The UK Supreme Court's decision in the "Renos" on CTL and the position under The Nordic Plan

The UK Supreme Court's recent decision in the "Renos" (Sveriges Angfartygs Assurans Forening (The Swedish Club) and others v Connect Shipping Inc and another, [2019] UKSC 29) will be a landmark case on marine insurance under the English Institute Time Clauses Hulls (1/10/83) "ITCH" conditions. It clarifies that when determining whether a vessel is a constructive total loss ("CTL") under the ITCH conditions, regard should be had to (a) the costs incurred prior to the owners' notice of abandonment, but not (b) remuneration payable under the SCOPIC clause. The decision will have significant importance in the insurance market because of the financial and practical implications. But what would be the position under the Nordic Marine Insurance Plan of 2013 version 2019 ("Nordic Plan")?

Herman Steen,
Partner,
Wikborg Rein

Niklas Sonnenschein,
Legal Counsel, Cefor (The Nordic Association of Marine Insurers)

The "Renos" sustained significant damage following a fire off the Red Sea Coast on 23 August 2012, resulting in the vessel losing main engine power and requiring salvage assistance. A Lloyd's Open Form ("LOF") with Special Compensation P&I Clause ("SCOPIC") was signed, and SCOPIC was invoked. Following extensive discussions between owners and H&M insurers the owners tendered a notice of abandonment ("NOA") on 1 February 2013. The H&M insurers contended that the vessel was not a CTL.

SCOPIC is an optional clause in the LOF. If included in the LOF and invoked by the salvor it provides a guaranteed remuneration based on predetermined rates for tugs, personnel and equipment deployed by the salvor. SCOPIC is only payable in so as far as it exceeds a conventional salvage award under the Salvage Convention 1989 Article 13. As a rule an Article 13 award is a H&M risk, whereas SCOPIC remuneration is a P&I risk.

Both the High Court and the Court of Appeal found that the vessel was a CTL, on the basis that the pre-NOA costs and the SCOPIC costs were included, and found it unnecessary to make findings as to the other alleged costs of recovery and repair. The Supreme Court granted leave of appeal in respect of the pre-NOA and SCOPIC issues.

The Supreme Court's decision

Whether costs incurred prior to NOA should be excluded from CTL calculation

On this issue the Supreme Court affirmed the decision of the lower courts and held that the "*cost of repairing the damage*" for the purpose of determining whether the vessel was a constructive total loss under the Marine Insurance Act section 60 (2) (ii) included all the reasonable costs of salving and safeguarding the "Renos" from the time of the casualty onwards, together with the prospective cost of repairing her. The cost of repairing the damage was in no way "*adeemed*" because part of it had already been incurred at the time when notice of abandonment was given and action brought on the policy.

Whether SCOPIC costs should be excluded from CTL calculation

The Supreme Court disagreed with the lower courts on this issue and held that SCOPIC costs should not be considered when assessing whether a vessel is a CTL. The Supreme Court emphasized that the SCOPIC costs were not to enable the ship to be repaired, but to protect the shipowner's potential liability for environmental pollution, which the Supreme Court stated was no part of the measure of the damage to the ship and had nothing to do with the possibility of repairing her. The Supreme Court pointed out that environmental pollution is a P&I risk and had been covered by the owners' P&I club, but held that the mere fact that the H&M insurer would not, under the policy terms, be liable for some item of expenditure on a partial loss basis does not necessarily mean that it cannot be included in the assessment of whether there is a CTL.

This may in many cases have great financial implications since the SCOPIC costs may be a large part of the salvage costs, such as in this case where the SCOPIC costs were about half of the total salvage remuneration.

The Supreme Court set aside the order of the High Court and remitted the matter back to the High Court to determine – with SCOPIC excluded from the assessment – whether the "Renos" was a CTL.

The Nordic Plan

Under the Nordic Plan the assured is entitled to claim a constructive total loss if the conditions for condemnation of the vessel are met under Clause 11-3. Condemnation is the term used in the Nordic Plan for constructive total loss. The conditions for condemnation are met when the damage is so extensive that the cost of repairing the vessel will amount to <u>at least 80 % of the insurable value</u> (or of the value of the vessel after repairs if the latter is higher than the insurable value).

Under Clause 11-5 the assured must – if he wishes the vessel to be condemned – submit a request for condemnation to the insurer without undue delay after the vessel has been salvaged and he has had an opportunity to survey the damage. This allows the parties to make rational decisions based on their best evaluation of the situation. The assured is not required to give notice of abandonment.

Pursuant to Clause 11-3 (4) the costs of repairs are deemed to include all costs of removal and repairs which, at the time when the request for condemnation is submitted, must be anticipated if the vessel is to be repaired. The relevant costs include the costs of repairing all damage reported in the previous three years. The provision however sets out some important exceptions, including that "*salvage awards*" shall not be considered.

As is pointed out in the commentary to the Nordic Plan, the fact that removal costs are included in the calculation means that the decisive point about condemnation is founded on a more realistic

basis. Alternatively, one would have to look at the damage to the ship alone, regardless of the location of the vessel. The example in the commentary is that there will be a material difference between a damaged ship which is in a port for example at Svalbard and a ship with similar damage in a port with good possibilities of repairs.

A line must however be drawn between removal costs (which counts towards condemnation) and salvage awards (which do not count towards condemnation).

The main reason why salvage awards are excluded from the condemnation assessment is that it will always be very difficult to estimate the salvage award in advance and this would introduce a serious element of uncertainty in the condemnation formula. At the same time, it is difficult to get the damage surveyed properly as long as the vessel has not been salvaged.

It is stated in the commentary that the distinction between "*salvage award*" and such expenses that shall be included, especially removal costs, must be based on general maritime law criteria:

> *"The decisive factor must be the situation which the ship was in when the salvor was given the assignment, and not whether the remuneration agreed to on a "no cure - no pay basis" was determined in advance or shall be paid according to accounts rendered."*

This means that not only Article 13 awards but also SCOPIC remuneration shall be excluded under the Nordic Plan in the condemnation calculation.

Even if the salvage award is not included in the condemnation formula, the H&M insurer must in practice also take the salvage award into consideration if the assured claims for a total loss before the ship has been salvaged. The significance of the condemnation request being made while the ship is still at the place of casualty, lies in the fact that this is the point in time that will be decisive for the assessment of the costs and the market value of the ship.

Furthermore, under the Nordic Plan salvage awards are covered as costs of measures taken to avert or minimise loss arising in connection with the casualty (sue and labour costs) up to an equivalent amount of the sum insured in addition to the compensation for particular loss or total loss.

Comment

The assessment in the "Renos" case would clearly be very different under the Nordic Plan.

Firstly, the CTL threshold is different. Under the Nordic Plan the threshold is 80%, whereas it is 100% under the ITCH.

The idea behind the regulation in the Nordic Plan -- i.e. the combination of the lower threshold and excluding salvage awards – is that it makes it easier for the assured to assess whether the requirements for a total loss are satisfied.

Finally, the mechanics under the Nordic Plan may in practice (mainly because of the lower threshold) more easily lead to a condemnation.