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Sue and Labour Clause in H&M and  
P&I Insurances – A Comparative  
Study of Its Practical Operation and  
Efficiency

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# Summary

Section 78(4) of the Marine Insurance Act 1906 (hereinafter referred to as the “MIA 1906”) imposes a duty on the assured “in all cases to take such measures as may be reasonable for the purpose of averting or minimising a loss”. In addition to this statutory duty, under the most widely used H&M (hull and machinery) forms as well as in accordance with the so-called P&I (protection and indemnity) Club Rule-books (hereinafter referred to as the “P&I Club Rules”) the assured is under a corresponding contractual obligation. Notwithstanding the applicability of the MIA 1906 to the H&M insurance policies as well as to the P&I Club Rules subjected to English law, the practical operation of the sue and labour clause utilized by the two types of insurers is not identical. This thesis explores the similarities and differences between the operation of the sue and labour clause in the H&M and P&I insurances, the possibility of ascribing their existence to the nature of the H&M and P&I insurance covers, as well as it analyses the impact of the above mentioned differences on the efficiency of the sue and labour clause in motivating the assured to duly exercise his duty to sue and labour under the particular type of insurance cover.

# 1 Introduction

## 1.1 Background

Centuries ago, those embarked upon a sea voyage had practically no means of communication with different ports. The parties to the insurance contract had therefore to agree that in the event of misfortune, it was the duty of the assured, who would be either on the ship or had a representative on the ship, “to use his powers to avert or minimise damage”<sup>1</sup>. Compliance with this clause known as the “sue and labour clause”<sup>2</sup> included incurring expenditure known as the “sue and labour expenses” or the “sue and labour charges”- “those costs borne by the assured to mitigate a loss, thereby reducing the liability of the underwriter for the loss”<sup>3</sup>. The roots of the sue and labour clause stretch as far as being found in the first written Anglo-American marine insurance policy on record. The mentioned policy from 1613 was drafted by British underwriters, and it was a hull policy of a ship called *The Tiger of London*. However, a similar sue and labour clause was contained in a policy prescribed under insurance legislation in Florence even earlier - in 1523,<sup>4</sup> and many believe that the sue and labour clause dates back even further to the unwritten customs of the maritime trade existing in the major seaports since antiquity.<sup>5</sup>

In English law, the duty to sue and labour is said to have first appeared in the context of abandonment. However, by the enactment of the MIA 1906, the duty had expanded significantly beyond the issues of abandonment.<sup>6</sup> Moreover, in *Kuwait Airways Corp. and Another v. Kuwait Insurance Company and S.A.K and Others*<sup>7</sup> it was stated that the law relating to the sue and labour clause was used in a number of nineteenth century decisions and subsequently codified in Section 78 of the MIA 1906.

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<sup>1</sup> Gauci, Gotthard The obligation to sue and labour in the law of marine insurance – time to amend the statutory provisions? Part 1, I.J.O.S.L. 2000, 1(Mar) 2-10, p. 3.

<sup>2</sup> Sue and labour clause is also known in some other types of insurance, including aviation insurance. See: *ibid.* However, as far as prevention costs are concerned, the relevant provisions in marine insurance policies provide the earliest authority allowing an insured to recover his costs for preventing a loss. See: 1971 Directors of The Columbia Law Review Association, Inc. Allocation of the Costs of Preventing an Insured Loss. 71 Colum. L. Rev. 1309., p. 2.

<sup>3</sup> Rave, Donald T. and Tranchina, Stacey, Marine Cargo Insurance: An Overview, 66 Tul. L. Rev. 371, p.6.

<sup>4</sup> Gauci, Gotthard The obligation to sue and labour in the law of marine insurance – time to amend the statutory provisions? Part 1, I.J.O.S.L. 2000, 1(Mar) 2-10, p.3.

<sup>5</sup> 1971 Directors of The Columbia Law Review Association, Inc. Allocation of the Costs of Preventing an Insured Loss. 71 Colum. L. Rev. 1309, p. 2.

<sup>6</sup> Gauci, Gotthard The obligation to sue and labour in the law of marine insurance – time to amend the statutory provisions? Part 1, I.J.O.S.L. 2000, 1(Mar) 2-10, p.3.

<sup>7</sup> *Kuwait Airways Corp. and Another v. Kuwait Insurance Company and S.A.K and Others* [1999] 1 Lloyd’s Rep. 803.

Despite of the current existence of the advanced means of communication, even today the sue and labour clause retains its significance and is found in virtually every marine insurance policy,<sup>8</sup> whether on a hull, a cargo, freight,<sup>9</sup> or in the P&I Club Rules, since it is still important for the insurer to encourage the assured to lessen the harmful effect of the insured perils. The modern sue and labour clause has not changed much since *The Tiger of London* where it read:

And in the case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment.<sup>10</sup>

The statutory duty of the assured and its agents to sue and labour in “all cases” contained in Section 78 of the MIA 1906 exists alongside with any express contractual term.<sup>11</sup> In the H&M insurance virtually every policy contains a sue and labour clause<sup>12</sup> which is similar to the corresponding statutory provision. The situation is different in relation to P&I insurance, since the duty to sue and labour contained in Section 78 of the MIA 1906 is based on the old Lloyd’s S.G. policy<sup>13</sup> designed primarily for use as a policy of property insurance in respect of H&M, cargo and freight. The mentioned statutory provision is therefore not directly transferable to the P&I insurance.<sup>14</sup> For this reason P&I clubs have their own rules requiring the taking of reasonable measures to avoid the losses the club would otherwise have been liable for.<sup>15</sup>

Due to the common origin of the sue and labour clause in the H&M and in P&I insurance, some of its key characteristics are valid under both types of marine insurance giving clarity to the assured as to the requirements for the reimbursement of the sue and labour costs either under the H&M policy or

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<sup>8</sup> Hazelwood, S.J., *P&I Clubs: law and practice* (3rd edition) 2000, London: Lloyd’s of London Press, p. 257.

<sup>9</sup> 1971 Directors of The Columbia Law Review Association, Inc. Allocation of the Costs of Preventing an Insured Loss. 71 Colum. L. Rev. 1309, p. 2. Note: there is, however, no sue and labour Clause in the Institute Time Clauses (Freight) 1995 or Institute Voyage Clauses (Freight) 1995.

<sup>10</sup> *Ibid*, p. 2.

<sup>11</sup> Bennett, Howard, *The Law of Marine Insurance* (2nd edition) 2006, Oxford: Oxford University Press, pp. 747-748.

<sup>12</sup> Hazelwood, S.J., *P&I Clubs: law and practice* (3rd edition) 2000, London: Lloyd’s of London Press, p. 257.

<sup>13</sup> Lloyd’s S.G. policy is the First Schedule “Form of Policy” to the MIA 1906. Note: under the Lloyd’s S.G. policy the assured was simply allowed but not required to sue and labour. Rose, F.D., Failure to Sue and Labour, J.B.L. 1990, May, 190-202, p. 2.

<sup>14</sup> Hazelwood, S.J., *P&I Clubs: law and practice* (3rd edition) 2000, London: Lloyd’s of London Press, p. 335.

<sup>15</sup> Bennett, Howard, *The Law of Marine Insurance* (2nd edition) 2006, Oxford: Oxford University Press, p. 749.

under the P&I Club Rules. The incentive to take all reasonable measures for the aversion or minimization of the insured loss therefore seems to be equal in the H&M and P&I insurances. However, there are also a number of important issues regarding the operation of the sue and labour clause, in particular, in relation to the assured's right to reimbursement of the incurred sue and labour costs, that are different under the H&M and P&I covers. Such differences may affect the assured's stimulus to incur any sue and labour costs for the benefit of the particular insurer, and, consequently, undermine the efficiency of the particular sue and labour clause.

Having obtained both the H&M and P&I insurance covers, as it happens most often in the shipping industry, it is crucial for the assured that there are no gaps in such combined cover. On the other hand, it is also important to avoid overlapping in the covers, which would be uneconomic, since the total sum of the premiums paid to various insurers will be unnecessarily high.<sup>16</sup> From the insurer's point of view, overlapping of the insurances creates an uncertainty as to which insurer covers what loss and to what extent. Consequently, the calculation of the premiums to be charged becomes considerably more complicated as well as there may appear a potential source of disputes and expensive litigation.<sup>17</sup>

The areas of overlaps between the H&M and P&I insurances are not many since "hull insurance is primarily directed towards indemnifying property damage whereas P&I cover is concerned with indemnifying an assured in respect of his liabilities"<sup>18</sup>. Therefore claims for liability that is covered or could be covered under the standard form of H&M policy are excluded from the P&I cover.<sup>19</sup> Whether such standard coverage is actually obtained, is not material for the purposes of determining the scope of the P&I cover.<sup>20</sup> However, despite the above mentioned way of distinguishing the respective areas of the H&M and P&I insurance covers, in certain instances an insurance overlap is possible. One of such areas is the recovery of the sue and labour expenses.<sup>21</sup>

The complex issue of identifying the insurer liable for particular sue and labour expenses becomes even more problematic when certain expenses are incurred by the assured for the benefit of both the H&M insurer and the P&I club. For instance, in acting to avert or minimize damage to the vessel, not only might the hull be saved for the benefit of the H&M insurer, but also some interests protected by the P&I coverage, for example, the vessel might have been prevented from becoming a wreck which would have been in need

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<sup>16</sup> Hazelwood, S.J., *P&I Clubs: law and practice* (3rd edition) 2000, London: Lloyd's of London Press, p. 256.

<sup>17</sup> *Ibid*, p. 335.

<sup>18</sup> *Ibid*, p. 257.

<sup>19</sup> Rible, Stephen V., *A Juxtaposition of Hull and Protection & Indemnity Coverages*, 83 *Tul. L. Rev.* 1189, p.3.

<sup>20</sup> *Ibid*.

<sup>21</sup> Other areas of difficulty are (amongst others) salvage, life salvage and collision liabilities. See: Hazelwood, S.J., *P&I Clubs: law and practice* (3rd edition) 2000, London: Lloyd's of London Press, pp. 257-258.

for removal or oil pollution may have been prevented.<sup>22</sup> The mentioned close relation sue and labour costs create between the insurable interests covered by the H&M and P&I insurances is, undoubtedly, a potential reason why even today sue and labour clause is still a source of litigation.<sup>23</sup>

The effectiveness of the sue and labour clause in encouraging the assured to protect the insured vessel gains an additional importance in the situations where the preservation of the vessel for the benefit of one insurer injures other insurable interests.<sup>24</sup> For example, where saving the ship's hull requires discharging oil from its tanks, the interests of the H&M underwriter are benefitted while the P&I club's interests are injured. Conversely, if in order to prevent injury or death to a seafarer, a hole needs to be cut in the hull of a grounded ship, the H&M insurer's interests suffer for the benefit of the P&I insurer. Since such loss caused to one of the insurers will generally be considered by the benefitting insurer as the sue and labour costs,<sup>25</sup> the assured's decision as to which interests to "sacrifice" in light of the peril will, amongst other factors, be influenced by the amount of the sue and labour costs recoverable from the H&M insurer and from the P&I club.

## 1.2 Purpose

This thesis addresses three main questions regarding the sue and labour clause in the H&M and P&I insurances, the first question being, what are the practical differences between the way sue and labour clause operates in the two types of marine insurance, the second question being, whether those differences are attributable to the characters of the H&M and P&I covers, and the third question being, whether the mentioned differences affect the efficiency of the sue and labour clause under the particular insurance cover.

This thesis begins with an introduction of the sue and labour clause discussing its general character, in particular, its purpose and implied nature. The next Chapter focuses on the distinction that needs to be made between sue and labour expenditure and other types of costs incurred in the event of a marine casualty. Later on, the sue and labour clause is linked with the H&M policies and the P&I Club Rules by outlining the scope of the two covers and providing examples of the sue and labour clause in the most popular H&M forms as well as in three of the P&I clubs subjected to English law. In continuation, Chapter 5 separates the sue and labour costs incurred for the benefit of the H&M insurer from those incurred for the aversion or minimization of wreck removal costs covered by the P&I clubs. It also distinguishes the H&M sue and labour expenditure from the P&I sue

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<sup>22</sup> Hazelwood, S.J., *P&I Clubs: law and practice* (3rd edition) 2000, London: Lloyd's of London Press, p. 344.

<sup>23</sup> Rave, Donald T. and Tranchina, Stacey, *Marine Cargo Insurance: An Overview*, 66 Tul. L. Rev. 371, p.6.

<sup>24</sup> Hazelwood, S.J., *P&I Clubs: law and practice* (3rd edition) 2000, London: Lloyd's of London Press, pp. 348-349.

<sup>25</sup> *Ibid*, p. 349.

and labour costs. Chapter 6 then discusses the common elements of the contractual duty to sue and labour in the H&M and P&I insurances. Next Chapter examines the different aspects of the sue and labour clause in the H&M and P&I insurances and considers the practical effect of these differences on the recoverability of the incurred sue and labour expenditure, as well as on the probability of the assured's failure to exercise his duty to sue and labour. Chapter 8 provides an analysis of the similarities and differences between the operation of the sue and labour clause in the H&M and P&I insurances and their effect on the efficiency of the clause. This author also seeks the possible explanation of the mentioned differences. Based on the carried out analysis, in the last Chapter this author comes to the conclusion regarding the reasons for the operation of the sue and labour clause being partly similar and partly different in the H&M and P&I insurances, and the impact of the detected differences on the efficiency of the sue and labour clause in the two types of marine insurance.

### 1.3 Method

Traditional legal approach has been adopted to achieve the purpose of this thesis to which effect this author uses case material, text books, journal articles as well as internet based information. Personal communication with P&I clubs is also employed in order to obtain a practical perspective on the issues in question. This author uses comparative method in order to detect the similarities and differences of the operation of the sue and labour clause under the H&M and P&I insurances generally as well as to evaluate the peculiarities of a particular H&M insurance form or P&I Club Rules of a certain club.

MIA 1906 is utilized as the source of the statutory duty to sue and labour under English law. In order to discuss and analyze the practical operation of the sue and labour clause in the H&M insurance, the Institute Time Clauses (Hulls) 1995<sup>26</sup>, the Institute Voyage Clauses (Hulls) 1995<sup>27</sup> (hereinafter together referred to as the "Institute Clauses 1995") and the International Hull Clauses 2003<sup>28</sup> are used. The particular H&M insurance forms were chosen as being currently the most widely used in the English marine insurance industry.<sup>29</sup>

Three P&I Club Rules operating under English law serve as the foundation for the analysis of the sue and labour clause in the P&I insurance cover: The North of England Protection and Indemnity Association Limited P&I Rules 2009/2010<sup>30</sup> (hereinafter referred to as the "Nepia Club Rules"), The

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<sup>26</sup> Supplement A.

<sup>27</sup> Supplement A.

<sup>28</sup> Supplement B.

<sup>29</sup> These H&M insurance forms also enjoy the predominant share of the global H&M insurance industry.

<sup>30</sup> Supplement C.

Britannia Steam Ship Insurance Association Limited 2010 Rules Class 3<sup>31</sup> (hereinafter referred to as the “Britannia Club Rules”) and The London Steam-Ship Owners’ Mutual Association Limited P&I Rules 2010-2011<sup>32</sup> (hereinafter referred to as the “London Club Rules”). The mentioned P&I clubs were chosen by this author due to two reasons: each of them forms a part of the International Group of P&I Clubs;<sup>33</sup> the tonnage entered into the three clubs is one of the highest in the United Kingdom.<sup>34</sup>

## 1.4 Delimitation

This thesis does not attempt to explore all the aspects of the operation and efficiency of the sue and labour clause in H&M and P&I insurances but rather addresses their selected elements. English law is at the focus of this thesis. American cases and an Australian case are referred to with a sole objective of illustrating certain elements of the operation of the sue and labour clause and they only concern the legal aspects that are treated in the same manner under English law. General issues regarding the sue and labour clause deriving from the legal literature on cargo insurance are also used for the enhancement of the part of this thesis that focuses on the nature of the sue and labour clause.

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<sup>31</sup> Supplement D.

<sup>32</sup> Supplement E.

<sup>33</sup> The significance of the International Group of P&I Clubs is that its “thirteen principal underwriting member clubs [...] between them provide liability cover (protection and indemnity) for approximately ninety percent of the world’s ocean-going tonnage.” <http://www.igpandi.org/> (27 April 2010).

<sup>34</sup> The North of England Protection and Indemnity Association Limited insured tonnage (at 10th August 2009) is 101,229,975 gt. <http://www.nepia.com/about-us/key-facts.php> (27 April 2010). The Britannia Steam Ship Insurance Association Limited insures approximately 138 million tons of owned and chartered tonnage and is one of the largest P&I Clubs, accounting for over ten percent of the world merchant fleet. <http://www.britanniapandi.com/en/Britannia-profile/index.cfm> (27 April 2010). The London Steam-Ship Owners’ Mutual Association Limited has a total entered tonnage exceeding 40m gt. <http://www.londonpandi.com/ContentPage.aspx?pageID=19> (27 April 2010).

## **2 The general character of the assured's duty to sue and labour**

The fact that the sue and labour clause is widely used in both the H&M and P&I insurance industries is unquestionable, however, various views exist on the true reason for the existence of the assured's duty to sue and labour and the corresponding right to reimbursement. It should also be established, whether the duty to sue and labour has an implied character and whether the insurer's duty to reimburse the assured for the incurred sue and labour expenses is equally valid in the absence of the sue and labour clause.

### **2.1 The purpose of the duty to sue and labour**

Taken the considerable age of both the statutory duty to sue and labour and its contractual counterpart preceding the enactment of the MIA 1906 by a number of centuries<sup>35</sup> it is necessary to bring back the true reasoning of the need for the duty to sue and labour and the corresponding duty of the insurer to reimburse the assured. Over the years, various different reasons have been expressed in the legal literature regarding the issue in question.

#### **2.1.1 Limited resources**

There are legal scholars who link the necessity of the duty to sue and labour with the need to "prevent the waste of resources in society, since they are obviously limited"<sup>36</sup>. This author, however, considers such linkage as a "long shot" since the duty to sue and labour essentially protects the financial resources of the assured by means of granting him a right to reimbursement, and the insurer's economy by having the effect of diminishing the extent of the loss he is liable for. Protection of the resources of society as a whole, in its turn, is unlikely to have been the incentive of the MIA 1906 draftsmen, nor those incorporating the sue and labour clause in, for instance, the P&I Club Rules.

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<sup>35</sup> See Chapter 1.1 for more on the historical evolution of the duty to sue and labour.

<sup>36</sup> MacDonald Eggers, Peter, Sue and Labour and Beyond: the Assured's Duty of Mitigation, L.M.C.L.Q. 1998, 2(May), p. 235.

## **2.1.2 Practical insurance industry considerations**

The need for the duty to sue and labour has also been explained using some practical reasons. Thus, it has been said that in the absence of the duty to sue and labour and the subsequent right to reimbursement of the sue and labour costs, recognized by law, the indemnity policy would encourage delay in compensating the assured for his loss as well as it would discourage the assured from taking actions to avoid or minimize that loss.<sup>37</sup> In the light of the above mentioned argument it can be said that the duty to sue and labour together with the right to reimbursement facilitates the efficient functioning of the marine insurance industry.

## **2.1.3 Doctrine of proximate cause**

The duty to sue and labour may also be said to derive from the complex issues of causation triggering the considerations as to whether the proximate cause of a certain loss or the extent of a certain loss was caused by the initial peril insured against or by the assured's own action or lack of action. In other words, if the assured incurs sue and labour expenses that can be attributable to an insured peril, they should be treated in the same way as any other loss that would have occurred due to the same peril. However, in the view of one legal scholar, Section 78(4) of the MIA 1906 has its origins in the fact that the assured cannot recover from the insurer for a loss suffered due to him not benefitting himself by averting or minimizing it rather than in the insured peril.<sup>38</sup> Notwithstanding these nuances in the doctrine of proximate cause with regard to the duty to sue and labour, it seems to be the most supported in the recent discussions.<sup>39</sup>

## **2.2 The implied character of the duty to sue and labour**

If the duty to sue and labour has its origins in the doctrine of proximate cause, can it then be said that it exists even in the absence of an express contractual sue and labour clause? Answering this question creates a subsequent query as to the implied character of the obligation of the insurer to reimburse the assured for the incurred sue and labour costs.

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<sup>37</sup> MacDonald Eggers, Peter, Sue and Labour and Beyond: the Assured's Duty of Mitigation, L.M.C.L.Q. 1998, 2(May), p. 244.

<sup>38</sup> Rose, F.D., Marine Insurance: law and practice (2004), London; Singapore: Lloyd's of London Press, p. 389.

<sup>39</sup> Hazelwood, S.J., P&I Clubs: law and practice (3rd edition) 2000, London: Lloyd's of London Press, p. 335.

## 2.2.1 The implied character of the duty

Before examining whether the duty to sue and labour has an implied character it is necessary to establish whether it genuinely is a duty. It is stated in the form of policy included in the first schedule to the MIA 1906 that:

in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, etc., or any part thereof without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured.

Despite the permissive wording of this contractual provision, it is understood as one imposing an obligation on the assured.<sup>40</sup> Section 78(4) of the MIA 1906 is less controversial, since it specifically says that:

it is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purposes of averting or minimising a loss.

Moreover, in *Integrated Container Service*<sup>41</sup> Lord Justice Eveleigh stated:

While it is not possible to state with certainty all the adverse consequences which will be suffered by an assured who fails to perform his duty under the sue and labour clause, there is no doubt that he incurs a risk of his claim for loss or damage being rejected in whole or in part if it can be shown that he failed to act when he should have done.

It therefore appears that Section 78(4) of the MIA 1906 as well as the contractual sue and labour clause impose on the assured an imperative duty to act rather than offer him an alternative of action.<sup>42</sup>

A view has been expressed in the legal literature that the duty to sue and labour should be considered as an aspect of causation rather than a positive duty required by law. According to this opinion, failure to exercise the duty to sue and labour interrupts the chain of causation between the peril insured against and the loss.<sup>43</sup> One issue, however, is clear – whatever leads to the recognition of the sue and labour as a duty, whether it is the wording of Section 78(4) of the MIA 1906 or the doctrine of causation, the assured has

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<sup>40</sup> Gauci, Gotthard The obligation to sue and labour in the law of marine insurance – time to amend the statutory provisions? Part 1, I.J.O.S.L. 2000, 1(Mar) 2-10, p.4. See also: *Emperor Goldmining Co Ltd v. Switzerland General Insurance Co Ltd* [1964] 1 Lloyd's Rep 348.

<sup>41</sup> *Integrated Container Service v. British Traders Insurance Co* [1984] 1 Lloyd's Rep. 154, 157.

<sup>42</sup> Rave, Donald T. and Tranchina, Stacey, Marine Cargo Insurance: An Overview, 66 Tul. L. Rev. 371, p.7.

<sup>43</sup> MacDonald Eggers, Peter, Sue and Labour and Beyond: the Assured's Duty of Mitigation, L.M.C.L.Q. 1998, 2(May), p. 237.

to (emphasis added) take reasonable measures to avert or minimize an insured loss.

It is now necessary to consider whether the assured is under the duty to sue and labour in the absence of a contractual sue and labour clause. The answer to this question lies in the different wording used in Section 78 (1) and Section 78(4) of the MIA 1906. While the former Section provides for the assured's right to reimbursement in the event of the sue and labour clause being incorporated into the insurance contract, the latter Section imposes upon the assured the duty to sue and labour "in all cases".<sup>44</sup> Moreover, an American case clearly demonstrates the implied character of the duty to sue and labour. Thus in *Slay Warehousing Co. v. Reliance Ins. Co.*<sup>45</sup> the court noted:

[T]he obligation to pay the expense of protecting the exposed property may arise from either the insurance agreement itself, [...] or an implied duty when the policy contract based upon general principles of law and equity.

## 2.2.2 The implied character of the right to reimbursement

Unlike the fairly uniform acceptance of the implied character of the duty to sue and labour, the authorities as to the implied character of the corresponding right to reimbursement vary.<sup>46</sup> First, the "full sue and labour clause" term needs to be explained.

"Full sue and labour clause" means that both the duty of the assured to sue and labour as well as his right to be reimbursed by the insurer are included in the clause. The opposite of a full sue and labour clause is a clause only containing the "duty component" and not the "right to reimbursement component".

Once again, the wordings of Section 78(1) and Section 78(4) of the MIA 1906 have a serious impact on the operation of the statutory duty to sue and labour. The argument against the assured's implied right to reimbursement is that Section 78(1) containing the right of the assured to recover the incurred sue and labour expenses is applicable "where the policy contains a suing and labouring clause", while Section 78(4) imposes the duty to sue and labour "in all cases" irrespective of the existence of a contractual sue and labour clause.<sup>47</sup> There are however a number of arguments expressed in the legal literature in favour of the assured's implied right to reimbursement for the incurred sue and labour costs.

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<sup>44</sup> Gauci, Gotthard The obligation to sue and labour in the law of marine insurance – time to amend the statutory provisions? Part 1, I.J.O.S.L. 2000, 1(Mar) 2-10, p. 8.

<sup>45</sup> *Slay Warehousing Co. v. Reliance Ins. Co.* 471 F.2d 1364, 1367-68 (8th Cir. 1973).

<sup>46</sup> MacDonald Eggers, Peter, Sue and Labour and Beyond: the Assured's Duty of Mitigation, L.M.C.L.Q. 1998, 2(May), p. 240.

<sup>47</sup> Gauci, Gotthard The obligation to sue and labour in the law of marine insurance – time to amend the statutory provisions? Part 1, I.J.O.S.L. 2000, 1(Mar) 2-10, p. 8.

One of the arguments in favour of such implied duty lies in the common law principle of restitution<sup>48</sup> and on the ground of unjust enrichment.<sup>49</sup> According to this view “if the assured will be indemnified [...] upon allowing a loss to occur, but he cannot recover his expenses when he prevents a loss, an inequity exists”<sup>50</sup>. Such situation is considered an unjust enrichment equal to the extent of the benefit the insurer derives from the assured's conduct.<sup>51</sup> The main counterargument to this view is that, by preventing or minimizing a loss insured against the assured is merely complying with his statutory (and contractual) duty.<sup>52</sup> In other words, it should not be considered “unjust” for an insurer to benefit from an exercise of a duty owed to him.<sup>53</sup> Thus, it does not appear possible for the assured to base his right to reimbursement of the incurred sue and labour expenses on the unjust enrichment doctrine.<sup>54</sup>

However, there is a number of other strong arguments in favour of the existence of an implied right to reimbursement. Firstly, in the absence of an implied right to reimbursement of the incurred sue and labour expenses, the assured is denied full indemnification under the insurance policy. Secondly, if Section 78(1) of the MIA 1906 implies a right to reimbursement into any express sue and labour clause, it seems to be correct to imply the same right in the event that the duty to sue and labour is only required by law, i.e., by Section 78(4) of the MIA 1906. Another argument in favour of the implied character of the second component of a full sue and labour clause is based on analogy with the doctrine of mitigation in general contract law<sup>55</sup>, where the innocent party benefits from having exercised its duty to mitigate the consequences of a breach of contract, by being reimbursed for the expenses reasonably incurred.<sup>56</sup>

In an Australian case heard by the Supreme Court of New South Wales *Emperor Goldmining Co Ltd v Switzerland General Insurance Co Ltd*<sup>57</sup>, where no sue and labour clause was contained in the policy, it was held that sue and labour expenses can be recovered when incurred pursuant to Section

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<sup>48</sup> Marks Cohen, Michael, Particular Charges in Carriage of Goods by Sea and Marine Cargo Insurance, L.M.C.L.Q. 2004, 4(Nov), 453, p.458.

<sup>49</sup> 1971 Directors of The Columbia Law Review Association, Inc. Allocation of the Costs of Preventing an Insured Loss. 71 Colum. L. Rev. 1309, p. 5.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> MacDonald Eggers, Peter, Sue and Labour and Beyond: the Assured's Duty of Mitigation, L.M.C.L.Q. 1998, 2(May), pp. 241-242.

<sup>53</sup> Rose, F.D., Marine Insurance: law and practice (2004), London; Singapore: Lloyd's of London Press, p. 383.

<sup>54</sup> MacDonald Eggers, Peter, Sue and Labour and Beyond: the Assured's Duty of Mitigation, L.M.C.L.Q. 1998, 2(May), p. 242.

<sup>55</sup> For more on the mitigation of loss and its interrelation with the duty to sue and labour see Chapter 3.1.

<sup>56</sup> For a closer analysis of these and some additional arguments in favour of an implied right to reimbursement see: Bennett, Howard, The Law of Marine Insurance (2nd edition) 2006, Oxford: Oxford University Press, pp. 755-756.

<sup>57</sup> *Emperor Goldmining Co Ltd v. Switzerland General Insurance Co Ltd* [1964] 1 Lloyd's Rep 348.

78(4) of the MIA 1906. The contrary view was adopted by the Court of Appeal in *Integrated Container Service Inc v British Traders Insurance Co Ltd*<sup>58</sup>, however, in the first instance judgement<sup>59</sup> it was referred to a statement in an earlier case that in the absence of an express sue and labour clause, the sue and labour expenses should nevertheless be recoverable from the insurer in the event that implying such right to reimbursement is necessary to give business efficacy to the contract.<sup>60</sup> Similarly, in *International Commodities Export Corp. v. American Home Assurance Co.*<sup>61</sup> it was said that:

[A] court may apply equitable principles to require that a marine insurer who benefits from an assured's efforts shall reimburse the assured for some of the costs.

It can be concluded here that the formulations of Section 78(1) and Section 78(4) of the MIA 1906 create little doubt as to the implied character of the duty to sue and labour, whereas the existence of the assured's right to reimbursement for the incurred sue and labour expenditure remains unclear as it is seen from the converse judicial decisions.

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<sup>58</sup> *Integrated Container Service v. British Traders Insurance Co* [1984] 1 Lloyd's Rep. 154.

<sup>59</sup> *ICS v. BTI* [1981] 2 Lloyd's Rep. 460, 465.

<sup>60</sup> Gauci, Gotthard The obligation to sue and labour in the law of marine insurance – time to amend the statutory provisions? Part 1, I.J.O.S.L. 2000, 1(Mar) 2-10, p. 7.

<sup>61</sup> *Commodities Reserve Co. v. St. Paul Fire & Marine Ins. Co.*, 879 F.2d 640 (9th Cir.1989), 417 - 418.

### **3 Distinguishing sue and labour expenses from other charges**

For a thorough understanding of the sue and labour clause it is necessary to distinguish between the duty to sue and labour and other seemingly similar notions, namely, mitigation of loss known in the general contract law as well as different efforts to rescue maritime property. While mitigation of loss has a very similar name to the minimization of loss required under the sue and labour clause, several types of attempts to rescue maritime property share the same broad objective as the duties taken by the assured when exercising his duty to sue and labour.

#### **3.1 Mitigation of loss in the general contract law and the doctrine of causation**

There is a certain degree of similarity between the duty of assured to sue and labour and the duty of the innocent party to the contract to mitigate loss arising out of that breach. In contract law generally the innocent party is entitled to damages, however, such loss that could have been reasonably avoided will not fall within the damages recoverable from the party in breach. An innocent party, who has suffered a breach of contract, will be liable to mitigate its damages, that is, to take steps to avoid or minimize its loss.<sup>62</sup> For example, in conformity with the above mentioned duty is not entering into any contractual relationship regarding a sale of the subject-matter clearly unavailable due to the other party's breach of contract. If, in contrary, the innocent party enters into such contractual relationship, any sums (contractual fines, interest, etc.) payable by the innocent party under that new contract will not be recoverable as damages from the party in breach of the original contract.

It is important to notice, that the mitigation of loss is not an obligation, but rather a condition of the innocent party's right to claim damages for the particular loss incurred. Thus, it is said that mitigation of loss is not a duty but a liberty that the innocent party enjoys. The consequence of non-mitigation of loss is that no claim for damages can be based on the subsequently suffered loss, since the choice not to mitigate cannot be made at the expense of the party in breach of the contract.<sup>63</sup>

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<sup>62</sup> Bennett, Howard, *The Law of Marine Insurance* (2nd edition) 2006, Oxford: Oxford University Press, pp. 750 -751

<sup>63</sup> *Ibid.*

The principle of mitigation of loss is closely linked with the doctrine of causation, according to which, if the loss was avoidable but it nevertheless was not avoided, it cannot be considered as having resulted from the breach of contract and it therefore is not recoverable. There have even been attempts expressed in the legal literature to assimilate the doctrine of mitigation of loss into the doctrine of causation to the effect that “there is no duty to mitigate, but merely a principle of causation”.<sup>64</sup>

It seems so far that the duty to sue and labour and the duty to mitigate loss are not completely separable. It is, however, possible to distinguish these duties. The duty to mitigate loss arises, when the breach of contract occurs and is known to the innocent party and not before that. The duty to sue and labour, in its turn, may arise much earlier, i.e., before the insured peril begins to operate but when it is obvious that it will start to operate (the time when the duty to sue and labour arises under the H&M and P&I insurances is discussed in Chapter 7.3). It is also important to highlight here that under an insurance contract, the loss is the breach, while under the general contract law the loss is the consequence of the breach.<sup>65</sup>

Taking into account the above stated, it can be said that despite the fact that both the duty to sue and labour and the doctrine of mitigation of loss are designed to diminish the loss to be indemnified by the party at the breach of contract (be it the insurer under the insurance contract or another party to a different contract),<sup>66</sup> these two duties can and should be distinguished due to the differences in the ways they operate in their respective areas of the contract law.

## **3.2 Different types of rescuing maritime property**

English marine insurance law, as codified in the MIA 1906, categorises different types of effort to rescue maritime property under separate headings even though they are all performed for virtually the same objective. There are separate provisions in the MIA 1906 on the sue and labour charges, general average losses and salvage charges. Also “particular charges” are used in the MIA 1906. The crucial differences between the sue and labour charges and other above mentioned charges and losses are further identified.

### **3.2.1 General average losses**

Section 78(2) of the MIA 1906 states:

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<sup>64</sup> MacDonald Eggers, Peter, Sue and Labour and Beyond: the Assured’s Duty of Mitigation, L.M.C.L.Q. 1998, 2(May), p. 235.

<sup>65</sup> *Ibid*, p. 236.

<sup>66</sup> *Ibid*, p. 239.

General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

In accordance with the above cited provision general average losses and contributions together with the so-called “pure salvage” charges are recoverable as usual insured losses, rather than as sue and labour costs.<sup>67</sup> One legal author, however, is of the opinion that the two mentioned types of expenditure can easily become sue and labour charges. Thus, it is alleged that in the modern English law the insurer’s liability for salvage is generally treated as sue and labour charge rather than as an insured loss. Similarly, contractual salvage charges incurred for the benefit of the common adventure qualify as general average losses and they therefore become recoverable as an insured loss and not as sue and labour expenditure.<sup>68</sup> However, apart from reading Section 78(2) of the MIA 1906 there is another way of distinguishing general average losses from the sue and labour charges. The key element for these purposes lies in the objective of the general average act.

Sue and labour expenses are always incurred by the assured (or his agents) for the purpose of saving his own property from loss by a peril insured against. In contrary, where several interests are imperilled and the expenditure is made for the common benefit of those interests, such expenses cannot be sue and labour charges.<sup>69</sup> Instead, such expenses are general average losses.

Despite this seemingly simple way of separating the two notions, in practice it is often difficult to draw a distinction between the sue and labour charges and general average losses when certain services are rendered to the vessel and both the H&M and P&I insurers’ interests become involved.<sup>70</sup> These difficulties are discussed in more detail in Chapter 5.

### 3.2.2 Salvage charges

Section 65(2) of the MIA 1906 defines “salvage charges” as:

[...] the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges

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<sup>67</sup> Rose, F.D., *Marine Insurance: law and practice* (2004), London; Singapore: Lloyd’s of London Press, p. 375.

<sup>68</sup> *Ibid*, p. 375.

<sup>69</sup> Cooke, Julian and Cornah, Richard (eds.) *Lowndes and Rudolf: the Law of General Average and the York-Antwerp Rules* (13th edition) 2008 London: Sweet & Maxwell, pp. 280-281; Rave, Donald T. and Tranchina, Stacey, *Marine Cargo Insurance: An Overview*, 66 *Tul. L. Rev.* 371, pp.7-8.

<sup>70</sup> Ribble, Stephen V., *A Juxtaposition of Hull and Protection & Indemnity Coverages*, 83 *Tul. L. Rev.* 1189, pp.13-14.

or as a general average loss, according to the circumstances under which they were incurred.

Thus, only the charges for the pure salvage services fall within the scope of “salvage charges” and not the salvage charges for the services rendered based on Lloyd’s Open Form or another form of agreement with the salvor. The so-called “contractual salvage charges”<sup>71</sup>, in their turn, are recoverable as particular charges or as a general average loss. Sue and labour expenses include such sums payable for the contractual salvage services in the event that they are recoverable as particular charges.<sup>72</sup>

Another element distinguishing salvage charges from sue and labour costs is the fact that, unlike for the recovery of the former type of expenditure, success of the measures taken is not necessary for the existence of the right to recovery of the incurred sue and labour costs.<sup>73</sup>

The practical importance of distinguishing the sue and labour charges from pure salvage charges is that the former charges can be recovered in addition to a total loss (at least under the H&M insurance) while the latter charges cannot.<sup>74</sup> The supplementary nature of the sue and labour clause is further discussed in Chapter 7.1.

### 3.2.3 Particular charges

The term “particular charges” is explained in Section 64(2) of the MIA 1906:

Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges.[...]

There are different types of particular charges, depending on whether the loss averted or minimized was insured against or not. Those particular charges incurred with regard to an insured loss, are sue and labour costs. It can therefore be said that sue and labour costs are not synonymous to particular charges. Instead, sue and labour expenses constitute a form of particular charges.<sup>75</sup>

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<sup>71</sup> Such term serves the purpose of distinguishing the charges incurred for a contractual salvage from the “salvage charges” used in the MIA 1906 to describe pure salvage charges. Rose, F.D., *Marine Insurance: law and practice* (2004), London; Singapore: Lloyd’s of London Press, p. 375.

<sup>72</sup> *Ibid*, p. 375.

<sup>73</sup> Rose, F.D., *Marine Insurance: law and practice* (2004), London; Singapore: Lloyd’s of London Press, p. 398.

<sup>74</sup> Riblé, Stephen V., *A Juxtaposition of Hull and Protection & Indemnity Coverages*, 83 *Tul. L. Rev.* 1189, pp. 13.

<sup>75</sup> Marks Cohen, Michael, *Particular Charges in Carriage of Goods by Sea and Marine Cargo Insurance*, *L.M.C.L.Q.* 2004, 4(Nov), 453, pp.456-457.

In the event that certain particular charges are incurred in relation to an uninsured peril, they do not constitute sue and labour costs. It is clear from Section 78(3) of the MIA 1906 which states that:

Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

The importance of distinguishing sue and labour expenses from other particular charges lies in the fact that the duty of the insurer to reimburse the assured for the incurred sue and labour expenses is (even though there is currently no uniformity amongst the judicial decisions regarding this issue) implied under the English law, while reimbursement of other particular charges is purely voluntary, in other words, only when such duty is expressly provided for in the contract.<sup>76</sup> The existence of an implied duty to reimburse the assured for the sue and labour costs is discussed above in Chapter 2.2.2.

“Particular charges” is often used interchangeably with “special charges”. However, it has been suggested in the legal literature that the mentioned terms are not synonymous. It was proposed that the former should be reserved for payments by insurers under insurance policies, and the latter - for payments by cargo owners under contracts of carriage.<sup>77</sup>

Now, when the general nature of the statutory duty to sue and labour is examined as well as it is distinguished from other similar notions of relevance to marine insurance, the contractual duty to sue and labour needs to be discussed with a focus on the H&M and P&I insurances.

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<sup>76</sup> Marks Cohen, Michael, Particular Charges in Carriage of Goods by Sea and Marine Cargo Insurance, L.M.C.L.Q. 2004, 4(Nov), 453, p.458.

<sup>77</sup> *Ibid*, p.459.

# 4 The contractual duty to sue and labour in the context of H&M and P&I insurances

Since the operation of the sue and labour clause in the H&M and P&I insurances may be influenced by the nature of the risks covered by these two types of covers, it is necessary to outline their character as well as to demonstrate the way the sue and labour clause is incorporated into the most widely used H&M forms and P&I Club Rules.

## 4.1 Sue and labour clause and H&M insurance

First, the nature of the H&M insurance cover needs to be considered and the form in which the duty to sue and labour is imposed on the assured by the H&M policies.

### 4.1.1 The scope of the H&M insurance cover

H&M policy is a "property cover" that provides the assured with an insurance against physical loss or damage to the vessel,<sup>78</sup> i.e., its purpose is to insure the vessel's hull and its gear.<sup>79</sup> The assured under the H&M insurance contract can be the owner of the vessel, its operator, or other person with an insurable interest in the vessel.<sup>80</sup>

The H&M policy is a policy of indemnity<sup>81</sup> and it thus indemnifies the assured against physical loss or damage to the vessel proximately caused by the covered perils sated in the policy. The H&M policy also indemnifies the assured for the expenses incurred in repairing or replacing the insured vessel, which was damaged, destroyed, or lost because of a covered peril. General loss and salvage charges resulting from a covered peril are also covered under the H&M policy. However, only pure salvage charges are covered under the H&M policy's "general average and salvage" clause.<sup>82</sup>

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<sup>78</sup> Lemon, Robert T., Allocation of Marine Risks: An Overview of the Marine Insurance Package 81 Tul. L. Rev. 1567, p. 2.

<sup>79</sup> Ribble, Stephen V., A Juxtaposition of Hull and Protection & Indemnity Coverages, 83 Tul. L. Rev. 1189, p.7.

<sup>80</sup> Lemon, Robert T., Allocation of Marine Risks: An Overview of the Marine Insurance Package 81 Tul. L. Rev. 1567, p. 2.

<sup>81</sup> Knudsen, Jean E., The hull policy today: thoughts from the claims world. Admiralty Law Institute Symposium: A Sea Chest for Sea Lawyers Article, 75 Tul. L. Rev. 1597, p. 11.

<sup>82</sup> Lemon, Robert T., Allocation of Marine Risks: An Overview of the Marine Insurance Package 81 Tul. L. Rev. 1567, p. 2.

For the purpose of this thesis the main characteristic of the H&M policy is that it reimburses the assured for his reasonable expenses incurred in attempting to avert or minimize an insured loss.<sup>83</sup> Sue and labour expenses covered under the H&M policy are those expenses incurred by the assured in averting or minimizing an otherwise insured loss, thereby reducing the H&M underwriter's liability. Therefore, for the assured to be able to recover the incurred sue and labour expenses, the averted or minimized loss has to be attributable to a peril covered under the H&M policy.<sup>84</sup>

#### **4.1.2 Sue and labour clause in the H&M insurance forms**

Apart from the statutory duty to sue and labour imposed on the assured by Section 78(4) of the MIA 1906, in the H&M insurance there is also a contractual duty to the same effect. The objective of such contractual clause is “not to introduce any obligations or rights not otherwise existing in law but simply to give expression to existing obligations and rights”<sup>85</sup>. The Institute Time Clauses (Hulls) 1995 and the Institute Voyage Clauses (Hulls) 1995 contain an identical sue and labour clause called “Duties of Assured (Sue & Labour)” in the former and “Duty of Assured (Sue and Labour)” in the latter. Clause 11.1 and Clause 9.1 respectively read as follows:

In case of any loss or misfortune it is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance.

Sue and labour clause is also contained in the International Hull Clauses 2003 and is called “Duty of the Assured (Sue and Labour)”<sup>86</sup>. The wording of Clause 9.1 of the International Hull Clauses 2003 is identical to the cited above, however, contrary to the Institute Clauses 1995, reference to under-insurance is omitted.<sup>87</sup> This fact introduced a significant change in the H&M industry which is valued very positively by the experts in the field.<sup>88</sup> The details and the importance of the innovation in the operation of the sue and labour clause in the event of under-insurance is discussed in Chapter 8.

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<sup>83</sup> Lemon, Robert T., Allocation of Marine Risks: An Overview of the Marine Insurance Package 81 Tul. L. Rev. 1567, p. 2.

<sup>84</sup> *Ibid*, p.3.

<sup>85</sup> Rose, F.D., Failure to Sue and Labour, J.B.L. 1990, May, 190-202, p. 6.

<sup>86</sup> Clause 9 of the International Hull Clauses 2003.

<sup>87</sup> For full sue and labour clauses incorporated into the Institute Clauses 1995 and the International Hull Clauses 2003 see supplement A.

<sup>88</sup> For example, Silver, Paul, International Hull Clauses 2003, S. & T.L.I. 2003, 4(3), pp. 12 - 13.

## 4.2 Sue and labour clause and P&I insurance

Now the nature of the P&I insurance needs to be looked at and the way in which the duty to sue and labour is imposed on the assured<sup>89</sup> by the P&I Club Rules.

### 4.2.1 The scope of the P&I insurance cover

P&I insurance cover is nowadays known as a type of insurance cover of its own. However, it may still be considered as an insurance cover designed to fill the gaps left by the H&M insurance and therefore excluding losses which normally would be insured under the H&M insurance policy. To this effect, P&I Club Rules exclude any liability in respect of sums insurable under the H&M policies using the clauses known as “escape” clauses, “non-contribution” clauses or “other insurance” clauses.<sup>90</sup> Moreover, the amount of coverage provided by the particular H&M policy is immaterial for determination of the P&I cover,<sup>91</sup> since all that matters is the coverage usually provided by the H&M underwriters. P&I club will therefore not be liable for any losses, expenses or liabilities regarding the insured vessel which would be covered by the H&M insurance had the assured at all times been insured under a standard H&M policy.<sup>92</sup> Also excluded from the P&I cover is liability which would not be recoverable under H&M policy by reason of deductible or similar quantitative limitation in the H&M policy.<sup>93</sup> With respect to collision liability, P&I club covers collision liability only to the extent that such collision liability is not covered in the H&M policy.<sup>94</sup>

P&I insurance is said to be an indemnity insurance, and not a liability insurance, although the indemnity provides the assured with liability coverage for 3rd party liability, etc.<sup>95</sup> It should also be noted that unlike the H&M insurers P&I clubs do not issue insurance policies to their assureds. Instead, the details of the insurance cover and other insurance matters are specified in the P&I Club Rules. Even though P&I Club Rules do not equal

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<sup>89</sup> For the purposes of uniformity of the terminology in this thesis “the assured” is used when referring to a member of a P&I club instead of “the member”.

<sup>90</sup> Hazelwood, S.J., *P&I Clubs: law and practice* (3rd edition) 2000, London: Lloyd’s of London Press, p. 255.

<sup>91</sup> Rible, Stephen V., *A Juxtaposition of Hull and Protection & Indemnity Coverages*, 83 *Tul. L. Rev.* 1189, p. 3.

<sup>92</sup> The standard H&M policy acceptable to P&I clubs are those representing the most comprehensive cover such as Institute Time Hulls 1983 or 1995 as well as standard terms of Norway, America and others. See: Hazelwood, S.J., *P&I Clubs: law and practice* (3rd edition) 2000, London: Lloyd’s of London Press, p. 255.

<sup>93</sup> *Ibid*, p. 256.

<sup>94</sup> Lemon, Robert T., *Allocation of Marine Risks: An Overview of the Marine Insurance Package* 81 *Tul. L. Rev.* 1567, p.6.

<sup>95</sup> *Ibid*, p. 6.

to a complete code,<sup>96</sup> they do constitute the general terms of the insurance contract between the P&I club and the assured.<sup>97</sup>

## 4.2.2 Sue and labour clause in the P&I Club Rules

Just like the H&M insurance policies, the P&I Club Rules are subject to the MIA 1906, including its Section 78 which is the most relevant section for the purposes of this thesis. Even though the statutory provisions of the MIA 1906 are largely reflected in the P&I Club Rules,<sup>98</sup> it is useful to look into the duty to sue and labour duty in the three P&I Club Rules chosen for this thesis.

Rule 19(20)(B) of the Britannia Club Rules provides a cover for the assured for:

Losses, costs and expenses necessarily incurred by a Member after an incident in order to avoid or reduce liability or expenditure against which the Member is insured by the Association, even if such losses, costs and expenses would otherwise be excluded by these Rules.

The wording of Rule 19(20)(b) of the Nepia Club Rules is identical to the above cited. Quite similarly, Rule 9.27.1 of the London Club Rules states that the assured is covered for:

Extraordinary costs and expenses [...] reasonably incurred after any casualty, event or matter for the purposes of avoiding or minimising any liabilities, costs or expenses against which the Assured is insured within this Class [...].

Interestingly, in addition to the above cited rules the Britannia Club Rules and the Nepia Club Rules also contain “Mitigation of Loss”<sup>99</sup> rules<sup>100</sup>:

Upon the occurrence of any incident which may give rise to a claim under these Rules, the Member shall take such steps as at the time shall appear proper for the purpose of averting or minimising any loss, damage, expense or liability in respect of which the Member may be insured under these Rules.

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<sup>96</sup> Other documents relevant for the determination of the terms of contract between the P&I club and the assured are: Certificate of Entry, the Articles or Statutes and Memorandum of Association, special arrangements, etc. See: Hazelwood, S.J., P&I Clubs: law and practice (3rd edition) 2000, London: Lloyd’s of London Press, p.55.

<sup>97</sup> *Ibid.*

<sup>98</sup> Martin, Stephen, Marine Protection and Indemnity Insurance: Conduct, Intent, and Punitive Damages, 28 Tul.Mar L.J. 45, p. 4.

<sup>99</sup> The crucial differences between the duty to sue and labour and mitigation of loss are discussed in Chapter 3.1.

<sup>100</sup> Clause 30(2) and Clause 33(2) respectively.

## **5 Distinguishing H&M sue and labour from P&I wreck removal and P&I sue and labour**

Since in the majority of instances the assureds are covered by both the H&M and P&I insurances they are under the duty to take such measures as may be reasonable for the aversion or minimization of the losses insured under the H&M policy as well as the losses that would otherwise fall within the P&I liabilities. There can thus occur certain situations where it is difficult to determine which of the two insurers is under the obligation to reimburse the assured for the particular sue and labour costs. While the assured would prefer to be indemnified for his endeavours to avert or minimize loss by both insurers, sue and labour clause is not designed to make the aversion or minimization of insured losses profitable.

### **5.1 H&M sue and labour and P&I wreck removal**

There are instances where taking measures to avert or minimize loss caused by such H&M insured risks as stranding, grounding as well as some other occurrences falling under the H&M insurer's liability consequently helps to avert or reduce a loss caused by risks covered by the P&I insurance. Such risks assumed by the P&I club can range from pollution to the vessel becoming a wreck. The question arises as to which insurer is liable for the reimbursement of the assured for such sue and labour costs and how far does the "chain of probability" that a certain loss would have happened stretch. Over the years the courts have scrutinised the issue of distinguishing between the sue and labour costs for the preservation of the hull and the costs of the aversion or minimization of wreck removal liability.

One of the differences between the H&M sue and labour and P&I wreck removal liability lies in the very purpose of the respective H&M insurance clause and P&I Club Rule. The purpose of the sue and labour clause in the H&M policy is to create an incentive for the assured to protect and preserve the hull after an incident in order to minimize the insurer's exposure to the consequent financial loss. Wreck removal Rule in the P&I insurance, in its turn, is not intended to create such encouragement. It is best illustrated by the fact that even if the assured let the wreck deteriorate beyond its value he would still retain the right to recovery of the full cost of the wreck removal. It can therefore be concluded that the focus of the sue and labour clause is

the minimization of the loss for the H&M insurer, while wreck removal Rule concerns itself with minimizing public hazards as directed by law.<sup>101</sup>

It is further necessary to highlight that the intention of the assured to benefit certain insured interests, in other words, the subjective end, is irrelevant for the purposes of determining which underwriter is liable for so incurred costs. To the contrary, the court will examine the measures taken while rescuing the vessel from an objective point of view without taking into consideration the intent of the assured. An American case clearly demonstrates the inapplicability of the subjective factor to the issue in question. In *Quigg Bros.-Schermer*<sup>102</sup>, a situation was considered where two barges were grounded and the assured promptly secured, repaired, and towed the barges back to their berth. The assured claimed reimbursement for the wreck removal expenses from his P&I club. Even though the assured argued that he only intended to avoid the P&I insurer's liability and not to repair and recover the vessels, the court concluded that such subjective intent did not determine the type of the incurred expenses. Securing, repairing and towing expenses were therefore held to be collectible as the H&M sue and labour costs.<sup>103</sup>

Since the intention of the assured does not determine whether the particular costs are attributable to the H&M sue and labour costs or to the P&I wreck removal expenses, the actions taken to rescue the vessel will fall within the H&M sue and labour costs as will any expenditure incidental thereto. In the event that the H&M insurer is of a view that the sue and labour expenses were not incurred for salvaging the vessel but rather for the aversion or minimization of the P&I insurer's wreck removal liability, the burden of proof will lie on the H&M underwriter.<sup>104</sup> Not only will the H&M insurer have to prove that the vessel would have become a wreck, which is determined by the court depending on different interpretations<sup>105</sup>. In addition to that, the H&M underwriter will also have to bear in mind that the P&I insurance only covers liabilities, costs and expenses incurred in respect of wreck removal where it is compulsory by law.<sup>106</sup> Where the law does not impose such requirement and the assured undertakes to remove the wreck, the liability for such expenses may fall under the H&M policy as sue and labour costs.<sup>107</sup> Therefore, the H&M insurer, in order to shift the duty to indemnify the assured for the incurred sue and labour costs would have to demonstrate that had the vessel become the wreck, its removal would have

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<sup>101</sup> Rible, Stephen V., A Juxtaposition of Hull and Protection & Indemnity Coverages, 83 Tul. L. Rev. 1189, p.7.

<sup>102</sup> *Quigg Bros.-Schermer* 2000 A.M.C. 2822.

<sup>103</sup> Rible, Stephen V., A Juxtaposition of Hull and Protection & Indemnity Coverages, 83 Tul. L. Rev. 1189, p.8.

<sup>104</sup> In the event that the assured's H&M insurance cover has ceased, the burden of proof lies on the assured. See: *Ibid*, p. 9.

<sup>105</sup> *Ibid*, p.7.

<sup>106</sup> The same applies to the costs of raising, destruction, lighting and marking of the wreck. See, for example, Nepia Club Rule 19(14).

<sup>107</sup> Lemon, Robert T., Allocation of Marine Risks: An Overview of the Marine Insurance Package 81 Tul. L. Rev. 1567, p.7.

been required by law. Taken the complexity of such a heavy burden of proof it is possible to agree with the commentator who stated that under such circumstances courts will not be generous in finding P&I insurance coverage.<sup>108</sup>

Some American judicial decisions illustrate how certain circumstances of the particular incident lead to a conclusion on whether the incurred expenses are classifiable as the H&M sue and labour or P&I wreck removal costs. In *Zurich Insurance Co. v. Pateman*<sup>109</sup>, the federal district court held that removal of a fishing boat from a channel was not undertaken to preserve the ship's hull since at the time of effectuating the removal the boat was a total or constructive total loss. The costs of the removal were therefore recoverable from the vessel's P&I club under the wreck removal clause. Interestingly, the decision was not influenced by the fact that the H&M insurer solicited bids to restore the boat after its removal from the channel. In the view of the court, these actions were merely the insurer's "attempts to mitigate damages".<sup>110</sup>

In *American Home Assurance Co. v. Fore River Dock & Dredge, Inc.*<sup>111</sup>, the court had to consider whether certain costs and expenses, arising from the grounding of two vessels were recoverable under the P&I cover. Compulsory wreck removal had to be done in the mentioned case and the P&I club contracted services of a salvage company to carry out the removal as well as it covered the costs thereof. The assured, however, had incurred additional expenses for, amongst other, wreck stabilization and security services for the two grounded vessels and argued that these costs were incidental to the wreck removal and thus were to be covered under the P&I wreck removal Rule. The court considered the expenditure for wreck stabilization and security measures, as the measures taken to preserve the vessels' hull and they were therefore held to be recoverable as the H&M sue and labour costs. The assured's argument that security services were intended to protect and secure the wrecks and to prevent the public from the unsafe wrecks' site was not supported by the court. The subjective intent of the assured was irrelevant to the outcome of the dispute since the employment of the objective criterion showed that security measures were provided in order to protect the vessel.<sup>112</sup>

It therefore appears that the nature of the assured's expenditure has to be analysed from the objective point of view in order to determine whether the costs were incurred for the preservation of the vessel's hull or for the aversion or minimization of a liability covered by the P&I club. Indirect benefit of the P&I insurer in the event that the hull is saved and thus

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<sup>108</sup> Rible, Stephen V., A Juxtaposition of Hull and Protection & Indemnity Coverages, 83 Tul. L. Rev. 1189, p. 9.

<sup>109</sup> 1988 A.M.C. 2813.

<sup>110</sup> Rible, Stephen V., A Juxtaposition of Hull and Protection & Indemnity Coverages, 83 Tul. L. Rev. 1189, p. 8.

<sup>111</sup> *American Home Assurance Co. v. Fore River Dock & Dredge, Inc.* 2004 A.M.C. 2455.

<sup>112</sup> Rible, Stephen V., A Juxtaposition of Hull and Protection & Indemnity Coverages, 83 Tul. L. Rev. 1189, p. 8.

prevented from becoming a wreck only amounts to a hypothesis. Proving that the hull would have become a wreck and the removal of the wreck would have been required by law is a complex task the H&M insurer has to fulfil in order to shift the liability for certain recoverable costs to the P&I club.

## **5.2 H&M sue and labour and P&I sue and labour**

The challenge of distinguishing the H&M sue and labour costs from the P&I sue and labour expenses arises in the event that they are incurred in order to avert or minimize a loss covered under both types of insurance. The only risk shared between the H&M and P&I insurers is the assured's collision liability. Normally, three fourths of such liability are underwritten by the H&M insurer, while the remaining one fourth falls within the P&I cover. Therefore, sue and labour costs incurred in relation to collision liability can qualify as sue and labour costs under both insurance covers. The exposure of each insurer to indemnifying the assured for such sue and labour costs depends on the nature of the particular actions taken for the aversion or minimization of collision liability.

In the event that it is possible to determine that the sue and labour expenditure with respect to collision liability has been made only for the benefit of the H&M insurer, these costs will be solely recoverable from the H&M underwriter up to the insured value of the vessel. Any excess thereof will not be recoverable from the P&I insurer and the assured will thus have to bear such expenses himself. If, on the other hand, the P&I club's Committee<sup>113</sup> considers that the incurred sue and labour expenses are equally benefitting the club, the incurred sue and labour costs will be recovered from the two underwriters in the same proportion as the collision liability itself.<sup>114</sup>

The process of determining which insurer's collision liability is being averted or minimized requires a thorough examination of all specific circumstances of the incident. Litigation process for the apportionment of the liability for the sue and labour costs between the H&M and the P&I insurers can be time-consuming and expensive. It can therefore be assumed that the H&M insurer will only endeavour to limit his sue and labour liability to three quarters of such expenses in the event that a high value vessel has been fully insured under the particular H&M policy and the assured's sue and labour expenses in relation to collision liability equal to or exceed such value. In such situation limitation of the H&M insurer's liability to three fourths of the insured value of the vessel will save him one fourth of such value.

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<sup>113</sup> For the purposes of consistency in this thesis the term "Committee" is used also to refer to Managers or Directors of the P&I club, depending on the particular P&I Club Rules.

<sup>114</sup> Based on personal communication with Graham Anderson, Manager of the Nepia Club.

In the event that the sue and labour costs were incurred in order to avert or minimize collision liability of a low value (or a low insured value) vessel or if the amount of the incurred sue and labour expenses is significantly lower than the insured value of an high-priced vessel, the H&M insurer is likely to indemnify the assured for such expenditure without seeking to share such liability with the P&I club.<sup>115</sup> Firstly, avoiding liability for one fourth of the low insured value of the vessel would not constitute a considerable saving for the H&M underwriter and, secondly, the litigation process may result in a bigger expenditure than the liability that is sought to be avoided.

In any event, the Committee can in its sole discretion decide whether the incurred sue and labour costs were to any degree incurred for the benefit of the club. In the event that the Committee comes to a positive answer to the posed question the assured may recover up to the full amount of the incurred sue and labour expenses in excess of those covered by the H&M insurer.

It has to be noted that the difficulties described above do not arise in every claim under the H&M policies or under the P&I Club Rules since, taken the distinct natures of the two covers, it is generally possible to determine for the benefit of which insurer sue and labour costs were incurred. It is therefore now necessary to proceed to the identification of the common and the dissimilar elements in the practical operation of the contractual duty to sue and labour under the H&M policies and in accordance with the P&I Club Rules.

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<sup>115</sup> H&M insurer is only liable for the sue and labour expenses up to the insured value of the vessel. For more details see Chapter 7.1.

# 6 The common elements of the duty to sue and labour in H&M and P&I insurances

From the largely similar wordings of the sue and labour clause under the H&M insurance forms and the corresponding Rules in the P&I Club Rules it is possible to detect certain analogies between them. There are certain pre-conditions for the costs incurred by the assured to qualify as the sue and labour expenditure and for their recoverability from the insurer that are equally demanded under both the H&M and P&I insurance covers.

## 6.1 An insured loss

One of the main requirements for the costs of aversion or minimization of loss to qualify as sue and labour expenses is that they have to be incurred in relation to an insured loss. Not only is this pre-condition to recovery of any aversion or minimization costs inferable from the sue and labour clauses in the H&M insurance forms and the P&I Club Rules but there is also a statutory provision to this effect. Section 78(3) of MIA 1906 equally applicable to both the H&M and P&I insurance industries states:

Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

Thus, if the assured suffers expenditure directed towards avoiding or minimizing an uninsured risk, such expenses will not qualify as sue and labour expenses. Similarly, if a breach of a statutory duty, including incurrance of any unreasonable sue and labour expenses, constitutes the proximate cause of the loss and it is not covered by the policy, the loss resulting from such breach will not be recoverable from the insurer.<sup>116</sup>

It is possible that the expenses for the aversion or minimization of loss were incurred in part to avert or minimize an insured loss and in part to avert or minimize an uninsured loss. In such event liability for the sue and labour expenses is apportioned between the assured and the insurer.<sup>117</sup> However, if the expenses were incurred to avert a covered loss, no apportionment is required merely because they serve also to avert an uncovered loss.<sup>118</sup>

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<sup>116</sup> MacDonald Eggers, Peter, Sue and Labour and Beyond: the Assured's Duty of Mitigation, L.M.C.L.Q. 1998, 2(May), p. 233.

<sup>117</sup> *Kuwait Airways Corp v. Kuwait Insurance Co SAK (No.1)* [1999] 1 Lloyd's Rep. 803.

<sup>118</sup> Bennett, Howard, *The Law of Marine Insurance* (2nd edition) 2006, Oxford: Oxford University Press, p. 757.

Despite the above mentioned mechanism of indemnifying the assured for the incurred costs depending on whether the loss to be averted or minimized is covered or not, in practice it is often difficult to determine, what risk are the expenses intended to avoid or lessen. This is where the proximate cause doctrine comes into play. However, due to the supplementary nature of the sue and labour clause, some authors find the applicability of the causation rule in its respect questionable.<sup>119</sup> The supplementary nature of the sue and labour clause is discussed in Chapter 7.1.

## 6.2 Extraordinary expenditure

Under both the H&M and P&I insurance covers the costs incurred by the assured need to be of an extraordinary nature to be considered as sue and labour expenditure. Therefore usual expenses incurred by the assured in order to make the insured vessel seaworthy alongside with the ordinary operational expenses necessary to proceed with the voyage will fail to qualify as sue and labour costs. Equally, expenses merely incurred after an insured peril are not sue and labour expenses, except when they are genuinely incurred in order to avert or minimize an insured loss. Consequently, costs for repairing the damaged vessel after an insured incident do not amount to sue and labour expenditure.<sup>120</sup> If such ordinary expenses were recoverable from the insurers, all costs of maintaining the vessels would have been shifted from the assureds to the underwriters, which is contrary to the very purpose of insurance.

Sue and labour costs are not limited to payments made for certain rescue services or other out-of-pocket expenses. Expenditure for the suing and labouring purposes can also take a form of a waiver of a valuable right or, alternatively, ransom. Moreover, also the payment of ransom could be either in cash or as a waiver of a claim.

The difficulty with a waiver of claim being treated as sue and labour expenditure is that the waiver has to be “a real loss and not a notional loss”<sup>121</sup>. In other words, if it is merely probable that the assured’s waived claim would otherwise be granted as a result of litigation or arbitration, such expenditure does not amount to sue and labour costs. Another peculiarity regarding the waiver of a claim as the sue and labour expenditure is that there will be no effective loss caused by waiver of claims when the waiver demand is made on the grounds of duress and is in itself illegal.<sup>122</sup> Interestingly, Rule 18.2 of the London Club Rules imposes a duty on the assured not to grant any waiver in respect of liabilities, costs and expenses

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<sup>119</sup> Bennett, Howard, *The Law of Marine Insurance* (2nd edition) 2006, Oxford: Oxford University Press, p. 759.

<sup>120</sup> Rose, F.D., *Marine Insurance: law and practice* (2004), London; Singapore: Lloyd’s of London Press, p. 398.

<sup>121</sup> Gauci, Gotthard *The obligation to sue and labour in the law of marine insurance – time to amend the statutory provisions?* Part 1, *I.J.O.S.L.* 2000, 1(Mar) 2-10, pp. 3-4.

<sup>122</sup> Curzon, Margaret, *Ransom by Waiver of Claims – Sue and Labour?* *I.J.O.S.L.* 1998, 1(Mar), pp. 49-51.

for which he is insured without prior consent from the club in writing. It may therefore appear that this Rule makes it impossible for the assured to recover any expenses incurred in a form of a waiver under the sue and labour provisions. These concerns are, however, eliminated by the wording of the sue and labour Rule of the London Club Rules which makes the recovery of the sue and labour costs conditional upon an approval of the club or determination by the Committee that the costs should be recovered. Therefore, if a waiver of a valuable right is approved by the club or, alternatively, it is subsequently considered as having been reasonable, such expenses may be recovered as sue and labour costs.

In respect of ransom, it was held by The Court of Appeal in *Royal Boskalis Westminster & Others v. Trevor Rex Mountain & Others*<sup>123</sup> that it could, in principle, qualify as sue and labour expenditure. The ransom in the mentioned case took a form of waiver of claim demanded by the Iraqis for permitting the assured's fleet and personnel to leave Iraq. Thus in *Royal Boskalis* the Court of Appeal acknowledged that a ransom may be recovered under the sue and labour clause and that such expenditure can be measured either as a cash payment or as a waiver of valuable contractual claims.<sup>124</sup> It should also be noted here that some P&I Club Rules contain a sub-Rule regarding recovery of ransom demands or extortion. Thus Britannia Club Rule 19(20)(iv) states:

losses, costs and expenses arising from or related to ransom demands or extortion shall be recoverable only to such extent as the Committee may determine.

## 6.3 Reasonableness of the expenditure

In Section 78(4) of the MIA 1906 the word "reasonable" is employed in relation to the sue and labour measures to be taken by the assured. The Institute Clauses 1995 and the International Hull Clauses 2003 similarly refer to measures "reasonably taken". The descriptions of the required sue and labour steps vary among different P&I Club Rules. Nepia Club Rules and Britannia Club Rules use "losses, costs and expenses necessarily incurred" while the London Club Rules utilize "extraordinary costs and expenses reasonably incurred". However, all the mentioned provisions, whether statutory or contractual, require the extraordinary expenses incurred by the assured in order to avert or minimize an insured loss to pass the so called "reasonableness test".

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<sup>123</sup> *Royal Boskalis Westminster NV v. Mountain* [1999] Q.B. 674.

<sup>124</sup> MacDonald Eggers, Peter, Sue and Labour and Beyond: the Assured's Duty of Mitigation, L.M.C.L.Q. 1998, 2(May), p. 230, footnote nr. 13.

The reasonableness test is said to be an objective one.<sup>125</sup> In *Integrated Container Service Inc. v. British Traders Insurance Co. Ltd*<sup>126</sup> Eveleigh J. Stated that:

it would be wholly unreasonable to penalize an assured upon the basis that, while he has shown that a reasonable man would have done as he did, yet in the light of all that has transpired the loss would not, as we now know, have been probable.

Thus, irrespective of whether the expenses incurred by the assured appear to have been unnecessary after the imminence of the peril is no longer in existence, such expenses are still recoverable as long as their incurrence was reasonable at the very time they were incurred.

It should also be noted that, unlike in salvage award, there does not have to be success in the aversion or minimisation of loss for the assured to be able to get reimbursement from the insurer.<sup>127</sup> In *Kuwait* it has been stated that the assured's right to reimbursement is linked to the reasonableness of the incurred expenses to avert or minimize a loss insured against and not to the success of the measures taken.<sup>128</sup> Therefore, even if the sue and labour costs incurred turn out not to have contributed to lessening the harmful effect of the insured peril, it does not affect the assured's right to reimbursement. Moreover, the assured does not have to prove that without the incurred sue and labour expenses the loss would very probably have occurred. It is only necessary to show that there was a risk that would have been borne by the insurer.<sup>129</sup>

The assured's claim for reimbursement of the incurred sue and labour costs will fail in the event that the measures he took for the aversion or minimization of an insured loss have been illegal or contrary to the public policy. Such sue and labour costs will not be considered as reasonable. If the measures taken are legal, but, instead, they are tainted, it is a matter of fact whether such measures are reasonable so as to entitle the assured to reimbursement.<sup>130</sup>

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<sup>125</sup> Gauci, Gotthard The obligation to sue and labour in the law of marine insurance – time to amend the statutory provisions? Part 1, I.J.O.S.L. 2000, 1(Mar) 2-10, p.5.

<sup>126</sup> *Integrated Container Service v. British Traders Insurance Co* [1984] 1 Lloyd's Rep. 154, 158.

<sup>127</sup> Rose, F.D., *Marine Insurance: law and practice* (2004), London; Singapore: Lloyd's of London Press, p. 398.

<sup>128</sup> *Kuwait Airways Corp v. Kuwait Insurance Co SAK (No.1)* [1999] 1 Lloyd's Rep. 803.

<sup>129</sup> *Integrated Container Service v. British Traders Insurance Co* [1984] 1 Lloyd's Rep. 154, 158.

<sup>130</sup> Rose, F.D., *Marine Insurance: law and practice* (2004), London; Singapore: Lloyd's of London Press, p. 397.

## 6.4 Required standard of conduct

Section 78(1) of the MIA 1906 requires sue and labour expenses to be “properly incurred”. It therefore appears that apart from the expenses themselves having to be reasonable also a certain standard of conduct is required from the assured when incurring those reasonable sue and labour expenses. The assured under the duty to sue and labour is “bound to act reasonably, but not more than reasonably”<sup>131</sup>. It has also been said in the legal literature that Section 78(4) of the MIA 1906 imposes a duty on the assured to act as a reasonable man intending to preserve his property rather than claiming from insurers, would act.<sup>132</sup> Such conduct required from the assured is often characterised as “conduct that might reasonably be expected of a person of normal competence in the circumstances of the peril that occurred”<sup>133</sup>.<sup>134</sup> Moreover, the intention of the assured need not be to benefit the insurer,<sup>135</sup> but simply to avert or minimize a loss to the subject-matter insured.

The standard of conduct required under the sue and labour clause was considered in *The Talisman*<sup>136</sup>. In the mentioned case the vessel sank due to a rapid ingress of water. Upon noticing the ingress the skipper of the vessel made a decision to keep the vessel’s seacocks open in order to allow the pumps to eliminate the water leaving the alternative solution - keeping the seacocks closed - unexecuted. Nevertheless, the vessel was lost. The court had to address the question of whether by failing to close the seacocks and refraining from sending Mayday signal the skipper complied with the standard of conduct under the sue and labour clause. Lord Keith of Kinkel concluded, that:

[W]hile a more knowledgeable individual, viewing the situation dispassionately, might have assessed the likely sources of ingress of water, decided that a seacock was one of the probable sources and acted accordingly, I do not for my part find it possible to hold firmly that any ordinary competent skipper would have acted different from the pursuer.

It is argued by some authors that the issue of the required standard of conduct under the sue and labour clause does not cause any practical

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<sup>131</sup> Rose, F.D., *Marine Insurance: law and practice* (2004), London; Singapore: Lloyd’s of London Press, p. 396.

<sup>132</sup> Soyer, Baris, *Warranties in Marine Insurance* (2001), London; Sydney: Cavendish Publishing, p. 246.

<sup>133</sup> Bennett, Howard, *The Law of Marine Insurance* (2nd edition) 2006, Oxford: Oxford University Press, p. 749.

<sup>134</sup> Such circumstances include the nature of the vessel, the level of qualification needed to command it, the weather conditions, desirability of any assistance, safety of human life, etc. Special consideration has to be made of the higher probability of errors and misjudgements in the emergencies. Rose, F.D., *Marine Insurance: law and practice* (2004), London; Singapore: Lloyd’s of London Press, p. 396.

<sup>135</sup> MacDonald Eggers, Peter, *Sue and Labour and Beyond: the Assured’s Duty of Mitigation*, L.M.C.L.Q. 1998, 2(May), footnote nr. 14.

<sup>136</sup> *Stephen v. Scottish Boatowners Mutual Insurance Association (The Talisman)* [1989] 1 Lloyd’s Rep. 535.

difficulties, since both the H&M policies and P&I Club Rules contain detailed provisions on notifying the insurer upon an occurrence of an insured loss as promptly as possible as well as they provide for the cooperation between the assured and the insurer in minimizing the loss, etc. However, *Bayview Motors Ltd v Mitsui Marine & Fire Insurance Co Ltd*<sup>137</sup> demonstrates that even a close communication between the assured and the insurer as to the ways of minimizing a certain loss does not always prevent subsequent disputes between the parties to the insurance contract. In the mentioned case the insurers argued that the loss occurred due to the assured's non-compliance with his duty to sue and labour by failing to contract lawyers for the legal advice and instigating legal proceedings against a third party. The dispute had arisen even though the insurer's agents had previously regarded such actions as lengthy and fruitless. The required standard of conduct therefore still retains its place among the pre-conditions for making the incurred sue and labour costs recoverable.

## 6.5 Persons under the duty

Section 78(4) of the MIA 1906 imposes a statutory duty to sue and labour not only on the assured but also on his agents. Sue and labour clauses in the Institute Clauses 1995 as well as in the International Hull Clauses 2003 also refer to "the [a]ssured and their servants and agents". It is therefore necessary to establish the range of persons under the duty to sue and labour as well as to determine to whom are they liable for performing this obligation.

While the term "agents" includes crew and master, such formulation does not include independent contractors. The *State of Netherlands v Youell* demonstrates the mentioned exclusion of independent contractors from the group of persons under the duty to sue and labour. In *State of Netherlands v Youell* insurer attempted to resist a claim of the Dutch navy in respect of a defective painting of two submarines built by the shipyard. The insurer based his defence on the basis that the deficiency was occasioned by negligence on the part of the yard amounting to a breach of Section 78(4) of MIA 1906. The Court, however, held that the shipyard could not be considered as the assured's agent for the purposes of the statutory duty to sue and labour. Lord Justice Buxton stated:

[...] it is certainly made explicit in the very first words of Bowstead and Reynolds (16th ed.): Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties... In that formulation, I venture to draw attention in particular to the words "so as to affect his relations with third parties".<sup>138</sup>

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<sup>137</sup> *Bayview Motors Ltd v. Mitsui Marine & Fire Insurance Co Ltd* [2002] 1 Lloyd's Rep. 652.

<sup>138</sup> *State of Netherlands v. Youell* [1998] 1 Lloyd's Rep. 236, 247.

It is suggested by legal scholars that the inclusion of “agents” into Section 78(4) of the MIA 1906 does not aim at making the agents liable to the insurer for failing to sue and labour but rather it protects the insurer from the situations where the assured tries to escape the consequences of non-compliance with his duty to sue and labour by alleging that it was a failure of the master or the crew. The assured has therefore to instruct his agents on the duty to sue and labour as well as he has to take appropriate steps to require the agents to take the sue and labour measures. Such instructions and requirements do not, however, make the assured’s agents and servants liable to the insurer for complying with the sue and labour clause since they are not parties to the insurance contract.<sup>139</sup>

An interesting situation arises when the sue and labour costs are incurred by an insurer who has reinsured the risk undertaken. In such event the primary insurer cannot recover the incurred sue and labour costs from his reinsurer since the primary insurer does not fall within the “agents and servants” of the assured under the duty to sue and labour.<sup>140</sup> Yet, without any doubt, the insurer’s right of reimbursement of the incurred sue and labour expenses from the reinsurer will largely depend on the reinsurance contract concluded.

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<sup>139</sup> Rose, F.D., Failure to Sue and Labour, J.B.L. 1990, May, 190-202, pp. 5-11.

<sup>140</sup> Rose, F.D., Marine Insurance: law and practice (2004), London; Singapore: Lloyd’s of London Press, p. 401.

# 7 The different elements of the duty to sue and labour in H&M and P&I insurances

Notwithstanding the similar components of the duty to sue and labour under the H&M forms and the P&I Club Rules there are a number of issues in relation to the duty and the expenses incurred thereof that are treated differently by the two types of underwriters. These distinct elements have a potential to create a gross disparity between the practical operation of the sue and labour clause in the H&M policies and the respective Rule in the P&I insurance.

## 7.1 Supplementary nature

In H&M insurance, the reimbursement of the sue and labour expenses has always constituted a separate insurance cover above the recoverable limit under the main insurance policy. A provision to this effect is contained both in the MIA 1906 as well as in the most widely used sets of H&M insurance clauses. Section 78(1) of MIA 1906 states:

(1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

As the result of the application of the cited statutory provision, sue and labour costs in the H&M insurance are recoverable on top of the insured value of the vessel under the main insurance contract making the insurer liable for such expenses independent of and in addition to the total value of the policy.<sup>141</sup> The Institute Clauses 1995 and the International Hull Clauses 2003 expressly acknowledge the supplementary nature of the clause in question by stipulating that the sum recoverable as the sue and labour costs “shall be in addition to the loss otherwise recoverable under this (H&M – author’s note) insurance”<sup>142</sup>.

The supplementary nature of the sue and labour clause, however, does not preclude the H&M underwriter from limiting the amount of the recoverable

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<sup>141</sup> 1971 Directors of The Columbia Law Review Association, Inc. Allocation of the Costs of Preventing an Insured Loss. 71 Colum. L. Rev. 1309, p. 3; *Kuwait Airways Corp. and Another v. Kuwait Insurance Company and S.A.K and Others* [1999] 1 Lloyd’s Rep. 803, 816-817.

<sup>142</sup> Clause 11.6, Clause 9.6 and Clause 9.5 of the respective set of clauses.

sue and labour expenditure by an agreement with the assured.<sup>143</sup> Thus, the Institute Clauses 1995 provide for the limitation of the recoverable sue and labour costs equal to “the amount insured under this (H&M – author’s note) insurance in respect of the [v]essel”<sup>144</sup>. The International Hull Clauses 2003 word the limitation of the recoverable sue and labour expenses as “the insured value of the vessel”.<sup>145</sup> Consequently, even in the event that the sum otherwise recoverable under the particular H&M policy reaches the amount insured, the assured is still entitled to reimbursement of the properly incurred sue and labour charges up to the same amount. Essentially, this limits the insurer’s risk under the policy to double of the insured value of the vessel. It must, however, be noted that in such events as the assured’s non-disclosure the insurer is discharged from all liability under the policy, including the sue and labour costs despite the supplementary nature of the clause.<sup>146</sup>

In P&I insurance there are no insurance policy limits as such. Instead, there are limits on each insured risk which seems to indicate that the amount of the recoverable sue and labour expenses is contained in these limits. Consequently, no sue and labour expenses can be recovered by the assured in the event that the maximum amount of a covered loss is reached before the consideration of any sue and labour expenses.<sup>147</sup> Therefore, unlike in the Institute Clauses 1995 and the International Hull Clauses 2003, no express acknowledgement of the supplementary nature of the sue and labour clause is made in the P&I Club Rules. In addition to that, contrary to the specific limitation of the recoverable sue and labour expenses contained in the mentioned H&M insurance forms, P&I Club Rules make the amount of such costs solely dependent on the discretion of the Committee.

London Club Rule 9.27.1 limits the recoverable sue and labour costs to the extent that such costs have been incurred with the approval of the club or that the Committee in its sole discretion determines that those expenses should be recovered. Britannia Club Rule 19(20)(i) similarly provides for two alternative grounds for the recovery of the sue and labour costs, namely, that those expenses were incurred with a prior agreement of the club or if the Committee determines that the expenses were reasonably incurred. It has to be noted here that Nepia Club Rules and Britannia Club Rules also provide for a third alternative criterion for the sue and labour costs to fall within the Club’s liability. To this effect, the respective Committee is granted a right to require the assured to incur certain sue and labour

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<sup>143</sup> It is, however, said to be “peculiar to the clause and not a general principle”. MacDonald Eggers, Peter, *Sue and Labour and Beyond: the Assured’s Duty of Mitigation*, L.M.C.L.Q. 1998, 2(May), p. 243, footnote 120.

<sup>144</sup> Clause 11.6 and Clause 9.6 of the respective set of clauses.

<sup>145</sup> Clause 9.5.

<sup>146</sup> Rose, F.D., *Marine Insurance: law and practice* (2004), London; Singapore: Lloyd’s of London Press, p. 393.

<sup>147</sup> Hazelwood, S.J., *P&I Clubs: law and practice* (3rd edition) 2000, London: Lloyd’s of London Press, p. 342.

expenses in the event that the Committee decides that such direction would benefit the interests of the club.<sup>148</sup>

Peculiarly, Nepia Club Rule 19(20)(A) only makes the recovery of the sue and labour costs dependant on the prior agreement with the Committee or its subsequent decision as to their reasonableness in the event that the costs are incurred by special direction of the Committee. In the view of this author, however, the same is applicable also to the situations where the sue and labour costs are incurred by the assured without the Committee's request thereof, since a request made by the Committee already implies its agreement to the expenditure to be made as well as it implies the reasonableness of such costs as long as the assured does not alter the nature and/or the amount of the requested costs. In support of the validity of this observation it is possible to rely on the information obtained from the Nepia Club which affirms that the club has the right to determine the reasonableness of the sue and labour expenditure where it has been made without any request of the Committee.<sup>149</sup>

It is now possible to conclude that sue and labour clause is supplementary to the main contract of the H&M insurance while under the P&I insurance sue and labour costs are equalized to any other liability assumed by the club and it does not give rise to any additional recovery to that for the main loss incurred.

## 7.2 Applicability of deductibles

After examining the supplementary nature of the sue and labour clause in the H&M insurance and its absence in the P&I cover it is necessary to discuss the applicability of deductibles to the sue and labour expenses in the two types of marine insurance.

It has been said in the legal literature that due to the sue and labour clause being supplementary to the H&M insurance policy the sue and labour expenses are not required to have reached a certain amount in order to become recoverable.<sup>150</sup> In other words, no deductibles are applicable to the sue and labour expenses. However, the Institute Clauses 1995 and the International Hull Clauses 2003 make deductibles applicable to the aggregate of all claims arising out of each separate occurrence, including the sue and labour expenses.<sup>151</sup> It may therefore initially appear that no deductible is applicable specifically to the sue and labour expenses which would be totally in accordance with the above mentioned legal view. However, it is not correct since in the event that the discharged duty to sue and labour leads to a complete avoidance of any loss, deductibles result in being applicable to the incurred sue and labour expenses solely. The general

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<sup>148</sup> Rule 19(20)(c) of Nepia and Rule 19(20)(C) of Britannia P&I Club.

<sup>149</sup> Based on personal communication with Graham Anderson, Manager of the Nepia Club.

<sup>150</sup> Rave, Donald T. and Tranchina, Stacey, *Marine Cargo Insurance: An Overview*, 66 Tul. L. Rev. 371, p.7.

<sup>151</sup> See Clause 12.1, Clause 10.1 and Clause 15.1 of the respective set of clauses.

principle that deductibles are applicable to the sue and labour expenses is also inferable from the fact that in all three mentioned sets of H&M insurance clauses deductibles are expressly made inapplicable to the sue and labour expenses in the event of a claim for a total or constructive total loss.<sup>152</sup> Total or constructive total loss is therefore an exceptional situation when no deductibles are applicable to the incurred sue and labour expenses.

In the P&I insurance sue and labour expenses are generally subject to the same deductible as the liability of the insurer for the averted or minimized loss. Rule 21 of the Nepia Club Rules states that “[...] the Members recovery from the Association shall be subject to the deductibles set out in the Certificate of Entry”. This general rule therefore applies, amongst the reimbursement for other insured losses, to the recovery of the sue and labour costs from the P&I club. The introductory sentence at the beginning of Section 4 of the cited Club Rules leads to the same conclusion by making Rule 21 applicable to every risk insured by the Association and also superseding any other rule inconsistent with its application.

Britannia Club Rule 19(20)(C)(ii) states that the sue and labour expenses shall bear the same deductible as the liability or expenditure so avoided or reduced would have borne. Similarly, Rule 9.27.3 of the London Club Rules requires account to be taken of any relevant deductible in evaluating the liabilities, costs and expenses for which the assured is insured and for the avoiding or minimizing of which the sue and labour expenses are incurred.

It is necessary to mention here that under both the Nepia Club Rules and Britannia Club Rules deductibles are also applicable to the situations where sue and labour expenses are incurred as requested by a special direction of the club. This is in a slight contrast with the fact that in the event that the insurer himself takes measures that, if taken by the assured, would have been recoverable from the insurer as sue and labour costs, the insurer does not have any right of such recovery from the assured.<sup>153</sup> Peculiarly, Britannia Club Rule 19(20)(ii) makes the legal costs and expenses incurred by the assured in respect of any insured liability or expenditure free of any deductible, while deductible is applicable to sue and labour costs. The recoverability of the legal costs incurred by the assured is closer discussed in Chapter 7.4.

The examination of the applicability of deductibles to the sue and labour expenses in the H&M and P&I insurances demonstrates that even though deductibles are applicable to such expenses in both types of insurance, there are certain differences in the way it is done. In the H&M insurance the deduction is made from the aggregate total of the claims arising out of or in connection to each event or occurrence, while the P&I Club Rules provide

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<sup>152</sup> See Clause 12.1, Clause 10.1 and Clause 15.3 of the respective set of clauses. See also: Bennett, Howard, *The Law of Marine Insurance* (2nd edition) 2006, Oxford: Oxford University Press, p 762.

<sup>153</sup> Rose, F.D., *Marine Insurance: law and practice* (2004), London; Singapore: Lloyd's of London Press, p. 383.

for deduction from the sue and labour expenses separately as it does with respect to all the insured liabilities. Another difference between the treatment of the sue and labour expenses by the H&M underwriters and P&I clubs is that, unlike under the P&I cover, in H&M insurance no deductibles are applicable to the aggregate amount of claims (nor to the incurred sue and labour expenditure) in the event of a claim for total or constructive total loss.

### 7.3 Time when the duty arises

It has been mentioned in Chapter 6.2 that ordinary expenses necessary to proceed safely with the voyage do not constitute sue and labour costs under neither the H&M cover or P&I insurance since they lack both statutorily and contractually required extraordinariness. It is, however, necessary to determine when the assured's duty to incur the extraordinary expenses arises. More precisely, do the expenses incurred for the purpose of avoiding or minimizing an insured loss become extraordinary when the peril insured against is imminent or when the insured incident has happened or has started to happen. The moments when the assured's duty to sue and labour arise under the H&M policy and under the P&I cover differ.

The Institute Clauses 1995 and the International Hull Clauses 2003 impose the duty to sue and labour on the assured "in case of any loss or misfortune".<sup>154</sup> Such formulation alone does not provide a complete answer to the posed question and it is therefore necessary to recourse to the respective English case law. Rix J. in *State of Netherlands v. Youell*<sup>155</sup> stated:

The duty to sue and labour does not arise until a peril is at any rate imminent: it is a duty that arises in response to a casualty, actual or imminent.

Similarly, in a later case *The Nore Challenger*<sup>156</sup> it was said:

It is trite law that the duty to sue and labour operates when the peril has arisen or is imminent - when the vessel is "in the grip of a peril.

Thus, if the assured misjudges the existence of an imminent peril and incurs any sue and labour expenses, the H&M insurer will not be liable for such expenditure. In *Joseph Watson & Son Ltd v Firemen's Funs Insurance Co of San Francisco*<sup>157</sup> Mr. Justice Rowlatt elaborated on this issue stating that the sue and labour expenses are the expenses collateral with the main process of

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<sup>154</sup> Clause 11.1, Clause 9.1 and Clause 9.1 of the respective set of clauses.

<sup>155</sup> *State of Netherlands v. Youell* [1998] 1 Lloyd's Rep. 236.

<sup>156</sup> *Linelevel Ltd v. Powszechny Zaklad Ubezpieczen SA (The Nore Challenger)* [2005] EWHC 421 (Comm), Para 82.

<sup>157</sup> *Joseph Watson & Son Ltd v. Firemen's Funs Insurance Co of San Francisco* [1922] 2 KB 355.

avoiding the peril insured against, and not the expenses incurred because it is thought, and mistakenly thought, that the peril had existed.<sup>158</sup>

Quite differently from the H&M insurance, in the P&I insurance, the duty imposed on the assured by section 78(4) of the MIA 1906 and the P&I Club Rules applies only from the moment of the actual occurrence of an event or happening insured against.<sup>159</sup> The three chosen P&I Club Rules contain clear provisions to that effect. The sue and labour clause contained in Rule 19(20)(b) of the Nepia Club Rules expressly states that the expenses in order to avert or minimize a loss insured against have to be incurred “after an incident”. Britannia Club Rules use the same wording. London Club Rules similarly refer to the expenses incurred “after any casualty, event or matter”<sup>160</sup>. There is an underlying link between such provisions of the P&I Club Rules and the fact that, unlike the H&M insurance, the P&I cover does not recognize the sue and labour clause as a separate engagement from the main contract of insurance. Thus later arising of the duty to sue and labour is in conformity with the fact that the assured gains his right to claim reimbursement of the sue and labour expenses simultaneously with the occurrence of an insured incident giving rise to a claim under the P&I Club Rules.<sup>161</sup>

Another explanation of the moment when the duty to sue and labour arises under the P&I insurance being later than the time when such duty arises under the H&M policy lies within the very character of the P&I cover. It is said that in the P&I insurance the extent of the statutory duty to sue and labour imposed by Section 78(4) of MIA 1906 is limited. The assured under the P&I insurance is not required to take every reasonable measure to avoid loss, hence the lack of any duty to sue and labour before the occurrence of an insured peril. If such a continuous requirement to avoid loss existed there would be many occasions with no P&I cover for liabilities resulting from negligence in a form of careless error or oversight which generally fall under the P&I insurance.<sup>162</sup> However, it is possible to challenge this argument by looking closer at the effect of negligence of the assured on his right to recover the incurred sue and labour expenses from the H&M insurer.

Despite the imperative character of Section 78(4) of the MIA 1906 it is said to have little practical impact on the assured’s right to reimbursement even from the H&M insurer to which the MIA 1906 is fully and directly applicable. Thus, the H&M insurer’s liability for a loss proximately caused by an insured peril even if such loss would have not occurred but for wilful

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<sup>158</sup> *Joseph Watson & Son Ltd v. Firemen's Funs Insurance Co of San Francisco* [1922] 2 KB 355.

<sup>159</sup> Hazelwood, S.J., *P&I Clubs: law and practice* (3rd edition) 2000, London: Lloyd’s of London Press, p. 337.

<sup>160</sup> Rule 9.27.1

<sup>161</sup> Hazelwood, S.J., *P&I Clubs: law and practice* (3rd edition) 2000, London: Lloyd’s of London Press, pp. 337-338.

<sup>162</sup> Martin, Stephen, *Marine Protection and Indemnity Insurance: Conduct, Intent, and Punitive Damages*, 28 Tul. Mar L.J. 45, p. 6.

misconduct or negligence of the master or crew “is generally not displaced by the duty to sue and labour”.<sup>163</sup> This is one of the key issues in the criticism of the MIA 1906 containing an apparent conflict of its Section 78(4) with Section 55(2)(a) which causes an inconsistency between insurance despite fault and refusing recovery for failure to exercise the duty to sue and labour.<sup>164</sup> Section 55(2)(a) of the MIA states:

The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would have not happened but for the misconduct or negligence of the master or crew.

The question arises as to whether the assured’s failure to comply with Section 78(4) of the MIA 1906 preclude him from getting reimbursement from the insurer or whether such situation only amounts to misconduct or negligence of the master or the crew for which the insurer is liable. Phillips, L.J. stated in *Youell*<sup>165</sup> that:

in practice negligence after the casualty will rarely be held to break the chain of causation. [...] s. 55(2)(a) applies before and after a casualty and [...] the duty referred to s. 78(4) will only have significance in the rare case where breach of that duty is so significant as to be held to displace the prior insured peril as the proximate cause of the loss.

It can therefore be concluded that negligence only has an impact on the insurer’s liability for the sue and labour costs in the event of “not simple negligence but something worse – gross negligence or recklessness”<sup>166</sup>. The mentioned fact excludes the possibility of explaining the different times when the duty to sue and labour arises under the H&M and P&I insurances based on the effect that negligence has on the assured’s rights to recovery from the two types of underwriters.

## 7.4 Recoverability of legal costs

Apart from the services contracted and immediate practical measures taken by the assured in order to avert or minimize an insured loss, the expenses arising out of defending a claim made against the assured or the instigation of the legal proceedings for the avoidance or limitation of an insured liability can also benefit the insurer. Such expenditure may be recovered by the assured in a similar way as the sue and labour costs are recoverable from the insurer. It is now necessary to consider the approaches the H&M and the

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<sup>163</sup> Rose, F.D., *Marine Insurance: law and practice* (2004), London; Singapore: Lloyd’s of London Press, p. 403.

<sup>164</sup> Rose, F.D., *Failure to Sue and Labour*, J.B.L. 1990, May, 190-202, p. 2.

<sup>165</sup> *State of Netherlands v. Youell* [1998] 1 Lloyd’s Rep. 236, p. 13.

<sup>166</sup> Clarke, Malcolm, *Wisdom after the event: the duty to mitigate insured loss* L.M.C.L.Q. 2003, 4 (Nov), 525, p. 532.

P&I insurers have taken towards reimbursing the assured for the incurred legal expenses.

Sue and labour clauses contained in the Institute Clauses 1995 and the International Hull Clauses 2003<sup>167</sup> explicitly state that collision defence and attack costs are not recoverable under them. These terms combined with the absolute absence of any provision on the recoverability of the legal costs (other than the recoverability of the costs incurred in relation to collisions) in all three mentioned H&M insurance forms lead to the conclusion that they do not qualify as sue and labour expenses, nor are they recoverable from the insurer. The only situation when the assured is indemnified by the H&M insurer for the legal costs incurred is when such expenses are incurred in relation to collision liability, however, even in that event they do not qualify as sue and labour expenses. Instead, legal costs constitute a separate category of the loss covered by the H&M insurer.

Clause 8.3 of the Institute Clauses (Hulls) 1995 and Clause 6.3 of the Institute Voyage Clauses (Hulls) 1995 make the H&M insurer liable for three fourths of the legal costs incurred by the assured or which the assured may be compelled to pay in contesting liability or taking proceedings to limit liability, provided that they were incurred with the prior written consent of the insurer. Such recovery is in addition to the covered three fourths of the collision liability itself.<sup>168</sup> Moreover, not only the legal costs incurred when contesting liability are recoverable (the costs of “defence”) but also the expenses of taking the proceedings to limit the collision liability (the costs of “attack”). The Institute Clauses 1995 do not provide for the quantitative limitation of the recoverable legal costs which, regarding the sue and labour expenditure, is restricted to the insured value of the vessel. The International Hull Clauses 2003, on the other hand, set a maximum for such recoverable legal costs equal to twenty five percent of the insured value of the vessel, except in the event of a specific written agreement of the insurer to the contrary.<sup>169</sup>

The recoverability of the remaining one fourth of the collision-related legal costs under the P&I cover is unclear from the P&I Club Rules. It can only be assumed that, just like the sue and labour expenses made in relation to collision liability discussed in Chapter 5.2, the legal costs would be shared between the H&M and P&I insurers only in the event if they are made for the benefit of both insurers. However, due to the straightforward purpose of the legal costs incurred when contesting collision liability or taking legal proceedings for its limitation they can only be considered to be made for the aversion or minimization of liability covered by both underwriters. Therefore such legal costs will be apportioned between the H&M insurer

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<sup>167</sup> More precisely, clauses Clause 11.2 of the Institute Time Clauses (Hulls) 1995, Clause 9.2 of the Institute Voyage Causes (Hulls) 1995 and Clause 9.2 of the International Hull Clauses 2003.

<sup>168</sup> For example, Clause 8.3 of the Institute Time (Hulls) Clauses states: “The Underwriter will also (emphasis added by this author) pay three fourths of the legal costs [...]”

<sup>169</sup> Clause 6.3.

and the P&I club in the same way as the collision liability, namely, three fourths and one fourth respectively. In practice, however, such legal costs are often apportioned equally between the H&M and the P&I insurers, each of them covering fifty percent of the costs. This approach may sometimes be more commercially viable to both underwriters.<sup>170</sup>

P&I clubs operating under English law have a more generous approach towards indemnifying the assured for the incurred legal costs in defending claims entailing club's liability than the H&M insurers. However, instead of treating such legal costs as a natural part of the sue and labour expenses, P&I Club Rules contain separate rules as to the recovery of the legal costs incurred by the assured in defending claims that are themselves insured against under the P&I cover.<sup>171</sup> Such provisions are usually incorporated into the P&I Club Rules together with the sue and labour clause under a common title as "Legal Costs, Sue and Labour"<sup>172</sup> clearly distinguishing the two categories of the recoverable costs incurred by the assured.

Similarly to the sue and labour costs, the amount of the recoverable legal costs under the P&I Club Rules is included in the maximum cover for the particular risk and they are only recoverable if they have been incurred with a prior agreement of the club or if the Committee determines that such costs were incurred reasonably. In addition to the above mentioned, Nepia Club Rule 19(20)(c) and Britannia Club Rule 19(20)(C) make the legal costs recoverable if their incurrence has been required by special direction of the respective club. However, in practice most of the legal costs related to appointment of consultants and lawyers are made through a cooperation between the assured and the P&I club (provided that the amount of the liability is likely to exceed deductibles) where they settle such costs directly.<sup>173</sup> In these instances, the incurrence of any unreasonable legal costs is unlikely to happen. Undoubtedly, also the duty to notify the club of any incident that may give raise to a claim under the P&I Club Rules, has an important role here.

To the contrast of the Nepia Club Rules and the London Club Rules, Britannia Club Rule 19(20)(ii) makes the legal costs incurred by the assured in respect of any insured liability or expenditure free of deductibles. This constitutes the main difference between the P&I club's liability with respect to the legal costs and the sue and labour costs incurred by the assured in the under the particular P&I Club Rules.

It has been said in the legal literature that P&I Club Rules often provide for the recovery only of the legal costs incurred while defending a claim made

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<sup>170</sup> Based on personal communication with Simon Chapman, Claims Executive of the London Club.

<sup>171</sup> Lemon, Robert T., Allocation of Marine Risks: An Overview of the Marine Insurance Package 81 Tul. L. Rev. 1567, pp.7-8.

<sup>172</sup> Rule 19(20) of Nepia Club Rules.

<sup>173</sup> Hazelwood, S.J., P&I Clubs: law and practice (3rd edition) 2000, London: Lloyd's of London Press, pp. 263 – 265.

against the assured without making any legal costs of filing a claim recoverable. According to the statements made in this respect, the assured's inability to be indemnified for any legal "attack" costs is based on the fact that such costs would normally fall under the costs of subrogation,<sup>174</sup> for example, after the assured has indemnified another shipowner for collision damage. However, under the three chosen P&I Club Rules the legal costs in relation to any insured liability or expenditure are not limited to the costs of "defence". It therefore appears that so long as the legal costs of making the claim are incurred with respect to an insured liability and they fulfil one of the criteria of recoverability,<sup>175</sup> the assured has a right to a corresponding indemnity.

This discussion has revealed that legal costs incurred by the assured are only recoverable from the H&M insurer when they are made in relation to contesting or limiting an insured collision liability. In addition to this, in virtually all such instances, the indemnification for the legal costs will be apportioned between the H&M and P&I underwriters. Contrary to the H&M insurers' approach, P&I clubs can potentially indemnify the assured for the legal costs incurred with respect to any covered liability.

## 7.5 Consequences of non-compliance

After an extensive discussion on the recoverability of the sue and labour costs under the H&M and P&I insurances the consequences of non-compliance with the duty to sue and labour should be considered. Numerous attempts have been made by the underwriters of marine risks to equate the breach of the sue and labour clause to a breach of a contractual warranty providing them with a defence to the assured's claim. This issue as well as other possible consequences of the assured's failure to sue and labour have at a certain time been addressed by the English courts.

The fact that the assured's failure to sue and labour is potentially detrimental to his right to recovery from the insurer was stated in *Integrated Container Services* where Eveleigh L.J. said:

While it is not possible to state with certainty all the adverse consequences which will be suffered by an assured who fails to perform his duty under the sue and labour clause, there is no doubt that he incurs a risk of his claim for loss or damage being rejected in whole or in part if it can be shown that he failed to act when he should have done.<sup>176</sup>

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<sup>174</sup> Hazelwood, S.J., *P&I Clubs: law and practice* (3rd edition) 2000, London: Lloyd's of London Press, p. 342.

<sup>175</sup> The alternative criteria depending on the particular P&I club may be: a request made by the Committee; a prior agreement of the Committee; the Committee's decision that the costs were reasonably incurred.

<sup>176</sup> *Integrated Container Service v. British Traders Insurance Co* [1984] 1 Lloyd's Rep. 154, 157.

None of the sue and labour clauses incorporated into the Institute Clauses 1995 or the International Hull Clauses 2003 contain a provision on the legal consequences of a breach by the assured of the duty to sue and labour. Multiple debates have therefore taken place in the courtrooms as to whether such breach amounts to a breach of warranty and thus relieves the insurer from any liability under the policy. This issue was scrutinized in *The Vasso*<sup>177</sup> where Mr. Justice Hobhouse stated that the purpose of the sue and labour clause is not to warrant but rather to create a right to be indemnified in accordance with the terms of the policy.<sup>178</sup> According to the mentioned view the duty to sue and labour is a contractual duty a breach of which gives rise to liability in damages. Mr. Justice Hobhouse also specified that a breach of the duty to sue and labour gives the insurer a claim for damages against the assured<sup>179</sup> “insofar as the insurer has been caused loss”.

The view taken in *The Vasso* was previously expressed in *The Gold Sky*<sup>180</sup> where it was held that failure to comply with the duty to sue and labour does not automatically give the insurer a defence to the claim, nor does it always entitle the insurer to a claim for damages. The insurer has to have suffered an actual loss due to the duty to sue and labour not being exercised. The absence of such an automatic right demonstrates the crucial difference between the operation of the sue and labour clause and that of a warranty a breach of which needs not be material to the risk for the insurer to be discharged from liability.<sup>181</sup>

The relative softness of the consequences of a breach of the sue and labour clause as opposed to the draconian warranty regime is also deductible from a comparison of the “Duty of Assured Clause” and the “Reasonable Dispatch Clause” of the Institute Cargo Clauses (A) made in *The Vasso*. Unlike the former clause, the latter states that compliance with the clause is a condition of the insurance.<sup>182</sup> It is therefore clear that compliance with the sue and labour clause is not intended to be a prerequisite to the insurance cover.

Another case illustrating the legal effect of the non-compliance with the duty to sue and labour is *Linelevel Ltd v Powszechny Zaklad Ubezpieczen SA (The Nore Challenger)*<sup>183</sup> where Cooke J was convinced that if the insured vessel had been put into drydock immediately, a part of the subsequent loss would not have occurred. On that basis, he made a

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<sup>177</sup> *Noble Resources and Unirise Development v. George Albert Greenwood (The Vasso)* [1993] 2 Lloyd's Rep. 309.

<sup>178</sup> See also: Thomas, Rhidian D. *The Modern Law of Marine Insurance* (1996), London: Lloyd's of London Press, p. 1996.

<sup>179</sup> Wood, Jonathan, *Maximising Recovery/Minimising Exposure: Recent Developments in Marine Insurance*, Int. I.L.R. 1994, 2(3), 89, p.15.

<sup>180</sup> *Astrovlanis Compania Naviera SA v. Linard (The Gold Sky)* [1972] 2 Lloyd's Rep. 187.

<sup>181</sup> Section 33(3) of the MIA 1906.

<sup>182</sup> See Clause 18 and Clause 16 of the Institute Cargo Clauses A.

<sup>183</sup> *Linelevel Ltd v. Powszechny Zaklad Ubezpieczen SA (The Nore Challenger)* [2005] EWHC 421 (Comm).

reduction, even though quite small, in the awarded insurance coverage.<sup>184</sup> Thus, the assured was not deprived of the entire cover but, instead, he was unable to recover the part of loss suffered attributable to his failure to minimize it. However, the severity of the consequences of non-performance of the duty to sue and labour should not be underestimated since the loss caused to the insurer by the breach can equal to the full amount of the assured's claim in which event the assured will be unable to recover at all.

Notwithstanding the importance of *The Vasso* and *The Gold Sky* in the evolution of the English law on the effect of the breach of the sue and labour clause on the H&M insurance cover there are later authorities<sup>185</sup> that make the consequences of the breach in question dependant on it being the proximate cause of the insured loss. It is said that the view according to which the effect of a failure by the assured to sue and labour is the insurer's right to claim for damages or a right to a counterclaim against the assured "is no longer tenable".<sup>186</sup> Instead, reduction or rejection of the indemnity has to be made in the event that the breach of the sue and labour clause amounts to the proximate cause of the loss "such as to deprive the assured of a recovery",<sup>187</sup>.

The application of the "proximate cause" criteria to the P&I insurance cover is more difficult since the P&I clubs rarely enter into as detailed proximate cause investigations as do the H&M insurers. Instead, the P&I Club Rules provide the Committee with a sole discretion to reject or reduce the amount of indemnity by the sum of the loss that the Committee believes would have been avoided had the assured complied with his duty to sue and labour.<sup>188</sup> The amount of such reduction can therefore vary from zero to the total sum of the claim.<sup>189</sup> From the P&I Club Rules chosen for the purpose of this thesis it is inferable that the consequences of a breach of the sue and labour clause can range from a reduction in the amount of indemnity to its total rejection.<sup>190</sup>

It should also be noted that in the P&I insurance the situation when the assured does not comply with his duty to sue and labour is closely linked

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<sup>184</sup> Marine insurance-perils of the seas-insurable interest-sue and labour clause-measure of indemnity, (2005) 11 JIML: Digest of contemporary developments, 2005, 11(5), pp. 312-313.

<sup>185</sup> *National Oilwell (UK) Ltd v. Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 582, *State of Netherlands v. Youell* [1998] 1 Lloyd's Rep. 236.

<sup>186</sup> Hazelwood, S.J., *P&I Clubs: law and practice* (3rd edition) 2000, London: Lloyd's of London Press, p. 338.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*, pp. 338-339.

<sup>189</sup> Bennett, Howard, *The Law of Marine Insurance* (2nd edition) 2006, Oxford: Oxford University Press, p. 753.

<sup>190</sup> For example, Rule 4.1 of Steamship Rules states: "The Committee may reject or reduce any recovery by an Assured where in its sole discretion it determines that the Assured has not at any time (whether before, at the time of, during or after any casualty, event or matter liable to give rise to a claim upon the Association) taken such steps to protect his interests as the Committee at its sole discretion would have expected an uninsured person acting reasonably in similar circumstances to have taken."

with the assured's duty to give a prompt notice to the club of every incident that could give rise to a claim under the P&I Club Rules as well as with the assured's duty to mitigate loss. Under some P&I Club Rules compliance with the above mentioned obligations can amount to conditions to any recovery from the club. There are, however, certain peculiarities in different P&I Club Rules regarding the duty of notification and the duty to mitigate loss that can have effect on the probability of the assured failing to comply with his duty to sue and labour. Such peculiarities in the three chosen P&I Club Rules are analysed in Chapter 8.

## 7.6 Under-insurance

Insuring a vessel for an amount that is lower than the value of the vessel is a common method employed by the assureds in order to make their insurance premiums less costly. However, when an insured incident occurs and the assured seeks reimbursement from the insurer, the under-insurance plays an important role in determining the amount of the indemnification. Even though in English law this principle was originally applied to the cases of general average and salvage, but not to claims for sue and labour costs<sup>191</sup>, nowadays the assured's ability to recover the incurred sue and labour expenses is no exception to this complex situation.

If the insurance policy only covers a part of the full value of the vessel, the insured himself is benefited in part by his costs incurred to prevent or minimize the loss. In such event, the insurer does not have to pay all the prevention costs but, instead, he only has to cover the portion of such expenditure that the insured value of the vessel bears against its full value.<sup>192</sup>

Both the Institute Clauses (Hulls) 1995 and the Institute Voyage Clauses (Hulls) 1995 contain a provision under their respective sue and labour clauses stating that in the event of the vessel being insured for an amount lower than its sound value at the moment of the occurrence giving rise to the claim the amount recoverable under the clause shall be reduced in proportion to such under-insurance.<sup>193</sup> However, this under-insurance rule is not applicable in the event that a claim for total loss had been admitted under the H&M policy and the insured vessel is saved. In such event the apportionment of the recoverable sue and labour costs depending on the under-insured value will only be done with respect to the sue and labour costs in excess of the value of the vessel saved.<sup>194</sup>

The International Hull Clauses 2003, to the contrary, do not make the reimbursement of the sue and labour expenses dependant on the correlation

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<sup>191</sup> Hudson, Geoffrey N. and Madge, Tim, *Marine Insurance Clauses* (4th edition) 2005, London; Singapore: Lloyd's of London Press, 2005, p 121.

<sup>192</sup> 1971 Directors of The Columbia Law Review Association, Inc. Allocation of the Costs of Preventing an Insured Loss. 71 Colum. L. Rev. 1309, p. 5.

<sup>193</sup> Clause 11.4 and Clause 9.4 respectively.

<sup>194</sup> *Ibid.*

of the value of the vessel and the amount it is insured for. Thus the assured is reimbursed for the incurred sue and labour costs irrespective of any under-insurance. This alteration of the 2002 version of the International Hull Clauses is valued by the marine insurance experts as a significant change in the H&M insurance making the “awkward practical calculations”<sup>195</sup> of the proportion of the indemnity unnecessary. However, taking into the consideration that the Institute Clauses 1995 still retain their dominance in the marine insurance market, the under-assureds continue to be subjected to the reduced sue and labour recovery.

Entry of the vessel into a P&I club for less than its full tonnage is the P&I equivalent of what is known as under-insurance under the H&M cover. Nepia Club Rule 22(1) on the general limitation of cover states that in the event that the ship is entered into the club for less than its full tonnage the club is only liable to the proportion that the entered tonnage bears to the full tonnage. Britannia Club Rule 27(1) and London Club Rule 7.1 equally provide for such proportional adjustment of the club’s liability. Even though the three mentioned Rules are not contained in the P&I Club Rules’ sue and labour clauses, they equally apply to all risks covered by the club including, without any doubt, sue and labour expenses. Thus, the practical effect that the entry into the P&I club of a vessel for less than its full tonnage has on the recoverability of the sue and labour costs is the same as that of under-insurance under the Institute Clauses 1995. However, under the H&M insurance the limit of the recoverable sue and labour costs will be equal to the insured (even if it is under-valued) value of the vessel, whereas in the P&I insurance the limit for each insured risk will be applicable to the loss by the peril and sue and labour costs together.<sup>196</sup> The Institute Hull Clauses 2003, in their turn, are significantly more generous to the under-assured than the P&I Club Rules when indemnifying him for the incurred sue and labour expenses. Under the Institute Hull Clauses 2003 the under-assured is in a more favourable position regarding recovery of the sue and labour costs incurred for the benefit of the H&M insurer than in the situation where he is encountered with the aversion or minimization of the P&I club’s undertaken risk.

There are certain situations when the under-insurance of the vessel in the H&M policy has an effect on the recoverability of the sue and labour costs from both the H&M and the P&I underwriters. Such instances arise when the sue and labour costs are incurred in relation to collision liability which is apportioned between the two insurers. If the sue and labour costs incurred are only attributable for the preservation of the H&M interests, they are covered by the H&M insurer to the proportion that the insured value of the vessel bears to its proper value. The maximum of such recoverable sue and labour expenses is equal to the insured value of the vessel. Whereas in the event that the sue and labour expenses are considered by the Committee as having been incurred for the benefit of the P&I insurer as well, three fourths

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<sup>195</sup> Silver, Paul, *International Hull Clauses 2003*, S. & T.L.I. 2003, 4(3), pp. 12 - 13.

<sup>196</sup> As stated in Chapter 7.1, under P&I insurance, no sue and labour costs are recoverable if the limit of the risk is reached before their consideration.

of such expenditure will be covered by the H&M insurer and the P&I insurer will cover the amount in the excess of such sum. The P&I club, however, will calculate the indemnification for the sue and labour costs taking into account the reimbursement the assured would have obtained from the H&M insurer, had the vessel been insured for its proper value.

It is inferable from the discussion above that in the H&M insurance the effects of under-insurance on the assured's right to recovery of the incurred sue and labour costs are different under the Institute Clauses 1995 and under the International Hull Clauses 2003. According to the former, the assured is only able to recover such amount of the sue and labour costs that reflects the proportion that the insured value of the vessel bears to its full value. The P&I Club Rules also provide for a similar reduction. The International Hull Clauses 2003, on the other hand, do not provide for any proportionate calculation of the indemnification for the sue and labour costs in the event of under-insurance. Peculiar situation arises in relation to the sue and labour expenses incurred with respect to collision liability where under-insurance of the vessel can be taken into account by both the H&M and P&I insurers.

## 8 Analysis

In modern shipping industry virtually every H&M policy and P&I Club Rules contain the duty to sue and labour which, considering its long history and the important role in protecting the insurance industry from extortionate and unnecessary expenses, takes a special place in the law of marine insurance. The peculiarities of the nature of the sue and labour clause make it different from other notions pertaining either to the general contract law or to the law of marine insurance. However, distinguishing the sue and labour costs incurred for the benefit of the H&M insurer from those averting or minimizing P&I club's liability for wreck removal or other costs and expenses, have a potential to make the process of recovery of the sue and labour expenditure time-consuming as well as they can jeopardize its success. Moreover, the implied character of the assured's right to reimbursement of the incurred sue and labour expenditure in the absence of a sue and labour clause in the insurance contract remains unclear.

Sue and labour clauses incorporated into the Institute Time Clauses (Hulls) 1995 and the Institute Voyage Clauses (Hulls) 1995 are practically identical. However, the International Hull Clauses 2003, the most recent set of clauses elaborated by the International Underwriting Association, introduced a radical change into the calculation of indemnity for the sue and labour expenses incurred by the assured. More precisely, the change was introduced with respect to the situations where the vessel is insured for an amount lower than its proper value.

The structure and the wording of the duty to sue and labour in the P&I Club Rules varies between clubs, but they nevertheless retain the uniformity of the general character of the duty to sue and labour under the P&I cover. The existence of the above mentioned peculiarities makes it possible to analyse the similarities and differences between the operation of the sue and labour clause in the H&M and P&I insurances and their practical effect in general, as well as focusing on the particular H&M form or specific P&I Club Rules.

Whether the expenses for the aversion or minimization of an insured loss fall within the H&M or P&I cover, there are certain elements necessary for these costs to qualify as sue and labour expenditure under either of the two covers: the expenses need to be incurred with respect to an insured loss, they have to be extraordinary, reasonable as well as properly incurred. Each of these elements alone does not reveal any practical differences between the operation of the sue and labour clause in the H&M and P&I insurances, however, when viewed in combination with some peculiarities of the two types of covers, they appear to have an impact on the efficiency of the sue and labour clause in the particular type of marine insurance.

An insured peril is a peril covered under the H&M policy or the P&I Club Rules respectively. In the instances where it is difficult to determine whether

the loss for the aversion or minimization of which the sue and labour expenses are incurred is insured, the doctrine of proximate cause is employed. The application of the doctrine of proximate cause allows the assured to recover his expenses where the “chain of causation” stretches far enough to link an insured loss and the sue and labour costs. In the event that the proximate cause of the loss is a breach of a statutory duty, for example, an unreasonable incurrence of sue and labour expenditure, the assured is deprived of his right to indemnification for both such loss and the incurred sue and labour costs. In some instances, however, the application of the doctrine of proximate cause to the duty to sue and labour under the H&M policy is questionable since the costs for protection of the vessel may be incurred before the operation of the insured peril. This issue is important in the absence of the sue and labour clause where it can be difficult to attribute the assured’s expenditure to the insured peril<sup>197</sup> in order to recover the costs as a loss caused by that peril. In P&I insurance such difficulty does not exist since the assured’s duty to sue and labour only arises after the insured incident. The time when the duty to sue and labour arises under the H&M and P&I insurances also has an impact on the “extraordinariness” criterion for the costs to qualify as sue and labour expenditure.

While ordinary expenses for making the vessel seaworthy as well as the usual operational expenses are not recognized as sue and labour costs under either of the two types of insurance, the moment when the expenses become extraordinary for the purposes of falling within the sue and labour expenditure are different in the H&M and P&I insurances. In accordance with the Institute Clauses 1995 and the International Hull Causes 2003 the assured’s duty to sue and labour arises when the insured peril has occurred or is imminent. A difficulty may therefore arise when the imminence of the peril is alleged by the assured in his attempt to recover the incurred sue and labour expenses. In the event that the assured mistakenly believes that the vessel is in the grip of an insured peril and incurs sue and labour expenses, he will not be able to obtain any indemnification for such costs from the H&M underwriter. The assured is therefore faced with a complex dilemma of choosing “the lesser evil”. On the one hand, incurring costs for the aversion or minimization of a seemingly imminent insured loss eliminates the risk of a failure to exercise the duty to sue and labour but makes the subsequent right to reimbursement of the costs questionable. On the other hand, waiting until the peril begins to operate averts the risk of exaggerating the imminence of the peril but, at the same time, it can result in non-compliance with the assured’s duty to sue and labour under the H&M insurance as well as his statutory duty “in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss”<sup>198 199</sup>.

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<sup>197</sup> MacDonald Eggers, Peter, Sue and Labour and Beyond: the Assured’s Duty of Mitigation, L.M.C.L.Q. 1998, 2(May), p. 242, footnote nr. 111.

<sup>198</sup> Section 78(4) of the MIA 1906.

<sup>199</sup> The importance of the nature of the threat is also obvious from the fact that the assured can recover the successfully incurred sue and labour costs for the aversion of a total loss even though he fails to avert a partial loss which is not covered by the insurer in a total loss policy. Rose, F.D., *Marine Insurance: law and practice* (2004), London; Singapore: Lloyd’s of London Press, p. 394.

Under the P&I insurance the assured's duty to sue and labour arises after the incident. Therefore, the assured does not bear the risk of committing a mistake when evaluating the probability of the insured occurrence happening. The later time when the duty in question arises, however, has also a negative effect since the chances of succeeding in averting or minimizing a loss are generally higher when the measures thereof are taken as early as possible. It can therefore be concluded that the result of the duty to sue and labour arising before the peril begins to operate in the H&M insurance is that it puts the assured in danger of miscalculating the imminence of the peril and thus jeopardises his right to reimbursement of the expenditure made. In the P&I insurance, to the contrary, the assured has a greater clarity as to the moment when the expenses for the aversion or minimisation of an insured loss have to be incurred. The negative effect of the duty to sue and labour arising only after the incident in the P&I insurance is that it lessens the assured's chances of succeeding in such endeavours subsequently exposing the club to a larger liability. However, it only causes negative consequences to the insurer and not to the assured, since success of the sue and labour measures taken is not necessary for the assured to be able to recover such expenditure. H&M insurer's interests are therefore better protected by imposing the duty to sue and labour on the assured when the insured peril has not yet begun to operate. The above discussed difference has its roots in the supplementary nature of the sue and labour clause in the H&M insurance and its absence in the P&I cover which are addressed later in this Chapter.

Apart from the incurred sue and labour expenses having to be extraordinary, under the most popular H&M insurance forms and the P&I Club Rules they are also required to be reasonable. Moreover, the required standard of conduct when incurring any sue and labour expenses is the same under both the H&M and P&I insurances, namely, it is that of a person of a normal competence in similar circumstances to those of the peril that occurred. However, with respect to the P&I insurance, "reasonableness" and the standard of conduct are smaller obstacles for the assured's right to recover the sue and labour costs than in the H&M policies for the reasons stated below.

Taking into account that under Nepia Club Rules and Britannia Club Rules the respective Committee has a right to request the assured to incur sue and labour expenses, such requested expenditure will not be subject to the "reasonableness test" nor to the "standard of conduct" test.<sup>200</sup> Being aware of the absence of any risk of incurring unreasonable sue and labour expenses in the event that they are requested by the Committee, the assured is most motivated to inform his club of any incident that could give rise to a claim under the P&I Club Rules at its very earliest stage. No similar right of the H&M insurer to require the assured to incur any sue and labour expenses by special direction is provided by the Institute Clauses 1995 or by the

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<sup>200</sup> Nepia Club Rule 19(20)(c) and Britannia Club Rule 19(20)(C). No such rule is contained in the London Club Rules.

International Hull Clauses 2003. Thus in relation to the sue and labour expenses the assured's risk of failing the "reasonableness test" or not complying with the "standard of conduct" is lower under the P&I cover than it is in the H&M insurance. However, this only applies to the instances when the sue and labour expenses are incurred by request of the Committee. In the event that the P&I Club Rules do not grant the right to its Committee to direct the assured to the incurrence of sue and labour expenses or when no such request has been made by the Committee after it is notified of the incident, the "reasonableness" and the "standard of conduct" tests constitute two equally complex obstacles for the assured on his way to recovery of the sue and labour expenditure under both the H&M and P&I covers.

H&M insurance policies and P&I Club Rules impose the duty to sue and labour on the same range of persons. The statutory duty to sue and labour as well as the sue and labour clauses incorporated into the H&M policies or P&I Club Rules impose an obligation to sue and labour on the assured, his agents and servants but not on the independent contractors. Moreover, any agents and servants do not owe the duty to sue and labour to the insurer but, instead, they are to be instructed by the assured to take measures to avert or minimize loss.

Perhaps, the main difference in the nature of the sue and labour clause in the H&M and P&I insurances is that under the former type of cover the sue and labour clause is considered to be an additional engagement to the main contract of insurance while under the latter sue and labour expenses are recoverable as part of the loss caused by the peril for the aversion or minimization of which the costs were incurred. Taking into account the considerable quantitative limits of the recoverable loss in the P&I insurance, it would have been extortionate for the club to have an additional obligation to cover sue and labour costs to the same high limit. In order to identify the practical effect of this difference it has to be analyzed together with the contractual limit of the indemnification for the incurred sue and labour expenses under the H&M forms.

The maximum amount of the recoverable sue and labour expenses is provided for under both the Institute Clauses 1995 and the International Hull Clauses 2003 such limit being the insured value of the vessel. The assured under the mentioned H&M sets of clauses is able to recover the incurred sue and labour expenses in addition to the indemnity for the loss so far as the expenditure has been reasonable. The total liability (including the sue and labour expenditure) of the H&M insurer for each insured incident is therefore equal to double the insured value of the vessel. To the convenience of the H&M underwriter, such limitation provides him with certainty as to what is the total amount he can be found liable for under the policy.

Under the P&I cover there is no recovery of any sue and labour expenses in the event that the limit of the cover for the particular risk has been reached before the consideration of any sue and labour costs. However, considering the nature of the risks assumed by the P&I clubs and the limits of their cover

being, to say the least, considerably higher than those under the H&M policies, the amount of non-covered sue and labour expenses becomes insignificant in relation to the amount of such covered loss as liability to passengers limited to 2,000,000,000 USD for any one occurrence.<sup>201</sup> In the view of this author the lack of the supplementary nature of the sue and labour clause in the P&I insurance does not result in a lower motivation of the assured to take reasonable measures for the aversion or minimization of an insured loss than the inducement that the most popular H&M forms create thereof. In the event of a small risk the insured loss together with the incurred sue and labour expenses will not exceed the amount covered by the P&I club and the assured will therefore be under no risk of incurring large unrecoverable sue and labour costs. However, in relation to high risks it is in the assured's interests to take all reasonable measures to avert or minimize subsequent loss, since any loss in excess of the sizeable limitation of the P&I cover will fall within the assured's own expenses.

Even if the supplementary nature of the sue and labour clause in the H&M insurance is viewed as an advantage (in comparison with the P&I insurance) for the assured being able to recover such costs in addition to the indemnification for the loss sustained, it is also comprised with some practical inconvenience. Such inconvenience is the fact that in order to recover sue and labour expenses from the H&M insurer the assured must make a claim for their reimbursement in addition to the main claim for the insured loss.<sup>202</sup> Furthermore, such additional claim for sue and labour expenses is not considered to be ancillary to the main claim for the loss, but rather a separate claim. The completely separate character of the claim for the incurred sue and labour expenses arises from the fact that a claim for such expenditure can arise even in the absence of an insured loss, for example, when the assured, while exercising his duty to sue and labour, achieves a complete aversion of the insured loss.<sup>203</sup>

Deductibles form a part of each H&M insurance policy insured under the Institute Clauses 1995 or the International Hull Clauses 2003 as well as they are provided for in the three P&I Club Rules chosen for this thesis. Nevertheless, they cannot be considered as a similarity between the sue and labour clause under the H&M and P&I covers due to a crucial difference between the way deductibles are applied to the sue and labour costs by the two types of underwriters.

The application of deductibles to the aggregate amount of all claims arising out of each incident, including any sue and labour expenses, under the H&M insurance has a certain effect on the motivation of the assured to incur sue and labour expenses depending on the level of the risk. If the assured believes that the imminent or actual insured peril constitutes a risk of sustaining a loss only amounting to an insignificant part of the deductibles,

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<sup>201</sup> The limitation under the P&I Club Rules of the International Group Clubs.

<sup>202</sup> Bennett, Howard, *The Law of Marine Insurance* (2nd edition) 2006, Oxford: Oxford University Press, pp. 757-758.

<sup>203</sup> *Ibid.*

it is in the interest of the assured to keep the aggregate amount of loss, including the sue and labour expenses, under the amount of deductibles in order to save the sum equal to the difference between the total loss sustained and the deductibles under the H&M policy. In addition to this, low amount of the incurred sue and labour costs limits the risk of such expenses being unreasonable. Contrary to this, when faced with a risk potentially leading to a total or constructive total loss, the assured, implying that he will have to cover the loss up to the amount of the deductibles, is encouraged to make a big sue and labour expenditure. In the event that sustaining high sue and labour costs results in averting or minimizing the loss, the assured may only have to cover an amount equal to or lower than the deductibles provided for in the policy. However, this motivation is undermined by the fact that in the event that the vessel becomes total or constructive total loss, no deductibles are applicable to the indemnification for the loss. Thus, if, despite the considerable sue and labour costs, the vessel becomes total or constructive total loss, the inapplicability of deductibles to either the loss or the sue and labour costs, relieves the assured from covering any expenditure. This author believes that in this situation the interest of the assured in the vessel is the factor determining whether he will endeavour to protect the vessel even though its total or constructive total loss will relieve him from any expenses, or, instead, salvage the vessel despite of knowing that he may be liable for the full amount of deductibles.

As it was mentioned before, P&I club covers wreck removal costs in the event that the wreck removal is compulsory by law. It therefore appears, that even in the event that the Nairobi International Convention on the Removal of Wrecks, 2007 (hereinafter referred to as the “Wreck Removal Convention”) comes into force, making the registered owner of the vessel<sup>204</sup> liable for the costs of locating, marking and removing the wreck,<sup>205</sup> such costs would still be recoverable from the P&I club. In other words, where a State Party to the Wreck Removal Convention determines that the wreck constitutes a hazard and needs to be removed, such request would fall within the situations where the removal is “compulsory by law”. Undoubtedly, if the particular assured under the H&M policy is not covered by any P&I club, the amount of wreck removal liability the assured may face in the event that the vessel becomes a wreck makes incurrence of all reasonable sue and labour costs for the aversion or minimization of loss a more attractive option when being on a grip of a peril.<sup>206</sup>

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<sup>204</sup> According to Article 1 of the Wreck Removal Convention the person liable under the Convention can also be the person or persons owning the ship at the time of the maritime casualty or the operator of the ship.

<sup>205</sup> The assured would only be able to escape from such liability if the vessel had become a wreck due to an act of war, civil war, act or omission done with intent to cause damage by a third party, etc. For an exhaustive list of exclusions see Article 10 and Article 11 of the Wreck Removal Convention.

<sup>206</sup> It should also be noted that, depending on the tonnage of the vessel, a compulsory insurance may also be required in order to cover the liability under the Wreck Removal Convention. See Article 12 of the Wreck Removal Convention.

In the event that the peril the assured is encountered with can potentially lead to an amount of loss higher than the deductibles stated in the H&M policy but it is unlikely to result in total or constructive total loss of the vessel, it is in the assured's interest to make high sue and labour expenditure. Failure of the measures taken for the aversion or minimization of the insured loss will not have any effect on the expenses of the assured. However, success of the measures taken may result in the aggregate of the loss and the sue and labour costs being lower than or equal to deductibles and thus save the assured a certain amount of money.

The applicability of deductibles to each risk insured under the P&I Club Rules together with the Committee's discretion to determine the reasonableness of the sue and labour costs incurred, also has an effect on the encouragement of the assured to take all reasonable measures to avert or minimize the amount of the insured liability or expenditure. When faced with a peril of any degree of danger, the assured is likely to take the "safe route" only incurring a small amount of the sue and labour costs in order to avoid the risk of making unreasonable expenditure as well as to keep the expenditure low under the amount of the sue and labour deductibles. Logically, the deduction from the amount of the loss and the sum of the incurred sue and labour expenses does not affect the motivation of the assured in duly exercising his duty to sue and labour in the event that the P&I club, using the right provided thereof by the P&I Club Rules, requires the assured to incur certain sue and labour costs. Such power of the Committee protects the club from the above discussed potential ignorance by the assured of his duty to sue and labour. Therefore, provided that the assured complies with his duty to inform the P&I club of any incident that may give rise to a claim under the P&I Club Rules, the club avoids any loss due to the assured's failure to take all reasonable measures to avert or minimize an insured loss. Giving timely notice to the club and protecting the insured vessel properly is also beneficial for the assured, since the amount of the loss sustained has an effect on the premium to be paid to the P&I club in the following year.

It can be concluded that the assured's expenses in order to avert or minimize the loss the insurer would otherwise be liable for can fall within the deductibles under both the H&M and P&I insurances. The application of deductibles under the H&M insurance will reduce the recoverable amount of the sue and labour costs by a lower proportion than under the P&I insurance. However, there are two factors that compensate this seemingly stricter application of deductibles to sue and labour costs under the P&I insurance. Firstly, the amount of deductibles under the P&I cover is generally much lower than in the H&M policies. Secondly, P&I clubs' Committees generally have the discretion to award the full amount of the sue and labour expenses without the application of any deductibles, which often happens in the event that the incurred sue and labour expenses are lower or insignificantly higher than deductibles.<sup>207</sup> Rules to this effect are

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<sup>207</sup> Based on personal communication with Simon Chapman, Claims Executive of the London Club.

contained in Britannia Club Rule 41(3) and Nepia Club Rule 46(2)(b). The former Rule states:

Notwithstanding any neglect or non-compliance with, or breach of, any of these Rules by a Member the Committee may in its sole discretion waive any of the Association's rights arising therefrom and may pass and pay in full or in part any claim which it thinks fit. The Association shall nevertheless at all times and without notice be entitled to insist on the strict application of these Rules.

The latter Rule reads:

Although the Association shall at all times and without notice be entitled to insist on the strict application of these Rules or relevant statutory enactments, the Directors and/or the Managers may in their sole discretion waive any of the Association's rights arising from any neglect or non-compliance therewith, or breach thereof by a Member, and may pass and pay in full or in part any claim which they think fit.

It is said in the legal literature that the mentioned discretion of the Committee is widely exercised making the sue and labour costs' regime more favourable to the assured.<sup>208</sup>

The amount of the legal costs incurred by the assured due to the proceedings for the aversion or limitation of an insured liability can constitute a significant expenditure. In the circumstances where such costs are not recoverable from the insurer, as it generally is under the Institute Clauses 1995 as well as in accordance with the International Hull Clauses 2003, certain situations can arise where there is no incentive for the assured to defend his rights in the legal proceedings, for example, where the amount of the claim exceeds the deductibles so far that even a successful defence of the claim would not relieve the assured from paying their full amount. If, on the other hand, the amount of the claim is well under the H&M policy's deductibles, the assured, provided that the legal costs do not significantly increase his total expenditure, will endeavour contracting qualified professionals in order to successfully defend the claim and minimize the expenditure. Therefore, with respect to the incidents likely to cause large amount of liability, the H&M insurer fails to motivate the assured to defend the claims brought against him or to embark on a legal "attack" entailing aversion or minimization of such insured liability.

The situation is different with respect to the legal costs incurred while contesting liability or taking proceedings to limit collision liability. The Institute Clauses 1995 and the International Hull Clauses 2003 provide for recovery of such legal costs to the same proportion as the collision liability itself, namely, three fourths, provided that such costs were incurred with a prior written consent of the underwriters.<sup>209</sup> Apart from motivating the

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<sup>208</sup> Hazelwood, S.J., *P&I Clubs: law and practice* (3rd edition) 2000, London: Lloyd's of London Press, pp. 339-340.

<sup>209</sup> Clause 8.3 of the Institute Time (Hulls) Clauses 1995 and 1995 Clause 6.3 of the Institute Voyage Clauses (Hulls) 1995.

assured to make an effort in defending his position in respect of collision liability, the mentioned provision also creates an incentive for the assured to consult with the H&M underwriter prior to getting engaged with any questionable legal advisers, etc. As the result of a closer cooperation between the assured and the insurer and the utilization of the underwriter's expertise the interests of both parties to the insurance contract are better protected.

Differently from the Institute Clauses 1995, the International Hull Clauses 2003 provide for a limitation of the recoverable legal costs incurred in relation to collision liability to twenty five percent of the insured value of the vessel.<sup>210</sup> This clause protects the H&M underwriter against the situations where the indemnification of the assured for his collision liability reaches three fourths of the insured value of the vessel and the incurred legal costs exceed the remaining one fourth of such value. In other words, the International Hull Clauses 2003 limit the total insurer's collision liability (including the liability for the legal costs incurred thereof) to the insured value of the vessel. Such limitation may seem to be less advantageous to the assured than the respective clause in the Institute Clauses 1995 providing for no limitation of the recoverable legal costs. However, by making the recovery of the legal costs dependant on the prior written consent of the underwriter, the insurer under the Institute Clauses 1995 is also protected from being liable for an amount higher than what he believes he should be liable for.

In the P&I insurance the recoverability of the legal costs incurred for the limitation of the insured liability is regulated under a common "Legal Costs, Sue and Labour" clause in the P&I Club Rules. Even though they are largely treated in the same way as the sue and labour expenses, under some P&I Club Rules there are certain peculiarities in their reimbursement regime. Thus, according to Britannia Club Rule 19(20)(C)(i) legal costs and expenses incurred by the assured in respect of any insured liability or expenditure are free from any deductibles. This is different from the applicability of deductibles under the mentioned P&I Club Rules to the sue and labour costs even in the event that their incurrence is requested by the Committee. However, just like the sue and labour expenses, legal costs are only recoverable when they are incurred with a prior agreement of the club or when they consider such expenses as being reasonably incurred.

It can therefore be concluded that the recoverability of the legal costs incurred by the assured under the P&I insurance is possible with respect to any underwritten risk, while in the H&M insurance such costs are only recoverable in relation to collision liability. This author believes that a more generous approach adopted by the P&I insurers regarding the indemnification of the assured for the incurred legal costs stimulates a closer communication between the assured and the insurer benefitting both the assured and the club. Getting a prompt notice of an insured incident gives

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<sup>210</sup> Clause 6.3 of the International Hull Clauses 2003.

the club an opportunity of an immediate involvement, control or direction of the legal proceedings regarding the assured's liability provided for in the P&I Club Rules. On the other hand, the assured is provided with a high level legal and technical advice regarding the incident. The character of the H&M insurance, however, justifies the above mentioned attitude to the legal costs incurred for the assured, since the H&M insurance does not generally cover liability, but rather it indemnifies the assured for the physical loss to the vessel's hull.

It has been mentioned in this thesis that neither of the two types of insurances in the focus of this thesis states expressly what is the effect of the breach of the sue and labour clause. It is, however, obvious from the relevant case law that in the H&M insurance the consequences of the assured's failure to sue and labour have gone through a process of a significant evolution.

The breach of the sue and labour clause has never been considered as one amounting to a breach of warranty. Therefore, the insurer cannot rely on it as a breach automatically releasing him from any liability under the insurance contract. In *The Vasso* and in *The Gold Sky* it was stated that a breach of the duty to sue and labour gives rise to the assured's liability in damages insofar as the insurer has suffered a loss. In *Linelevel Ltd v Powszechny Zaklad Ubezpieczen SA (The Nore Challenger)* a reduction was made to the amount of the indemnification under the policy due to the breach of the sue and labour clause. Contrary to the above stated judgements, the current legal consequences of the assured's failure to exercise his duty to sue and labour are only imposed in the event that such failure amounts to the proximate cause of the loss. Thus, despite the fact that the sue and labour clause is generally treated as a separate agreement between the assured and the underwriter, the effect of its breach is closely linked with the doctrine of proximate cause which takes an important place in the main contract of the H&M insurance.

Under the P&I Club Rules the effect of the breach of the sue and labour clause is largely at the discretion of the Committee. However, out of the three P&I Club Rules chosen for this thesis only the London Club Rules contain an express "Unreasonable Conduct" Rule providing the Committee with the discretion to reject or reduce any recovery from the club in the event that the assured has failed to protect his interests insured under the P&I Club Rules to the extent that the Committee would have expected a reasonable uninsured person to do. This clause practically amounts to an "uninsured owner" requirement and, no doubt, encompasses also the duty of the assured to sue and labour. So far the consequences of a failure to exercise the assured's duty to sue and labour, namely, reduction or rejection of the indemnity, under the H&M and under the P&I insurances seem to be similar. However, the degrees of the applicability of the "proximate cause" doctrine in the two types of insurances are different.

Considering the character of the P&I insurance, scrupulous investigation of the proximate cause of the loss does not determine whether any reduction or rejection is to be made. Instead, the decisive factor is the decision of the Committee made while exercising its sole discretion. Such decision is less likely to constitute any negative consequences to the assured's right to recover the suffered loss and the sue and labour expenditure if he complies with his duty to inform the club of any incident that can give rise to a claim under the P&I Club Rules. In the event of such notice being promptly given, the Committee is likely to exercise its right to request the assured to carry out certain sue and labour actions, provided that the P&I Club Rules grant such right to the Committee. Such notice also increases the chance of the assured of getting a prior agreement of the club to the incurrance of the particular sue and labour costs.

Therefore, in practical terms, an assured's failure to sue and labour is highly unlikely to occur due to the detailed requirements of the P&I Club Rules concerning notification of the event, provision of all the available information, collaboration, etc, even at the earliest stages of the incidents.<sup>211</sup> Institute Clauses 1995 and the International Hull Clauses 2003 also contain a provision on a prompt notification of the underwriter upon occurrence of an incident, whereby loss, damage, liability or expense may result in a claim under the H&M policy. Under the Institute Clauses 1995 the assured's right of any recovery from the H&M insurer ceases in the event that the above mentioned notice is not given during 12 months after the assured became aware of the occurrence, unless the insurer agrees to the contrary in writing.<sup>212</sup> International Hull Clauses 2003 shorten such period of time to 180 days.<sup>213</sup> However, considering that recovery of the sue and labour costs from the H&M insurer, does not depend on his prior approval of the incurrance of the costs nor does the H&M insurer have a right to request the incurrance of any sue and labour costs, the assured's duty to notify the H&M underwriter of any incurred incident has little effect on the assured's risk of non-compliance with the duty to sue and labour. The H&M insurer may wish to provide the assured with some practical advice on the necessary sue and labour measurer. However, compliance with such recommendation is not mandatory to the assured.

Similarly to the issue of incurring legal costs in relation to an insured liability, it is likely that in the event that the assured is not experienced or skilled enough to carry out certain sue and labour activities the P&I club will take charge of those<sup>214</sup> and the assured will consequently be protected from any unreasonable expenses. Therefore, if the duty to inform the club of any insured incident is complied with and the instructions of the Committee,

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<sup>211</sup> Martin, Stephen, *Marine Protection and Indemnity Insurance: Conduct, Intent, and Punitive Damages*, 28 Tul. Mar L.J. 45, p. 7.

<sup>212</sup> Clause 13.1, Clause 11.1 and Clause 43.1 of the respective set of clauses.

<sup>213</sup> Clause 43.2 of the International Hull Clauses 2003.

<sup>214</sup> Provided, of course, that the liability in question exceeds the deductibles.

if any, are executed no question of failure to sue and labour appears.<sup>215</sup> However, different P&I Club Rules put diverse emphasis on this duty to notify the club.

Nepia Club Rules make the duty to give a prompt notice to the club about any incident that can be reasonably expected to give rise to a claim under the Nepia Club Rules<sup>216</sup> a condition to the assured's right to recovery from the club, unless the Committee in its discretion decide otherwise.<sup>217</sup> The particular P&I Club Rules also provide for a right of the Committee to require the assured to make any sue and labour or legal expenses. In the event that no such request is made, the sue and labour expenses are recoverable if a prior agreement of the Committee is obtained or if the Committee decides that they were reasonably incurred. Therefore the assured has a very high motivation to inform the club of any incident insured against in order to secure his right of any recovery from the club. However, if neither the request or agreement regarding the necessary sue and labour expenses is obtained from the club it is at the assured's own risk whether the taken sue and labour measures will be subsequently considered as amounting to compliance with the duty to sue and labour.

Rule 30(1) of Britannia Club Rules does not make the right of the assured to reimbursement of the sue and labour costs dependant on his compliance with the duty of notification. Failure of the assured to sue and labour is therefore more likely to happen under the Britannia Club Rules than under the Nepia Club Rules. Under the former P&I Club Rules there is a considerably lower pressure on the assured to inform the club of an insured incident. As the result, the chances of the assured getting a request for the incurrence of the sue and labour costs or an approval thereof are reduced.

Perhaps, the most clear consequences of non-compliance with the duty to sue and labour are contained in the London Club Rules. The already mentioned London Club Rule 4.1 gives the right to the Committee to reject or reduce any recovery by the assured when in its sole discretion it determines that the assured has not at any time taken such steps to protect his interests as the Committee at its sole discretion would have expected an uninsured person acting reasonably in similar circumstances to have taken. It therefore appears that in the event that the assured does not take reasonable measures to avert or minimize a loss insured against, the Committee has a right to reduce or even reject the indemnification in total. In addition to this, London Club Rule 18.1.1 also imposes a duty on the assured to promptly notify the insurer of every casualty, event and claim against him which threatens to give rise to any insured liability, costs or expenses. London Club Rule 18.3 goes on to give the insurer the authority to reject or reduce any recovery to which such breach of the duty to notify may appear to the Committee to be relevant. Therefore, both the

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<sup>215</sup> Martin, Stephen, *Marine Protection and Indemnity Insurance: Conduct, Intent, and Punitive Damages*, 28 Tul. Mar L.J. 45, p. 7.

<sup>216</sup> See Rule 33(1).

<sup>217</sup> See Rule 33(5).

consequences of failure to inform the club about the casualty as well as to reasonably protect the assured's interests can amount to total rejection of the claim.

Taking into account the above mentioned, the consequences of the assured's non-compliance with the duty to sue and labour are quite similar under the H&M and P&I covers, however, the peculiarities of the provisions on the duty of notification contained in different P&I Club Rules have a practical effect of reducing or increasing the likelihood of the assured's failure to exercise the duty in question.

The effect of under-insurance on the recoverability of the incurred sue and labour costs can be discussed with a focus on the H&M and P&I insurance separately as well as in relation to their cumulative effect regarding collision liability and the sue and labour and legal expenses incurred thereof.

The amount of the recoverable sue and labour costs under the H&M cover is limited to the insured value of the vessel under the Institute Clauses 1995 as well as under the International Hull Clauses 2003. The Institute Clauses 1995 provide for the sue and labour costs' recoverability in proportion to the correlation that the insured value of the vessel bears to its proper value, except in the event of a claim for a total loss. Consequently, in the event of any under-insurance the maximum indemnification for any reasonably incurred sue and labour costs will be lower than if it was insured for its true value. To the contrary, the amount of the sue and labour costs recoverable under the International Hull Clauses 2003 is not dependant on any under-insurance, thus being far more beneficial for the under-assured and creating a better incentive for him to take all reasonable measures to avert or minimize an insured loss than the sue and labour clause under the Institute Clauses 1995. For this reason the International Hull Clauses 2003 are said not only to be more attractive to the assureds, but also to be superior to most other rival insurance forms, including the Norwegian Marine Insurance Plan 1996.<sup>218</sup>

It may appear at the outset that the approach adopted in the International Hull Clauses 2003 is far more costly for the H&M insurer than that taken in the Institute Clauses 1995. However, taking into account the importance of the sue and labour measures in minimizing or even preventing the insured loss, a more generous operation of the clause can result in a lower liability of the H&M insurer for the insured loss. The decision as to whether to take a particular sue and labour measure often needs to be taken very promptly and one timely taken action can prevent even a total or constructive total loss. It should also be noted here that apart from the reduction of the sue and labour costs in the event of under-insurance the deductibles are also applicable to the aggregate amount of the claims (including the claim for the sue and labour costs) under each separate occurrence (except in the event of a total loss or constructive total loss). In the event that the sue and labour

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<sup>218</sup> Silver, Paul, *International Hull Clauses 2003*, S. & T.L.I. 2003, 4(3), pp. 12 - 13.

measures taken by the under-assured are successful in completely averting the insured loss, firstly, the indemnification for such costs would be reduced proportionately to the under-insurance and, secondly, deductibles would be applicable to the sue and labour costs. Therefore, the under-assured, knowing that both the mentioned factors contribute to a lower percentage of the reimbursement of the sue and labour costs, is unlikely to overlook them when deliberating any incurrence of the sue and labour expenses.

The combined effect of under-insurance and applicability of deductibles on the recoverability of the sue and labour costs from the H&M insurer may in some instances have a practical effect on the motivation of the assured to incur expenses for the aversion or minimization of the insured loss. In the event that the imminent peril is likely to cause total or constructive total loss it is in the assured's best interests to take every reasonable step to reduce the harmful effect of the incident since the amount of the indemnification for the total or constructive total loss will be reduced according to the under-insured value of the vessel. The inapplicability of deductibles to the claims for total or constructive total loss, differently from its effect in the event that the vessel is insured for its full value, therefore does not diminish the assured's incentive to fully comply with his duty to sue and labour. Similar situation occurs in the event that the imminent peril is likely to cause a loss above the deductibles but it cannot amount to total or constructive total loss. If the sue and labour measures are successful, the assured will only have to cover the amount of the loss equal to or even lower than deductibles. If, however, the assured does not succeed in preventing averting or minimizing the loss, in addition to full amount of deductibles, the assured will also have to cover the amount of loss above the reduced indemnification proportional to under-insurance. Lower amount of indemnification if the vessel is under-insured does not, however, have any effect on the assured's motivation to protect the vessel if the insured peril is only likely to cause a loss well below the deductibles. In such situation the assured will always try to keep the aggregate amount of the loss, including sue and labour costs, as low as possible.

Similarly to the effect of under-insurance on the reimbursement under the H&M cover, the indemnification the assured is entitled to under the P&I insurance is apportioned to the proportion that the tonnage of the vessel entered into the club bears to the vessel's full tonnage. However, since the limit for each insured risk contains the recoverable sue and labour expenses, in the event of under-insurance such limit will be reduced to the above mentioned proportion and thus little amplitude will be left for the recoverable sue and labour costs. Therefore in the event of under-insurance the likelihood of the assured being able to recover all of the incurred sue and labour expenses is very low, since the limit of the particular risk is probable to be reached before any sue and labour costs are added to the sum of the loss sustained. Such operation of the sue and labour clause in the event of a vessel's partial entry into the P&I club is less advantageous to the assured than that of the corresponding clause in the Institute Clauses 1995 and in the International Hull Clauses 2003. However, the nature of the risks insured

and the potential amount of loss to be covered justify the P&I Clubs' strict attitude to under-insurance. Besides, the fact that an under-assured himself partially benefits from the aversion or minimization of loss only makes it fair that the costs for the protection of the proportion of the tonnage of the vessel not entered into the club is not covered by other members<sup>219</sup> of the P&I club.

The recoverability of the sue and labour costs becomes more complicated in the event of collision liability, particularly when under the H&M policy the vessel is insured for an amount lower than its true value. Since collision liability is shared between the H&M and P&I insurers the expenditure of the assured for the aversion or preservation of the loss thereof can also be shared between both underwriters. Whether such sue and labour costs are apportioned amongst the two insurers depends on the nature of the sue and labour measures taken in each particular instance. Therefore, if in the Committee's opinion, the actions taken by the assured for the aversion or minimization of the collision risk were not solely for the benefit of the H&M insurer but also for that of the P&I insurer, such sue and labour expenditure will be treated in the same way as the collision liability itself. In other words, in the situation described above the H&M insurer will reimburse the assured for three fourths of the incurred sue and labour expenditure, while the P&I insurer will cover the expenses in excess of those recoverable under the H&M policy.

Such treatment of the sue and labour expenses incurred for the benefit of both the H&M and P&I insurers leads to a number of conclusions. In the event that the assured is faced with a collision risk that is likely to cause collision liability exceeding the limitation under the P&I Club Rules<sup>220</sup> the assured is motivated to incur large sue and labour expenses, since any excess of the mentioned limit will have to be borne by himself. Similarly, if the collision risk is unlikely to cause such an extensive loss it is in the assured's interests to incur even large sue and labour expenditure since he is likely to recover their full amount.

In the event that the sue and labour costs are incurred by the assured for the aversion or minimization of collision liability and they are solely attributable for the preservation of the H&M interests, the assured will only be able to recover such reasonably incurred costs equal to the insured value of the vessel and no apportionment of these costs will be made between the H&M and P&I insurer.

Therefore, the combined operation of the sue and labour clauses in the H&M and P&I insurances create a strong incentive for the assured to incur the sue and labour expenses for the benefit of both insured interests, since in such event his chances of recovering the full amount of such costs are the highest.

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<sup>219</sup> The word "member" is used here in order to emphasize the mutual character of the P&I insurance.

<sup>220</sup> More precisely, in the Certificate of Entry.

As it was mentioned in Chapter 7.6, in the event of under-insurance the P&I club only covers the assured's liability in excess of the amount that would have been recoverable from the H&M insurer had the vessel been insured for its true value. Under-insurance in the H&M policy has the same effect on the amount of the recoverable sue and labour expenses from the P&I club when they are incurred in relation to collision liability. Therefore, provided that the Committee considers the incurred sue and labour expenses as recoverable under the P&I cover, in the event of under-insurance the club will only cover the amount of the sue and labour expenses in excess of what would have been covered by the H&M insurer.

## 9 Summary and Conclusion

A number of similarities as well as various differences in the way the sue and labour clause operates in the H&M and P&I insurances have been detected in this thesis. The similarities between the sue and labour clause incorporated into the two types of marine insurance originate in the very purpose of the duty to sue and labour while the practical differences in the operation of the sue and labour clause in the H&M and P&I insurances are explainable by the character of each of the two insurance covers or are attributable to the established commercial practice. Certain above mentioned peculiarities can have an effect on the efficiency of the sue and labour clause in encouraging the assured to take all reasonable steps for the aversion or minimization of an insured loss.

The similarities between the operation of the sue and labour clause in the H&M and P&I insurances are certain requirements for the costs to qualify as sue and labour expenditure and to be recoverable from the insurer. These similarities are: an insured peril, extraordinary expenditure, reasonableness of expenditure as well as its proper incurrence. Moreover, the same range of persons is under the duty to sue and labour under both the H&M and P&I insurances. Another requirement for the assured to be able to get indemnification for the incurred sue and labour expenses concerns the time when the expenditure is made, and it is different in the H&M and P&I insurances. Under the H&M insurance, the duty to sue and labour arises when the insured peril is imminent, while this duty under the P&I cover arises after the insured incident.

The mentioned arising of the duty to sue and labour under the H&M cover is less favourable to the assured than the time when the duty in question arises in P&I insurance. In the H&M insurance the assured is under the risk of misevaluating the imminence of the peril which can result in incurrence of unreasonable and therefore unrecoverable expenses or, conversely, in failure of the assured to sue and labour. In the P&I insurance, the assured has the clarity as to when the sue and labour measures become necessary and he is therefore better protected from incurring unrecoverable sue and labour expenses and from failing to comply with the obligation in question. From the insurer's point of view the sue and labour clause incorporated into the most popular H&M forms favours him better than its equivalent in the P&I Club Rules, since the aversion or minimization of insured loss is more likely to be successful when the measures thereof are taken before the occurrence of the peril. Such difference between the two insurance covers stems from the absence of the supplementary nature of the sue and labour clause in P&I insurance as opposed to the clause being a separate engagement under the H&M policies. Thus, under the P&I Club Rules, a claim for the sue and labour costs arises simultaneously with a claim for an insured loss.

The lack of the supplementary nature of the sue and labour clause in the P&I insurance can initially seem to make the P&I cover less beneficial for the assured than the H&M cover. However, the quantitative limits of the insured loss under the former cover being considerably higher than those undertaken by the latter insurer, justify the inability of the assureds under the P&I cover to recover the incurred sue and labour expenditure in addition to the maximum recoverable amount of loss. Considering the nature of the P&I cover, in the view of this author, the lack of the supplementary nature of the sue and labour clause in the P&I Club Rules does not have a detrimental effect on encouraging the assured to avert or minimize an insured loss. In the event of a small risk, the loss together with the sue and labour expenses will still fall within the recoverable limits of the P&I Club Rules. If, to the contrary, the assured is faced with a high risk, he is motivated to take sue and labour measures in order to avoid being liable for any excess of the amount of the loss insured by the club.

Equal conclusion can also be reached by looking at the issue in question from the insurer's point of view. In the event that the assured incurs sue and labour costs, the H&M underwriter can be found liable for double the amount insured under the policy, while P&I club will only be liable up to the amount insured with respect to particular risk. Since the amount of indemnification the assured under the P&I Club Rules can obtain from the club is much higher than double the insured value of the vessel under the H&M policy, it cannot be said that the P&I insurer is in an economically more favourable position. Therefore the lack of the supplementary nature of the sue and labour clause in the P&I insurance is directly attributable to the nature of the cover and it protects the clubs from extortionate expenses in addition to the massive amount of expenditure they can be subjected to.

The application of deductibles to sue and labour costs in the H&M and P&I insurances is done in different manners. In the H&M insurance they are applicable to the total amount of claim for the loss, including any sue and labour expenses, while P&I Club Rules provide for a separate application of deductibles to the loss and the sue and labour costs. This difference does not make either of the two sue and labour clauses more efficient in motivating the assured to protect the insured vessel in the event that the amount of the potential loss is considerably lower than the amount of deductibles. However, if the assured is faced with a peril which is likely to cause a loss higher than the deductibles but unlikely to cause total loss, the mentioned motivation of the assured under the two types of marine insurance is different. In such event, the assured under the H&M policy, knowing that in the event of any outcome of his steps for the protection of the vessel he will be liable for the amount of deductibles, is stimulated to suing and labouring. To the contrary, the assured under the P&I Club Rules, when faced with a risk that is likely to cause a loss higher than deductibles but considerably lower than the maximum recoverable loss for the particular risk, is less motivated to incur any sue and labour costs since the deductibles will be applicable to such costs and the loss separately. Consequently, in the

circumstances described above, the P&I club is more exposed to having to reimburse the assured for a loss that could have been avoided.

The seeming advantage of the H&M forms over the P&I Club Rules with respect to the application of deductibles wanes in the event of a peril that is likely to cause total loss of the insured vessel. Since under the discussed H&M forms deductibles are not applicable in the event of total or constructive total loss, the assured, depending on his interest in saving the vessel, may choose an imaginary performance of his duty to sue and labour in order to be released from bearing any of the sue and labour expenditure. In the P&I insurance it appears that, when faced with a peril that is likely to cause a loss exceeding the amount covered by the club, the assured is motivated to incur large sue and labour expenses, since any excess of the mentioned limit will have to be borne by the assured.

By covering the legal costs (subject to certain requirements) incurred by the assured in the aversion or minimization of his liability covered by the club, the P&I Club Rules encourage the assured to start legal proceedings or defend the claims made against them which will ultimately fall within the club's expenditure. H&M underwriters fail to create such stimulus, except in the event of collision liability. These virtually polar approaches taken by the two types of insurers can be explained with the crucial difference between the covers they provide – P&I insurance covers a wide range of the assured's liabilities, while the H&M policy generally does not insure the assured's liability, collision liability being an exception to the above mentioned general rule. Therefore, the difference in question cannot be considered as having an adverse effect on the efficiency of the sue and labour clause in the H&M insurance. Whereas, taking into consideration the character of the P&I insurance, the assured's right to indemnification of the incurred legal costs stimulates a closer communication between the assured and the club benefitting both parties of the insurance contract.

The consequences of non-compliance with the duty to sue and labour range from reduction in the indemnity to total rejection of the claim under both the H&M and P&I insurances. However, a distinction can be made in the probability of the assured's failure to sue and labour. In the H&M insurance the key element determining the consequences in question is the proximate cause of the loss, while in P&I insurance the principal factor is the discretion of the Committee. In the latter type of insurance there are two elements that, if not eliminate the probability of the assured's failure to sue and labour, make such risk relatively low. These two elements are: the Committee's right to request incurrence of sue and labour expenses by special direction and the assured's duty to give prompt notice to the Committee of any incident that may give raise to a claim under the P&I Club Rules. Provided that the Committee is granted the above mentioned right and the assured complies with his duty of notifying the club, non-compliance with the duty to sue and labour is highly unlikely to happen. Therefore, two above mentioned elements protect the assured from any reduction in the amount of his claim or its rejection as well as they assist the

P&I club in controlling the sue and labour costs incurred by the assured. The assured's duty to notify the H&M insurer about any insured loss, in its turn, does not significantly decrease the risk of the assured's failure to exercise his duty to sue and labour since recovery the H&M insurer is not entitled to requesting the incurrence of any sue and labour costs by a special direction. Moreover, no prior approval from the H&M insurer is necessary in order to make the sue and labour costs recoverable. Any advice with respect to the necessary sue and labour measures obtained from the H&M insurer does not bind the assured.

In the event of under-insurance the International Hull Clauses 2003, undoubtedly, create a better incentive for the assured to properly exercise his duty to sue and labour than the Institute Clauses 1995 and the P&I Club Rules. Even though the assured himself benefits from the suing and labouring measures taken if the vessel is not insured for its full value, motivating the assured for taking every reasonable step for the aversion or minimization of an insured loss can ultimately protect the insurer from incurring large amounts of liability that could have been avoided.

In the situations involving collision liability the combined operation of the sue and labour clauses in the H&M and P&I insurances has an effect on the assured's motivation to incur sue and labour expenses with respect to the mentioned insured risk. In the event that the sue and labour measures taken are solely attributable to the H&M insurer, the assured will only be able to recover such expenses up to the insured value of the vessel and no indemnification will be obtained from the P&I club. Therefore, the assured is only encouraged to incur such sue and labour expenses up to the amount equal to the insured value of the vessel. If, however, in the opinion of the Committee, the sue and labour measures taken were for the benefit of both insurers, sue and labour costs incurred with respect to collision liability will be apportioned between the two insurers. Therefore, even when faced with collision risk that is likely to cause a liability exceeding the covered amount under the P&I Club Rules, the assured is still motivated to take all reasonable steps for the aversion or minimization of the loss, since any excess of the collision liability limit will fall within the assured's own liability.

It should also be noted that in the event of under-insurance in the H&M policy, the assured will only be able to recover from the P&I club an amount of indemnification in excess of what he would have obtained had the vessel been insured for its full value. It can therefore be concluded that the assured has a strong incentive to incur sue and labour expenses with respect to collision liability for the benefit of both the H&M and P&I insurers, since in such event his chances of getting indemnification for all of the sue and labour expenditure made are the highest.

There is no doubt that the interest of the assured in the insured vessel is one of the key elements determining whether all the reasonable measures for the aversion or minimization of an insured loss will be taken. However, an

effective sue and labour clause in the H&M policies and P&I Club Rules creating a strong incentive for the assured to embark on taking the actions for the protection of the subject matter insured have a great potential to assist both the assureds as well as the H&M and P&I insurers in avoiding extortionate, unnecessary expenses detrimental to the shipping and the insurance industries.

# Supplement A

## Institute Time Clauses (Hulls) 1995

### [...] **Duties of Assured (Sue & Labour)**

11.1. In case of any loss or misfortune it is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance.

11.2. Subject to the provisions below and to Clause 12 the Underwriters will contribute to charges properly and reasonably incurred by the Assured their servants or agents for such measures. General average, salvage charges (except as provided for in Clause 11.5.), special compensation and expenses as referred to in Clause 10.5. and collision defence and attack costs are not recoverable under this Clause 11.

11.3. Measures taken by the Assured or the Underwriters with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

11.4. When expenses are incurred pursuant to this Clause 11 the liability under this insurance shall not exceed the proportion of such expenses that the amount insured hereunder bears to the value of the Vessel as stated herein, or to the sound value of the Vessel at the time of the occurrence giving rise to the expenditure if the sound value exceeds that value. Where the Underwriters have admitted a claim for total loss and property insured by this insurance is saved, the foregoing provisions shall not apply unless the expenses of suing and labouring exceed the value of such property saved and then shall apply only to the amount of the expenses which is in excess of such value.

11.5. When a claim for total loss of the Vessel is admitted under this insurance and expenses have been reasonably incurred in saving or attempting to save the Vessel and other property and there are no proceeds, or the expenses exceed the proceeds, then this insurance shall bear its pro rata share of such proportion of the expenses, or of the expenses in the excess of the proceeds. As the case may be, as may reasonably be regarded as having been incurred in respect of the

Vessel, excluding all special compensation and expenses as referred to in Clause 10.5.; but if the Vessel be insured for less than its sound value at the time of the occurrence giving rise to the expenditure, the amount recoverable under this clause shall be reduced in the proportion to the under-insurance.

11.6. The sum recoverable under this Clause 11 shall be in addition to the loss otherwise recoverable under this insurance but shall in no circumstances exceed the amount insured under this insurance in respect of the Vessel. [...]

## **Institute Voyage Clauses (Hulls) 1995**

### **[...] 9. DUTY OF ASSURED (SUE AND LABOUR)**

9.1 In case of any loss or misfortune it is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance.

9.2 Subject to the provisions below and to Clause 10 the Underwriters will contribute to charges properly and reasonably incurred by the Assured their servants or agents for such measures.  
General average, salvage charges (except as provided for in Clause 9.5), special compensation and under this Clause 9.

9.3 Measures taken by the Assured or the Underwriters with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

9.4 When expenses are incurred pursuant to this Clause 9 the liability under this insurance shall not exceed the proportion of such expenses that the amount insured hereunder bears to the value of the vessel as stated herein, or to the sound value of the vessel at the time of the occurrence giving rise to the expenditure if the sound value exceeds that value. Where the Underwriters have admitted a claim for total loss and property insured by this insurance is saved, the foregoing provisions shall not apply unless the expenses of suing and labouring exceed the value of such property saved and then shall apply only to the amount of the expenses which is in excess of such value.

9.5 When a claim for total loss of the vessel is admitted under this insurance and expenses have been reasonably incurred in saving or attempting to save the vessel and other property and there are no proceeds, or the expenses exceed the proceeds, then this insurance shall bear its pro rata share of such proportion of the expenses, or of the expenses in excess of the proceeds, as the case may be, as may reasonably be regarded as having been incurred in respect of the vessel, excluding all special compensation and expenses referred to in Clause 8.5; but if the vessel be insured for less than its sound value at the time of the occurrence giving rise to the expenditure, the amount recoverable under this clause shall be reduced in proportion to the under-insurance.

9.6 The sum recoverable under this Clause 9 shall be in addition to the loss otherwise recoverable under this insurance but shall in no circumstances exceed the amount insured under this insurance in respect of the vessel. [...]

# Supplement B

## International Hull Clauses 2003

### [...] 9 DUTY OF THE ASSURED (SUE AND LABOUR)

9.1 In case of any loss or misfortune it is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance.

9.2 Subject to the provisions below and to Clause 15, the Underwriters shall contribute to charges properly and reasonably incurred by the Assured their servants or agents for such measures. General average, salvage charges (except as provided for in Clause 9.4), special compensation and expenses as referred to in Clause 8.5 and collision defence or attack costs are not recoverable under this Clause 9.

9.3 Measures taken by the Assured or the Underwriters with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

9.4 When the Underwriters have admitted a claim for total loss of the vessel under this insurance and expenses have been reasonably incurred in saving or attempting to save the vessel and other property and there are no proceeds, or the expenses exceed the proceeds, then this insurance shall bear its pro rata share of such proportion of the expenses, or of the expenses in excess of the proceeds, as the case may be, as may reasonably be regarded as having been incurred in respect of the vessel, excluding all special compensation and expenses as referred to in Clause 8.5.

9.5 The sum recoverable under this Clause 9 shall be in addition to the loss otherwise recoverable under this insurance but shall in no circumstances exceed the insured value of the vessel. [...]

# Supplement C

## The North of England Protection and Indemnity Association Limited P&I Rules 2009/2010

[...] 19 (20)

### Legal Costs, Sue and Labour

#### (a) Legal Costs

Costs and expenses which a Member may incur in respect of any liability or expenditure against which the Member is insured under these Rules.

#### (b) Sue and Labour

Losses, costs and expenses necessarily incurred by a Member after an incident in order to avoid or reduce a liability or expenditure against which the Member is insured by the Association even if such losses, costs and expenses would otherwise be excluded by these Rules.

#### (c) Special Direction

Losses, costs and expenses which a Member may be required to incur by special direction of the Association in cases where the Directors decide that it is in the interests of the Association that the directions be given even if such losses, costs and expenses would otherwise be excluded by these Rules.

PROVIDED ALWAYS THAT in Rule 19(20)(c):

- (A) no such losses, costs or expenses shall be recoverable unless either they have been incurred with the prior agreement of the Managers, or the Directors shall determine that such losses, costs and expenses were reasonably incurred;
- (B) costs and expenses incurred in respect of a formal enquiry into a casualty involving an Entered Ship shall be recoverable to such extent only as the Directors may determine. [...]

# Supplement D

## **The Britannia Steam Ship Insurance Association Limited 2010 Rules Class 3**

[...] 19(20)

### **Legal Costs, Sue and Labour**

#### **Legal costs (A)**

Legal costs and expenses which a Member may incur in respect of any liability or expenditure against which the Member is insured under these Rules.

#### **Sue and labour (B)**

Losses, costs and expenses necessarily incurred by a Member after an incident in order to avoid or reduce a liability or expenditure against which the Member is insured by the Association, even if such losses, costs and expenses would otherwise be excluded by these Rules.

#### **Special direction (C)**

Losses, costs and expenses which a Member may be required to incur by special direction of the Association in cases in which the Committee decides that it is in the interests of the Association that the direction be given, even if such losses, costs and expenses would otherwise be excluded by these Rules.

#### **PROVIDED ALWAYS THAT:**

(i) no such losses, costs or expenses shall be recoverable unless either they have been incurred with the prior agreement of the Managers or the Committee shall determine that such losses, costs and expenses were reasonably incurred;

(ii) unless otherwise agreed the costs and expenses incurred under paragraph (A) shall be free of

deductible and any losses, costs and expenses incurred under paragraphs (B) or (C) shall bear the same deductible as the liability or expenditure so avoided or reduced would have borne;

(iii) costs and expenses incurred in respect of a formal enquiry into a casualty involving an Entered Ship shall be recoverable to such extent only as the Committee may determine;

(iv) losses, costs and expenses arising from or related to ransom demands or extortion shall be recoverable only to such extent as the Committee may determine. [...]

# Supplement E

## The London Steam-Ship Owners' Mutual Association Limited P&I Rules 2010-2011

### [...] 9.27 Sue and Labour and Legal Costs:

- 9.27.1** Extraordinary costs and expenses (other than under Rule 9.26) reasonably incurred after any casualty, event or matter for the purpose of avoiding or minimising any liabilities, costs or expenses against which the Assured is insured within this Class, but only to the extent either that such extraordinary costs and expenses have been incurred with the approval of the Association or that the Committee in its sole discretion shall determine that the same should be recovered.
- 9.27.2** Legal costs and expenses relating to any liabilities, costs or expenses against which the Assured is insured within this Class, but only to the extent either that such legal costs and expenses have been incurred with the approval of the Association or that the Committee in its sole discretion shall determine that the same should be recovered,
- 9.27.3** PROVIDED that the operation of Rule 9.27 shall require account to be taken of any relevant deductible in evaluating the liabilities, costs and expenses for which the Assured is insured within this Class and for the avoiding or minimising of which the extraordinary or legal costs and expenses shall have been incurred. [...]

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