heavy weather, collision, machinery breakdown, or other accident involving damage to ship and resort to or detention at a port	Port of refuge expenses.

Once the amounts allowable in general average have been identified the total is divided pro rata over the net arrived value (including sacrifices) of the property at

the end of the voyage. The proportions attaching to ship and cargo are usually recoverable under their respective insurance policies.

		General Average
Shipowners' losses and expenses		
Cost of repairs of damage to vessel's machinery sustained in refloating operations		US\$ 250,000
Cost of discharging, storing in lighters, and reloading cargo discharged to lighten vessel		US\$ 100,000
Salvage awarded to tugs for refloating vessel		US\$ 1,150,000
Cargo owner's losses		
Value of cargo jettisoned in efforts to refloat	US\$ 500,000	
Damage to cargo caused by forced discharge, storage and reloading	US\$ 100,000	
		US\$ 600,000
		US\$ 2,100,000

(For simplicity, we have omitted the allowances for commission and interest).

Once the amount of the general average has been determined, it is then apportioned over the arrived values at destination. Broadly, these values are taken by starting with the sound market value for the ship (at destination), or C.I.F. value for cargo, and deducting any loss/damage that has occurred. To ensure equality of contribution, any damage that is going to be allowed in general average is then added back.

Apportioned:- Ship			
Arrived value at destination in damaged condition	US\$ 6,750,000		
Add allowance in general Average for refloating damage	US\$ 250,000		
	US\$ 7,000,000	Pays in ppn	US\$ 700,000
Cargo			
Invoice value after deduction of loss and damage	US\$ 13,400,000		
Add allowance in General Average in respect of jettison and damage due to forced discharge	US\$ 600,000		
	US\$ 14,000,000		US\$ 1,400,000
	US\$ 21,000,000	Pays in ppn	US\$ 2,100,000

(General average equals 10% of the contributory values.)

5. Recovery of General Average losses

The Shipowner has a possessory lien on cargo in respect of general average contributions and generally that lien is exchanged for security in the form of an average bond signed by the receiver and a cash deposit or insurer's guarantee. The shipowner is required to collect security even if the only losses that have been suffered are those of cargo, in order to protect the interests of the parties that have suffered a loss as against the other interests involved in the adventure (other cargo interests, time charterers, etc.).

The cost of collecting security, producing an adjustment and collecting contributions, etc. may be uneconomic if the amount of the general average is relatively modest. For this reason the majority of hull policies contain a "General Average Absorption Clause" (sometimes called "Small General Average Clause")

which means that general average losses can be recovered in full under the hull policy, without having to resort to cargo interests.

6. Defences to contribution

Rule D of the York Antwerp Rules provides:

“Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault. “

If a general average situation has arisen because of a breach of the contract of affreightment (e.g. the vessel was unseaworthy because of defective radar and ran aground) cargo interests will have a defence to any request for contribution. Subject to terms of entry the shipowner will usually be able to recover cargo's proportion of general average in such cases from the P & I Club.

Collisions

1. General

Collision is considered to be a peril of the sea, and therefore damage sustained as a result of collision is generally recoverable under hull and machinery policies. However, by their very nature, collisions involve more than one vessel and not only the physical damage sustained by the insured vessel, but also its potential legal liability for the damage inflicted on the other ship.

The relevant clause in ITC Hulls, 1.10.83 is Clause 8:

“8.1 The Underwriters agree to indemnify the Assured for three-fourths of any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for

8.1.1. loss or damage to any other vessel or property on any other vessel

8.1.2. delay to or loss of use of any such other vessel or property thereon

8.1.3. general average of, salvage of, or salvage under contract of, any such other vessel or property thereon, where such payment by the Assured is in consequence of the vessel hereby insured coming into collision with any other vessel.

8.2. The indemnity provided by this Clause 8 shall be in addition to the indemnity provided by the other terms and conditions of this insurance and shall be subject to the following provisions:

8.2.1. Where the insured Vessel is in collision with another vessel and both vessels are to blame then, unless the liability of one or both vessels becomes limited by law, the indemnity under this Clause 8 shall be calculated on the principle of cross-liabilities as if the respective Owners had been compelled to pay to each other such proportion of each other's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of the collision.

8.2.2. In no case shall the Underwriters' total liability under Clause 8.1. and 8.2. exceed their proportionate part of three-fourths of the insured value of the Vessel hereby insured in respect of any one collision.

8.3. The Underwriters will also pay three-fourths of the legal costs incurred by the Assured or which the Assured may be compelled to pay in contesting

liability or taking proceedings to limit liability, with the prior written consent of the Underwriters.

EXCLUSIONS

8.4 Provided always that this Clause 8 shall in no case extend to any sum which the Assured shall pay for or in respect of

8.4.1. removal or disposal of obstructions, wrecks, cargoes or any other thing whatsoever

8.4.2. any real or personal property or thing whatsoever except other vessels or property on other vessels

8.4.3 the cargo or other property on, or the engagements of, the insured Vessel

8.4.4. loss of life, personal injury or illness

8.4.5. pollution or contamination of any real or personal property or thing whatsoever (except other vessels with which the insured Vessel is in collision or property on such other vessels)."

The first point to be noted is that the clause refers to three-fourths only. Whilst some hull insurers cover collision liabilities in full, it is more common to find only 3/4ths covered under the hull policy, with the balance of 1/4th covered by the P & I Club.

The next point to note is that the clause responds only to certain legal liabilities for losses sustained by a third party (loss or damage, delay/loss of use, G.A./ salvage) in consequence of collision with another vessel. Important words here are "collision" and "another vessel".

A further point to note is that the clause also extends to cover 3/4ths of certain legal costs and finally that not all liabilities are covered (see exclusions).

2. “Single” & “Cross” Liabilities

Assume the following figures:

	Vessel A	Vessel B
	20% to blame	40% to blame
Damage	£80,000	£400,000
Demurrage (loss of Earnings)	£40,000	£160,000
	£120,000	£560,000

Settlement between the Owners: (Single liability)

A is liable to B for 20% of £560,000	= £112,000
B -"- A " 80% of £120,000	= £96,000
Net A pay B	£16,000

At law, the settlement between the Owners is made on a SINGLE LIABILITY basis, whereby the Owner with the greater liability (in monetary terms) makes a single payment to the other, i.e. A pays B £16,000 in the above example.

Except where one or both ships are able to limit their liability under statutory provision in the relevant jurisdiction, the Collision Clause assumes that two payments will be made on a CROSS LIABILITIES BASIS.

Cross Liabilities means that the claims are dealt with on the assumption that the Owner of each vessel has paid to the other vessel their respective proportion (depending on how the liability has been attributed to each ship) of the other's damages.

The concept for dealing with liabilities under the clause on this basis resulted from the decision in the “Balnacraig”. The single liability settlement between the two ships was in favor of the “Balnacraig”. When the owners tried to recover their collision liability (before the set-off) under the collision clause, the court held they were not entitled to do so because no actual payment has been made. This was deemed to be unfair and a CROSS LIABILITIES wording was introduced into the clause. The effect of this wording is that, for insurance purposes only:

A will be assumed to have paid to B £112,000 & B will be assumed to have paid to A £96,000

The net amount of money passing between the shipowners is identical, but the policy claims will be larger with cross liabilities. For this purpose, assume a full 4/4ths cover.

Claim on A's Policies	P.A.	Collision Clause	Owners
Single Liability			
Repairs to A	£80,000		
Demurrage on A			£40,000
Single liability payment to B		£16,000	
Claim on Policies (Total £96,000)	£80,000		
Single Liability			
Repairs to A	£80,000		
Demurrage on A			£40,000
Assumed payment to B-20% x £560,000		£112,000	
Assumed recovery from B-80% x £120,000 divided repairs/demurrage	Cr. 64,000		Cr. 32,000
Claim on Policies (Total £128,000)	£16,000	£112,000	

3. Costs - Clause 8.3

Legal costs incurred by the assured usually fall into the following categories:

- 1) General Costs incurred in the early stages of the case and determining the degree of blame attaching to each vessel.
- 2) Costs of Defence (against the other side's claim).
- 3) Costs of Recovery (prosecuting our claims against the other side).

General costs are in due course sub divided into costs of defence and costs of recovery. The costs of defence fall under the Collision Clause and the costs of recovery attach to different categories of recovery made from the other side.

4. Example of Treatment of costs.

Now assume that when our vessel A collided with B, that both vessels had been found equally to blame, and that the amounts originally claimed by each side and eventually agreed were as follows:

	A		B	
	Claimed	Agreed	Claimed	Agreed
Repairs	£100,000	£80,000	£500,000	£400,000
Demurrage	£50,000	£40,000	£200,000	£160,000
	£150,000	£120,000	£700,000	£560,000

Assume also that A pays legal costs of £10,000 allocated as follows:

General Costs	£6,000
Costs of Defence	£2,000
Costs of Recovery	£2,000
	£10,000

These will be charged in the Adjustment regarding A's claim as follows (this time we are assuming the more usual spilt of 3/4ths Hull and 1/4th P&I):

		General Costs	Costs of Recovery	P.A.	Collision Clause	Owners
General Costs	£6000	£6000				
Cost of Defence	£2000				£2000	
Cost of Recovery	£2000		£2000			
	£10,000					
General Costs		£6000				
Apportioned						
Claim	£120,000 bears	£1,059	£1,059			
Counter Claim	£560,000 bears	£4,941			£4,941	
	£680,000 bears	£6,000				
		Cost of Recovery	£3,059			
Apportioned						
Repairs	£80,000 bears	£2,039		£2,039		
Demurrage	£40,000 bears	£1,020				£1,020
	£120,000 bears	£3,059				
					£6,941	
			Less One-fourth	-£1,735	£1,735	
				£2,039	£5,206	£2,755

5. Recoveries

There are many occasions following a claim under the insurance policies where an amount is recovered from a third party. For example:

- i) From a repairer in respect of a negligent act or repair.
- ii) From a charterer for damage arising as a result of the vessel proceeding to an unsafe berth.
- iii) From another vessel in respect of damage done in a collision.

Under the doctrine of subrogation, the insurer acquires no proprietary rights in respect of the subject-matter insured, but he is entitled to the benefit of any recovery less the costs of recovery, up to the amount he has paid or is liable to pay under the insurance policy. In addition, the insurer is only entitled to receive the benefit of the recovery against items which he has paid or is liable to pay (i.e. a hull and machinery insurer will not share in the recovery for loss of earnings), and the terms of the policy may also affect the precise method of division of the recovery between assured and underwriter. A comparison of the Institute Time Clauses - Hulls - 1.10.83 and the American Institute Hull Clauses - 2.6.77 serves to demonstrate this point.

The Institute Time Clauses - Hulls - 1.10.83 contain the following clause:

12.3 Excluding any interest comprised therein, recoveries against any claim which is subject to the above deductible shall be credited to the Underwriters in full to the extent of the sum by which the aggregate of the claim unreduced by any recoveries exceeds the above deductible.

The American Institute Hull Clauses - 2.6.77 are silent on this point, and the effect of this is that the recovery under such clauses is apportioned taking into account the owners' uninsured loss represented by the deductible. The International Hull Clauses 2003 have specific wording to the same effect.

Take for example, a vessel involved in a collision as a result of which she sustains damage amounting to US\$100,000. This amount is claimed from underwriters and subsequently a recovery is made from the colliding vessel (which is wholly to blame for the collision) of US\$80,000.

- i) Claim/recovery if vessel insured under policies subject to Institute Time Clauses - Hulls - 1.10.83 (or 1.11.95 version).

Claim:

Cost of collision damage repairs	US\$ 100,000
Less: policy excess	US\$ 25,000
	Net Claim US\$ 75,000

Recovery:

To the insurer - the sum paid under the original adjustment	US\$ 75,000
To the assured - the balance	US\$ 5,000
	US\$ 80,000

- ii) Claim/recovery if vessel insured under policies subject to American Institute Hull Clauses, or International Hull Clauses 2003.

Claim:

Net claim as above	US\$ 75,000
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Recovery:

To the insurer - $75/100\text{ths} \times \text{US\$}80,000$	US\$ 60,000
To the assured - $25/100\text{ths} \times \text{US\$}80,000$	US\$ 20,000
	US\$ 80,000

6. General average recoveries

Occasionally hull insurers will settle a claim in full for general average sacrifice damage to the vessel, prior to the completion of the general average adjustment, when such items are included in full either under a payment on account certificate or a preliminary adjustment.

Under the general average adjustment they will receive credit for such payments and receive contributions from third parties such as cargo, time charterers and container owners.

7. Duties of assured

The assured must pursue a recovery action against third parties wherever possible, and where practicable keep the insurer advised at all times of the course of action he proposes to take. Failure of the assured to adopt this procedure for any of the following reasons:-

- i) Negligently failing to take proper measures to hold third parties responsible,
- ii) Expecting insurers to take necessary steps themselves,
- iii) Avoiding the recovery action for reasons of his own commercial relationships, may cause problems at a later stage, in that the insurers' own rights of subrogation may thereby have been prejudiced. Consulting the insurer as to the proposed course of action will also facilitate the subsequent claim by the assured of any costs he may have incurred in trying to make a recovery.

Practical claims handling

1. Planning

The smooth running of a claim will often depend on appropriate policy coverage being in place to meet it, in accordance with the needs and expectations of the assured. In addition to an overall periodic review of cover, any changes in circumstances or trading patterns may require a re-appraisal of coverage and the possible introduction of new wordings.

One of the consequences of the significant increases in deductible levels is that assureds have become less familiar with the procedures involved in processing a claim. It is therefore often helpful to draw up a simple claims procedure document that identifies the basic steps to be taken, the personnel involved and their contact details.

2. Notification

Notice of any incident likely to give rise to a claim should always be given to insurers promptly to enable them to instruct a surveyor. It is better to withdraw a notification if the casualty is less serious than first thought, than to give late notice months after the event. The average adjuster should also be given the preliminary facts of the situation to enable an initial appraisal of the likely claim to be carried out.

If the incident may be the fault of a third party, prompt notice must also be given to them, holding them liable for all losses etc. In addition to protecting the assured's uninsured losses (e.g. loss of earnings) it is important to protect insurers' rights of subrogation. Failure to do the latter may result in a reduction of the claim.

3. Communication

In the aftermath of a serious casualty it is important that the assured communicates regularly with the attending surveyor regarding the situation as it develops, and any intended course of action. If there is an area of potential difficulty it is better that it is discussed openly at the time, rather than presenting insurers with a *fait accompli* at some later date.

Where the assured is a large corporation it is also important that effective communication is maintained between the different divisions – the commercial, technical, legal and insurance departments may all have a different perspective

on the situation and it often happens that one department will take a decision without fully understanding all the implications. An internal claims procedure document can often help avoid this tendency.

Smaller companies naturally have a more integrated approach, with perhaps only one or two individuals being involved – here the danger is that there may be gaps in their knowledge and experience that may need to be supplemented by outside experts.

4. Managing expectations and reserves

With any serious casualty, there will be financial fallout that goes well beyond the cost of repairs or other expenses covered by the hull policy. Even with a loss of hire policy in place, there are likely to be some unrecoverable costs.

Some aspects will often need further investigation before likely recovery can be confirmed, but it should be possible to map out the main heads of claim at a reasonably early stage. This avoids wasting time pursuing items that are not properly recoverable and ensures that the assured's finance department does not have an unrealistic expectation of what will be able to recover.

Similarly, initial reserve figures should be provided to insurers at an early stage; it is also vital that these reserves are updated if circumstances change. With the present strong financial controls, accurate reserving is very important for insurers and providing reliable information helps to maintain goodwill.

5. Information and documentation

A major casualty can be traumatic for an organisation and the individuals within it, and this can sometimes lead to a reluctance to release information that may be needed to progress the claim. Similarly, large companies may have document channels for ISM and accounting purposes that move relatively slowly, so that important reports and large invoices take some time to emerge.

The initial assessment of the casualty therefore needs to be followed promptly by a clear list of information and documents required to move the claim forward towards establishing liability, likely quantum and the arrangement of on account payments by insurers.

Claims procedures can help by outlining in general terms what may be required but the different circumstances of each casualty will give rise to specific requirements.

6. Role of average adjusters

In the case of the “Playa de las Nieves” (1974) Donaldson J. said, in relation to a protest that the Institute Time Clauses (Freight) are a trap for the unwary:

“Marine insurance is a technical matter and marine policies on large commercial vessels are not intended for do-it-yourself enthusiasts. Those effecting such policies may be expected to have skilled advisers.”

The same applies to the handling of claims and the importance of the role of the average adjuster who, as an independent intermediary, may be appointed by any party to a marine adventure to advise generally or assess liabilities from an impartial viewpoint.

The qualification required to be a Fellow of the Association of Average Adjusters covers practical claims matters and also requires a detailed knowledge of the law of marine insurance, general average, carriage of goods by sea etc. Added to this theoretical knowledge is “hands on” experience of a wide variety of claims and the ability to provide rapid analysis of complex documentation.

Working with the brokers, hull insurers and P & I Clubs, the adjuster can therefore act as a guide through the different stages of any claim. The approach throughout is non – adversarial, seeking to identify and resolve areas of potential dispute without delaying the claim settlement process or damaging commercial relationships between the parties.

The assured can therefore be confident that his losses will be recovered without unnecessary delays and that all relevant costs are considered. The assured’s personnel are diverted from their normal duties for the minimum time necessary and no effort is wasted in the pursuit of items that are not properly recoverable. From the Insurer’s point of view, the claim is professionally stated and is received by him in a concise and organised format that facilitates prompt settlement.

Richard Cornah

Honorary Fellow of the Association of Average Adjusters

Paul Rowland

Fellow of the Association of Average Adjusters

Joseph Shead

Senior Associate of the Association of Average Adjusters

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Richards Hogg Lindley (RHL) is a leading provider of independent marine claims advice and adjusting services.

To find out more about our services, please visit our website

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