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Total Loss and Abandonment in Marine Insurance Law

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Index

Abstract 5

I. Total Loss in Marine Insurance 7

1.1 Introductory elements 7

1.1.1 Marine Insurance: English Legal Sources and Bodies 7

1.1.2 Clauses related to total loss and abandonment in a maritime insurance contract: a general view of clauses 10

1.1.3 A comparative analysis between clauses related to total loss and abandonment 11

1.1.4 General notion of loss 13

1.1.5 Notice of claim and tenders 15

1.1.6 Automatic discharge from liability 16

1.2. Actual Total Loss 17

1.2.1 Where the subject matter insured is destroyed 18

1.2.2 Damage to cease to be a thing of the kind insured 20

1.2.3 Meaning of irretrievable deprivation 21

1.2.4 Actual total loss of freight 23

1.3 Constructive Total Loss 24

1.3.1 Definition and types of CTL 24

1.3.2 Constructive total loss based on reasonable abandonment 27

1.3.3 Constructive total loss based on deprivation of possession 28

1.3.4 Constructive total loss based on damage to insured property 29

1.3.5 Distinction Between Actual Total Loss and Constructive Total Loss 30

1.3.6 Effect of Constructive Total Loss 32

II. The Abandonment legal regime and procedure 33

2.1 The doctrine of abandonment 33

2.2 Abandonment and Notice of Abandonment Distinguished 37

2.3 The Notice of Abandonment 38

2.4 When Notice of Abandonment is Not Required 41

2.5 Insurers' Rights upon Acceptance of Abandonment 44

2.6 The Impact of Abandonment on the Assured's Rights 47

2.7 Form of notice of abandonment 50

2.8 Timing of notice of abandonment 52

2.9 Acceptance and Refusal of a Notice of Abandonment 56

2.10 Notice of abandonment by assignee/loss payee 59

2.11 Comparison Between Subrogation and Abandonment. 60

III. Total Loss and Abandonment in the Italian Law 64

3.1 The Italian Navigation Code 64

3.1.1 Constitutive process of the Italian Navigation Code 64

3.1.2 The content of the Navigation Code 65

3.1.3 Insurance law in the Italian Navigation Code 67

3.2 The abandonment in English and Italian Law: A Comparative Analysis 68

3.2.1 The abandonment in the Italian Navigation Code 68

3.2.2 Comparison of the discipline of abandonment between Italian law, English law, and international maritime practice 73

3.3 Italian and English Case Law on Total Loss and Abandonment 79

3.3.1 *Algio S.p.A. v. Siat Società Italiana di Assicurazioni e Riassicurazioni S.p.A.*, Cass. Civ., Sez. III, n. 12975/2022 79

3.3.2 Sveriges Angfartygs Assurans Forening (The Swedish Club) v Connect Shipping Inc 83

Conclusions 86

Bibliography 87

Table of Cases..... 89

Abstract

Gli istituti della perdita totale e dell'abbandono costituiscono aspetti peculiari e fondamentali del diritto assicurativo marittimo, poiché riflettono il delicato equilibrio tra gli interessi delle parti coinvolte. Questo elaborato si propone di analizzare tali istituti partendo dal contesto normativo britannico, con particolare riferimento alle sezioni 57-60 del Marine Insurance Act 1906, che disciplinano la perdita totale effettiva (Actual Total Loss) e la perdita totale costruttiva (Constructive Total Loss). Successivamente, viene affrontato l'istituto dell'abbandono, con un approfondimento delle sezioni 61-63 dello stesso atto legislativo, evidenziando le implicazioni pratiche e giurisprudenziali nella giurisdizione inglese. Nella parte conclusiva, l'analisi assume una prospettiva comparativa, mettendo a confronto le normative inglesi con quelle italiane, in particolare le disposizioni del Codice della Navigazione italiano relative all'abbandono. L'approfondimento teorico si completa con l'esame di due casi giurisprudenziali rilevanti, uno italiano e uno internazionale, che illustrano l'applicazione concreta delle normative e offrono spunti critici sulle differenze tra i due sistemi giuridici. Questo studio mira a fornire un quadro completo e articolato della regolamentazione dell'abbandono e della perdita totale, delineando gli aspetti cruciali del diritto assicurativo marittimo moderno.

The institutions of total loss and abandonment constitute peculiar and fundamental aspects of marine insurance law, as they reflect the delicate balance between the interests of the parties involved. This thesis proposes to analyse these institutes starting from the British regulatory context, with particular reference to sections 57-60 of the Marine Insurance Act 1906, which govern Actual Total Loss and Constructive Total Loss. Subsequently, the institution of abandonment is addressed, with an examination of sections 61-63 of the same act, highlighting the practical and jurisprudential implications in English jurisdiction. In the concluding part, the analysis assumes a comparative

perspective, comparing the English regulations with the Italian ones, in particular the provisions of the Italian Code of Navigation concerning abandonment. The theoretical insight is completed with the examination of two relevant case law cases, one Italian and one international, which illustrate the concrete application of the regulations and offer critical insights into the differences between the two legal systems. This study aims to provide a comprehensive and articulate overview of the regulation of abandonment and total loss, outlining crucial aspects of modern maritime insurance law.

I. Total Loss in Marine Insurance

1.1 Introductory elements

1.1.1 Marine Insurance: English Legal Sources and Bodies

Due to its historical influence in the international seafaring industry, today the marine insurance is underwritten in England by insurers that work via Lloyd's market, insurance company outside Lloyd's and by associations for mutual insurance. In order to define the structure of the marine insurance market and its sources it is necessary to start with a focus on the origins and the development of Lloyd's. [1] In a first moment Lloyd's was a coffee house opened in 1688 in London, in the right place at the right time, in fact, it became a key place where people linked with shipping could meet. Lloyd's coffee develops a primal shipping intelligence system collecting news and gossip directly from the harbor to share with the customers.[2] This information sourcing activity led to the birth of the Lloyd's List (1734), which supply London and beyond weekly with shipping news, as departure and arrivals, the cargo transported on each ship, where the country's fleets was operating and where pirates activity were known[3], and the Lloyd's Register (1760s) where surveyors, appointed by underwriters, collected information about the conditions of vessels[4], both are active nowadays. Lloyd's reputation continued to grow, and they began to dominate shipping insurance globally providing their policies and permitting the encounter between underwriters and brokers; an insurance market was born. In 1811 Lloyd's, under a Deed of Association, was established as a Society normed by several regulatory committees and with new election's rules for the members. As a statutory corporation, the Society of Lloyd's was established in 1871 with the first Lloyd's Act, from then on to sign his name to a Lloyd's policy without being a Lloyd's recognized underwriting member became illegal. During the twentieth century Lloyd's capability to

[1] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006., p. 2.
[2] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023. p. 6
[3] https://www.lloyds.com/about-lloyds/history/coffee-and-commerce
[4] Christopher Kingston. "Marine Insurance in Britain and America, 1720-1844: A Comparative Institutional Analysis." *The Journal of Economic History*, vol. 67, no. 2, 2007, p. 385-386

cover risks at worldwide location increased with introduction of the delegated underwriting concept and with the possibility to begin members for foreign people from 1994. Lloyd's ceased to be self-regulatory on November 30, 2001; instead, it is now under the Financial Services and Markets Act, which places the Prudential Regulation Authority and the Financial Conduct Authority in charge of microprudential supervision. [5]

After having explored the impact and the evolution of Lloyd's of London and their insurance market, it is relevant to also consider the role of another body that influenced the industry, the Institute of London Underwriters (ILU). The rise of the ILU represented a response to the needs of an evolving market, like that which stimulated the establishment and growth of Lloyd's. The repealing of the Bubble Act, which since 1720 forbade the creation of new joint-stock companies and the raising of funds without the approbation by a royal chart, permitted from 1824 onwards many corporate ventures to access into the market; from 1860' with the push the American Civil War gave to the insurance market, these companies started to become successful. The Institute of London Underwriters was established on June 5, 1884, to serve as a venue for cooperation amongst these corporate participants.[6] Although in principle it was intended to include Lloyd's underwriters, it proved impossible to place them within the memorandum of understanding and articles of incorporation of the Institute. From the beginning a particular focus of the Institute's work was its commitment in drafting standards clauses for maritime policies. Four years later the establishment a primal set of clauses was promulgated, the 1888 Time Clauses 'recommended by the Institute of London Underwriters for adoption in the year's policies on hulls'. Next, separate Institute hull clauses for time and voyage in 1893 and the first "Institute Cargo Clauses" in 1912 were introduced. The maximum acceptability of the clauses was granted by the creation in 1910 of a joint committee including representatives of the Lloyds' Underwriters' Association. The London International Insurance and Reinsurance Market Association and the Institute merged in 1998 to create the International Underwriting Association of London (IUA) in an effort to offer the London insurance market a unified voice. Nowadays new

[5] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023. p. 7

[6] See generally C Hewer, *A Problem Shared: A History of the Institute of London Underwriters* 1884-1984 (1984)

market forms and clauses are issued with the joint work of committees including members of the IUA and Lloyd's.[7]

The previous examination has resumed the evolution of two of the major bodies that influence the maritime insurance industry, but in order to have a complete view of the sector it is necessary to analyze the acts promulgated in the English Law. The first significant marine insurance law statutory intervention was the Marine Insurance Act 1745, issued with the intention of to eliminate the widespread practice of gambling disguised by marine policies. The act, indeed, required that to sign an insurance policy persons must be interested in the subject matter. Common law court doctrines continued to dominate discussions about marine insurance throughout the nineteenth century[8], and then the previous act was incorporated into the Marine Insurance Act 1906.[9]

The aim of the MIA 1906 was to codify the court judgments about the marine insurance industry of past two hundred years; there wasn't an intention of changing the law in force at that time. The act provided also rules for non-marine law, since there wasn't a comparable non-marine regulatory code. About this codification three main issues were highlighted: first of all, the rules of MIA 1906 had force only where there wasn't an agreement between the parties in the policies drafting, in fact, the marine insurance were mainly ruled by the sets of standard marine clauses already present at the time. Second, the marine practice has continued to change during the following years, so the MIA 1906 represents an overview of the maritime insurance laws in effect in 1906 and many relevant successive decisions refined the Act's wording. Last, even though it contains most of the major principles in marine insurance law, the MIA 1906 is not entirely exhaustive.[10] With regard to this thesis, the most relevant provisions of the act are those in sections 53-66, which are specifically devoted to the institutes of total loss and abandonment.

[7] H. Bennett, The Law of Marine Insurance II ed., Oxford, Oxford University Press, 2006, p. 10-11
[8] H. Bennett, The Law of Marine Insurance II ed., Oxford, Oxford University Press, 2006, p. 20
[9] Colinvaux's law of insurance, ed. Robert Merkin, 7th. ed., London, 1997, p. 1
[10] Colinvaux's law of insurance, ed. Robert Merkin, 7th. ed., London, 1997, pp. 2-3

In 2015 the United Kingdome Parliament promulgated a relevant reformation of insurance law, the Insurance Act 2015 (IA 2015). [11] The IA 2015 introduced rules' modification regarding the duty of utmost good faith and warranties, remedies for making fraudulent claim and, most importantly for the focus of this thesis, a section about terms that are not pertinent to the actual total loss. [12]

1.1.2 Clauses related to total loss and abandonment in a maritime insurance contract: a general view of clauses

After having introduced two of the main bodies of the marine insurance industry and some major codification of the sector, it will also be useful for the purpose of the general discourse to include a focus on the maritime insurance practice and, in particular, on the sets of clauses that include the terms related to the total loss and abandonment. The first modern wide form issued by the UK insurance market for the insurance of vessels was the Institute Time Clauses, Hull, 1/10/83 (ITCH 83). Before that moment all earlier Institute Time Clauses, Hulls, issues were intended to be attached to Lloyd's SG form. This new set of clauses was meant to contain the specifications necessary to add and, in some specific cases, modify the terms of Marine Insurance Act 1906. With the introduction of ITCH 83, one can therefore deduce that, having been totally set aside, the conditions of Lloyd's SG form were no longer applicable in any way to the creation of a maritime insurance policy, but this is not true, or at least not entirely. In fact, in some circumstances the value of SG form still remains, for instance for the cases related to the sections 30 and 91 (2) of the Marine Insurance Act 1906[13]. However, the revisions made in the Institute Time Clauses, Hulls, of 1/10/83 were actually extensive and included a detailed rephrasing of some of the fundamental information that was previously there in Lloyd's SG form.

On 1/11/95 a new version of Institute Time Clauses, Hulls, was published. Although it represented an updated version of the clauses, the changes issued in 1995 were not that

[11] Insurance Act 2015
[12] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023. p. 11
[13] Hudson, G., Madge, T., & Sturges, K. (2012). Marine Insurance Clauses (5th ed.). p.87

extensive as the 1983's were.[14] The ITCH 1995 version was not very welcome by underwriters, and despite a part of the new hull insurance placed on London insurance market were subject to ITCH 1995, shipowners and managers who were operating high-quality vessels and had clean records were still able to bargain for their renewals using the ITCH 1983.[15] Following the lack of success of the ITCH 1995 clauses, and the consequent low take-up of it, it was determined by the Joint Hull Committee to hold a market-wide consultation in order to draft the International Hull Clauses (IHC). As the name suggests, these clauses were not meant to be perceived as simply "London market based," but rather as international clauses. The new IHC clauses were released on 1/11/2003 after long debates and suggestions that led to multiple revisions during the drafting process. Also, these new clauses were not entirely adopted by the market and nowadays it is possible to find policy drafted on the basis of either ITCH 83, ITCH 95 and ICH 2003, as well as on American Institute Hull Clauses, which was published in its most recent version in 2009. [16]

1.1.3 A comparative analysis between clauses related to total loss and abandonment

The clauses that will be considered in this paper to analyze the terms related to total loss and abandonment are Institute Time Clauses, Hulls, 1.11.95 (ITCH 95), International Hull Clauses, 1.11.03 (IHC 2003), American Institute Hull Clauses 9.29.2009 (AIHC 2009), which represent the most recent version of them. Clause 19 of ITCH 1995 is quoted to begin the analysis:

"19.1 In ascertaining whether the Vessel is a constructive total loss, the insured value shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

[14] Hudson, G., Madge, T., & Sturges, K. (2012). Marine Insurance Clauses (5th ed.). p.88
[15] Hudson, G., Madge, T., & Sturges, K. (2012). Marine Insurance Clauses (5th ed.). p.89
[16] Hudson, G., Madge, T., & Sturges, K. (2012). Marine Insurance Clauses (5th ed.). p.90

19.2 No claim for constructive total loss based upon the cost of recovery and/or repair of the Vessel shall be recoverable hereunder unless such cost would exceed the insured value. In making this determination, only the cost relating to a single accident or sequencing of damages arising from the same accident shall be taken into account."

According to this first clause, when determining if the vessel represents a constructive total loss, the insured value is equivalent to the repaired value of the vessel, and the residual value of damaged ship or wreck is not considered. It follows from this that, in constructive total loss accounting, the focus is only on the vessel's reparations costs. Then it is established that a claim for constructive total loss will be recoverable only if the repair costs exceed the insured cost, that is, the cost of the repaired and functioning ship. In addition, only the necessary repair costs are included caused from a single accident, or sequential damages provoked by the same accident.

Is now presented instead the clause 21 of IHC 2003:

"21.1 In ascertaining whether the vessel is a constructive total loss, 80% of the insured value of the vessel shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

21.2 No claim for constructive total loss of the vessel based upon the cost of recovery and/or repair of the vessel shall be recoverable hereunder unless such cost would exceed 80% of the insured value of the vessel. In making this determination, only the cost relating to a single accident or sequence of damages arising from the same accident shall be taken into account."

The relevant change in respect of ITCH 95 Clause 19 is that to determine a constructive total loss is compulsory to display expenses as low as 80% rather than 100% of the Insured Value. This difference from the ITCH 95 permits to consider the IHC 2003 clause comparable with the Norwegian Plan[17] and civil law countries where a similar provision is given. [18]

Lastly, the Total Loss clause of AIHC 2009 is offered:

"In ascertaining whether the Vessel is a constructive Total Loss the Agreed Value shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

[17] The Norwegian Marine Insurance Plan of 1996, Version 2010
[18] Richards Hogg Lindley 2003 IHC Review, A Commentary on the International Hull Clauses (01/11/03), 18th November 2003), p. 25

There shall be no recovery for a constructive Total Loss hereunder unless the expense of recovering and repairing the Vessel would exceed the Agreed Value. In making this determination, only expenses incurred or to be incurred by reason of a single accident or a sequence of damages arising from the same accident shall be taken into account, but expenses incurred prior to tender of abandonment shall not be considered if such are to be claimed separately under the Sue and Labor clause.

In the event of Total Loss (actual or constructive), no claim is to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

In no case shall the Underwriters be liable for unrepaired damage in addition to a subsequent Total Loss sustained during the period covered by this Policy."

In respect of the above clauses, here again the amount of repair costs necessary to declare a constructive total loss has to exceed the 100% of the Agreed Value. In addition, some limits are introduced by AIHC's clause as, the exemption of the costs supported before the tender of abandonment if these are to be requested apart according to the Sue and Labor clause, the impossibility of a claim for freight in case of total loss, and the exoneration of liability for underwriters towards unrepaired damage additionally to an ensuing Total Loss suffered in the policy's cover period.

1.1.4 General notion of loss

In the last paragraph, through the examination of the clauses, the legal institution of total loss was introduced. Before to proceed with further analysis of the total loss in the marine insurance law, it will be helpful to define the loss from a general insurance law point of view. The concept of loss developed in general and non-technical either as a means of financial loss, or as in a tighter sense of deprivation loss. It is possible to define a loss as any loss, damage or deprivation that leaves an insured financially impoverished than he was before.[19] The wounds to feelings and sensibilities are not included in the meaning of loss from an insurance point of view. While in case of breach of contract or

[19] Clark M. AL., The Law of Insurance Contracts, I ed., London 1989, p. 291

tort the claim for hurt feelings and traumas may be allowed, in the indemnity insurance species such loss is not recoverable. Furthermore, if it is not stipulated in the policies, the loss does not reach out to consequential loss.[20]

It is now discussed the loss caused by damage and deprivation of loss. In the event of damages in non-marine insurance law only two species of loss are acknowledged: total loss and partial loss. The first case consists in the full destruction of the insured subject matter, while, the second type of loss, occurs when the subject matter is in part damaged, and the possibility of a reparation exists. The relevant distinction between total loss and partial loss is the gauge of indemnity; if a total loss occurs, the insured is allowed to recover the entire value of the insured subject matter, if its policy permits that, on the other hand, in case of partial loss the decrease in the subject matter's value due to the insured danger is the insured's measure of indemnity, and it is typically represented in repair costs. [21] Typically, damages refer to a change of the physical state of the insured subject matter. The key aspect of this change is that the matter is less worthwhile than it was before. [22] Conversely, the loss of possession is the case of an irretrievably deprivation of possession; if there is an actual possibility of recover of the insured subject matter then there is no loss whatsoever.[23] It follows that the temporary deprivation is not a loss, and if there's no reason to believe the subject matter won't be returned to the insured, even if time is unclear, he has unsuccessfully proved the loss.[24]

[20] Clark M. AL., The Law of Insurance Contracts, I ed., London 1989, p. 293
[21] Lowry J.-Rawlings Ph.-Merking R., Insurance Law. Doctrine and Principles, IV ed., Oxford, 2022, p. 314
[22] Clark M. AL., The Law of Insurance Contracts, I ed., London 1989, pp.295
[23] Lowry J.-Rawlings Ph.-Merking R., Insurance Law. Doctrine and Principles, IV ed., Oxford, 2022, p. 315
[24] Clark M. AL., The Law of Insurance Contracts, I ed., London 1989, p.294

1.1.5 Notice of claim and tenders

Before focusing on the main topic of the chapter, it will be useful to introduce two other elements of marine insurance law, the first of which is the notice of claim and tenders. In the event of an accident resulting in loss or damage that could give effect to a claim, the assured is obliged by the terms of the insurance to notify the underwriters.[25]

ITCH 95 and IHC 2003 clauses will be presented again to compare maritime practice provisions. It follows firstly the clause 13.1 of ITCH 95:

"13.1 In the event of accident whereby loss or damage may result in a claim under this insurance, notice must be given to the Underwriters promptly after the date on which the Assured, Owners or Managers become or should have become aware of the loss or damage and prior to survey so that a surveyor may be appointed if the Underwriters so desire."

A relevant legal issue that is possible to find here is the meaning of the term "promptly." The sense of prompt notice according to the clause 13.1 is in every instance a question of fact. When an event that requires the given of a notice of claim happens, this one, has to be sent as soon as it is fairly possible, following the date on which assured, owners or managers "become or should have become" informed of the damage or loss and, unquestionably, ahead survey. Another legal issue related to this clause is the possibility for a mortgagee to be considered in the same way as an "assured" under a policy of insurance. In fact, he would be required to notify the underwriters in line with clause 13.1 if he became aware that the insured ship suffered an accident.[26] It is now taken to compare the clause 43.1 of ICH 2003 clauses:

"43.1 In the event of an accident or occurrence whereby loss, damage, liability or expense may result in a claim under this insurance, notice must be given to the Leading Underwriter(s) as soon as possible after the date on which the Assured, Owners or Managers become aware of such loss, damage, liability or expense so that a surveyor may be appointed if the Leading Underwriter(s) so desire."

The main difference, in respect of the clause 13.1 of ITCH 95, is the presence of two other effects produced by an accident that may bring to a claim; these are liability

[25] Hodges Susan, Law of Marine Insurance, London, 1996, p. 353
[26] Hodges Susan, Law of Marine Insurance, London, 1996, pp. 353-354

and expense. So, there is an extension of the scope of application, and under this clause the insurance policy will may cover a bigger number of claims. It is possible to notice also that the term "promptly" is absent and substituted by the expression "as soon as possible" that may imply an increased urgency then the previous term of the clause 13.1 of ITCH 95.

1.1.6 Automatic discharge from liability

Another significant issue regarding the above presented clauses is the automatic discharge from liability. According to Clause 13.1 of the ITCH 95, the assured, whether these are owners or managers, must notify the underwriters of any loss or damage within twelve months of the date on which they learned of it or should have known about it. The underwriters are automatically discharged from liability for any claim under the insurance about any resulting claim if they don't report within the permitted 12-month period.[27] In this clause appears the term "automatic discharge" that is lent from *The Good Luck*[28], a judgement by House of Lords about the effect of a breach of promissory warranty. Coming from a ruling that concerned another legal case, the term "automatic discharge" of liability in the context of marine insurance has a different effect. Contrary to a promissory warranty breach, the underwriter's liability does not cease on the day of the breach. The only claim that aren't recoverable because they are related to the specific accident that he neglected to report are time-barred. Furthermore, as opposed to a promissory warranty breach, the underwriter's future duty is definitely not terminated by the violation, nor is the insurance contract itself. Of course, the underwriters may choose to waive the breach; however, in accordance with clause 13.1, this must be verified in writing.[29]

[27] Hodges Susan, Law of Marine Insurance, London, 1996, p. 354
[28] [1991] 2 Lloyd's Rep 191, HL.
[29] Hodges Susan, Law of Marine Insurance, London, 1996, p. 354

1.2. Actual Total Loss

The Actual Total Loss is defined by the Section 57(1) of the Marine Insurance Act, which points out:

"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."[30]

Thereby, an actual total loss can be related to: Ships, Goods or Freight. The main focus of this thesis will remain on total loss of ships, in order to analyze further the abandon of the ship, but also the total loss of freight will be briefly discussed.

Some early circumstances that could bring to an actual total loss are the ones concerning the physical destruction of the vessel; examples of this are the sinking of the ship or the entirely destruction by fire.

The causes above described brings down the ship to a mere congeries of planks and there is no doubt that as a ship she stopped to be such.[31] In case of these events, we talk about "loss of specie", where the expression "specie" refers to word "kind" and not to the meaning of gold or money, as often happens referring to insurable interest.[32] Nevertheless, also if a vessel continues to exist an actual total loss may occur; for instance, when she is captured during war times or taken by pirates, there is an actual total loss, in fact the ship is out of the reach of the parties interested. There is an actual total loss as well if the vessel is so damaged that she is not seaworthy without repairs and she cannot be led to a port where there could be the possibility to repair the ship.[33]

Going back to the definition provided by MIA 1906, s. 57 the three forms of actual total loss specified are: [34]

1. Where the subject matter insured is destroyed
2. Where the subject matter insured is so damaged as to cease to be a thing of the kind insured.
3. Where the assured is irretrievably deprived of the insured subject matter.

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[30] MIA 1906, s. 57
[31] Hardy, I. E. R, Marine Insurance; Butterworths: London, 1985, p.346
[32] Robert Henry, Marine Insurance, Brown, 5. ed, Witherby, 1986, p.130
[33] Hardy, I. E. R, Marine Insurance; Butterworths: London, 1985, p.346
[34] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023. p.277

1.2.1 Where the subject matter insured is destroyed

As briefly seen above, in the destruction form of actual total loss, a lack of character is required. In the framework of marine hull insurance, and more precisely of vessels as insured subject matter, it proved necessary to determine whether in case of accident the insured ship was still a vessel or had been turned into nothing more than a collection of planks and become just a wreck.[35] Which are the main causes of an actual total loss of ship and how much a ship has to be damage before one may say that she was "destroyed. First, as anticipated above, some typical instances of a ship being destroyed include capsizing in a strong tropical storm, sinking in extremely deep waters, and devastating fires,[36] then there will be presented the evolution of actual total loss of ship jurisdiction's to determine an answer to the second question: in a first moment the case *Bell v Nixon*[37] provided that, to claim an actual total loss in form of destruction, "her planks and apparels had to be scattered in the sea", then in *Cambridge v Anderton*[38] came out the famous expression "a congeries of planks" coined by Chief Justice Abbot that stated: "If the subject-matter of insurance remained a ship, it was not a total loss, but if it were reduced to a mere congeries of planks, the vessel was a mere wreck …". In the end Lord Watson during the arbitration of *Sailing Ship Blairmore Co Ltd v Macredie*[39] has concluded that the Blairmore wasn't a total loss since she:

> "…did not become, in the strict sense of the term, a total wreck, seeing that she was not reduced to the condition of a mere congeries of wooden planks or of pieces of iron which could not without reconstruction be restored to the form of a ship, and that she had sunk in a depth water which admitted of her being raised to the surface and repaired" [40]

These arbitrations brought to the definition provided by the Act and generally it follows from them that, even though severely damaged, there is no actual total loss of a ship and there is no destruction, if it still has the character of a ship and is safe in the

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[35] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006., p. 643.
[36] Total Loss and Abandonment in the Law of Marine Insurance in the Law of Marine Insurance, Khurram, R., Journal of Maritime Law, and Commerce (J. Mar. L. & Com.) 1994, 25, p. 97.
[37] (1816) Holt NP 423 at p 425.
[38] (1824) 2 B & C 691.
[39] (1898) AC 593 at p 598
[40] Hodges Susan, Law of Marine Insurance, London, 1996, p. 355

owner's custody;[41] further, they always refer to the concept of sinking to determine whether or not a total actual loss has occurred.

However, it is relevant to know that, in *Barker v. Janson*[42], a case determined before the Act, Mr. Justice Willes took a different approach; he stated that an actual total loss of ship could be claimed if a ship suffers such damage that it cannot be repaired and cannot be brought to a port where the reparations may be completed, because he sustained that the subject matter ceased to be a ship that will never be able to function as a ship. This vision appears more liberal an easier requirement to comply with, but at the same time it is unclear whether the conditions of test of navigability and of the impossibility to carry out repairs should be considered conjunctively. However, there is a tendency to consider that both criteria have to be fulfilled, so, the vessel must be in a situation where it is impossible, for whatever reason, to do any necessary repairs required for it to be considered completely lost; simply being unnavigable is insufficient. It follows that this approach is ambiguous, and it seems to be referred more to the second form of actual total loss that it will be discussed next.[43]

[41] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006., p. 643
[42] (1868) LR 3 CP 303 at p 305.
[43]Hodges Susan, Law of Marine Insurance, London, 1996, p. 356

1.2.2 Damage to cease to be a thing of the kind insured

In order to fulfill the conditions of "ceasing to be a thing of the kind assured" a ship needs to have undergone a swap of commercial identity. Identifying and characterizing the initial identity of assured subject matter is a prerequisite for any inquiry pertaining to a change in commercial identity. To analyze this second form of actual total loss provided by the Act the instance of *The Shakir III*[44] represents a leading case.[45] The Shakir III was a semi-submersible heavy lift vessel, which was disarmed and towed, as dead ship, to scrapping in a Chinese port. During the voyage to China the tug and tow broke apart, leaving her stranded on the island of Wuzhu Zhou. After the accident, its essential components resulted in not so damaged or lost, despite the fact that Shakir III was grounded and not able of sailing without salvage and a certain degree of repair. The vessel maintained his original appearance and kind as a dead ship capable of being towed away for breaking up. In the arbitration of this case, Potter LJ pointed out:

> "In those circumstances, and bearing in mind that the vessel was a dead ship under tow and heading for break-up, it does not seem to me that, by reason of its grounding and/or the damage it had sustained, it had lost its essential identity or ceased to be a thing of the kind insured" [46]

This case shows how the initial identity of the assured good is relevant in order to state the "ceasing of being a thing of the kind assured"[47].

[44] *Fraser Shipping Ltd v Colton (The Shakir III)* [1997J 1 Lloyd's Rep 586
[45]Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006., p. 644
[46] [1997] 1 Lloyd's Rep. 586, 591.
[47]Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023. p.280

1.2.3 Meaning of irretrievable deprivation

The third form of actual total loss might show some controverse aspects and it is not always clear to ascertain its presence in an actual total loss claim. The certainty that a property will not come back in the disposition of the owner is a condition not required by the irretrievable deprivation, because acquiring certainty is impossible unless the property has been destroyed. In fact, the meaning of irretrievable deprivation, in the framework of marine insurance law, involves a degree of probability of non-recovery. [48] In order to consider a deprivation as irretrievable, the regaining of the possession of the vessel has to be entirely out of the power of the assured or the underwriters, as in *George Cohen, Sons & Co v Standard Marine Insurance Co Ltd*[49]; the issue was if an old battleship, that stranded on the Dutch coast and was detained by the Dutch authorities as a threat for the sea defences of the area, was or not an actual total loss for irretrievable deprivation. The owner's claim for actual total loss was rejected by the court for two reasons. First of all, even if the operation of physical remotion would have been a tough engineering performance demanding high costs and relevant preparation, it would have been possible for the owner and so the vessel was not irretrievably lost. Secondly, the court highlighted that the order of the Dutch authorities could well be removed by a superior body, and so, although influential, the decree was not final, an appeal was available. [50] Recovery is instead impossible due to a sale of the subject matter insured under a legal decree of a court of competent jurisdiction. An adverse, valid, and legal transfer of the owner's right of property results in the owner losing the subject matter's property, which is considered to be as much of a total loss as if it had been completely destroyed.[51]

Regarding the concept of irretrievable deprivation, the cases of capture by warships and especially by pirates have been discussed in the last years. The recent assessments in *Masefield v Amlin* by Steel J[52] and later by the English Court of Appeal[53] have shown the

[48] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006., p. 646
[49] (1925) 21 Ll L Rep 30.
[50] Hodges Susan, Law of Marine Insurance, London, 1996, p. 359

[51] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023. p.284
[52] [2010] 1Lloyd's Rep. IR 345
[53] [2011] EWCA Civ 24

problems related to ascertain if a seizure of the assured subject matter by pirates requiring a ransom, can be a cause of claim for an actual total loss.[54] In order to approach this thematic it is necessary to define the phenomenon of maritime piracy. A definition of the modern maritime piracy was provided by the United Nations Convention on the Law of the Sea of 1982 in the article 101:

> "Definition of Piracy. Piracy consists of any of the following acts:
> (a) any illegal acts of violence or detention, or any act of depradation, committed for private ends by the
> crew or the passengers of a private ship or a private aircraft, and directed:
> (i) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft.
> (ii) Against a ship, aircraft, persons, or property in a place outside the jurisdiction of any State.
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts
> making it a pirate ship or aircraft.
> (c) any act of inciting or intentionally facilitating an act described in sub-paragraph (a) or (b)."

The marine insurance precedent-based definition is different with the international above presented definition but some elements tallies with UNCLOS 1982, as the requirement of operating for personal greed by a pirate and the necessity of the violence at the moment of the appropriation. Nevertheless, contrary to the international convention, maritime insurance law permits piracy to be recognized as such in territorial waters as well as on the high seas, assuming that the vessel can be said to be at sea. Furthermore, for marine insurance piracy is not required a pirate committing his illegal activity from a vessel apart from the victim ship. A characteristic that defines modern-day piracy is the intention to demand payment for a ransom, as opposed to the pirates' relatively easy seizure of the ship, the goods, or both which appear to have been defining aspect of piracy from earlier times. If in the case of a unfair appropriation, the indemnification by the underwriter would be simply based on the loss of the deprived item, on the other hand if there is a case of piracy for a ransom, the indemnification for the payment of the ransom by the owner, would probably be a case of raising issue about if the recovery should comply with the suing and laboring provision, or if it is a general average case. Furthermore, the question of whether the insured's loss of adventure could result in a legitimate claim for total loss emerges when an insured vessel is held for

[54] Total losses and the peril of piracy in English law of marine insurance, Gauci, Gotthard, WMU Journal of Maritime Affairs, 2012-04, Vol.11 (1), p 115

ransom by pirates for an extended period of time.[55] Having clarified the definition of maritime piracy from the insurance law point of view, it is possible to return to the judgement of *Masefield v Amlin* to understand if a loss by piracy could give raise to an actual total loss. The answer to this problem was provided by Rix LJ who stated that contrary to the typical case of capture carried out by a nation's warship condemned as a prize, the piratical seizure could represent an actual total loss, if the pirates escape with the assured matter for their private ends and the possibility of finding and recovering the vessel is null. It is relevant to note that whether a chance of recapture remains even a capture carried out by pirates will not give rise to an immediate actual total loss.[56]

1.2.4 Actual total loss of freight

To end this paragraph about the actual total loss it is consistent to include the theme of actual total loss of freight, which is strictly connected to the actual total loss of ship. The profit of operating a vessel is known as freight. In order to be paid under a freight policy, the assured must demonstrate that, had it not been for the involvement of some of the risks insured against, some freight would have been earned. This can be carried out by demonstrating the placement of goods on board or the existence of a contract pertaining to their transportation. An insurance policy covering freight is a promise that the ship's owner will always be able to collect freight from those who have agreed to pay for it, regardless of the risks covered.[57] A total loss of ship provoked by insured peril would by nature result in a total loss of freight. As instance, in *Denoon v The Home and Colonial Assurance Co*[58] a ship transporting rice was damage to become a wreck and so that was an actual total loss of ship and cargo, turning in an actual total loss of freight of the rice carried by the ship.[59] An actual total loss of the vessel will result in an actual total loss of freight, unless there is cargo on board and it may be safeguarded whole or in part

[55] Total losses and the peril of piracy in English law of marine insurance, Gauci, Gotthard, WMU Journal of Maritime Affairs, 2012-04, Vol.11 (1), pp. 116-117
[56] [2011] EWCA Civ 24 at paragraph 56
[57] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023. p.289
[58] (1872) LR 7 CP 341

[59] Hodges Susan, Law of Marine Insurance, London, 1996, p. 361

and moved on to another ship to earn freight.[60] Furthermore, if it happens just an actual total loss of goods but it is possible for the ship to transport other cargo on the trip insured and thereby to collect an equal amount of, or some freight, the assured of freight cannot claim for a total loss of freight, by reason of the principle of indemnity.

1.3 Constructive Total Loss

1.3.1 Definition and types of CTL

The concept of constructive total loss, only available in marine insurance, is an instrument of law used for estimating an appropriate amount of reimbursement. It is a type of loss that fits between actual and partial total loss. More precisely, a partial total loss that is monetarily equal to a total loss is called a constructive total loss (CTL), and it can be treated as at the assured party's discretion. Even though the vessel, for example, was not destroyed, the assured may be entitled to claim a total loss of the vessel if the conditions for a CTL are fulfilled the reason for this is that the term "total loss" should be interpreted in its commercial context. As a result, the thing's actual existence does not prove that the loss was a total loss.[61] The legal source of constructive total loss is provided by the section 60 of Marine Insurance Act 1906 which is divided in two subsections. These two subsections are worthy to be observed carefully:

"(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.

In estimating the cost of repairs, no deduction is to be made in respect of

[60] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023. p.291

[61] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023.p.300

> general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or
> (iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival."[62]

Section 60 (1) offer a comprehensive broad interpretation of a "constructive total loss", on the other hand section 60 (2), seems to go in specific setting out a list of happenings which could be cause of constructive total loss of vessel and goods. However, some peculiarities of the two subsections have been analyzed by legal experts. First, is noted that s.60 (1) requires that the subject matter be "reasonably abandoned" in order to be a constructive total loss. However, s. 60 (2) makes no mention of this kind of restriction. Second s. 60 (2) provides two specific examples of a constructive total loss: cost of repairs in s.60 (2)(ii) and (iii) and the deprivation of possession in s. 60 (2)(i); it was not clear if these were instances of the above subsection, or they were separate heads of claim, even if the wording "in particular" suggests that they are examples of subsections (1). Thirdly, section 60 (2) makes no mention of freight. It was by no means simple to combine the two subsections. Luckily, the house of Lords has settled the dispute in *Robertson v Petros M Nomikos Ltd*[63], where Lord Wright stated that: "The two subsections contain two separate definitions, applicable to different conditions of circumstances."[64] In particular, the two subsections are independent, and s. 60(2) does not serve as an example of a CTL covered by s. 60(1).

Once clarified the distinction between the two subsections, it is possible to define the requirements to claim a constructive total loss. According to s. 60(1) where the insured subject matter is reasonably abandoned there is a constructive total loss; this concept expresses that when the voyage is no more worthy to pursue the entire voyage is lost. A leading case reflecting that idea is *Mitchell v Edie*[65] where Buller J stated there are two types of total losses: the first occurs when the entire property actually perishes, and this

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[62] MIA 1906, s. 60.
[63] [1939] AC 371, HL, hereinafter cited as *The Robertson Case*
[64] Hodges Susan, Law of Marine Insurance, London, 1996, pp. 362-363
[65] (1787) 1 Term Rep. 608, 615

is referred to as the actual total loss, the second occurs when the property continues to exist, but the journey is lost or the cost of pursuing it outweighs the potential reward. The owners have the option to abandon if the journey is lost but the property is saved, however this would only be an average loss if they don't choose to do so. [66] The second subsection is added to subs. (1) and refers to three different situations: "deprivation of possession of the subject matter insured, damage to the insured ship and damage to the cargo". As seen in 1.2.3 if the insured is deprived of the possession of the ship and the recovery is not possible, that will provoke an actual total loss. In two separate situations, as mentioned in Section 60(2)(i), the deprivation of possession of the subject matter insured may, but constructively, result in their total loss. As a result, the assured, who has lost possession of the subject matter insured because of a peril insured against, may assert a claim for their constructive total loss if they can demonstrate that either, it is improbable that they will be able to recover the ship or the goods, as the case may be, or that doing so would cost more than the items would be worth when recovered. When a vessel suffers damage from an insured risk, the worth of the ship after repairs would be more than the cost of correcting the damage as seen in s. 60(2)(ii). When commodities are damaged, the cost of fixing the damage and transporting the items to their destination must be greater than the value of the goods when they arrive. In addition, s. 60(2)(ii) provides that future salvage operations and any future general average contributions to which the ship would be liable if repaired should be taken into account when estimating the cost of repairs. General average contributions to those repairs payable by other interests should not be subtracted. In the marine practice, the "cost of repair" has always been considered as including salvage charges, and that is proven beyond doubt by cl. 19.2 of the ITCH 1983 and cl. 21 of the IHC 2003 which requires account to be taken of the "cost of recovery and/or repair".[67]

[66]

[67] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023, pp. 300-302

1.3.2 Constructive total loss based on reasonable abandonment

The first two cases of constructive total loss encompass reasonable abandonment of the insured subject matter because an actual total loss seems inevitable or cannot be prevented without an expenditure more than the value of the subject matter once preserved. The leading case *The Lavington Court*[68], explains the meaning of constructive total loss based on reasonable abandonment. On 18 July, a ship confiscating by the Crown was torpedoed while taking part in a convoy. Neither sailing nor towing were practicable and the enemy submarines had the stricken vessel at their mercy. So, the master commanded the entire crew to move on another ship and leave the vessel behind abandoned. Then a tug was sent and appropriately rescued in tow the vessel, but on 1 August the ship sank after more than 600 miles of towing. As for a total loss, the owner received payment from the hull underwriters on July 18. However, they also requested hire from the Crown for the duration of July 18 – August 1.

At this point it became essential to determine when the constructive total loss had occurred, because the charterparty of requisition provided that the hire would have been ceased in that case. A majority of the court of appeal ruled in favor of the shipowners based on the circumstances, however their contention that section 60(1)'s abandonment equated to the assured's abandonment by the underwriters was unanimously rejected. Du Parcq Lj stated that the meaning of "abandon" in section 60 (1) is to renounce all proprietary and possessory rights in relation to the insured property. The master's command for the sailors to get off satisfied neither approach to abandonment. The master's order for the crew to disembark was not based on a sense that the ship was sinking but rather on a justifiable fear for their safety. Conversely, he stated that he felt the ship would not sink for some time, and he and the navy escort concluded that salvage, if possible, might be started promptly. Given those circumstances, the master did not feel that the vessel would be lost totally at that point, and there was not the requisite intention to give up the ship.[69] One would have assumed that the word "abandon" should have had the same meaning in both subsections of s. 60(1) as the requirement of reasonable

[68] *Court Line Ltd v R (The Lavington Court)* [1945] 2 All ER 357.
[69] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006, pp. 650-652

abandonment is embraced by both. Even under s. 60(1) itself, Lord Justice Scott noted, the phrase appears in two distinct ways. Considering this, it is essential to express the idea of abandonment in the appropriate context to prevent misunderstandings.[70]

1.3.3 Constructive total loss based on deprivation of possession

Section 60(2), that refers only to ship and goods but not to freight, is split in two parts. There are some requirements to invoke this section. First the assured must demonstrate that he has been "deprived of the possession of his ship or goods by a peril insured against"; then, either that, it is improbable that he will be able to bring back the vessel, or the goods, if applicable, or, the goods or the ship that are lost, as the case may be, would be more expensive to retrieve than they would be worth. The capture by enemies, a belligerent state, a barratrous crew or any third party running away with the vessel are the common cause that provoke the deprivation of possession of ship and goods. The assured must be denied the freedom to use and dispose of his vessel upon capture, regardless of whether the means of capture are friendly or hostile. To show that a total deprivation of possession of the insured subject is not enough to claim for a constructive total loss; the characteristic of "unlikely" must be proved. The term "unlikely" might be controversial and it is worthy to analyze it. Before the establishment of the Act the main concept was the term "uncertain;" this, was compared to "unlikely" in the *Polurrian Case*[71]. The introduction in the Act of the test of "unlikelihood of recovery" against the test of "uncertainty of recovery," had modified the previous law to disadvantage of the assured. The criterion is "not merely quite uncertain whether they would recover her within a reasonable time, but that the balance of probability was that they could not do so."[72] In the above citated case the recovery of the ship was not unlike under this criterion, but only uncertain, so there was no constructive total loss.

Furthermore, Justice Stable in *The Lavington Court*[73] set a degree of probability to define the concept of unlikely: "somewhere between mere uncertainty on the one hand

[70] Hodges Susan, Law of Marine Insurance, London, 1996, pp. 365-366
[71] *Polurrian SS Co Ltd v Young* (1915) 1 KB 922
[72] *Ibid*, at p 937
[73] [1945] 2 All ER 357 at p 369.

and inevitability on the other". So, considering the terms "unlikely," "unavoidable" and "uncertain" the first is less severe than the second, but still more stringent than the third.[74] To summarize the issue it can be reported the instructive words of Lord Wright of the House of Lords in *The Rickards Case*[75]:

> "There is a real difference in logic between saying that a future happening is uncertain and saying that it is unlikely. In the former, the balance is even. No one can say one way or the other. In the latter, there is some balance against the event. It is true that there is nothing in the Act to show what degree of unlikelihood is required. If, on the test of uncertainty, the scales are level, any degree of unlikelihood would seem to shift the balance, however slightly. It is not required that the scale should spring up and kick the beam."

1.3.4 Constructive total loss based on damage to insured property

In case of damage to the ship the main issue is related to the cost of repair, under s. 60(2)(ii). Although it could be technically possible to repair the ship, doing so might not be feasible from an economic point of view because the cost of repairs would exceed the ship's value after repairs.[76] The historical controversy issue was if the value of the ship after repairs should be compared to the cost of repairs only, or to the value of the vessel before repairs plus the cost of restoration. In this regard, it is useful to refer to the leading case *Angel v Merchants' Marine Insurance CO*[77]. The court of appeal stated the exclusion of the value before repairs from the total value, in accordance with the view of the time while the MIA 1906 was being drafted and enacted. Section 60(2)(ii) has been held to enact *Angel* and consequently, to exclude the unrepaired value of the ship from the calculation, an exclusion reaffirmed by the Institute and International hulls clauses, even though *Angel* was later overruled as a matter of common law by the House of Lords.[78]

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[74] Hodges Susan, Law of Marine Insurance, London, 1996, pp. 373-375
[75] [1941] 3 All ER 62 at p 81, HL
[76] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023, p. 319
[77] [1903] I KB 811.
[78] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006, pp. 657-658

The Renos[79] case recently provided more clarification and support for the subsection 60(2)(ii), stating that the typical measure of indemnification under an insurance policy covering property damage is the decrease in the property's value due to the happening of the insured risk. According to MIA 1906, s.69, the reasonable cost of repairs conducted so far is the measure of loss. It is the appropriate deprecation resulting from the unrepaired damage if no repairs have been made. The measure of the vessel's value degradation is the fair cost of the repairs which have been performed. The ship has no value, and the loss is total, both financially and physically, if the reasonable cost of repairs is higher than the insured value, as specified under the legislative definition of a constructive total loss. The owner's abandonment did not make the ship a CTL in cases where the ship was too old and not unworthy repairing due to the amount of damage. If the case had been decided otherwise, the insurance would have guaranteed the ship's quality. [80]

1.3.5 Distinction Between Actual Total Loss and Constructive Total Loss

Once all the cases of constructive total loss have been overviewed, here is a summary comparison between the above citated constructive total loss and the main argument of the second subchapter, namely the actual total loss. A constructive total loss is kind of a legal construct, whereas an actual total loss is one that exists both in law and in reality. To put it in another way, it is a total loss under the law but not always in the reality. It can be converted into a total loss in fact through the abandonment process, which is a unique legal doctrine found in maritime insurance law that coexists with constructive total loss. The distinction between practical impossibility and commercial or business impossibility and has frequently been used to characterize the difference between actual and constructive total loss. When operating expenses are so high that is nearly impossible for a business to "stay afloat," the circumstance of the market determines how the legislation is intended to work. A good example of the difference between constructive and actual total loss can be observed in *George Cohen, Sons & Co.*

[79] [2019] 2 Lloyd's Rep. 78 [11].
[80] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023, p. 319-320

v. Standard Marine Insurance Co.[81] In that instance, an antiquated naval warship was being towed to a particular site in order to be disassembled and destroyed.

The ship ran aground on the Dutch coast while traveling. Regarding an argument over whether the occurrence resulted in an actual or constructive total loss, Roche J. made the following ruling after referencing the pertinent statutory term of actual total loss:

> "Having regard to the whole of the evidence... I am of [the] opinion that this vessel physically could be got off. It would be a matter of great elaboration and difficulty, but at all events, putting the matter at the highest, I am not satisfied that she could not .... In these circumstances there has been no irretrievable deprivation which a Court can find by reason of physical impossibility."

Furthermore, in accordance with the MIA 1906 and the common law, Roche J. also said in his opinion that if an actual total loss is lawfully claimed no notice of abandonment must be given. The judge learned determined that there had been constructive total loss in this case for two reasons. First, even though it would have cost significantly more than the vessel's insured value, he was satisfied that the vessel could be lifted off the ground after finding that the concept of irretrievable deprivation was unconvincing. In addition, the evidence presented in court demonstrated that, although retrieving the ship would require engineering expertise, it was not technologically impossible. Consequently, this case demonstrates the previous point that, even if the irretrievable deprivation argument may fail to support a claim for actual total loss, a claim for constructive total loss may very well succeed.[82]

[81] (1925) 21 L. L. Rep. 30 (Q.B.).
[82] Total Loss and Abandonment in the Law of Marine Insurance in the Law of Marine Insurance, Khurram, R., Journal of Maritime Law, and Commerce (J. Mar. L. & Com.) 1994, 25, pp. 102-103

1.3.6 Effect of Constructive Total Loss

What could be called the procedural features of legislation pertaining to constructive total loss are outlined in Sections 61, 62, and 63. The procedures that an assured must follow in order to "validate" his claim for a constructive total loss are outlined. Sections 61 should be read in conjunction with section 62(1). The former refers to insured subject matter being abandoned, whereas the latter relates to the notification of abandonment that the insured must provide to the insurer in the event he decides to treat the loss as "an actual total loss." Section 62(1) state that:

> 'Subject to the provisions of this section, where the assured elects to abandon the subject matter to the insurer he must give notice of abandonment. If he fails to do so, the loss can only be treated as a partial loss.'

The first few words of Section 61 are significant: the assured may only "abandon" the subject matter insured to the insurer "where there is a constructive total loss." However, he must notify the insurer of his intention to "abandon" the insured subject matter by sending an abandonment notice as soon as he has made the decision. [83] In the next chapter the doctrine of abandonment will be investigated, in particular delving into the details of the notice of abandonment and his peculiarities and cases related to.

[83] Hodges Susan, Law of Marine Insurance, London, 1996, p. 391

II. The Abandonment legal regime and procedure

2.1 The doctrine of abandonment

In order to start with the new topic, it is necessary to define the legal abandonment. A void usually results from the abandonment of any property, be it a ship or a real estate. Legal uncertainty often surrounds abandoned or voluntarily and permanently relinquished property. Despite the fact that this relinquishment is a "question of fact," finding or intermediating parties are not allowed by law to mark ownership by entering the vacuum or vacuity. It can be argued that in order for an abandonment to be considered lawful, it needs to comply with the doctrine of abandonment. Although the common perception that abandonment results in the loss of all rights and interests in a property, the title is unaffected. When property is lawfully abandoned, the rightful owner naturally passes it to the intermediary or finder, who then reduces it to both actual and constructive possession. The finder has a legitimate claim if the owner has renounced, given up, or relinquished the title by any public declaration or act. The finder my use "adverse possession" to reduce the property to possession if the owner has refrained from taking anu of the aforementioned measures, preventing the rightful owner from asserting ownership and title. In short, the regime of legal abandonment is established by expression of a sincere desire to give up something. According to maritime law, a ship is not relinquished or permanently abandoned if it is abandoned because of an act of God. In situations where the ship's recovery is deemed impossible, the owner is required by law to register the vessel. The ship can still be in constructive possession even after it has been physically abandoned, meaning that ownership is not lost due to derelicto and that it is not res nullius or res derelict. In the event that all ownership rights are renounced, the abandonment of is deemed lawful and the quiritarian owners' ownership is forfeited., making the ship a res nullius.[84]

In the framework of constructive total losses, the law imposes a distinct notification requirement. [85] Before starting to overview the procedure and the effect of the notice of

[84] Mukherjee, Proshanto K., et al., editors. *Maritime Law in Motion*. 1st ed. 2020., Springer International Publishing, 2020, pp. 359-360
[85] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006, p. 692

abandonment it is worth to dwell on the meaning of "abandon." As specifically mentioned in s. 61, is to be carried out by the assured "to the insurer". The meaning of the term "abandon," for the aim of a notice of abandonment, and several other features of the doctrine of abandonment, were all given a comprehensive analysis by the House of Lords in *Rankin v Potter*[86]. In the arbitration of the above cited case, Mr. Baron Martin stated that: "'... there is not a word in the English language used in a more highly artificial and technical sense than the word "abandon"". He recognized that, despite being commonly used equally in speech, the terms "abandonment" and "notice of abandonment" refer to two different and distinct ideas. In relation to the previous sentence, he said:

> "... in reference to a constructive total loss, it is defined to be a cession or transfer of the ship from the owner to the underwriter, and of all his property and interest in it, with all the claims that may arise from its ownership, and all the profits that may arise from it …"

So, the assured actually renounce all his rights in the property to the insurer when he "abandons" the subject insured matter. Mr. Justice Brett explains the logic behind this abandonment requirement in *Rankin v Potter*, arguing that the goal of abandonment would seem to be to maintain the indemnity principle, which is the basis of marine insurance, and to keep the assure from receiving both full payment of the insured amount and the valuable thing in his possession at the same time.[87]

In the opinion of Lord Abinger in *Roux v Salvador*[88] "The requirement of abandonment was a necessary outcome of restricting the insurance contract's object to a strict indemnity." A total loss as defined by insurance law does not necessarily require the total annihilation of the covered subject matter to leave nothing of value. When a storm causes a vessel to be physically wrecked and is considered a total loss, recoverable parts of the ship may still be wort something. This is particularly true in the event of a constructive total loss. This idea allows those who are suing under maritime insurance legislation to recover the amount of indemnity for a total loss in cases where the insured subject matter is practically departed from a business perspective, even though it is still

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[86] (1873) LR 6 HL 83
[87] Hodges Susan, Law of Marine Insurance, London, 1996, pp. 391-392
[88] (1836) 3 Bing (NC) 266, 283.

existent. However, indemnifying the assured for the entire value of the insured property is the measure of indemnity for a total loss. Because an assured's right to indemnification is limited by the indemnity principle to the actual total loss incurred, allowing the assured to maintain any remaining value of the insured subject matter in addition to receiving the total loss measure of indemnity would result in unjust entitlement to the extent of that value. Therefore, an indemnity claim for a total loss inevitably requires the assured to give up all remaining rights to whatever part of the insured property remains to the insurer.[89]

Property law experts who endorse the theory that desertion is an independent action to deprive oneself of property also highlight the fact that property should not be destroyed during the cession process, even though the owner who gives up ownership and possession outright has the option to do so. The destruction of property cannot be considered a transfer because there is no transferee, as abandonment in property law necessitates the involvement of two parties: the transferor and the transferee. Stated differently, a transfer must be unilateral in order for it to be considered an abandonment under property law. The following passage from *Bright v. Gineste*[90] provides a precise definition of the term "unilateral."

> "To constitute an abandonment in the strict legal sense there must be a parting with title that is unilateral, the owner must leave the property free to the acquisition of whoever wishes to claim it, and indifferent as to what may become of it. A transfer of property from one person to another cannot be affected by abandonment, and abandonment cannot be made to a particular individual. A relinquishment by one person to another is not an abandonment."

In summary, the doctrine of abandonment governs the relationship between the insurer and the insured in insurance matters and it is closely related to the doctrine of subrogation, despite having the same meaning in maritime law as the transfer of assets from one party to another. Its application in marine insurance law has expanded. Abandonment, on the other hand, is an action that occurs when the insured sends the

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[89] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006, pp. 692-693

[90] 284 P (2d) 839, 842 (Cal.App. 1955)

insurer a notice. Subrogation is a right where the insurer is unquestionably limited to the "rights of the insured." The notice of abandonment in marine insurance can be viewed as a unilateral transfer whereby the notice from the assured serves as a proof of departing from their title, much like the philosophy of abandonment ingrained in property law. The intention to transfer and actual transfer are crucial components of the abandonment doctrine. However, in certain cases, the owner of a vessel may give up ownership without considering the possibility of future possession; this could also be interpreted as an act of abandonment. This is a variation from the original idea, but in those situations where the owner voluntarily gives up ownership, there is no transfer for consideration, no unilateral declaration of giving up ownership, no explicit declaration of relinquishment, and no evidence of cession of ownership to another individual or institution, there remains only an undefined lapse of time. As a result, somewhere along this continuum, the vessel loses its actual identity and becomes freed from all legal obligations and rights. The anatomy of abandonment becomes pertinent only at that point, and a critical analysis of the numerous theories, principles and regulations surrounding the notion of abandonment is required.[91]

The transfer of rights is, nevertheless, not automatic. The insurer is allowed to accept or refuse the abandonment of the ship, because that should be considered as an offer by the assured of its rights in the remaining property. The common law that was in effect at the time stated that property passed automatically to the insurer, was amended in this way by the 1906 Act. In the event that the insurer chooses to assume the assured's rights, the transfer happens only when the total loss amount is paid and it is even subject to that, it becomes effective retroactively from the moment of the casualty. [92] Hence, the Marine Insurance Act 1906 states in section 79(1) that:

"Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for."

[91] Mukherjee, Proshanto K., et al., editors. *Maritime Law in Motion*. 1st ed. 2020., Springer International Publishing, 2020, pp. 346-347
[92] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006, pp. 692-693

In the same way, section 63(1) provides that:

"Where there is a valid abandonment, the insurer is entitled to take over the interest of the assured in whatever may remain of the subject matter insured, and all proprietary rights incidental thereto."

2.2 Abandonment and Notice of Abandonment Distinguished

Whether actual or constructive, the abandonment is an essential feature of every claim for total loss, not to be confused, however, with the procedural requirements of the notice of abandonment. In the case of a constructive total loss, the assured has the right to choose between, if to treat the loss as a partial loss and, or abandoning the subject matter insured to the insurer and consider the loss as total. If opting to abandon, in order to be entitled to receive a compensation for a total loss, the assured must comply with the formal requirement to give the insurer notice of abandonment with proper diligence following learning of the loss.

So, the distinction between the two juridical features is that abandonment envisages the selling of interest by the assured needed by the indemnity principle in any situation of total loss, on the other hand, notice of abandonment advises the insurer of the assured's intention to make a total loss claim in the event that the insured property is still in existence. In the event of a constructive total loss, the notification method meets the interests of equity by requiring the assured quickly decide and indicate its election, allowing the insurer to maximize its profit from what remains. The next subsection will start the focus on the notice of abandonment features. [93]

[93] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006, pp. 693-694

2.3 The Notice of Abandonment

The notice of abandonment is unique to marine insurance law, in that it is required to be sent to the event of a constructive total loss claim. It is merely an offer from the assured party. Although the term "abandonment" in s.61 seems to imply an act on the part of the assured, actually it typically refers to his decision to notify the insurer of his abandonment in accordance with s.62(1), even doing so means that it could lose his election rights under s.61. It indicates that the underwriters must get notice of abandonment. With the notice, the insurer is enabled to exercise the rights which arise on his behalf upon an effective abandonment. It provides the insurers with the tools to conduct investigations, allowing them to preserve the ship from further deterioration or repair if they decide that doing so would be helpful to them. It also guarantees that insurers receive all benefits to which they should be entitled as ship owners in the event that they were held liable for the entire loss. Once he receives a notice of abandonment the insurer has the right to accept or reject it. Upon acceptance of the notice, the insurer shall have the right to assume ownership of the remaining portion of the hull and to be paid for any freight earned, regardless of casualty. The freight is embedded with the abandonment. In fact, in *Davidson v. Case*[94], Dallas CJ concluded that, without an agreement to the contrary, the freight follows the assignment of the ship, and the insurers are entitled to freight upon the ship's abandonment. [95]

A separate contract that is a subsidiary of the primary insurance contract begins with the notice of abandonment. Notice is like the offer before a contract. The notice may withdraw in the same way that the offer may be withdrawn. The assured may withdraw a constructive total loss prior to taking action eliminating the foundation for the assured's claim of a constructive total loss. It might be removed if the assured decides to treat it as a partial loss, or it might be withdrawn if there is a warrant breach that absolves the insurer of responsibility. This implies that the assured's interest in the property does not immediately terminate or pass to the insurer in cases where the assured has given notice of abandonment.[96]

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[94] (1820) 8 Price 542

[95] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023, p.327-328

[96] He, Xiaojia. "An Analytical Review of the Doctrines of Subrogation and Abandonment in the Law of Marine Insurance." (2010), p. 39

The aim of the notice of abandonment has been clarified by Lord Porter in *Rankin v Potter*[97] in this way:

"In cases of marine insurance, the regular mercantile mode of letting the underwriters know that the assured mean to come upon them for a complete indemnity, is by giving notice of abandonment, which is a very different thing from the abandonment or cession itself. This notice when given is conclusive … the consequence of which is that everything is ceded to ... the underwriters."

Lord Justice Cotton provided two arguments for the necessity of a notice of abandonment in *The Kaltenbach Case*[98] . First, the insurers may then "do the best they can and make the most they can" with regard to the claim and, in particular, the subject-matter insured or what remains of it, after receiving the notification. The second is that the assured, once providing the notice, "cannot go back from his decision." In the following extract of his judgment, Lord Justice Brett gave a further explanation and, counting on practical grounds, he remarked[99]:

"'Now, a loss may occur in any part of the world, and losses frequently occur in places where the underwriter has no power to get notice of the loss except from the assured, and there must be great danger that the owner of the ship or goods might take his own time to consider what to do, and to wait and find out whether the markets were likely to rise or fall before he arrived at any decision, and this is the reason why in all cases it is made a part of the contract that, when there is a claim for constructive total loss, notice of abandonment must be given."

He believed that the notification of abandonment was "introduced by shipowners and underwriters" unanimous consent, and therefore become part of their contract." It is now required in order for a claim for a constructive total loss to be valid.

There was some uncertainty at one point regarding the purpose of a notice of abandonment throughout the development of the doctrine of abandonment as law. This was partially provoked by, predictably, by the phrase "condition precedent." The case of

[97] *(1873) LR 6 HL 83 at p 119.*
[98] (1878) 3 CPD 467 at 471, CA
[99] (1878) 3 CPD 467 at p 472, CA

Roura&Forgas v Townend[100] dealt with the question as to "whether the giving of such notice is an integral element of a constructive total loss or is rather a condition precedent to a claim by the owner of a ship and goods based upon such loss." In this instance, "claim" is the key word. Lord Wright took time in the House of Lords to explain the uncertainty surrounding *The Robertson Case* in the following manner[101]:

"... notice of abandonment is not an essential ingredient of a constructive total loss. The Appellant's argument confuses two different concepts, because it confuses constructive total loss with the *right to claim* for a constructive total loss. The right to claim ... depends on due notice of abandonment under s 62 of the Act. The distinction is explicitly stated in s 61 ... The section makes it clear that the right to abandon only arises when there is a constructive total loss *in fact*. That is the necessary precondition to a right to abandon."

Since Lord Porter's explanation of this legal matter is concise and clear, the following passage from his judgement may be helpful for more in-depth comprehension of the point[102]:

"... abandonment may be a condition or consequence of recovery and not a condition precedent to the existence of a total loss whether actual or constructive. A constructive total loss may exist, but if the assured wishes to take advantage of it he must give notice of abandonment, at any rate in a case where there would be any possibility of benefit to the insurer.

Accordingly, the notice of abandonment is an essential prerequisite to claim for a constructive total loss, and not only an essential ingredient of a constructive total loss.

Actually, a notice of abandonment cannot turn what is otherwise not a constructive total loss into a constructive total loss. Note that, in order to justify the issuance of a notice of abandonment, the subject-matter insured must first constitute a constructive total loss. Stated otherwise, previous to the issuance of a notice of abandonment, there must be a constructive total loss.[103]

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[100] [1919] 1 KB 189.
[101] [1939] AC 371 at p 381, HL. Emphasis added.
[102] [1939] AC 371 at p 393, HL
[103] Hodges Susan, Law of Marine Insurance, London, 1996, pp. 392-393

2.4 When Notice of Abandonment is Not Required

Only in cases where the underwriters might be impacted by the circumstances of facts, is notice of abandonment required. It implies that there is something to give up or abandon. Notice become an "idle ceremony" and is unnecessary if the underwriters were unable to change their position as a result of receiving a notice of abandonment.[104]

Hence, referring to the general rule requiring the giving of a notice of abandonment, there are some derogations. If it turns out to be a "idle ceremony" or a meaningless exercise, statutes and case law are prepared to waive the requirement. The so called "idle ceremony" could be present essentially in three circumstances. The first, which is generally stated in s.62(7), happens when there is "no possibility of benefit to the insurer", even in the event that notice is given to him. The second, explicitly provided by common law, refers to freight and is probably currently regulated by s.62(7); the third, covered by s.62(9), is related to re-insurance.

With regard to the first case of the above cited group, s.62(7), which is of general application, provides:

> "Notice of abandonment is unnecessary where at the time when the assured receives information of the loss there would be no possibility of benefit to the insurer if notice were given to him."

The source of this exception to the general rule, can be identified in the leading case *Rankin v Potter*[105], where the majority of the judges used the term "idle ceremony." It is sufficient to state that the House, adopting the views of most judges, ruled that, as far as freight was concerned, no notice of abandonment needed to be given. The specifics of the other issues in the case are best discussed elsewhere. Certain judges believed that the assured did not need to submit notice of abandonment because there was an actual total loss of freight. Others adopted the prudent path and justified their decision by stating that, under the circumstances, the giving of notice of abandonment was excused because there was actually nothing to abandon, without directly responding to the question of

[104]Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023, p.333

[105] (1873) LR 6 HL 83. The case primarily concerns whether a notice of abandonment is necessary in cases of total freight loss, but it is also well-known that the authority is dealing with the delicate question of whether a constructive total loss of freight actually exists.

constructive total loss of freight. Therefore, there was no need for the assured to give notice of abandonment of the chartered freight to the insurers. On the other hand, because of specific facts of the case, *The Kaltenbach Case* was able to give a clearer explanation of the law on the need for a notice of abandonment. The case made it easier for the court to give a more "honest" explanation of the law because it dealt with a constructive total loss of a ship rather than freight. Repeating the case's facts is necessary since they are especially pertinent to illustrate the legal concept established therein. In short, the defendants insured the plaintiff's ship for a trip. She ran into a bank on January 22 and sustained damage. After a survey on 24, it was suggested that she be sold. The owners decided to sell the vessel on February 7 and informed the captain of their decision in a letter. On 11 she was condemned, and on 23 sold. The plaintiffs filed a claim for total loss against the insurers on March 11. Since the court was ready to acknowledge that the ship was in such a state previous to the sale that assured was entitled to abandon the vessel and demand for a constructive total loss, the question of whether the sale was justified or not is not relevant in this case. The court could then decide whether the assured was exempted from providing notice of abandonment based on this. The plaintiffs argued that it was not necessary for them to give a notice of abandonment because they were unable to notify the insurers in a time that would have allowed them to take advantage of the situation or issue any orders related to the vessel. Even in the unlikely event that defendants received a notice of abandonment they could not have benefited from it. No judge could find a reason to relieve the assured of the duty to give a notice of abandonment; in the case in question, informing the insurer of circumstances was not a pointless formality. Lord Justice Brett, having carefully reviewed the sequence of events, concluded that the plaintiffs should have sent the notice to the insurers either on February 7, by the next post, or by the next telegraph. The reasoning behind the decision can be found in a statement made by Lord Justice Theisger[106]:

"One can see that if at any moment an assured, who is entitled to treat a loss as a constructive total loss, may at the same time absolve himself from the necessity of giving notice of abandonment by selling the vessel, which although a prudent course, is not a necessary course, it would lead to the greatest danger of fraud upon the underwriters, and at all event to very considerable inconvenience in reference to policies of marine insurance."

[106] (1878) 3 CPD 467 at p 486, CA

In *Vacuum Oil Co v. Union Insurance Soc of Canton*[107], Lord Justice Bankes of the court of appeal provided insight into his interpretation of the statutory expression "no possibility of benefit," establishing a post statute authority on the matter. He declared:

"What it means ... is that when the circumstances are such that the underwriter, if the goods had been abandoned and he had had the absolute control over them, could have exercised that control and done what he thought best under the circumstances."

The standard is, to clarify it in simple terms, were the insurers able to profit from the property? In a recent instance, the insurance could not have profited from abandonment in *The Litsen Pride*[108] since it was impossible to rescue a vessel wrecked in a conflict zone. Judge Hirst stated:

"I hold that there was no possibility of benefit to the underwriters if notice had been given, since any notion of salvage was completely impracticable by reason of the place where, and the war-time circumstances in which, this vessel was sunk." [109]

Furthermore, according to the Marine Insurance Act 1906, an insurer may waive notice of abandonment, and a notice is not required in cases when the insurer has reinsured his risk. The insurer may be seen to have waived the need for a notification if it pays for a CTL even though no notice of abandonment has been issued. In addition, in certain situations, such as when an assured discovers the constructive total loss only after the vessel has become an actual total loss, a notice might not be required. When an actual total loss follows a constructive total loss, this could happen. On March 9, 2000, at around 14:20, a fire broke out in the engine room of the vessel Kastor Too. The ship drowned in deep water on March 10 between 5:00 and 6:00, fifteen hours later. The notice of abandonment was not required. Due to the fire, the vessel became a CTL and there was not enough time to issue notice of abandonment before the vessel entered the seawater and became an actual total loss. Similarly, the court applied s.62(7) in *Clothing Management Technology Ltd v. Beazley Solutions Ltd* [110] , the facts of which were mentioned above. There was no chance that the insurer in Beazley could really exert any

[107] (1926) 25 Ll L Rep 546 at p 549, CA.
[108] [1985] 1 Lloyd's Rep 437 QBD.
[109] Hodges Susan, Law of Marine Insurance, London, 1996, pp. 393-395
[110] [2012] 1 Lloyd's Rep. 571.

kind of meaningful control over salvage. Insurance companies were aware of the situation and had the option to take it, if they had wanted to, with the assured's approval. Likewise, no notice of abandonment was required in Bayview Motors Ltd v. Mitsui Marine & Fire Insurance Co Ltd.[111] By then, the insured vehicles had been used and distributed. According to local law, bringing a lawsuit against the local Customs authorities whose assets could not be attached would be a time-consuming and pointless endeavor.[112]

If the loss occurs in a war zone and it is too late to salvage the covered property or if it is too late to stop the insured products from vanishing, then the notice of abandonment requirement is waived. The insurer may also choose to ignore the requirement for a notice of abandonment. The procedure for notice of abandonment does not apply to reinsurance contracts. [113]

2.5 Insurers' Rights upon Acceptance of Abandonment

Abandonment, if approved by the insurers, retroactively alters the property within the insured subject matter, starting from the moment of the casualty causing the abandonment. It is commonly compared to the sale or assignment of the insured property right after the loss. According to the description of Martin B in the leading *case Rankin v Potter*[114], an abandonment covered by a hull policy includes:

> "... a cession or transfer of the ship to the underwriter, and of all his property and interest in it with all the claims that may arise from its ownership, and all the profits that may arise from it, including the freight then being earned. Its operation is as effectually to transfer the property of the ship to the underwriter as a sale for valuable consideration, so that of necessity it vests in the underwriter a chattel o more or less value, as the case may be."

Therefore, in cases where underwriters pay compensation based on an actual total loss determined under s.58 of Marine Insurance Act 1906, the underwriters are entitled to inherit the vessel if it is later found to be theirs. In a comparable manner, any freight that

[111] [2002] 1 Lloyd's Rep. 652.
[112] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023, pp.333-334
[113] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006, p. 695

[114] (1873) LR6 HL83, 144

was being earned at the time of the casualty that led to the abandonment and that was later earned belongs to the abandonee:[115]

"The abandonees are considered as purchasers of the ship at the moment of the casualty to which the abandonment refers: and although the contract of the shipowner does not run with the ship, it is well settled that, as incident to the ship, the right to the whole freight, pending at the time of the sale and subsequently earned, belongs to the purchaser of the ship."[116]

The *Case v. Davidson* case, in which a vessel and its freight were insured separately, marked the moment this idea first appeared. Following the ship's capture, the freight and the ship were turned over to their respective underwriters, who paid on a total loss. The benefit of the freight was considered to extend to the vessel insurer when the ship was later recaptured, finished its voyage, and earned freight. Lord Ellenborough rated the following principle[117]:

"An abandonment to the underwriter on ship, transfers to him nor merely the hull, but the use of the ship, and the advantages resulting from the completion of the voyage. If, upon the completion of the voyage, the abandonee may withhold the goods until the freight is paid, he must have acquired an indefeasible title to it. I consider his title as derived out of the use of the ship."

In cases when the freight is paid upon delivery of the goods to the destination port, no freight will have been earned during a casualty that results in an abandonment. When the voyage is subsequently completed, the owner of the cargo would be improperly enriched if they got benefit from carriage without payment. The owner of the vessel is the one who has to be paid when the right to payment of freight accumulates; upon ship abandonment, this person becomes the ship underwriter. Additionally, if a freight policy is not properly worded, the assured cannot submit a claim, because the freight insured has not been lost; rather it has been earned by someone other than the assured.

In contrast, freight is earned by the shipowner and not by underwriter using the ship after abandonment when it is paid to the shipowner prior to casualty to which the abandonment relates and is not dependent upon the vessel arriving safely at the port of

[115] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006, p. 695
[116] *Miller v Woodfill* (1857) 8 El & Bl 493, 503 *per* Lord Campbell CJ; MIA 1906, s 63(2)
[117](1816) 5 M & S 79, 82-3.

destination. In *Miller v Woodfil*[118]*l*, the assured covered the ship and the freight individually and loaded the ship on his own account for a trip from St. john, New Brunswick, to Liverpool. The ship got aground just twenty miles from Liverpool in Southport. The insured abandoned the ship to the ship insurers and, at his own expense, arranged for a lighter to deliver part of the cargo to Liverpool before obtaining the ship to complete the voyage with the remaining cargo. Subsequently, the ship underwriters requested credit for freight for the entire cargo during the entire voyage. If a third party had owned the goods, their claim would have been successful. On the facts, nevertheless, there was no freight pending at the time of the casualty. It didn't matter if the assured's goods' increased value due to their movement had been covered by insurance under the freight designation. The assured cargo owner would not have been subject to any claims from the ship buyer. Furthermore, the increased value of the goods at the time of the accident due to substantially completed carriage was comparable to the freight earned prior to the casualty, as evidenced by their increased price had they been sold afloat. As a result, the ship underwriters were only found to be entitled payment for the carriage of the remaining cargo from Southport to Liverpool; this was the only advantage that the assured, as the owner of the cargo, received from using the ship following the accident that gave rise to the abandonment.

When property is abandoned, only the rights associated with it are transferred to the insurers. It doesn't transmit rights that the assured person has, even if those rights were earned as a result of the circumstances leading to their complete loss and abandonment. The insured ship in the leading case *Glen Line Ltd v. Attorney-General*[119] was taken over by the German government at the start of the World War I, and compensation was given in accordance with the terms of the peace treaty after the war. The underwriters, who had provided the assured with indemnity on a total loss, attempted unsuccessfully to obtain that payment.[120] According to Lord Warrington, there are two separate grounds of action that arise from an error that results in the total loss of a ship. Together with any claim for freight that is still being earned at the time of the casualty, the owner is entitled to damages

[118] (1857) 8 El & Bl493
[119] (1930) 36 Com Cas 1
[120] The British government was actually the claimant; it had reinsurance that covered 80% of the damage and was claiming 20% of the settlement for the primary underwriters and 80% of the compensation for itself. The underwriters declined to back the government's claim.

for the loss of the ship. This right expires upon abandonment. Second nevertheless, the owner is fully entitled to compensation for any lost earnings through personal claims. It belongs to the owner regardless of whether the ship is abandoned because it is not a right associated with or incidental to it. According to the real interpretation of the treaty, the guaranteed received the larger amount of compensation for lost earnings, even though it was still more than what was recoverable under English law.

Similar to this, in the *Sea Insurance Co v. Hadden*[121], the other vessel was at fault for causing a collision that resulted in the assured's ship suffering a constructive total loss. The question of whether the ship underwriters were entitled to the freight damages emerged after the hull underwriters paid for the total loss and the assured had received damages for the lost ship and lost freight. According to the Court of Appeal, freight underwriters were the only ones who could reclaim such damages. [122]

2.6 The Impact of Abandonment on the Assured's Rights

As previously mentioned, in the framework of the maritime insurance law, abandonment is considered to be an offer to the insurer to transfer any rights the assured may have in the remaining insured subject matter. They may accept or reject that offer. From this, three questions arise. First, can the assured give up all rights to the insured property through a unilateral act of abandonment without another party claiming such rights? Second, if that's even possible, does that affect the assured's right under the insurance contract? Thirdly in the event that the rights of the insured are biased, what kind of prejudice is it? There's no definitive response to any of these issues.

Even in the absence of a counterparty assuming those rights, it seems possible for an owner of property to unilaterally give up full ownership of the held property. At that point, the property becomes res nullius and is available for acquisition by any finder. The subject of unilaterally giving up ownership of a vessel has come up in relation to liability for wreck disposal. The House of Lords interpreted the law requiring a wreck's owner to

[121] (1884) 13 QBD 706
[122] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006, pp. 695-698

pay removal costs in *The Crystal*[123], treating the owner at the moment of removal rather than when the vessel became into a wreck. The appellant shipowners submitted written notification to the harbor authorities that they had abandoned the vessel as a wreck and also issued notice of abandonment to the underwriters who paid as on a total loss after the casualty but before the disposal procedures. It was decided that the owners had effectively sold their assets to avoid being subject to statutory obligation in these circumstances. They "had abandoned the vessel as derelict on the high seas, without any intention of resuming possession or ownership," according to Lord Herschell. They had also given notice abandonment to the underwriters. Lord Watson, in expressing his agreement with Lord Herschell, stated that the appellants had lost all proprietary interest in the wreck before the respondents began operations with the intention of removing it, but he did not mention the notice of abandonment to the insurers. Lord Ashebourne asked if "a mere assignment" may result in liability avoidance without offering his view. By their letter to the harbor authorities, the appellants "declared that they had abandoned all rights of property and given up all interest in the vessel," thereby ceasing to be owners within the meaning of the statute. However, Lord Macnaghten expressly disregarded the appellants' interactions with the underwriters and held that the appellants ownership was no longer conferred upon them for all purposes. Lord Morris acknowledged that the appellants had abandoned the ship, but he did not specify how. While not entirely, the ruling leans in favor of the idea that an owner can give up their proprietary rights by acting alone and abandoning their property without a third party taking up their rights in return. Furthermore, it has been held that the assured loses ownership rights for the purpose of liability for the costs of wreck removal not only in cases where the insurer has accepted the notice of abandonment, making it irreversible, but also in cases where it has been rejected prior to the incurrence of removal expenses. The latter can be hard to reconcile with the current Law's treatment of abandonment as an offer of rights. Rejecting an abandonment notification is equivalent to refusing the offer. In order to receive indemnity for a total loss, the assured does not need to give up any rights under the current law.

The indemnity principle is reinforced by the abandonment concept. It is obvious that the assured cannot give rights to any remaining insured property to a third party for

[123] *Arrow Shipping Co Ltd v Ijme Improvement Commissioners (The Crystal)* [1894J AC 508.

a fee without first making an offer to the insurer. If not, the assured would be unjustly enriched by double recovery to extent of the latter and get both indemnity for a whole loss and the third party receipt as between the assured and the insurer. However, any risk of double recovery is eliminated when an assured unilaterally abandons all rights to the insured property, assuming that this is possible. The question that so arises is whether the doctrine of abandonment in insurance law is intended to fulfill an additional function, namely to provide insurers with the opportunity to recover a portion of the indemnity for which they are accountable to the assured. It is evident that it can do so, but the question is whether insurance contracts should be interpreted as giving the insurer these recoupment rights, excluding the assured from using their unilateral right divestiture to defeat the insurer's recoupment opportunities, preventing contrary intent. The 1906 Marine Insurance Act is unclear. According to Section 61, an assured must "abandon the subject-matter insured to the insurer" in order to recognize a constructive total loss as a total loss. In a comparable way, section 62(1) associates the option to "abandon the subject matter insured to the insurer" with the abandonment procedure notification. However, it is not apparent whether the rights in the subject matter that are to be offered to the insurer are those that were in place at the time of the casualty, when the claim for a total loss was made, or even when rights were transferred (i.e., when the insurer paid).

The implications of failing to give the insurer the rights that existed in the insured property on the date of the casualty become evident, even if maritime insurance contract law does encourage the assured to do so. In light of this, is the assured no longer able to make a claim for the entire loss, or does the insurer still bear liability for the entire loss but may also be entitled to damages for breaching an implied contractual term, which would be calculated by deducting the amount that the exercise of transferred rights would have recovered from the indemnity measure? The former might seem out of proportion to the assured's actions.[124]

[124] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006, pp. 698-701

2.7 Form of notice of abandonment

The notice of abandonment has to be unambiguous and unequivocal. The notice must clearly and concisely state that the assured has to chosen to treat the loss a total loss and offered to give up all rights to the subject matter insured to the underwriters. Notice of abandonment may be given in writing, verbally, or partially through word of mouth. It can also be given in any way that expresses the assured's intention to give up his insured interest in the subject matter insured unconditionally to the insurer, according to MIA 1906, s. 62(2): [125]

> "Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer."

It was initially decided that a desire for a total loss does not imply abandonment.[126] Similar to this, it was determined in *Involnert Management Inc. v. Aprilgrange Ltd*.[127] that the assured's letter to the insurer, in which it was stated that the yacht was "almost certainly" a constructive total loss, was insufficient to meet the requirements of MIA 1906 s.62(2). Nothing in the letter stated or suggested that it was the assured's intention to give up its interest in the yacht to insurers unconditionally, but the subsection demands notice of abandonment, indicating the "intention of the assured to abandon his insured interest in the subject matter insured unconditionally to the insurer." [128]

In *Parmeter v. Todhunter*[129], it was found that "an implicit parol abandonment is too unclear and cannot be supported." In this instance, the insurers received only instructions regarding the disposition of the ship and its contents. It was decided that this was insufficient notice of abandonment because it did not indicate an intention to give up the insured subject matter. [130] More specifically, according to Lord Ellenborough's ruling in *Parmeter v. Todhunter,* "the abandonment of must be direct and express and I think

[125] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023, p. 330
[126] *Parmeter v Todhunter* (1808) 1 Camp. 541, 542.
[127] [2015] 2 Lloyd's Rep. 289.
[128] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023, p. 331
[129] (1808) 1 Camp 540.
[130] Hodges Susan, Law of Marine Insurance, London, 1996, p. 397

the word 'abandon' should be used to make it effectual." Under this scenario, the insurance broker was the one who contacted the underwriters, requesting that they consider the loss under consideration to be a total loss and that they provide the required instructions for handling the ship and its cargo. Lord Ellenborough even said that it would be preferable to completely avoid giving oral notices of abandonment. [131]

In *Currie v. Bombay Native Insurance Company*[132], the Privy Council rejected the *Parmeter* ruling. Although the term "abandonment" was not used in that instance, the court determined that the message conveyed was adequate to convey the assured's intention to give up his interest in the subject matter to the insurer. The acceptance of oral or mixed notices, as well as the lack of necessity for using the phrase "abandonment" if the communication's wording makes it apparent that an abandonment is intended, have been unequivocally established by subsequent cases.

In *Cohen*, the assured requested payment of the insurance proceeds in writing to his underwriter, stating that the insured vessel was a total loss. Roche J held that for the purpose of the Act, it was sufficient even though the word "abandonment" did not appear in the notice. It was decided in *The Litsion Pride*[133] case that, sending telexes and the submitting a writ for total loss constituted a legitimate notice of abandonment. In *Panamanian Oriental Steamship Corporation v. Wright*[134], it was decided that a broker's endorsement of the policy, together with a claim for constructive total loss, was sufficient notice of abandonment.[135]

In summary, a notice of abandonment does not have to follow a set format; however, it must state that the guaranteed intends to give the insurer his insured interest in the subject matter insured unconditionally. [136]

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[131] Total Loss and Abandonment in the Law of Marine Insurance in the Law of Marine Insurance, Khurram, R., Journal of Maritime Law, and Commerce (J. Mar. L. & Com.) 1994, 25, pp. 107-108
[132] (1869) L.R. 3 P.C. 72
[133] (1925) 21 L. L. Rep. 30 (Q.B.)
[134] [1970] 2 Lloyd's Rep. 365
[135] Total Loss and Abandonment in the Law of Marine Insurance in the Law of Marine Insurance, Khurram, R., Journal of Maritime Law, and Commerce (J. Mar. L. & Com.) 1994, 25, p. 108
[136] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006, p. 701

2.8 Timing of notice of abandonment

In relation to the topic of timing for a notice of abandonment the MIA 1906 provides:

> "Notice of abandonment must be given with reasonable diligence after the receipt.
> of reliable information of the loss, but where the information is of a doubtful
> character the assured is entitled to a reasonable time to make inquiry."

Hence, it is not expected of an assured to respond immediately with a notice of abandonment upon learning of the loss of his ship. Laws provide him a reasonable amount of time to ascertain the precise nature of the loss and choose the best line of action. [137]

Prior to the Marine Insurance Act of 1906, the court held that the notice of abandonment should be given promptly; whether the notice was given with reasonable promptitude will depends on the facts of the case. In the case where a notice of abandonment was given one day after the owner was provided with all the means to know all the facts of the case, it was sufficiently prompt. In particular, the notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss; however, where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.

In reference to the expression "with reasonable time," the terms "speedily," "quick" and "as soon as may be" were used. It also considers whether the notice was sent promptly and what actions the underwriters might take if they had been notified. In *Aldrige v. Bell*[138], the insurance covered the ship Lion when it arrived in Kinsale on November 24. After an evaluation on December 2 and again on December 14, it came to light that the repairs would exceed the vessel's worth. The abandonment notice was sent on January 6 January was provided too late. Similarly, the notice of abandonment was too late when the assured knew the pertinent information on February 11 but failed to send notice of abandonment until June 11 of the same year.

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[137] Hodges Susan, Law of Marine Insurance, London, 1996, p. 396
[138] (1816) 1 Starkie 498; *Abel v Potts* (1800) 3 Esp. 242.

When the assured knew the total amount of damage suffered, he is expected to send a notice of abandonment. In *Kaltenbach v. Mackenzie*[139] , Brett LJ held that the assured needs precise information about the type of damage in order to make an informed decision about whether or not to abandon his ship. Only to know that his vessel is damage may not be sufficient. The circumstances will determine many aspects of what constitutes "reliable information of the loss." The necessary information will not be "reliable" as long as it is "doubtful." Before a notice of abandonment is given to the insurer, the assured gets a reasonable amount of time to inspect the loss or damage. In an emergency situation where a reasonable person would have to judge that there is an alarmingly real risk of the insured subject matter being lost, the insured must provide notice of abandonment as soon as he receives that information. [140]

But in the *Rickards v. Forestal Land Co.*[141] case, a time restriction for insured's reflection was set. According to Lord Wright, "To wait to see how things turn out or to decide what may best suit his interest" would not be permitted for an assured.[142]

The assured cannot take too much time to determine which path would be most beneficial to him. For example, when it involves cargo damage, he can just look at the crucial condition of the cargo to determine the extent of the cargo to determine the extent of the damage, without taking the market conditions into account. Stated differently, the assured is not permitted to exploit this latitude as a means of assessing the status of the markets and making decisions about whether or not to abandon.

In *Anderson v. Royal Exchange Assurance Company*[143], where the vessel named Fanny sailed with wheat on board and ran ashore, the notice of abandonment was considered to have been provided too late. For a period of four weeks, the vessel's hull was totally submerged at high water, making it impossible to lift or remove until the cargo was in it. The cargo was damaged as a whole. After being removed off the ship, the wheat

[139] (1878) 3 C.P.D. 467, 472.
[140] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023, p. 331-332
[141] [1942] AC 50 at p 79, HL.
[142] Hodges Susan, Law of Marine Insurance, London, 1996, p. 396
[143] (1805) 7 East 38.

was kiln dried. After some of the remaining wheat was sold to feed hogs and what was left was thrown into the water because it was deemed unfit for human consumption, the assured gave a notice of abandonment. It was decided that the abandonment was too late. According to the court, the assured took a risk and tried to rescue as much as possible from the accident; nevertheless, when he saw that his efforts would not allow him to recover his loss, he gave notice.

Here follow some interesting more recent cases. In *Involnert Management Inc. v. Aprilgrange Ltd*[144]., a case where the covered yacht sustained significant damage from a fire that broke out on December 3, 2011, the notice of abandonment was also given too late. Insurance appointed surveyors visited the site that same day, and on December 5, 2011, they issued and initial report indicating the extent of the damage to underwriters. "Based on the current available evidence, it is considered that the vessel will almost certainly prove to be a constructive total loss," they warned in their report. Additionally, on May 14, 2012, naval architect hired by the assured reported them that overall the cost of repairs would exceed the yacht's insured value. At this date, the assured possessed reliable evidence showing that the yacht had turned in a constructive total loss. On July 12, 2012, he did not, however, deliver the notice of abandonment. Leggat J accepted the insurers' dispute that the notification of abandonment was not given with reasonable diligence after receiving credible information about the loss, so it was not given as soon as required by s. 62(3) of the MIA 1906. The assured would have needed a few days to instruct its solicitors and obtain legal advice, so a few days would have been acceptable; however, the few-month gap between May and July was excessive given the lack of any justification for the delay in serving the notice of abandonment.

In the case of *PT Adidaya Energy Mandiri v. MS First capital Insurance Ltd*.[145], the assured also provided a late notice of acceptance. Based on the evidence, Jeremy Lionel Cooke IJ stated that the assured was aware of the quotations for the vessel's repair costs by December 2018, at which point some temporary repairs had also been finished. The May 22, 2019 notice of abandonment was given. Because of this the notice of was not

[144] [2015] 2 Lloyd's Rep. 289.
[145] [2022] SGHC(I) 14 [196]

provided with due caution even after the assured had access to reliable information about the loss.

The topic of abandonment after choosing to repair was covered in the leading case *Thomas Benson v. John Chapman*[146], a case involving vessel and freight insurance. On June 29, 1839, the ship sailed from Pernambuco to Liverpool carrying a Cargo. But after she ran into a rock beyond the harbor the vessel was sent back to be repaired. The master proceeded with the repairs the expanses of which exceeded the value of the ship and freight. After being released during repairs, the cargo was reshipped, and the ship brought the cargo to Liverpool. It was no longer a total loss because the freight had been earned. The House of Lords ruled that the assured could not renounce what the master had done, choosing to fix instead of giving a notice of abandonment and demanding a constructive total loss. There was no indication that the master went above his powers making that election. The assured gave a notice of abandonment, but it was ineffective because he was left in the same situation as if no repairs had been made after learning of the substantial costs. The assured was unable to remove the masters' election. However, assuming the assured was not intentionally negligent, a notice would be not be too late if the assured finds some damage that did not cause him to believe the cargo was so damaged as to constitute a constructive total loss, but later learns that the true nature of the loss makes it a constructive total loss. [147]

[146] (1849) 2 H.L. Cas. 696.
[147] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023, p. 331-333

2.9 Acceptance and Refusal of a Notice of Abandonment

In relation to acceptance and refusal of a notice of abandonment the Act provides as follows in s. 62(4)-(6):

> "Where notice of abandonment is properly given, the rights of the assured shall not be prejudiced by the fact that the insurer refuses to accept the abandonment. The acceptance of abandonment may be either express or implied from the conduct of the insurer, but the mere silence of the insurer after notice shall not be construed as an acceptance. Where notice of abandonment is accepted the abandonment is irrevocable, and the acceptance of the notice shall be construed as conclusive admission of liability for the loss and the sufficiency of the notice."

In cases where a notice of abandonment is considered void due to a fundamental mistake, this nullity also applies to any acceptance of the notification, and the insurer is entitled to reimbursement for any indemnity that was paid.[148]

When the assured provides notice of abandonment, the insurer has to reply as soon as possible to say whether or not he accepts the abandonment. An abandonment may be explicitly accepted or inferred from the insurer's actions. After notice, the insurer's quiet does not constitute an acceptance.

In practice, abandonments are almost never accepted by insurers unless they are a part of a larger settlement for the claim. It is interesting to note that an insurer's silence for two months following receipt of the assured's notice of abandonment was interpreted as acceptance of the notice. In the leading case *Hudson v. Harrison*[149], the assured asked the insurers to a meeting at Lloyd's coffee shop following his notice of abandonment. The defendant did not attend the meeting, but three of the subscribing underwriters did. The courts observed that the defendant insurer did not raise any objections. "If the underwriters meant otherwise, they should have acted otherwise," stated Burrough J.

[148] Bennett, Howard. *The Law of Marine Insurance*. 2. ed., Oxford university press, 2006, pp. 702-703
[149] (1821) 3 Brod. & Bing. 97, 109–110.

When a notice of abandonment is approved, the decision to abandon is final. By accepting the insurer is deemed to have acknowledged the notice's legality as well as his own financial responsibility for the whole damage.

The assured's interest in the insured subject matter and any associated proprietary rights are transferred to the insurer upon acceptance of the notice of abandonment. This is based on the assumption that the subject matter covered by the insurance, or a portion of it, is supposed to exist in specie; at this point, there is always a chance that it will reach its destination or, at least, that the actions taken to retrieve or preserve it will have some effect on its value.

The insurer becomes the owner of the ship upon acceptance of the notice of abandonment and is entitled to all earnings that the ship may earn. Anything earned by using that ship before it became his ship is not entitled to insurance. When the cargo is delivered at the port of destination, the insurer, acting as the owner, is entitled to the freight for the ship's use during the entire journey, if the freight is payable at the time the goods arrive. The freight that was paid for before she was designated as his ship is not entitled to be reimbursed to the insurer. The person who received the freight and was paid for it at the time, it was paid when he was the ship's owner earned it; he did not earn it by using the vessel.

Acceptance of the notice of abandonment by the insurer implies recognition of both the notice of abandonment legitimacy and the insurer's obligation to pay for a constructive total loss. When the notice of abandonment is accepted, he would get an equitable lien. When insurers have permanently chosen to take over the assured's interest in the wreck and have definitively recognized obligation for the constructive total loss, an equitable lien would take priority over payment for the constructive total loss. According to the traditional logic, he would obtain equitable ownership in the right amount upon payment for a constructive total loss. The insurer acquires complete legal title upon payment according to MIA 1906 s. 79(1).

The underwriters are free to choose to not assume the assured's interest. The assured's legal or at least equitable ownership to the vessel will be transferred to insurers

upon payment for a constructive total loss and affirmative election to assume the assured's interest in the vessel. It was declared that insurers could establish proprietary rights in the vessel in their favor by accepting notice of abandonment or, in the event that this is not the case, by irrevocably electing to take over the assured's interest in the wreck upon the promised payment for a constructive total loss. Underwriters are free to accept the assured's implied offer made by the assured to relinquish their interest in the constructive total loss, provided that the assured persist in demanding payment for it even after they have rejected the notice of abandonment. The insurers maintained the option to exercise proprietary rights over the subject matter in accordance with MIA 1906 s.79(1), if there was a subsequent payment for constructive total loss without any acceptance of the notification of abandonment.

In *The WD Fairway*[150] the insurers paid for a constructive total loss even though they had rejected the notice of abandonment. As a result, some of the insurers chose to acquire ownership of the vessel, while others did not. Following the vessel's sale, the remaining insurers allegedly exercised their right to seize ownership of the craft. Because the assured did not have the title to transfer to the buyer at the time of the sale, the insurers who had exercised their statutory rights were each entitled to a share in a vessel equal to their share of the paid loss and were not subject to the terms of the sale. In contrast, the purchaser obtained rights in the vessel that could not be overridden by the subsequent sale because the insurers who had not opted to take over the vessel prior to the claimed sale had neither a legal nor an equitable stake in it. In line with s. 63, the insurer has the option to elect to assume ownership of the insured subject matter and all rights associated with it, granting the insurer an equitable lien over the subject matter in the event that an abandonment is accepted. [151]

Another interesting legal issue was highlighted in the leading case *Whitworth Bros v. Shepherd*[152] where a vessel valued at £9,000 was insured by Henderson for £8,000 with the pursuers for £500 with a third syndicate. The assured gave notice of abandonment to each and every underwriter when the ship was stranded. The Henderson syndicate

[150] *The WD Fairway* [2009] 2 Lloyd's Rep. 191, [44]
[151] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023, pp. 334-336
[152] (1884) 12SC (4th) 204

rejected it and was subsequently deemed partially accountable. A constructive total loss was admittedly incurred by the pursuers. The ship was mortgaged for £13,168, and repairs 20% of her total value. The assured declined to transfer a stake in the vessel, and pursuers were unable to transfer an unrestricted portion due to the mortgage.[153]

2.10 Notice of abandonment by assignee/loss payee

According to the judgement in *The ZouZou*[154], the shipowner, not the bank, must determine whether a claim for a constructive total loss is eligible in the context of a claim under a mortgagee's interest insurance. The claimant in The ZouZou was a vessel's mortgagee, who was covered by a mortgagee's interest insurance (MII).[155] An MII policy is an additional protection that is carried separately to protect the mortgagee's interest in the vessel in the event that the hull insurance policy does not cover loss in the event of, for instance, the vessel owner's breach of the terms of the underlying insurance coverage. Comparably, a marine insurance policy (MAP) protects the mortgagee against financial loss in the event that the mortgaged vessel is found to have inadequate protection and indemnity insurance to cover liability claim made against it. The most common scenario in which this occurs is when a pollution incident occurs.[156] The owner of the ship obtained war risk insurance from the Hellenic Mutual War Risks Association. According to Hellenic Mutual's coverage, the owners of the vessel would be considered to have been deprived of ownership with no chance of recovery if it were detained for longer than a year. The crew was accused of trying to smuggle diesel oil, which led to the vessel being detained in Venezuela for around 14 months. After then, four crew members were put on trial and found not guilty. The bank attempted to recover under the MII since the war risks insurer avoided the policy due to a violation of the obligation of fair presentation of the risk. The War Risks Policy was incorporated and was subject to the terms of notices of assignment dated January 20, 2020, in favor of the bank. The "Interest" insured under

[153] Xiaojia He, An Analytical Review of the Doctrines of Subrogation and Abandonment in the Law of Marine Insurance, Lund University, 2010, p. 46
[154] [2022] EWHC 1169
[155] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023, p 336
[156]Timpone, M. S. (n.d.). *Mortgagee's interest insurance (MII) and mortgagee's additional perils coverage (MAP)*. Seward & Kissel - Maritime Blog, February 25, 2021.

the MII Policy was “Mortgagee and/or Lessors and/or Innocent Owners Interest as Assignees and Loss Payees under the owners Policies.” Therefore, the indemnity would have been given to the bank if a recovery had been obtained under the War Risks Policy. When an event occurs that would have been regarded as a constructive total loss in the dispute between the shipowners and their insurers, it loses funds in relation to its interest as assignee and loss payee. Stated differently, any insured loss incurred by the shipowner is, in theory, likewise sustained by the bank. However, because the bank was unable to demonstrate that an insured risk was the reason for the entire 12-month term of detention, the judge denied the request for a constructive total loss.

The judge stated that even though the request for a constructive total loss was denied, the notion of a constructive total loss has to be evaluated from the shipowner’s perspective rather than the bank’s. What mattered was the shipowner’s possession, not the bank’s. It was not necessary for the bank to submit its own notification of abandonment. The date that the shipowner offered a notice of abandonment was crucial in determining whether the vessel became a constructive total loss. The bank’s risk was “as Assignees and Loss Payees under the owners Policies and Club Entries (as defined in the Conditions hereto)” rather as a mortgagee. [157]

2.11 Comparison Between Subrogation and Abandonment.

The right of the insurer to “step into the shoes” of the insured following indemnification of his loss is the most straightforward way to explain the insurance law idea of subrogation. At that point, he is eligible for all of the assured’s rights, remedies, benefits, and advantages. This idea stops the assured from profiting generously from his loss. Brett LJ concluded in the leading case of *Castellain v. Preston*[158] that "in order to apply the doctrine of subrogation . . . the insurer must be placed in the position of the assured." Then he stated:

[157] Gurses, Ozlem. *Marine Insurance Law*. 3. ed, Routledge, 2023, pp. 336-337
[158] (1883) 11 Q.B.D. 380, at 388 (C.A.).

"[T]hat as between the underwriter and the assured, the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort.

capable of being insisted on, or already insisted on, or in any other right, whether by way of condition or otherwise, legal, or equitable, which can be, or has been exercised or has accrued, and whether such.

right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished."

Section 79 of the Act, which deals with subrogation, provides as follows:

"(1) Where the insurer pays for a total loss either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the insured

in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing?

the loss.

(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and

remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss."

Legally speaking, abandonment and subrogation occur in every instance of total loss. Abandonment is a corollary of the subrogation doctrine in this regard. Despite their slight differences, the two doctrines have an impact on how the windfall is settled.

The two doctrines have different prerequisites. Subrogation occurs upon the assured's payment, and the assured receives it automatically following the payment for the insured loss. What provokes the abandonment is instead the constructive total loss; the insurer is not entitled to it by default. Additionally, the insurer will clearly acknowledge the abandonment following the assured's notification of abandonment.

The aims of the two doctrines are different. The primary goal of subrogation is to prevent the insured from profiting from the insured loss at the insurer's expense. This is

achieved primarily through two concepts. First, there is no reason to provide any benefit under the contract to a third party who is not a designated beneficiary or aware of the terms of the agreement. The moral foundation of tort law reinforces this. Second, the majority of insurance agreements are by their very nature indemnity arrangements, meaning that the insurer's primary responsibility is to make the guaranteed whole. Should it be completely unconnected transaction, like a stranger giving a gift to the contract, the indemnification concept would not apply to stop the insurance contract from being recovered.

While the assured will receive compensation for the covered loss, he will not be eligible to receive any benefits from the insurance policy. If the insured can profit from the insurance, there are two disadvantages. Initially, an insured individual might not use the same care as one who is not covered; they might even fake a loss in order to profit from the claims. Second, since it might promote losses, the insurance company would have to pay more, adding to the financial burden on society as a whole. The insurer benefits from this subrogation. Stated differently, the insurance company aims to achieve marginal savings that make difference between a slight profit and loss. Even today, subrogation is used to shield claimants from undue enrichment outside of the scope of maritime insurance.

The doctrines of abandonment and subrogation have different outcomes and impacts. Section 79 of the Marine Insurance Act deals with the subrogation's effect, whereby he becomes subrogated to all the assured's rights and remedies pertaining to that subject matter, as of the moment the casualty causes the loss. In accordance with this, the insurer takes the place of the assured following satisfaction. In the event that an insurer pays them for a total loss, the assured retains them in trust. The third party does not make direct payments to the insurer.

The policy might define how the recovery is handled if the claim is settled as a partial loss and is subject to deductible. The Act would be applicable in the absence of a clear clause in the contract. The recovery from a third party will be credited to the underwriters in proportion to the net claim after deductible is applied, and to the assured in proportion to the deductible that he has paid, according to English law. However, the

amount paid to the underwriter under the Act or the ordinary ITC may never exceed the sum he paid the assured.

Regardless of the insured value or the amount paid by the insured, the insurer would be entitled to assume the assured's interest in whatever portion of the subject matter that remains after it has been paid for, including the goods, salvage, and any other incidental proprietary rights.

However, there cannot be an abandonment in situation when there is a partial loss.

The indemnity principle is the basis of subrogation. Profits can be earned by the guaranteed at the insurer's expense. The insurer's rights under subrogation are limited to the amount they receive; under abandonment, they are entitled to the whole of the recovery. [159]

[159] Xiaojia He, An Analytical Review of the Doctrines of Subrogation and Abandonment in the Law of Marine Insurance, Lund University, 2010, pp. 48-50

III. Total Loss and Abandonment in the Italian Law

3.1 The Italian Navigation Code

3.1.1 Constitutive process of the Italian Navigation Code

The Italian Navigation Code was established on April 21, 1942. It represents one of the sources of Italian navigation law, and specifically it must be considered as a primary source of these. Furthermore, it is one of the six codes of Italian law system, together with the Civil Code, the Penal Code, the Code of Civil Procedure, the Code of Penal Procedure, and the Code of Administrative Procedure.[160]

The credits for the realization of the code go to the special ministerial committee, chaired by jurist Antonio Scialoja. The process took two years to complete and publish the code, but the path of maritime reform and code revision had actually been underway for many years and had proceeded very slowly. Three government commissions alternated from 1904 to 1920 to prepare the reform of the 1877 Merchant Shipping Code: none of these commissions, however, produced significant results. The idea to constitute a separate code exclusive for the matter of navigation arose in 1924 when a new commission was formed, since, at that time, maritime law was embraced between the second book of Commercial Code and the Merchant Shipping Code. In December 1926, the first draft of a unitary and organic marine code was released. Then the process continued at slow pace and with fragmentary results, until July 31, 1931, when the "Draft Maritime Code" was presented to the Minister of Justice. Despite its positive reception, it was not very successful in practice; rather, it served as the foundation for the future codification of navigation law rather than as a significant achievement.

The revision of the codes was resumed at the end of 1939, and a special Ministerial Committee led by Scialoja was tasked with reforming the maritime legislation. The committee create the ministerial draft of the Navigation Code, which covered not only

[160] A. Lefebvre D'Ovidio - G. Pescatore - L. Tullio, Manuale di diritto della navigazione, ed. XVI, Milano, 2022, pag. 56

the maritime navigation but air navigation as well. This new and original draft of the Navigation Code was examined by the Subcommittee of the Legislative Assemblies and was approved by Royal Decree no. 9 of 27 January 1941. Then, Royal Decree No. 327 of 30 March 1942 published the final text of the Navigation Code, which finally came into force on 21 April 1942.[161]

3.1.2 The content of the Navigation Code

Since it governs all the relationship connected to navigation, the Italian Navigation Code encompasses the entire field of navigation in its broadest and most comprehensive sense, not only private sea trading. First of all, it rules the public aspects of navigation as well by combining the private and public laws which frequently interlock and make it impossible to separate the two. Second, the code governs inland navigation as well as maritime navigation (both commercial and noncommercial, with the exception of the Navy). This is a new development in this area because, previously, only the public aspects of this topic were regulated by law, but the code also takes into account its private aspects. Thirdly, the code addresses navigation in the air. The necessity of including this topic in the code has been extensively discussed because, despite their general similarities, maritime law and air law are very different and cannot be considered two sub-divisions of the same topic. Some have contended that the code could only superimpose one law on top of the other, not actually succeeding in fusing the two laws.[162] Finally, the code systematically addresses the main international maritime conventions that Italy has already ratified and incorporated into specific internal laws though with the necessary modifications, coordination, and adaptations to prevent conflicts, with the Italian legislative system and interpretive issues.[163]

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[161] A. Lefebvre D'Ovidio - G. Pescatore - L. Tullio, Manuale di diritto della navigazione, ed. XVI, Milano, 2022, pp. 23-25

[162] Plinio Manca, The Italian Code of Navigation: Translation and Commentary, A. Giuffrè, 1958, p. 2. The author believes that this unity of approach is justified by the similarities or, at very least, by the identification of technical circumstances that arise in the two subjects. Since carrying to and fro constitutes the essence of numerous legal relationships in both the maritime and aviation domains, this identity of treatment has been achieved in accordance with the very nature of things.

[163] Plinio Manca, The Italian Code of Navigation: Translation and Commentary, A. Giuffrè, 1958, p. 3

The Italian Navigation Code has 1311 articles and is split into four parts, the first of which is headed "Preliminary Provisions". Each of these four sections is further separated into books, which are further subdivided into several titles, and each title is further subdivided into chapters.

Despite having only fourteen articles, the Preliminary Provision section is very important, in fact, Article 1 establishes the sources of the law of navigation, Article 2 define the territorial sea, Article 3 deals with the airspace that is subject to the State's sovereignty, and Articles from 4 to 14 contain private international law rules. The regulations governing maritime and inland navigation are found in Part One (Articles 15-686), air navigation is covered in Part Two (Articles 687-1089), criminal and disciplinary provisions pertaining to navigation are dealt with in part Three (Articles 1080-1285), and transitional and supplemental provisions are covered in Part Four.

Notwithstanding the concept of Antonio Scialoja, nowadays the Italian Code of Navigation is not representing the main source of the maritime law, because many aspects of the matter are not ruled in the Code, but they find regulation elsewhere. Actually, a "polysystem"[164] has been set up, where in addition to the Italian Navigation Code other sources have same legal power. The Code could be now considered as a landmark for understanding the laws that are now in force in the Italian legal system, nevertheless, it had not claimed to exhaust the discipline of that particular branch of law already at the time of its adoption.[165]

[164] I S.M. Carbone – P. Celle – M. Lopez De Gonzalo, Il diritto marittimo attraverso le clausole contrattuali, ed. Vi, Torino, 2020, pag. 7
[165] M.M. Comenale Pinto, Il «diritto vivente» e l'autonomia del diritto della navigazione. Interrogativi agli albori del terzo millennio, in Riv. dir. nav., 2021, pag. 3

3.1.3 Insurance law in the Italian Navigation Code

Special elements of insurance against shipping risks are regulated by the Italian Navigation Code. They are subject to the general and non-life insurance provisions of the Civil Code's insurance law, so long as they are not exempted under Navigation Code articles 514-547. In fact, the civil code fully regulates insurance contracts in articles 1882-1919 which include the general rules governing the matter and related also to maritime insurance. The latter is only addressed by the Navigation Code to the extent that specific regulations must be created to add to or remove the general provisions of the civil code.[166]

The type of risks that maritime insurance covers is what primarily defines it. Art. 521 adopts the system of listing a specific number of risks that are among the most common and frequently encountered risks of navigations such as collision, shipwreck, explosion, jettisoning, piracy, etc., and then closing this list, which is not intended to be exhaustive, with a general expression embracing all potential navigation accidents. These exclude hazards resulting from conflicts and war, which are often covered by a unique type of insurance made mandatory by special laws in case of war. [167] Across jurisdictions, risks of navigation are in principle the same for all types of marine insurance.[168]

According to Italian law the insurance contract of maritime and navigation risks, is for pecuniary interest, aleatory and for consideration; in addiction it must be written. Contractual features are included in appropriate forms, named insurance policies, usually supplemented by standards clauses which deal with specific aspects of the matter. Most common clauses come from English law provided by the Institute of London Underwriters, such as Institute Voyage Clauses Hull 1995 and International Hull Clauses

[166] Plinio Manca, The Italian Code of Navigation: Translation and Commentary, A. Giuffrè, 1958, p. 263, According to the author, Lefebvre D'Ovidio and Pescatore, The unique nature of the risk (at sea accidents) and property covered (ships, shipments, freight), all of which are related to navigation, clearly justifies these differences.; [166] A. Dani, Le Assicurazioni del trasporto marittimo, in I Contratti del trasporto (a cura di F. Morandi) Bologna 2013, pp. 760-761

[167] Plinio Manca, The Italian Code of Navigation: Translation and Commentary, A. Giuffrè, 1958, p. 263

[168] A. Dani, Le Assicurazioni del trasporto marittimo, in I Contratti del trasporto (a cura di F. Morandi) Bologna 2013, p. 757

2003. Sometimes the inclusion of these clauses in the Italian policies created some interpretation and coordination problems.[169]

3.2 The abandonment in English and Italian Law: A Comparative Analysis

3.2.1 The abandonment in the Italian Navigation Code

Among the articles related to insurance law, articles 540-546 of Italian Navigation Code are specifically referred to abandonment.

Art. 540 provides the precise cases that are admitted to cause an abandonment:

"The Insured can abandon to the Insurer the ship and request the indemnity for total loss in the following cases:

a) when the ship is lost, or has become absolutely unfit for the navigation and cannot be repaired, or when the means of necessary repairs are lacking in the place neither the vessel can, by towing, reach a port in which such means exist or obtain same requesting them elsewhere.

b) when the ship is presumed lost.

c) when the total amount of the expenses for the repairs of the material damages suffered by the ship reaches three quarters of her insurable value."

The admitted causes for abandonment are divided in three sections; the first places emphasis on the unfitness and the unseaworthiness of the ship, allegedly due to damage suffered, in fact it is then also mentioned as a cause for the abandonment the impossibility to access repairs due to lack of means or because the ship cannot reach a port where these means of repair are available. This is an issue that will be analyzed later. The second type of reason for abandonment is the presumption of loss, and this happens if the vessel is considered untraceable and there is no information on its status or position for a significant period of time. Finally, the last motive happens when the ship has a residual value, and it is not considered a total loss. The code places at three quarters the minimum

[169] E. Piombino, L'impiego di clausolari stranieri nel contratto di assicurazione marittima: la soluzione adottata dalla nuova polizza corpi dell'ANIA, in Dir. mar. 1989.

percentage of value lost due to damage, to admit an abandonment of ship or goods. This case will be discussed subsequently as well. [170]

According to Manca, an interesting legal issue arose when considering if it is possible for a ship to be deemed lost if it capsized near a port, ensuring its recovery. Can the goods on board be considered completely lost in the same scenario, even though they are not susceptible to decay by nature, even though they have been submerged for a while? The shipwreck of the "Nordanland," which had a load of steel pipes among other goods on board, occurred in the Port of Genoa on February 20, 1955, raised this topic. The corresponding insureds stated their intention to abandon the ship and its goods in order to receive full compensation. However, this assertion was obviously unfounded because neither the tube nor the vessel was definitely lost.

The situation where several packages are covered by the insurance and not all but only some are damaged, which often arise in practice, is another noteworthy case in relation to abandon topic. For example, the author assumes that twenty bales of skins are covered by insurance, which is extended to one month after the items are discharged and placed in the warehouse Four bales remain in deposit after Consignee removes 16 bales in a matter of days. These four bales sustain severe damage that exceeds three-quarters of their insurable worth. Does their owner have the right to abandon these four bales? Art. 545, 2° paragraph, which stipulates that the abandonment must encompass all items that were at danger at the time of the accident and that the abandonment is connected to, gives some validity to the affirmative response. It may be assumed that in order to determine whether or not the right of abandonment exists, the insurance must be regarded as covering the items that are gradually left under the policy as others periodically withdrawn. This is especially true if abandoned goods are actually the ones that are exposed to risk when the accident occurs. Therefore, abandonment is permitted when damage to these goods exceeds three-quarters of their insurable worth. [171]

[170] S. Ferrarini, Le assicurazioni marittime, III ed. Milano, 1991, p. 471-472; A. Lefebvre D'Ovidio - G. Pescatore - L. Tullio, Manuale di diritto della navigazione, ed. XVI, Milano, 2022, pp 752-754
[171] Plinio Manca, The Italian Code of Navigation: Translation and Commentary, A. Giuffrè, 1958, pp. 268-269;

Then articles 541 and 542 deal with the abandonment of goods and abandonment of freight, listing causes related to those seen for abandonment of ship:

541. (Abandonment of the goods). The Insured can abandon the Insurer the goods and request the indemnity for total loss in the following cases: a) when the goods are totally lost; b) when the ship is presumed lost;

c) when, in the cases foreseen in the letter a) of the preceding article, from the date of the loss or of the unseaworthiness of the vessel, three months have elapsed for the perishable goods or six months for those not perishable without the goods having been recovered and loaded for the continuance of the voyage;

d) when, irrespective of any expenses whatsoever, the damages for deterioration or loss in quantity exceeds three quarters of the insurable value.

542. (Abandonment of the freight). The Insured can abandon the freight to be earned at the time of the accident and exact the indemnity for total loss in the following cases:

a) when the Insured has totally lost the right to the freight;

b) when the ship is presumed lost.

Article 543 addresses the form and the expiry dates of the statement of abandonment:

"The abandonment must be declared by writing to the Insurer within two months or, if the accident happened outside Europe or countries wetted by the Mediterranean, within four months from the date of the accident or from the date in which the Insured proves to have had knowledge of same.

In case of presumed loss, the time limit is of two months and runs from the day in which the ship has been cancelled from the register of inscription. If the abandonment has as object a vessel, the declaration must be made in the form prescribed by art. 429 and published in accordance with art. 250 and following.

Nevertheless, if the act of nationality has been lost in the accident, the publication is carried out by the transcription in the register.

The declaration of abandonment, having as object the ship, must be notified to the Insurer; in every other case, it must be brought to the knowledge of the Insurer himself by registered letter.

After the expiry of the time under the first paragraph, the Insured can only exercise the action of average."

First of all, the code includes a geographical diversification in the timing of giving the statement of abandonment. According to the article if the accident happens in Europe

or in countries bordering the mediterranean sea the statement must be sent within two months, otherwise, outside the above cited areas, the expiry of time is four months. Time counting starts from the moment of the accident, or from the point in time when the assured demonstrates that he was aware of the same. In case of presumed loss, the maximum time allowed is still two months, but the time starts from the day in which the register of inscriptions no longer lists the ship. The form of the statement, when the object of the lost is a ship, is provided by articles 429 and the form of publishment by article 250 and following. To ensure legal publicity, publication takes place by means of transcription in the register in cases where the ship's nationality certificate was lost in the accident. Furthermore, when the subject is insured is the vessel the code provides that it is enough to notify the abandonment to the insurer, without specifying the form; in any other situation it is required to acknowledge the insurer a registered letter. Lastly, the insured lose his right to abandon if he notifies the abandonment after the expiring date. [172]

Article 544 focuses on the regulation of the communications to be made by the Insured in declaring the abandonment and it states that:

"In declaring the abandonment, the Insured must inform the Insurer if on the things abandoned other insurances have been stipulated or ordered, or if real rights or of guarantee weigh on same.

In default, the Insurer is bound to pay the indemnity only from the time in which these informations are given to him by the Insured.

In the event of false or knowingly incorrect communications, the Insured loses all the right deriving from the insurance contract."

In order to ensure that the insurer has a clear framework of the situation as well as of the legal and financial conditions of the abandoned good, and to avoid disputes or conflict arising, the insured must inform the insurer whether other insurances have been taken out to cover the asset or whether there are real rights or of guarantee over it. In the absence of this information, the insurer may wait to pay the indemnity until it has been properly communicated to it. This represents a protection for the underwriter against the risk of not having all the necessary information at its disposal. On the other hand, if the

[172] S. Ferrarini, Le assicurazioni marittime, III ed. Milano, 1991, pp. 484-489; A. Lefebvre D'Ovidio - G. Pescatore - L. Tullio, Manuale di diritto della navigazione, ed. XVI, Milano, 2022, p. 543

insured provides false or intentionally incorrect information, he forfeits his rights under the insurance contract; this severe sanction protects the insurer's interests and the transparency of the communications between the parties. [173]

Then Article 545 deals with the object of abandonment providing that:

"The abandonment of the things insured must be effected without conditions.

It must include all the things under risk for the Insurer at the moment of the accident, from which the abandonment arises, and the rights belonging to the Insured towards third parties in relation with the same things.

If the insurance does not cover the entire insurable value of the thing. the abandonment is limited to a part of the thing itself, in proportion to the insured amount."

According to the code, following the abandonment the insurer receives the good as a whole, without exceptions or reservations. No conditions can therefore be imposed on the insured, and the latter cannot maintain any control over the abandoned property, avoiding any possible ambiguity. A description of what is transferred to the insurer upon abandonment follows in the article. First of all, all property at risk at the time of the accident and included in the policy passes to the insurer, and therefore not only what actually damaged. In addition to physical property, the abandonment also includes the insured's claims against third parties relating to the insured property. The article concludes by providing protection for the insured in the event of the transfer to the insurer of property of greater value than that covered by the policy. In fact, the abandonment is proportionally limited to the actual covered value. Only in this case can the insured abandon only a part of the good. [174]

The article 546 is the last one dedicated to the subject within the Italian Navigation Code provides regulation regarding the effect of abandonment:

"If the validity of the abandonment has not been contested within thirty days from that in which the declaration of abandonment has been brought to the knowledge of the Insurer, or if the validity of the abandonment has been judicially recognized, the Insured is entitled to collect the indemnity for

[173] S. Ferrarini, Le assicurazioni marittime, III ed. Milano, 1991, pp. 489-490; A. Lefebvre D'Ovidio - G. Pescatore - L. Tullio, Manuale di diritto della navigazione, ed. XVI, Milano, 2022, pp. 754-755
[174] S. Ferrarini, Le assicurazioni marittime, III ed. Milano, 1991, pp. 490-491

total loss. The ownership of the things abandoned and the rights indicated in the preceding article are transferred to the Insurer from the day in which the latter has been informed of the abandonment, unless the Insurer declares to the Insured that he does not intend to profit of same, within ten days from that in which the validity of the abandonment has become incontestable in accordance with the preceding paragraph.

The declaration of the Insurer must be made, published, and brought to the knowledge of the Insured in the forms requested by art. 543 for the declaration of the abandonment.

First, a thirty-day time limit is set for contesting the abandonment from the moment the insurer is informed of the insured's declaration of abandonment. After that, if no objection is made, or if the abandonment is judicially recognized, it becomes final; the insured is consequently eligible to claim compensation for total loss. On the insurer's side, on the other hand, when the abandonment is recognized as valid, ownership of the abandoned property and all rights examined in the preceding articles pass to the insurer from the day it was informed of the abandonment, thus retroactively. The insurer also has another option, namely that of declaring, within a maximum of ten days from the validation of the abandonment, as described in the same article, that it does not wish to benefit from the effects of the abandonment, thus not acquiring ownership of the abandoned property. Thus, in each case the insured receives compensation for the total loss, while the insurer may decide whether or not to assume ownership of the abandoned property. Lastly, the forms specified in article 543, which include formal publishing and notification to the insured, must be followed by the insurer in their waiver. [175]

3.2.2 Comparison of the discipline of abandonment between Italian law, English law, and international maritime practice

After having examined in detail the English law, the point of reference for the international legal framework, and more briefly in this chapter the Italian law on marine insurance, this section will compare the regulations of the English and Italian legal systems, in order to analyse the points of contact and divergences between the two. A typical element of maritime insurance practice, the IHC 2003 clause, will also be

[175] S. Ferrarini, Le assicurazioni marittime, III ed. Milano, 1991, pp. 494-499; A. Lefebvre D'Ovidio - G. Pescatore - L. Tullio, Manuale di diritto della navigazione, ed. XVI, Milano, 2022, pp 755-756

compared. First of all, it must be premised that the sources of law that will be taken into consideration, namely, the Italian Code of Navigation and the Marine Insurance Act 1906, reflect the legal context of origin, hence, the civil law for the Italian jurisdiction and the common law for the English jurisdiction. Specifically, the following issues will be compared: the conditions for abandonment, the notification of abandonment, the consequences of incorrect notification, the acceptance of abandonment and the effects of abandonment.

As listed above, the first aspect is the conditions for an abandonment. The reference article in the Navigation Code 540, while in the MIA 1906 the landmark is section 61. The Italian Navigation Code sets three requirements for abandonment without however mentioning explicit differences between actual and constructive total loss.[176] Dwell on these three requirements, the first two could, however, be traced back to actual total loss, while the third one is very interesting as it approaches the concept of constructive total loss by considering the repair value compared to the insurable value of the asset; a cutoff is set to declare total loss when the recovery cost exceeds three quarters of the asset's value. Section 61 of the MIA 1906, on the other hand, states that in the case of constructive total loss, if the insured does not treat the loss as partial, it may abandon the insured asset to the insurer equating it with an actual total loss. The definition of constructive total loss in MIA 1906, on the other hand, comes from Section 60, which states that a constructive total loss is deemed to exist when the costs of recovery or repair exceed the value of the item when repaired.

Thus, both legislations provide for abandonment following a loss, but whereas under English law the cost of repairing the damage must exceed the value of the property itself, so as to fall within constructive total loss, under the Code of navigation it is sufficient if the cost of repair exceeds seventy-five per cent of the insured value; there is thus a greater degree of leniency in decreeing a total loss. The Code is more permissive whereas the MIA 1906 requires a more significant loss.

[176] . Ferrarini, Le assicurazioni marittime, III ed. Milano, 1991, p. 470

In international maritime practice, lower limits of loss sustained are set than in MIA 1906. For instance, in the IHC 2003 clauses eighty per cent is set as the threshold value of repair costs on the value of the asset from which a constructive total loss can be determined. There is therefore greater similarity on this issue between the Italian Navigation Code and the clauses currently used in the maritime insurance industry than in MIA 1906.

A comparison is now made concerning the notification procedure for abandonment. Under Italian law, if the subject of the abandonment is a ship, a written and published declaration is required as provided for in articles 429 and 250 of the Code, which provide for transcription and publication in the official registers; this is a highly formal requirement derived from a rigid approach. In comparison, the MIA 1906 with section 62(2) is more flexible, in fact it is permitted to send the notice of abandonment either in writing or orally, or even in a mixed mode between the two, provided that the intent to abandon the insured property is clear. A greater freedom of communication, characteristic of a system where the content of the notice is more important than the form, thus appears evident.

Regarding the timeframe for sending the notification, article 543 of the Italian Navigation Code stets precise deadlines, namely two months for incidents in Europe or in the Mediterranean and four months for events outside these areas. In the MIA on the other hand does not provide strict deadlines, but states that the sending of the notice of abandonment must take place with "reasonable diligence" from the moment reliable news of the loss has been received. Here the protection is strong with respect to the insured who can make a decision after obtaining the necessary information.

Under Italian law, namely article 543 of the Code, the right to declare abandonment expires if the notice's deadline is missed, and the insured loses some of their rights as a result.[177] Specifically, the insured is only eligible to receive payment for partial losses.

[177] . Ferrarini, Le assicurazioni marittime, III ed. Milano, 1991, p. 487

However, the Marine Insurance Act 1906 in English framework contains different conditions for the failure to give notice. According to section 62(1), the insured may only treat the loss as partial in the absence of notice; however, the MIA permits the insured not to provide notice in cases when the accident information is a type that would not benefit the insurer, as specified in section 62(7).

Next, let the discussion turn to the comparison of the consequences of incorrect notification of abandonment. Article 544 of the Italian Code of Navigation provides that the insured, at the time of the declaration, must inform the insurer of any other insurance or real rights attaching to the property. If such information proves to be false or intentionally inaccurate, the insured automatically forfeits any rights under the insurance contract. This provision clearly emphasizes the need for good faith and transparency on the part of the insured. The Marine Insurance Act 1906, s. 62, does not directly address the case of misrepresentation in the notice of abandonment. The common law imposes the obligation of "utmost good faith" in all insurance contracts, including the obligation not to omit material information or falsify statements. Regarding the principle of utmost good faith, it is important to note that the reform of the MIA 1906 in 2015 led to changes.

The caption for part 5 of the Insurance Act 2015 reads, "Good Faith and Contracting Out". Only one of its five sections, namely section 14, is focused to "Good Faith", with the other four focusing on prohibitions against contracting out terms that would disadvantage the insured. Of all the New Act's provisions, Section 14 is unquestionably one of the most prominent and recognizable. It says:

"(1) Any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party *is abolished. 68*

(2) Any rule of law to the effect that a contract of insurance is a contract based on the utmost good faith is modified to the extent required by the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012."

Following the development of this innovative new regulation, the section once more makes significant changes by directly and clearly addressing the Marine Insurance Act 1906:

"(a) [I]n section 17 of the Marine Insurance Act 1906 (marine insurance contracts are contracts of the utmost good faith), the words from "and" to the end are omitted, and

(b) [T]he application of that section (as so amended) is subject to the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012."

As a result, the MIA 1906's section 17 now simply states, "A contract of marine insurance is a contract based on upon the utmost good faith". Sections 18, 19, and 20 of the MIA 1906, have also been completely eliminated by the New Act, which means that the intricate framework the MIA established regarding "Disclosure and Representation" is completely gone. The only thing left is a single, brief sentence that restates the "utmost good faith" as the cornerstone of marine insurance. A brief note should be made of the reminder of part 5. It forbids insurers from employing contractual provisions that disfavor the insured, and it even mandates that insurers take initiative-taking steps to alert the insured to such provisions prior to the contract being finalized. [178]

Now let us examine similarities and discrepancies in terms of notice acceptance. A comprehensive procedure is given, beginning with the Italian code of navigation, and there is a 30-day limit for appealing the notification, after which is deemed accepted regardless. After this acceptance, the insurer must pay for the entire loss and has ten days from the date of formalization to decide whether to deny the rights acquired by the insured's abandonment. In contrast the MIA 1906 requires a clear declaration of the insurer's will for acceptance to take place, therefore an insurer's refusal to reply to the notice of abandonment does not necessarily result in acceptance. As a result, MIA 1906 allows for both express and implicit acceptance, while the insurer need not formally object if they choose not to. In contrast, the Italian Navigation Code demands a formal answer within a specific period of time.

A comparison of the expected effects in the event of abandonment is finally provided. Beginning with the crucial idea of abandonment, there a re significant parallels between section 63 of the MIA 1906 and the article 546 of the Italian Navigation Code.

[178] Attilio M. Costabel, "The UK Insurance Act 2015: A Restatement of Marine Insurance Law" (2015) 27:2 St Thomas L Rev 133, pp. 144-145

It is clear from both sources that the insured gives the insurer ownership of property if the abandonment is deemed to be legal and legitimate. From the perspective of differences, the Italian law again inserts a temporal reference, as it is reiterated that the abandonment can be contested within thirty days of the insurer receiving the declaration of abandonment.[179] In contrast, the English text makes no mention of temporal limitations. Another difference is that the MIA 1906 gives the insurer the right to freight, net of the costs incurred in earning it following the accident, while the Navigation Code makes no mention of the insurer's right to freight or expenses following abandonment. The Italian jurisdiction subsequently cities the previous articles and stipulates that the insured has ten days to indicate whether it does not intend to benefit from the transfer of ownership of the abandoned property, in which case the insured retains ownership rights. There is no comparable clause in MIA 1906 section 63 that gives the insurer a deadline to decide whether or not to take advantage of the abandonment.

In the end, both statues acknowledge that abandonment allows the transfer of property and rights to the insurer. However, they differ in how challenges are made, rights to freight, and procedural details. MIA 1906 places more emphasis on the insurer's practicality and effectiveness, while the Navigation Code takes a more formalistic and protective stance toward the insured.

In conclusion, despite addressing the same topic, namely abandonment in maritime insurance, the two texts emphasize two radically different legal philosophies. The nature of the legal sources themselves and the application of the regulations, which have various peculiarities that encompass their legal standing to their adaptability and flexibility, both reflect these differences. The Italian Navigation Code, a law that is a component of the greater Italian legal system, is a part of a legal tradition that is distinguished by formality and rigidity as well as a strong emphasis on minimizing uncertainty and avoiding ambiguity. Clear time limits and a clearly defined procedural logic are features of the code of navigation's treatment of abandonment. On the other hand, the common law legal system, which derives its authority from both state laws and case law that is binding on

[179] S. Ferrarini, Le assicurazioni marittime, III ed. Milano, 1991, p. 494

subsequent jurisprudence, governs the British law known as the Marine Insurance Act 1906. Examining the text reveals a higher level of interpretive flexibility, probably due to a strong reliance on earlier court decisions and legal precedents, which can affect how the law is interpreted and applied.

3.3 Italian and English Case Law on Total Loss and Abandonment

To conclude this thesis, two judgements on the subject of total loss and the doctrine of abandonment will be examined in both the Italian and International contexts with reference to English law, in order to highlight how legal theory and normative texts are reflected in maritime practice.

3.3.1 *Algio S.p.A. v. Siat Società Italiana di Assicurazioni e Riassicurazioni S.p.A.*, Cass. Civ., Sez. III, n. 12975/2022

The judgment Algio S.p.A. v. Siat S.p.A., issued by the Court of Cassation, Civil Section III, under No. 12975 of 2022, is taken as an example as a relevant case of Italian case law regarding the application of the Italian code of navigation in the context of maritime insurance, and in particular the abandonment of ships and goods. The dispute between the parties originated from a contract for the maritime transport of insured goods, which due to a breakdown of the ship during navigation did not reach their destination. At this point, Algio S.p.A., the owner of the cargo, sent a notice of the abandonment of the goods to the insurers, invoking payment for a total loss under both Article 541 on the abandonment of the goods and Article 540, which is dedicated to abandonment of ship.

The sequence of events was as follows: the motor vessel DOUAA-A, owned by the Egyptian shipowner Abdulrazzak Mohamed Abobakr, was used to transport an order of granular superphosphate from Damietta, Egypt, to Ravenna, Italy. The cargo was loaded on October 7, 2010. Algio established a co-insurance policy for the goods through Agency 3P Assicurazioni S.r.l. to cover the value of the goods. Faro Assicurazioni e

Riassicurazioni S.p.A. (40%) and Siat Società Italiana di Assicurazioni e Riassicurazioni S.p.A. (60%) split the insurance coverage. The shipowner declared on October 15, 2010, that a major malfunction had prevented the ship from sailing. For the required technical inspections, the ship was towed to the port of Tartous in Syria. The ship was deemed unseaworthy by the harbormaster in the port of Tartous. Inspections reveal that the main engine has sustained severe damage, and there were indications of an explosion that would necessitate drive shaft replacement. As a result, Algio believes that the ship was unseaworthy, and that prompt repair was almost impossible. On May 3, 2011, Algio informed the insurance companies of the abandonment of the goods, citing the right to compensation for total loss of cargo under Article 541 of the Italian Navigation Code, which refers to article 540 for the assessment of the ship's state, because the ship could not be repaired in a timeframe compatible with the resumption of the voyage. Because there were no longer any conditions for a safe and timely continuation of the voyage, Algio believed that the ship's unseaworthiness justified the cargo's abandonment. Siat claimed that the legal requirements for the good's abandonment were not fulfilled, so it rejected the declaration of abandonment and refused to pay the indemnity. In contrast, Faro Assicurazioni entered into compulsory liquidation without objecting. [180]

Following Siat Assicurazioni's denial of compensation, Algio S.p.A. took a legal action to recover the worth of the abandoned goods. The representative of Siat, Agenzia 3P Assicurazioni S.r.l., was subject of the action. In order to receive compensation for the total loss of cargo, Algio requested that the Court of Venice determine whether the abandonment of the goods was lawful under Article 541 of the Italian Navigation Code, which also makes reference to Article 540 to evaluate the ship's condition. Algio S.p.A. contended that the ship was in an unseaworthy state and that the cargo's abandonment was entirely justified because of the carrier's lack of cooperation and the impossibility of transmitting the cargo to another vessel. According to Articles 540 and 541 of the Code, Algio contended that abandonment was justified because prompt repair was impossible in the port of Tartous. Siat Assicurazioni raised an objection, claiming that the legal requirements for acknowledging abandonment had not been fulfilled. There could be no

[180] Cass. Civile Sent. Sez. 3 Num. 12975 Anno 2022, pp. 2-3

question of absolute and definitive unseaworthiness, as required by Article 540, since the ship was repairable, according to Siat.

Algio's claim was upheld by the Court of Venice, which ruled that the abandonment declaration was lawful and valid. Since the ship was unable to continue the voyage and could not be repaired in a reasonable amount of time, the court determined that the requirements outlined in articles 540 and 541 of the Italian Navigation Code were satisfied. At the conclusion of the first instance, it was decided that Siat Assicurazioni, should compensate Algio for the entire loss of cargo by paying him €238,110.23 plus accessories. This decision was based on the interpretation that the ship's extreme unseaworthiness satisfied the conditions for abandonment.

Siat brought an appeal against the Court's decision, claiming that the Court had misapplied the Navigation Code and questioned the definition of unseaworthiness. Siat asserted that that the ship was technically repairable and not in a completely unseaworthy condition, which would have permitted abandonment under Article 540. Siat defended its stance claiming that the Code of Navigation required a condition of definite unseaworthiness, with a complete and irreversible loss of seaworthiness, in order to assert the right to abandonment. This condition was absent in the current case. Algio's claim was rejected by the Court of Appeal of Venice, which reformed the first instance ruling after accepting Siat's arguments.[181]

Algio then appealed the decision in the Court of Cassation, citing eight grounds, including an allegedly misreading of the Navigation Code's rules. In the context of this thesis, the ruling on the first two grounds of appeal is particularly noteworthy.

The ship's non-repairability and supposed complete unseaworthiness are the subject of the first reason. Algio disputes the Court of Appeal's interpretation of Article 540(a) of the Italian Navigation Code, which held that a ship must be "absolute nonrepairable" or that is ultimately and totally incapable of sailing. Algio contends that this interpretation would be overly restrictive and that the Navigation Code would permit

[181] Cass. Civile Sent. Sez. 3 Num. 12975 Anno 2022, p. 3

abandonment even in cases where the ship is "relatively nonrepairable," or theoretically repairable but not actually able to be repaired in time to continue the voyage. Algio cites Court of Cassation decision No. 428/1975, which he interprets as favoring the possibility of abandonment even in cases of "relative non reparability," to support his argument. According to this line of reasoning, Algio believes that his right to compensation is legitimate even if the ship is repairable but, given the extent of the damage, cannot be fixed in time to finish the carriage. Algio's first argument is rejected by the Court of Cassation, which holds that the definition of unseaworthiness cannot be expanded to include "relative non-repairability" considering Articles 540 and 541 of the Code of Navigation. The Court of Cassation affirms that the Code requires "absolute unseaworthiness," which is defined as the ship's unquestionable inability to be repaired, in order to support the abandonment of goods. The rules' requirement of absolute irreparability was not met in this instance because, although the ship had been damaged, it had been towed to a port (Tartous) where repairs could be made.[182]

Yet, the autonomy or cumulative nature of Art. 541's requirements is the subject of the second ground. Algio contends that the abandonment situations covered by Art. 541 of the Code of Navigation's subparagraphs (a), (b), (c), and (d) do not have to happen one after the other; rather, they can function in different ways. The appellant claims that the Court of Appeal misunderstood the requirements for abandonment as cumulative conditions, requiring the ship to be unseaworthy (as defined by Article 540(a)) and to have its cargo lost or damaged in order to allow abandonment. Algio specifically contends that the ship's mere unseaworthiness (ex-Art. 541(c), which alludes to Art. 540(a)), would have been enough to allow abandonment and the resulting compensation. The Court of Cassation also rejects this ground. The Court makes it clear that the Court of Appeal only evaluated the specific case using the combined provisions of Article 541(c) and 540(a) and had no intention of requiring a cumulative application of all the conditions outlined in Article 541. It was observed that the Court of Appeal considered the legal requirements for abandonment without bringing up any extra conditions that were not stipulated in the law. [183]

[182] Cass. Civile Sent. Sez. 3 Num. 12975 Anno 2022, pp.4-8,12-15
[183] Cass. Civile Sent. Sez. 3 Num. 12975 Anno 2022, pp.8,15

Subsequently, the Court of Cassation also rejected the third ground of appeal, while upholding the fourth and fifth, a logical defect in the grounds of the appeal judgment, and consequently absorbing the last three. The judgment of appeal, with partial acceptance, will therefore be set aside with referral to the Court of Appeal of Venice.[184]

3.3.2 Sveriges Angfartygs Assurans Forening (The Swedish Club) v Connect Shipping Inc

The case proposed below, also known as *The Renos* has already been cited in the course of the thesis to illustrate the operation of constructive total loss and represents a relevant decision in international maritime insurance law.

A large fire broke out in the engine room of Connect Shipping Inc.'s ship, the MV RENOS, while it was moving in 2012. The owners felt the need to launch rescue efforts right away after the fire, which severely damaged the ship and jeopardized its integrity. They relied on a specialized team to try to save the ship and minimize the damage. It was used to carry out the salvage, a Lloyd's Open Form (LOF) contract that contained the Special Compensation P&I Club Clause (SCOPIC), which calls for extra compensation to cover costs associated with safety or the environment. The total cost was greatly raised by the costs of environmental prevention during salvage as well as repairs. The owners of the MV Renos decided to declare the ship a constructive total loss under the Marine Insurance Act 1906 because the costs of restoring it to operation would have been greater than the ship's actual value. The shipowners informed the insurers of their intention to abandon the ship, as required by the law, in order to obtain CTL compensation. The insurers, however, contested the shipowners' decision, claiming that environmental protection costs and costs incurred before the notice of abandonment was declared were not admissible since they had nothing associated with ship repair.

[184] Cass. Civile Sent. Sez. 3 Num. 12975 Anno 2022, p. 18

Then the case was arbitrated by the High Court, which decided in favor of the shipowners, stating that the constructive total loss calculation should take into account salvage costs, including SCOPIC and pre-notification costs. The insurers appealed to the Court of Appeal because they were unsatisfied with the ruling. The latter questioned the significance of the SCOPIC expenses for the CTL calculation, but it did validate the salvage and pre-notification costs. Ultimately, the matter reached the UK Supreme Court, where the two issues raised by the case; whether or not the expenses incurred prior to the notice of abandonment and the SCOPIC costs could be included in the computation of the constructive total loss declaration, were examined, debated, and decided.

Regarding the first issue, the insurers contended that these expenses were "sunk costs" because they had already been incurred prior to the notice of abandonment being sent. They reasoned that prior expenses should not affect this determination, and parties' rights crystallize at the time of the notice of abandonment. The Supreme Court rejected this claim under the Marine Insurance Act of 1906, emphasizing that the insurance loss happens at the exact moment of the loss, that is, during the fire. Therefore, the CTL calculation must account for all reasonable costs required to return the ship to a repairable state, regardless of when those costs were incurred. Among other formal purposes, the notice of abandonment informs insurers that the owner plans to treat the loss as total; however, it does not restrict the insured's ability to include expenses already incurred in the CTL computation. A loss may be deemed constructive if "the cost of repairing the damage exceeds the value of the ship when repaired," according to Section 60(2)(ii) of the Marine Insurance Act of 1906, which serves as the foundation for this idea. Therefore, the computation must account for all expenses related to salvage, towing, and temporary protective measures that are required to recover and repair the ship. In fact, the Court noted that it would have major practical consequences to exclude such expenses, which are frequently essential to determining the extent of the damage, particularly when salvage of the ship is a requirement for its repair. [185]

The second point of contention was SCOPIC costs, or extra fees paid to salvors to prevent or mitigate environmental damage during salvage operations. These expenses result from a particular provision included in the typical Lloyd's Open Form salvage

[185] [2019] UKSC 29 pp. 3-13

contract. The primary question was whether the SCOPIC expenses qualified as "cost of repairing the damage" under section 60(2)(ii). The Court determined they should not be considered into the CTL calculation, since the SCOPIC costs are only intended to protect the environment and not to repair the ship. To maintain the integrity of the various insurance risk categories, the Court emphasized the required distinction between SCOPIC and repair costs. According to the ruling, SCOPIC costs remain the same regardless of whether a prudent uninsured owner is persuaded to include them in the salvor contract. SCOPIC costs are meant to reduce an environmental risk that is completely distinct from the damage to the insured asset; they do not directly aid in ship repair.[186]

The decision makes it clear that, in practical terms, any reasonable expenses associated with the ship's salvage and repair must be factored into the CTL computation, so long as they are directly related to the repair. This concept makes sure that necessary expenses incurred prior to the notice of abandonment are not disregarded for determining compensation, in order to safeguard the insured. However, SCOPIC expenses, which are intended to safeguard the environment, must be managed independently under the P&I regulations.

[186] [2019] UKSC 29 pp. 13-18

Conclusions

The analysis attempted to illustrate the legal and jurisprudential framework of the institutions of total loss and abandonment in maritime insurance law. The distinction between Actual Total Loss and Constructive Total Loss clearly emerged, as the former is based on tangible and actual criteria such as the destruction of the asset or the irretrievability of the asset, while the latter introduces a more commercial dimension to the loss, allowing the insured to treat as total a loss which, although not materially final, makes it economically unsustainable to continue shipping or recover the asset. Starting with constructive total loss, the issue of abandonment was then addressed, that is a technical and procedural mechanism that allows the transfer of residual rights over the insured object to the insurer. This institution proves to act as a tool to rebalance the parties and appears to be oriented towards preserving the principle of indemnity without generating unjustified enrichment. With particular regard to this issue, it was possible to compare the Italian and English jurisdictions by observing how both aim at balancing the needs of all parties involved. Finally, the analysis of two cases analysed through the reciprocal judgments made it possible to observe the practical application of maritime insurance regulations. Further and future study could focus on the implications of the introduction of regulations such as the *Insurance Act 2015 in international maritime practice.*

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- (1872) LR 7 CP 341.
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