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## ***ABOUT US***

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

## **THE INTRICACIES IN UNDERSTANDING TOTAL LOSS IN MARINE INSURANCE.**

AUTHORED BY - ISABEL SAVIO BALA,  
Advocate and Guest Faculty

In marine insurance like all insurance policies we see risk insured and loss. Loss is classified as partial loss and total loss.

The concept of total loss is explained in Sections 57, 58 and 60 of Marine insurance act 1963. Actual total loss and constructive total loss are two concepts that are unique to Marine insurance. In Marine insurance establishment of loss can be arbitrary like "loss at sea". Total loss is interesting because of Section 57 that states where the subject matter is destroyed or so damaged as to cease to be a thing of the kind insured or where the assured is irretrievably deprived of the subject matter, there is an actual total loss. Section 60 states there is a constructive total loss where the subject matter insured is reasonably abandoned on account of its actual total loss where the subject matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable or because it could not be preserved from actual loss without an expenditure which would exceed its value when the expenditure had been incurred.<sup>1</sup>

As an advocate what intrigues me is how do someone decide the difference of actual and constructive loss. For actual loss there is no need to give notice of abandonment according to Section 57(2). Section 62 states that a notice of abandonment is required for constructive loss. The insurer has to accept the notice of abandonment only then it will be considered as constructive total loss otherwise it would be considered as partial loss. Constructive total loss gives the right of subrogation to the insurer who is given the right to retrieve and recover. The most important and challenging question is when does an insured have knowledge of constructive loss and what is to be done when the notice of abandonment is declined by the insurer.

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<sup>1</sup> Marine Insurance Act 1963.

The "Bamburi" (1982) 1 Lloyd's Rep 312, a vessel was indefinitely detained in Iraq because of the out break of hostilities between Iraq and Iran, Staughton J stated that the owners have been deprived of the free use and disposal of their vessel, all movement of the ship was prohibited thus they were not in possession of their ship. In this case the arbitrator stated that loss of possession means deprivation of rights, and can be classified as loss.<sup>2</sup> The time when the notice of abandonment is to be given depends on the knowledge of the assured, it must be given with reasonable diligence after the receipt of reasonable information of the loss. It is a question of fact.<sup>3</sup>

A cargo of hides was on its way from Calcutta to Bourgas in an Austrian ship. On account of the war like conditions the ship was told to sail to a safe port. The goods were landed and sent up country but the assured did not give notice of abandonment. The goods were seized by the Austrian Government and sold. The insurer was held not liable for actual total loss, Fooks V Smith (1925) 132 LT 486.<sup>4</sup>

Actual total loss is when the insured item is completely destroyed or damaged beyond repair a ship that has sunk, cargo completely destroyed. Constructive total loss is the assurance of facts by which actual total loss is perceived and a notice sent to the insurer claiming the loss as actual loss. Constructive total loss is also accepted to be in the event that retrieving the insured cargo or ship would cost more than the value of the insured good.

There are so many understandings to be put into the above, the insured is expected to take care of the insured goods and ensure that steps are taken to minimize risk and loss. When the ship is stranded in a far off place the decision of the assured to judge the loss is critical to claim.

There is the understanding of the notice to abandonment, can the assured take steps to retrieve the cargo or ship after sending a notice of abandonment. In the case of *Svergies Angfartygs Assurans Forening V Connect Shipping Inc* (2019) UKSC 29, the Supreme Court stated that if the principle in these cases is that although a constructive total loss has occurred, the assured is limited to his actual loss so far as reduced by subsequent events it must follow that no

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<sup>2</sup> Sergey Nedelko Attorney at law, Ilyashev&Partners, publications, " Constructive loss of a ship due to non-constructive position of cargo owners: features of disputes due to blocking of ships in ports" 19th June 2023.

<sup>3</sup> KSN Murthy&KVS Sharma, Modern Law of Insurance in India, 6th edition page 257.

<sup>4</sup> Avtar Singh, Law of Insurance. 3rd edition page 322.

expenditure of the owner himself by way of salvage or repair can be regarded as reducing the cost of repairing the damage, it does not reduce his loss.<sup>5</sup>

The scope of marine insurance is vast and covers a range of risks and perils. The Indian marine insurance market is very competitive with both public and private players offering a wide range of insurance products. The risks covered vary according to the policy taken like collision, grounding, fire, theft, natural disasters, etc. The varied insurance products include hull insurance, cargo insurance, marine liability insurance, and marine reinsurance.<sup>6</sup>

Upon total loss of the entire cargo by an insured peril the sum insured is paid in full, and if part of the cargo is a total loss, the appropriate proportion of the insured value is paid. To get the compensation under marine insurance the owner must inform the insurance company immediately so that the insurance company can take necessary steps to determine the loss.<sup>7</sup>

The claims are based on the coverage of the policy, not all marine insurance policies cover total loss. Clauses in a marine insurance policy is to be read and understood, clauses that address constructive total loss like " No claim for constructive total loss shall be recoverable hereunder unless the subject matter insured is reasonably abandoned either on account of its actual total loss appearing to be unavoidable or ship the cost of recovering, reconditioning and forwarding the subject matter to the destination to which it is insured would exceed its value on arrival".<sup>8</sup>

Thus the intricacies is to judge if the loss is constructive total loss and total send a notice of abandonment on time. The justifiable cause is the apparent outcome of actual total loss. If the concepts of total loss is understood based on the claims made and case laws then as an advocate we can understand the importance of the facts revolving around loss in marine insurance.

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<sup>5</sup> CMS Law - Now, "Damaged beyond repair? Supreme Court clarifies test for constructive total loss of a ship" Steven wise, 03/07/2019.

<sup>6</sup> BIMAKAVACH, " Marine insurance in India: A comprehensive overview" by Rajendra kumar Jain, January 12, 2024.

<sup>7</sup> <https://www.gicouncil.in/insurance-education/types-of-insurance/marine/> Last visited 19/6/25.

<sup>8</sup> <https://irdai.gov.in/document-detail?documentId=1001884> Last visited 19/6/25.