

Total Loss Only Marine Hull Insurance

Marine insurance is important as it covers the loss or damage of ships, cargo, and terminal and so on.¹ Generally, it provides a wide range of coverage that protects shipments from various perils.² Marine insurance are important to have as a consignee who has cargoes transporting on sea. Recently, there had been a few reported cases of cargo ship sinking, one of which is the cargo ship "Jin Tian" from China that sank in Japan's waters, causing eight death and others missing.³ Another recent case is the Tanzanian cargo ship that sank in Iran.⁴ In such situation, consignees are often faced with great cargo loss. However, the shipowners are also greatly affected by the sinkage of the ship. Besides marine insurance that is aimed to protect against cargo losses, there is also the marine hull insurance that protect against the loss and/or damage of the vessel itself.⁵ For that, this article explores into the Total Loss Only Cover ("TLO") available in marine hull insurances and how these policies operate. These forms of Hull and Machinery Insurance are often the only cover insurers will be willing to offer for vessels beyond a certain age. Aged vessels will encounter more incidents of breakdown and may have to undergo costly repairs. The TLO policies do not cover partial losses which in most cases constitute repairs. The cover offered will be actual total loss or destruction of the vessel or situations of a constructive total loss.

Overview of TLO

A total loss occurs when all the goods are completely or almost completely lost.⁶ The Marine Insurance Act 1906 ("the Act") provides that there are two types of total loss, namely, actual total loss ("ATL") and constructive total loss ("CTL").⁷ It also further explained, unless a different intention appears from the terms of the insurance policy, the insurance protecting against total loss includes ATL and CTL.⁸ The law of marine insurance is originated in England, the Act codifies the common law, and is still acts as the central to marine insurance practice.⁹ The English law of marine insurance is applicable and adopted in Malaysia via Section 5 of the Civil Law Act 1956,¹⁰ this was confirmed in the case of **Leong Brothers Industries Sdn Bhd v Jerneh Insurance Corp Sdn Bhd [1991] 1 MLJ 102**. ATL as defined in section 57 of the Act, is where the subject-matter insured is destroyed, damaged, or ceased to be a thing of the kind insured or where the assured is irretrievably deprived thereof.¹¹ This provision is reproduced from Lord Abinger's judgment in **Roux v Salvador**.¹² In addition to that, section 58 of the Act also include missing ships as ATL.¹³ The case of **Masefield AG v Amlin Corporate Member Ltd: The Bunga Melati Dua**¹⁴ considered the capture of the vessel by pirates and its removal into Somali waters cause the cargoes to be an ATL in terms of the Act because the claimant was 'irretrievably deprived' of the cargo. Example of ATL would be in situation where the ship is completely wrecked as in the case of **Kastor Navigation Co Ltd v AGF MAT** ("the Kastor Navigation case")¹⁵ and/or damaged as to losing her character as a ship completely and becomes a mere congeries of materials which would be used for rebuilding her as in the case of **Cambridge v Anderson**¹⁶.

If the assured is not able to prove ATL, claims under CTL may be possible.¹⁷ CTL is defined in section 60(1) of the Act as follows: "where the subject matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or it could not be preserved from actual total loss without an expenditure which would exceed its value when expenditure is incurred". The Act further laid down instances where CTL can arise.¹⁸ A CTL can be claimed in instances such as where an actual total loss appears to be unavoidable, where the assured is deprived of the ship and is unlikely to recover it,¹⁹ where the estimated cost of recovering the ship would exceed the saved value of the ship,²⁰ where the estimated cost of repairing damage to the ship would exceed the ship's repaired value or where the estimated cost of recovery and repairs would exceed the value of the ship when saved and repaired.²¹ Ultimately, as Özlem Gürses commented in the Marine Insurance Law (2015), a total loss may either be an actual loss or a constructive loss, "both are equally total losses, that is, the assured is entitled to claim for a loss of the whole subject matter insured."²²

How to Claim for CTL?

There is a need for abandonment and notice in order to claim for CTL. Meanwhile, unlike CTL, it is impossible for the assured, in a case claiming for ATL to treat the loss as partial loss, and he has no election to make.²³ In the case of **Roura & Forgas v Townend and Others [1918 R. 253]**,²⁴ the court explained that in order to constitute a CTL of the ship two constituent elements were necessary, namely 1) a state of facts external to the shipowner such as to warrant an election by him to treat the loss as total and 2) an election by the shipowner to so treat the loss expressed by a timely notice of abandonment.²⁵ Hence, in a case of ATL where no election can be made, there is no need for any notice of abandonment.²⁶ Pursuant to Section 62(1) of the Act, in all cases of CTL, the assured must give notice of abandonment. Section 62(7) and (8) of the Act provides for the exception where at the time the assured was notified of the loss, the insurer could not derive no benefit from the notice or where the insurer waived the notice, then a notice of abandonment is not required to claim for CTL. An example is the **Kastor Navigation** case where the ship became a CTL after the fire, the crew abandoned the ship which she then sank about 15 hours later. In this case, there was no legal requirement to issue a notice of abandonment to issue a notice of abandonment could have the opportunity to treat the loss as a CTL by issuing the notice, the ship already became an ATL.²⁷ A notice of abandonment can be either an oral or written statement given by the assured or a broker to the underwriter where he formally abandons the ship and claims for a CTL.²⁸ Such notice must be given with reasonable diligence after the assured became aware of the facts.²⁹ Purpose of such notice of abandonment to be given to the underwriter is to give the underwriter an opportunity to take all reasonable measures to prevent or minimise the loss.³⁰

Apart from giving notice of abandonment, it is also subject to the acceptance of the notice by the underwriter and such acceptance can be implied by the conduct of the underwriter.³¹ With that, the underwriter also have the right to reject the notice.³² The master plays an important role and holds the responsibility alongside the carrier and the shipowners.³³ The shipowner and carrier need to obtain safety management certificates and documents of compliance in accordance with the International Convention for the Safety of Life at Sea.³⁴ Without these documents, the insurance cover may be halted.³⁵ This in turn will affect the possible claim for ATL or CTL. In addition to the notice of abandonment, the insurer should be provided with original bills of lading, shipping documents, note of protest, copy of letter of credit, vessel's classification record, survey report, casualty report and media report.³⁶

Conclusion

Understanding Total Loss Only Insurance Coverage is crucial as aged Vessels can only be insured under these terms. It covers not only instances where the vessel is totally loss / destroyed, but also where there is unlikely chance of recovery or that the costs of recovery far exceed the value of the vessel after repairs. Shipowners need to be aware of the type of losses they are claiming. It is also very important to notify underwriters on abandonment, so that underwriters have opportunities to take measures to prevent or minimise losses.

¹ Persatuan Insurans Am Malaysia, 'Marine Insurance', (PIAM, n.d.), <[² Secure Now, 'Why is Marine Insurance Important?', \(Secure Now, 29 August 2020\), <\[³ Nicholas Yong, 'Jin Tian: Eight dead after cargo ship sinks off coast of Japan', \\(BBC, 27 January 2023\\), <<https://www.bbc.com/news/world-asia-64408770>> accessed 30 January 2023.\]\(https://securenow.in/insuropedia/why-is-marine-insurance-important/#:~:text=Marine%20insurance%20provides%20comprehensive%20coverage,apart%20from%20covering%20various%20expenses.> accessed 30 January 2023.</p>
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⁴ MI News Network, 'Why Tanzanian Cargo Ship Sank in Iran', (Marine Insight, 31 January 2023), <<https://www.marineinsight.com/videos/video-why-tanzanian-cargo-ship-sank-in-iran/>> accessed 31 January 2023.

⁵ Howden, 'Marine Hull Insurance', (Howden, n.d.), <[⁶ Policy Bazaar, 'Difference between Total Loss and Partial Loss in Marine Insurance', \(policy bazaar, n.d.\), <<https://www.policybazaar.com/corporate-insurance/articles/difference-between-total-loss-and-partial-loss-in-marine-insurance/>> accessed 30 January 2023.](https://www.howdengroup.com/id-en/cover/marine-hull#:~:text=Marine%20Hull%20and%20Machinery%20Insurance%20protects%20the%20insured%20vessel%20or,is%20in%20transit%20over%20water.> accessed 30 January 2023.</p>
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⁷ Section 56(2) of the Marine Insurance Act 1906 ("the Act").

⁸ Section 57 of the Act.

⁹ Halsbury's Laws of Malaysia - Insurance (Volume 20), at paragraph 490.561.

¹⁰ *Ibid.*

¹¹ Section 57 of the Act.

¹² (1836) 3 Bing NC 264, Ex Ch.

¹³ Section 58 of the Act

¹⁴ [2010] EWHC 280 (Comm), [2010] 2 All ER 959.

¹⁵ [2004] 2 Lloyd's Rep 119, CA (Eng).

¹⁶ [1824] 2 B & C 671.

¹⁷ Robert H. Brown, 'Marine Insurance Volume Three Hull Practice', (1993, Witherby), p. 214.

¹⁸ Section 60(2) of the Act.

¹⁹ Section 60(2)(i) of the Act

²⁰ Section 60(2)(ii) of the Act

²¹ *Ibid.*

²² Shweta Mishra and Zahirul Bashar, 'Claim for total loss under marine insurance policy', (The Daily Star, 23 December 2021), <<https://www.thedailystar.net/law-our-rights/law-watch/news/claim-total-loss-under-marine-insurance-policy-2925156>> accessed 30 January 2023.

²³ Halsbury's Law of Malaysia at paragraph 490.765.

²⁴ [1919] 1 K.B. 189

²⁵ *Ibid* at 193.

²⁶ Section 57(2) of the Act.

²⁷ Kastor Navigation Co Ltd v AGF MAT [2004] 2 Lloyd's Rep 119, CA(Eng).

²⁸ Robert H. Brown (n x) at 221.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ Shweta Mishra and Zahirul Bashar (n x).

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*



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