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Salvage, Sue & Labour and Constructive Total Losses

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Overview

Conceptually, salvage, sue and labour and constructive total losses are quite distinct from each other. In practice however, the distinctions can blur in the context of a marine insurance claim following an insured loss. It is necessary to characterize and adjust various expenses incurred in the loss adjustment. Salvage and “sue & labour” are two types of expenses or charges that can be incurred. Their application may have an effect in the determination of whether a loss is a Constructive Total Loss.

An appreciation of what different charges, or expenses that might be claimed, is important in the determination of what is payable against a policy in the event of loss and in the characterization of the loss itself.

The chart at the end of this paper [Appendix ‘A’] may be of assistance in summarizing concepts addressed in this paper.

I will deal firstly with Constructive Total Losses and then the meaning of and application of charges, such as general average, sue and labour and salvage charges.
1. The Categorization of Losses: What is a Constructive Total Loss?

Assume that there is a covered loss to insured property, caused by an insured peril. That loss is either going to be regarded as a partial loss, or a total loss. A total loss is in turn either an actual total loss or a constructive total loss. Unless a different intention appears from the terms of the policy, insurance against a total loss includes a constructive total loss as well as actual total loss.

An actual total loss is conceptually clear. This has been clarified by case law long before the drafting of the marine insurance legislation. s. 58 of the Ontario Marine Insurance Act R.S.O. 1990 c. M.2 [hereinafter the “Ontario Act”] and s. 56 of the Federal Marine Insurance Act S.C. 1993, c. 22. [hereinafter the “Federal Act”] define actual total losses in clear fashion:

- where the subject matter insured is destroyed or so damaged so as to cease to be the thing of the kind insured, or
- where the assured is irretrievably deprived of the insured item.

The Ontario and Federal Acts also contain provisions deeming, on certain facts, when actual total losses are presumed to have occurred.
It follows that a loss is either partial or total. A **partial loss**, involves one or more of the following:

- a particular average loss [less than the whole]
- a general average loss [addressed below]
- salvage charges [addressed below]
- particular charges e.g. “sue and labour” expenses [addressed below]

which present a straightforward situation. The assured presents a claim whereby – depending on the policy provisions and the facts of the claim – the insured property (being damaged or affected to some extent but something less than the destruction or permanent loss of use) the insurer either then repairs the item or indemnifies the assured. It is worthy to note that the above referred to general average, salvage and particular charges incurred by the assured may be compensable under the policy for a partial as well for a total loss. A particular average loss is a loss of the subject matter insured that is caused by a peril insured against and is not a general average loss, but this is distinct from what is referred to as **particular charges**.

Salvage charges, if incurred [see definition below] will be payable by the insurer as a loss caused by the insured peril. These charges are adjusted as being a part of the insurance coverage limits over the insured property.
In contrast, sue and labour expenses [as defined below] are considered as a supplementary coverage and are therefore recoverable in addition to the sum insured under the policy.

If there is an actual total loss, there is no need for the assured to give a notice of abandonment.

The difference between an actual total loss and a constructive total loss is a matter of degree. With new technologies there will be fewer actual total losses as the ability to recover, or restore maritime property from certain perils increases.

2. Constructive Total Losses

Subject to the wording of the policy, there is a constructive total loss where the item insured is reasonably abandoned on account of either:

- its actual total loss appearing to be unavoidable, or

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1 Section 61, Ontario Act, and section 57, Federal Act
- because it cannot be *preserved* from **actual total loss** without an expenditure that would *exceed its value* if the expenditure is incurred, or
- where the assured is deprived of the possession of his ship or his goods by a peril insured against, and it is *unlikely that he can recover* the ship or goods, or
- where the the assured is deprived of the possession of his ship or his goods by a peril insured against, and the cost of recovering the ship or goods would exceed their value when recovered, or
- in the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired\(^2\), or
- in the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

Where there is a **Constructive Total Loss** [“CTL”] the assured may either treat the loss as a partial loss or abandon the insured item to the insurer and treat the loss as if it were an **actual total loss**.

\(^2\) In estimating the cost of repairs, no deduction is made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired
If the assured elects to treat a loss as a constructive total loss, [it may opt to treat a loss as a partial loss] it is required to provide the insurer with a **notice of abandonment**. If the assured fails to do this the loss will only be treated as a partial loss.³ The legislation provides that there are different means by which this abandonment might be communicated to, and for that matter accepted by the insurer. It must however be provided to the insurer with reasonable diligence. The assured must act immediately once receiving reliable information on the circumstances of a loss.

If an abandonment is not accepted – the insurer may disagree that a loss is not a partial loss only, or, there may be coverage issues – the assured has by the timely and proper notice of the abandonment preserved it’s right to assert a CTL and the insurer’s rejection of the notice will not by itself prejudice the assured. Once a notice of abandonment is accepted [by words, or conduct of the insurer⁴] the abandonment is irrevocable and the acceptance of the notice conclusively admits liability for the loss.

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 it.

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³ Section 63, Ontario Act, and section 58, Federal Act
⁴ Mere silence by the insurer is not acceptance of an abandonment
Where there is a valid abandonment, the insurer may take over the interest of the assured in whatever remains of the insured item and the insurer then has all proprietary rights in that item.

The point must be reiterated that the insurer will not be liable for what amounts to a constructive total loss where no notice of abandonment has been given, unless this requirement be waived by the insurer or as seen above, there is no benefit to the insurer by it’s communication.

Where the insurer refuses to accept an abandonment and repairs a vessel at a cost less than the value of the item when repaired, there is not a CTL. Where in turn the insurer refuses to accept an abandonment and repairs a vessel at a cost greater than the value of the vessel restored, there is a CTL.

3. Distinguishing Various Charges of Claims on a Policy in Event of Loss

Before defining “Salvage charges” and “sue and labour” it may be helpful to summarize the nature of charges generally that may be filed in the context of a claim by an insured peril.
“Particular Average and Particular Charges”

A “particular average” loss is simply a partial loss of the insured item, unless it be what is referred to as a “general average loss”. Particular average refers to actual damage to, or loss of part of the item insured.

Expenses incurred by or on behalf of the assured for the safety or preservation of the item insured, other than general average or salvage charges, are called particular charges and particular charges are not included in particular average. Expenses incurred under the “sue and labour” clause of a policy are particular charges. Particular charges, such as sue and labour charges, are recoverable under the policy in addition to the sum insured.

A “general average loss” is a loss caused by a general average act and it includes a general average expenditure as well as a general average sacrifice.\(^5\) Where there is a general average loss, the party upon whom it falls in entitled, subject to certain conditions, to a rateable contribution from the other parties interested. Where an assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of
that loss that falls upon him, and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his rights of contribution from the other parties liable to contribute. Subject to the terms of the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the insured item, he may recover this from the insurer.

Unless otherwise provided in the policy the insurer however is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding a peril insured against.

**“Sue and Labour charges”**

As mentioned above, this is an example of particular charges. If properly incurred, these are recoverable by the assured in addition to the sum insured.

The legislation codifies the duty of the assured and his agents to take such measures as may be reasonable for the purpose of averting or minimizing a

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5 A general average act occurs when an extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperiled in the common adventure.

6 See s. 79, Ontario Act, s. 79, Federal Act
loss. This obligation exists, whether or not there be a suing and labouring clause in the policy.

A standard Sue and Labour clause is as follows:

“In case of any loss or misfortune, it shall be lawful and necessary to and for the Assured, his or their factors, servants and assigns, to sue, labour and travel for, in and about the defense, safeguard and recovery of the goods and merchandise, or any part thereof, without prejudice to his insurance, nor shall the acts of the Assured or this Company, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of abandonment. The reasonable expenses so incurred shall be borne by the Assured and the Company in proportion as the sum hereby insured bears to the whole value at risk.”

Where the policy contains a suing and labouring clause, this is deemed to be supplementary to the contract of insurance and the assured may recover from the insurer any expenses properly incurred pursuant to that 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. General average losses and contributions, and salvage charges [see below] are not recoverable under this clause.
Expenses incurred, to avert or diminish any risk not covered by the policy are not recoverable under the suing and labouring clause.

“Salvage charges”

Recall that “salvage” involves circumstances where:

i) maritime property, is

ii) is danger,

iii) requiring some element of rescue

iv) which is voluntarily saved, by one having no contractual or public duty to do so,

v) which saving was successful.

Salvage charges are defined⁷ as the charges recoverable under maritime law by a salvor independently of contract but do not include the expenses of services in the nature of salvage rendered by an assured or his agents or any person employed for hire by them for the purpose of averting a peril insured against, and such expenses, where properly incurred, may be recoverable as particular charges or as a general average loss according to the circumstances under which they were incurred.
Subject to any provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recoverable as a loss by those perils. Accordingly, salvage charges are recoverable under the policy, and not under the sue and labour clause and as such they cannot be recovered in addition to the sum insured.

\[ \text{See s. 66, Ontario Act, s. 64, Federal Act} \]
## Appendix ‘A’

### Categorization of Losses (assuming an insured peril)

<table>
<thead>
<tr>
<th>Partial Loss</th>
<th>or</th>
<th>Total Loss$^8$</th>
</tr>
</thead>
<tbody>
<tr>
<td>$\downarrow$</td>
<td>$\downarrow$</td>
<td>$\downarrow$</td>
</tr>
<tr>
<td>$\text{[“particular average” = actual damage to, or loss of part of item insured]}$</td>
<td>$\downarrow$</td>
<td>$\text{Actual total loss or Constructive total loss}^9$</td>
</tr>
<tr>
<td>\hspace{1cm}$\downarrow$</td>
<td>$\downarrow$</td>
<td>$\downarrow$</td>
</tr>
<tr>
<td>$\text{• settlement per terms of policy [no abandonment in fact [not an actual total loss] or any intent to abandon [CTL]; insured continues with ownership of item]}$</td>
<td>$\downarrow$</td>
<td>$\text{• item destroyed or assured deprived?}$</td>
</tr>
<tr>
<td>$\downarrow$</td>
<td>$\downarrow$</td>
<td>$\text{Treat as a partial loss? or as “CTL”}^{10}$</td>
</tr>
<tr>
<td>$\downarrow$</td>
<td>$\downarrow$</td>
<td>$\text{• reasonably abandoned?}$</td>
</tr>
<tr>
<td>$\downarrow$</td>
<td>$\downarrow$</td>
<td>$\text{• notice of abandonment required with reasonable diligence if notice would have any possibility of benefit to insurer}$</td>
</tr>
<tr>
<td>$\downarrow$</td>
<td>$\downarrow$</td>
<td>$\downarrow$</td>
</tr>
<tr>
<td>$\text{• insurer accepts or}$</td>
<td>$\downarrow$</td>
<td>$\text{• insurer rejects}^{11}$</td>
</tr>
<tr>
<td>$\downarrow$</td>
<td>$\downarrow$</td>
<td>$\downarrow$</td>
</tr>
<tr>
<td>$\text{- liability for CTL }$</td>
<td>$\text{- repairs item at cost&lt;}$</td>
<td>$\text{admitted value when repaired } \neq \text{CTL, or, if}$</td>
</tr>
<tr>
<td>$\downarrow$</td>
<td>$\downarrow$</td>
<td>$\downarrow$</td>
</tr>
<tr>
<td>$\text{- insurer takes over}$</td>
<td>$\text{- repairs item at cost&gt;}$</td>
<td>$\text{interest of assured and deals with subject matter as it’s own value of restored item, then = CTL}$</td>
</tr>
</tbody>
</table>

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$^8$ Unless the policy otherwise provides, the assured can elect to claim for a partial loss if evidence filed in support of a claim for total loss suggests only a partial loss.

$^9$ The policy may contain provisions defining a CTL

$^{10}$ Assured’s election, provided elements of a CTL established, insured item now dealt with as though an actual total loss

$^{11}$ Insurers rejection of abandonment of notice by itself not prejudicial to assured