SUE & LABOUR – A TRADITIONAL DOCTRINE KEEPING UP WITH THE TIMES

INTRODUCTION

The subject of my address has long interested me, in part because of how it sits, quirky and quaint, on the margins of marine insurance contracts and in part because I have found that its practical day-to-day application sometimes lacks consistency. I initially imagined it to be an old-established and quintessentially English institution, subject to moderately complicated rules but manifestly aimed at achieving a fair result (rather like the game of cricket). I now feel that the time has come to dust off this venerable doctrine and give it a good airing.

ACKNOWLEDGEMENTS

At the outset I must acknowledge my debt to the various sources of fact and guidance that underlie this brief paper. The focus is on London market policies subject to English law and the material referenced includes large scoops of the 18th edition of Arnould plus the current Supplement, reflecting recent developments. I have looked closely at the treatment of Sue and Labour by Professor Howard Bennett of Nottingham University in the 2nd edition of his seminal textbook "The Law of Marine Insurance" (2006). I am grateful to both Herbert Smith Freehills and our hosts today Clyde & Co., for providing additional thoughts and material. I also make reference to two previous Chairman's Addresses from 1982 and 1985.

All the textbooks and cases cited are listed alphabetically at the end.

And finally I must thank Richards Hogg Lindley for their kind permission to reproduce (for today's presentation only) the 2 cartoons which I have included in the handout. They are the work of the highly talented Hidde Lahaise, a qualified Partner of their Rotterdam office, whom I had the pleasure of getting to know and work with in the mid - 1990's. Hidde died suddenly at the age of 48 in 2003 whilst serving as President of AIDE (the forerunner of AMD) and is much missed.

HISTORY

A. Origins

It is not known when exactly a Sue and Labour clause was first included in a marine insurance policy but a passage found in Guido Rossi's recent publication "Insurance in Elizabethan England" refers to the existence in the mid-sixteenth century of two popular variants of the clause, according to the first of which, the narrow Dutch-Italian model, the Insured would be permitted to recover, repair and preserve marine cargo, whilst under the broader Franco-Spanish model the Insured might also be permitted to sell the cargo to avoid an insured loss. So much for my supposition that the "fair-game" principles of the sue and labour clause must have sprung from the lush green playing fields of England!

By way of example of this Continental European import, one of the earliest versions appeared in a French policy of 1565; the clause embraces the preservation of the vessel as well as the cargo and (in contemporaneous translation) runs as follows:

> "And we gyve to him * * * ample powar to helpe and gyve order for to save them said shippes and marchandises or part of the same to sell and distribute them yf ned be as well to our prouffytte as dommage withowte asking us leave or license. And we shall paye all charges averedge and expenses whiche shall beren at the sewte and saving of them said shippes and merchaundisses be yt that there be anything recovered or not."

[* * * here the name of the insured owner of the subject matter insured was inserted. In these early days the cargo was probably the main event in marine insurance contracts; if it was at all valuable it would invariably be tracked and even accompanied throughout the voyage by the shipper's agents or "factors", who were the persons designated to "lay hands on the cargo" and perform the suing and labouring in case of need.]

The earliest mention of such a clause in an English policy dates from a decade or so later. By 1577 its use in London had become widespread and we would immediately recognise the first use of the phrase: "sue, labour and travail".

It is worth saying that, despite the transformational changes in communications since the sixteenth century, marine Insurers have maintained the same general attitude toward decision-taking in time of peril, viz., that it is for the owners or custodians of the imperilled property to take the appropriate measures, as soon as possible, via the agency of the ship's Captain and perhaps other decision-takers; the Insured is not expected, much less obliged, to refer to Insurers before committing the funds or taking the measures required in the context of the duty to mitigate. As the French wording implies, the need is for action "withowte asking us leave or license".

B. The SG Form

By 1779 a standard wording had made its way into the SG Form of policy, which was in use in the London market until the 1980's, reading as follows:

> …/…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 said Goods and Merchandises and Ship, &c, or any part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his sum herein assured. And it is especially declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property insured, shall be considered as a waiver of acceptance of abandonment…/…

Note that much of this SG wording is still found in the American Institute Hull Clauses 2009 (AIHC 2009). Parsing the archaic terms, we note the derivations and meanings:

- Factor = Agent
- Assign = Assignee
- Sue = "continue, persevere", from Anglo-French suer "follow after, continue," Old French suir, sivre "pursue, follow after, sue in court" (Modern French suivre), from Vulgar Latin sequere "follow". Compare the phrase in the 1565 form: "…sewte and saving…"
- Travel = originally "to toil, labour" (see travail). The semantic development may have been via the notion of "go on a difficult journey," but it also may reflect the difficulty of any journey in the Middle Ages.

We can easily discern how the Insurers, quite logically, perceived the odds to be against them when it came to marine property sailing into potentially sticky situations in remote locations, and how concerned they were to incentivise the policy-holders (and more particularly their "factors, servants and assigns") to take whatever measures they reasonably could to preserve the property from the specific perils, against which they had been content to insure them.

C. Statutory Regulation – MIA 1906

Inevitably, in the normal course of business, disputes arose, a few of which were referred to the courts for resolution. A summary of the legal principles that were in place by the end of the 19th century is to be found in the Marine Insurance Act 1906 (MIA 1906), where Section 78 sets out the principles which apply, where a sue and labour clause is included in the policy, in the following terms:

> 78. Suing and labouring clause.
>
> (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 maybe reasonable for the purpose of averting or minimising a loss.

D. The 1980's - the London market consigns the SG Form to History

The old Sue and Labour Clause has now been restated in modern language; the most popular version currently in use for hull policies is contained in the Institute Time Clauses – Hulls 1983 (ITCH 1983), reading as follows:

> **13 DUTY OF ASSURED (SUE AND LABOUR)**
>
> 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.
> 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.
> 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.
> 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.

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.

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.

Mr. Donald O'May, one of the principal architects of the reforms of the early 80's, remarked that there would be no need for an upsurge of litigation in the wake of the reforms; instead: the changes in language "should be interpreted in the context of the old jurisprudence." Mr O'May's position has been vindicated in practice, inasmuch as no such upsurge has occurred. There have been cases, but more of a trickle than a stream.

E – S&L Provision under Cargo Clauses

Under the 2009 version of the Institute Cargo Clauses the equivalent provision is expressed more briefly than under a hull policy:

MINIMISING LOSSES

Duty of Assured

16. It is the duty of the Assured and their employees and agents in respect of loss recoverable hereunder

16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss, and

16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised

and the Insurers will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties.

Most of the essential features of a full wording are carried across from the old SG Form, including the duty to mitigate and the concomitant right to reimbursement, although it is perhaps odd not to find any reference to the standard trigger of "any loss or misfortune".

An additional feature, specifically tailored for the cargo version of the sue and labour wording, is the incorporation of the bailee clause (Clause 16.2), whereby the duty of the Assured extends to protecting rights against third parties. The duty embraces at once the possible enforcement of possessory rights (such as the recovery of property) as well as of rights to financial compensation. In the latter respect the scope of the duty in the case of cargo therefore exceeds that set forth in the standard sue and labour clause.

2) DEFINITION OF TERMS

A. S&L as distinct from "salvage charges" and "salvage"

One of the several potentially perplexing aspects of this area of study is the use of the terms "Particular charges", "salvage charges" and "salvage". These days I doubt if it the term "particular charges" is of much more than academic or historical interest but *en passant* we should note that it is used in the MIA 1906 to embrace all expenses incurred for the benefit or preservation of the subject matter insured when a peril threatens to operate or has begun to operate, except those that fall into the category of general average or non-contractual salvage as defined by the Act (i.e. salvage *stricto sensu* under maritime law). It follows that "particular charges" could include both salvage under contract and sue and labour charges. For the sake of completeness, as we shall see later on, particular charges may be recoverable in the absence of a sue and labour clause.

In relation to "salvage charges" (i.e. salvage proper under maritime law), the House of Lords made clear in *Aitchison v Lohre (1879)* that a volunteer salvor is not considered to be a factor, servant or assign of the assured. We therefore have it on the highest authority that the act of throwing a rope to a ship in distress, in the absence of a contract, is not the prelude to a sue and labour claim.

It follows that the simple term "salvage" refers to salvage services rendered under a contract, such as LOF or Wreckhire.

B. Other definitions

In the interests of brevity I am using the compressed term "Duty to mitigate" herein as shorthand for "The right and the duty to take reasonable measures to avert or minimise a loss".

References to a "sue and labour clause" include clauses entitled "Duty of Assured", etc.

3) DUTY TO MITIGATE AND RIGHT TO RECOVER

A. In what circumstances do the Duty to Mitigate and the Right to Recover arise?

Since the inclusion of the sue and labour clause in the SG Form it is has been clear from the introductory words: "and in the case of any loss or misfortune…" that the duty imposed in S. 78 (4) may arise once an insured peril has started to operate. The duty to mitigate on behalf of Insurers is not expressed in the SG Form (whose language is merely permissive: "it shall be lawful…" but the duty has been held to exist from at least the late 18th century and both the MIA 1906 and the modern clauses reflect that position.

Turning that idea round by 180 degrees, from the assured's perspective, in order to recover from Insurers, he must be able to show that a duty to mitigate has arisen.

In this still somewhat controversial area, much has been written about 3 law cases which were decided over a period of 119 years, starting with *Lohre v Aitchison (1878),* via *Integrated Container Service v British Traders (1983)* and leading to *Royal Boskalis Westminster v Mountain (1997)*. I do not intend to rehearse all of the issues raised in detail – hopefully the following brief summary will hit the high points:

Lohre v Aitchison (1878) involved an action to recover under a sue and labour clause "salvage charges" that were payable according to maritime law. The Court of Appeal held that such charges were so recoverable but that decision was reversed the following year by the House of Lords in *Aitchison v Lohre (1879),* as we have already seen. In the Court of Appeal Brett L.J, in outlining the general principles of the sue and labour doctrine, used the following two turns of phrase:

- "If by perils insured against the subject-matter of insurance is brought into such danger that without unusual or extraordinary labour or expense a loss will very probably fall on the underwriters, and if the assured or his servants…"
- [describing how each underwriter will have to pay his proportion] "…the sum they would have had to pay if the probable loss had occurred…"

Brett L.J. was therefore setting the bar for the assured at a pretty high level. In the House of Lords Lord Blackburn neither expressly approved nor disapproved the general description offered by Brett L.J. but he did go so far as to offer his own (seemingly less stringent test), which ended as follows:

- "…and therefore the insurers bind themselves to pay in proportion any expenses incurred, whenever such expense is reasonably incurred for the preservation of the thing from loss."

Over a century later in the *Integrated Container* case Eveleigh and Dillon LL.JJ. were asked to deal with findings of fact made by the Official Referee. Now in 1983 referees did not have the benefit of multi-angle "slow mo" video footage or goalmouth technology and it would be fair to say that the precise facts of this case have remained slightly murky. Arnould certainly considers that the case is more important for its statement of general principles than its application of the law to a particular set of facts. Be that as it may, the re-formulation of basic principles provided by Eveleigh L.J. is well known and often cited as a practical guide to what constitutes the "trigger" for the duty to mitigate and the right to recover. It contains a sharp put-down for the use of hindsight and it softens Brett L.J.'s "very probable outcome" test (perhaps in deference to Lord Blackburn's dictum in the higher Court). It reads:

(i) "As the right to recover expenses is a corollary to the duty to act, the assured should be entitled to recover all extraordinary expenses reasonably incurred by him where he can demonstrate that a prudent assured person, mindful of an obligation to prevent a loss, would incur expenses of an unusual kind. In my opinion this is the effect of the sue and labour clause, and I do not think that authority compels me to hold otherwise…

(ii) … the sue and labour clause entitles the assured to recover the cost of such measures when there was a risk that underwriters might have to bear that loss. I do not think it is open to insurers…to assert that as a matter of ultimate truth they would never have been liable…

(iii) I believe that the true test … is whether or not in all the circumstances the assured has acted reasonably to avert a loss when there was a risk that insurers might have to bear it…"

The next landmark is the *Royal Boskalis* case, which concerned dredging works that were being performed close to the Iraqi-Kuwait border in 1990, when they were interrupted by the Iraqi

invasion. The case, brought by the joint-venture dredging company against their war risk insurers, was heard in the Commercial Court by Rix J. who, after careful consideration of the *Integrated Container* case, provided clarification of the notion of imminence in this context. In particular, when addressing the question of when the statutory duty is owed, he decided that it was not necessary that the insured peril should actually be in operation before the duty to mitigate and the right to recover arise, and that it is sufficient that the peril exists and is obviously imminent.

When considering the appropriate test to be applied to determine an assured's entitlement to reimbursement, Rix J. specifically approved what he referred to as the test "compendiously and accurately" put by Eveleigh L.J. as set out under (i) above. The insurers did not challenge Rix J.'s reasoning and in the Court of Appeal in *Royal Boskalis* the following formulation of sue and labour principles, put forward by the plaintiff's counsel, also unchallenged, was accepted by Stuart-Smith L.J:

> "The insured is entitled to recover under the sue and labour clause if he can show
>
> (1) that he or his agent has taken 'unusual and extraordinary' steps of exertion,
> (2) that the object of this action was to preserve the insured property from loss by an insured peril,
> (3) that the insured peril was operative or obviously imminent,
> (4) that the loss, if it had occurred, would have been of a type recoverable under the policy,
> (5) that it was reasonable to take the steps."

To round off this part of the discussion, the following extract from the current edition of Arnould wraps up the question of the imminent threat:

> "The imminent danger of the advent of an insured peril is plainly sufficient to bring the right and duty into operation, at least so long as the danger really exists. It is also clear that the right to sue and labour at underwriters' expense does not arise unless and until the operation of an insured peril is imminent, under usual forms of sue and labour clauses. An expenditure incurred in order to prevent a loss from arising or recurring in future, when there is no existing or imminent threat to the subject matter insured, cannot be recovered as sue and labour. Apart from the fact that such prophylactic expenditure fails to meet the essential requirements of imminence of an operation of insured perils and threat of loss, in most cases such expenses could not be regarded as extraordinary, since underwriters do not engage to meet the cost of ordinary ship's maintenance. In any event, the circumstances in which the right and duty arise are made a matter of express stipulation, by the words 'in case of any loss or misfortune'." [Arnould: 18th Ed., Ch. 25-11]

But just in case you were thinking that the dictum of Rix J. in *Royal Boskalis* had, by virtue of surviving the Court of Appeal, effectively lowered by a few notches the bar that Brett L.J. had reached so high to set in place in *Lohre v Aitchison*, the 2015 case of the "*Brillante Virtuoso"* reopened the question of whether the appropriate test was that suggested by Eveleigh L.J. in the *Integrated Container* case (and approved in *Royal Boskalis*) or the earlier, tougher, "very probably" test from 1878. The reasoning that led Flaux J. to step back from affirming *Royal Boskalis* is simply that he found the level of risk of loss in the "*Brillante Virtuoso"* to be sufficient to satisfy either test. He did recognise that insurers had "very fairly" submitted that "very probably" may be putting the

requisite level of risk too high but there still needs to be a significant risk. That is as far as he went and whilst we can walk away with a strong presumption that the assured need only demonstrate the existence of a tangible risk to insurers, we are still left with the slightly unsatisfactory image of the bar being placed at an uncertain height in any future "jump-off" that the assured may face in order to validate the requisite level of risk in a claim for sue and labour.

B. When does the duty terminate?

One of the principles that may be adduced from the cases and the authoritative texts is that sue and labour expenses may generally be recovered as long as the peril continues to operate. Arnould adds a refinement of this simple proposition by adding that "the right to sue and labour at underwriters' expense can only continue while the insured property remains in the grip of the peril and while there continues to be an imminent risk of an increase in the amount of the insured loss…" [Arnould: 18th Ed., 1st Supp., Ch. 25-13]

This leads us to the somewhat complex issues that may arise in total loss scenarios. The first point is whether the tendering of a Notice of Abandonment will *per se* bring to an end the duty to mitigate and the right to recover. Oddly, the point had not previously been the subject of any direct authority but in the *Kuwait Airways* case Rix J. had rejected the idea that the making of a total loss claim automatically brought the sue and labour allowances to an end.

The duration of the right to claim sue and labour in a marine context was raised by the underwriters of the "*B Atlantic"* case, where the judgment of the Commercial Court was issued in 2014. In this case Flaux J. held that in many cases at the time of the writ agreement, the vessel would still be "in the grip of the insured peril", such that it would be in the interest of both parties that the sue and labour expenses continued to be incurred. As a result, the right to recover sue and labour expenses did not end on tendering of NOA (or its rejection with the writ clause) but rather on the date that a claim form was actually issued.

Some months later the same issue came up before the same Judge in the case of the *"Brillante Virtuoso".* The vessel was redelivered by salvors in October 2011, Notice of Abandonment (NOA) was tendered in December 2011 but it is noteworthy that, contrary to custom, the underwriters did <u>not</u> agree to place the assured in the same position as if a writ or claim form had been issued on that same date. The cost of standby tugs and related expenses continued to be incurred. A claim form was eventually issued on 8th February 2012. In mid-March 2012 the vessel was eventually delivered to scrap dealers. In a previous section we mentioned the view that Flaux J. had formed in relation to the required level of risk of loss in a claim for sue and labour and how the ongoing physical consequences of the alleged seizure by pirates enabled the assured to pass that test with flying colours. One of the other questions before him was whether the tendering of the NOA in February 2012 brought to an end the right to claim for sue and labour.

Although what was applicable in the realm of aircraft insurance did not necessarily bind Flaux J. in the *"Brillante Virtuoso"*, he followed the same reasoning as had been applied by Rix J. in the *Kuwait Airways* case, describing the notion that a NOA signified the cut-off point for sue and labour as misconceived. He accordingly held that 8th February 2012, when the claim form was in fact issued, was the watershed date, marking both the crystallisation of the rights of the parties with respect to a total loss claim and the end of the assured's ability to recover expenses under the heading of sue and labour.

So where, we may ask, do these decisions leave the habitual practice in cases subject to English marine insurance law whereby insurers, primarily for practical reasons, do normally agree to place the assured in the same position as if a writ or claim form had been issued on the same date as the NOA is tendered, i.e. the date which Arnould refers to as the "deemed date of the commencement of the action"?

The newly clarified principle seems to be that, although the respective positions of the parties are deemed to have become in large part crystallised as at the date of the writ agreement, that crystallisation will not prevent the admission under the sue and labour clause of qualifying expenses, up to the actual commencement of proceedings, or by implication the date when Insurers and Claimants reach a formal agreement which obviates the need to litigate. I pause merely to speculate on the possible utility of a bespoke additional clause to be included in the writ agreement, making clear that any claim for sue and labour will be not be prejudiced by the adoption of a "deemed date" for the commencement of the action.

We are now in a position to identify 3 scenarios where expenses incurred post a "deemed date" may be recoverable:

- The first is that described in the *"Brillante Virtuoso"*, where sue and labour expenses are recoverable since the insured property is considered still to be in the grip of the peril
- The second is where post-casualty expenditure may be regarded as having been incurred on behalf of underwriters. The expenses in question would no longer rank as sue and labour *per se* but rather as being recoverable on the basis of agency or of restitution. This reference echoes the 1982 Address to this Association by Donaldson M.R., which remains a respected commentary on this ill-defined area of marine law and practice.
- The third arises from an ongoing liberty, mentioned by Arnould, where expenses are incurred against the backdrop of insurers' continuing denial of a total loss; during that interregnum between "deemed date" and actual commencement of proceedings, the insured enjoys the option of re-presenting the claim as one for 100 per cent particular average, and if that option is exercised the right to sue and labour will then revive, with retroactive effect, always assuming that the property remains in the grip of the insured peril. *(Royal Boskalis v Mountain [1997])*.

A final consideration that has cropped up in a recent case in which I have been involved is whether the issuance of a wreck removal order alters the position described above. In practice, whatever the strictly correct legal position, my feeling is that such an order is likely to make it difficult to sustain a claim to be suing and labouring thereafter to prevent further loss under the hull policy. However, if bunkers and/or other hydrocarbons are required to be removed in compliance with such an order, the question could then arise of whether a separate right and duty to sue and labour come into existence in the context of the vessel's P&I cover, of which more later on.

C. The Notion of Imminence

And now, a personal beef. One of the most disturbing misapprehensions that I have come across amongst insurers' claims examiners is the notion that imminence is equivalent to immediacy, as measured from the time of the loss. Thus, for these individuals, the right to sue and labour has a "shelf-life" of a certain period, almost regardless of the circumstances.

Without wishing myself to take "unusual and extraordinary steps of exertion" by filling numerous pages with commentary on this point, I do feel it worth emphasising that the word "imminent" is derived from the Latin *imminere,* meaning "to overhang". In insurance, as elsewhere, the word connotes the presence of an impending threat; and the cases show that such a threat may well not be removed, despite the best efforts of the parties responsible, for a considerable time.

We have seen how long the threat remained imminent in the case of the *"Brillante Virtuoso".* And of course there are occasionally more complex scenarios, especially in the context of offshore projects, where the advent of winter weather and/or long lead times for key components can oblige the parties concerned to incur unusual expenditure in order to stabilise and make safe the affected property, pending a permanent fix.

For example, in a recent incident with an FPSO, tugs were employed for almost a year to provide safe positioning for the vessel following the failure of the swivel system. Although the various claims have not yet been finalised, it has been agreed in principle that the charges relate to the ongoing mitigation of damage and are therefore recoverable under the sue and labour clause.

The circumstances of a loss may mean that temporary repairs are the prudent and reasonable choice. But the performance of temporary repairs may not remove the imminence of a significant risk of further damage, meaning that further unusual and extraordinary steps may be required. Whilst the period of over a year considered reasonable in the *"Integrated Containers"* case may raise eyebrows, it nevertheless illustrates how long the peril may be capable of maintaining its grip, despite the efforts of the responsible parties to effect mitigation.

D. Underlying fundamental problem – tension between S. 78(4) and S. 55(2)(a):

As regards the nature and scope of the duty to mitigate, it has been clear since the early 1920's that the assured is not under any legal duty to the insurer to exercise any particular degree of care throughout the maritime adventure. Indeed, he is generally protected against any loss indirectly caused by negligence by MIA S. 55 (2) (a). In addition, most marine policies contain specific cover for negligence on the part of the principal actors in the maritime adventure, albeit subject to the backstop of a due diligence defence.

Instead the statutory duty to mitigate arises only when the occurrence of an event creates a potential loss. Clearly, if the mitigation is successful, there will generally be no issues concerning the assured's right to recover reasonable sue and labour charges. A problem may arise, however, (i) in the event of misapprehension by those concerned as to what needs to be done, (ii) by their omission to act at all, or (iii) by virtue of their negligence in carrying out what would otherwise have been appropriate mitigation efforts. We will return to these issues in a moment.

E. Effect of breach of the duty to mitigate

There are comparatively few cases in which the scope of the duty and the effect of any breach have been considered. In the absence of clear signposts, at one point along the legal pathway it was thought that a failure to mitigate could give rise to an action against the assured in damages. Hence the insurers could avail themselves of a counter-claim to be set off against the assured's primary claim upon the policy. That particular side-track was blocked off, however, by virtue of the decisions in *National Oilwell (UK) Ltd v Davy Offshore Ltd. (1993)* and *State of Netherlands v Youell (1998).* These days, when faced with a metaphorical knot created if the duty to mitigate ends up entwined

by human error or omission, the courts will look to untangle the strands by following the learned editors of the 16th edition of Arnould [Arnould: 18th Ed., Ch. 22-13] and applying the doctrine of proximate cause. In essence a negligent response to a casualty may be identified as either the proximate cause of the loss or as an aggravating cause, by virtue of which insurers will acquire either a complete or a partial defence to the claim, except where (as is usually the case) the negligence itself constitutes an insured peril.

As may be imagined, the practical application of these principles will always be heavily fact-dependent. To return to the 3 examples of possible breaches of the duty to mitigate cited above:

(i) Misperception that a peril existed needing to be mitigated

Joseph Watson & Son Ltd v Firemen's Fund (1922) concerned a claim in general average*. The captain thought, (erroneously) that there was a fire in the vessel's hold. It was held that the damage caused to the cargo in his efforts to extinguish the non-existent fire could not be treated as a general average loss. The case provides a rare example of how hindsight may in fact be used in such circumstances to form a view of the decisions taken by those in authority. Per Arnould: "It is one thing to say that when a peril in fact existed, one must take the view of the captain as to what would be the outcome of that peril; it is another thing to say that one should take his view as to whether a peril existed or not." [Arnould 18th Ed. Ch. 25-12, Note 65]
(*In the opinion of the current editors of Arnould, the principle that the danger must be real, as well as imminent, is equally applicable to expenses in the nature of suing and labouring).

(ii) Negligence in the performance of the measures to be taken

The chain of causation was broken in the case of *Tanner vs. Bennett (1825)* where the ship was driven ashore and might have been repaired but for the negligence of the agents of the assured who failed to have her properly surveyed, thereby leading to her being condemned and broken up. The jury found, under direction, in favour of the underwriters.

In contrast, in the case of the "*Popi M" (1983)* it was held in the lower court (and the point was not the subject of an appeal) that the crew's intervention, although negligent, did not give rise to a separate right to recovery. It illustrates the kind of situations in which negligent omissions, in the panic and confusion resulting from a casualty, will not be seen as breaking the chain of causation; the vessel would not have sunk if the crew had closed the tunnel door, but Bingham J. held that whatever caused the initial entry of seawater was the sole proximate cause of her loss.

(iii) Omission to mitigate

In the case of the *"Morning Star" (1987)*, the assured under a TLO policy on war risks failed to pay a fine, resulting in the confiscation of the of the vessel for illegal fishing; such failure to sue and labour was held to be the proximate cause of the loss.

In general it may be concluded that the application of the causation test as discussed in National Oilwell (UK) Ltd vs Davy Offshore Ltd. (1993) is the benchmark. In that case A breach by the Contractor (N.O.) of the duty to take all reasonable measures to avert or minimise loss under s.78(4)

meant that it would be unable to establish that the loss was proximately caused by an insured peril, as opposed to its own fault. In particular there has been a failure to take such obvious steps as any prudent uninsured could be expected to take, enabling it to be said there has been a break in the chain of causation.

F. Who may act in response to the duty to mitigate?

In the "State of Netherlands" case differing views were expressed by the Appeal Court judges as to whether efforts on the part of lawyers engaged to attempt the recovery of a vessel from detention under a war risks policy could properly be classed as sue and labour. The current editors of Arnould prefer the view that it is question of fact and that there is no restriction on the classes of persons who may qualify as the agent of the assured [Arnould 18th Ed. Ch. 25-15]. Therefore, if persons outside the circle of those delegated by a shipowner to perform a marine adventure perform mitigating actions on behalf of the insured, they may in general terms be treated as agents of the assured.

However, for good order we should reiterate that volunteer salvors who are reliant upon maritime law for their remuneration do not qualify as agents for these purposes. Equally, reinsurers are not sufficiently close to the action for their reinsured clients to be considered as their factors, servants, assigns, agents, etc., as used in the various wordings, both ancient and modern *(Uzielli v Boston Marine [1884]).*

4) APPORTIONMENT OF SUE AND LABOUR CHARGES

A. Underinsurance and Partial Insurance

MIA 1906 is silent on the question of under-insurance in relation to a claim for sue and labour. At first blush this silence is surprising, considering the incorporation at Section 73 of a mechanism to deal with under-insurance in cases of general average and salvage under maritime law. The relevant text reads:

> **73. General average contributions and salvage charges.**
>
> "…but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance…"

In the case of claims for Sue and Labour, we need to look at Section 81 for guidance. It reads as follows:

> **81 - Effect of under insurance.**
> Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.

We may therefore recognise two varieties of so-called under-insurance. The first is where the value is not fixed but the property is insured (either intentionally or unintentionally) for an inadequate amount compared to what turns out to be its true value following a loss. We could usefully refer to that as generic under-insurance. The second is a quite different and occurs when, having agreed an

insured value with insurers, the assured elects to bear a percentage of the risk, such that the agreed insured value is divided between them, and any claim will be borne in the same proportions. A better term for that second arrangement would perhaps be “partial insurance”.

By way of background to the drafting of the Act, the practice of pro-rating sue and labour charges in the first case (viz. inadequacy of amount insured under an unvalued policy) was already well established. Indeed the drafters of the Act would have received recent reaffirmation from the decision in *Cunard v Marten (1902),* which concerned a policy taken out by a carrier on his potential liability transporting a cargo of mules. The case report shows that the combined value of the mules, and therefore the potential maximum liability, although left unspecified, was always clearly going to exceed the sum insured of £20,000. In other words it was an unvalued policy where the insurable value was found, upon testing, to be in excess of the sum insured, (although in this case it was not in fact necessary to define the precise quantum of that insurable value).

In the course of the judgment Walton J. offered the following specific observation as to how the policy might be interpreted:

> Assuming, merely for the purposes of argument, that the total value of the mules and possible liability was 40,000l., the effect of the policy, treating it as a policy on the mules, would be that the shipowners' interest was insured to the extent of one-half only, and, in the case of a loss, whether total or partial, they would be entitled to recover one-half of such loss and no more.

From there he went on to comment more generally about sue and labour clauses, as applied to property, where the insured elects to bear part of the risk himself:

> “If the assured has insured himself or goods to the extent of one-half only of the value of his property or interest in the goods insured, he, in respect of each and every item of suing and labouring expense, recovers one half and bears one-half himself. This is the perfectly well established basis of every adjustment of suing and labouring expenses.”

It is therefore apparent that, as regards sue and labour, the drafters of the Act did not feel the need to include specific statutory regulation of either generic under-insurance or of partial insurance. And arguably they did not need to do so, as it was perfectly clear that what they referred to globally as “underinsurance” would be remedied appropriately, under both unvalued policies and under partially insured valued policies, if the circumstances dictated such an outcome in either scenario.

In summary, the silence of the Act in respect of unvalued policies, as applied to a claim for sue and labour, does not override the principle reconfirmed in *Cunard v Marten* as being applicable to both generic underinsurance and to partial insurance, and prorating should therefore be applied in each case. In contrast the silence of the Act will bite where, under a valued policy, 100% of the risk is insured; in that case, barring any specific provision to the contrary, the value is fixed and binding, and thus the pro-rating of a claim for sue and labour will not be applicable.

However, the key phrase is “barring any specific provision to the contrary”. Almost all modern hull policies covering marine property contain a clause effectively making claims for sue and labour subject to the mechanism set out in Section 73, i.e. imposing a sanction for a *de facto* shortfall between sound market value and the agreed insured value, or perhaps between comparative

damaged values. Such clauses, in respect of suing and labouring, were not long in the gestation after the 1906 Act and had certainly become a standard market practice within a couple of decades, as evidenced by the inclusion of the following provision in the Institute Hull Clauses 1931:

> 10. In the event of expenditure for Salvage, Salvage charges, or under the Sue and Labour Clause, this Policy shall only be liable for its share of such proportion of the amount chargeable to the property hereby insured as the insured value, less loss and/or damage, if any, for which the insurer is liable bears to the value of the salved property.
>
> Provided that where there are no proceeds or there are expenses in excess of the proceeds, the expenses, or the excess of the expenses, as the case may be, shall be apportioned upon the basis of the sound value of the property at the time of the accident and this policy without any deduction for loss and/or damage shall bear its pro rata share of such expenses or excess of expenses accordingly.

The modern version appears at clause 13.4 of ITCH 1983:

> 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.

Arnould comments in relation to 13.4: "This sub-clause appears substantially to give effect to the general principle recognised in *Cunard v Marten…"* [Arnould 18th Ed. Ch. 25-15]. I would agree but would add that the position is more complex and the sub-clause also continues the tradition of dealing, necessarily by specific policy provision, with the silence of the Act in respect of a fully insured vessel whose value has been fixed and agreed with the insurers.

As a corollary, where the policy contains no special clause regarding under-insurance, neither statute law nor judicial precedent seems to entitle insurers to apply pro-rating of sue and labour expenses in the event of a shortfall arising between a fixed and agreed insured value and the sound market value at the time of the loss, whether such shortfall existed at inception or arose later. The provisions of Section 27(3) therefore remain applicable and, in the absence of fraud, the agreed valuation may not be opened. (We will see an example of this in practice a little later).

In particular, and despite Arnould's reference in this context, I do not think that the decision in *Kuwait Airways* points to a different conclusion since the problem that arose in that case did not relate to underinsurance of the type we are considering but instead to the bundling of the sue and labour limit together with the limit applicable to the primary losses.

Clause 13.5 is an expansion on the cover afforded under the second part of 13.4 and relates only to total loss scenarios. It is referred to as the "quasi-general average clause" and, strictly speaking, it does not fit neatly into the framework of a sue and labour clause, since it deals with situations involving more than one interest:

> 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.

The first time a wording of this type appeared in the standard hull clauses was in 1952. It is aimed at filling a gap in cover where general average efforts have not succeeded in preventing the vessel from becoming a total loss. In the circumstances envisaged in the sub-clause the hull policy will pay a total loss. However, were it not for the cover provided by this clause, any excess expenditure incurred in respect of attempts to preserve the vessel would be forfeit by reason of the facts (i) that general average and salvage are not payable in excess of a total loss and (ii) such excess expenditure could not be classed as a sue and labour expense, given that other property is involved as part of the exercise.

In summary, both 13.4 and 13.5 are aimed at giving effect to the principle discussed in the *Kuwait Airways* case, that "the assured is only entitled and the underwriter is only liable in proportion to the respective interests at stake when the expenses are incurred". I would add: "unless otherwise determined by the prior agreement of a valuation and/or by the policy wording".

Here I must pause to recognise the erudite analysis of the clause 13.5 which my predecessor as Chairman Mr. George Hughes included in his 1985 Address to this Association, entitled "Towards a Reasonable Consensus on Sue and Labour", [available on our website]. George dissected with some passion the deficiencies of the clause as he saw them; his 3rd and 4th recommendations for remedial treatment were as follows:

> 3. I am suggesting that clause 13.5 be amended to cover the proportion of the expenses of salvage and general average which fall upon the shipowner in excess of the net proceeds of ship where such proceeds exist, or,
> 4. Alternatively, that consideration be given to a proper agreement being arranged between hull underwriters and the clubs whereby such expenses as we have been discussing are paid rateably by each and the basis upon which such apportionment will be made.

Suggestion no. 3 would throw upon the hull insurer the net burden that has fallen upon the shipowner in the absence of an equitable solution involving the participation of the P&I Clubs. The alternative suggestion no.4 calls for such an agreement. Now, whilst I am confident that average adjusters, hull insurers and PandI Clubs have strenuously sued, laboured and even travailed in the

meantime to find pragmatic, if not always elegant or strictly correct, outcomes to the problem that George identified, sadly, I detect no signs of progress towards any type of formal market agreement.

B. Increased Value Policies

In the absence of any specific language in the policy, the Insurers of a primary policy will expect to fund any claim falling within the limit of that primary policy, plus any sue and labour charges, without the participation of the increased value policy. The leading case of *Boag vs Standard Marine Insurance Co. (1936)* involved such a situation; in that instance the increased value insurers claimed a right to participate in a recovery but Branson J. rejected their contention. However, the downside for the primary Insurers was that they were held to be unable to oblige the IV Insurers to contribute, *inter alia,* to the Sue and Labour charges.

The Institute Cargo Clauses 1982 reflect the cargo market's desire to achieve a more obviously equitable arrangement. Clause 14 provides for the overall valuation to be deemed to be aggregated into a comprehensive valuation, whereby both primary and IV Insurers share in all losses (including any element of sue and labour) and by the same token they also share in any recovery.

For risks other than those attaching to cargo (e.g. hull and machinery / offshore energy assets) the markets have not seen the need to follow the path adopted by their cargo market brethren. In practice, therefore, for non-cargo risks, recoverable sue and labour will generally fall on the primary policy unless either the primary claim triggers a payment under the IV policy or there is clear evidence that the incurrence of the sue and labour charges was of benefit to the IV insurers.

5) FURTHER GENERAL PRINCIPLES

A. Supplementary Nature of the Engagement

That the nature of the engagement is supplementary and subject to its own rules was established by *Lohre v Aitchison (1878),* already mentioned. Not much more needs to be added, except to mention the US case of *Reliance Insurance v Yacht Escapade (1874)* where, with full knowledge of a breach of warranty, the insurer had obliged the assured to incur salvage and other costs to preserve the vessel. Upon Insurers' resistance to paying out under both the primary and the supplementary contracts, they were sued and estopped from using the breach of warranty as a means to avoid payment under either of the contracts.

I would have left this topic with the observation that Arnould considers it questionable if the waiver contained in 13.3 of the 1983 clauses is sufficient to protect underwriters from suffering a similar fate under similar circumstances in today's market place:

> 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.

But again, up pops the *"Brillante Virtuoso"* and with it the old chestnut of whether, in a CTL claim, sue and labour expenses can be counted twice. The issue is simply whether such expenses can both:

(i) form part of the calculation required to reach the CTL threshold and (ii) be treated under the sue and labour contract as recoverable in addition to a total loss.

In short, Flaux J. took no objection to the principle of expenses being able both to rank in the calculation and to be recovered additionally as sue and labour. In this context it is again appropriate to recognise the guidance towards the same conclusion, provided from this chair by Donaldson M.R. in his 1982 Address to our Association [available on our website].

B. Costs must be reasonable

A series of law cases straddling the end of the 19th century and the beginning of the 20th set the scene for how the law should apply to sue and labour claims made in relation to preserving and forwarding cargo. In *Lee v Southern (1870)* a ship with cargo of palm oil for Liverpool ended up stranded on the Welsh coast and the ship-owner sent it overland to destination at a cost of over £200, thereby avoiding the loss of his freight. Having plotted the reasonable (and cheaper) hypothetical alternative, involving the detention of the vessel in Wales for repair and onward carriage to Liverpool, the court decided that the ship-owner was entitled to only £70.

In similar vein, *Meyer v Ralli (1876)* and *Wilson Bros. v Green (1917)* were both decided on the basis of the cheaper but reasonable alternative courses of action which were not in fact adopted.

C. Suing and Labouring to avoid Liabilities

A brief review of the salient points inevitably begins with *Xenos v Fox (1868)*, where the plaintiffs failed to persuade the courts that the cost of their successful defence of a collision action was properly recoverable under the sue and labour clause. The grounds for the decision reflected an arguably rather narrow view that the introductory phrase "loss or misfortune" restricts the application of the clause to events happening to the thing insured (in that case, the insured vessel).

By 1902 and the case of *Cunard v Marten*, to which we have already referred in relation to underinsurance, evidence can be seen of evolution in the development of the sue and labour doctrine. The case concerned an insurance placed by the carrier of a cargo of mules, not on the cargo itself but instead on the carrier's potential liability to the cargo-owner, due to the omission of the usual negligence clause in the contract of affreightment that would otherwise have protected the carrier. The Court turned down the plaintiff's case on exactly the same grounds as *Xenos v Fox*, viz. that only goods, merchandises and the ship can be the subject of a sue and labour claim. Yet the report of the judgment shows that Walton J.'s issue was that the classic sue and labour wording as per the SG Form did not enable him* to depart from the necessity to link the expenditure directly with the preservation of the goods, as opposed to the avoidance of a liability. He did, however, say:

> "I fully recognise that a suing and labouring clause might be framed which would be appropriate to such an insurance as was effected in the present case."

(* Despite his willingness to construe the clause as applying to the cargo, an idea that was rejected, in hindsight rather misguidedly, by the plaintiffs: "The plaintiffs, however, do not contend that the policy should be construed…as an insurance on goods.")

As we have already noted, more I think as a matter of tidiness than in homage to judicial precedent, collision attack and defence costs are excluded from the ambit of the modern sue and labour clauses attaching to hull and cargo policies. Yet, as has been made clear in *King v Brandywine (2004)* there is

no reason in principle why, if a hull or cargo policy covers other liabilities, the doctrine of sue and labour should not be applicable to efforts to mitigate them.

And moving across to glance at the specialist marine liability market, we can see that the P and I Clubs have embraced the doctrine, albeit with an understandable degree of caution. Not for them that old Continental idea of the assured being encouraged to get on with the mitigation efforts "withowte asking us leave or license". For example, per Section 25 of the current UK Club Rules:

> "Sue and labour and legal costs
>
> (A) Extraordinary costs and expenses (other than those set out in paragraph (B) of this Section) reasonably incurred on or after the occurrence of any casualty, event or matter liable to give rise to a claim upon the Association and incurred solely for the purpose of avoiding or minimizing any liability or expenditure against which the Owner is wholly or, by reason of a deductible, partly insured by the Association, but only to the extent that those costs and expenses have been incurred with the agreement of the Managers or to the extent that the Directors in their discretion decide that the Owner should recover from the Association.
>
> (B) Legal costs…etc."

D. Costs must be unusual or extraordinary

As mentioned previously, in *Lohre v Aitchison (1878)* Brett L.J. decided that the suing and labouring clause may be invoked in cases where the assured exerts "unusual or extraordinary labour" or is made liable "to unusual or extraordinary expense".

The question of crew wages and provisions and other running expenses of a vessel during periods of detention due to an insured peril has exercised the minds of practitioners for some years. Previous editions of Arnould considered the effect of termination (by frustration) of the relevant charter-party or equivalent engagement to be decisive for determining the question; thus, prior to such a termination, crew and other running expenses went on being incurred in expectation of earning freight once the detention ended and were therefore regarded as being for the account of the ship-owner.

The issue came before Flaux J. in the "*B Atlantic"*. His analysis provides clarification on a number of points:

> Insurers' objections to paying for certain manning costs and technical management were founded on 2 main arguments:
>
> a. That they were excluded respectively by clause 16 (Wages and Maintenance) and by clause 17 (Agency Commission)
> b. That, prior to the charterers' declaration that the voyage was frustrated, they were ordinary expenses that the owners were contractually obliged to incur under the charterparty or because the claim related to the loss of use of the vessel and lay outside the scope of the hull policy covering war risks.

The judge dismissed the first argument (per a. above) as being misconceived. The provisions cited relate to particular average claims and have no application to sue and labour.

The second argument (under b.) was rejected on the facts of the case. The only reason for keeping a full crew on board, both before and after the charterparty was frustrated, was to facilitate the

vessel's departure once released. Therefore the expenses (in excess of the cost of a skeleton crew that would be regarded as a normal outlay) ranked as sue and labour. Incidentally, the judge also said that he preferred the first of the underwriters' arguments articulated under b. above (i.e. they were ordinary expenses that the owners were contractually obliged to incur under the charterparty) even though his decision on the point went against them.

E. Position if there is no S&L Clause

The MIA 1906 is intriguingly silent on the question of what happens if there is no sue and labour clause in the policy.

According to the current edition of Arnould, there is no reported case in which an English court has expressly held that particular charges are recoverable when there is no sue and labour clause or similar provision, "doubtless because the clause is almost invariably included in the policy". In *Emperor Goldmining v Switzerland General (1964)* the Supreme Court of New South Wales held that particular charges are recoverable in the absence of a suing and labouring clause. Arnould is generally in favour of this outcome, although its editors warn against the idea that the clause could, in consequence, be considered as surplusage. Instead, the better position is that the assured can recover in the absence of such a clause, subject to a 2-part test:

- where it can plausibly be said that the need for the expenditure is the direct and natural result of the casualty and
- where the MIA 1906 does not lay down a specific measure of indemnity which meets the case

Therefore, in summary, "the right to reimbursement is probably not one that exists in all circumstances, in the absence of the clause".

F. Waiver Clause

To take an example from ITCH 1983 (adopted verbatim in subsequent versions of the standard hull and machinery clauses):

> 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.

The editors of Arnould consider "that the waiver clause can only affect the question of whether notice of abandonment has been waived or abandonment accepted, and does not, in any more direct manner, affect the question of which of the parties to the insurance is ultimately to bear the cost of the measures undertaken by agreement between them, or which the underwriters may require the assured to undertake or may themselves undertake". So, in short it does not bite on the rights and duties to sue and labour. [Arnould 18th Ed. Ch. 25-04]

G. Inclusion of Sacrifice

We have referred above to the outcome of *Royal Boskalis (1997)* in the context of the degree of peril required. An incidental consequence of the judgment is that the case is authority for the proposition that a financial sacrifice, reasonably and properly made to avoid loss, can also be the subject of a sue and labour claim. Specifically, the "finalisation agreement" made in order to extricate the insured

dredgers from Iraq contained a waiver of substantial claims of payments under the dredging contract.

Whether, under a hull policy, the same principle would extend to the sacrifice of property deliberately damaged or reasonably abandoned, jettisoned or cut away in order to avoid loss, outside the ambit of general average, is probably still an open question. Instinctively I would have thought that in the case of an un-laden vessel not under charter, the more natural home for a claim for loss or damage by sacrifice would be the ballast GA clause under ITCH 1983:

> 11.3 When the Vessel sails in ballast, not under charter the provisions of the York-Antwerp Rules, 1974 (excluding Rules XX and XXI) shall be applicable, and the voyage for this purpose shall be deemed to continue from the port or place of departure until the arrival of the Vessel at the first port or place thereafter other than a port or place of refuge or a port or place of call for bunkering only If at any such intermediate port or place there is an abandonment of the adventure originally contemplated the voyage shall thereupon be deemed to be terminated.

In the same way, where cargo is the subject of sacrifice, a primary claim under the cargo policy will be triggered under all 3 versions (A, B or C) without the need to treat such loss as a case of suing and labouring.

6) PRACTICAL APPLICATION

A. Preferred option for a salvage claim?

We should pause briefly to consider the overlap that exists between the cover afforded by the GA and salvage clause in the standard hull clauses and that available under the sue and labour clause. According to the current edition of Arnould, in appropriate circumstances there would appear to be no advantage to a shipowner in presenting his claim under a GA and Salvage Clause as opposed to the sue and labour clause. Reference is made to the V*ergina* (2001) where the assured sought (but failed) to persuade the court that insurers bore the burden of proving that certain salvage expenses, claimed under the GA and Salvage Clause, were not in fact properly recoverable. The inference may be drawn that the Sue and labour clause offers a possibly advantageous separate test of recoverability, quite apart from the attraction of a potentially relevant additional sum insured.

Nevertheless it remains slightly unclear if the assured is always best advised to present the vessel's proportion of a salvage award as a claim for sue and labour. By way of illustration that, in practice, a choice does not necessarily have to be made, we need look no further than, yes indeed, the "*Brillante Virtuoso"* where the Owners presented their proportion of the salvage award under the GA and salvage clause and alternatively as sue and labour expenses under the relevant clause. Flaux J. commented that he did not have to decide the matter as the expenses in question were clearly recoverable in either case.

B. Protection of the marine environment

We should note that under ITCH 1983 there are no specific exclusions in either the General Average and Salvage Clause or in the Duty of Assured (Sue and Labour) bearing on that part of a salvor's remuneration which relates to the protection of the environment, (viz. Art. 14 awards, including

SCOPIC if applicable) as opposed to the salvage of property. Arnould says: "In practice, however, the position under the 1983 Clauses is still that hull underwriters will meet the cost of an enhanced Art.13 award, and that special compensation payments will be treated as falling outside the scope of the hull cover even though such payments might, on the face of it, appear capable in some cases of being classed as sue and labour expenditure…" and later: "It would not appear to be in the interests of any of the parties concerned to disturb this division of responsibility…" (i.e. the demarcation line between the amounts payable respectively by hull underwriters and by the PandI Clubs).

C. Forwarding Charges

An innovation in the 1982 cargo clauses was the introduction of a forwarding charges clause, which could be triggered in the event of the insured transit being terminated short of original destination, or short of any substitute destination properly nominated in accordance with the terms of clauses 9 (Termination of Contract of Carriage) or 10 (Change of Voyage). The main provision is as follows:

> "12 Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter insured is covered under this insurance, the Insurers will reimburse the Assured for any extra charges properly and reasonably incurred in unloading storing and forwarding the subject-matter insured to the destination to which it is insured…/…"

The editors of Arnould [[Arnould 18th Ed. Ch. 25-25] express the opinion that there is an overlap between clause 12 and clause 16, the sue and labour clause – hence its inclusion for completeness herein. (The numbering of these clauses has not changed in the 2009 cargo clauses).

D. Payment of Ransom

As part of the discussion of the duties and rights associated with sue and labour we should review the latest thinking on the payment of ransom to pirates and terrorists.

The first principle in both cases is that of legality. In relation to pirates, the Court of Appeal decided in *Masefield v Amlin (The Bunga Melati Dua) (2011)* that the payment of ransom is not, in general terms, illegal. The case also put to rest the notion that, even though not unlawful, such payments could be considered to be against public policy. That position is apparently not altered by the Counter Terrorism and Security Act 2015.

As for payments to terrorists, the law precluded such payments even before the passing of the Counter Terrorism and Security Act 2015, thereby excluding the possibility of an indemnity being available under the sue and labour clause.

The second principle is that of what we might term predominant purpose. In practice, a ransom payment is usually aimed at the release of valuable property (vessel/cargo) and its restitution to its owners. The payment (or the prospect thereof) invariably also secures the lives and sometimes even the comparative wellbeing of the crew. The guiding principle, just as in the case of life salvage, is that no apportionment of the ransom should be made to reflect the protection of lives. Examples of the application of this principle can be found in the *Royal Boskalis* case *(1997)*, in *Standard Life v Ace (2012),* and most recently in the case of the *"B Atlantic" (2015),* where legal fees were incurred in attempts to have the vessel and her crew released from custody in Venezuela following their arrest when cocaine was discovered strapped to the outside of her hull. In that case Flaux J. offered the following analysis:

> "where expenses are incurred both for the purpose of extricating the vessel from the insured peril and for some other purpose which is not sue and labour (here the defence of the crew) there is no principled basis for apportioning the expenses between those purposes, so they are all to be properly regarded as sue and labour expenses …it is only if the insurers can demonstrate that the relevant expenditure was incurred solely for the other purpose that the expenditure will not be recoverable as sue and labour."

Finally in the piracy case *The Longchamp (2015)* the issue arose of whether the property at risk in the common adventure had to be the sole purpose of the ransom payment and it was held that it did not. Although that case concerned a general average, Lowndes considers that the same principle extends to claims for ransom brought under a sue and labour clause. (That case is currently being referred to the Supreme Court on different grounds and we await the final outcome with interest.)

7) USE OF THE SUE AND LABOUR CLAUSE OUTSIDE THE MARINE MARKET

A. Use in offshore policies

1. Construction Wording

To begin with the construction phase, the sue and labour clause in the standard offshore construction clauses, WELCAR 2001, reads as follows:

> 9 SUE AND LABOUR CLAUSE
>
> It is further agreed that in the case of any imminent physical loss or physical damage to the property insured hereunder, which is the direct result of a peril insured against, the Assureds, their servants and their agents may sue, labour and travel for, in and about the defence, safeguard and recovery of the subject matters insured without prejudice to this insurance and may incur reasonable expenses in efforts to avert or minimise a loss which may fall under Section I.
>
> The expense so incurred shall be borne by the Assureds and Underwriters proportionately to the extent of their respective interests. No acts of Underwriters or the Assureds in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.
>
> Underwriters' limit of liability under this clause shall be 25% of the scheduled value contained in the latest agreed Schedule B at time of loss of the item or items that are the subject of such sue and labour.

Apart from the egregious absence of the apostrophe in the last sub-paragraph, a perilous situation which, as you will have observed, I have hastened to mitigate, we note two features which have no exact equivalent in the hull or cargo clauses:

(i) The first is a variation on the theme of apportionment, requiring that expenses be shared between assured and underwriters proportionately "to the extent of their respective interests".

The leading commentator David Sharp in his work "Upstream and Offshore Energy Insurance" offers the example of fire-fighting expenses which confer the dual benefit of

controlling and limiting damage to the subject matter insured (I am thinking of a partly constructed platform for instance) and of preventing a blowout, an event which is not covered under WELCAR. Equally, he mentions that expenditure by way of sue and labour may result in the avoidance of a delay in the project schedule. He says that in arriving at the settlement of such a claim, the energy market would look to achieve overall equity between the parties, but that in the absence of a "sensible split…the whole cost may be paid under the WELCAR Form..."

My experience has certainly been that the existence of "grey areas" and the consequent need to negotiate offshore energy claims, in dialogue with the appointed energy loss adjuster, is more frequent than in the traditional marine market. Thus, in the type of scenario envisage by David Sharp, where the suing and labouring confers the added benefit of avoiding delay, I would not be surprised to see a percentage of the sue and labour charges being split off and treated as "extra cost of working" under any relevant business interruption policy, such as one covering DSU (Delay in Start-Up) or, in the operational context, LOPI (Loss of Production Income).

(ii) The second feature is the limitation of the expenses to 25% of the declared value of "the item or items" which appears in the latest update of the valuation of the construction project (i.e. the most recent valuation agreed prior to the loss). This clearly constitutes a major restriction, as compared to ITCH 1983, where a further 100% of the entire agreed value of the vessel is available to pay qualifying sue and labour expenses.

2. Operational Wording

With respect to operational (as opposed to construction) insurance, the London Standard Platform Form (LSPF 2009) offers an example of a bespoke offshore wording which incorporates a simple form of sue and labour clause, as follows:

> "[This section will…/…reimburse the Insured for…/…2.B (ii) costs or expenses properly and reasonably incurred by the Insured or its servants and agents in taking such measures as may be reasonable for the purpose of averting or minimising physical loss of or physical damage to the Property Insured which would be recoverable under this Section."

Again, two features stand out:

(i) No specific apportionment is mentioned as being applicable in the event of under-insurance.

(ii) The sub-limit applicable to any claim for sue and labour is described as: "25% of the applicable insured value, any one Occurrence, unless specifically scheduled otherwise."

We saw earlier how the absence of a specific clause regulating what we termed "type (i) under-insurance" would leave Insurers without an obvious remedy. We recently had such a case in our office, where the same offshore pipeline had been separately insured by 2 Joint Venture Partners on widely (not to say wildly) differing valuations. Expenditure by way of suing and labouring was claimed under the LSPF 2009 and the Lead Insurers on the lower of the 2 valuations quoted *Cunard v. Marten* as evidence that under-insurance should apply.

We were able to show that the policy in that leading case was unvalued, whereas in our case the policy was a valued one and therefore MIA S. 27 (3) was definitive and the value was binding, notwithstanding the disparity between the values agreed respectively and independently by the two JV Partners.

3. **Mitigation of Business Interruption**

Some time ago I came across an illustration of what is meant by the "grip of the peril". It concerned an offshore case where the adjuster had to consider a claim for "additional expenses" incurred in order to repair two gas lift compressors, installed side by side on the deck of an FPSO. The normal *modus operandi* was that the compressors were alternated at certain intervals, whereby compressor A would be on load, allowing B to be taken off load for regular maintenance, and then vice-versa. In brief, compressor A exploded due to an insured peril and had to be rebuilt. Part permanent repairs were carried out to A but, largely due to long delivery times for the balance of the parts required, the remainder of the reinstatement work was deferred until over a year after the incident. During this interval B was on full load without relief and began to feel the strain, keeping going with commendable valour but not without greatly increased vibrations. The insured therefore took the prudent decision to dampen and structurally reinforce compressor B in order to avoid it sustaining damage due to being over-worked while A was still out of service.

The adjuster felt that cost of dampening and reinforcing B could be allowed under the sue and labour clause as an alternative to placing A back on load, presumably at reduced power. Insurers objected, considering that if allowable at all, such costs might form part of the "extra cost of working" under any business interruption insurance that might be in place.

I must say that I sympathised with the Insurers' position, particularly as it would be hard to classify compressor A as still being in the grip of the initial peril; instead, we agreed that compressor A had achieved an uneasy stability from shortly after the explosion, even though its noisy neighbour continued violently straining every sinew to keep up production!

B. Use in non-marine policies

We have already referred to a well-known example of a sue and labour provision as applied to aviation in the *Kuwait Airways* case. The policy in question covered "sue, labour and costs and expenses and salvage charges and expenses incurred by or on behalf the insured…etc." So it was clearly a sue and labour clause, even if the precise terms of its expression were, so to speak, a little laboured.

Apart from aviation, Arnould comments [Arnould 18th Ed. Ch. 25-01] that the use of such a provision in non-marine policies appears to be uncommon. I am not sure if it represents a growing trend, but anecdotal evidence from colleagues in our claims department and from conversations in the market place suggests that sue and labour clauses in onshore policies are not so rare. Indeed, colleagues are currently involved in a fascinating onshore construction case involving a stuck tunnel-boring machine, where expenses have been incurred in order to prevent it from tipping into an underground abyss. The situation became a touch more complicated when unexploded ordinance was discovered underground, requiring particular attention at some additional cost!

And in the same vein a large Middle Eastern oil conglomerate recently had a claim in respect of a large ethylene storage tank, located next to a residential area in a European country, where heatwave conditions required the intervention of the local fire brigade at regular intervals to create a mist of cool water, aimed at preventing any type of uncontrolled escape. The efforts were only partially successful and the combination of physical damage repairs and considerable sue and labour expenses took the claim over the rather large deductible.

My interest was aroused in these 2 non-marine cases not only by the inclusion of a sue and labour wording in all of the respective policies but also, and in particular, by the fact the drafters of these 21st century non-marine policies had clearly had a good education. Yes indeed, there it was, in both cases, in its full glory: the mellifluous wording from the SG Form, including those indefatigable factors, servants and assigns.

8) RECOMMENDATIONS

So where, you may wonder, does all this legal theory leave the practitioners in the market place? As will be apparent from our brief review, the clarification provided by the recent legal decisions concerning total loss scenarios is undoubtedly very helpful. I would add the following suggestions:

A. Writ agreements

I would recommend an amendment to the standard writ agreement (if such a wording exists) to reflect the possibility of recoverable expenditure being incurred beyond that "deemed date" and up to the date of a formal agreement or the actual commencement of legal proceedings.

B. Shelf-life

I recommend all concerned to recognise that the duration of the duty and right to sue and labour is essentially fact-dependent, rather than time-dependent.

C. Underinsurance

I recommend that the parties to a marine or offshore insurance contract should make clear by the inclusion of specific wording whether or not pro-rating will apply to a sue and labour claim in the event of underinsurance by reason of an insufficiency of the agreed value (ascertained post-facto).

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APPENDIX – EXAMPLES OF SUE AND LABOUR PROVISIONS IN H&M CLAUSES OUTSIDE THE UK

Denmark

DANISH TIME CLAUSES – HULLS 01.01.1992 (Now replaced by the Nordic Plan 2013)

8.6 Salvage expenses etc.
In addition to the instances mentioned in §§8.1 and 8.5, this insurance covers expenses and sacrifice reasonably incurred or undertaken to save the vessel from an imminent peril or to limit damage, provided, however, that the said peril or damage is covered under this insurance.

Finland

GENERAL HULL INSURANCE CONDITIONS (Finland) - 1996 (Now replaced by the Nordic Plan 2013)

Measures in the event of loss or damage

§ 15 • Average or other recoverable casualty

1 • Where an average or other recoverable casualty is apprehended or has occurred, the Assured shall …/…

c) to the best of his ability take such measures as circumstances require for the purpose of averting and diminishing any damage,

d) take requisite measures for the preservation of the rights against a third party, where the latter is,

or may be presumed to be, liable to pay indemnity or to participate in general average ; and

e) comply as far as possible with any directions given by the Insurer in connection with the casualty

France

Police Française d'Assurance maritime sur corps de tous navires – Tous Risques (2012)

2.5 Mesures préventives

L'assuré doit apporter les soins raisonnables à tout ce qui est relatif à la sécurité du navire. Il doit prendre toutes les mesures utiles en vue de préserver le navire d'un événement garanti ou d'en limiter les conséquences.

En cas de manquement à ces obligations, les assureurs peuvent se substituer à lui pour prendre les mesures qu'impose la situation sans pour autant reconnaître que leur garantie soit engagée du fait de leur intervention.

Tout manquement aux obligations prévues au présent article peut, en cas de sinistre, entraîner la réduction de l'indemnité proportionnellement à l'étendue des pertes et dommages.

3.3 Mesures conservatoires

L'assuré doit et les assureurs peuvent prendre ou requérir toutes les mesures utiles au sauvetage ou à la préservation :

a) des biens assurés ;

b) des droits contre les tiers responsables.

si l'assuré ne se conforme pas aux obligations énumérées au présent article, les assureurs peuvent procéder à une réduction proportionnelle de l'indemnité à moins qu'ils n'en aient convenu autrement.

French insurance policy for marine hulls of all types - All Risks (2012)

2.5 Preventive Measures

The insured must adopt reasonable precautions in all matters affecting the safety of the vessel. He must take all measures aimed at preserving the vessel from an insured occurrence or at limiting the consequences thereof.

Should these obligations not be met, the insurers may take charge and adopt such measures as may be required by the circumstances; however, such intervention shall not constitute an admission of insurers' liability.

In the event of loss or damage, any breach of the obligations described in this clause 2.5 may result in the proportionate reduction of the indemnity payable, reflecting the extent of such loss or damage.

3.3 Mitigation Measures

The insured and the insurers must take or order to be taken all measures required for the safety or preservation of:

a) the property insured

b) rights against liable third parties

If the insured does not comply with the obligations set forth in this clause 3.3, the insurers may apply a proportionate reduction of the indemnity payable, unless otherwise agreed.

Germany

(Commentary provided by our Vice-Chairman, Burkhard Fischer, of ALBATROSS ADJUSTERS LIMITED, Cyprus):

The German heading of ADS Cl. 32 is "Aufwendungen", which may be translated into English with "Expenditures". The official English translation of the heading reads "Sue and Labour Charges, Particular Charges". Ritter-Abraham defines "Aufwendungen" as "Vermögensopfer jeder Art", i.e. any kind of voluntary surrender of property value, and explains further that this includes not only

direct expenditure, i.e. expending money or assuming liabilities, but also a loss of value or rights. This should leave no doubt that legal costs are deemed included. Provided that there is no doubt or disagreement about the nature of the expenses incurred, the expenses should be met by Underwriters even if they remain unsuccessful, as provided by ADS Cl. 32(2).

The wording of ADS Cl. 32 makes reference to "loss or damage for which Underwriters are liable". This is the point where some Underwriters conclude that the Assured, in his attempt to not only salve the insured part of his property but also the policy deductible that would fall on himself, should bear his "share" of the costs.

The background of the conflicting views on sue and labour is that there appear to be different interpretations as to what, in case of a Hull & Machinery cover based on ADS and DTV-Hull Clauses 1978 (2/1992) constitutes the DTV Cl. 21.1 deductible.

One interpretation puts the deductible into the same category as **uninsured items**, such as loss of income. This would lead to a situation where expenses incurred in accordance with ADS Cl. 32 in order to avoid or minimise a loss that would not reach the deductible, are to be borne by the Assured rather than the Insurers, even if all other requirements of ADS Cl. 32 were fulfilled.

The alternative interpretation would be that the deductible forms **part of a claim** and is in principle covered, if it wasn't for the agreed deduction from the claimed amount per DTV-Cl. 21.1. This is for instance stated in Enge/Schwampe "Transportversicherung", 4th edition, 2012, p. 70. On this basis, if ADS Cl. 32 expenses were incurred, these would probably be absorbed by Underwriters in full, without any deduction.

DTV Cl. 21.3 provides that the deductible is not applied to expenses as per ADS Cl. 32. However, it has been the practice (at least of some Adjusters) to make a deduction from ADS Cl. 32 expenses on the basis that Underwriters should not be liable for expenditure incurred to avoid or minimise a damage that would not be covered by them. If we look at the standard example of a lost anchor / retrieval costs, the figures would look as follows:-

Example 1

Value of anchor 50.000

Retrieval costs 30.000

Deductible 60.000

If the anchor is successfully retrieved, the Assured would probably have to pay the retrieval costs in full.

The situation is not clear in case that the retrieval is unsuccessful. It could be that H&M Underwriters would again not pay anything, arguing that the retrieval costs did not concern any loss recoverable under the policy. Alternatively, they might apply the deductible of 60.000 to the total costs incurred by the Assured (80.000) and then pay 20.000.

Example 2

Value of anchor 100.000

Retrieval costs 30.000

Deductible 60.000

If successfully retrieved, at least some Adjusters would apportion as follows:

Assured to pay: 30.000 x 6/10=18.000

H&M to pay: 30.000 x (10-6)/10=12.000

If unsuccessful, Underwriters would probably pay the full costs of the new anchor plus unsuccessful retrieval costs, less the policy deductible. In my view, the logical consequence should be to apply the same deduction from the unsuccessful retrieval costs that is applied to the successful retrieval costs. However, this results in a worse situation for the Assured, and the Underwriters' current practice, namely not to apply any deduction in addition to the policy deductible, would therefore never be queried.

Italy

CAPITOLATO DI ASSICURAZIONE CORPI MARITTIMI EDIZIONE 1988

"POLIZZA CAMOGLI"

General Conditions

Policy of Marine Insurance on Hull and Machinery of vessel and other Ship-Owners Interests. At the conditions of the Clauses of the Institute of London Underwriters.

Art 1 - Conditions of Insurance

The insurance is subject to the Conditions of the attached Clauses of the Institute of London

Underwriters, as indicated in art 1 of the "Particular conditions" where the expressions - for use only with the new marine policy form - and -this insurance is subject to the English law and practice - referred to in the heading are deemed to be cancelled.

Art 2 - Law governing the contract and interpretation of the English Clauses

The present contract is governed by Italian Law. The English Clauses attached to the present Policy must nevertheless be interpreted and applied as they are interpreted and applied in England.

Netherlands

Institute Standard Dutch Hull Form – 1984

Incorporates Clause 13 - DUTY OF ASSURED (SUE AND LABOUR) verbatim as per ITCH 1983.

Nordic Plan 2013

Clause 3-30. Duty of the assured to avert and minimise loss

If a casualty threatens to occur or has occurred, the assured shall do what may reasonably be expected of him in order to avert or minimise the loss. If possible, he shall consult the insurer before taking any action.

Commentary:

Clause 3-30. Duty of the assured to avert and minimise loss

This Clause corresponds to Cl. 53 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

The first sentence imposes on the assured a duty to avert or minimise the loss, while the second sentence requires the assured to consult with the insurer. The provision corresponds to Nordic ICAs, although the provisions do not contain any duty to consult with the insurer. It is somewhat superfluous to impose a duty on the assured to consult with the insurer, since it is already part of the duty to notify and the duty to keep the insurer informed of further developments under Cl. 3-29. The provision serves as a good signal, however, and has, accordingly, been maintained.

In the 1964 Plan, the duty of the assured to act was formulated as encompassing "what he can" do to avert and minimise the loss. In accordance with Nordic ICAs, this wording has been replaced with "what may reasonably be expected of the assured".

The duty to take measures to avert or minimise the loss will be present when there is an impending danger of a casualty occurring, and when the loss is to be minimised after the situation has been brought under some degree of control.

Under Cl. 53, third sentence, of the 1964 Plan, the assured was under a duty to comply with the requirements imposed by the insurer, unless the assured ought to have known that they were based on incorrect or insufficient information. This provision has been deleted because it raised the possibility of difficult conflicts of interest between the assured and the insurer, and possibly also between insurers inter se. For example, a situation could be envisaged where the ship had small cracks in the cylinder liners or other minor damage which did not make the ship unseaworthy, but which nonetheless had to be repaired. Under Cl. 53, third sentence, the loss-of-hire insurer could require that the shipowner request a seaworthiness certificate and continue to sail to avoid loss-of-hire. On the other hand, the shipowner would have a clear interest in having the repair carried out at once, particularly if he had a high daily indemnity under the loss-of-hire insurance. If there was a danger that the cracks could develop and cause a casualty, then the hull insurer would also have an interest in having repairs carried out promptly. The assured could then find itself in the position of receiving conflicting requirements from different insurers, a most unfortunate situation. Moreover, circumstances such as these should really be assessed under the rules in Cl. 3-22, and it would be unfortunate if the insurer could instead use Cl. 3-30 as authority to impose requirements on the assured.

A situation can be envisaged where the insurer needs to give separate instructions, e.g., in connection with salvaging the ship. Special rules are not needed for this; it is implicit in the requirement that the assured listen to the recommendations of the insurer. If the assured chooses to take other action which later turns out to be less expedient, there is the risk that he will be judged to have acted with gross negligence pursuant to Cl. 3-31.

In a conflict of interest between the assured and the loss-of-hire insurer as to whether the ship is so damaged that it cannot sail, the view of the classification society will usually be determinative. If the classification society is in doubt and different experts have divergent views on the matter, then the assured must make a decision based on what he believes is best in light of all of the interests involved.

Under Cl. 5-21, the duty to avert and minimise the loss continues after the object insured has been taken over by the insurer, if the insurer does not himself have the opportunity to take care of its interests.

Russia

II • Extent of Liability

Para 2 • Under insurance contacts concluded in accordance with these Rules are indemnified losses arising from fortuitous accidents and perils of the navigation as well as due to others sudden and unforeseen reasons.

The insurance contract may be concluded on the basis of one of the following conditions:

1 - “With Liability for Total Loss and damages”:

Under the insurance contract concluded under this condition are indemnified:

…/…

e) necessary and properly incurred expenses for minimizing the loss and ascertaining its extent, if the loss is indemnified in accordance with the insurance conditions.

Spain

Essentially the Spanish custom is to use standard UK market insurance clauses as interpreted under English law, so in practice the position is probably the same as in the UK.