

HOW AND WHEN TO CALCULATE A TOTAL LOSS

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- **Section 57 of the Marine Insurance Act 1906:**

- *(1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.*
- *(2) In the case of an actual total loss no notice of abandonment need be given.*

- *So: 3 types of ATL*

- Destruction
- Change of character
- Irretrievable deprivation



Actual Total Loss

- When does the subject-matter "*cease to be a thing of the kind insured*"?
 - When it "*ceases to retain that character and becomes a wreck*" (*Cambridge v Anderton* (1824) 2 B&C 691).



Actual Total Loss

- Alternatively, when is the insured "*irretrievably deprived*" of the ship?
- "*The Bunga Melati Dua*" *Macefield v Amlin* [2011] EWCA Civ 24
- 2008 Piracy



- **Section 60 of the Marine Insurance Act 1906:**

- *(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.*
- *(2) In particular, there is a constructive total loss—*
 - *(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or*
 - *(ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.*

Constructive Total Loss - CTL

- **Section 60 of the Marine Insurance Act 1906:**
 - *There is CTL where:*
 - *An ATL appears to be unavoidable, or*
 - *The cost or recovery / repair would exceed the repaired value*



- Would the cost of recovering or repairing the vessel exceed its repaired value?
- What would a prudent uninsured owner do? Repair or abandon?
- *"Precise estimates are, of course, impossible, and (...) a large margin ought to be added to the figures of cost of repair to cover risks (...) which "prudent uninsured owner" would certainly take into consideration in determining whether eh should repair or sell." (Angel v Merchants Marine Insurance Co [1903] 1KB 811).*
- Reconfirmed in *Suez Fortune v Talbot ("The Brilliante Virtuoso") 2015*
- Applies to valued and unvalued policies *"[u]nless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there is a constructive total loss." (s27(4)).*
- In practice most Institute Hull Clauses agree that the insured value should displace the actual value (Cl.19 of the 1983 and 1995 Cluses)

- Only costs which "*would have to be expended to put the ship right*" can be included in the calculation (*The Medina Princess* [1965] 1 *Lloyd's Rep* 361).
- In practice, this may include:
 - Third party repair costs
 - Towage to port of repair (including insurance costs)
 - Cost of replacement bunkers
 - Costs of salvage (SCOPIC?)
 - Expenses reasonably incurred to determining whether there is a CTL
 - Repairs undertaken by the insurers

- However, note that:
 - *"In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interest but account is to be taken of the expense of future salvage operations, and any future general average contributions to which the ship would be liable if repaired."* (s60(2)(ii))
- Also, most Institute Clauses expressly exclude value of the wreck.



- Suez Fortune Investments Ltd v Talbot Underwriting Ltd [2015] EWHC 42 (Comm)
 - When determining whether the vessel was a CTL, should the vessel have been repaired in China or in Dubai?
 - Dubai was US\$11m more.
 - Held that: the most appropriate place was not necessarily the cheapest.
 - The factors included:
 - The proximity of the yard (risks of long-distance towage);
 - The cost of the tow and of insurance for the tow;
 - The reputation of the respective yards;
 - The length of repair period and associated loss of income; and
 - The relative location of the yards in question to the Vessel's next employment after repair.

- **Section 61 of the Marine Insurance Act**
- *"Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss."*
- "Abandonment" has two meanings:
 - The transfer of the ship from the assured to the insurer
 - Secondly, it may refer to the notice of abandonment which must be tendered before a CTL claim can be made
 - The difference is key

Notice of Abandonment – s.62



- In order to make a claim for CTL, an assured must tender NOA (s62(1))
- It must be given with *"reasonable diligence"* (s62(1))
- It must express a clear and unconditional intention to abandon the property to the insurer and to claim for total loss (s62(2))
- The requirement for notice may be waived by the insurer (s62(8))
- In limited circumstances the notice may not be necessary; such as when *"there would be no ... benefit to the insurer if notice were given to him"* (s62(7)).

- Non-Acceptance
 - The usual practice is for insurers not to accept NOA (potential liabilities attaching)
 - If rejected, there is no prejudice to the assured (s62(4)).
- Acceptance
 - Where the insurer accepts the notice:
 - the acceptance may not be revoked (s62(6));
 - the insurer becomes conclusively liable for the loss; and
 - the insurer may assert its right to take over the proprietary rights to the casualty.
- Warning: deemed acceptance

