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A Case Study: Law of Salvage in Restricted Marine Insurance

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Abstract

Representing the backbone of global trade, the marine industry is intrinsically vulnerable to numerous perils. Common challenges encompass mechanical failures, adverse weather conditions, collisions, groundings, and other sea hazards. Accidents lead to ongoing salvage efforts that, although crucial for the preservation of life and property, may result in perplexing legal and financial consequences, especially with regard to the extent and applicability of insurance coverage. This paper provides a critical analysis of the challenges arising from the concessions that the insured must accept for an A-rated insurance coverage of assets otherwise uninsurable at a fair price. Considering the unequal access to information, the authors elaborate how these intricate issues may de-facto lead to a non-existent insurance coverage amid a crisis. Legal and practical ramifications of unrequested salvage services, the responsibilities of ship owners in such circumstances, and the criteria for appropriate salvage award assessment are extensively discussed. Meticulous and detailed examination allows to furnish pertinent insights into matters of concern for the insurance businesses, ship owners, salvors, and other maritime industry stakeholders.

Keywords: *Insurance, Marine Insurance, Salvage, General Average, Proximate Cause, Burden of Proof.*

Introduction

Insurance is a traditional mechanism for transferring risks, particularly in maritime transport operations. Sea perils generally impact a number of stakeholders, including ship operators, charterers, cargo proprietors, and occasionally passengers, who are collectively engaged in what is referred to as the "common adventure" under English Law terminology. A sea voyage is fraught with many hazards, often originating from a single incident. Many cases extend beyond sole jurisdiction requiring application of various legal frameworks. Modern marine insurance contracts often incorporate multiple sets of standard terms as well as unique terminology pertinent to statutes, common law, international treaties, and the body of case law. In case of losses, the above circumstances render average adjustment into a complicated challenge. This research examines the recent incident involving the MV Beda ship (name altered to maintain confidentiality), in which contradictory assertions emerged from the underwriters and the brokers representing the insured's interests. Certain considerations worth attention are elaborated in this study.

Case background

Built in the 1990s, the MV Beda is an aged 16,500 gross tonnage bulk carrier flying under the flag of South Korea. In August 2024 the ship was carrying a cargo of steel rods bound for the port of Aqaba, Jordan, in the Northeast Red Sea extremity. The voyage encountered a sequence

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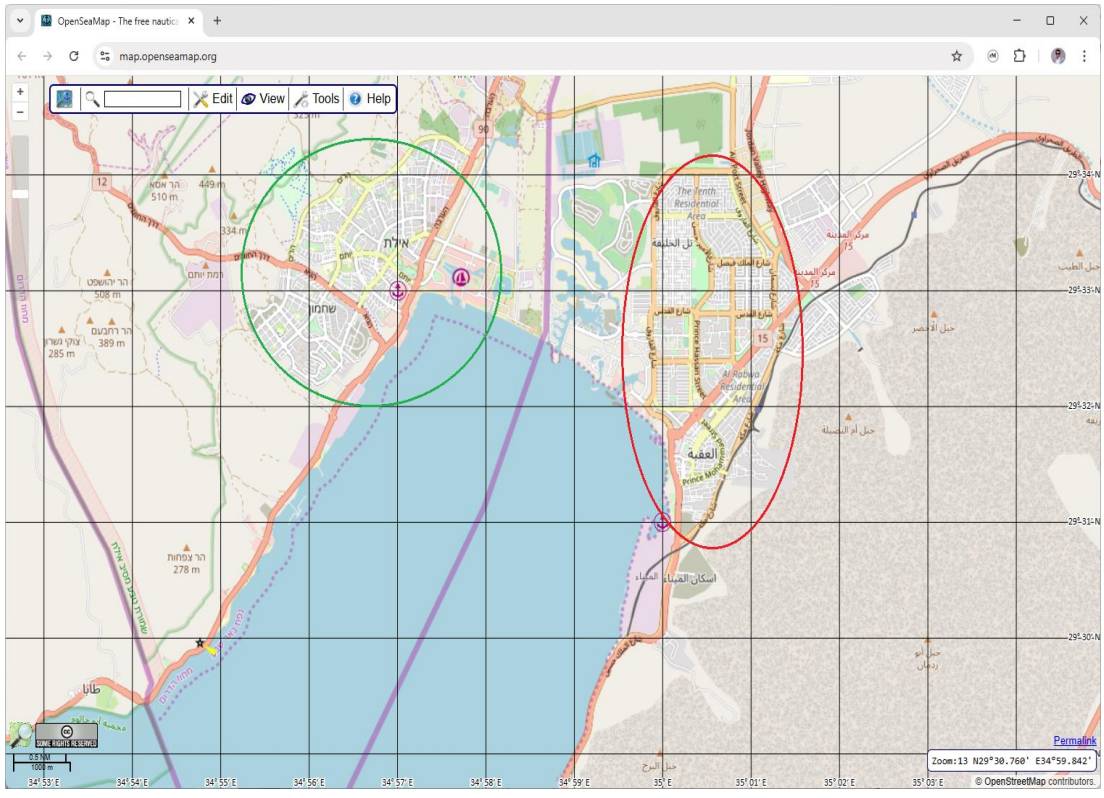
of adverse events rendered according to the reports by the master and the chief engineer. At 2:20 PM local time, the ship arrived at the Aqaba anchorage; the master ordered the engines to stop. Although just two hours away from the port, the vessel had to wait at the anchorage due to no suitable berth available. Considering that the sandy seabed of the Aqaba anchorage fails to provide firm holding, ships are normally allowed to drift freely with the main engines shut-down most of the time and started if necessary to adjust the position. At some point the chief engineer was unable to restart the engines upon the master's order to manoeuvre the ship back to an appropriate position. The chief engineer reported the engine breakdown allegedly caused by a machinery (i.e. air distributor) failure, requiring approximately four to five hours to troubleshoot. The vessel continued drifting. According to the master's incident report, the North Eastern wind drifted the ship 0.7 miles into Israeli territorial waters.



Picture 1. Eilat, Israel (left) - Aqaba, Jordan (right) ports borderline. [Source: openseamap.org]

According to the explanation contained in the report, at 6:10 PM the Israeli coastguard decided to dispatch two tugs from the nearby port of Eilat; by 6:44 PM, both of the tugs had made fast to the MV Beda and commenced towing. At 7:53 PM the master received a call from the lead tug informing that the convoy was approaching Jordanian territorial waters and that the tug casting off procedure was initiated. Overall, the Israeli towage operations lasted 1 hour and 16 minutes, excluding the voyage time required for the tugs to travel from and back to the Eilat port. Tugs from the Port of Aqaba and the pilot were already waiting for the MV Beda. At 8:30 PM, the pilot boarded her; five minutes later the lead tug set sail. Meanwhile, the chief engineer continued repairing the main engine. At 8:47 PM the engine was successfully restarted. The master performed several manoeuvres to confirm accurate engine operation. Nonetheless, the

Jordanian pilot was determined to continue tug assistance to berth for safety reasons. Upon arrival at Aqaba, the tugs cast off shortly before the pilot disembarked at 11:00 PM. The master manoeuvred the ship under his own power to position her alongside the container terminal. Following the incident, two invoices were issued to the ship-owners: one by the Eilat Port regarding the salvage fees and the other by the Aqaba Port regarding piloting and tug assistance.

The Claim

The ship was insured for USD 5,000,000 under a limited Hull and Machinery policy. The time policy governed by the law of England and Wales incorporated the Institute Time Clause - Hulls 1/11/95 CL280 *"but free of any claim in respect of partial loss and/or damage to the vessel unless caused by fire, lightning, explosion, grounding, stranding, damage received in collision with ship or vessel or objects."* The policy also incorporated a number of warranties, including two of relevance to the incident. One warranty imposed a restriction to navigate within the areas designated as high risk Listed Areas by the Joint War Committee (lmalloyds, 2025)

"Warranted no cover given whilst in breach of latest JWC listed areas (current JWLA-031) plus subsequent amendments unless prior advice and terms/as to be agreed prior to the breach. Suspension of the cover is deemed to be from the departure from port prior to the vessel entering the excluded area until arrival at port following the exit of the included area."

The other warranty of relevance is related to seaworthiness. The policy states, *"Warranted vessel is seaworthy throughout the whole period of insurance."* Later in August 2024, the shipowner's broker requested assistance with the underwriter and attached an invoice for the towage fees charged by the Eilat and Aqaba Ports, as well as other additional port fees incurred at Aqaba. Furthermore, it was revealed that the ship owners contacted the Aqaba Port authorities for assistance "immediately" after the engines failed; however, the Eilat Port authorities considered the request a distress call and intervened accordingly.

Wording-Related Issues

The underwriter rejected the broker's claim, citing as a principal reason, that the vessel's predicament would not have arisen unless engine broke down, with the latter circumstance not specifically included for coverage under the *"but free of any claim in respect of partial loss and/or damage to the vessel unless caused by..."* provision, except if caused by specific named risks, none of which was involved. The insurer had asserted foreseeable machinery issues prior to the insurance contract inception, citing the ship's age and the record of repeated machinery-caused incidents. In addition, the insurer reserved the right to argue that the vessel had violated the warranted navigation conditions, eventually rendering the insurance coverage inapplicable under the policy terms throughout the entire period of concern. The broker disputed the assertions accordingly. The issues for further consideration are as follows:

- Does the *"but free of any claim…"* clause effectively exclude the coverage of losses that would not have been suffered otherwise unless the engine broke down, including the charges imposed by the Israeli port?

- Does the breach of navigation conditions render the insurers exempt of all liability arising throughout the breach duration? Did the ship breach any other warranties, if any, that are likely to affect the insurer's liability?

- Was the ship's predicament such that the resulting losses would be deemed eligible for coverage under any of the available partial loss categories? If yes, which category would apply

and what evidence would be needed to substantiate the claim?

⇀ Finally, once the above issues are resolved, what, if any, is the insurer's liability with regard to the claim of the assured?

Marine Insurance Act 1906 Loss Categories

Under the law of England and Wales, marine insurance is governed by the Marine Insurance Act 1906 (MIA) and the Insurance Act 2015. These statutes codified and expanded the common law principles of marine insurance that had developed over past centuries. Concepts, such as salvage, general average and particular average, are fundamental for determining the liability of the insurer in the present case. The MIA divides insurable losses into several categories. Thus, Paragraph 56 discerns between *"total loss"* (i.e. the entire subject matter covered by the insurance is lost or deemed irrecoverable), and *"partial loss."* Partial losses are further subdivided into four categories: particular average loss [§64(1)], particular charges [§64(2)], salvage charges [§65], and general average loss [§66]. Each of these categories bears specific conditions and entails specific liabilities for the insurer. Accurate identification of partial loss is therefore highly consequential. Considering the subtle differences between the categories, clarification of borderline cases is predominantly dealt with by the marine insurance jurisprudence.

Particular Average Loss

For a loss to qualify as *particular average*, two conditions must be fulfilled:

1. The loss must impact only one party to the common adventure, and
2. The loss must be caused by a peril covered by the insurance.

A clear case would be damage to a vessel's hull during a storm requiring repair but not threatening the vessel's safety, considering that storm damage is covered under the insurance. The loss affects the ship-owner, but not the cargo interests and therefore satisfies the first category; since storm damage is covered by the insurance, the loss satisfies the second category as well. Considering that the MV Beda case does not comply with particular average loss requirements, further elaboration is not feasible.

Particular Charges

Paragraph 64(2) of the *Marine Insurance Act 1906* defines particular charges as *"expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges…"* Such expenses are not automatically covered under the MIA insurance. However, marine insurance policies often impose a duty on ship operators to act in a way as to minimise or avert losses that might otherwise lead to the insurer's liability. Such expenses are commonly referred to as *"sue and labour costs."* Paragraph 76(2) of the MIA provides that if a policy includes a *"sue and labour"* clause, particular charges may be recoverable provided that they are incurred "*in order to avert a loss insured against*",

"Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against."

Paragraph 78(3) reaffirms the above condition stipulating that *"expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause."*

General Average Loss

The MIA defines general average loss as the loss resulting from a general average act occurring when:

- Any extraordinary sacrifice or expenditure…
- …is voluntarily and
- Reasonably made or incurred…
- …in time of peril…
- …for the purpose of preserving the property imperilled
- …in the common adventure…

(§66(2)—the text of the Paragraph is broken down into distinct conditions for clarity reasons)

The term "common adventure" refers to the joint undertaking between the ship operators and cargo owners. Unlike particular average loss, a general average loss must be incurred for the good of all the interests involved. Typically, this implies cases where both the vessel and cargo are threatened. The loss is then shared proportionately among the parties according to the amount of interest in the common adventure [§66(3)]. A good example would be where a ship is in danger of imminent grounding that jettisons part of her cargo. In such cases, the cost of the sacrificed cargo is shared among the shipowner and all cargo interests, so that no single cargo owner bears the entire cost. Paragraph 66(4-5) provides that the insurer is liable to indemnify the assured for their proportionate contribution to a general average loss where the expenditure is incurred. In case of under-insurance, the amount indemnified is prorated under Paragraph 73(1). However, as in the case of particular charges, the insurer is only liable under this heading where the general average act was undertaken to avert a peril for which the insurance provides cover [§66(6)]. Thus, it is entirely possible for a general average liability to arise for the assured without the insurer being liable to indemnify the resulting contribution.

Salvage Fees

Salvage operations are performed to rescue the vessel and her cargo from maritime perils. Salvage operations may involve several measures, such as towing a ship in distress, rescuing a grounded vessel, or offering aid in situations like on-board fire. Historical jurisprudence on valid salvage claims outlines several essential criteria such as the presence of a maritime peril, assistance provided voluntarily without requirement under a contractual agreement, or assistance contributing to a full or partial success of the operation (Butakova & Ivanova, 2019). MIA salvage provisions refer to three conditions to be satisfied in order for a rescue operation to qualify as salvage:

1. The salvor must act voluntarily;
2. The subject must be in peril;
3. The operation must achieve success.

"Act voluntarily" means that the salvor is not acting under a pre-existing duty or contract specifying any pre-agreed fees. The MIA includes this condition under Paragraph 65(2), which defines salvage charges as *"the charges recoverable under maritime law by a salvor independently of contract."* In fact, courts indeed acknowledge salvage operations carried out under an agreement, but only where those are concluded on a *no-cure-no-pay* basis rather than a hire-for-service contract, without fees having been fixed in advance. The same Paragraph [§65(2)] further clarifies that salvage charges *"do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against…"*, emphasizing that, instead, such excluded expenses should be considered under one of the other available categories, *"… Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred."*

Law of Salvage and Salvage Charges

It has long been established in case law that the amount of fees awarded for salvage operations should provide sufficient incentives to encourage potential salvors to undertake risks associated with assisting vessels in peril and to maintain tugs with suitable equipment and crew for the above purpose. For this reason, salvage fees reflect not only the salvor's time and effort, but also the value of the property salvaged and any extraordinary skill, or risk involved in the operation. In addition, effective protection of the environment from potential pollution resulting from the risk is sometimes rewarded with additional fees. As a result, salvage fees are typically higher than those payable for superficially similar services rendered under an ordinary commercial contract. It is not uncommon that the amount of salvage fees is often subject to arbitration owing to the complexities involved in its calculation. The MIA does not specify a formula for determining the amount of salvage fees, instead simply stating that those are *"…the charges recoverable under maritime law by a salvor…"* [§65(2)]. Many salvage claims are governed by the International Convention on Salvage 1989. Jordan is a signatory to this Convention, but Israel is not. Accordingly, salvage operations conducted within Israeli territorial waters are subject to domestic Israeli law. The relevant legislation includes certain historic British laws incorporated into the Israeli legislation in 1948. Specifically, the applicable statutes include the Admiralty Courts Acts of 1840 and 1861, the Salvage Fee and Lost Merchandise Order 1926 and the Wrecks and Salvage Fees Ordinance1926 (both enacted under the British Mandate), and the Shipping Act (Vessels) 1960. The ultimate court of arbitration is the Haifa District Court in Israel, which exercises jurisdiction as the national Admiralty Court.

Warranties in Insurance After the Insurance Act 2015

The MIA defines a warranty as *"a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts"* [§33(1)]. It further stipulates, *"A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not"* [§33(3)]. Warranties may be either express (i.e. incorporated in the policy), or implied (i.e. inherent in the policy arising by operation of MIA provisions). The MIA specifies several implied warranties, including a warranty of seaworthiness; which is similar, but not without differences to the warranty incorporated in the policy covering the present case. The express seaworthiness warranty bears similarity – though in a weaker form – to the implied warranty provided under the MIA. Specifically, Paragraph 39(5) states that *"in a time policy there is no implied warranty that the*

ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness." Historically, in cases involving marine insurance, courts have held that a breach of warranty voids cover under the policy from the moment of breach. The policy in such a case contains a more stringent provision with respect to the navigation conditions warranty: cover will be voided not only from the moment of breach, but also retrospectively from the moment of the vessel's departure from its previous port of call. However, the interpretation of warranty has followed a more stringent approach with regard to the insured parties' interest following the coming into force of the Insurance Act 2015 (IA) in 2016. The IA contains two provisions that affect the insurer's power to enforce the consequences of breaches of warranty. Paragraph 10 of the IA provides that breach of warranty merely suspends cover for the period of the breach; once the breach is remedied, the cover is restored automatically. Under Paragraph 11 of the IA, where non-compliance with a contractual condition does not increase the risk of the loss claimed, which would otherwise be covered, the insurer may not rely on the breach in order to refuse to cover the loss. In a non-consumer insurance contract, the parties may agree to contract out the provisions stipulated in Paragraphs 10 and 11 of the IA. However, Paragraph 17 imposes a special duty of transparency on insurers. Therefore, in order to justify the loss of cover under contractual clauses contrary to the provisions stipulated in Paragraphs10 and 11, an insurer must prove that special efforts have been made to draw the attention of the assured to the effect of the clauses in the course of negotiation.

Causation in Marine Insurance Law

"…Whether or not a loss is covered by a marine policy depends on ascertaining its proximate cause." — Mance LJ in Cendor Mopu [2011]. Paragraph 55 of the MIA stipulates that an insurer is liable for losses if and only if those losses are *"proximately caused"* by a peril insured against. This Paragraph is important and merits quoting in full:

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

The term *"proximate"* used in the Act is potentially confusing and was clarified in an important case issued a couple of years after the statute was passed: *Leyland Shipping v Norwich Union* [1918] AC 350. The case concerned a ship transporting gold between Southampton and the French Le Havre coast. While crossing, the ship was struck by German torpedoes, sustaining damage, but remaining afloat to reach Le Havre. In order to prevent disruption of wartime activities, the harbour authorities insisted that she be berthed in shallow water outside the harbour. The actions of the tides, as well as the process of grounding and refloating exacerbated the damage incurred by the torpedoes, eventually leading to the hull failure and ship loss in two days. The ship was declared a total loss; the owners claimed reimbursement under their policy. The insurers refused the claim, arguing that the torpedo damage, though covered, was not the "causa proxima" (proximate cause) of the final loss (Fujimoto, 1959). In judgment, Shaw LJ rejected the notion that "proximate" could be interpreted in this context as nearer in time (although such had been the common interpretation in case law before the MIA was passed - e.g. *Cory v Burr (the "Rosslyn")* (1881 – 82) LR 8 QBD 313; (1882) 9 QBD 463; (1883) 8 App Cas 393). Instead, he affirmed that when the Act referred to *"proximate cause,"* it should be understood as intending the *"effective cause."* This clarification, though poor in clarity, established that the addition of concurrent causes (e.g. the inhospitality of the harbour and the

action of the tides) does not necessarily unseat a retrospectively prior cause as *"proximate cause".* Leyland Shipping set a precedent for many future cases in which the court tried to disentangle multiple concurrent causes. In one major case, *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] 1 QB 57 and *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd* (The "Miss Jay Jay") [1987] 1 Lloyd's Rep 32 [see also Navigators judgment p. 22] established that where two concurrent causes are both judged *"proximate"* or *"effective"* and one is covered while the other is excluded, the exclusion is to be enforced. However, in most cases the court seeks to reach a positive judgement with regard to several concurrent effective causes and to determine liability on that basis.

In recent decades an important principle has emerged that when a loss occurs from the intrinsic nature of an earlier cause, such that subsequent causes are *"neither here nor there"*, then the earlier cause is deemed effective, despite the intervention of subsequent causes. Where the subsequent event is a fortuitous or accidental trigger for a loss stemming from an earlier condition, then such event is more likely to be considered the effective cause. Noteworthy is the case of *T M Noten BV v Harding* [1989] 2 Lloyd's Rep 527; [1990] Lloyd's Rep 283, which dealt with a shipment of leather gloves that suffered damage during the voyage from Calcutta to Rotterdam. In Calcutta, moisture evaporated due to monsoon heat; upon reaching Rotterdam, it condensed and precipitated down on the cargo. Initially, Phillips J ruled that the effective cause of the damage was the condensation. However, the verdict was overturned on appeal, as the intrinsic flaw of the wet gloves was identified as an effective cause. Bingham LJ opined, *"The proximate cause of the damage was the moisture in the cargo, and the fact that it evaporated from the cargo before condensing and falling back on the cargo was neither here nor there."*

In *Navigators Insurance Company Limited v Atlasnavios-Navegacao LDA* [2018] UKSC 26, the Supreme Court ruled on another case involving concurrent causes. The B Atlantic cargo ship was berthed at a port in Venezuela, waiting for loading of goods bound for Europe. While at the port, a third party attached drug packages to her hull, presumably for the packages to be retrieved by henchmen on arrival at a port in Europe. The plan was foiled by the Venezuelan authorities, who discovered the drugs during an inspection. The crew was charged with smuggling, convicted and jailed, while the ship was arrested, with a large payment demanded in exchange for release. The ship owners sought reimbursement under their policy covering losses resulting from malicious acts, arguing that the loss was suffered as a result of the drug traffickers' actions. The insurers rejected their claim citing the exclusion of *"capture seizure, arrest, restraint or detainment, and the consequences thereof or any attempt thereat".*

In his judgment, Mance LJ dismissed the owners' argument that the planting of the drugs was the ultimate cause of the loss and that the subsequent seizure of the ship *"can be regarded, and dismissed causatively, as no more than incidents of or sequela to the original malicious act."* On the contrary, he pointed out, the smugglers must have believed that there was some chance for the contraband to elude detection. The inspection and the discovery of the drugs were fortuitous accidents that did not emerge inevitably from the planting of the drugs, even if that original event made the ship liable to seizure. Finally, in *Global Process Systems v Syarikat Takaful Malaysia Berhad* [2011] UKSC 5, the Supreme Court reached an eyebrow-raising verdict, which nevertheless demonstrates the same principle in action. In this case, the Cendor MOPU was an oil rig that was being transported from Texas to Malaysia. The rig consisted of a platform equipped with three giant legs to let the platform be jacked down to rest on the seabed or raised up for transport. For the journey to Malaysia, the platform was placed on a barge, with its legs jacked up so as to tower above the said platform. The Cendor MOPU was insured as

cargo against perils, including "*perils of the seas*", a standard risk defined under the MIA. The policy excluded losses arising from inherent vice of the insured cargo.

At Saldanha Bay, serious fatigue cracking was detected in the legs of the platform, with emergency repairs carried out with the intention of performing more thorough repairs upon arrival in Malaysia. However, as the journey continued in rough seas, the two legs sheared off one following the other. The court had to determine whether the effective cause was the inherent vice of the Cendor MOPU or the action of the rough seas. The Supreme Court upheld the verdict of the lower court, rejecting the insurers' appeal. The court concluded that, although the cracking to the legs of the platform made the platform susceptible to loss, it did not render the loss inevitable. The court determined that the true cause of the loss was the specific combination of wind and wave action, which exploited the weaknesses in the legs, causing them to give way. Although the weather conditions were not extraordinary, they were not inevitable, fortuitous and accidental, and thus constituted the effective cause of the loss.

Results and Discussion

Question: Was the insurer's liability affected by breach of warranty?

In assessing the client's claim, a fundamental consideration is whether the insurer may be entitled to refuse all or some liability on the basis of breach of warranty. The United Nations Convention on the Law of the Sea (UNCLOS) delineates different marine zones, each granting different degrees of jurisdiction to coastal states. Zones included under convention are as follows:

⇀ Article 8-Internal Waters: Under this Article internal waters located towards the land side of the baseline of a coastal state are defined. The coastal state exercises full sovereignty over its internal waters, just as it exercises full sovereignty over its land territory.

⇀ Article 3-Territorial Sea: According to UNCLOS Article 3, the territorial sea extends up to 12 nautical miles from the baseline of the coastal state. The coastal state has sovereignty over its territorial area, which includes the airspace above and the seabed below this area. However, exceptions are available for foreign vessels which enjoy the privilege of innocent passage through the territorial sea.

⇀ Article 10-Contiguous Zone: Under the Article, international law defines the contiguous zone as a maritime area extending up to 24 nautical miles from the baseline of the coastal state. In this zone, the coastal state may exercise jurisdiction to prevent and punish infringements of its customs, immigration, fiscal, or sanitary laws and may regulate activities within its territorial sea.

⇀ Article 57-Exclusive Economic Zone (EEZ): The EEZ extends up to 200 nautical miles from the baseline of the coastal state, according to the treaty. Within the EEZ, the coastal state has the jurisdiction rights for the reason of exploring and exploiting, including the conservation and management of the natural resources – both living and non-living – of the waters superjacent to the undersea and its soil. The state may conduct other activities for the economic exploitation and exploration of the said area, such as the production of energy through the use of water currents and wind.

⇀ Article 36-High Seas: Under the Article, the high seas are open to all states, whether coastal or landlocked. However, the high seas exclude the territorial sea and the seabed beneath.

In the matter of the MV Beda, it was essential to ascertain the competence of the states to adjudicate the right of salvage. The vessel, while near the Aqaba Port, experienced the main engine failure and drifted into Israeli waters. Under maritime law, if the vessel is located within Israel's territorial seas (i.e. within 12 NM of its coastline), Israel has a strong ground for executing the salvage operation. However, if the vessel is beyond Israeli territorial seas, jurisdiction may be contested, with considerations such as the vessel's flag state (Republic of Korea) and the location of the vessel's owner may become pertinent. Israel defended their action citing probable navigational risks and apprehensions about marine safety. At the time of the incident, Israel was among the Joint War Committee Listed Areas due to war risks, and under the insurance policy the client had warranted that such circumstances would not arise. However, pursuant to the warranty specified directly in the policy, the effect is to void the coverage for an extended period starting from the time the vessel departed from its previous port of call to the time it reached the next port. In the event of the matter being brought before court, the provisions of the Insurance Act 2015 would have to be taken into account. The more stringent form of the warranty overrides the effect of Paragraph 10 of the IA, which stipulates that the loss of cover resulting from a breach of warranty will only last for the duration of the breach. The warranty overrides Paragraph 11 of the IA, as it voids liability for any loss arising from the breach, not merely those where the risk of loss was increased by the breach. In a non-consumer insurance contract, both provisions of the IA can be contracted out, with the contract only subject to the Paragraph 17 transparency provisions. While the case law regarding this relatively recent statute is limited, current indications suggest that courts will adopt a stringent approach in the application of Paragraph 17.

In the recent case *Scotbeef v D&S Storage Ltd and Lonham Ltd* [2024] EWHC 341 (TCC), a strict reading was endorsed by the court, which may have relevance to the case under consideration. Kelly J rejected the insurer’s attempt to enforce contracting-out clauses in the contract finding that there was insufficient evidence to show that the client’s attention had been sufficiently drawn to these clauses at the time of contract renewal. This approach is in line with cases predating the Insurance Act that emphasise that a contract must be read in the context of all communications between the parties discussing the contract terms (see for example, Supreme Court decision in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* (UK) [2010] UKSC 14). In the present case, should the underwriters seek to rely on the violation of the navigation restrictions, they must secure documentation demonstrating that appropriate attention was directed towards the contracting-out implications, and that all pertinent correspondence corroborated this stance, particularly at the time of the policy's most recent renewal. The policy documents alone will not provide sufficient evidence; therefore, the burden is imposed on the insurer to demonstrate the transparency requirement was satisfied. The common ground was that the breach of navigation limits did occur. However, in the negotiations with the underwriter, the broker claimed that the breach occurred due to engine failure while the vessel was in Jordanian waters, and that the subsequent incursion into Israeli waters was unintentional and despite the crew’s best efforts. While the claim is debatable, there are some reasonable grounds to support it.

In *Fraser v BN Furman (Productions) Ltd* [1967] 1 WLR 898, the court ruled that an exclusion in an insurance contract should not be construed in a manner that is “*repugnant to the commercial purpose of the contract*”. In that case, the insurer had construed an exclusion in a way that would limit coverage for the client’s liability in circumstances where the client was unaware of the breach. Diplock LJ held that such an interpretation frustrated the very purpose

of the contract as liability arising from events beyond the control and knowledge of the assured was precisely the kind of risk, against which the policy was contracted to protect. This principle has been reaffirmed in subsequent marine insurance cases, including the recent *Hongfa Shipping Co. Ltd v MS Amlin Marine N.V. and Another* [2021] EWHC 999 (Comm). There is another breach of warranty whereupon the insurer may seek to rely, provided suitable evidence can be established. The contract includes both an implied (MIA §39) and express warranty of seaworthiness. The implied warranty is more limited in scope since a breach occurs only if the assured is privy to the unseaworthiness of the vessel at the time she departs from port, whereas the express warranty is breached even if the vessel becomes unseaworthy mid-voyage.

Should a survey of the ship demonstrate that the engine failure was due to unseaworthiness, with no additional accidental cause, a breach would be established, potentially allowing the liability to be avoided. Given that the period of breach would apply to the entire duration of the incident, this would not challenge Paragraph 10 of the Insurance Act 2015. Since unseaworthiness would clearly increase the risk of the loss claimed, it would not challenge Paragraph 11 accordingly. For this reason, the scrutiny of transparency conditions is likely to be less stringent. In the absence of positive evidence establishing the vessel's unseaworthiness, we will proceed on the assumption that this potential breach cannot be relied on either.

Question: Is the "free of any claim" clause relevant in assessing the insurer's liability for other categories of partial loss?

During their initial loss discussions regarding the loss, a significant contention arose between the broker and the underwriters regarding the implications of the *"free of any claim"* policy language, in contrast to the more commonly used *"free from particular average"* or *"FPA"* clause. Both variants are referenced for clarity:

- Institute Time Clause 1.11.95 Cl.280 "***but free of any claim in respect of partial loss and/or damage to the vessel unless caused by*** fire, lightning, explosion, grounding, stranding, and damage received in collision with ship or vessel or objects".

- Institute Time Clause 1.11.95 Cl.280 "***but free of particular average unless caused by*** fire, explosion, lightning, grounding, and stranding, capsizing, sinking, collision with other vessels or fixed or floating objects".

Should the shipowner neglect to reveal pre-existing mechanical defects, the insurer may argue that this constitutes material non-disclosure, thereby invalidating the claim (*Manifest Shipping v Uni-Polaris Insurance* [2003] UKHL 1). Discrepancies in information distribution, on the other hand, resulted in one party (the insurer) assuming that all incidents related to machinery damage were excluded under their policy's specific language, while the other party (the assured through their broker) assumed that a more standard FPAUCB interpretation was applicable. Given that the case policy language contains a far broader exclusion, this diminishes the chances of the assured to succeed in litigation, which aligns with case law precedent, where courts have upheld strict interpretations of policy exclusions in favour of insurers (*Global Process Systems v Syarikat Takaful Malaysia Berhad* [2011] UKSC 5). However, for academic purposes we have further elaborated the assumption that the broker could have amended the policy's explicit terms to align with those more commonly encountered by him, thereby potentially succeeding in the implementation of Paragraph 17 of the IA 2015. The underwriter argued that, since the engine failure was the *causa sine qua non* of the potential grounding and the eventual Israeli intervention, the charges resulting from the latter were excluded under the FPA clause. The

broker, however, strongly disagreed, asserting that under the Institute Time Clause - Hulls CL280, *"…the salvage part is separate. As such there are no particular average claims unless caused by the named perils but other claims, such as salvage and GA would not be dependent upon the claim having arisen from one of the named perils."* Was the broker correct in his assertion?

It is true that the MIA 1906 explicitly distinguishes particular average and general average loss [§64(1)]. The MIA further stipulates that particular charges *"are not included in the particular average"* [§64(2)], and obliges the insurer to cover such charges when they fall under a sue and labour clause, notwithstanding that the subject of insurance *"…may have been warranted free from particular average…"* [MIA §78(1)]. Although the MIA leaves open the possibility that salvage charges can be recovered as part of a particular average claim, it insists that the inclusion of an FPA clause in the contract does not automatically absolve the insurer from liability for such charges [§76(2)]. In this sense, salvage and general average are treated as distinct from particular average. However, this doesn't mean, as the broker suggested, that liability for a particular average is irrelevant when assessing liability for other types of partial loss. Each of the three categories involves losses incurred in the attempt to prevent a potential loss to the vessel that may or may not ultimately have materialized. In each case – whether under the provisions of the MIA, or the ITCH CL280, or both – the insurer is only liable when the potential loss, had it occurred, would itself have been covered under the policy. Particular charges. Paragraph 78(3) of the MIA provides that particular charges are not recoverable if incurred to avert a loss not covered by the insurance. Likewise, the sue and labour clause of the ITCH CL280 states, though in positive terms, that such charges are only recoverable when *"averting or minimising a loss which would be recoverable under this insurance"* [§11.1]. General average loss. Paragraph 66(6) of the MIA provides that an insurer is only liable for general average losses where the latter were incurred to *"…preserve against a peril insured against."*

Paragraph 10.4 of the ITCH CL280 provides that no claim for either salvage charges or general average losses will be admitted *"…where the loss was not incurred to avoid or in connection with the avoidance of a peril insured against."* Consequently, contrary to the broker's assertion that the exclusion of the engine failure is not relevant to the expenses if they can be treated as salvage or general average loss, the opposite interpretation is supported by the decision in *Samuel v Dumas* [1924] AC 431, where the House of Lords ruled that insurers are only liable for salvage expenses when they arise from an insured peril, as well as *in Roura & Forgas v Town Marine Insurance Co* [1918] 1 KB 194, where the court held that expenses incurred to mitigate a loss must be causally linked to a covered peril for them to be claimable. Thus, the essential question is as follows: had the potential loss (i.e. that the fees were incurred in order to avert a peril) not been averted, would such loss have been eligible for coverage under the insurance? The answer to this question is a matter of causation.

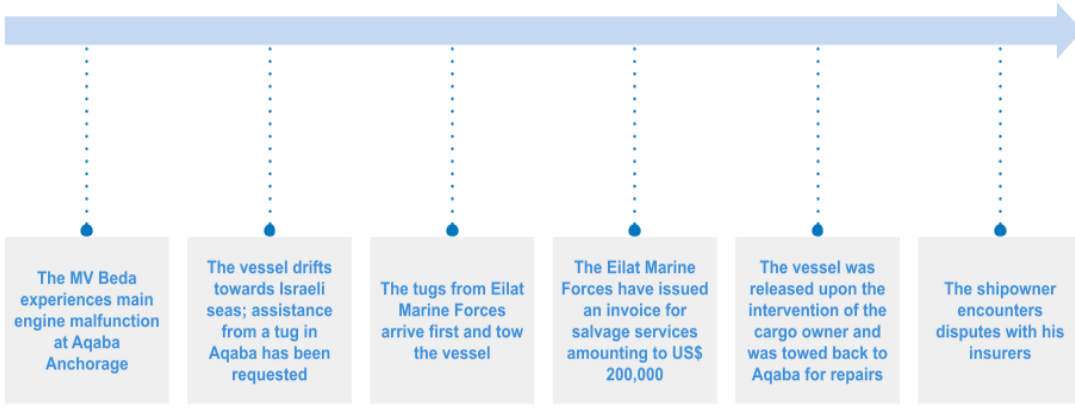
Question: If the loss was incurred in averting a peril, was that peril the one that would have been covered, had it eventuated?

If the MV Beda seeks to claim under one of the three categories of partial loss other than particular average, she must establish that the loss was incurred in order to avert a peril that, had it materialized, would have been covered under the insurance. The peril was grounding with consequent damage or destruction; however, in order to understand whether it would have been covered, the *"proximate"* or *"effective"* cause must be determined. There are at least three candidate causes to consider:

¬ The failure of the main engine, which left the ship adrift. The failure of the engine, absent one of the named causes, is excluded under the FPA.

¬ The action of the wind and waves, which pushed the vessel into Israeli waters and towards the risk of running aground. This event falls under the category of *"perils of the seas, rivers, lakes, or other navigable waters,"* covered under ITCH CL280 §6.1.1.

¬ The inaction or negligence of the crew. Loss or damage caused by "*negligence of Master Officers Crew or Pilots*" is covered under ITCH CL280 §6.2.2.



Picture 2. The MV Beda Incident Timeline

Since the engine failure was the initial cause of the entire sequence of events, it might seem intuitive to consider it the effective cause. However, the jurisprudence is clear on the matter. There is nothing inevitable in the sequence of events which means that the engine failure during four or five hours must necessarily result in grounding. This remains true even if the engine failure made the ship more vulnerable to running aground. This principle is similar to the situation in the B Atlantic where the actions of the drug smugglers made the vessel liable to seizure, but did not cause the seizure, or in the Cendor MOPU where the cracks in the legs of the platform made them susceptible to breaking off but did not directly cause the breakage. As in the Cendor MOPU case, the action of the wind and waves was fortuitous – the wind was blowing in the right direction and with sufficient force to push the ship into danger before the engine could be repaired. Therefore, the wind was likely the effective cause, rendering the potential loss, which may have been averted, eligible for coverage under the "*perils of the seas*" clause.

In the unlikely event that this argument failed, the shipowners might be able to rely on the negligence of the master and crew, which is also covered under the policy. Preliminary reports commissioned by the underwriter indicate that the crew failed to take several actions that could have avoided the situation. For example, there is no evidence that the crew attempted to drop anchor. The report further suggests that the engineer should have attempted to start the engine manually by repositioning the cylinders for start, which might have temporarily restarted the engine, providing enough power to steer the ship out of trouble. In conclusion, assuming that the ship was genuinely in danger of running aground, such loss would likely have been covered under the *"perils of the seas"* clause as the result of the fortuitous action of the wind, or as negligence of the master, officers, crew, or pilots. Consequently, subject to the satisfaction of

other conditions, the fact that the incident stemmed from an event excluded under the FPA clause would not preclude a claim under the sue and labour clause (for particular charges), general average loss, or salvage fees. We can now consider whether such other conditions were, in fact, satisfied. This requires further analysis of the Israeli and Jordanian charges, as the conditions under which they were incurred differ significantly. In each case, we will need to consider which of the available categories of partial loss, if any, might be applicable.

Question: Was the service provided by the Eilat Port carried out voluntarily, or were they acting as agents for hire?

When the Eilat Port issued its invoice for the assistance provided to the MV Beda, it included a single charge listed as *"salvage fees."* However, this description alone is insufficient to establish that the loss indeed qualified as salvage charges for the purposes of the insurance contract, or that it failed to fall under either of the other two categories. Depending on the conditions, "*expenses of services in the nature of salvage*" can also be recovered as particular charges under a sue and labour clause, or as general average loss [MIA §65(2)]. In this case, a key consideration is the claim by the owner's agent that the master attempted, unsuccessfully though, to reject the offer of assistance from the Israeli tug. Unless the client can provide evidence to the contrary, this fact would preclude a claim under either the sue and labour or general average category. Both categories apply only to recover expenses that were incurred proactively by the insured. General average loss must be *"voluntarily and reasonably made or incurred"* [MIA §66(2)], while the ITCH CL280 provides that the insurer will contribute to particular charges where these are incurred by the assured or their agents.

The distinction between salvage and general average may initially appear of little significance, since both categories entail a liability that is proportional to each party's interest in the adventure. However, the two concepts operate differently. Successful salvage results in a lien on the property recovered, with the owners of the various assets being severally liable. In contrast, a general average is an expenditure or sacrifice made by one party on behalf of the common maritime adventure, with general average contributions then becoming payable by the other parties in proportion to their respective interests. A major case to establish this principle is *The Raisby* (1885) 10 PD 114. The Raisby steamship lost power in the Bay of Biscay. The Raisby master agreed with the master of a passing ship to tow the stricken vessel to a nearby port, with both parties agreeing to be bound by the arbitrators' judgement on the amount of fees due. The salvors successfully claimed the proportion of the salvage fees from the shipowners that corresponded to the rescue of the vessel, but were unable to claim from the cargo owners. They sued, claiming that the agreement signed by the two masters made the owners of the rescued ship liable for the full amount of fees awarded in arbitration. The court rejected this argument, confirming that salvage and general average are distinct concepts and cannot be conflated. Notwithstanding the agreement, the shipowners were only liable for their own share of the salvage fees, whereas the cargo owners owed no general average contribution, since no general average act had occurred.

Likewise, the ITCH sue and labour clause [§11] incorporated in the policy establishes a duty on the assured to take reasonable measures where available to minimise any claim that might arise from a peril insured under the policy, with the insurer agreeing to reimburse the resulting costs incurred. Since a true salvage operation, by definition, is carried out on a *no-cure-no-pay* basis, i.e. voluntarily, and imposes a lien on the property saved upon successful resolution, it is clear that the resulting liability cannot be interpreted as the cost of discharging the sue and labour

duty. This pertains to the share of salvage fees on the part of the assured and, by extension, the total amount of the payments. The principle that *sue and labour* requires intentional action on the part of the assured or their agents was established before the MIA was passed in *Aitchison v Lohre* [1879] 4 App(a). In that case, the House of Lords ruled on the disagreement between lower courts on the issue. In his judgement Lord Blackburn stated,

"General average and salvage do not come within either the words or the object of the suing and labouring clause, and that there is no authority for saying that they do. ... the object of [the sue and labour clause] is to encourage and induce the assured to exert themselves…. It is all one whether the labour is by the assured or their agents themselves, or by persons whom they have hired for the purpose, but the object was to encourage exertion on the part of the assured; not to provide an additional remedy for the recovery, by the assured, of indemnity for a loss which was, by the maritime law, a consequence of the peril. In some cases the agents of the assured hire persons to render services on the terms that they shall be paid for their work and labour, and thus obviate the necessity of incurring the much heavier charge which would be incurred if the same services were rendered by salvor, who are to be paid nothing in the case of failure, and a large remuneration proportional to the value of what is saved in the event of success. I do not say that such hire may not come within the suing and labouring clause. But that is not the case. The owners of the Texas did the labour here, not as agents of the assured, and being paid by them wages for their labour, but as salvors…, which… gives them a claim against the property saved by their exertions, and a lien on it, and that quite independently of whether there is an insurance or not; or whether, if there be a policy of insurance, it contains the suing and labouring clause or not".

This ratio was cited by Stuart-Smith LJ as authority in a more recent case, *Royal Boskalis Westminster N.V. and Others v Trevor Rex Mountain and Others* [1997] EWCA Civ J0228-18. On the grounds that the master did not arrange the Israeli towage, but rather attempted to refuse it, the resulting charges cannot be claimed as either general average loss or particular charges. However, this also suggests that the intervention met the first of the three salvage conditions – voluntariness. It is evident that the salvors were not acting pursuant to any prior agreement with the ship master or her owners. The ship-owner opted not to declare GA, probably due to the following reasons:

- Commercial Relationships: Cargo owners often dispute GA declarations, which can lead to legal delays (see *The "Trade Green"* [2000] 2 Lloyd's Rep 451);

- General Average Adjustments: Declaring GA involves complex calculations and contributions from multiple parties, often requiring litigation or arbitration (see *The "Kyzikos"* [1989] 1 Lloyd's Rep 1);

- Time Sensitivity: The vessel was detained pending payment of the salvage award, meaning a prolonged GA process could have delayed operations (see *The "Bosworth"* [1999] 1 Lloyd's Rep 321).

Ultimately, although invoking GA could have mitigated financial liability, the prospect of legal challenges and delays likely deterred the shipowner from pursuing this option.

Question: Was the MV Beda in a situation of imminent peril at the time of the Israeli intervention?

For a claim to be covered as salvage fees, voluntariness on the part of the salvor is required,

along with two additional conditions: (1) the subject must have been in a situation of imminent peril, and (2) it must be successfully saved. The common ground was that the vessel and its cargo were returned to Jordanian territorial waters without damage, thereby satisfying the condition of success. However, the question remains whether the vessel was in imminent peril? The unrequested salvage operation may lead to disputes between the parties; specifically, the individual who rendered services to recover the property of the owner (vessel or cargo) without the owner's explicit agreement or request. These issues may result in disagreements between the two parties concerning the owed amount of charges. Typically, a salvor must render the service voluntarily, without the expectation of receiving a salvage award. If the salvor is legally obligated to perform rescue services, they may not be entitled to compensation or may receive a reduced award (Baughen, 2023). Maritime law clearly distinguishes between compulsory salvage and voluntary salvage. Compulsory salvage arises when a salvor is legally obligated to render aid in specific circumstances. This obligation may stem from an existing contract, a legal requirement, or a professional duty (e.g., a coast guard's duty to rescue). By contrast, voluntary salvage occurs when a salvor provides assistance to a vessel in distress without any prior contractual or legal duty to do so (*NV Wijsmuller v Owners of Motor Tanker Tojo Maru* [1972] AC 242). The salvor intervenes and acts independently, according to their will. The distinction between these two salvage categories is crucial, as it affects the eligibility for a salvage award and the considerations required to assess the award's value. If the ship-owner can prove that the intervention was unnecessary or that a commercial towage agreement was already in place, they may contest the salvage claim (Chircop et al., 2016)

However, voluntary salvors are particularly favoured under salvage law, as their acts are regarded as more commendable. Courts are generally reluctant to overturn salvage awards unless clear evidence of bad faith or excessive charging is demonstrated (*The "Sandefjord"* [1953] 2 Lloyd's Rep 557). Given that the vessel was drifting towards Israeli territorial waters, an argument can be made that some level of emergency intervention was justified, potentially undermining any legal challenge. In the present case, the evidence is limited. The master's incident report mentions a strong north-easterly wind. The underwriter obtained a weather report for the region for the day of the incident, which indicated settled weather with good visibility. At 5:00 PM, the wind was recorded as northerly and moderate (8.8 m/s or about 17 knots). Although the report does not align with the master's report, local wind variation is not uncommon, meaning that the master's version cannot be entirely ruled out either. A critical issue may be the call for assistance made to the Aqaba Port authorities. Although the master did not mention such a call in his report, it is evident that the Aqaba Port was notified, as the invoice issued by the port lists tug activity from 5:30 PM. If the insured can produce records of a call requesting urgent assistance, it is likely to be accepted as *prima facie* evidence that the ship was in genuine peril at the time of the incident. It is well established in case law that where the question is whether a loss is covered by an insurance policy, the burden of proof lies with the insured; if the question is whether a loss is excluded, the burden of proof rests with the insurer (see, e.g. Coleman J's judgment in *King and others v Brandywine Reinsurance Co.* (UK) Ltd [2004] EWHC 103 (Comm), also: Pearson J in *Compania Naviera Santi SA v Indemnity Marine Insurance Co Ltd, 'Tropaioforos'* [1960] 2 Lloyd's Rep 469). Assuming that evidence can be provided to demonstrate that the ship was in imminent peril, and that all other conditions have been met as discussed above, the insurer will be liable under the policy.

Question: What is the extent of the insurer's liability for a claim for salvage fees?

Under Paragraph 10.1 of the incorporated ITCH CL280 terms, the insurance covers *"...the*

Vessel's proportion of salvage, salvage charges…". Consequently, the insurer is not liable for the full amount of the charges imposed by the Eilat Port, but rather a proportionate share that reflects the value of the insured vessel in relation to the value of the common adventure, which includes the cargo. Under the same clause, the insurer's liability is to be adjusted downward in case of under-insurance. Insurers can challenge claims on the grounds of reasonableness under the MIA, but in this case, given that no prior arrangement existed with the Eilat Port authorities, it is hard to see how such an objection could succeed. However, once the insurer has indemnified the client, the right to challenge the fees in Israeli courts under the doctrine of subrogation is retained (as established in the judgment extending this right to foreign insurers in *ALA 8588/19 Haifa Port Co Ltd v Certasig Insurance and Reinsurance Co Ltd.* (2020)). Grounds for such a challenge may include arguments that the fees were unreasonably high given that the assistance provided involved minimal risk or skill, or that the fees were disproportionate to the value of the property salvaged.

Question: Did the service provided by the Aqaba Port constitute salvage services?

Unlike the Israeli invoice, the document issued by the Aqaba Port did not explicitly list any charges as salvage fees. Instead, it detailed specific tasks and fuel supplies for each of the two tugs, along with a charge for the pilot's services. If the shipowners decide to claim salvage, they bear the burden of demonstrating the validity of all elements of the claim – voluntariness, peril, and success. Given that salvage operations expose both the insured and the insurer to significantly greater liabilities than routine towage expenses, the insurer may require a valid justification for such a claim. Should the insured be unable to establish that the charges correspond to salvage fees and subsequently submit a claim under general average or sue and labour, the insurer may challenge the reasonableness of the expenditure, particularly if it is deemed unreasonably high – a course of action that would not be available for a salvage claim. On the agent's account, the master contacted the Aqaba Port authorities as soon as the engine failure was detected. At that time the ship was adrift, with the master's incident report stating that a strong NE wind was pushing the ship towards the Israeli territory. The master's request for assistance from the Jordanian port does not automatically negate the possibility that the Jordanian tugs were acting voluntarily in the legal sense of salvage. Courts accept that services agreed under a Lloyd's Open Form or other written instrument formalising a *no-cure-no-pay* arrangement constitute valid salvage. In the absence of such an agreement (no such document has been provided), the owners may have to request communication logs from the port. If the port proposed fixed or per-hour charges, the owners are unlikely to succeed in a claim for salvage fees, especially if the agreement provided that the fees would be due regardless of success or failure (as per Stuart-Smith LJ in *Royal Boskalis Westminster N.V. and Others v Trevor Rex Mountain and Others* [1997] EWCA Civ J0228-18).

The element of peril may be more challenging to prove with respect to the Jordanian fees than the Israeli fees. At the time the master contacted the Aqaba Port authorities, the ship was immobilized and adrift, with approximately two hours' sailing time away from the port. *Prima facie* this appears a perilous situation. The insured might rely on Teare J's comments regarding the engine failure in *The Cape Bonny* [2017] EWHC 3036 (Comm)). In his ruling, the judge referred to a textbook discussion that presented two conflicting interpretations of a situation in which a ship's main engine had failed. In the interpretation endorsed by Teare J , the text book's authors claimed that *"mere immobilisation …even if the accident occurs in fine weather"* could, in certain circumstances, constitute peril. However, as this comment was *obiter dicta*, it is not conclusive. Regardless, by the time the Jordanian tugs had made contact with the MV Beda, and

after she had been towed back to Jordanian waters by the Israeli tugs, the main engine was successfully restarted. At that point it is difficult to argue that the ship was still in imminent peril justifying a salvage award. While the Aqaba Port authorities would certainly demand payment for the rendered tug assistance services, such payment would not be owed under a typical salvage agreement, where a successful rescue from peril is a necessary condition for entitlement. Furthermore, by this stage, the ship appeared capable of proceeding to Aqaba under its own power. However, according to the master's incident report, the "*pilot decided to keep two tugs with us*". Would the cost of this act of prudence on the part of the pilot meet the conditions of salvage? The argument seems weak, but the outcome would depend whether the assured can provide further details justifying the pilot's decision.

Question: Are the Jordanian fees recoverable as general average or under the sue and labour clause?

Setting aside, for the moment, the question of whether the Jordanian charges are recoverable as salvage fees, we now consider whether the shipowners can claim them under the alternative categories of partial loss available. In either case, in order to succeed, the loss must have resulted from a decision on the part of the shipowners or their agents to take action to avert a peril insured against. This seems relatively straightforward to establish, as the master contacted the Aqaba Port authorities for assistance. In this case, it is for the shipowners to demonstrate that the agreement between the master and the port authorities was not concluded on a *no-cure-no-pay* basis. Let us assume that this condition is satisfied for the purposes of the discussion. With that condition satisfied, the question arises whether the claim qualifies under sue and labour clause or as a general average loss. This distinction is significant because the insurer's liability under the sue and labour clause could potentially be greater. Where the conditions are met, the insurer's liability under this clause is accumulated with the total liability under other clauses of the contract. This means that a successful claim may result in indemnity that exceeds the amount insured under the contract. In contrast, a general average loss is factored into the calculation of whether the total claim has exceeded the insured amount. More importantly, the insurer is only liable for the contribution of the assured to a general average loss, while they are liable for the full amount of particular charges if the latter are covered under the sue and labour clause. A general average loss refers to a loss arising from a general average act, which is defined in Paragraph 66(2) of the MIA as *"extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure."*

The sue and labour clause (Paragraph 11 of the ITCH CL280 terms) provides that particular charges are covered where incurred through the action of the assured or their agents [§11.1] in order to reduce potential liability of the insurer under the policy. The MIA additionally stipulates that particular charges are *"other than general average and salvage charges"* [§64(2)]. It is evident that while general average loss and indemnity under the sue and labour clause share similarities, the two concepts do not overlap for the following reasons:

1. The scope of general average is more restricted than sue and labour, with the following additional conditions:

a. the beneficiary must be the common adventure, and

b. The general average act resulting in the loss must be *"extraordinary."*

2. If the conditions for general average are satisfied, it is unnecessary to consider whether

sue and labour applies, due to the explicit stipulation in Paragraph 64(2) of the MIA -- general average is the primary remedy and only if it does not apply should sue and labour be considered.

In most cases the question of peril need not be taken into account. While the definition of peril for general average is arguably stricter (*"in a time of peril"*), both categories of loss are covered only where the loss was incurred to avoid or minimise a peril insured against (MIA §66(6), §78(3); ITCH CL280 §11.1). Consequently, a stricter language defining a general average is unlikely to have any impact. Therefore, step one is to consider whether the charges imposed by the Aqaba Port authorities satisfy the conditions for a general average act. At the time the master called for assistance, the MV Beda, along with her cargo (i.e. the common adventure), was imperilled, and as previously established. The master made the call for assistance voluntarily, with no reason to suggest any unreasonable course of action for a master who is concerned about the vessel's safety. If the ship was imperilled due to the risk of grounding, the cargo was equally imperilled, with the remedial action having benefited the common adventure. A different question is whether the expenditure incurred was "extraordinary" within the meaning implied by the act? A major case on this matter is *Wilson and Another v Bank of Victoria* (1867) LR 2 QB 203, which predated the MIA and informed its provisions on general average and particular charges. In that case, the Royal Standard was on a voyage from Australia to Great Britain. Early on the journey, the ship struck an iceberg and suffered significant damage. Unable to continue under sail, the vessel proceeded under steam power to Rio de Janeiro. During this journey, the vessel's coal reserves were depleted, and the master replenished them in Rio. A general average was declared, including the cost of the coal among other items; however, the cargo owners refused to contribute. The case focused on the definition of "extraordinary." In his judgment, Blackburn J observed,

"The ship-owners, by their contract with the freighters, are bound to give the services of their crew and their ship, and to make all disbursements necessary for this purpose. ... Now, the disaster which occurred in this case, no doubt, caused the engine to be used to a much greater extent than would generally occur on such a voyage, and so caused the disbursement for coals to be extraordinarily heavy; but it did not render it an extraordinary disbursement. The case is similar to that of an ordinary sailing vessel, in which, owing to disasters, the voyage is unusually protracted, and consequently the owner's disbursements for provisions, and for the wages of his crew, if they are paid by the month, are extraordinarily heavy. It is not similar to that of the master hiring extra hands to pump when his crew are unable to keep the vessel afloat, or any other expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature. We think, therefore, that there is no right to charge this item to the general average, and, consequently, that the rule to enter the verdict for the defendants must be made absolute"

Assuming that the Jordanian tugs were engaged under contract by the assured in the present case, and thus acted as their agents, the question arises whether their services would qualify as *"extraordinary in nature"*? Alternatively, could the service be considered routine, something that shipping operators would typically expect to arrange from time to time? Given that the anchorage was located far from the port, well beyond the usual range covered by tugs and pilots for routine manoeuvres, it is likely that the court would uphold the extraordinary nature of the service. If the other conditions for a general average are satisfied, but the extraordinariness of the service is disputed, then the cost could potentially be considered as particular charges. In that event, the insurer would bear greater liability for the reasons given above. Thus, if a *prima facie* case for a general average is established, the insurer is unlikely to oppose. Conversely, the cargo

interests may attempt to resist a general average claim, should it be declared, arguing that the conditions of “extraordinary” and “reasonable” were not satisfied.

Conclusion

The foregoing discussion shows the complexity of considerations involved in assessing a marine insurance claim. Maritime practitioners should advocate for legal reforms to standardize salvage compensation methods. Current salvage laws, including the Salvage Convention 1989, have been criticized for lacking clear guidelines regarding involuntary state-led salvage claims (Chircop et al., 2016). The insurance industry should collaborate with the International Maritime Organization (IMO) to develop new frameworks in order to:

- Establish fixed compensation thresholds for involuntary state salvage;
- Introduce mandatory arbitration clauses for salvage dispute resolution;
- Require advance notification before state-led salvage operations are initiated.

By supporting legal reforms, insurers can mitigate uncertainties and avoid excessive salvage claims, thereby promoting a more predictable financial environment. The implications of marine insurance policies require meticulous risk assessment by ship-owners and policy refinements by insurers, alongside the involvement of experienced professional intermediaries, such as brokers, to facilitate optimal agreements between the parties. However, the distribution of information represents a critical challenge. The presented case highlights an issue where, according to traditional economic theories, agents often exhibit behaviour that deviates from absolute rationality, typically overestimating known risks while underestimating the unknown (Taleb, 2005). Ship-owners face a dual imperative: ensuring meticulous documentation and proactively challenging any potentially unfavourable terms. To mitigate financial risks and secure comprehensive coverage, ship-owners are advised to implement proactive strategies, such as establishing pre-arranged salvage contracts and declaring General Average, as well as carefully scrutinizing the language of the insurance contract, ideally with the assistance of an independent third party. However, the suitability of a broker to serve as an independent third party may be limited by the revenue earned from the transaction.

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