

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Legal and documentary aspects of the marine insurance contract



UNITED NATIONS

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
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Legal and documentary aspects of the marine insurance contract

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ABBREVIATIONS

c.i.f.	cost, insurance, freight
F.C. and S.	free of capture and seizure
F.I.A.	full interest admitted
f.o.b.	free on board
F.P.A.	free of particular average
F.S.R. and C.C.	free of strikes, riots and civil commotions
ILU	Institute of London Underwriters
JHF	Joint Hull Formula
P & I [Clubs]	Protection and Indemnity [Clubs]
P.P.I.	policy proof of [insurable] interest
S.G.	ship and goods
UNCTAD	United Nations Conference on Trade and Development
W.A.	with average

Case law

AMC	American Maritime Cases
C.A.	Court of Appeal
Com. Cas.	Commercial Cases Reports
Fed.	Federal Reporter (United States of America)
K.B.	English Law Reports, King's Bench Division
Lloyd's Rep.	Lloyd's List Law Reports
Q.B.D.	English Law Reports, Queen's Bench Division
U.S.	United States Reports (opinions of the United States Supreme Court)

EXPLANATORY NOTE

References to dollars (\$) are to United States dollars.

PREFACE

The present report was originally issued in November 1978^a and was considered at its sixth session by the Working Group on International Shipping Legislation of the Committee on Shipping of the Trade and Development Board. The Working Group recommended to the Committee, in paragraph 3 of its resolution 3 (VI): (a) that the existing marine insurance policy conditions and practices used in national markets covering international business should be examined; (b) that the different legal systems governing marine insurance contracts should be investigated; and (c) that, in the light of these studies, and bearing in mind the suggestions contained in chapters V and VI of the report, a set of standard clauses should be drawn up as a non-mandatory international model.^b

The work of drawing up a set of clauses as recommended in resolution 3 (VI) commenced at the seventh session of the Working Group, held from 1 to 19 December 1980. As a result of the decision of the Committee on Shipping at its ninth session, held from 1 to 12 September 1980, the seventh session of the Working Group was devoted to hull insurance. As background documentation for the session, the UNCTAD secretariat submitted to the Group two complementary reports, entitled "Legal and documentary aspects of the French marine insurance legal regime"^c and "Legal and documentary aspects of Latin American marine insurance legal regimes".^d The Working Group at its seventh session formulated two composite texts as a basis for work on a set of risk clauses and one composite text as a basis for work on a collision liability clause and recommended that its eighth session should be devoted to continuing the work on hull insurance and to commencing work on cargo insurance (resolution 4 (VII)).^e

This report considers in detail the standard policies and clauses used in the United Kingdom at the time of its original issuance in 1978. However, subsequent to that time, revised versions of standard policies and clauses used for cargo insurance have been adopted by the insurance market of that country with effect from 1 January 1982.

^a TD/B/C.4/ISL/27 and Corr.1 and Add.1.

^b See the report of the Working Group on its sixth session, held from 18 to 26 June 1979 (TD/B/C.4/ISL/28), annex 1.

^c TD/B/C.4/ISL/30.

^d TD/B/C.4/ISL/31.

^e For the report on the seventh session of the Working Group, together with the composite texts, see TD/B/C.4/ISL/32.

Chapter I

INTRODUCTION

1. Legal and documentary aspects of marine insurance have been the subject of consideration within the United Nations Conference on Trade and Development from the very first session of the Conference, held at Geneva in 1964. At that time recommendation A.IV.23¹ was adopted stating, *inter alia*, that:

The competent international organizations should examine the question of the adoption of:

(a) Uniform clauses for marine, land and air transport insurance.

2. At the second session of the Conference, held at New Delhi in 1968, it was asserted by developing countries that a large proportion of the existing body of international shipping legislation had originated at times when the interests of the developing countries had not been taken into account. In particular, it was felt that the law and practices relating to bills of lading, charter parties, limitation of shipowners' liability and marine insurance were all unsatisfactory from the point of view of developing countries. They considered that there was a serious need for improvement of the legislation in those fields as well as for filling gaps in fields where legislation did not exist.

3. Conference resolution 14 (II) of 25 March 1968² recommended that the Working Group on International Shipping Legislation be created to "review commercial and economic aspects of international legislation on shipping in order to identify areas where modifications are needed and to give recommendations concerning new legislation which has to be drafted". It also listed certain subjects, among which was marine insurance, that should be taken up "for drafting appropriate conventions or for revising existing legislation".

4. In pursuance of this recommendation, the Committee on Shipping adopted resolution 7 (III) of 25 April 1969³ establishing the Working Group on International Shipping Legislation. At its first session, held at Geneva in 1969, the Group adopted a work programme that included marine insurance as a priority subject.⁴ In setting out its work programme, the Working Group had before it a note by the UNCTAD secretariat in which it was stated that:

[Marine insurance] policy forms, which are prepared by the insurers, contain many complicated and archaic clauses which are not apparently uniformly interpreted in many countries and have been the subject of repeated demands for reconstruction and simplification.

Mere unification of the legal rules on an international plane might not be effective in maintaining a balance between the conflicting interests of the insurer and the assured unless the terms of the policy are also internationally unified along equitable lines. The Working Group may wish to examine the clauses used in policy forms in different countries and consider the desirability of recommending their simplification and unification so that they may be easier understood and may carry the same meaning everywhere in appropriate cases.⁵

A similar concern for greater clarity and uniformity as well as the desirability of an international agreement was expressed by a developed market-economy country during the debate that took place at the first session of the Working Group.⁶

5. At its second session, held at Geneva in 1971, the Working Group approved arrangements accepted by the Committee on Invisibles and Financing related to Trade, which also had marine insurance on its agenda,⁷ whereby the requirements of both the Working Group and the Committee could be served by one study on marine insurance. The Working Group at the same time noted a provisional outline for the study prepared by the UNCTAD secretariat which envisaged research into the economic, commercial and legal aspects of marine insurance as well as its functioning and impact on the balance of payments of developing countries.⁸ Subsequently, however, the scheduling of agenda items placed the consideration of marine insurance by the Committee on Invisibles and Financing related to Trade sufficiently in advance of the Working Group's sixth session that it would have been difficult for the Shipping Division to collaborate on a joint study while meeting the separate agenda requirements of the Working Group on charter parties and bills of lading. Furthermore, as work progressed it was realized that the subject of marine insurance involved such a wide range of considerations, and involved an analysis of such magnitude, that it would not be feasible to present the study in all its various facets in one report.

6. Consequently, rather than one unified report on marine insurance, two separate studies have been prepared, each addressed to the particular concerns of the organ in which it is to be used. The first study, entitled "Marine cargo insurance"⁹ was submitted to the Com-

¹ *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No. 64.II.B.11), third part, annex A.

² *Ibid.*, Second Session, vol. I, *Report and Annexes* (United Nations publication, Sales No. E.68.II.D.14), annex I, sect. A.

³ See *Official Records of the Trade and Development Board, Ninth Session, Supplement No. 3* (TD/B/240), annex I.

⁴ *Ibid.*, Ninth Session (third part), *Annexes*, agenda item 7, document TD/B/289, para. 17.

⁵ "Working paper on international shipping legislation" (TD/B/C.4/ISL/2), para. 39.

⁶ See *Official Records of the Trade and Development Board, Ninth Session (third part), Annexes*, agenda item 7, document TD/B/289.

⁷ The Trade and Development Board, at its 213th plenary meeting on 8 September 1969, had invited the Committee to give high priority to a study on marine insurance, with special reference to its impact on the balance of payments of developing countries. See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 16* (A/7616), part three, para. 103.

⁸ "Study on marine insurance: note by the UNCTAD secretariat" (TD/B/C.4/ISL/L.7), para. 3.

⁹ TD/B/C.3/120.

mittee on Invisibles and Financing related to Trade at its seventh session, held at Geneva in 1975. It contains a descriptive analysis of marine cargo insurance, its institutional aspects, its role in world trade and an analysis of the commercial and economic problems experienced by marine cargo insurance markets in developing countries. The report suggests appropriate solutions to these problems with a view to promoting a larger participation of the insurance markets of developing countries in international marine cargo insurance to improve the balance-of-payments position of these countries.

7. The present report, which includes a consideration of both hull (used here in reference to ocean-going vessels) and cargo insurance, draws upon the provisional outline previously noted by the Working Group, as well as the various expressions of dissatisfaction and suggestions for improvement expressed in UNCTAD forums concerning the legislative rules and practices involved in marine insurance. Consequently, the report concentrates on an analysis of the marine insurance contractual relationship, including the legislation, policy conditions and practices that affect the process of obtaining insur-

ance, the system of rating and the rights and duties of the parties. Furthermore, since marine insurance is an area in which there is no applicable international convention, despite its international characteristics, an analysis was made of the effects of this absence of international legislation on the legal and economic position of marine assureds and insurers, particularly in developing countries.

8. Thus, after a brief comment on the methodology used in preparing the report and a general introduction to the economic role, basic principles, structure and operation of marine insurance, the report presents an analysis of some specific legal difficulties experienced by assureds and/or insurers under the present system of legal rules and practices governing marine insurance. After having identified several specific areas where improvements to the present system governing marine insurance could be made, the report analyses the effect of the absence of any international agreement governing marine insurance and considers possible means for developing an international legal base for marine insurance contracts.

Chapter II

METHODOLOGY

9. A difficulty experienced in producing an analysis of marine insurance that is international in scope is the paucity of information concerning the differences existing between national laws, policy conditions and practices governing marine insurance. Furthermore, with regard to determining legal problems within a particular legal system, the tendency for marine insurers to avoid formal litigation to settle disputes results in an acute absence of reported legal decisions which might otherwise have highlighted areas of difficulty.

10. To compensate for this absence of literature the secretariat sent two questionnaires, one on marine cargo insurance and the other on marine hull insurance, to all States members of UNCTAD. Substantive replies were received from 68 countries, of which 45 were developing countries, 17 developed market-economy countries and 6 socialist countries. In addition, missions were undertaken by secretariat members to certain marine insurance markets as well as to maritime centres in developing countries to obtain a broad perspective of the concerns of both the insurer and the assured. Furthermore, the secretariat secured the services of an expert in marine insurance from a major international marine insurance market who acted as consultant and adviser on various technical aspects of the study.

11. In this connection, the secretariat would like to express its gratitude to the various Governments, organizations and experts for the assistance given and the invaluable background material furnished through replies to the questionnaire and in discussions with members of the secretariat.

12. Of the government responses to the questionnaires that were received, the majority appeared to have been prepared by insurance organizations in the national market or by a governmental organization reflecting the perspective of insurers. To provide a more balanced perspective on which to base this report, special efforts were made, during missions as well as during personal contacts with maritime industry personnel, to elicit the views of assureds as to their marine insurance policies. Although in some situations, particularly in the case of relatively large shipowners, assureds were well informed concerning their insurance needs and policy coverage, a significant number of assureds, particularly shippers and consignees, revealed after an initial statement of general satisfaction with their insurance coverages that there was a widespread and profound lack of understanding of the specific aspects of their marine insurance policy coverages. Even in the case of hull insurance, instances were discovered where shipowner personnel sometimes found difficulty in dealing with the seemingly technical variations in policy coverages and in selecting the coverages adapted to their specific insurance needs. In the end, it was discovered that far too often assureds were dependent on the recommendation of the insurer as to

the appropriate policy coverage—or at best on that of a broker, often situated in a major marine insurance market having very little contact with the country or assured concerned. This distinct lack of understanding of marine insurance policy coverages on the part of many assureds signalled to the secretariat the existence of possible inadequacies in the presentation of the terms and conditions in the standard documentation used for the marine insurance contract.

13. Additional factors that shaped the approach of the secretariat's inquiry involved the historical evolution of the current international market structure of marine insurance. At the time of the establishment of ocean trade on a more or less regular basis between what are now called developing countries and developed market-economy countries, ocean trade, and concurrently marine insurance, were regulated almost exclusively by colonial Powers. Since also at that time the subject colonial territories had relatively few indigenously owned fleets involved in international trade on a regular basis, both insurers and shipowner assureds for the most part came from developed market-economy countries. This situation remained unchanged until the late 1940s and early 1950s, when developing countries first began to own and regularly operate vessels in their foreign trade. Nevertheless, despite the growth of indigenous assureds and the emergence of marine insurance markets in developing countries, the financial predominance of the developed market insurance centres has remained and many of the developing countries continue to use the marine insurance laws, practices, policy forms and clauses of these same developed market insurance centres.

14. Furthermore, since British merchant fleets dominated world tonnage at the time that marine insurance practices and conditions of cover were crystallizing into recognizably modern forms during the last quarter of the nineteenth century and the beginning of the present century, it was only natural, given also the United Kingdom's ascendancy at that time in general commerce and finance, that London should have become the international market centre of marine insurance. For this reason a distinctive feature of marine insurance is the profound impact the British market, as well as the policy forms, clauses and legislative provisions in force in the British market, have had on the conduct of marine insurance internationally, particularly that involving developing countries.

15. Lastly, during the emergence of modern marine insurance practices as described above, the advantages to be gained from uniformity of the insurance conditions comprising insurance contracts began to be realized on a national basis in the form of standardized clauses developed privately by the marine insurance industry. As was often the case, these standard clauses were drafted by

insurers, often with little organized consultation with assureds,¹⁰ and thus standardized conditions of cover were developed unilaterally by insurers to suit the needs of the particular national market in which they were situated. As has been stated by a noted insurance expert, "the most serious objection to standard clauses was that in many instances they were not a product of the free balancing of interests resulting from negotiations between the parties to the contracts, but a dictate from the stronger, or at least the better organised, of the parties".¹¹

16. The secretariat thus found that the entire marine insurance industry had evolved historically from, and had largely retained, practices and conditions of cover which were formulated by insurers from developed countries. In this connection, it was concluded that neither as insurers nor as assureds had interests from developing countries an effective role in shaping the legal regime governing marine insurance contracts.

17. As a result of the foregoing considerations, it was felt incumbent upon the secretariat in its research to analyse marine insurance from the critical perspective of whether it met the needs of developing countries and the

¹⁰ Except for, in the case of the British market, special trade clauses for certain commodities which were developed in consultation with national trade organizations for the commodity concerned (see para. 88).

¹¹ V. Dover, *Uniformity in Marine Insurance Policy Form and Clauses* (Göteborg, Akademiförlaget-Gumperts, 1963), p. 15.

needs of assureds. Specifically, the analysis was designed to identify those aspects of the marine insurance contractual relationship which cause problems in international shipping and trade, such as a general lack of clarity in the presentation of contract documents, and specific ambiguities, inequities or lacunae in standard policies and in other terms and conditions commonly used. It was also designed to identify unsatisfactory procedures for obtaining insurance cover or for settling claims; deficiencies, distortions or excessive cost factors in market practices; as well as variations in national legislation, regulations or practices that cause difficulties for the parties to the marine insurance contract. As a result of the predominance of the British market and its laws, practices, and policy conditions, the secretariat was able to concentrate a large part of its investigation on the British marine insurance legal regime. A principal consideration of the analysis undertaken was to answer the question whether the problems identified and analysed needed to be remedied through international action, and if so, in what form.

18. A last point to be made is that, owing to the complexities of this topic and the limitations on the length of United Nations documents, it has not been possible to make this report an all-encompassing description of marine insurance; rather, its treatment of the subject-matter is primarily concerned with some of the areas which are considered to present difficulties or could be subject to improvement.

Chapter III

THE ECONOMIC ROLE OF MARINE INSURANCE

19. Marine insurance is a centuries-old aid to the conduct of sea trade. Its purpose has been to enable the shipowner and the buyer and seller of goods to operate their respective businesses while relieving themselves, at least partly, of the burdensome financial consequences of their property's being lost or damaged as a result of the various risks of the high seas.

20. The need to insure property against the economic consequences of its loss or damage has become a fundamental feature of modern society. Particularly in the case of property representing substantial investments in vessels, commodities, manufactured goods or industrial plants (and often involving outside financing), the owner, as well as his creditors, insist on ample insurance cover. Without this cover the various interests involved in international trade, whether they be owners of goods, shipowners, mortgagees of vessels having provided the necessary finance for the construction of vessels, or banking institutions involved in a documentary sale of goods or extension of credit in connection with the sale of goods, would lack the necessary security of knowing that at least the monetary equivalent of the objects insured will be available to cover their financial risk in the event of an accident. Thus, marine insurance adds the necessary element of financial security so that the risk of an accident occurring during the transport is not an inhibiting factor in the conduct of international trade.

21. The importance of marine insurance, both to assureds, in terms of the security it provides and its cost element in the overall economics of running a ship or transporting goods, and to countries, particularly developing countries, in its impact on their balance-of-payments positions, cannot be overemphasized. In this respect, for a more thorough analysis of the economic role of marine insurance in international trade and its importance to developing countries and their balance of payments, reference should be made to the UNCTAD secretariat study on marine cargo insurance (see para. 6 above), which is complementary to this study on the marine insurance contract.

Chapter IV

THE OPERATION OF MARINE INSURANCE

A. Some basic principles¹²

22. It has been said that:

In theory, the purpose of any form of insurance is to replace that which has been lost. It is not intended that the assured should make a profit from his loss but that he should merely be in no worse position than he was before the loss occurred. ... it is not practicable to expect the insurer to replace an object which is lost, nor is it reasonable to expect him to remove the damage thus restoring the damaged object to the whole sound object. As a compromise, any recompense must be of a monetary nature and this system of reimbursement is called "indemnifying".¹³

23. A fundamental principle of marine insurance is that, in order to obtain insurance coverage, there must be some sort of legal or equitable relation between the person benefiting from the insurance and the insured property. This relationship is called an "insurable interest" and it is used to prevent the policy of insurance from being used as a method of gambling on the loss of someone else's property. The concept is, as a rule, liberally applied so that an insurable interest can be found to exist whenever such person is in a position to benefit by the safe arrival of the vessel or goods or be prejudiced by its loss or damage.

24. A contract or policy of marine insurance is an arrangement whereby one person, called the insurer or underwriter, agrees, according to specific terms of the contract, to indemnify another person, called the assured, for losses incurred in connection with property, such as a ship, goods or other movables, involved in maritime transport.¹⁴ In other words, an insurer underwrites, or subscribes to a risk, the word "risk" being used in this context to refer to the risk of loss occurring in connection with insured property, and this risk of loss can include not only actual property losses but also financial losses, such as those resulting from loss of freight, passage money, commission or profit as well as certain types of liabilities incurred to third parties.

25. The specific terms of the insurance contract usually stipulate certain limitations as to the type of occurrences that may cause losses for which the insurer will pay an indemnity. Such occurrences are called "insured risks" or "insured perils". Thus a policy may specify that only certain maritime risks, or "perils of the seas", are covered. Alternatively, a policy may be a war risk policy whereby only losses caused by acts of war or related events are covered. Another possibility is that the policy

may specify that it covers liabilities arising from the insured property's causing damage to other property, as might arise when vessels are involved in collisions.

26. Additional restrictions may be placed on the type of losses for which an indemnity will be paid. For example, a policy may be limited to covering only total losses.¹⁵ Alternatively, the policy may indicate that it includes all types of partial loss, called "average", or it may distinguish between different types of "averages", covering "general average", which is "average" caused deliberately to save all the interests in the voyage from total loss,¹⁶ but excluding "particular average", which is "average" caused accidentally by the "perils of the seas" (such as wind, waves and storms) or other risks (e.g. fire) insured against.

27. In return for the agreement of the insurer to enter into the contract of insurance, the assured agrees to pay a "premium". The premium is considered compensation for running the risk of loss of the insured property and is normally retained whether or not the insured property is lost. The size of the premium will depend on the insurer's estimation of the degree of risk that the insured property will incur a loss and on the amount of indemnity he will have to pay. By underwriting numerous risks, and receiving the corresponding premiums, the insurer expects that by operation of what may be informally termed the "law of averages", only some of the risks he has underwritten will actually result in a claim against him whereby he must pay an indemnity.

28. Generally speaking, insurers prefer to spread their potential liabilities in relatively small amounts over a number of risks in order to profit from the probability that only a limited percentage will experience losses. The concept of the "spreading of risks" is a basic principle of insurance. It is widely practised by marine insurers in order to minimize the extent of financial loss in the event that a particular insured object is lost by an insured peril. Thus, rather than to insure 100 per cent of one object, it is considered better to insure 50 per cent of two objects or, even better, only 25 per cent of four objects, so that the loss of any one object will not be a heavy financial loss to the insurer.

29. In order to spread risks, a marine insurer may subscribe to only a portion of a risk presented to him (that is to say, he agrees to underwrite the risk of loss of

¹² For a more complete explanation, see the study by the UNCTAD secretariat "Marine cargo insurance" (TD/B/C.3/120).

¹³ R. H. Brown, *Marine Insurance—The Principles* (London, Witherby and Co Ltd., 1970), p. 19.

¹⁴ Though, as will be pointed out later, the period of insurance for goods in transit now often exceeds the actual ocean transport in order to cover the goods during a connected inland movement from point of origin to point of destination.

¹⁵ An actual total loss involves the insured object's being destroyed or irretrievably lost to the assured. Another type of total loss is a "constructive total loss", whereby the assured reasonably abandons the insured object to the insurer because it appears either that an actual total loss is unavoidable or that to prevent a total loss would require an expenditure greater than the value of the object saved.

¹⁶ General average is based on the ancient maritime concept that if merchandise is thrown overboard (jettisoned) to lighten the ship, the loss occasioned for the benefit of all must be made good by the contribution of all (e.g., the owners of the ship and the cargo).

the property only up to a certain percentage of its value), thereby requiring an assured to approach additional insurers to agree to accept the remaining portion of the risk. Insurance coverage whereby more than one insurer insures a portion of a risk directly from the assured is called "co-insurance". Although each insurer contracts individually on his own behalf for a portion of the total risk, he nevertheless usually does so on the same contractual terms and conditions as the first insurer (called the "leader").¹⁷

30. Alternatively, insurers may accept 100 per cent of a risk and then approach another insurer to accept a portion of the risk which the first insurer does not wish to bear. Such an arrangement, whereby one insurer accepts a risk directly from the assured and then passes on all or a portion of the risk to one or more additional insurers, is called "reinsurance". Subsequent reinsurance contracts made between the first insurer and subsequent insurers do not change the original contractual relationship between the assured and the first insurer. Reinsurance may be undertaken on a case-by-case basis, called "facultative reinsurance",¹⁸ whereby the reinsurance on a particular risk insured by the original insurer is arranged individually for that risk only. Alternatively, the original insurer and the reinsurer may make a general agreement in advance, whose terms are intended to cover all, or a designated category of, subsequent reinsurances between the two parties and which obligates the parties to cede and accept such reinsurances accordingly. This type of reinsurance is called "treaty reinsurance".¹⁹ By appropriate clausings in the reinsurance arrangement, the same terms and conditions as those of the original insurance usually apply to the reinsurance and to the claims paid thereunder.²⁰

B. International characteristics

31. A distinctive feature of marine insurance is the degree to which it is international in scope. Most cargo insurance is inherently international since the coverage

¹⁷ The "leader" refers to the first insurer with whom the premium rate and conditions of the insurance are negotiated. The equivalent concept exists in most marine insurance markets using co-insurance arrangements. Subsequent co-insurers generally rely on the expertise of the leading insurer and follow his lead in respect of the terms and conditions of the insurance.

¹⁸ The term "facultative" in this context refers to the right of an underwriter to decide in reinsurance whether or not to accept a risk.

¹⁹ No attempt will be made here to describe the various forms treaty reinsurances may take. However, see the study by the UNCTAD secretariat *Reinsurance problems in developing countries* (United Nations publication, Sales No. E.74.II.D.2).

²⁰ Using British practice as an example, a "pay as may be paid" clause may be inserted in facultative reinsurances. Such a clause reads as follows:

"This policy is declared and agreed to be a Reinsurance of ... and to pay as may be paid on the original policy or policies and to be subject to the same clauses and conditions."

V. Dover, *A Handbook to Marine Insurance* (London, Witherby and Co. Ltd., 1975), p. 481.

A "follow the fortunes" clause may be inserted in a reinsurance treaty. Such a clause is typically worded, in part, as follows:

"The Ceding Company reserves to itself the sole right to settle all losses, whether by way of compromise or 'ex gratia' payments or otherwise, and all settlements shall be unconditionally binding on the Reinsurer. ..."

J. K. Goodacre, *Marine Insurance Claims* (London, Witherby and Co. Ltd., 1974), pp. 633-634.

of goods transported by sea usually involves transport from one country to another. Thus the consignor/seller of the goods and the consignee/buyer often represent separate individuals subject to different laws and speaking different languages. The insurers of the goods may be situated in the country of the consignor or the consignee or in a third country having no other contact with the transport than through the insurance contract. Hull insurance is international as a result of the risk of loss or damage to the vessel occurring abroad and of the tendency for many shipowners to place all or part of their insurance in a country other than the country where they are situated. A factor involved in this latter tendency has been the increase in the number of vessels owned by shipowners from countries, including developing countries, which lack sufficient capacity to provide marine insurance cover for such local vessels, thereby requiring many shipowners to obtain their insurance coverage with insurers situated in a few developed market-economy countries—such as the United Kingdom of Great Britain and Northern Ireland and the United States of America. Thus, it is not at all uncommon for a shipowner to insure all or part of the value of his vessels directly in another country, even though he may have no connection with this country other than the insurance contract.

C. The structure of the marine insurance industry

1. MUTUAL INSURANCE ASSOCIATIONS

32. Broadly speaking, the conduct of marine insurance can be divided into that which is conducted for profit, referred to here as "commercial insurance", and that which is undertaken for mutual benefit, referred to as "mutual insurance".

33. Mutual insurance involves a group of persons or corporations agreeing in advance to contribute to offset each other's losses. In other words, each member of the group is in a sense an insurer for each other member. When a loss is incurred by one member, all the other members contribute ratably according to a predetermined formula, so that the loss falls evenly on all members. Since contributions are only intended to offset actual losses, there is in mutual insurance, as opposed to commercial insurance, no intention of accumulating a profit (which would only accrue to the members' benefit in any case).

34. The use of mutual insurance arrangements has been generally limited to the formation of associations of shipowners covering the risk of property loss, referred to simply as hull insurance, and the risk of incurring liabilities in connection with the operation of their vessels, referred to as liability insurance. At the present time, there are a very limited number of mutual associations offering hull insurance cover to ocean-going vessels (often referred to as "hull clubs"). Sometimes such clubs offer liability insurance as well. Most mutual marine insurance associations provide only liability insurance cover. Liabilities for which shipowners need insurance cover can be in the form of, *inter alia*, cargo claims, claims by the crew for injury and sickness, collision liability claims, and claims for wreck removal. Mutual associations offering insurance for these liabilities are called Protection and Indemnity (P & I) Clubs.

35. As a result of the mutual character of the P & I and other hull clubs, it is felt that the contractual relationship existing in such clubs (which takes the form of membership rules) is relatively less in need of close analysis at this stage. Furthermore, owing to the enormous scope of marine insurance, it is not feasible to undertake here an all-encompassing analysis of both mutual insurance and commercial insurance. Thus, this report concentrates on the "arms-length" contractual relationship between the assured and the insurer as it exists in the commercial markets, which is considered a more appropriate basis for the present analysis.

2. COMMERCIAL INSURERS

36. Commercial insurers operate on the basis of accepting the "premium" in advance and retaining it whether or not the insured property is lost, as described above (see para. 27). The conduct of commercial marine insurance can be found in most countries throughout the world and involves both hull and cargo insurance. Commercial marine insurers vary in size and, with the exception of Lloyd's of London, which is composed solely of private individuals grouped together in various underwriting syndicates, marine insurers are either private or government-owned corporations or governmental entities. Several marine insurers may be grouped together to form a large competitive market, as is frequently the case in developed market-economy countries or, as is more often though not always the case in socialist and developing countries, one insurer may be the sole operating marine insurer in a particular country's insurance market.²¹ In view of the international contractual relationships frequently undertaken by national insurers, it should be noted that some national insurance market associations are members of the International Union of Marine Insurance, which serves as an annual forum for the exchange of views on matters of mutual interest.

37. Although it is not possible to describe the structure of the marine insurance market in each country, it is intended that at least a brief idea should be given of the structure of the British market, which has traditionally been considered the main marine insurance market in the world. The British market consists of insurers primarily situated in a few major cities, London being the most important. Situated in London is "Lloyd's", which is an association of individual insurers numbering over 14,000, each with unlimited personal liability for the risks underwritten. These individual insurers are grouped into 300 syndicates. The affairs of each syndicate are managed by an underwriting agency which is responsible for appointing a specialist underwriter to accept risks on behalf of the other non-active syndicate members. All risks are brought to the Lloyd's syndicates via specially authorized intermediaries, called "Lloyd's

brokers", who are nevertheless free to place insurance elsewhere.

38. The London market is also composed of insurance corporations, most of which are members of an association called the Institute of London Underwriters (ILU). The ILU furthers the mutual interests of the members in matters of marine insurance. There are several joint committees composed of representatives of the ILU and Lloyd's, such as the Joint Hull Committee, which oversees renewal terms for hull insurance policies, and the Technical and Clauses Committee, which is entrusted with the drafting of the standardized market clauses used by the entire British market.

39. As to the international structure of the marine insurance industry, a few broad generalizations may be made concerning the international role of the various national markets. First, it should be noted that the process of spreading risks mentioned earlier (see paras. 28-30) results in portions of such risks being accepted by insurers situated across national boundaries. However, this spreading of risks on an international scale is not confined solely to specifically large risks; rather the total volume of risks underwritten by a particular insurer or group of insurers in a particular country may be deemed beyond its underwriting capacity, and this may occur especially in newly established marine insurance markets in developing countries, thereby necessitating the cession of a large portion of the risks to insurers situated in other countries.

40. In reference to specific markets, the British market has long been the dominant international centre for marine insurance. There are also a few other large markets, such as that in the United States of America, as well as some smaller ones, such as that in the Netherlands, which have become strongly international in orientation, where risks originating from other countries are now readily accepted by insurers on a direct basis, even as part of a larger co-insurance arrangement with at least one other national market. There are also other markets, often situated in developed market-economy or socialist countries, such as France, Japan, Norway and the Soviet Union, which concentrate somewhat more on local risks but which have nevertheless, it is understood, recently become open to international direct business, and in many cases accept such business on a regular basis. Other markets, including many insurance markets in developing countries which have just recently been established and which have not yet developed sufficient capacity or expertise to conduct marine insurance internationally on a large scale, are for the most part limited to accepting on a direct basis only those risks which have originated locally. However, among developing countries there are some relatively more developed insurance markets, such as those in India and Kuwait, which are prepared to accept on a direct basis risks from other countries.

41. The international spreading of risks has also been assisted by the growth of large international organizations specializing in accepting reinsurances. Such professional reinsurers, which are in a sense "wholesale" insurance dealers purchasing insurance risks from "retail" insurers who deal with the public directly, rely on accepting reinsurances originating from all parts of the world. In addition to a few large professional reinsurance companies, such as those situated in Switzerland and the Federal Republic of Germany, some entire insurance

²¹ The term "insurance market" exists as a loose description of a place where insurance is conducted or of a group of insurers offering a particular type of insurance, or even of different types of insurers. Thus, in the United Kingdom, where both London and Liverpool have insurers gathered together, one may refer to the London market or the Liverpool market or collectively the British market. Furthermore, reference may be made to the "commercial markets" versus the "P and I market", or the Lloyd's market versus the "company market". Generally speaking, every country that has at least one insurer conducting business can be referred to as a market—described in this report as either the "local" or the "national" market.

markets in developed market-economy countries, particularly the British, United States and Japanese markets, act virtually as professional reinsurance organizations for many of the new insurance markets in developing countries which lack sufficient capacity to cover more than a small percentage of the local cargo and hull risks.

42. If the international relationship of the various national markets is placed in historical perspective, the tendency appears for national markets to be more and more interested in accepting risks on an international basis, whether because of competition between markets to obtain the resulting increased premium income (on a direct or reinsurance basis), the increased insurance needs of a more widely dispersed shipowning and cargo owning clientèle, or a need to spread risks. Thus several markets are now becoming internationally oriented and competing with the British market in what was once virtually its sole domain. In this connection, with the emergence of independent States from former colonial territories as well as the growth of indigenous assureds and insurers in these emergent States, what was once a relatively simple international structure involving a few nationally oriented marine insurance markets in developed countries now involves increasingly complex contractual relationships of assureds, insurers, co-insurers and reinsurers situated across numerous national and cultural boundaries.

D. The legal regimes of marine insurance

43. The term "legal regime" is used in this report to refer collectively to all rules and procedures that affect the contractual relationship of the marine insurer and the assured. It thus includes the policy conditions and legislative provisions, as well as supplementary influences, such as judicial decisions and "market practices". In order to illustrate the international context in which marine insurance functions, a brief international review of the two primary components of the various legal regimes governing marine insurance—that is to say, national policy conditions and legislative provisions—is given below.

1. NATIONAL POLICIES USED IN MARINE INSURANCE

44. At the current time there are no international uniform policy conditions, as such, for marine insurance. Thus, varied policy forms produced by numerous national marine insurance markets are used, such as the Lloyd's S.G. Form (see para. 69 below), the "Institute Clauses" produced by the Institute of London Underwriters, the General Conditions of Hull Insurance produced by the Japanese Hull Insurers' Union, the Regulations for the Insurance of Goods in Transport and the Hull Insurance Regulations produced by Ingosstrakh of the Soviet Union, the *Police française d'assurance maritime sur corps de tous navires à l'exclusion des navires de pêche, de plaisance, des voiliers et des navires à moteur auxiliaire* (French marine hull insurance policy), the *Police française d'assurance maritime sur facultés* (French marine insurance policy (cargo)), the *Police d'assurance maritime sur facultés* (marine insurance policy (cargo)) used by the Société nationale d'assurance

(SONAS) of Zaire, the General Conditions for Cargo Insurance approved by the Asociación Mexicana de Instituciones de Seguros, and the General Conditions for Cargo Insurance and Hull Insurance drafted by the National Insurance Institute of Costa Rica, to name but a few.

45. However, despite the variety of national marine insurance policy conditions, it may be said that the use of the policy forms produced by the British insurance market for both hull and cargo insurance (hereinafter collectively referred to as "British conditions") has become so widespread that the policy forms are virtually *de facto* international insurance conditions. Approximately two thirds of the countries in the world utilizing hull or cargo insurance use the British conditions solely, or as an alternative to, or in conjunction with, local policies.²² When considering only developing countries, this figure rises to about three quarters. In the case of cargo insurance, some countries use British conditions for their export trade and local policies for their import trade.²³ French marine insurance conditions also have a certain international influence among some developing countries that have a French or Belgian historical connection.²⁴

46. As for those marine insurance markets which use local policies, sometimes such policies exist as an alternative to British conditions²⁵ or sometimes they are used in conjunction with some parts of British conditions. In this latter respect, it is often difficult to state categorically whether a particular country has a local policy or not, since the local policy may range between being (a) a close replica of British conditions,²⁶ (b) a policy that is local in many respects but incorporates in various forms one or more clauses found in British conditions,²⁷ (c) a local policy to which practice permits the

²² Based upon the government replies received to the secretariat questionnaires on hull and cargo insurance.

²³ As indicated in the replies of Denmark, Finland, Hungary, Norway and Sweden to the secretariat questionnaire on cargo insurance. This practice results from the belief that foreign consignees prefer a universally recognized insurance policy, such as British conditions, over a relatively unknown local policy.

²⁴ As indicated in the replies of the Central African Empire, Mali and Senegal to the secretariat questionnaires. Furthermore, the hull and cargo policies issued by the Société nationale d'assurance (SONAS) of Zaire and by the Société nationale d'assurances et de réassurances (SNAR) of Guinea appear to be based to a certain extent on French conditions.

²⁵ For example, the reply of Italy to the secretariat questionnaires indicates that in addition to four standard local policies, hull insurances may equally be made subject to the Institute Clauses. Also, a local cargo insurance policy is used in addition to British conditions. The reply of Argentina indicates that any shipowner may choose from among the various standard clauses known in the international market and may also choose Argentine clauses. The reply of the Soviet Union indicates that in addition to local cargo insurance conditions, called the Regulations for Insurance of Goods in Transport, British conditions are sometimes used as well.

²⁶ For example, the hull insurance policy issued by the National Insurance Corporation of Tanzania Limited incorporates only minor alterations to British conditions.

²⁷ For example, the open policy of transport insurance issued by the Union de Seguros, S.A., of El Salvador. Although the policy is on the whole a local policy, it incorporates the "perils" clause of the Lloyd's S.G. Form (see para. 71) in Spanish translation with an express stipulation that British "doctrine, jurisprudence, practice and custom" shall govern its interpretation. Also it is understood from the reply of Brazil to the secretariat questionnaire on hull insurance that a local policy is used there incorporating the principal clauses and conditions adopted by the London market, duly modified to take into account local legislation.

attachment of British clauses²⁸ or (d) a truly local policy to which it is not envisaged that foreign clauses may be attached.²⁹

47. Among developing countries in Asia and Africa there is a general tendency to use British, or in some cases French, conditions, or a close local variant, according to their respective historical or cultural connections. A few national markets in Latin America and Africa use in some cases United States conditions, often alongside British conditions, which they closely resemble.³⁰ Separate local conditions most frequently exist in developed market-economy countries, in socialist countries and Latin American countries. However, in the case of Latin American countries many of the local policies incorporate in various forms one or more Institute Clauses or anticipate the attachment of some of the Institute Clauses (see footnotes 27 and 28). Furthermore, an exception to the general rule that separate local policies tend to exist in developed market-economy countries can be found in those countries which all share a historical connection with the United Kingdom, in which case, although a local policy may exist, it is basically very similar to British conditions.³¹ On the other hand, developed market-economy countries whose legal system is in the civil law tradition are relatively more likely to have a separate local policy which differs from British conditions.

48. Among the reasons why British conditions continue to be so widely used, despite the absence of any obligation to use them, appear to be the historical economic predominance of the British market in terms of insurance placements on both a direct and a reinsurance basis, particularly from developing countries; the high level of expertise existing on the subject in the British market and, above all else, established precedent. Once a certain set of policy conditions becomes commonly understood and in wide use in different markets of the world, then the increased international use and acceptability of these policy conditions becomes to a certain extent self-generating. Generally speaking, insurance policies written subject to British conditions will be considered easier to reinsure or co-insure and, more importantly, will be more readily accepted by foreign assureds.

2. NATIONAL REGULATIONS GOVERNING MARINE INSURANCE

49. As has been stated earlier, there is no international convention applicable to marine insurance. The International Law Association developed in 1901 what were known as the Glasgow Marine Insurance Rules. These were designed to be incorporated by contract into marine insurance policies and to govern certain aspects of total losses and notices of abandonment, partial losses as

to ships, the effect of unseaworthiness and double insurance. However, they failed to gain wide acceptance. Consideration is currently being given within the European communities to a draft Council directive on the co-ordination of laws, regulations and administrative provisions relating to insurance contracts within the Communities. However, in its present form the draft is not applicable to marine insurance contracts.

50. Numerous countries, including some developing countries, have enacted domestic legislation providing some form of regulation of the marine insurance contract. The form of this legislation varies from country to country. In some countries it may exist primarily in the form of a specific enactment on marine insurance³² or as a section on marine insurance contained in a larger enactment on insurance generally;³³ in civil law countries it may exist primarily as a specific chapter on marine insurance in the national commercial³⁴ or maritime code.³⁵ Such specific legislation is often thus supplemented by other, more general, enactments, such as general contract laws, applicable portions of civil codes etc. Among developing countries, those in Latin America are the most likely to have legislation on marine insurance, usually as a section in a commercial or maritime code. Some countries, including some developing countries, regulate the marine insurance contract by relying on local insurance legislation generally applicable to all types of insurance contracts.³⁶

51. Numerous countries rely on the Marine Insurance Act, 1906, of the United Kingdom (hereinafter referred to as the 1906 Act) as the basic legislative regulation of the marine insurance contract. This reliance is occasionally formalized in some countries by incorporating the 1906 Act into local legislation, either verbatim or in similar form (see footnote 32). In other cases it is less formalized in that it may result from the practice of the local judiciary to refer to British law³⁷ or from a contractual stipulation in the marine insurance policy.³⁸

³² For example, the Marine Insurance Act, 1906, of the United Kingdom; Law. No. 67-522 of 3 July 1967, of France; the Marine Insurance Act, 1963, of India; the Marine Insurance Act, 1909-1973, of Australia; the Marine Insurance Act, 1968, of Kenya.

³³ For example, chapter II, "Marine insurance", in the Insurance Act of 1914 of the Philippines.

³⁴ In Venezuela, for example, marine insurance is dealt with in title VIII of the Commercial Code, as well as in articles 1,136 and 1,800 of the Civil Code. See also title III, "Marine insurance", of the Commercial Code of Spain, 1885; book II, title VI (Maritime Law of 21 August 1879), of the Code of Commerce of Belgium (in conjunction with the Law of 11 June 1874 on insurance in general to the extent that it is not derogated by the Maritime Law).

³⁵ For example, title VII, "Insurance", in the Maritime Code of Ethiopia, 1960; chapter XII, "Marine insurance contracts", in the Code of Commercial Navigation of the Union of Soviet Socialist Republics; and book VI, "Marine insurance", in the Maritime Code of Poland.

³⁶ For example, the Law of 22 March 1962 of Senegal; and Iran Insurance Act, 1937.

³⁷ For example, the courts of the United States of America accord great weight to the 1906 Act as indicative of the general maritime law in the United States on the subject, unless contrary United States judicial authority or other compelling reasons exist which require a divergence from British law. See *Queen Ins. Co. v. Globe and Rutgers Fire Insurance Co.*, 263 U.S. 487 (1924). But see *Wilburn Boat Company v. Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955). Also as indicated in the replies to the secretariat questionnaires by, for example, Bangladesh, Malawi and the United Republic of Tanzania.

³⁸ For example, as indicated in the replies to the secretariat questionnaires by Thailand; Hungary (it is stipulated on export policies that use British conditions that British law shall apply); Norway and Sweden (British law frequently applies to export cargo insurance if stipulated in the contract).

²⁸ For example, Spanish translations of some of the Institute Cargo Clauses may be attached to the local Argentine marine insurance policy currently in use. According to the replies to the secretariat questionnaires, Mexican and Turkish conditions may be expanded in the same manner.

²⁹ As is the case with, for example, French and Norwegian conditions.

³⁰ As indicated in the replies to the secretariat questionnaires from Liberia, Panama and Venezuela.

³¹ As is the case, for example, with United States conditions (the American Institute Clauses issued by the American Institute of Marine Underwriters).

52. Among developing countries this tendency to refer to British law appears, from the replies to the secretariat questionnaires, to occur most frequently in countries in Africa and Asia, though some Latin American countries which utilize some British clauses in conjunction with a local policy stipulate that British law and practice shall govern the interpretation of specifically those clauses.³⁹

53. However, the practice of referring to British law is by no means limited to developing countries; it occurs in many developed market-economy countries⁴⁰ and some socialist countries.⁴¹ In many cases this reference to British law occurs despite the existence of local marine insurance legislation, but generally such reference is limited to a particular type of marine insurance, such as cargo insurance of exports, and it is usually tied to the fact that British clauses are used as to that particular type of marine insurance (see footnotes 38 and 39).

54. It is also understood that some French-speaking countries on the African continent rely on French marine insurance legislation.⁴² Furthermore, as a result of the wide use of the 1807 French Commercial Code as the basis for many other codes in civil law countries, particularly those enacted during the nineteenth century, there is a tendency for the provisions of the 1808 Code applicable to marine insurance to be reflected to varying degrees in the codes dating from this period in many Latin American and European countries.⁴³

55. In those countries where there is no specific law on marine insurance contracts and no reference is made to British or French law, then the local law applicable to all contracts may be relied upon.⁴⁴

56. Although the exact content of national legislation varies from country to country, broadly speaking it can be said that legislation often, though not universally, tends to contain rules regulating the following aspects of the contractual relationship: insurable interests, insurable value, disclosures and representations made at the time of forming the contract, the form and content of the policy, double insurance, the premium, "floating" or "open" cargo policies, rules on voyage policies (concerning commencement of the voyage, deviation, delay etc.), liability insurance, insurance for the benefit of another person, the types of risks, the increase of risk during the period of the contract, the effect of negligence of the assured, the assignment of the policy, the loss and abandonment of the insured subject-matter, the obligations of the assured in the event of loss, the measure of indem-

nity, the rights of the insurer upon payment of a claim, and prescription.

57. A further point that should be emphasized in connection with national legislation governing marine insurance is that, as a result of the highly complex and technical nature of the subject-matter, it tends to leave a fair amount of discretion to the parties to the contract as to the exact terms and conditions that will govern their insurance relationship. As a result, legislative provisions frequently tend to be optional; that is to say, they are frequently capable of being altered by contract.⁴⁵ Thus, the final legal regime governing the relationship between the parties may be substantially different from the original legislative provisions. In some countries the legislative provisions, at least those specifically applicable to marine insurance itself, are completely overridden by uniform contractual rules agreed upon by the private industry within the country.⁴⁶

E. Brief review of the British marine insurance legal regime

58. In order to assist in providing a greater understanding of commercial marine insurance for the purposes of undertaking at a later stage a more detailed analysis of specific points, a brief summary of some major aspects of the law, policy conditions and market practices of marine insurance will be given. As a result of the historical development of marine insurance, it appears that British laws, policy conditions and practices are the most commonly understood components of marine insurance contracts throughout the world. Con-

³⁹ For example, article 87 of the 1906 Act. As has been said of the 1906 Act:

"...speaking generally, the main object of the Act is to declare the law, that is to say, to indicate to the parties the legal position if they do not make any express bargain, leaving them free to make any bargain they like to suit their own needs".

M.D. Chalmers, *Chalmers' Marine Insurance Act*, 1906, 7th ed., E.R.H. Ivamy, ed. (London, Butterworths, 1971), p. 137.

See also article 2 of French Law No. 67-522 of 3 July 1967 on marine insurance designating those articles which are not capable of being overridden by contract, thereby permitting the parties to alter the effect of the other provisions by their mutual agreement. Furthermore, as indicated in the reply of Spain to the secretariat questionnaires, the provisions of the Commercial Code of 1885 apply only in the absence of provisions in the insurance contract.

⁴⁶ As indicated in the reply of Norway to the secretariat questionnaires, the Law on Insurance Contracts in most respects permits the parties to the contract to negotiate private regulation. Hull insurance is thus regulated privately by the Norwegian Marine Insurance Plan of 1964, and cargo insurance by the Norwegian Insurance Plan for the Carriage of Goods of 1967, both adopted in consultation with representatives from industry, trade and academic organizations.

As indicated in the reply of Sweden, the Act on Insurance Contracts is for the most part overruled for merchant vessels by the provisions of the "General Swedish Hull Insurance Conditions", which were formed by the Swedish Association of Marine Underwriters, the "Swedish Club" and the Swedish Shipowners' Association.

As indicated in the reply of the Federal Republic of Germany, the provisions of the Commercial Code (arts. 778-900) are invariably ruled out by agreement. The "German General Rules of Marine Insurance" (ADS) are applied, supplemented by the Special Conditions for Cargo (ADS Cargo 1973) or the Hull Clauses of the Association of German Marine Insurers, as the case may be. The ADS and the ADS Cargo 1973 were drafted together with, and agreed upon by, representatives of the interested groups involved in economic activity, and by the German Insurance Brokers' Association. The Hull Clauses are agreed upon by the Association of German Shipowners and the Association of German Insurance Brokers.

³⁹ As done, for example, in the open policy of transport insurance used in El Salvador (see footnote 24). The Spanish translations of British clauses used in the Argentine market usually contain a similar stipulation (see footnote 25).

⁴⁰ For example: Japan, as to cargo insurance; the United States of America; Denmark, Finland, Norway and Sweden as to cargo insurance of exports; and the Netherlands as to hull insurance and sometimes as to cargo insurance.

⁴¹ For example Hungary (see footnote 38).

⁴² As indicated in the reply to the secretariat questionnaires by Mali. It is also understood that Zaire refers to either Belgian or French law, though national legislation is in the process of being drafted.

⁴³ See R. de Smet, *Traité théorique et pratique des assurances maritimes*, vol. III (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 531.

⁴⁴ For example, as indicated in the reply of Iraq to the secretariat questionnaires, Iraqi civil law is applied to the marine insurance contract.

sequently the British approach to the marine insurance contract has been used as the basis for most of this review.

1. THE PLACEMENT OF INSURANCE COVER

59. Purchasers of marine insurance are usually ship-owners (or sometimes their mortgagees desiring to obtain direct cover for their financial interest in the vessel) or cargo owners, who may be either shippers of goods for which cover must be arranged according to, for example, c.i.f. terms of sale (or who desire cover for the period of time they are responsible for the goods in, for example, an f.o.b. sale) or consignees who must arrange their own insurance for goods purchased on, for instance, f.o.b. terms. In order to place insurance cover such persons must approach either an insurer directly or an insurance broker.

60. The broker exists in the British marine insurance market as an independent intermediary between the assured and the insurer to facilitate the placement of insurance as well as, at a later date, the settlement of claims. The broker is chosen by the assured and, as his agent, gives advice on the type of cover needed and seeks to obtain such cover on the best terms and conditions reasonably possible from one or more insurers. The broker is remunerated for his services by way of a commission which is deducted from the premium charged by the insurer. A broker is distinguishable from an insurance agent, the latter being merely the representative of one or more insurers who procures insurance business directly for their account. Brokers exist in several countries throughout the world, including some developing countries, but are strongest in the United Kingdom, the United States and some countries of Western Europe. Rarely is their use obligatory, though in the British market it is necessary to use a broker accredited to Lloyd's if it is desired to obtain insurance cover specifically from that organization.

61. In order to be able to obtain insurance cover, the assured must give a full description of the risk—what it is (vessel or cargo, type etc.), its value, where it is going, etc.—which will be considered by potential insurers in deciding whether or not to accept the risk and at what premium rate. Thus, the disclosures and representations made by the assured concerning the risk must be accurate.

62. The provisions of the 1906 Act governing disclosures and representations made by the parties to the insurance contract stipulate that the contract is based upon the utmost good faith and is voidable by the injured party if the good faith standard is not maintained. The assured must disclose to the insurer before the contract is concluded every material circumstance which is known or ought to have been known to the assured in the ordinary course of his business (unless it is known or should have been known by the insurer, as is the case with generally publicized information). Furthermore, any material representation of a fact made by the assured to the insurer during the negotiations for the contract must be substantially correct. A material circumstance or representation is defined to be that which would influence the judgement of a prudent insurer in fixing the premium or in determining whether he will take the risk. If the assured fails to disclose material information or misrepresents a material fact, then the insurer may

avoid any liability for losses under the policy even though the loss may be caused by some circumstance entirely unrelated to the innocent non-disclosure or misrepresentation. Similar rules exist in national legal regimes following the British law.⁴⁷

63. Under British law a marine insurance policy may stipulate the value of the insured object as agreed upon by the parties to the contract. The value agreed in the policy is, as between the insurer and the assured, conclusive of the actual, or insurable, value of the insured object. Alternatively, the policy may not specify the value of the insured object, thus leaving the insurable value to be ascertained at the time of loss or damage. The conclusiveness of the agreed value as to the insurable value of the insured object is generally agreed to be a useful instrument to avoid future uncertainties in determining the measure of indemnity in case of loss.⁴⁸ Thus, if there is a total loss of the subject-matter, the measure of indemnity is the agreed value, even if the actual value is greater or lesser than the agreed value. In practice, virtually all cargo and hull insurance policies are valued policies, i.e. they stipulate an agreed value.

64. If the assured purchases an amount of insurance, called the insured sum, which is equal to the insurable value or the agreed value stipulated in the policy, then the assured is said to be "fully insured". If the assured sum is less than or more than the insurable or agreed value, then the assured is said to be underinsured or overinsured, as the case may be. If he is underinsured, he is considered to be his own insurer for the difference not covered by insurance. Thus, he is considered a co-insurer with the other insurers.

65. If the assured is overinsured, since insurance is intended only to indemnify the assured for his loss, he may only recover up to the insurable or agreed value of the object. Frequently overinsurance may occur when there are two or more insurance policies covering the same risk, which is called "double insurance". In the case of overinsurance by double insurance, the principle of indemnity still applies, thereby limiting the assured's recovery to the insurable or agreed value.

66. When quoting a premium rate for a particular risk, an insurer will take into account various considerations applicable to the risk that may affect the likelihood of a loss occurring and the amount of the insurer's potential liability. For hull insurance, such considerations may be the type of the vessel (bulk carrier, tanker, container ship, liquefied gas carrier, etc.), the tonnage, the type of motive power (nuclear reactor, sail, motor), the state of the equipment, the age of the vessel, the trading limits of the vessel (world-wide or limited to a particular geographic area), the type of cargoes carried, the quality of the management of the vessel, past claims experience, the date of the last survey and the classification symbol of the vessel,⁴⁹ the conditions of the insurance and the value of the vessel. For cargo insurance, such considerations might be the type of the cargo, the adequacy of its

⁴⁷ For example, the Marine Insurance Act, 1963, of India; the Marine Insurance Act, 1909-1973, of the Commonwealth of Australia.

⁴⁸ Furthermore, a valued cargo policy enables the assured to include his anticipated profit so that in the event of loss he is in the same position as though the voyage had been completed.

⁴⁹ Classification societies are private organizations having as their purpose the inspection of vessels to determine their seaworthiness. On the basis of these inspections the vessel is placed in a grade represented by a particular symbol indicating its degree of seaworthiness.

packaging, its value, the type of ship to be utilized, the nature of the voyage, the claims record of the shipper and the conditions of the insurance.

67. The establishment of the initial preliminary rate is a question of the individual judgement of the insurer. The use of tariffs is not commonly resorted to in marine insurance, particularly in the British market. Where there is competition between one or more insurers in a particular market, as there is in the British market, the initial rate of premium for a risk is generally determined according to such competitive factors. However, in hull insurance, which is usually on a time basis, when a policy comes up for renewal, it is intended in the British market that the new premium will be determined by the application of what is known as the "Joint Hull Formula" (JHF). The terms of the JHF are agreed upon by the Joint Hull Committee comprising representatives from Lloyd's and members of the Institute of London Underwriters. The intention of the JHF is to restrict competition as to the premium rate on such renewals. However, its application is on a purely voluntary basis. It is understood that, as a result of competitive factors, the strict application of the JHF is not currently being observed, though it is intended to be used as a guideline by the leaders in determining renewal premiums. Several marine insurance markets in other countries apply a similar type of formula to such renewals.⁵⁰

68. Although the exact terms of the JHF are not made public, its effect is to impose penalty premium increases on ships that have shown an unsatisfactory claims experience. The formula is graduated into five separate categories according to the number of vessels in an insured fleet and the total of the agreed values. Thus, category A applies to fleets with up to three vessels irrespective of value, category B to fleets of three or more vessels with a value not in excess of \$50 million, category C to fleets of three or more vessels with a value of over \$50 million, category D to fleets in excess of eight vessels with a value of over \$100 million, and category E to fleets in excess of 15 vessels with a value of over \$250 million. The required percentage increases to the premium vary according to the category, with higher percentage increases being charged for those fleets with lower agreed values and/or number of vessels. To avoid a penalty increase a fleet must show a credit balance of premium over claims, the minimum for which varies according to the category; categories applicable to the smaller fleets and lower agreed values require higher credit balances.⁵¹

⁵⁰ For example, the Italian market (Dover, *A Handbook to Marine Insurance*, op. cit., p. 118), and Belgium and the Republic of Korea as indicated in the replies to the secretariat questionnaire on hull insurance. It is also understood that renewal formulas exist in markets situated in the Federal Republic of Germany, the United States of America, India and Spain. Many markets not utilizing a formula as such may apply an across-the-board surcharge to reflect inflation in repairs, while others approach each renewal on its individual merits.

⁵¹ Since the present report was first issued, the JHF has been amended twice, once in 1979 and once in 1980. It is understood that instead of the five categories A to E, there are now four categories. Categories 1, 2 and 3 correspond to the old categories A to D, and category 4 corresponds to the old category E. Category 1 applies to fleets with a value of up to \$40 million, category 2 up to \$200 million, category 3 up to \$400 million, and category 4 in excess of \$400 million. Furthermore, in place of a specific penalty increase for each category, a range of possible increases is now applicable to categories 1, 2 and 3 as a group, thereby providing greater flexibility in determining the renewal rate and correspondingly less built-in prejudice against smaller fleets as opposed to larger fleets within these three categories.

2. THE INSURANCE POLICY

69. The British marine insurance policy is based upon an ancient document called the "Lloyd's S.G. Form", which has remained virtually unchanged since the eighteenth century.⁵² A copy of the S.G. Form as it appears in the First Schedule of the 1906 Act is contained in annex I to the present report.

70. An analysis of the S.G. Form shows that it contains various provisions which, through the completion of the appropriate blanks, set forth a description of the parties, the voyage, the subject-matter insured including the name of the vessel and the master, the duration of the risk, certain liberties in the routing of the voyage (called the "touch and stay" clause), the value of the insured subject-matter (the "valuation" clause), the risks insured against (called the "perils" clause), certain liberties of the assured and insurer to minimize the extent of casualties (the "sue and labour" clause and the "waiver" clause), the promise of the insurers to insure the property (the "binding" clause), the receipt of the premium (the "attestation" clause) and certain limitations on the payment of claims in the form of "franchises"⁵³ (the "memorandum").⁵⁴ There are different versions of the S.G. Form in use, but, with the exception of some versions used by other national markets, most make only minor changes to the original version.

71. The heart of the S.G. Form, known as the "perils" clause, enumerates the various risks for which the insurance offers protection. Virtually unchanged for centuries, the clause has been the subject of a significant amount of litigation. The wording of the clause in the Lloyd's S.G. Form is as follows:

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detentions of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, etc., or any part thereof.⁵⁵

The overall reluctance to alter this centuries-old insurance document has resulted in the need to attach lengthy amending clauses to the original policy form as a means of keeping pace with modern development of marine insurance. Such clauses are drafted under the

⁵² It was officially adopted by Lloyd's in 1779 and has since then been incorporated in the First Schedule of the 1906 Act. It can be used for the insurance of goods as well as of hulls since it contains appropriate wording to cover both types of risks. However, hull and cargo interests may be treated separately by printing separate S.G. Forms for hull and cargo and leaving out irrelevant wording in each case, as is done in the "Companies Combined Policies" issued by the Institute of London Underwriters.

⁵³ A "franchise" is an amount that must be reached before a claim is payable; however, once this amount is attained, the claim is payable in full. R.H. Brown, *Dictionary of Marine Insurance Terms* (London, Witherby and Co. Ltd., 1975), p. 146.

⁵⁴ The last paragraph of the S.G. Form, beginning with "N.B.", is known as the "memorandum".

⁵⁵ The "Companies Combined Policies" for hull and cargo, respectively, amend the phrase "goods, and merchandises, and ship, etc." in accordance with the actual subject-matter of the insurance. The perils clause in the American Institute Hull Clauses is amended in a similar manner. Furthermore, a clarifying final phrase is added to the United States perils clause which reads "... excepting, however, such of the foregoing perils as may be excluded by provisions elsewhere in the Policy or by endorsement thereon".

auspices of the Institute of London Underwriters (see para. 38) and are referred to as the "Institute Clauses".

72. There is a large variety of Institute Clauses, ranging from the very basic to the very specialized for certain types of cargo and hull risks. It is common for a set of such clauses to be grouped together on a single page, which, when attached to the S. G. Form, represent a basic insurance "package" for a particular type of insurance. Additional sets of clauses may also be attached to this basic set to alter the overall insurance to conform to the specific risk and the type of insurance desired. Although it is not possible to review here the numerous different types of clauses presented to the ship or cargo owner, a few of the standard versions which often form the base of the most common types of hull and cargo insurances are presented below.⁵⁶

(a) *Hull insurance*

73. Most hull insurances are underwritten on a time basis and are thus usually subject to a standard set of clauses called the "Institute Time Clauses: Hulls" (see annex II) in addition to the S. G. Form. Such clauses are commonly known as the "all risks" hull clauses or "full conditions". Alternative clauses may be used if a different scope of cover is desired or if coverage on a voyage basis is desired (such as the "Institute Time Clauses: Hulls — F.P.A. Absolutely", the "Institute Time Clauses: Hulls — Free of Damage Absolutely", or the "Institute Voyage Clauses: Hulls"). Set forth below is a brief review of some of the more important clauses of the Institute Time Clauses: Hulls, which are of interest in the present report.

74. The first clause, called the "running down" clause, or collision clause, expands the scope of the normal marine coverage offered by the S. G. Form by including liabilities incurred by the shipowner for damage to other vessels in a collision. Such cover is offered by way of a supplementary contract, thus the insurer is liable under this clause for claims coming under its terms up to its specified limits without reference to any other loss paid under the hull policy. Nevertheless, the scope of cover is quite limited. In the standard form of the clause, only three-fourths of collision liabilities are covered, and then only as to actual collisions between vessels (thereby leaving uncovered liabilities arising from collisions with fixed or floating objects, "non-contact" collisions, etc.). Furthermore, the insurer's liability to reimburse the assured is limited to three-fourths of the agreed value of the vessel (though four-fourths coverage can be obtained). The standard version of the clause appearing in United States conditions is somewhat more comprehensive, in that it provides for the payment of four-fourths of such liabilities up to the agreed value. Both versions also contain a list of exceptions, excluding liability for certain designated claims, such as for wreck removal or loss of life. These excluded liabilities or portions of liabilities can be covered by entering a vessel in a P & I Club (see para. 34).

75. Clause 7 (the "Inchmaree" or "additional risks" clause) provides an additional list of insured risks to

complete the perils clause in the S. G. Form. Since the S. G. Form is not altered to fit advancing technology and changing insurance needs, the additional risks clause has become the recognized vehicle for adding new risks to be covered by the hull policy. As a result, the wording of the clause has increased in length and has continued to be the centre of litigation as it acts as the focal point of two competing philosophies, one of which expects the hull policy to cover only limited risks while the other expects an "all risks" coverage.⁵⁷

76. The salient feature of the clause is that it covers only "damage to the subject matter insured directly caused by..." certain enumerated risks. Thus, considering, for example, the risk of "bursting of boilers, breakage of shafts", reimbursement is given only for the damage caused by these events without replacing the burst boiler or broken shaft.

77. Another clause, called the "liner negligence" clause, may be attached to the policy to replace the additional risks clause upon payment of an additional premium, though it is understood that sometimes no additional premium is required. It evolved as a response to dissatisfaction with the scope of the additional risks clause and is a by-product of the insurance philosophy that expects hull insurance to give essentially an "all risks" cover. The clause is not issued as an Institute Clause, rather, variants of it were initially put forward by shipowners and the current standard form resulted from mutual agreement between representatives of shipowners and underwriters.⁵⁸ The text is as follows:

Subject to the terms and conditions of this policy this insurance is also to cover:

Bursting of boilers and/or Breakage of shafts.

Damage to and/or loss of the subject matter of this insurance caused by any accident, latent defect, malicious act, negligence, error of judgement or incompetence of any person whatsoever but excluding the cost of repairing, replacing or renewing any defective part condemned solely in consequence of a latent defect or fault or error in design or construction.

Provided that such damage or loss has not resulted from want of due diligence by the Owners of the Vessel or any of them or by the Managers.

Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the vessel."

An analysis of the text reveals a greater scope of coverage than that of the additional risks clause. It appears that the risks of bursting of boilers and breakage of shafts are covered themselves instead of just the damage caused thereby. Furthermore, coverage is offered for damage caused by a larger number of risks, in effect damage caused by most types of fortuitous events.

78. Clause 9 amplifies the "sue and labour" clause in the Lloyd's S.G. Form. Clause 11 (the "co-insurance" clause) provides that whenever the occurrence of one of the enumerated risks in the first part of the additional risks clause (explosion on shipboard etc.) which in turn causes machinery damage is even remotely attributable to crew's negligence, then an additional "deductible" of 10 per cent of the net claim for such damage is applied.

79. Clause 12 (the "deductible average" clause) overrides the franchise set forth in the "memorandum" in

⁵⁶ However, the various clauses concerning freight insurance are not reviewed here.

⁵⁷ F. L. Tetreault, "The hull policy: the 'Inchmaree' clause", *Tulane Law Review* (New Orleans), vol. XLI, 1966-1977, p. 333.

⁵⁸ The United States market has a similar clause issued under the aegis of the American Hull Insurance Syndicate.

the S.G. Form (see para. 70) and provides in its place that the aggregate of all claims (except claims for total loss) "arising out of each separate accident or occurrence" are subject to a "deductible".⁵⁹ National policy conditions existing in other insurance markets often use a similar type of deductible.⁶⁰

80. Clause 19 (the "tender" clause) applies once damage has occurred to an insured vessel resulting in a claim on the policy. The clause refers to the assured's duty to give notice of the loss to the insurer prior to survey, and if appropriate, the nearest Lloyd's agent; the insurer's power to choose the port of repair; the insurer's veto power over the choice of repair yard; the insurer's power to take tenders; and the penalty for failure to comply with the conditions of the clause. Since the standard used to determine the insurer's liability for partial loss to a vessel is the reasonable cost of repairs, the clause is an important reserve power for the insurer to control repair costs.

(b) Cargo insurance

81. The cargo owner usually has the choice of three standard options concerning the scope of the insurance cover. These options are contained in three sets of clauses called the Institute Cargo Clauses: one set is "F.P.A." (free of particular average), one is "W.A." (with average) and the third is "All Risks" (see annexes III, IV and V, respectively). They are virtually identical, with the exception of clause 5, which sets forth the respective terms.

82. In addition to clause 5, clause 1, called the "transit" clause, is particularly important since it incorporates what is known as the "warehouse to warehouse" clause. The effect of the clause is to override wording in the S.G. Form concerning duration of the cover (from port to port) and extends the insurance cover from the point of origin of the goods to their point of destination, subject to certain conditions.

83. The wording of clause 5 depends on whether the F.P.A., W.A. or "All Risks" clauses are used. In addition to delimiting the indemnity payable for certain types of losses, each clause is a complement to the perils clause in

⁵⁹ A "deductible" is an amount that must be exceeded before a claim is recoverable, and then only the amount in excess is payable. The exact size of the deductible will depend on negotiations between the assured and the insurer. In 1975 it was proposed in the British market that all existing hull policies be raised by 25 per cent but with a limit of \$60,000 for large fleet operators, though higher deductibles can be negotiated if desired by shipowners. In 1980 the British market increased deductibles by 20 per cent without a corresponding reduction in premium. In cases where existing deductibles were \$100,000 or more, then an increase in premium could be made in lieu of a deductible increase.

⁶⁰ For example, United States hull conditions contain a similar type of deductible clause. Norwegian hull conditions contain a deductible applicable to "each casualty" (Norwegian Marine Insurance Plan of 1964, sect. 189). French hull conditions usually contain a deductible applicable to each event with the attachment of clause III, "Assurance tous risques". On the other hand, Japanese hull conditions do not use a deductible in the prevailing cover "Class No. 5—F.P.A. unless 4/4 R.D.C.". However, a deductible is in fact used in the additional perils clauses (A) and (B) which correspond roughly to the British "Inch-maree" clause (clause 7 of the Institute Time Clauses: Hulls) and the liner negligence clause respectively. In these cases the deductible is used on a per accident basis. A deductible is also used in the additional perils clause (C), which provides coverage for heavy weather damage. Although stated to be applicable on a per accident basis, heavy weather damage occurring on a single sea passage between two successive ports is regarded as being due to one accident.

the S.G. Form by amplifying the insured risks covered by the policy.

84. W.A. conditions provide that the franchise specified in the "memorandum" of the Lloyd's S.G. Form shall apply to partial loss claims, other than general average, except that in the case of a total loss of an entire package in loading or unloading, the agreed value of that package is payable in full. If the vessel is stranded, sunk or burnt the franchise is eliminated for all damage occurring during the voyage, even if it is "heavy weather" damage (see footnote 120). Damage reasonably attributable to fire, explosion, collision or contact of the vessel and/or craft and/or conveyance with ice or any other object or substance other than water is also recoverable. Damage occurring during discharge at a port of refuge is also covered. It is asserted that the practical effect of the clause vis-à-vis the franchise in the memorandum of the S.G. Form is that only claims for heavy weather damage are actually subject to the application of the franchise.

85. Clause 5 in the F.P.A. conditions is identical to that in the W.A. conditions in so far as the vessel's being stranded, sunk or burnt is concerned, and also in so far as collision, contact of vessel or craft, fire, explosion, packages damaged at port of refuge or totally lost in loading or discharge are concerned. The only difference in cover between the W.A. and F.P.A. conditions occurs when a partial loss is caused by heavy weather and the vessel has not been stranded, sunk or burnt during the voyage. Under the W.A. conditions the loss is recoverable subject to the franchise, but under the F.P.A. conditions it is not recoverable at all.⁶¹

86. The "All Risks" version of clause 5 offers the widest cover of the three in providing that all loss or damage to the insured goods is covered if caused by a fortuitous event and is not proximately caused by delay or inherent vice of the subject-matter. The franchise in the memorandum of the S.G. Form is expressly overridden and all claims are paid without the application of a franchise.

87. Separate additional clauses also exist, such as those specifically applicable to what are known as "extraneous risks" not covered by the S.G. Form with W.A. or F.P.A. conditions attached. For example, loss by pilferage and loss by non-delivery for which no cause can be found are both extraneous risks which can be covered according to different terms and conditions by the attachment of one of six different versions of Institute Clauses.

88. Special Trade Clauses also exist for certain types of commodities. Such clauses have been negotiated between insurers and certain trade associations in the United Kingdom for the commodity concerned. For example, special clauses have been adopted for the corn, flour, rubber, sugar, timber, jute and frozen meat trades. The risks insured against are adapted to the circumstances of the particular trade.

(c) War risk insurance

89. The enumeration of war risks in the perils clause, namely, "men of war, ... enemies, pirates, rovers, ... surprisals, takings at sea, arrests, restraints, and detentions of all kings, princes, and people, of what nation,

⁶¹ Brown, *Dictionary of Marine Insurance Terms*, op. cit., p. 192.

condition, or quality soever ...", is regularly excluded ("warranted free") by the addition of the F.C. and S. (free of capture and seizure) clause, which is specially printed on the S.G. Form, either marginally or in italics.⁶²

90. The F.C. and S. clause is repeated again in all Institute Clauses for hull and cargo insurance which may be attached to the S.G. Form to cover marine risks.⁶³ In order to ensure a comprehensive exclusion of war-related risks, hull insurance clauses — to use the Institute Time Clauses: Hulls as an example (see annex II) — contain additional exclusions of various other types of war risks, such as malicious detonation of an explosive or weapon of war (clause 24) and nuclear weapons (clause 25).

91. If hull war risk cover is desired, then a new policy is usually issued with attached clauses, such as the Institute War and Strikes Clauses: Hulls — Time (see annex VI), which grants war risk coverage in clause 1, paragraph (1), literally by reinstating those aspects of the perils clause and other war risks formerly excluded both by the F.C. and S. clause and by clause 24 of the Institute Time Clauses: Hulls, and then enumerating in paragraphs (2), (3) and (4) of clause 1 other war risks not felt adequately covered by the preceding paragraph.

92. As to cargo insurance, the S.G. Form is usually specially stamped with two additional exclusionary clauses. The first excludes damage to the goods caused by strikes and other types of civil commotions and is called the F.S.R. and C.C. (free of strikes, riots and civil commotions) clause.⁶⁴ The other clause, called the "frustration" clause, is designed to come into operation if the F.C. and S. clause is deleted (indicating that war risks coverage is offered by the policy).⁶⁵

93. The Institute Cargo Clauses reproduce the F.C. and S. clause and the F.S.R. and C.C. clause. Each clause contains a proviso that should the clause be deleted, then the current Institute War Clauses or the Institute Strikes Riots and Civil Commotions Clauses, respectively, shall be deemed to be a part of the insurance. In practice the

exclusionary clauses are not necessarily physically deleted; instead, the appropriate clauses granting positive war or strike risks cover are attached (and, in effect, override the former clauses).

94. The Institute War Clauses for cargo insurance (see annex VII) grant positive war risks cover in the same manner as do the Institute War and Strikes Clauses: Hulls — Time; that is by literally reinstating the risks excluded by the F.C. and S. clause and then by enumerating certain additional coverages as well as including a repetition of the "frustration" clause. The Institute Strikes Riots and Civil Commotions Clauses grant positive strike risk cover by enumerating the risks to be covered. Additional war risk clauses exist which can be used according to the circumstances and type of cover desired. Also, special war risk clauses exist which can be used with the Special Trade Clauses.

3. THE CLAIMS SETTLEMENT PROCESS

95. If a loss or damage occurs which results in a claim under the policy, the assured under the British system will usually request a broker to proceed with the mechanics of the settlement. For complicated cargo loss claims and for most hull claims, the broker submits the claim to an average adjuster who calculates, or "adjusts", the claim according to his professional expertise and in an impartial manner without becoming an advocate of the position of either the assured or the insurer. The claim will then be submitted to the claims adjuster of the insurer, who has the responsibility of determining whether the insurer has any liability under the policy to pay the claim; if so, he will adjust the claim himself if it has not already been adjusted; if it has, he will review the adjustment to see if everything is in order.

96. Upon payment of an indemnity to the assured under the policy, the insurer is subrogated to any claims the assured may have against any third parties who may have caused the loss. The term "subrogation" refers to the act by which an insurer, having settled a loss, is entitled to place himself in the position of the assured to the extent of acquiring all the rights and remedies in respect of the loss which the assured may have possessed, either in the nature of proceedings for compensation or recovery in the name of the assured against third parties.⁶⁶ Thus, the insurer may recover from such third parties to offset the indemnity he has paid to the assured. Nevertheless, the insurer's right to recovery is limited to the amount of the indemnity paid to the assured.

⁶² The wording of the clause can be found in clause 23 of the Institute Time Clauses: Hulls (see annex II) or clause 12 of the Institute Cargo Clauses (see annexes III, IV and V).

⁶³ Inclusion of the F.C. and S. clause in the Institute Clauses is considered necessary to avoid the risk of implication by omission which might result from the rule that attached clauses override the S.G. Form when the two are in conflict, especially as to any new risks covered by the clauses.

⁶⁴ Clause 13 of the Institute Cargo Clauses (see annexes III, IV and V).

⁶⁵ The terms of the "frustration" clause are as follows:

"This policy is warranted free of any claim based upon loss of, or frustration of, the insured voyage or adventure caused by arrests restraints or detentions of Kings Princes Peoples Usurpers or persons attempting to usurp power."

⁶⁶ R. de Kerchove, *International Maritime Dictionary* (New York, D. Van Nostrand Company, Inc., 1961), p. 804.

Chapter V

ANALYSIS OF THE BRITISH MARINE INSURANCE LEGAL REGIME

97. The international context in which marine insurance functions and some major elements of the British legal regime governing marine insurance having been reviewed, this chapter of the report presents, in the light of the considerations in chapter II, an analysis of some specific aspects of the legal regime governing marine insurance which, in the opinion of the UNCTAD secretariat, create inequities, result in lacunae, cause difficulties in the contractual relationship between the assured and insurer or otherwise merit improvement. The British legal regime is again taken as a basis for most of this analysis in view of its international use. In an attempt to give a wider perspective to the analysis and in so doing to assist in providing alternative solutions to the particular issue being discussed, reference has been made, where appropriate, to the approaches used by other countries.

98. To assist in the orderly analysis of the various aspects of the legal regime governing marine insurance, three categories will be considered: (a) those aspects common to both hull and cargo insurance, (b) those aspects involving only hull insurance, and, finally, (c) those aspects involving only cargo insurance.

A. The legal regime common to both hull and cargo insurance

1. PROCEDURE FOR THE PLACEMENT OF INSURANCE

99. The replies to the UNCTAD secretariat questionnaires on marine insurance indicate that there is some dissatisfaction with the procedures for obtaining insurance cover in certain countries as well as internationally.⁶⁷

100. Specifically in relation to brokers, although it appears that they are generally thought to offer a useful service in most national markets where they operate (see para. 60), it is understood that difficulties are experienced in some countries, such as those where brokers are able to offer their services without having sufficient

expertise in the specific field of marine insurance.⁶⁸ It is advisable for all countries in which brokers are established locally to ensure that they meet minimum standards of competence and financial responsibility. Furthermore, since an assured relies upon a broker's independence from any particular insurer, not only for advice on the type of cover but also for his ability to obtain the best terms and conditions, it is necessary that brokers and insurance agents be easily distinguishable to prospective assureds. Though concerned primarily with non-marine brokers, recent legislation in the United Kingdom has attempted to achieve this goal.⁶⁹ As to marine insurance brokers, in view of the importance of Lloyd's in this area, most marine insurance brokers must of necessity be accredited to this organization, which applies its own qualifying standards of conduct and responsibility. Some other countries permitting the local operation of brokers regulate their activities.⁷⁰

2. INSURABLE INTEREST AS A FACTOR IN THE ENFORCEABILITY OF THE MARINE INSURANCE CONTRACT: P.P.I. POLICIES

101. Although it is a basic principle of insurance that an assured must have an insurable interest in the insured object (see para. 23), it has become common practice in marine insurance to issue policies which forgo the need for proof of insurable interest. Such policies are called P.P.I. (policy proof of interest) or F.I.A. (full interest admitted) policies and are used to insure interests where it is either difficult to prove that they exist or difficult to prove the amount that is at risk.

102. Despite the commercial convenience of such policies, under British law any policy effected P.P.I. is void even if the assured has and can prove an insurable interest.⁷¹ This is not the approach of all legal regimes. Under

⁶⁷ The reply of Ghana to the secretariat questionnaire on cargo insurance indicated that assureds complain of inadequate explanation of the types and extent of covers given them. The reply of Kenya to the questionnaire on hull insurance indicated that the terms, rates and conditions are imposed on shipowners by insurers, to be accepted as presented or to be rejected. The reply of Sri Lanka to the questionnaire on hull insurance indicated that dissatisfaction exists because confirmation of cover is almost always delayed due to the need to obtain reinsurance abroad. Furthermore, no negotiations are involved as to the terms, conditions and excess. The reply of the Soviet Union to the questionnaire on cargo insurance indicated that there is room for improvement and simplification of the entire procedure for the provision of cover.

⁶⁸ For example, the reply of Panama to the secretariat questionnaires indicated that some brokers may not be technically qualified or may lack experience. Furthermore, the reply of Belgium to the hull and cargo questionnaires states that "there are legal difficulties concerning the position and liability of the broker".

⁶⁹ The Insurance Brokers (Registration) Act 1977 provides that it is a criminal offence to carry on business as an insurance broker without being registered with the Insurance Brokers Registration Council. Eligibility for registration is based upon a professional qualification and three years' experience, or five years' experience if no professional qualification exists. Lloyd's brokers are automatically eligible for registration. The Council is to establish a Code of Conduct and certain financial requirements and will have the power to remove brokers from the register if found guilty of "unprofessional conduct". The Council is also authorized to set up rules for a compulsory professional indemnity insurance as well as a compensation fund.

⁷⁰ For example, the reply of Mexico to the secretariat questionnaire on cargo insurance stated that there is national legislation regulating the activities of brokers and that they are monitored by the insurance supervision authorities.

⁷¹ See article 4 of the 1906 Act, equating P.P.I. policies to actual gambling or wagering contracts, which are void.

United States law, a P.P.I. provision relieves the assured from the obligation to prove an insurable interest. Nevertheless, the insurer is able to avoid liability if he can prove that no insurable interest exists.⁷² Similarly, under French law a stipulation that the insurer agrees to dispense with proof of interest other than production of the policy itself is considered to reverse the burden of proof, thereby requiring the insurer, if he contests the existence of a valid insurable interest, to prove that no such interest exists.⁷³

103. It would appear from modern insurance practice that the British rule may be unnecessarily severe in making such policies void. Although the rule was originally designed to eliminate gambling in marine insurance contracts, there nevertheless appears to be a commercial need for P.P.I. policies since they are in common use despite being void in law and therefore unenforceable. The assured is prejudiced since he has no legal rights under the policy, thus he cannot sue for its enforcement, nor can he sue for return of the premium. In practice, difficulties for assureds in the British market are few in view of the respect insurers have had for their promise to pay according to the terms of the policy. However, the unenforceability of P.P.I. policies affects more than just the insurer-assured relationship in that the assured is also deprived of any legal remedies for negligence on the part of a broker in effecting a P.P.I. policy.⁷⁴ Furthermore, insurers on such policies do not acquire any legal rights of subrogation upon payment of a claim under the policy as to any recoveries from third parties.

104. It is suggested that the British rule should be eliminated in favour of a more enlightened approach to the commercial needs of assureds.⁷⁵ One solution may be to adopt the approach used in the United States of America and in France. Another possibility is to enforce the P.P.I. clause and to rely on criminal law sanctions against gambling in insurance policies to curb any flagrant absence of insurable interest.⁷⁶ It is doubtful that this change would have any practical effect on the frequency with which assureds are found to have no legitimate insurable interest;⁷⁷ however, the change would have the beneficial result of bringing legal rules more in line with modern commercial needs and practices.

⁷² M. J. Healy and D. J. Sharpe, *Cases and Materials on Admiralty* (St. Paul, Minn., West Publishing Co., 1974), p. 648, citing *Hull v. Jefferson Ins. Co.*, 279 Fed. 892 (S.D.N.Y. 1921).

The Insurance Act, 1915, of the Philippines provides that the P.P.I. stipulation is void, thereby maintaining the enforceability of the policy but requiring the assured to prove his insurable interest.

⁷³ See R. Rodière, *Droit maritime* (Paris, Dalloz, 1971), p. 512.

⁷⁴ See, for example, *Thomas Cheshire and Co. v. W. A. Thompson* (1918) 24 Com. Cas. 114, where insurers successfully avoided liability on an insurance policy because of non-disclosure of material information; and *Thomas Cheshire and Co. v. Vaughan Bros. and Co.* [1920] 3 K.B. 240, where the assured's action against the brokers for negligence in failing to disclose the information to the insurers failed because the insurance was on a P.P.I. basis and therefore void.

⁷⁵ However, the reply of Belgium to the secretariat questionnaire on cargo insurance suggested that P.P.I. clauses be banned, thereby not permitting assureds to avoid proving interest when making a claim.

⁷⁶ For example, the Marine Insurance (Gambling Policies) Act, 1909, of the United Kingdom.

⁷⁷ In support, cf. J. Bockrath, "Insurable interest in maritime law", *Journal of Maritime Law and Commerce* (Cincinnati, Ohio), vol. 8, No. 2 (January 1977), p. 258.

3. THE EFFECT OF NON-DISCLOSURE AND MISREPRESENTATION

105. Although the purpose of the British rule on disclosures and representations made at the time of forming the insurance contract (see paras. 61-62) is justifiable, i.e., to ensure that the information put before the insurer is complete and accurate in order to permit him to make a knowledgeable assessment of the risk, the rule goes too far in favouring the insurers. Under the British rule the assured is held strictly accountable for correctly assessing the materiality of particular information in the eyes of another person, i.e. a prudent insurer—an assessment which is difficult to make in many circumstances. It is admitted that the assured cannot convey all the information he may possess concerning the subject-matter at risk. Thus, the assured must sift through the mass of information to find that information which is material to another person. In this respect it should be noted that the assured, particularly if he is a cargo owner, is not accustomed to assessing risks for insurance purposes, as is an insurer, and that this makes it more difficult for him to make a determination of materiality.⁷⁸ Furthermore, since cargo policies are assignable to consignees in the sale-of-goods contract, the insurer may avoid the policy even on a claim from such an innocent assignee.

106. Thus, the possibility not only for innocent error but also for injury to innocent parties is quite great. Nevertheless, the sanction of complete voidability of the insurance contract by the insurer is applicable to all types of omissions or misrepresentations. Fraud is not a necessary element in making the contract voidable, rather any failure to disclose or any misrepresentation caused by mistake, negligence or accident is sufficient. The argument in favour of the rule is that "... non-disclosure or misrepresentation, whether fraudulent or completely innocent, strikes at the very basis of the contract for the risk which the insurer has accepted is not that which he contemplated".⁷⁹ Nevertheless, it appears that the sanction of voidability in all cases, even when a loss occurs which is completely disconnected from any of the facts undisclosed or misrepresented, is unnecessarily severe (at least as to errors not caused by bad faith). It would seem that in order to protect the insurer the rule would only have to make the contract voidable as to losses related to non-disclosure or misrepresentation.

107. Useful reference may be made to other national legal regimes on this point. The Norwegian insurance conditions⁸⁰ stipulate that where the person effecting the insurance has fraudulently neglected his duty of disclosure, the contract is not binding even as to losses not connected with the fraud. As to cases where the assured has not acted fraudulently but is at fault in failing to perform his duty of disclosure, and where it is established that the insurer would have accepted the contract if he had been fully informed, but on different terms and

⁷⁸ The task of the assured is eased somewhat by assistance from a broker or by information specifically requested by the insurer; however, it should be noted that brokers do not exist in all countries.

⁷⁹ L. J. Buglass, *Marine Insurance and General Average in the United States: An Average Adjuster's Viewpoint* (Cambridge, Maryland, Cornell Maritime Press, Inc., 1973), p. 15.

⁸⁰ The Norwegian Marine Insurance Plan of 1964 and the Norwegian Insurance Plan for the Carriage of Goods of 1967.

conditions, then the insurer will be liable if it is proved that the loss is not attributable to the non-disclosed or misrepresented information. Provision is made in this case for termination of the contract by the insurer on seven days' notice. On the other hand, when it is determined that the insurer would not have accepted the contract if fully informed, then he is free from liability. Lastly, where the person effecting the insurance has made incorrect or incomplete disclosure without any blame attaching to him, the insurer is liable as if correct disclosure had been made, but he may terminate the insurance on giving 14 days' notice.

108. Another possible approach can be found in French law. The basic rule is that non-disclosure of material information or misrepresentation which "appreciably" diminishes the insurer's opinion of the risk renders the contract voidable even though the omitted or misrepresented information was not connected to a loss under the policy. However, if the assured can prove his good faith, e.g. that he was ignorant of the materiality of the information, then there are two possibilities. If it is determined that the insurer would not have covered the risk had he been fully informed, then the contract is still voidable. On the other hand, if it is determined that the insurer would have covered the risk, but at a higher premium, then the insurer's liability for loss is reduced in proportion to the ratio between the premium actually paid and the premium which would have been charged had the insurer been fully informed.⁸¹

4. DRAFTING AND STRUCTURE OF THE POLICY

109. Although the use of the S.G. Form together with the attachment of the desired Institute Clauses may result in flexibility in the scope of insurance cover, this *ad hoc* "building block" concept of an insurance policy nevertheless results in a policy coverage that is very difficult to follow. Rather than by the logical, overall restructuring and reform of a unified document, modernization has taken place outside the basis of the contract, requiring a complicated patchwork of amendments, exceptions and supplementary clauses to be added to a document that was not constructed with the intention that such amendments would be made. The resulting policy "... becomes a document of some complexity, the construction of which is often a matter of great difficulty".⁸² As one leading authority has stated:

... the S.G. Form of Policy has been found quite unsuited to modern usage as is demonstrated by the fact that in no insurance transaction is it employed without modification, either by the attachment or by the incorporation of overriding clauses. ... By slavish adherence to antiquated policy wording, the business of marine insurance has perhaps been permitted to become entirely too complicated. ... In practice, there is hardly a clause in the ... [S.G. Form] which has a close affiliation with modern practice, for attached clauses modify in almost every particular the basic wording.⁸³

⁸¹ Law No. 67-522 of 3 July 1967, art. 6. But see Rodière, *op. cit.*, p. 475; H. Harrel-Courtès, *Le nouveau droit français de l'assurance maritime et des événements de mer* (Paris, Argus, 1968), p. 8.

A similar approach concerning a proportional reduction of the indemnity payable can be found in the Iran Insurance Act, 1937, art. 13.

⁸² Ivamy, *Marine Insurance, op. cit.*, p. 104.

⁸³ Dover, *Uniformity in Marine Insurance Policy Form and Clauses, op. cit.*, pp. 22-23.

110. The British policy has also frequently been the subject of judicial criticism. For example, in *Atlantic Maritime Co. Incorporated v. Gibbon* [1953]⁸⁴ it was stated:

The policy is ... based upon ... [the S.G. Form] to which numerous slips ... have been added, so that little indeed is left of the original foundation. ... I have no doubt that those engaged in this class of business find it convenient that their policies should take this form. But ... the task of the Courts in construing the resultant document or documents is certainly rendered more difficult. The very numerous cases to which we have been referred make it not, indeed, easy to contend that those entering into this class of business well understand the conventional accumulation of clauses which constitute the policy.⁸⁵

111. Difficulties of interpretation or general dissatisfaction with the structure of the British policy have also been referred to in several of the replies to the UNCTAD secretariat questionnaires on marine insurance.⁸⁶

112. Certainly the concept of expanding coverage by the attachment of additional clauses is by no means unknown by other markets not utilizing British forms,⁸⁷ and it presents a reasonable means for constructing a policy coverage in that it offers a wide degree of flexibility in the possibilities of coverage. However, the British policy suffers from utilizing an antiquated basic document. Alterations to the S.G. Form have been resisted on the grounds that it has been subject to such a large amount of litigation over the years that its meaning is now clear. It is feared by supporters of the S.G. Form that any attempted improvements would initiate a flood of litigation to clarify the new wording.

113. Although such arguments merit consideration, the immortalization of an antiquated and obscurely worded document as being immune from any improvement is excessive and unnecessary. In fact, changes in the legal effect of the documents are made all the time by the attachment of Institute Clauses. When drafted carefully, such changes have not been and need not be the clarion call for a flood of new litigation. Thus the unyielding resistance to any change of the S.G. Form is unfounded.

General considerations

114. Although it is not intended to make here a detailed analysis of all the possible alterations to the S.G. Form (the text of which is reproduced in annex I), it is nevertheless useful, before analysing in detail the provi-

⁸⁴ 2 Lloyd's Rep. 294, C.A.

⁸⁵ *Ibid.*, p. 299. As cited in Ivamy, *Marine Insurance, op. cit.*, pp. 106-107.

⁸⁶ As indicated in the replies of Belgium, Czechoslovakia and Uganda to the secretariat questionnaires on marine insurance. Some replies indicated the existence of difficulties in interpreting the policy but also indicated that any ambiguities were construed in law against the insurers as drafters of the policy or were overcome by consultation between the parties (as indicated in the replies of El Salvador (as to "foreign policies"), Ghana, Nigeria and the United Kingdom). Without specifying the policy forms to which reference is made, the reply of the Soviet Union to the cargo questionnaire indicated generally that there is room for improvement and simplification of the documents, terminology and insurance clauses; as to hull insurance, it indicated that there is room for improvement as regards policy clauses not completely satisfactory either to Soviet shipping companies or to foreign reinsurance underwriters.

⁸⁷ The French marine insurance policies, for example, envisage the attachment of additional clauses to the main policy form.

sions granting marine risk and war risk coverage, to mention some of its salient features:

(a) The language of the S.G. Form should be updated and useless verbiage characteristic of such ancient documents should be eliminated.

(b) Unnecessary elements should be eliminated. For example, there is no continuing need to retain a space for the name of the master since it is now virtually never inserted. Another example is the "binding" clause guaranteeing that the policy shall have the same "... force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London", which is a historical curiosity that can be discarded without altering the legal effect of the document.⁸⁸

(c) Consideration should be given to whether phrases which are superseded by the attached Institute Clauses should be eliminated. For example, wording formerly used to describe the insured voyage ("at and from..." [port of departure and destination to be inserted]) could be eliminated for hull insurances since the majority of these are on a time basis, thereby rendering such a description irrelevant. For those few hull insurances which are on a voyage basis, and thus where this phrase could still be relevant, it should be placed in the hull voyage clauses directed to these types of insurance.

(d) The "touch and stay" clause ("And it shall be lawful for the said ship, etc., in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever...") has been criticized as in need of revision since such rights are usually governed either by statutory provision or by specific policy wording.⁸⁹ The sweeping statement concerning permitted ports of call is misleading since the right is automatically restricted by rule 6 of the Rules for Construction of Policy appearing in the First Schedule of the 1906 Act.⁹⁰

(e) The "attestation" clause is defective in that it refers to receipt of the premium ("confessing ourselves paid the consideration due unto us ..."), which is, in fact, virtually never received at the time of execution of the policy. The Companies Combined Policies correct the defect by referring to the promise to pay the premium, and it is suggested that this practice should be followed on all versions of the S.G. Form.

(f) Consideration should also be given to eliminating the "memorandum" which establishes franchises applicable to both hull and cargo insurances (see para. 70 above and footnote 54). It should be noted that the Institute Clauses used for hull insurance contain a provision establishing a deductible which overrides the memorandum (see para. 79 above); as to cargo insurance, the Institute Cargo Clauses (All Risks) pay irrespective of the percentage of the loss, thereby rendering the memorandum ineffective. Furthermore, F.P.A. conditions contain provisions which are to be read in sub-

stitution of the memorandum. Only Institute Cargo Clauses (W.A.) refer to it, and for this purpose the relevant parts of the memorandum could be incorporated into those specific Clauses. It should be noted that some countries utilizing the S.G. Form, or a variant thereof, have taken steps in this direction.⁹¹

(g) Some thought should be given to whether the arrangement of the S.G. Form could be improved. Suggestions have been made to arrange the sections in a more logical order, to use subheadings as is done in some of the American Institute Clauses, to provide more space for the required information, and to use the "schedule" type of policy often used in non-marine insurance.⁹² In Sweden, "the layout of the forms is adapted to the mechanical process of producing at one typing a number of related commercial documents",⁹³ and perhaps some improvements along the same lines could be made to the S.G. Form.

Marine risk coverage: the perils clause

115. The wording of the perils clause (see. para. 71) is so antiquated and the draftmanship is so inadequate that the clause by itself is extremely difficult to understand for anyone not highly familiar with British case law. It should be remembered in this respect that the S.G. Form is used in insurance markets, and received by consignees, situated in countries other than the United Kingdom, thereby rendering the clarity allegedly achieved by prior case law of little benefit in an international context.

116. There are several alterations that could be made to the clause:

(a) The concept of "perils of the sea" should be clarified to indicate that it embraces only "fortuitous" events.

(b) Since the word "thieves" has been held to refer only to theft with violence, this limitation should be indicated in the text to avoid the possible misunderstanding that "pilferage" is included. The United States version of the clause attempts to clarify the term by referring to "assailing thieves".

(c) Antiquated terminology should be either eliminated—as in the case of "letters of mart and counter-mart" and "rovers", neither of which now exist—or updated—as in the case of the phrase "Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage". Similarly, the term "insured subject-matter" could replace "goods and merchandises, and ship, etc.".

(d) The phrase "and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the ... [insured subject-matter]" is misleading to the uninformed and can easily be reworded to indicate that according to legal doctrine only perils "similar" to the ones previously enumerated are

⁸⁸ See L.J. Kent, "Some thoughts on the marine policy form and the case for its revision", *Journal of the Insurance Institute of London*, vol. 52, 1963-1964, p. 95.

⁸⁹ Dover, *Uniformity in Marine Insurance Policy Form and Clauses*, op. cit., p. 24.

⁹⁰ "In the absence of any further license or usage, the liberty to touch and stay 'at any port or place whatsoever' does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination."

⁹¹ For example, a variant of the Lloyd's S.G. Form for cargo insurance issued by the Swedish Assurance Co., Ltd., has eliminated the memorandum. It is also understood that versions of the Lloyd's S.G. Form issued in Denmark and Norway eliminate the memorandum. See Dover, *Uniformity in Marine Insurance Policy Form and Clauses*, op. cit., p. 29.

⁹² See Kent, loc. cit., p. 88.

⁹³ Dover, *A Handbook to Marine Insurance*, op. cit., p. 228.

to be included by the phrase, as has been done in the United States version of the clause.

(e) The terms of the perils clause which are considered to constitute "war risks" are regularly overridden in the standard British hull and cargo covers by the F.C. and S. clause (see para. 89 above). Since the ultimate intent of the clause is never to grant cover for war risks, the relevant words should be eliminated.

117. Once such alterations have been made, the perils clause becomes fairly simple in presentation and infinitely more understandable. An easier-to-understand version of the clause, adopting some of the above suggestions, appears in a Swedish cargo insurance policy⁹⁴ and reads as follows:

The following risks are covered by this policy: Perils of the seas, fire, jettisons and barratry of the master, mariners and all other perils, losses and misfortunes of a like kind that have, or shall come to the detriment or damage of the said goods or any part thereof: ...

118. However, reform of the perils clause can be more far-reaching than just simplifying the language. As a result of the inviolability of the perils clause in the S.G. Form, any expansion of the risks covered by the policy has taken place for hull insurance in the "additional perils" clause (clause 7) of the Institute Time Clauses: Hull. In cargo insurance the expansion of the perils clause has taken place in clause 5 of the Institute Cargo Clauses offering F.P.A., W.A. and "All Risks" coverage respectively. Rather than continue with bifurcated risk clauses hidden in separate documents, it would be preferable to develop one unified risks clause.

119. Some thought should also be given to whether the method of granting insurance coverage by specific enumeration of the perils covered, as appears in the perils clause and most of the supplementary equivalents in the Institute Clauses, should be changed to an all risks grant of cover subject to whatever exceptions are desired. Such a broad grant of cover subject to enumerated exceptions has been used in varying forms by some national policies⁹⁵ and is the approach used by most national policies, including British conditions, when offering an "all risks" cover for cargo insurance.⁹⁶ Although approaching the issue from a completely different perspective, this method of listing risks for which coverage is not given can produce virtually the same result as listing risks for which coverage is given.⁹⁷

120. The advantage of the "all risks minus exceptions" approach is that since the assured, unlike the insurer, is as a rule not familiar with all the possible injury that may befall his merchandise or vessel, it is difficult for him to envisage those perils not covered.⁹⁸ Thus, this approach makes it easier for the assured to understand his insurance coverage.

121. For example, the reference to "thieves" as one of the risks listed in the perils clause is subject to misinterpretation. An uninformed cargo owner, desiring insurance against pilferage, might be misled into thinking that the perils clause offered him such coverage. In fact, clandestine theft or pilferage is not covered by the term "thieves"; rather it is an extraneous risk that must be specifically mentioned in the policy if coverage is desired. However, if an insurance policy offered a broad "all risks" coverage subject to a list of exceptions, among which was "pilferage", then the potential assured would be immediately apprised that the policy was inadequate for his needs and that a wider scope of cover must be purchased.

War risk coverage: the perils clause, the "free of capture and seizure" clause, and other clauses

122. Although war risk insurance is admittedly a complex subject, particularly in its interrelationship with marine risks cover,⁹⁹ the method by which war risk insurance is underwritten (see paras. 89-94) has been frequently criticized as being unnecessarily complicated. As has been stated in a recent British judicial decision:

It is probably too late to make an effective plea that the traditional methods of insuring against ordinary marine risks and what are usually called war risks should be radically overhauled. The present method, certainly as regards war risk insurance, is tortuous and complex in the extreme. It cannot be beyond the wit of underwriters and those who advise them in this age of law reform to devise more straightforward and easily comprehended terms of cover.¹⁰⁰

123. The very concept of granting an insurance cover and excluding it in the same document (the S.G. Form), and then excluding it again in attached clauses, which override the first document in any case, and then granting it again (either in another document or as an additional attachment) by reinstating the original exclusion, is so complicated and contorted that the uninitiated is confused by the very procedure of the insurance without even considering the complicated draftsmanship. The very complexity of the subject calls for the most simple and straightforward procedures. Furthermore, this degree of unnecessary complexity works against assureds, especially those in developing countries, who are far from the centres of expertise on this subject.

5. TEMPORARY PAYMENT CLAUSE FOR DISPUTES AS TO WHICH INSURER IS LIABLE FOR THE LOSS

124. An occasional difficulty occurs involving the determination of whether loss or damage falls under one marine insurance policy or another. Frequently, this will

⁹⁴ Insurance policy issued by the Swedish Assurance Co. Ltd.

⁹⁵ For example, the Norwegian Marine Insurance Plan of 1964 (hull insurance); the French marine hull insurance policy; the "German General Rules of Marine Insurance" (ADS) of the Federal Republic of Germany; and the General Conditions of Hull Insurance issued by the Japanese Hull Insurers' Union.

⁹⁶ See, for example, clause 5 of the Institute Cargo Clauses (All Risks) (annex V below), and articles 2 (2) and 7 of the French marine insurance policy (cargo).

⁹⁷ However, there may be differences with respect to the burden of proof that a loss is covered by the policy.

⁹⁸ Brokers, who could explain such factors, exist only in some markets.

⁹⁹ Insurers consider the drafting of such clauses to be a very delicate issue. It is feared that without the proper wording, insurers having underwritten a war risks coverage may end up paying for losses that are more properly characterized as marine losses, and vice versa. Furthermore, it is important to provide mirror coverage so that an assured holding war and marine policies will not be left uncovered by a gap in the coverage offered by the two policies.

¹⁰⁰ *Panamanian Oriental Steamship Corporation v. Wright* [1971] 1 Lloyd's Rep. 487. C.A., by Justice Mocata; as cited in Goodacre, *op. cit.*, pp. 651-652. Furthermore, the reply of Belgium to the secretariat questionnaire on marine hull insurance stated that the methods of granting war risk coverage "... can satisfy the practitioners of the marine insurance industry but constitute in the end a defiance to judicial logic and perhaps good sense".

involve a dispute between insurers on a marine risks policy and insurers on a war risks policy.¹⁰¹ This is generally a problem of determining the proximate cause of the loss. It is suggested that in order to eliminate potential hardship on assureds, marine insurance policies should stipulate that in the event of uncertainty as to which policy is liable (as opposed to whether there is a liability), the insurers on each policy should make a joint provisional payment to the assured until the issue of liability is resolved, at which time adjustments could be made between the various insurers. This system would ensure prompt payment to the innocent assured who, despite being fully insured against marine and war risks, is the victim of a conceptual difficulty in which he is normally uninterested. This sort of provisional joint payment reflects in fact what is done in practice on an *ad hoc* basis, but it would eliminate the sometimes substantial delays that occur before this can be agreed upon by the insurers concerned.

125. However, an argument against institutionalizing this procedure is that it would represent a temptation for an insurer to dispute liability in the first instance in every case, however clear may have been the liability, so as to have the claim temporarily subsidized by other insurers. Nevertheless, it should be noted that such a clause exists in Norwegian insurance conditions.¹⁰²

6. TREATMENT OF AGREED VALUES IN DETERMINING SUBROGATION RIGHTS

126. In reference to the use of an agreed value to be conclusive of the insurable or actual value of the subject-matter (see para. 63), under British law this same conclusiveness of the agreed value applies to determine the extent of the insurer's subrogation rights in recoveries obtained from third parties. Thus, the insurer's right to the recovery is based upon the agreed value in the policy without reference to the actual value of the subject-matter. If the insurer has paid an indemnity equal to the agreed value in the policy, he is considered to have full rights to the recovery up to the amount he paid the insured (the agreed value), after which the assured receives any remaining part of the recovery for his own benefit. This rule applies even when the actual value, one of the factors upon which the amount of liability of the third party to the assured may be based, is greater than the agreed value. Thus although the recovery may be enhanced by reason of the greater actual value, the insurer receives the recovery in preference to the assured by reason of the conclusiveness of the agreed value in determining the rights of the parties to such recovery.¹⁰³ French law on hull insurance appears to use the same

approach concerning hull insurance policies containing an agreed value.¹⁰⁴

127. However, it is suggested here, and supported by some individuals within the industry with whom the secretariat has had contact, that the approach used by the British and French legal regimes to this issue of relative subrogation rights is inequitable to the assured. In cases where recoveries from third parties are based upon actual values which are higher than those agreed in the insurance policies, the assureds on these policies should be viewed as co-insurers for that part of the value of the subject-matter which exceeds the agreed value, thereby being entitled to a proportionate share of the proceeds of the recovery from third parties. This is the approach adopted in the United States¹⁰⁵ and, it is understood, in Norway. Thus the application of the valuation clause should be limited to regulating the indemnity payable under the insurance contract. When it comes to obtaining the benefits of a recovery from a third party liable for the loss, the purpose of the valuation clause has already been served and, since the contract of insurance plays no part in determining the liability of the third party to the assured, it is difficult to rationalize the continued application of the clause in allocating the benefits of the recovery. Considering the respective motivations of the parties in entering into the insurance relationship, it is difficult from an equitable point of view to argue that the insurer should be the party preferred in the allocation of recoveries. Rather, it would seem more equitable to establish an equality of rights to such recoveries, as suggested here.

7. JURISDICTION PROBLEMS IN LEGAL RECOURSE ACTIONS

128. Disputes may arise between the insurer and the assured concerning the marine insurance policy and it may be necessary for the assured to seek legal recourse to have the dispute resolved. As a general rule, legal proceedings involving marine insurance issues are relatively infrequent, since there is a tendency on the part of insurers to prefer compromise settlements and to resort to litigation only on questions of principle. This tendency is very noticeable in the British market but rather less pronounced in some others, including the United States market.

129. The process of obtaining jurisdiction for litigation and enforcement of judgements is a relatively simple process when there is only one insurer underwriting 100 per cent of the risk situated in the same country as the assured. However, when there is more than one insurer underwriting a particular risk, the assured must in theory proceed individually against each insurer, since each insurer enters into a separate contract with the

¹⁰¹ Though it could occur between two sets of hull insurers, between hull insurers and P & I insurers, between hull insurers and insurers of ships under construction, or between hull insurers and insurers of extraordinary costs. L. Strøm-Olsen, Jr., *Comments on the Norwegian Marine Insurance Plan of 1964* (Oslo, Norges Handels og Sjøfartstidende, 1965), p. 10.

¹⁰² Norwegian Marine Insurance Plan of 1964, sect. 91; Norwegian Insurance Plan for the Carriage of Goods of 1967, sect. 99.

¹⁰³ See, for example, *Thames and Mersey Marine Insurance Co. Ltd. v. British and Chilean Steamship Co.* [1916] 1 K.B. 30, C.A.; [1915] 2 K.B. 214.

¹⁰⁴ However, French law on cargo insurance does not recognize an agreed value which is conclusive between the parties. See French marine insurance policy (cargo), art. 12 (1); and P. Lureau, *Commentaires des polices françaises d'assurances maritimes sur corps de navires* (Paris, Librairie générale de droit et de jurisprudence, 1974), p. 126.

¹⁰⁵ See Buglass, *op. cit.*, p. 276, citing *Aetna Ins. Co. v. United Fruit Co.*, 1938 AMC 710.

assured and no one insurer is responsible for the liabilities of any of the other insurers. For large risks placed in markets relying heavily on co-insurance as a means to cover the risk, such as the London market, this obligation could be burdensome.

130. In practice, the difficulty of obtaining jurisdiction over numerous co-insurers is eased by the usual willingness of co-insurers to choose one insurer, usually the leader, against which suit may be brought and agree to be bound by the court decision in the case. However, rather than rely on unbinding past practice, it would seem desirable to enshrine this practice in a binding obligation in the policy. Such an "agreement to be bound" clause would eliminate the risk of the occasional errant co-insurer and could be useful in all markets where co-insurance exists.¹⁰⁶

131. As for insurances placed directly with a foreign insurer, the process of obtaining effective jurisdiction over that insurer may be somewhat complicated for the assured. If the foreign insurer has a branch office located within the same jurisdiction as the assured, jurisdiction can in all probability be effectively obtained over the foreign insurer by service of process on that branch office. However, if the insurance was effected abroad through the medium of a broker, the assured may be forced to institute legal action in a foreign country where the insurer is situated. Such international litigation is generally considered a complex and costly practice and represents a serious impediment to undertaking legal recourse procedures. In such circumstances, the assured would be well advised to agree to a compromise settlement, regardless of the legitimacy of his claim.

132. Some markets utilize jurisdiction clauses for insurances placed abroad. A notable example of this practice is the use of the "New York suable clause" in hull insurances placed in the British market on behalf of a United States assured. Such a clause gives the assured the option to institute suit in the United States and have the dispute governed by United States law and practice.¹⁰⁷ Equivalents of such a clause can be found in some other markets.¹⁰⁸

133. It is suggested that assureds obtaining insurance coverage directly abroad, or via a broker, as well as insurers seeking facultative reinsurance placements abroad, insist upon the inclusion of a jurisdiction clause that stipulates a convenient jurisdiction.¹⁰⁹ In some cases the insurer may be legitimately hesitant to designate the local judiciary if it lacks marine insurance expertise. In such cases, consideration should be given to naming another jurisdiction within the region. In any case, unless an assured is a large international organization, for which the conduct of litigation in London or

New York does not present overwhelming practical difficulties, it seems inequitable to expect a small local assured to institute proceedings in the foreign insurer's domicile or not at all.

134. A good case in point can be found in the British market procedure for settling claims abroad.

With the insurer's agreement a policy or certificate can provide for claims to be settled by a settling agent at a named place abroad. This practice is fairly common in cargo insurance where the consignee prefers to collect any claim payable on the insurance in the country of destination, rather than submit his claim to London. The policy or certificate is marked C.P.A. (Claims Payable Abroad) and the name and address of the settling agent to whom claims should be presented is shown.¹¹⁰

There also exists a special form entitled "Lloyd's Marine Insurance Policy (Cargo Form) Providing for the Settlement of Claims Abroad" designed to serve the same purpose. However, this form stipulates that although the claim may be settled abroad, "All disputes must be referred to England for settlement, and no legal proceedings shall be taken to enforce any claim except in England where the Underwriters are alone domiciled and carry on business". This provision appears in principle to be inequitable to the assured. Since it has been agreed to settle the claim abroad, it would seem only appropriate that resolution of disputes as to such settlements be made abroad as well.

135. The fact that there are so few instances in which the assured must seek legal recourse in marine insurance can, in fact, be used as an argument in support of arrangements whereby insurers provide for foreign legal recourse. Unlike an individual assured, insurers are able to spread out the costs of such infrequent legal proceedings over numerous insurances which have been accepted.

136. In summary, it is suggested that careful consideration should be given to the inclusion of a satisfactory jurisdiction clause in all international placements as well as the use of an "agreement to be bound" clause in favour of one designated insurer in all co-insurances. By the use of such clauses, it is felt that assureds would receive better and more effective legal protection of their contractual rights without undue prejudice to the position of insurers.

B. The legal regime applicable solely to hull insurance

1. THE APPLICATION OF THE JOINT HULL FORMULA TO RENEWALS

137. The application of the JHF in the British market (see paras. 67 and 68) is the subject of frequent criticism. One criticism that may be made is that it discriminates against the small and/or low valued fleets in favour of the high valued larger fleets. This occurs as a result of requiring for those categories representing the smaller fleet sizes and values a higher credit balance of premium over claims to avoid a penalty premium increase and then requiring, in addition, a higher percentage premium increase for those same categories when a penalty

¹⁰⁶ In the French market some policies contain a "clause d'apéri-tion" which stipulates that the co-insurers are bound by a legal decision against the leader. See Rodière, *op. cit.*, p. 470.

¹⁰⁷ For an example of such a clause, see Buglass, *op. cit.*, pp. 2-3.

¹⁰⁸ An example of a jurisdiction clause that provides for the possibility of bringing suit against all co-insurers in one forum, albeit not necessarily one that is convenient to the assured, can be found in section 147 of the Norwegian Marine Insurance Plan of 1964, where it is stipulated that "The assured may institute legal proceedings against the co-insurers in the courts of the venue applicable to the leading insurer."

¹⁰⁹ Reinsurances placed abroad pursuant to a treaty are usually subject to an arbitration clause in the treaty.

¹¹⁰ Brown, *Dictionary of Marine Insurance Terms*, *op. cit.*, p. 358.

is in fact imposed.¹¹¹ This difference in treatment between small and large fleets has been defended on the grounds that larger fleets have a wider spread of risks which thus provides a better balance within the individual fleet.¹¹² On the other hand, it has been claimed that the distinction made according to fleet size in the British market is too large:

When we [the Norwegian Hull Committee, which quotes premiums for about one half of the Norwegian merchant fleet] calculate the premium surcharge based on individual statistics, we do not make very much difference between large and small fleets. As is known, the London underwriters do things otherwise. Their formula for penalties based on statistics affects the small and medium-sized fleets (A, B and C fleets) considerably more than the large fleets (D and E fleets). This large difference between the two markets has existed for many years and ... it would have been a poor lookout for many of ... [the Norwegian] A and B fleets if there had been no national market.¹¹³

138. The point made about this difference in treatment between large and small fleets has particular relevance to developing countries where smaller, lower valued fleets are more likely to be found. Thus, small shipowners from developing countries obtaining their insurance coverage directly from the British market, from a local market that follows the JHF, or from a local market that must reinsure a substantial portion of the risk in the British market, will be placed at a competitive disadvantage vis-à-vis large shipowners from developed market-economy countries by having to bear a relatively larger premium penalty increase.

139. Furthermore, it has been asserted that the JHF does not take into account sufficiently the original premium level, with the result that there are unreasonable differences between the hull premiums for vessels within the same category.¹¹⁴ In this respect it should be noted that the JHF refers only to percentage premium increases. For example, it is useful to consider the different situations of two identically sized and valued vessels in the same category of the JHF, one with an original premium quotation which results in, say, the payment of \$30,000 per annum, and the other, whose owner had originally exploited the competitive market forces more to his advantage, with a premium payment of only \$20,000 per annum—or a difference in premium of \$10,000. If the premium of both vessels is increased by 20 per cent over a period of four years, the annual premium payment for the first vessel would be about \$62,000 while for the second it would be only \$41,500, giving a difference in premium of \$20,500.¹¹⁵ In this situation the first vessel is at a clear competitive disadvantage by having to pay a higher premium, and this

disadvantage becomes greater with each penalty increase under the JHF without any intervention by either vessel owner.

140. The above criticisms of the JHF exist to the extent that the formula is rigidly applied. As has been stated earlier, as a result of competitive forces the JHF is not, in the British market at least, being strictly applied. However, it is understood that it is still strictly applied in the marine insurance market of at least one developing country and it is to be presumed that it will again be applied strictly in the British market when competitive circumstances permit. Under normal circumstances when the exact terms of the JHF have been strictly applied, procedures for amelioration of the JHF in specific instances have been available upon application to the Joint Hull Committee. However, it is the opinion of the UNCTAD secretariat that such procedures for amelioration are inadequate to alleviate the inequitable discrimination inherent in the JHF for some shipowners.

2. MARINE RISK COVERAGE: THE "ADDITIONAL PERILS" CLAUSE AND THE "LINER NEGLIGENCE" CLAUSE

141. Concerning the granting of marine risks coverage by the use of the "additional perils" clause (clause 7 of the Institute Time Clauses: Hulls) (see annex II) in conjunction with the perils clause in the Lloyd's S.G. Form (see para. 71), it is necessary to repeat here the assertion made earlier (see para. 118) that it is unfortunate that the granting of cover under British conditions must be made in two separate clauses appearing on two separate pieces of paper. However, if the liner negligence clause is attached, it in effect overrides the other two clauses because of its wide scope of cover (for the wording of the liner negligence clause, see para. 77). In any case it would be preferable for the purpose of simplicity if the perils clause and the "Inchmaree" clause were combined. Alternatively, as suggested earlier (see paras. 119–121), the two clauses could be replaced by an all risks grant of cover subject to the necessary exceptions to make the cover equal what is currently granted by the two together. This suggestion would result in making the differences between the "all risks" cover of the liner negligence clause and the more limited cover offered by the perils clause and the additional perils clause easily distinguishable.

142. An example of the limitations of the additional risks clause which are not easily detectable in the current format can be found in the phrase "latent defect", which, as a result of an early court decision, is considered not to include "error in design". Thus, despite the absence of any express limitation to this effect and despite the fact that the clear meaning of "latent defect" would include a "latent error in design", the additional perils clause does not offer such coverage. Further drafting improvements could be made in order to make it clear that the additional perils clause does not cover replacement of the defective parts that cause damage.¹¹⁶ An "all risks" grant

¹¹¹ As a result of the amendment of the JHF subsequent to the original issuance of this report, the latter aspect of this criticism is no longer as valid in that instead of a specific penalty increase for each category, a range of possible increases is now applicable to categories 1 to 3 as a group. See footnote 51.

¹¹² As indicated in the reply of the Federal Republic of Germany to the secretariat questionnaire on hull insurance.

¹¹³ H. C. Bugge, "The principles in Norwegian premium calculation and the capacity of the Norwegian market", *Norwegian Shipping News*, No. 14, 1975, p. 27.

¹¹⁴ Speech by H. C. Bugge, entitled "The Norwegian hull insurance market", to the Marine Discussion Group of the Insurance Institute of London, 13 March 1962 (unpublished).

¹¹⁵ *Ibid.* However, it would appear that the amendments that have been made to the JHF subsequent to the original issuance of the present report ameliorate to some extent the severity of this problem by providing greater flexibility in assessing what percentage increase in premium to apply. See footnote 51.

¹¹⁶ The liner negligence clause could also be improved to indicate clearly that such replacements are covered if the part has caused damage. Both clauses have in fact been criticized for the poor quality of their draftsmanship. See Tetreault, *loc. cit.*, p. 344. See also "Thoughts on the 'liner negligence' clause", *Fairplay Shipping Journal* (London), vol. 216, No. 4282 (16 September 1965), p. xxiii.

of cover minus designated exceptions would make these limitations easily noticeable.

143. Another difficulty is that the liner negligence clause is not universally known to assureds nor is any attempt made to publicize its existence. There appears to be a marked reluctance on the part of insurers to offer this clause to the public.¹¹⁷ It is understood that it is not uncommon for insurers to refuse to underwrite at any rate of premium insurances subject to the liner negligence clause. The standard justification for this limited offering of the clause is that its wide coverage should be granted only to those shipowners who have "earned it", i.e. those who run well-maintained vessels and whose "due diligence" can be taken for granted, thereby reducing the possibility of claims. However, it is more reasonable to deal with bad claims records by higher premiums, instead of continuing with an almost all risks cover which fails to meet the insurance needs of assureds fully and which is liable to mislead the uninitiated. Furthermore the extent to which the liner negligence clause increases the overall incidence of claims under the policy is debatable. In any case, it is clear that the liner negligence clause minimizes to a marked extent the amount of investigation necessary to substantiate claims of this nature, thereby simplifying the overall claims settlement process.

3. "ALL CLAIMS, EACH ACCIDENT" DEDUCTIBLE

144. Concerning the application of a deductible to claims coming under a hull insurance policy (see para. 79), there are some aspects of the "all claims, each accident" basis for the deductible which are less than satisfactory, at least as to some shipowners. First, as a result of the application of a deductible on an "each separate accident or occurrence" basis, the degree to which the assured shipowner must bear the financial burden of damage to his vessel depends on the manner in which the damage occurred.¹¹⁸ If a fully insured vessel subject to a deductible of \$50,000 is damaged in one accident to the extent of \$200,000 then the insurer will pay \$150,000 and the shipowner will bear the remaining \$50,000 himself. If on the other hand the vessel is damaged to the same extent but in a series of, say, four accidents sufficiently disconnected to be considered separate accidents, and each causing \$50,000 worth of damage, the shipowner will have to bear the full \$200,000 himself.

145. It is claimed in this regard that the impact of the application of multiple deductibles should not be of great concern to shipowners, in view of the relatively small deductibles carried by the majority of shipowners insured in the commercial insurance markets today. As a rule, even with the application of multiple deductibles it is claimed that the total sum is sufficiently small to fit within the average shipowner's maintenance budget. However, if a shipowner desires to carry a large deductible in his hull policy to reduce the premium level, he should bear in mind the potentially variable effect an

"each accident" deductible can have on his financial position. A shipowner in this situation might well consider negotiating a deductible based on a set period of time.¹¹⁹ Although this approach negates many of the claims adjustments benefits realized by the use of the "each accident" basis for a deductible, such a change may nevertheless be advisable to avoid the unpredictability of the each accident basis.

146. Furthermore, the "separate accident or occurrence" rule is a difficult one to apply to some factual situations. In order to deal with such situations, clarifying language should be added to assist in its application or to provide another basis on which to apply the deductible. This has already been done in the case of "heavy weather"¹²⁰ damage in that the deductible clause provides that "claims for damage by heavy weather occurring during a single sea passage between two successive ports shall be treated as being due to one accident". Similar provisions exist in some other national policy conditions with regard to "heavy weather".¹²¹ Clarifying language could also be used with regard to other difficult factual situations, such as contacts during a single canal transit and damage resulting from a single ranging¹²² operation in a port, or similar contacts with a pier. In these situations it is difficult to separate each different contact of the ship with a wall or another ship and to determine whether there were several accidents or occurrences or only one.¹²³

147. Concerning the special provision made for "heavy weather" mentioned above, it is suggested that certain improvements could be made to render its application less inequitable to some shipowners. The treatment of damage occurring during a single sea passage between two successive ports as due to one accident makes the application of the deductible dependent on the trading schedule of the particular vessel. Thus, a long voyage between two particular ports will create only one deductible whereas two short voyages during the same time span will create two deductibles. It is understood that, at the request of assureds, alterations are occasionally made for vessels on unusual trading patterns. However, a more uniform and equitable approach is to revise the provision in the standard hull clauses by eliminating the concept of a sea passage between two ports in favour of a set period in time in all cases.

148. Another aspect of the "all claims, each accident" deductible that merits improvement is the application of the deductible to claims for sue and labour expenses. The expression "sue and labour" refers to the assured's duty to undertake reasonable efforts and expenses to

¹¹⁷ The same situation appears to exist in the the Japanese market for equivalent coverage to both the additional perils clause and the liner negligence clause. See *Marine and Inland Transit Insurance in Japan* (Tokyo, The Non-life Insurance Institute of Japan, 1979), p. 116.

¹¹⁸ See Association of Average Adjusters, *Report of the General Meeting* (London, May 1970), p. 12.

¹¹⁹ Such as a month, six months or a year. For a discussion of this possible approach, see *ibid.*, pp. 12-13.

¹²⁰ The expression "heavy weather" is used to refer to the extraordinary action of the wind and the waves. It is also defined in the deductible clause to include contact with floating ice.

¹²¹ For example, the deductible clause in the American Institute Hull Clauses; and Norwegian Marine Insurance Plan of 1964, sect. 189.

¹²² The term "ranging" in its marine insurance context relates to a situation where two vessels approach and lie alongside each other, usually for the purpose of transferring property from one vessel to the other. Brown, *Dictionary of Marine Insurance Terms*, op. cit. p. 325.

¹²³ The deductible clause in the American Institute Hull Clauses contains an additional clarifying phrase reading in part "... each accident shall be treated separately, but... a sequence of damages arising from the same accident shall be treated as due to that accident..."

prevent or minimize a loss. As long as the loss is proximately caused by an insured peril, then the insurer will reimburse the assured for such sue and labour expenses, whether or not the action taken is successful. However, considering that the sue and labour concept operates to the benefit of the insurer, it seems rather unjust that the insurer should apply a deductible to such effort.¹²⁴ Furthermore, although the assured is obligated to sue and labour, the application of a deductible to these reimbursements would seem to have a somewhat lessening effect on the incentive to sue and labour expeditiously. It is also understood that, despite the express exclusion of total loss claims from the application of the deductible, some insurers in the British market are attempting to apply the deductible to sue and labour expenses incurred in connexion with a total loss. In addition to discouraging sue and labour efforts when a total loss seems probable, this interpretation also appears contrary to the spirit of the provision. It should be noted that some national policy conditions utilizing a deductible specifically exclude its application to sue and labour expenses.¹²⁵

4. THE "CO-INSURANCE" CLAUSE: CREW'S NEGLIGENCE AND MACHINERY DAMAGE

149. The terms of clause 11 of the Institute Time Clauses: Hulls (see para. 78 and annex II), known as the "co-insurance" clause, are frequently criticized by shipowners as being unduly harsh. The clause has never been adopted in the United States market, and the Canadian Hulls (Pacific) Clauses have dropped it as it was rarely used.¹²⁶ However, Norwegian hull conditions appear to use a roughly similar type of clause.¹²⁷

150. The question arises whether the clause is at all appropriate in a standard hull insurance cover in view of the enormous value of a modern vessel and the need for shipowners to protect themselves from the potentially large damage claims that can arise. Although it can be argued that the existence of such a clause is justified by the ever increasing number of accidents involving crew negligence, the clause affects arbitrarily both the careful and the careless shipowner, since it is a recognized fact that even the most careful shipowner can experience a negligent act on one of his vessels which leads to serious damage. To eliminate this arbitrary treatment it would seem that the clause should, at the most, be used only on a case-by-case basis. Thus, to the extent that crew negligence can be attributed to a controllable factor within the power of a particular shipowner—for example, in the case of a shipowner who has a long history of claims for crew's negligence and who thus appears to have a management policy that is in some way inadequate—the application of an additional deductible clause might give him the necessary economic stimulus to re-examine his policies.

151. Certainly there are conflicting policy considerations on this issue and perhaps greater thought should be given to the relative needs of the parties to the contract, i.e., the insurer, who needs to prevent excess claims of this nature, and the assured, who needs to protect himself against the financial consequences of such an event. It is suggested that the application of an additional deductible as a standard element of hull insurance cover may not be adequate in meeting both these conflicting needs in a fair manner.¹²⁸ It is understood that in practice the clause is deleted in some instances. In this respect, consideration should also be given to whether selectively increasing the premium level vis-à-vis certain shipowners would not be a more effective and less arbitrary method of economic stimulus to prevent crew negligence.

5. THE EFFECT OF AGREED VALUES ON INDEMNITY FOR GENERAL AVERAGE CONTRIBUTIONS, SALVAGE CHARGES AND SUE AND LABOUR EXPENSES

152. One notable exception to the British rule that the agreed value in a marine insurance policy is conclusive of the insurable or actual value of the vessel involves the treatment of agreed values vis-à-vis the indemnity for general average contributions,¹²⁹ salvage charges¹³⁰ and sue and labour expenses.¹³¹ In order to determine the amount of indemnity for such liabilities and expenses, the agreed value in the policy is compared to the actual value of the subject-matter at the time of loss or at the end of the voyage.¹³² Assuming that the vessel is fully insured under the policy, i.e. that the amount of insurance coverage purchased equals the agreed value, and if the agreed and actual values are the same, then the indemnity payable to the assured is unaffected. However, if the agreed value is less than the actual value, then the assured is treated as being actually underinsured for such liabilities (despite being fully insured on the face of the policy), and thus the indemnity is reduced in proportion to the difference between the two values.

153. Thus, an assured with a policy based upon the Lloyd's S.G. Form with the "Institute Time Clauses: Hulls" attached runs a risk of having to bear a portion of such liabilities. The same situation exists in many other

¹²⁴ See also Association of Average Adjusters, *Report of the General Meeting* (London, May 1971), p. 14.

¹²⁵ For example, Norwegian Marine Insurance Plan of 1964, sect. 189.

¹²⁶ *Fairplay International Shipping Weekly* (London), 17 October 1974, p. 45.

¹²⁷ Norwegian Marine Insurance Plan of 1964, sect. 187; Special Conditions for Hull Insurance of Steamers and Motor Vessels, art. 7.

¹²⁸ However, the reply of Kuwait to the secretariat questionnaire on hull insurance advocated the strict application of the clause, and, if possible, increasing the size of the deductible; and the reply of Bangladesh advocated redrafting the clause to exclude from the coverage of the policy all damage that can be attributed to crew negligence.

¹²⁹ A general average contribution is a payment by one of the interests involved in a general average adjustment to reimburse those other interests in the voyage which have been damaged or have incurred expense as a result of a general average act (see para. 26).

¹³⁰ Salvage charges refer to money payable in an award to a third party who acted independently of contract to preserve property from an insured peril. Brown, *Dictionary of Marine Insurance Terms*, op. cit., p. 351.

¹³¹ For an explanation of "sue and labour", see para. 148.

¹³² Reimbursement for general average contributions and salvage charges is governed by article 73 of the 1906 Act. Although equally applicable to cargo insurance, the practical risk of such underinsurance for cargo has been eliminated by the 1974 revision of the York/Antwerp Rules stipulating that the contributory (actual) value shall be based upon the value stated in the commercial invoice plus the cost of insurance and freight, which is usually less than the agreed value stated in cargo insurances (which invariably incorporate these elements plus anticipated profit). Reimbursement for sue and labour expenses is governed by clause 9 of the Institute Time Clauses: Hulls (see annex II).

national hull policy conditions.¹³³ Although the actual relationship of the various interests to a general average or salvage adjustment is unaffected by this rule, the amount of indemnity the assured receives for his liability to contribute to the other interests in general average is reduced.

154. As a result of the potentially large fluctuations in hull valuations which can occur over a short period of time as well as the extreme difficulty in determining hull valuations, there is a real risk of establishing an agreed value at the beginning of a policy for what is thought to be the realistic market value of the vessel, only to find out at the time of loss that the agreed value is significantly lower than the actual value of the vessel.¹³⁴ Consequently, additional coverage is offered, upon the payment of a higher premium, by the Institute Excess Liabilities Clause (Hulls) or the Institute Total Loss and Excess Liabilities Clauses (Disbursements, etc.), both of which contain identical clauses offering coverage for such "excess liabilities" as are created by the agreed value in the basic hull policy being lower than the actual value.

155. It is suggested that this treatment of agreed values as not being conclusive of actual values for the purposes of these potential liabilities and expenses creates an inequitable situation for the assured.¹³⁵ Admittedly, it may not often occur in the insurance markets of developed market-economy countries that an assured shipowner is not aware of this potential exposure to excess liabilities under the standard hull conditions. However, in developing countries, where the expertise in marine insurance affairs is not yet well established, an assured shipowner may well be unaware of such potential gaps in his insurance cover. Thus, having attempted to value his vessel realistically he may be under the impression that he has purchased a comprehensive cover when using the standard hull conditions. It is submitted that it is undesirable for insurance conditions used internationally to contain such hidden gaps, since they assume a level of expertise in other national markets that does not always exist; they also assume the existence of brokers to alert assureds to difficulties, which is not the case in all national markets.

156. It has been asserted that the purpose of the present approach is to limit the insurer's potential liability for these claims. However, this argument is not totally convincing. As to general average contributions and salvage charges, the relationship between market and insured values is only one of several factors determining the indemnity for which the insurer will be liable and which the insurer must consider in the calculation of

premium.¹³⁶ Thus, the insurer's potential liability will vary for other reasons as well.

157. Consequently, it is suggested that a standard hull cover be developed which makes the agreed value conclusive of the actual value for the purpose of calculating the indemnity for these liabilities and expenses. Thus, assuming full insurance coverage is purchased, then these potential liabilities will be covered in full by such conditions. This approach is used in some other national legal regimes.¹³⁷ Such a unified cover would seem to offer shipowner assureds a desirable insurance package with fewer hidden lacunae for the uninformed shipowner, particularly those shipowners in developing countries. Furthermore, the elimination of the currently fragmented cover would result in less complexity in the overall policy for purposes of clause interpretation as well as a simpler claims adjustment process.

6. COLLISION LIABILITY COVERAGE

158. Aside from the fragmentation inherent in granting collision liability cover partly in the commercial market and partly with the P & I Clubs (see para. 74), there are certain characteristics of the commercial market collision liability cover which could be simplified. As a result of the cover in the collision clause being limited to three-fourths, or four-fourths, of the agreed value of the vessel, as the case may be, there is a risk to the shipowner that he will incur collision liabilities which exceed the limit of the agreed value. Shipowners using British conditions frequently seek to insure the risk of such excess collision liabilities through the use of the Institute Excess Liabilities Clause (Hulls) (or the Institute Total Loss and Excess Liabilities Clauses) or through coverage in a P & I Club.

159. It is suggested here that such additional insurance coverage in the form of a separate set of clauses to be attached to the basic policy is unnecessary. Since the "running down" clause is a separate insurance contract offering indemnity in addition to the basic coverage for damages, the extent of coverage offered by that clause need not be the same as for the basic policy. The agreed value of the vessel establishes its insurable value for purposes of fixing the maximum limit of reimbursement for damage to the hull. However, this sum does not always coincide with the amount of potential collision liabilities. Rather than arbitrarily limiting the collision liability coverage to the agreed value of the vessel, the "running down" clause could be amended slightly to leave the limit of liability open to be filled in by agreement.¹³⁸ This approach would eliminate the need for a

¹³³ American Institute Hull Clauses (2 June 1977), as provided by the general average and salvage clause and the sue and labour clause; General Conditions of the Hull Policy issued by Seguros Océánica Internacional, S.A., Mexico, clause 1 (b) (as to general average and salvage); French marine hull insurance policy, art. 26 (1).

¹³⁴ The market values of ships fluctuate continuously. See S. N. Sanklecha, "Hull insurance and valuation of ships", *Indian Shipping* (Bombay), vol. 29, No. 5/1977, pp. 7-10; and Association of Average Adjusters, *Report of the General Meeting* (London, May 1977), citing a case involving a dispute as to the sound value of a vessel: "... some seven opinions were obtained from reputable expert valuers both in the U.K. and on the continent of Europe, all of which quoted different figures. Of these the highest was more than 140 per cent in excess of the lowest".

¹³⁵ In general support of this argument, see Association of Average Adjusters, *Report of the General Meeting* (London, May 1977), Address by Chairman.

¹³⁶ For example, the insurer's liability for general average contributions will vary according to the value of the cargo carried. This was indicated in the Chairman's address referred to in footnote 135, in which it was noted that this is not the case with sue and labour expenses.

¹³⁷ For example, Norwegian Marine Insurance Plan of 1964, sect. 70.

¹³⁸ Although alterations would be necessary to the presentation of the limit of liability as a result of differences in calculating the indemnity under the collision liability clause and the excess liabilities clause, incorporation of the two clauses need not ultimately result in changes in the insurer's potential liability. Subsequent to the original issuance of this report, it was asserted, at the seventh session of the Working Group on International Shipping Legislation, held in December 1980, that it is current practice in some markets to have such excess liabilities cover underwritten as a separate contract with either separate insurers or reinsurers, thereby reducing the feasibility of this suggested amendment with respect to those markets.

separate excess liabilities clause to be attached to cover such excess collision liabilities, thereby simplifying somewhat the process of obtaining and subsequently interpreting the actual insurance cover. If the coverage is desired according to the standard conditions currently available, then the agreed value of the vessel can be inserted, thereby leaving the assured free to cover himself against the risk of excess collision liabilities through a P & I club.

7. THE CHOICE OF WHERE TO HAVE REPAIRS UNDERTAKEN; OPERATION OF THE "TENDER" CLAUSE

160. If damage that is covered by the insurance policy has occurred to a vessel, the choice of where to have the repairs done is an important factor in view of the fact that the standard used to determine the insurers' liability in such cases is the reasonable cost of repairs. Clause 19 of the Institute Time Clauses: Hulls (see annex II) empowers insurers to veto the shipowner's choice of repair yard and to take their own tenders or require further tenders to be taken for such repair work. In practice it is understood that insurers expect the assured to take tenders initially. However, if insurers require that additional tenders be taken, they will pay an allowance of 30 per cent per annum of the agreed value of the vessel in respect of the loss of time caused by the taking of further tenders, but only if the assured accepts one of the additional tenders that the insurers have approved. If further tenders are taken and they are lower, and the insurers approve them, there does not seem to be any problem. However, if the further tenders are higher, it is unlikely that the insurers would approve any of them, and thus they would rely instead on one of the earlier tenders taken by the assured. In this situation the clause operates inequitably for the assured because, although further tenders have been required by the insurers and time has been lost as a result of such additional tenders, one of the requirements for the assured to be entitled to the allowance has not been fulfilled, since the insurers have not approved one of the tenders so taken.¹³⁹

161. The last part of the clause concerns the imposition of a penalty amounting to a reduction of 15 per cent of the ascertained claim for failure to comply with the conditions of the clause. Thus, those parts of the clause dealing with the assured's duty to give notice of loss to the insurers and the insurers' power to choose the port of repair are included within the scope of the penalty as well as that part dealing with the taking of tenders.¹⁴⁰ Although the penalty is a useful method of obtaining strict adherence to the terms of the clause, the penalty should be more flexible to take into consideration possible extenuating circumstances. It has been asserted that there are some situations where:

it may be impossible or impracticable for the assured to give effect to the provisions of the Tender Clause, as there may be statutory or other restrictions as to where repairs may be undertaken. For example, currency restrictions may preclude the execution of repairs—other than

those essential for seaworthiness—outside the country in which the ship is registered. In other cases, repairs executed abroad may be the subject of heavy duties on return of the vessel to its home port. When shipyards are busy, ship-repairers may be unwilling to tender.¹⁴¹

Although it may be that insurers will agree to *ad hoc* amelioration of the penalty, it is preferable to incorporate into the clause a more flexible rule upon which the shipowner may rely as a matter of right.

8. "PAYMENT ON ACCOUNT" CLAUSE TO ASSIST EFFECTUATION OF REPAIRS

162. It is generally recognized that a shipowner may need to have a payment on account in advance of the completion of the formal claims settlement to meet large repair bills. As matters at present stand, however, there is no obligation on insurers to make payments on account in respect of their liability under standard British conditions. Although in practice it is rare for insurers to refuse to make such payments, the assured in fact has no means of obliging them to do so. Thus it would seem desirable that a provision be inserted in hull policies to the effect that, in cases where the insurers' liability is not at issue, insurers should make payments on account at least in respect of major repair costs approved by their surveyors. A similar situation to that in the British market exists in the French market, where, although no clause exists, insurers usually agree to a payment on account for large repairs.¹⁴² On the other hand, such a provision exists in Norwegian insurance conditions.¹⁴³

9. THE DECISION NOT TO UNDERTAKE REPAIRS: CLAIMS FOR UNREPAIRED DAMAGE

163. Claims for damage to a vessel that is left unrepaired at the time of claiming indemnity from insurers generally involve a lengthy negotiation and are a source of delay in the claims settlement process. This situation arises from the convergence of a number of problems. One of these problems is an inevitable practical difficulty in estimating the "sound" value—i.e. before the damage—and the damaged value of a vessel. Estimates made by expert sale and purchase brokers will often differ by wide margins.

164. Another problem, at least under British conditions, is a legal difficulty resulting from uncertainty in the legal framework governing the indemnity for such claims. The 1906 Act stipulates that the assured is entitled to an indemnity for unrepaired damage to a vessel that has not been sold during the currency of the policy, based on either the reasonable depreciation resulting from such damage or the reasonable cost of repairs for such damage, whichever is the lower.¹⁴⁴ However, the

¹³⁹ Section 182, "Invitation to tender", of the Norwegian Marine Insurance Plan of 1964 appears to avoid the problem mentioned by basing a similar allowance purely on loss of time in excess of 10 days.

¹⁴⁰ A similar penalty exists in French hull conditions for certain types of non-compliance of the assured with the requirements of the French equivalent to the tender clause. See French marine hull insurance policy, art. 23.

¹⁴¹ Dover, *A Handbook to Marine Insurance*, op. cit., p. 441; see also "Philippine repair mandate has far-reaching effects on the industry", *Fairplay International Shipping Weekly* (London), 23 March 1978, p. 57, referring to a Philippine Presidential Decree which places restrictions on the place of repairs for all Philippine-owned and/or registered vessels.

¹⁴² See "Le règlement des indemnités d'assurances", report presented by P. Latron to the Marine (Hull) Insurance Seminar sponsored by the General Arab Insurance Federation (Casablanca, 1-4 September 1975), p. 16.

¹⁴³ Norwegian Marine Insurance Plan of 1964, sect. 90.

¹⁴⁴ Article 69 (3). As to unrepaired damage on a ship that is sold during the currency of the policy, see *Pitman v. Universal Marine Insurance Co.* (1882) 9 Q.B.D. 192.

1906 Act fails to provide any indication of how "reasonable depreciation" and "reasonable cost of the repairs" should be determined. Furthermore, British legal decisions have not dealt with these issues in a satisfactorily uniform manner. As a result, there are several conflicting viewpoints in the British market on whether the agreed value in the policy should be taken into account in determining the depreciation,¹⁴⁵ whether the estimated cost of repairs should include the estimated cost of dry-docking,¹⁴⁶ and at what time the estimated repairs should be considered.¹⁴⁷ Attempts have been made to deal with unrepaired damage claims by means of claims settlement clauses or claims cut-off clauses, but none of these clauses has gained wide acceptance.¹⁴⁸

165. Even aside from these practical difficulties—and the legal confusion which, it has been claimed, could be avoided by adequate clausing in the insurance contract¹⁴⁹—there appears to be an overall reluctance on the part of the insurer to pay such claims. This reluctance is based on the opinion that they operate in many cases to the unfair advantage of the assured. For example, a claim for unrepaired damage may be made on a vessel about to be sold for scrap, and unless the damage affects the volume of metal retrievable as scrap, the unrepaired damage will usually have no impact on the scrap value. As a result, the assured gets the normal proceeds on the sale as well as the indemnity for the unrepaired damage.¹⁵⁰ This situation can also arise in sales when the vessel is sold to a new owner to be used for further trading.¹⁵¹

166. Thus, as has been said: "It is possible under the existing basis of dealing with unrepaired damage claims that, due to events occurring after expiry of the policy, the assured may make a 'profit' in that he may ultimately not have to suffer a cash loss".¹⁵² To this extent it is clear then that the current British approach to unrepaired damage fails to ensure that the contract of insurance is

one of indemnity for actual losses suffered by the assured. Consequently, there has developed an understandable reluctance on the part of insurers to apply strictly the legal formulae for such claims—quite apart from any confusion as to which formula should be used—thereby creating a fertile opportunity for the breakdown of the claims settlement procedures into a situation where claims must be negotiated in virtually all circumstances.

167. As a result, it can be argued that the difficulties existing in the area of claims for unrepaired damage are more than just problems of making the necessary estimates in values and repair costs on the one hand, and lack of clarity and precision in the existing legal rules on the other. Rather, the problem may be viewed as one affecting the nature of the claim itself as it is currently conceived. In this respect, it is suggested that efforts should be made to find a new legal basis for such claims that comes closer to providing the assured with a realistic indemnity for the actual monetary loss suffered.

168. Suggestions have recently been made in support of revising the basis for unrepaired damage claims.¹⁵³ Such suggestions are based on the concept of limiting such claims to cases in which the assured has actually suffered a monetary loss in a sale. Thus, in the case of subsequent total losses and in most cases of scrap sales, where the assured incurs no financial detriment by reason of the existing unrepaired damage, such claims would be eliminated. In other cases of vessel sales, the assured would have to show a loss by reason of reduced proceeds of the sale, subject to the estimated reasonable cost of repairs. Such suggestions merit serious consideration as forming a possible basis for a future compromise between the interests of the assured and those of the insurer as to such claims. Care would have to be taken to make allowance for some cases of scrap sales as well as some regular sales for future trading where the assured has incurred a financial loss by reason of such unrepaired damage but such loss is not reflected in the sale proceeds (see footnotes 150 and 151).

169. As part of the effort to revise the basis for unrepaired damage claims, the approach of other national legal systems should be analysed. In the Japanese and Norwegian hull conditions, claims for unrepaired damage are permitted only in the case of vessel sales.¹⁵⁴ In such cases the claim is calculated on the basis of the estimated cost of repairs at the time of the sale¹⁵⁵ but limited to the reduction in the sale proceeds attributable to the damage.¹⁵⁶ The approach of the United States

¹⁴⁵ See *Irvin v. Hine* [1950] 1 K.B. 555; *Elcock v. Thomson* [1949] 2 K.B. 755.

¹⁴⁶ Such charges can form up to one third or one half of the reasonable cost of repairs. See Association of Average Adjusters, *Report of the General Meeting* (London, May 1966), pp. 18–19; and Buglass, *op. cit.*, pp. 108–109.

¹⁴⁷ See *Irvin v. Hine* [1950] 1 K.B. 555; *Helmville Ltd. v. Yorkshire Insurance Company (the "Medina Princess")* (1965) 1 Lloyd's Rep. 361; K. Goodacre, "The inflation factor in hull claims", *Fairplay International Shipping Weekly* (London), 8 May 1975, pp. 33–35; and Dover, *A Handbook to Marine Insurance*, *op. cit.* p. 439.

¹⁴⁸ See Association of Average Adjusters, *Report of the General Meeting* (London, May 1976), p. 12; and Goodacre, "The inflation factor in hull claims", *loc. cit.*, p. 35.

¹⁴⁹ See J. K. Goodacre, *Marine Insurance Claims* (London, Witherby and Co. Ltd., 1974), p. 279.

¹⁵⁰ However, there can be cases of scrap sales where the vessel would not have been sold were it not for the damage. In such cases the market value of the vessel without the damage could well be higher than its scrap value, thus the assured in such sales could incur a loss. See Association of Average Adjusters, *Report of the General Meeting* (London, May 1977), Address by Chairman.

¹⁵¹ However, in this situation it is often difficult to determine whether the sale price was unaffected by the unrepaired damage (e.g., because the damage did not affect the seaworthiness and was sufficiently minor to avoid ever having to be repaired) or the seller was particularly fortunate in getting a good price. It is argued in the latter case that the assured should be able to make a claim for unrepaired damage since, if it had not been for the damage, the sale price could have been even higher.

¹⁵² Association of Average Adjusters, *Report of the General Meeting* (London, May 1977), Address by Chairman.

¹⁵³ *Ibid.*

¹⁵⁴ Under Norwegian conditions, such claims are limited to only certain types of sales. See Norwegian Marine Insurance Plan of 1964, sect. 174.

¹⁵⁵ Under Japanese conditions the estimated repair costs are reduced to the extent of certain benefits which would have been obtained and costs which would have been incurred had the repairs actually been effected, such as scrap value of parts, dry-docking charges and repairer's profit. See *Marine and Inland Transit Insurance in Japan* (Tokyo, The Non-Life Insurance Institute of Japan, 1979), p. 117.

¹⁵⁶ Under Norwegian conditions, failing proof to the contrary, the damage is deemed not to have reduced the sale proceeds in the case of a vessel sold for scrap and, in the other designated cases of sales, to have reduced the proceeds by the estimated cost of repairs. See Norwegian Marine Insurance Plan of 1964, sect. 174 and the accompanying commentary.

market is based on the British approach. However, it has been stated that claims for depreciation have never been negotiated in the United States, as they have in the United Kingdom.¹⁵⁷ Nevertheless, it should be noted that recent amendments to the American Institute Hull Clauses have resulted in the insertion of the following clause:

No claim for unrepaired damages shall be allowed, except to the extent that the aggregated damage caused by perils insured against during the period of the Policy and left unrepaired at the expiration of the Policy shall be demonstrated by the Assured to have diminished the actual market value of the Vessel on that date if undamaged by such perils.¹⁵⁸

On the other hand, in the French insurance market, claims for unrepaired damage are apparently not generally permitted since it is understood that claims are as a rule only compensated against paid invoices.¹⁵⁹

170. In summary, it is apparent that the problem of claims for unrepaired damage merits more detailed consideration than is possible in this report. Nevertheless, the UNCTAD secretariat has taken the opportunity here to highlight the unsatisfactory nature of the existing approach and to suggest that a broad revision should be made of the basis of this type of claim.

10. THE LEGAL EFFECT OF DEDUCTIBLES IN DETERMINING SUBROGATION RIGHTS

171. As has been previously explained (see para. 96), upon payment of a claim by the insurer to the assured, the insurer is subrogated to the rights of the assured against third parties responsible for the loss. As a general rule, if the insured object is underinsured, that is to say, if the amount of insurance purchased is less than the agreed value stated in the policy, then the assured is treated as a co-insurer to the extent of the underinsurance and receives the benefit of any recoveries from third parties on a proportional basis along with the other insurer(s). However, it is somewhat of an open question under British law whether the existence of a deductible, which creates a form of underinsurance by making the assured bear a certain portion of the loss himself, entitles the assured to be treated as a co-insurer for the purposes of participating on a proportional basis in recoveries from third parties. However, British marine insurance conditions deny the assured a co-insurer status as to the deductible.¹⁶⁰ Thus, the insurer receives all of any recovery up to the full claim paid, and only after this amount is reached will the assured receive any of the recovery to offset his deductible. On the other hand, United States

conditions grant the assured a co-insurer status for the amount of the deductible, thereby enabling a proportional distribution of any recoveries from third parties.¹⁶¹ This is also the approach used in French and Norwegian conditions.¹⁶²

172. It is suggested that the British practice is inequitable to the assured. Whenever hull damage has occurred it is quite clear that both parties have suffered losses—the insurer in paying the claim, and the assured in bearing the deductible. The insurer desires to diminish his losses by offsetting recoveries from third parties and it seems inequitable to deny the assured the same opportunity. It would seem in this respect that the insurer, who is in the business of running the risk of loss, does not merit preferential treatment over the assured, who has attempted to eliminate the risk of such losses by buying the insurance in the first place.

173. Furthermore, it has been asserted that this approach to recoveries from third parties acts as an impediment to amicable claims settlements in collision cases by reducing the assured's interest in agreeing to any settlement where mutual fault is admitted.¹⁶³

174. Although the point raised is not a major issue in cases where the policy contains only a very small deductible, it obviously increases in importance with the size of the deductible and can become a significant factor in the recovery of the assured. It should be noted that some shipowners with fleets that carry large deductibles have been able to eliminate the clause and replace it with one permitting a proportional distribution of recoveries. Yet this alternative is not entirely satisfactory since it requires the assured to be very well informed of the legal effect of the standard wording in the insurance contract.

C. The legal regime applicable solely to cargo insurance

1. MARINE RISK COVERAGE: THE F.P.A., W.A. AND "ALL RISKS" CLAUSES

175. As was indicated in chapter II, the UNCTAD secretariat noticed in its contacts with assureds that a large number of them lacked a clear understanding of their insurance cover and of whether it fitted their insurance needs. This problem was most noticeable among cargo assureds, especially those situated in developing countries where an expertise in marine insurance is not generally well established. In undertaking an analysis of the Institute Cargo Clauses it was found that, as in the case of hull insurance, the presentation of the provisions of the insurance policy is unsatisfactory in terms of assisting the assured to understand the conditions of his coverage. In this respect the comments made earlier (see paras. 109–123) concerning the general inadequacy of the Lloyd's S.G. Form, and particularly the perils clause, are applicable to cargo insurance. Compounding the difficulties created by the S.G. Form is the complexity of

¹⁵⁷ See Association of Average Adjusters, *Report of the General Meeting* (London, May 1966), p. 18. However, there appears to be the identical controversy concerning dry-docking expenses as exists in the London market. See Buglass, *op. cit.*, pp. 108–109.

¹⁵⁸ Claims (General provisions) clause, American Institute Hull Clauses (2 June 1977).

¹⁵⁹ See French marine hull insurance policy, art. 23; and Lureau, *op. cit.*, p. 254.

¹⁶⁰ As a result of the penultimate paragraph of clause 12 of the Institute Time Clauses: Hulls (see annex II). A deductible was not commonly utilized in British conditions before 1969, but when one was in fact used—as in the "Institute Time Clauses: Hulls—Excess... All Claims" (1 June 1964)—a clause was inserted requiring a proportional distribution between the assured and the insurer of most recoveries from third parties to the extent that the assured bore part of the loss through the application of the deductible.

¹⁶¹ See Buglass, *op. cit.*, p. 279.

¹⁶² See, for example, Norwegian Marine Insurance Plan of 1964, sect. 96 (2).

¹⁶³ See Association of Average Adjusters, *Report of the General Meeting* (London, May 1971), p. 16; and *ibid.* (London, May 1970), p. 14.

the presentation of the different scopes of cover offered in clause 5 of the three standard policy coverages, i.e. the Institute Cargo Clauses, F.P.A., W.A. and "All Risks", respectively. A review of the three versions of this clause was given in paragraphs 83 to 86 above.

176. A perusal of the three versions of clause 5 (see annexes III, IV and V) reveals that it has a dual purpose, acting not only as a complement to the perils clause in the Lloyd's S.G. Form, by amplifying the insured risks covered by the policy, but also as a modifier of the "memorandum" of the S.G. Form, by regulating the indemnity payable as to certain types of losses.¹⁶⁴ Considering first the F.P.A. and W.A. versions of clause 5, which are somewhat similar in presentation, each suffers from attempting to accomplish too much in one sentence, with no logical breakdown between their distinct functions. Thus, taking the W.A. version of clause 5 as an example, the terms of the memorandum are incorporated by the wording "Warranted free from average under the percentage specified in the policy..." and then modified by applying the wording "unless general, or the vessel or craft be stranded, sunk or burnt" to all categories of the goods specified in the memorandum.¹⁶⁵ Within the same sentence the memorandum is overridden as to packages lost during loading, trans-shipment or discharge operations by the phrase:

but notwithstanding this warranty the Underwriters are to pay the insured value of any package which may be totally lost in loading, trans-shipment or discharge...

This phrase has the added effect of amplifying the perils clause by making the loss of a package in such circumstances an insured peril in itself.

177. The last part of the sentence has the same dual effect as that mentioned above. The phrase reads:

... also for any loss of or damage to the interest insured which may reasonably be attributed to fire, explosion, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at a port of distress.

This part of the sentence overrides the memorandum as to loss or damage caused by the additional designated events. It also amplifies the perils clause not only by dispensing with the normal rules of causation and making an indemnity payable for such loss or damage which "may reasonably be attributed" to the designated events, but also by including additional insured perils, such as the collision of a "conveyance", e.g., a vehicle used during land transport. The F.P.A. version of clause 5 has a similar format and presents the same problems of interpretation.

178. As a result of the complex structure of both the F.P.A. and the W.A. clauses, neither is easily understandable. Certainly no one not highly familiar with marine cargo insurance coverages would be able to read either clause and have a clear understanding of what it meant in terms of his insurance coverage. Given the fact that marine cargo insurance policies are used by cargo

owners throughout the world who have varying degrees of expertise in transport matters, such clauses fall far short of providing an adequate basis for the insurance contract.

179. It would seem first of all necessary to abandon the use of one sentence to cover all the functions of the clause, and a clear distinction should be drawn between wording that expands the risks insured against and wording that affects the indemnity payable for losses caused by insured risks. Without such a separation of functions the intent of the clause is not readily discernible, and the antiquated S.G. Form adds to the confusion, with the result that the overall presentation of the policy becomes extremely difficult for the average assured to understand.¹⁶⁶

180. Furthermore, as suggested earlier (see para. 114), the overall policy presentation could be simplified by merging the applicable parts of the memorandum into the W.A. version of clause 5 and eliminating it altogether in the S.G. Form since it is overridden in F.P.A. and "All Risks" coverages.

181. Concerning the "All Risks" version of clause 5, problems of presentation are not as complex as a result of the use of a simplified approach involving a broad grant of coverage for all risks, subject to certain exceptions. However, despite its simplified format, the "All Risks" version of clause 5 frequently misleads assureds into thinking that it grants a wider coverage than in fact it does.¹⁶⁷

182. For the assured who reads the clause, he will realize that "All Risks" is not in fact an all risks cover since the risks of loss or damage caused by delay, inherent vice or the nature of the subject-matter insured are excluded. To assist assureds it would be useful to clarify that, as pointed out in article 55 (2) (b) of the 1906 Act, this exclusion also applies to situations where the delay itself has been caused by an insured peril. Although it is possible that this may be understood by someone with a well developed understanding of the legal rules governing causation and of the use of the English legal jargon "proximate cause", it is not reasonable to expect assureds to understand this fine legal distinction, particularly considering the document's international use.¹⁶⁸

183. Even more important is the misunderstanding caused by the restrictive definition of the term "risk". Assureds frequently purchase this cover on the assumption that it gives insurance protection against any loss or damage howsoever caused, short perhaps of wilful misconduct of the assured as well as the expressly stated exceptions. However, to the surprise of many assureds, the scope of the standard "All Risks" coverage is somewhat more limited since the phrase "risk of loss or damage" is used in a technical sense to exclude normal

¹⁶⁶ Similar W.A. clauses used by some other national markets are clearer than the British W.A. version of clause 5 as a result of the separation of the two functions served by the clause. See, for example, Regulations for Insurance of Goods in Transport issued by Ingosstrakh of the Soviet Union, sect. 2, "With particular average".

¹⁶⁷ As indicated, for example, by the reply of Ghana to the secretariat questionnaire on cargo insurance.

¹⁶⁸ Policy conditions used by some other national markets expressly indicate this limitation, for example, the "delay warranty" clause in the American Institute Cargo Clauses, and article 5 of the General Conditions for the Insurance of Maritime and/or River Transport issued by Patria, Compañia de Seguros Generales S.A. of Argentina.

¹⁶⁴ This aspect is reflected in the fact that F.P.A. coverage excludes indemnity for certain types of particular average, i.e. partial losses; W.A. coverage includes particular average subject to a franchise; and "All Risks" covers all losses without the application of a franchise. For the terms and effect of the memorandum, see annex I, last para., and paras. 70 and 114 above.

¹⁶⁵ In many forms of the S.G. Form commonly used now, the words "sunk or burnt" are often added after the last "stranded" appearing in the memorandum, but the first "stranded" still appears alone.

losses which occur in the shipment of certain types of commodities, such as a percentage loss of weight or volume with grains or fluids. The exclusion of this type of loss is based on the concept that a "risk" of loss or damage does not include losses of an inevitable nature, as might be termed normal transit loss or damage. However reasonable this premise might seem, particularly to those fully conversant with the legal basis upon which it rests, it is not evident to the average assured, particularly to those not highly knowledgeable in British law or insurance precepts. The concept of an all risks coverage is arguably so close to the broader concept of "all loss or damage" coverage, which includes even such normal transit losses as specified above, that it is understandable that an average assured could, and often does, confuse the two. Since no standard clauses are published granting "all loss or damage" coverage, thereby not automatically calling the attention of the assured to the fact that wider insurance coverage is possible, it is all the more incumbent upon the "All Risks" version of clause 5 to call attention expressly to the limitations of its coverage. Without this clarification embodied in the clause, it will continue to mislead unsuspecting assureds as to the scope of the insurance purchased.¹⁶⁹

184. A last point is the relationship between F.P.A., W.A. and "All Risks" cover. Serious consideration should be given to improving the ability of the assured to understand exactly what is and what is not covered by each type of coverage vis-à-vis the other coverages. In other words, the three types of cover represent a scale of increasing scope of cover from the least extensive, the F.P.A. cover, to the most extensive, the "All Risks" cover. Yet it is extremely difficult for an assured to be able to determine how this variation in scope is actually reflected in the risks or types of damage covered and not covered. In this respect, reference should be made to the discussion of the advantages of an all risks grant of cover minus exceptions approach (see paras. 119-121). As pointed out, the express listing of exceptions to a broad grant of cover facilitates the task of the assured in determining whether the insurance meets his particular needs and in comparing the cover with other variations. It is suggested that such an approach could be used in cargo insurance to structure three levels of insurance cover, more or less along the lines of the present types if this is desired, from which the assured could choose depending on the level of the premium.

2. INSURANCE COVERAGE FOR THE CONSEQUENCES OF DELAY

185. As previously indicated (see para. 182), the "All Risks" version of clause 5 of the Institute Cargo Clauses excludes "loss damage or expense proximately caused by delay". This same exclusion applies to W.A. and F.P.A. conditions, but is inserted at the end of the transit clause (clause 1). This exclusion applies even if the delay

itself is caused by an insured peril. Thus, if a vessel is stranded with the result that there is damage to the cargo by the incursion of sea water, the standard marine insurance policy would cover the loss. However, as a result of the delay exclusion, if the original stranding had not damaged the cargo, but because of the perishable nature of the cargo the ensuing delay resulted in its deterioration, such a loss would be considered not covered. In the light of this lacuna in the standard cargo insurance covers, it can be argued that without specific alteration on an *ad hoc* basis, such policies may fail to meet the commercial needs of an assured.

186. It has been asserted that the delay exclusion is incorrectly founded upon the concept of delay as being a distinct "peril" which may cause loss or damage.¹⁷⁰ Rather, delay may be nothing more than a channel through which a peril may operate. Certainly, if the peril causing the delay is an insured risk in the policy, then any physical damage resulting from the delay is legitimately within the scope of the transport risks from which the cargo owner seeks protection when purchasing his insurance cover.

187. The rationale for excluding the consequences of delay is often based on an analogy to "inherent vice". Goods that deteriorate with the passage of time, such as fruit, have the inherent vice of being "perishable" and it is argued that insurers do not wish to be involved in underwriting such a risk. However, such an analogy is claimed to be ill-founded.¹⁷¹ All goods have certain "inherent properties" which subject them to the risk of different types of damage. Some goods, such as cement, are ruined by sea water but others may be relatively unaffected. The inherent property of perishable goods, i.e. their perishability, merely exposes such goods to a different type of risk, i.e. that of delay. Thus, little can be said for covering the loss of cement caused by a stranding which resulted in the incursion of sea water, but not covering the decay of fruit caused by the same stranding which resulted in delay of the transport. The degree of risk may be different, i.e. the risk of delay may be greater than the risk of incursion of sea water, but this variation is more properly reflected in the level of the premium charged and not the use of exclusions of coverage.

188. Delay may also be caused by risks other than those normally included in a marine insurance policy, such as the risks of damage to port facilities, inefficiency of the carrier etc. Furthermore, delay may result in losses other than just physical damage to the goods. Thus, the assured may suffer "commercial" losses, such as a fall in the price of the goods during the delay, or production difficulties arising as a result of the late arrival of needed materials. Although arguments can be put forward for the expansion of the standard marine insurance coverage to include delay caused by the other types of risks mentioned above as well as the risk of "commercial losses" to the assured caused by delay,¹⁷² and some limited extensions have been made by some national insurance legal regimes,¹⁷³ the argument in favour of includ-

¹⁶⁹ Policy conditions used by some other national markets indicate such limitations expressly: for example, section 22 of the Norwegian Insurance Plan for the Carriage of Goods of 1967 excludes in subparagraph (e) "normal trade losses"; and section 6 of the "All Risks" conditions of the Regulations for Insurance of Goods in Transport issued by Ingosstrakh of the Soviet Union excludes losses arising in consequence of "specific properties of the cargo including drying up" and "shortage of cargo while the outer packing is intact".

¹⁷⁰ See K.S. Selmer, "Delay in cargo insurance", *Cargo Insurance and Modern Transport*, K. Grönfors, ed. (Göteborg, Akademiförlaget, 1970), p. 13.

¹⁷¹ Selmer, *loc. cit.*

¹⁷² *Ibid.*

¹⁷³ For example, Norwegian Insurance Plan for the Carriage of Goods of 1967, sect. 68.

ing physical loss or damage to goods resulting from delay caused by an insured peril has been used here as the most blatant illustration of the inadequacy of the standardized coverage for such losses offered by the Institute Clauses. It is understood that delay coverage may be granted in the British market on an *ad hoc* basis by the inclusion of appropriate wording, such as the phrase "deterioration from any cause".¹⁷⁴ However, in the absence of a standardized clause to this effect, assureds, particularly in other national markets using the Institute Clauses where practices may differ, are at a disadvantage in asserting that such cover is a legitimate concern of a marine insurance policy and are thus less likely to be able to obtain such cover.¹⁷⁵

3. THE USE OF SUBROGATION FORMS

189. After an insurer has paid a claim under a cargo insurance policy, often the insurer will require the assured to sign a subrogation form. Although not legally necessary for the right of subrogation to be vested in the insurer, such forms assist insurers in pressing claims against third parties since they offer clear proof that the insurer holds the same rights as the assured. However, occasionally such forms are worded in such a way that the assured assigns to the insurer his entire right of action against third parties for the claim instead of just subrogating it.¹⁷⁶ This results in permitting the insurer to sue in his own name and correspondingly prohibiting the assured from suing at all. Such assignments have been held legal,¹⁷⁷ and they permit the insurer to recover from third parties liable for the loss even more than the insurer may have paid as an indemnity to the assured—which would not be the case in a mere subrogation of rights. Thus, the assured is divested of certain rights of recovery against third parties for the loss sustained which would otherwise be granted to him under the established rules of subrogation (see paras. 96 and 126–127).

190. The use of such forms in place of normal subrogation forms seems clearly to be an inequitable practice since it is unlikely that the assured realizes the full impact of the document he is signing. Although it is

understood that such forms are not now in current use in the British market, it is known that they are still used in some other markets of the world, including markets in developing countries, though to what extent has not been precisely determined.

D. Summary of suggested improvements

191. This chapter of the report has highlighted certain areas where it has been felt that the dominant legal regime governing marine insurance could be improved. As has been mentioned earlier, the British legal regime has been used as a focus for this analysis since it is the single most widely used base for the marine insurance contract throughout the world, and in this sense it is virtually a *de facto* international legal regime of marine insurance. However, it should be emphasized that no attempt has been made to single out the British legal regime as being worse than any other. Since only areas in which it is felt improvements could be made have been dealt with, an unwarranted negative impression might be obtained. This is not the intention of the report. Rather, despite the specific points mentioned, the British legal regime is a sophisticated legal basis for the marine insurance contract, on the whole satisfactory to both sides of the insurance relationship. Nevertheless, there are areas that could be improved, and this has been the concern of this chapter. Admittedly, since the British marine insurance legal regime is by its nature a national market creation, its particular content and format as applied to marine insurance transactions effected within the British market are the sole concern of that market. On the other hand, to the extent the British legal regime is used by the international community as a basis for marine insurance contracts, its content and format are of legitimate international concern. The suggested improvement that could be made to this legal regime can be summarized as follows:

(1) Although this point does not relate specifically to the British regime, consideration should be given in countries permitting the local operation of brokers to the development of regulations requiring minimum standards of competence and financial responsibility.

(2) The statutory rule voiding insurance policies written on a P.P.I. (policy proof of [insurable] interest) basis should be eliminated in view of the proven commercial need for such policies.

(3) The statutory rule stipulating that all non-disclosure or misrepresentation—even if innocent—of material information at the time of making the insurance contract enables the insurer to avoid liability even as to damage caused by an event completely unconnected with the non-disclosure or misrepresentation, should be amended to eliminate the obviously inequitable situation.

(4) The antiquated Lloyd's S.G. Form should be revised and updated. Specifically, the "perils" clause should be revised to make it comprehensible in the modern context as well as to eliminate war risk terminology. Furthermore, the perils clause should be combined with the other appropriate Institute Clauses so that the designated risks appear in one unified risks clause. Consideration should be given to altering the method of granting insurance coverage from the enumeration of perils method to an all risks grant of cover-

¹⁷⁴ See Dover, *A Handbook to Marine Insurance*, op. cit., p. 408. However, Special Trade Clauses may include a standardized cover for delay, e.g., clause 4 of the Institute Frozen Food Clauses (Excluding Frozen Meat), "Full Conditions".

¹⁷⁵ A majority of the replies to the secretariat questionnaire on cargo insurance from socialist and developed market-economy countries indicated that coverage for the consequences of delay is possible, usually on an *ad hoc* basis and usually in the form of coverage for physical loss or damage to the goods resulting from delay caused by an insured peril. However, approximately half of the replies from developing countries, including those which use British conditions in some form, indicated that such cover was not granted. The following response from a national market of a developing country using British conditions reveals the difficulty created by the absence of standardized wording granting delay coverage.

"The insurance companies stick to the terms and conditions stipulated by the clauses of the Institute of London Underwriters regarding delay which is specifically excluded therein."

¹⁷⁶ An example of such wording is as follows: "In consideration for the payment of the sum of . . . for the loss of . . . I hereby abandon to you all my rights, title and interest in the said goods . . .".

¹⁷⁷ See Goodacre, *Marine Insurance Claims*, op. cit., p. 596, citing *Compañía Colombiana de Seguros v. Pacific Steam Navigation Company* [1963] 2 Lloyd's Rep. 479.

age minus specific exceptions. Consideration should also be given to facilitating the method of granting war risk insurance. All these reforms are designed to make the insurance coverage easier to understand and to interpret, particularly in view of its international use.

(5) Consideration should be given to the drafting of a temporary payment clause for situations where two or more insurers are in dispute as to who is liable for a loss.

(6) The rule making the agreed value in the policy binding in the determination of the rights of the parties to any recoveries from third parties should be altered in view of the resulting inequitable preference given to insurers in cases where the actual value of the insured object is greater than the agreed value.

(7) It is recommended that all policies underwritten on a co-insurance basis should include an "agreement to be bound" clause to avoid the assured having to sue each insurer individually in the event of a dispute. Furthermore, all international insurances where the assured and the insurer(s) are situated in different countries should contain a jurisdiction clause stipulating a mutually convenient jurisdiction.

(8) The discriminatory aspects of the Joint Hull Formula should be eliminated.

(9) Concerning specifically hull insurance, it is recommended that the "all risks" cover contained in the liner negligence clause should be made available to all shipowners who are prepared to pay the appropriate premium. The "Inchmaree" clause and the liner negligence clause should also be redrafted to make their intended effect easier to understand.

(10) Efforts should be made to reduce some of the difficulties in the use of "all claims each accident" deductibles, such as those that arise when there are particularly large deductibles, and in the application of deductibles to heavy weather damage and to sue and labour expenses. The use of special clauses to assist in the application of the concept of "each accident or occurrence" is also suggested.

(11) It is suggested that the "co-insurance" clause is inappropriate as a standard part of hull insurance policies.

(12) The rule reducing the indemnity payable for general average contributions, salvage charges and sue and labour expenses in cases where the agreed value in the

hull insurance policy is less than the actual value of the insured object should be eliminated.

(13) It is recommended that the collision liability coverage offered in the "running down" clause should permit the possibility of fixing an independent limit on the insurer's liability under the clause instead of automatically tying this limit to the agreed value in the policy.

(14) It is suggested that two potentially inequitable applications of the "tender" clause, involving the payment of an allowance for lost time when additional tenders are required by the insurer, and the imposition of a penalty for non-compliance with the terms of the clause in cases where the assured is prevented from complying by circumstances beyond his control, should be eliminated.

(15) It is suggested that a payment on account clause should be inserted in hull policies.

(16) The basis of indemnity for unrepaired damage claims should be revised.

(17) It is suggested that the clause in standard hull policies denying the shipowner a "co-insurer" status to the extent of his deductible, thereby denying him proportional rights to participate in recoveries from third parties and instead giving the insurer preference in such recoveries, is inequitable to the shipowner and should be amended.

(18) The presentation of clause 5 in the F.P.A. and W.A. versions of the Institute Cargo Clauses should be simplified and perhaps revised to conform better with the "All Risks" version in order to facilitate a comparative analysis of their respective scope of coverage. The "memorandum" in the Lloyd's S.G. Form should be incorporated into the W.A. conditions and eliminated in all other instances. Furthermore, the exact scope of coverage of the "All Risks" version of clause 5 vis-à-vis the exclusion of coverage for normal transit losses and the consequences of delay should be made clearer.

(19) The development of standard clauses granting coverage for physical damage resulting from delay caused by an insured peril is suggested.

(20) The use of "subrogation" forms which in fact assign to insurers the assured's rights of action against third parties in return for payment of an insurance claim should be prohibited.

Chapter VI

CONSIDERATION OF THE DEVELOPMENT OF AN INTERNATIONAL MARINE INSURANCE LEGAL REGIME

A. The diversity of national marine insurance legal regimes

192. As part of the analysis of the British marine insurance legal regime, the approaches of other national legal regimes were also examined in order to provide a wider perspective to the analysis and in so doing to assist in providing alternative solutions to the particular problem being discussed. As has been revealed by this comparative analysis, other national legal regimes often take different approaches to particular aspects of marine insurance. In fact, despite common threads that may be discerned in most marine insurance legal regimes, there are numerous substantive differences between them. All of these differences will affect the type and degree of insurance protection the assured receives from his insurance policy.

193. In addition to the comparisons already made in previous chapters of this report, some additional ones are set forth below in order to provide a better perspective of the problem. Although it is not possible to list all the variations between different national marine insurance legal regimes, even a very limited comparison between certain aspects of some of those regimes amply illustrates the complexity of the problem.

194. Divergences in coverage in hull insurance can be noticed in the treatment of collision liability coverage by various national conditions. For example, under British standard conditions¹⁷⁸ and the standard conditions of the Société nationale d'assurance of Zaire¹⁷⁹ collision liability coverage normally extends only to three-fourths of the claim up to three-fourths of the agreed value of the vessel, assuming no underinsurance. However, conditions in France,¹⁸⁰ Norway,¹⁸¹ the Federal Republic of Germany¹⁸² and the United States of America¹⁸³ normally provide four-fourths liability coverage, and under Argentine conditions¹⁸⁴ the percentage cover is left open to be agreed upon by the parties.

195. Furthermore, with respect to the type of collisions covered, conditions in France, Norway, the Federal Republic of Germany and Zaire cover liability arising from a collision of the assured vessel with fixed

objects as well as other vessels.¹⁸⁵ However, British, American and Argentine conditions cover only liability arising from collision with another vessel, thus requiring fixed object collision liability coverage to be obtained from a P & I Club.¹⁸⁶

196. Concerning another aspect of the difference in collision liability coverage, British, American, Norwegian and Argentine conditions provide collision liability coverage as a separate contract. Thus, a particular average recovery is permitted up to the sum insured (i.e., the amount of insurance purchased), as well as a collision liability recovery up to the sum insured in addition. However, the standard French hull policy offers only one combined coverage with one limit of recovery (the sum insured), thereby requiring a particular average claim and a collision liability claim to be considered together.¹⁸⁷

197. As to the rules governing the premium payable for insurance covers, differences in the legal regimes of the various markets can have a substantial impact on the eventual overall cost of the insurance. For example, there are differences in the approaches of the markets as to premium payment when there have been successive losses claimable under a marine insurance policy (this is true in theory of both hull and cargo insurances). Under standard British, American and Norwegian conditions¹⁸⁸ the sum insured acts as a limit to the insurer's liability on a per accident basis; thus successive losses during the currency of the policy are each covered in reference to the sum insured. As a result, it is possible for the total recovery for all successive losses to exceed the insured sum. However, under standard French conditions for cargo and hull insurance, the sum insured

¹⁸⁵ However, as an example of additional complicating factors between just two sets of conditions, reference may be made to one aspect of the Norwegian and French conditions. Even though they are similar in that they both cover fixed object collision, the French policy gives cover for liability arising from the use of the vessel's chains and anchors (art. 2, second para.), whereas the Norwegian conditions exclude this coverage (art. 194 (g)).

¹⁸⁶ Of course, the coverage of collision liabilities is infinitely more complex than it appears from the present review. Some form of P & I coverage will invariably be necessary if full coverage is desired, since most hull policies exclude various aspects of the liabilities that can arise from a collision, ranging from personal injury and loss of life claims to pollution claims.

¹⁸⁷ However, the assured may expand the coverage by the attachment of clauses XIII, XIV or XV and the payment of an additional premium.

Subsequent to the initial issuance of this report, in 1978, the French hull policy was amended so as to provide a separate fund for collision liability claims which is equal to the agreed value of the vessel. See the report by the UNCTAD secretariat "Legal and documentary aspects of the French marine insurance legal regime" (TD/B/C.4/ISL/30), para. 47.

¹⁸⁸ For example: 1906 Act, art. 77; Norwegian Marine Insurance Plan of 1964, sect. 79.

¹⁷⁸ Institute Time Clauses: Hulls, clause 1 (see annex II).

¹⁷⁹ Marine hull insurance policy, art. 12.

¹⁸⁰ French marine hull insurance policy, art. 2.

¹⁸¹ Norwegian Marine Insurance Plan of 1964, sect. 196.

¹⁸² DTV-Kaskoklauseln 1978 of the Association of German Marine Insurers, sect. 34, "Ersatz an Dritte".

¹⁸³ American Institute Hull Clauses, collision liability clause.

¹⁸⁴ Third-party risk clause issued by the Chamber of Marine Insurers.

represents the total liability of the insurers on a per voyage basis. Thus in effect the sum insured is reduced after each event giving rise to the insurers' liability in accordance with the monetary value of the claim. In the case of successive losses the total value of which exceeds the insured sum in the policy, only the sum insured can be recovered by the assured.¹⁸⁹ Nevertheless, under the standard French hull policy the insurers agree to automatic reinstatement of the full insured sum after each such event on condition of the payment of an additional premium. A somewhat similar approach appears to exist in Argentine and Zairian conditions as to hull damage¹⁹⁰ in that the sum insured is the maximum liability of the insurer during the entire term of the insurance policy, with provision for automatic reinstatement upon payment of additional premiums. As a result of this difference in approach, an assured under policies similar to French, Zairian or Argentine conditions will be subject to the continual risk of additional premium payments during the currency of the policy, though presumably incurring at the outset of the policy a lower premium than would be the case under British conditions, where the risk of such additional premiums in this case is not present.

198. Another difference between the various national legal regimes, which affects cargo insurance, involves the duration of the insurance coverage. Although it is now common for cargo insurance coverage to be offered from one inland point to another inland point (instead of from the port of loading to the port of destination), the application of this inland point to inland point coverage varies from one national market to another.

199. The inland point to inland point concept of cargo insurance is usually defined to mean from the seller's place of storage of the consigned goods to the buyer's place of storage of such goods. In the London market as well as in the other markets that follow the British marine insurance legal regime, this type of coverage is known as "warehouse to warehouse" coverage and is included in the transit clause.¹⁹¹ Although it is not feasible to treat all the nuances of this type of cover, one easily comparable element of the cover will be analysed for the purpose of illustrating the possible variations between such extended covers in various national markets. Most national conditions offer coverage up to the intended destination of the consignment, subject to certain qualifications, but such extended inland coverages are generally subject to a time-limit beyond which coverage ceases even though the consignment is still in transit. In British, American, Soviet and Chinese conditions it is 60 days after discharge of the goods from the overseas vessel.¹⁹² French, Guinean and Zairian conditions specify that although the coverage for the goods while in certain designated areas of the port continues for 30 days after discharge from the vessel or other vehi-

cle of transport, this period is reduced to 15 days when the destination is a point inland.¹⁹³ Norwegian, Swedish, Mexican and Turkish conditions specify 15 days from when the discharge of the goods was completed.¹⁹⁴ However Swedish and Mexican conditions provide a 30-day maximum if the destination to which the goods are insured is outside the municipal limits of the port of discharge. Danish conditions limit such extended inland coverage to eight days after the goods have landed or 30 days after arrival of the vessel at its destination, unless a separate warehouse to warehouse clause is specially attached which grants coverage similar to Swedish and Mexican conditions.¹⁹⁵

200. The obvious overall conclusion to be drawn from this comparative analysis of but a few aspects of marine hull and cargo insurance is that the extent, degree and scope of insurance conditions vary from country to country. These variations exist despite the extensive international influence of British, and to a degree French, marine insurance policies.

B. The role of uniformity in marine insurance

201. Given the international character of marine insurance, it would seem almost axiomatic that there is a need for harmonization of the legal regimes governing the rights and obligations of the parties to insurance contracts involving international transport and trade. Yet, as has been shown, despite the existence of a virtually *de facto* international marine insurance legal regime, there remains a remarkable degree of diversity in the content of the legal regimes governing marine insurance. This point has also been brought out by noted international authorities on marine insurance.¹⁹⁶

202. The fact that divergent national legal regimes exist in the conduct of marine insurance has certain consequences for the parties to the contract, particularly the assured, who will have difficulty in understanding the insurance coverage of a foreign insurance market. For example, this difficulty may arise when an assured is a consignee of goods covered by an insurance purchased abroad. It is obviously important to that consignee to know the conditions of the insurance in order to know whether it meets his insurance needs. A similar situation may also arise when a shipowner places a hull insurance coverage abroad.

203. The importance to the consignee of knowing the content of the insurance coverage was acknowledged by some of the countries responding to the secretariat questionnaire on cargo insurance. It was stated in some

¹⁸⁹ French marine hull insurance policy, art. 31; French marine insurance policy (cargo), art. 27.

¹⁹⁰ See General Conditions of the Hull Insurance Policy issued by Antorcha, Compañía Argentina de Seguros, S.A., art. 7; marine hull insurance policy issued by SONAS of Zaire, art. 23.

¹⁹¹ Institute Cargo Clauses, clause 1. See annexes III, IV and V.

¹⁹² American Institute Cargo Clauses, clause 1; Regulations for Insurance of Goods in Transport issued by Ingosstrakh of the Soviet Union, sect. 3; Ocean Marine Cargo Clauses of the People's Insurance Company of China, clause 3.

¹⁹³ French marine insurance policy (cargo), art. 9; Guinean marine insurance policy (cargo); marine insurance policy (cargo) issued by SONAS of Zaire.

¹⁹⁴ Norwegian Insurance Plan for the Carriage of Goods of 1967, sect. 31 (in cases where the goods are not to be stored at the consignee's warehouse at the designated place of destination); General Conditions for the Insurance of Goods of the Swedish Association of Marine Underwriters, art. 5 (c); the warehouse to warehouse for sea shipment clause issued by the Asociación Mexicana de Instituciones de Seguros; and Turkish Marine Policy, Cargo—General Conditions, clause 8.

¹⁹⁵ See General Danish Conditions, art. 9; and Association of Danish Marine Underwriters, clause 108.

¹⁹⁶ See de Smet, *op. cit.*, p. 529; and Dover, *Uniformity in Marine Insurance Policy Form and Clauses*, *op. cit.*

replies that although local policies were used to cover imports, the Institute Clauses were generally used for exports to avoid presenting a foreign consignee with an unknown local insurance coverage (see footnote 23). In this respect, the degree of international uniformity achieved by the international influence of British conditions has certainly alleviated, though by no means removed, the difficulties caused to assureds by diversity in the marine insurance legal regimes.

204. However, it is important to consider the context in which assureds will need to rely on foreign insurance coverages, particularly in developing countries. On 6 November 1975 the Committee on Invisibles and Financing related to Trade adopted resolution 9 (VII)¹⁹⁷ endorsing recommendations contained in the UNCTAD secretariat study on marine cargo insurance¹⁹⁸ concerning the placement of marine cargo risks in the local insurance markets of developing countries. The UNCTAD thesis, as expressed in that document,¹⁹⁹ is that developing countries should promote their domestic marine insurance markets, and that a certain protection of emerging local industry is warranted if imposed on a temporary basis.

205. Consequently, the UNCTAD secretariat study on marine cargo insurance reviewed various types of protective measures designed to foster the placement of cargo insurance in the local markets in developing countries. Thus, assureds in developing countries implementing the UNCTAD strategy on the local placement of marine insurances will not as a rule be confronted with a foreign insurance coverage—since it is intended that such coverages will, as a rule, be issued locally. Consequently, the advantages to be gained from an international harmonization of legal systems will not in theory be of immediate concern to such assureds.

206. A similar policy of encouraging the local placement of risks was recommended as to hull insurance in an UNCTAD secretariat study entitled "Insurance of large risks in developing countries".²⁰⁰ The suggested guidelines contained in that study were endorsed by the Committee on Invisibles and Financing related to Trade in its resolution 13 (VIII) of 9 December 1977.²⁰¹ In that resolution the Committee endorsed the conclusions of the study that insuring large risks in the domestic market was essential to promoting the sound development and growth of the domestic insurance industry. Thus, it may be expected that shipowners in developing countries will normally be utilizing a local insurance coverage and will not be purchasing insurance coverage directly abroad.

207. However, there are several factors that must be taken into account in determining the degree to which assureds will be purchasing foreign insurance coverages and thus have an interest in the international harmonization of marine insurance legal regimes. First, as is pointed out in the marine cargo insurance study referred to above (para. 204), there may frequently be instances

in the case of imports—for example, of aid shipments or shipments financed by foreign loans—where it is in the interest of developing countries not to require the local placement of insurance. In these cases the Government may waive its right of strict enforcement of the local insurance rule if such a waiver is conducive to more favourable terms in trade relations. Similarly, in cases of trade between developing countries it may be desirable to make special arrangements whereby each country would underwrite a designated percentage of the value of the goods exchanged between them. In other situations, one of the developing countries may have a national regulation requiring the local placement of insurance for exports instead of imports. In all of these instances, consignees in developing countries may well be relying upon a foreign insurance coverage and thus have a distinct interest in the harmonization of national marine insurance legal regimes.

208. Secondly, the UNCTAD recommendations on the local placement of insurance coverages are directed only to developing countries in need of developing their local insurance markets. Thus, regulations concerning the local placement of insurance cover may not be appropriate for countries that already have a strong, well established insurance market—as might be the case in developed market-economy countries—and therefore assureds in these countries, either as consignees or shipowners, may be utilizing foreign insurance coverages. Similarly, as regulations on the local placement of insurances lead to a strengthening of the insurance markets in developing countries and eventually result in well established markets capable of competing on an international basis, developing countries may well consider eliminating such regulations. Their local assureds could then purchase foreign insurance coverages or receive shipments insured under foreign conditions, and in such cases an international harmonization of marine insurance legal regimes would be a distinct benefit to such assureds.

209. In such a situation, where there may be numerous well established and competitive markets, including markets in developing countries, from which the assured may purchase insurance, it would be desirable for the assured to be able to make an effective comparison between different national coverages, to understand the policy differences and to translate these differences into variations in the terms for such coverages. However, as a result of the divergences in the various national legal regimes governing marine insurance, this ability to make a comparison is severely hampered.²⁰² Similarly, as is stated in the introduction to the tables of practical equivalents of the principal terms, clauses and conditions of cover used in various countries for the insurance of cargo against the risks of international transport, issued jointly by the International Union of Marine Insurance and the International Chamber of Commerce:

The question of marine and transport insurance is one of the most delicate problems in international trade. This is due not only to the diversity in the types of insurance but also to the fact that some clauses and expressions which at first sight may appear to be synonymous do in

¹⁹⁷ See *Official Records of the Trade and Development Board, Seventh Special Session, Supplement No. 2* (TD/B/590), annex I.

¹⁹⁸ TD/B/C.3/120.

¹⁹⁹ *Ibid.*, para. 203.

²⁰⁰ TD/B/C.3/137.

²⁰¹ See *Official Records of the Trade and Development Board, Eighteenth Session, Supplement No. 3* (TD/B/684), annex I.

²⁰² In support, see Dover, *Uniformity in Marine Insurance Policy Form and Clauses*, *op. cit.*, p. 30.

fact leave the door open to certain divergences, either in their interpretation or in their application, the importance of which may fail to strike those not fully conversant with those terms.²⁰³

210. Thus, from the perspective of the assured, international harmonization of the various marine insurance legal regimes is an important element for the successful operation of intermarket competition. This principle is valid both for the assureds in countries where intermarket competition currently exists and for assureds in developing countries, which may eventually develop strong, well-established insurance markets and may thus choose to eliminate national regulations requiring the local placement of insurance coverages.

211. A final consideration which points to the usefulness of international harmonization of marine insurance legal regimes, and which is applicable at this time, relates to an additional aspect of resolution 9 (VII) of the Committee on Invisibles and Financing related to Trade. In that resolution the Committee stated that "in recognition of the economic problems of the developing countries, it would be appreciated if insurance on exports from developing countries could be placed, where possible and technically feasible, in the markets of those countries". In the implementation of such a policy, developing countries would receive a distinct benefit from the international harmonization of marine insurance legal regimes: there would be greater international acceptability of the insurance policies issued in their countries, and the contents of their local policies would be made more readily known to foreign consignees covered by them.

212. As far as insurers are concerned, the harmonization of the various national marine insurance legal regimes would only be of interest in the international spreading of risks where the policy conditions may originate from a country other than that of the insurer, and in this respect such harmonization would appear not to offer the same distinct benefits. In treaty insurance arrangements, a treaty covering marine insurance risks is frequently only one item in a "package" of several different types of insurance, such as fire or motor. The primary consideration for a reinsurer in such a situation is the overall flow of premium and claim payments. If the "package" of treaties does not result in a sufficient surplus of premiums over claims, the treaties will be either revised or cancelled. It is claimed that the very nature of treaty reinsurances makes potential variations in the policy conditions governing the original insurance of relatively minor importance. In this respect, reinsurers generally agree to accept, within the scope and underwriting limits provided in the treaty, all risks accepted by the original insurer that come within the terms of the treaty and, under current practices, the reinsurer may never have any knowledge of the individual risks underwritten or the premium charged. In other words, there are numerous other variables that could have a far greater impact on the success or failure of a particular treaty reinsurance, and the exact wording of the policy conditions is therefore not of prime concern to the reinsurer.

²⁰³ International Union of Marine Insurance and Chamber of Commerce, *Tables of Practical Equivalents of the Principal Terms, Clauses and Conditions of Cover Used in Various Countries for the Insurance of Cargo against the Risks of International Transport*, 3rd ed. (Zurich, 1969), p. 3.

213. However, in the case of facultative reinsurance arrangements involving large risks, such as hulls, it has been stated that the local policy conditions used by the original insurer will be relatively important to the reinsurer, "because frequently substantial amounts are paid under standard broad forms of cover for losses which unintentionally come within the scope of the policy but which were not taken into consideration when the rate was fixed."²⁰⁴ Furthermore to the extent that co-insurances are arranged on an international basis, i.e. if there are several co-insurers situated in different countries underwriting a portion of a risk directly (see para. 29), it would appear that such co-insurers would have a similar concern in the exact wording of the policy conditions. Unless the national legal regime that is the basis of the particular insurance coverage is known to the insurers, be they facultative reinsurers or co-insurers, they will have underwritten the risk without fully knowing to what extent they have exposed themselves to a potential liability. Thus, in cases involving a direct insurer and a reinsurer or several co-insurers situated in different countries, harmonization of national marine insurance legal regimes would appear to offer a distinct benefit. As it is, of course, a certain degree of harmonization already exists as a result of the widespread use of the British legal regime as the basis of many hull insurance contracts.

214. In summary, without any international uniformity in the national marine insurance legal regimes, the international conduct of marine insurance, particularly from the assured's perspective, would be severely impeded. However, the degree of uniformity in legal regimes achieved in practice appears to be sufficient from an underwriting point of view and does not appear to play a major role in inhibiting international reinsurance arrangements.²⁰⁵ Nevertheless, from an assured's point of view the existing variations between national legal regimes pose distinct difficulties which could be alleviated by greater harmonization.

C. An international legal base for marine insurance contracts

215. As has been shown, the international nature of marine insurance creates a distinct need for a certain degree of international harmonization of the legal regimes governing the rights and duties of the parties to the insurance contract involving international transport and trade. The use of the British legal regime virtually as a *de facto* international marine insurance legal regime demonstrates this need. Yet, despite its *de facto* international status, the British legal regime is limited by its national character. Although it is claimed that a certain amount of informal international consultation between

²⁰⁴ See the study by the UNCTAD secretariat "Insurance of large risks in developing countries" (TD/B/C.3/137), para. 26.

²⁰⁵ However, the situation does result in an occasional surprise to reinsurers when called upon to pay unexpected claims. For example:

"It is on the record that the Insurance Plan of a particular Scandinavian country was not translated into the English language until a dispute arose which could not be determined until the British reinsurers had had an opportunity of studying the plan in their own language".

Dover, *Uniformity in Marine Insurance Policy Form and Clauses*, op. cit., p. 29.

some markets is undertaken during the revision of Institute Clauses,²⁰⁶ the overall content and form of the legal regime remains for the most part a national product to meet national needs and national law. As a result, the international use of this regime can frequently be inappropriate to the local law of other countries.²⁰⁷ Consequently, developing countries will often be faced with the potentially unsatisfactory alternative of applying the British legal regime to the marine insurance contract or developing a legal regime which more closely relates to local law and customs.

216. It can be argued that there may be a tendency for local policies to increase in number as insurance markets in developing countries become more sophisticated and as the demand for an insurance policy more appropriate to the local laws and customs of the country concerned increases. This trend is reflected in the efforts of some developing countries to develop local marine insurance policies.²⁰⁸ It would seem that this trend towards separate national policies may continue to have viability as a natural result of economic and legal maritime development in developing countries,²⁰⁹ particularly as long as British conditions remain the only international alternative to the development of local policies.

217. However, the development of local marine insurance legal regimes creates difficulties by adding to the proliferation of variant legal regimes in a field of commercial activity highly dependent on a degree of uniformity. Thus, it would seem in the interest of the entire international marine insurance community to agree upon an international uniform legal base for marine insurance contracts which would take into account the legal and economic factors of more than just one country in order to facilitate its acceptability by as wide a range of countries as possible.

218. On the other hand, there would appear to be a need for, as well as benefit to be derived from, a certain degree of flexibility between different national legal regimes. Given the current level of international economic, legal and cultural diversity, variations in national marine insurance legal regimes will inevitably exist to meet what are perceived to be local needs.

²⁰⁶ See, for example, V. Dover, *Analysis of Marine Insurance Clauses* (London, H. F. and G. Witherby Ltd., 1960), p. 4.

²⁰⁷ See, for example, the study by the UNCTAD secretariat "Marine cargo insurance" (TD/B/C.3/120), para. 247; this was also indicated in the reply of Iraq to the secretariat questionnaire on marine cargo insurance.

²⁰⁸ For example, recent work has been undertaken under the auspices of the General Arab Insurance Federation to develop a unified Arab policy for cargo insurance, whereas at the moment most Arab countries use British conditions. Similarly, Brazil, which until recently used British or United States conditions, has now introduced a national hull insurance policy containing the main clauses and conditions used in the British market, but modified to take account of local legislation.

²⁰⁹ In this respect, it is interesting to note the following point brought out in an earlier UNCTAD secretariat insurance report:

"The earlier a country achieved its political and economic independence, the sooner the juridical influence of the colonial Power decreased, and the greater was the opportunity for novel solutions to evolve. This applies particularly to the Latin American countries, all of which started with the same conception of law, but which today present a rather wide range of systems of insurance legislation and supervision."

Insurance Legislation and Supervision in Developing Countries (United Nations publication, Sales No. E.72.II.D.4), part two, para. 20.

219. As a result of the above considerations, it is suggested that serious consideration should be given to developing a truly international legal base for marine insurance contracts which envisages a degree of national market flexibility without losing the benefits gained from international uniformity. Support for international action concerning the legal regime governing marine insurance was expressed in several of the replies to the UNCTAD secretariat questionnaires on marine insurance.²¹⁰ Some suggestions for such international action which attempt to achieve the maximum benefits inherent in both uniformity and diversity are set forth below.

220. In order to present the possibilities for international action in a comprehensive yet clear form, the concept of a legal regime governing the marine insurance contract is divided below into its three major components: (1) the insurance contract, (2) existing national legislative provisions, and (3) market practice, particularly as it relates to claims settlements.²¹¹

1. THE INSURANCE CONTRACT

221. As has been indicated earlier, the contractual terms governing the marine insurance policy constitute the very heart of a marine insurance legal regime and it is here that the most important progress toward international harmonization can be achieved. In developing this aspect of a legal regime, special attention should be paid not only to the content of the provisions but also specifically to the format so as to ensure the maximum clarity and effectiveness in the international context.

(a) Format

222. In the search for the most appropriate format for such uniform policy conditions, reference could be made to the Norwegian plans—the Norwegian Marine Insurance Plan of 1964 and the Norwegian Insurance Plan for the Carriage of Goods of 1967 (see footnote 46)—which offer a simple format easily applicable to an international context. Each of these plans, which cover hull and cargo insurance respectively, is a comprehensive insurance code, arranged logically in a unified document and adopted privately by the marine insurance market in consultation with the various groups of assureds.²¹² The unified, logical arrangement avoids the overlapping, difficult-to-follow effect of constructing a

²¹⁰ The type of international action referred to included: greater harmonization or simplification of certain principles and clauses with respect to cargo insurance (Belgium); a greater uniformity of procedures, in the case of cargo insurance, and the possibility of international agreements, in the case of hull insurance (Italy); the establishment of uniform contractual provisions (El Salvador); the elaboration of an international convention with respect to hull insurance (Kuwait and Venezuela); the spelling out in an international convention of the rights and liabilities of the parties to the contract, and achievement of uniformity in contractual provisions or claims settlement procedures (Uganda); consideration of the drafting of an international convention for policy forms and clauses (Iran).

²¹¹ Additional components of a legal regime, such as judicial decisions, have been considered in conjunction with these components.

²¹² For example, the Norwegian Shipowners' Association, the Mutual Hull Clubs Committee, the Federation of Norwegian Commercial Associations, the Federation of Norwegian Industries and the Charterers' Committee.

policy by the attachment of separate clauses. Use of the Plans is optional, thus they may be altered by contract. Using hull insurance as an example, there is a standard policy expressly stipulating that the contract is subject to the terms of the Plan (without involving the actual attachment of the Plan), but which also includes a limited number of additional clauses modifying specific provisions of the Plan by substituting new wording completely, eliminating a particular paragraph of a provision in the Plan, or supplementing a provision with additional wording.

223. Although some other national legal regimes have a similar system for establishing the contractual basis for marine insurance,²¹³ the Norwegian Plan system has been mentioned as one of the most comprehensive and modern formulations of this type. It is suggested that a similar approach could be applied internationally by creating a "core" legal regime (as is done in the Norwegian market with the adoption of a "Plan"), which would act as the central peg of an international legal system and from which all national variations would be derived. The proposed core could consist of non-binding uniform policy conditions forming a virtually comprehensive code governing all major aspects of the marine insurance contract, as is the case with the Norwegian Plans. Since the uniform policy conditions forming the core would be non-binding, they could be altered as desired to fit the needs of each national market. However, to maintain the unifying aspect of the core, it would be preferable to reflect the Norwegian practice by keeping the core uniform policy conditions themselves unaltered, and to make such alterations as are necessary in each national market as a separate stipulation in the national policy form. Thus, when alterations are made by the insertion of overriding clauses in the national policy, it will be easier to compare the resulting variations with those in other national markets, since all variations would stem from a common base and would have to be shown specifically as overriding clauses in the actual contract. In this manner the primary benefit from uniformity, that is to say increased knowledge, will be largely achieved without depriving national markets of their right to form their own local variations.

(b) *Content*

224. Up to this point only the format of such international uniform conditions has been dealt with; consideration of their content is more difficult. The groundwork for international uniform conditions has already been established by the widespread use of the British conditions. However, there are difficulties with the use of a national policy for an international role in that it will primarily reflect the legal, cultural and economic aspects of the country of issuance. To the extent that the legal, cultural and economic structure of other countries resembles that of the issuing country, then perhaps such a national policy can be easily utilized internationally. However, it is perhaps asking too much of a national policy to fulfil successfully the role of an international policy for all countries, particularly those with dissimilar legal, cultural and economic structures. From this per-

spective, a strong argument can be made for the development of a truly international policy drafted with more than one country in mind, which would as a result be acceptable to an even wider range of countries than is currently the case with British conditions.

225. On the other hand, it must be admitted that despite the national base of the British conditions, they have already achieved a certain international status. The question whether to continue to rely on them to fill an international role is one of priorities. British conditions offer a sophisticated set of widely known clauses ready for immediate use. The opposite extreme of drafting new international conditions from the very beginning may require a commitment of time and effort which the international marine insurance community may not be prepared to accept. An intermediate possibility would be to use the Institute Clauses as a base for a new set of international uniform conditions, making such alterations as are necessary to adapt them to a wider range of countries. This occasion could also be taken to achieve an overall simplification of the policy conditions used for marine insurance, as suggested in chapter V above, and to make such conditions more easily translatable into other languages.

226. In summary, if it is decided that international uniform policy conditions are desirable, the initial content of such conditions could well be based on the British marine insurance legal regime, modified as necessary to accommodate as many other legal, cultural and economic systems as is reasonably possible. This, however, relates solely to the content of such conditions—and it is only one possibility designed to facilitate the drafting process. As to the format of such international uniform conditions, it is the opinion of the UNCTAD secretariat that the British format of clause attachment is ill suited to the international context if a balance of the benefits of uniformity and flexibility is desired. Rather, it is considered desirable to adopt a central "core" as is done with the Norwegian Insurance Plans, with alterations appearing only on the insurance contract form as issued in each country. Thus what is being suggested here is to fit "British content", modified as is necessary, into something similar to "Norwegian format", with the possibility of incorporating any improvements that may be gained from a comparative analysis of other systems.

(c) *The development of a "commentary" to assist in the interpretation of the international uniform conditions*

227. If it is decided to develop a set of international uniform policy conditions for marine insurance, it may be desirable to consider the use of guidelines for the interpretation of such conditions in the form of a "commentary" to each clause. Although such commentaries do not normally have the same legal status as the conditions of the contract themselves, they nevertheless can be of great assistance in the interpretation of difficult contractual clauses. This point has particular relevance in the international context since such international conditions will undoubtedly be translated into several languages and the existence of an explanatory commentary assists in the maintenance of an accurate reflection of the original drafters' intention in all subsequent translations. Furthermore, it is considered that the use of a well-developed commentary as an interpretative aid will

²¹³ As in Sweden and the Federal Republic of Germany (see footnote 46).

assist national judiciaries in ascertaining the intention of the drafters and will reduce the role that variant local legal concepts often play in interpreting international instruments for domestic use.

228. There is ample precedent for such a commentary. It is understood that commentaries have been successfully used as interpretative devices for the Norwegian Insurance Plans. It is noted that the English translation of the General Swedish Hull Insurance Conditions is published with accompanying commentaries. Although it must be admitted that the *travaux préparatoires*, which the suggested commentary closely resembles, are not as highly regarded in common law systems as they are in civil law systems, it should be noted that the Marine Insurance Act of 1906 of the United Kingdom has appended to it in the First Schedule a set of "Rules for Construction of Policy". Furthermore, although they do not have the same legal status as that suggested in this study for an explanatory commentary, it is known that similar types of interpretative aids to difficult clauses in British conditions have been compiled by the Association of Average Adjusters in the United Kingdom, to assist in the adjustment of claims.²¹⁴

229. Even if it is not decided to develop a set of international uniform conditions, the development of a commentary to assist in the interpretation of contractual provisions, as suggested in this section, would be a useful improvement to any set of national conditions which do not already have equivalent interpretative aids. This suggestion is particularly relevant to British conditions in view of the international use of such clauses.

(d) *The drafting of the international uniform conditions and commentary*

230. An inherent element in the successful adoption of such uniform policy conditions is that they be internationally acceptable to insurers and assureds and that they be subject to the possibility of subsequent revision as the need arises. Absence of the first element will result in their not being used by the parties to the insurance transaction. Absence of the second element will result in their quickly becoming out of touch with international insurance needs and will foster the development of varied national clauses to fill the gap. Thus, what is needed is an internationally representative group of marine insurance experts from all geographical regions which will draft the uniform conditions and then will revise them as appropriate. The corresponding body in the British market is the Technical and Clauses Committee, and similar bodies exist in other national insurance markets.

231. With respect to the establishment of such an international drafting group, it should be noted that many national markets rely primarily on representatives of insurers for the drafting of clauses, though some of these consult relevant assureds from time to time, particularly shipowners for hull insurance, and in the case of

some types of cargo insurance relevant trade organizations are regularly involved (see para. 88). In any case, there are many markets where assureds are not involved in the drafting process on a regular basis (see, however, footnote 46), although some markets have a procedure whereby the clauses are drafted by insurers and then submitted to governmental authorities for approval. It is suggested that if general acceptability by all the parties to the insurance contract is regarded as a desirable goal to be achieved for the uniform policy conditions, then it would seem best to include representatives of assureds as well as insurers.

2. LEGISLATIVE PROVISIONS

232. As has been indicated earlier, the legal regimes governing marine insurance are primarily established by the provisions contained in marine insurance contracts themselves. There is a tendency in many national marine insurance legislations for the applicable statutory rules to be, at least in part, optional, that is to say, they are capable of being altered by contract. In extreme cases the national legislation is almost completely optional. In some such cases, the national legislation is overridden on a regular basis, either in large part or in its entirety, by provisions in the marine insurance contract (see, however, footnote 46). In other cases involving national legislations with a large number of optional provisions, such as the Marine Insurance Act, 1906, of the United Kingdom (see footnote 45), most of these provisions continue to govern the contractual relationship as a result of the absence of overriding provisions in the contract. On the other hand, French law treats at least some of its statutory rules on insurable interests, representations and disclosures, fraud in the making of the contract, modifications during the contract, double insurance, negligence of the assured, disputes as to whether a loss is caused by maritime or war perils, the consequence of failure to pay premium, and prescription, as not capable of being altered by contract.²¹⁵

233. Thus, although it is possible that a certain degree of uniformity could be achieved in marine insurance law purely by establishing uniform policy conditions as described above, nevertheless, as a result of the existence in some national legislations of important mandatory rules governing the contractual relationship, there are limits to how far uniform policy conditions can go in achieving legal uniformity. This situation raises the issue whether there should be international uniform legislative provisions concerning the marine insurance contract to foster uniformity in the application of the proposed international policy conditions.

234. On a domestic basis, national legal regimes apparently contain marine insurance legislation for three reasons. The first is to enforce a particular rule of law considered to be in the public interest. The second is to provide rules for interpreting the enumerated contractual provisions. The third is to provide what are considered to be necessary rules for governing the contractual relationship where the contract itself is silent. Drawing from the domestic level, it would appear that consider-

²¹⁴ See, for example, Association of Average Adjusters, *Report of the General Meeting* (London, May 1972), appendix (report of the Special Committee appointed at the General Meeting of the Association on 13 May 1971 to consider the interpretation of the expression "each separate accident or occurrence" in the Institute Time Clauses: Hulls, 1 October 1969 and 1 October 1970).

²¹⁵ See article 2 of French Law No. 67-522 of 3 July 1967, on marine insurance.

ation should first of all be given to whether there are certain legal rules concerning marine insurance which are considered so essential to the international public interest that they must be enforced on all contractual relationships regardless of the agreement of the parties. It is not possible to consider in this report which rules should be made mandatory, since even on the basis of a simple comparison of French and British law, a wide divergence of opinion is revealed on this point, as seen in paragraph 232 above. It is suggested that this issue can only be solved by a careful analysis of all existing national legislations governing marine insurance to identify all those provisions that are mandatorily applicable and then to have all countries review the list to arrive at a mutually acceptable compromise.

235. In this respect, it has been asserted that as a result of the highly technical and varied nature of maritime commerce, and the fact that practices and the level of technology are in a constant state of flux, the vast majority of the marine insurance contractual relationships must necessarily be left to the actual terms and conditions of the insurance contract. Because of the relative inflexibility and permanent nature of statutory rules, to rely too heavily on legislation to form the intricate framework of the marine insurance contract is to run the risk that such rules may become quickly outmoded by the changing needs of insurers and assureds. National legislators appear to have recognized this risk, hence the relatively high proportion of optional statutory rules.

236. The second possible reason for developing legislative provisions involves a consideration of whether it is desirable to provide legislative interpretative aids for the marine insurance contractual provisions. However, the suggestions made earlier in this report concerning the development of a "commentary" to be used as a background interpretative guide for the proposed international uniform policy conditions (see sect. I (c) above) may be considered adequate for this purpose.

237. The third reason for adopting legislative provisions involves a consideration of whether it is desirable to provide statutory rules to govern the contractual relationship in the absence of express contractual stipulations. In its essence this is merely a process of filling in the holes in a partially constructed contractual relationship. In the context of the suggestions made earlier for the development of international uniform policy conditions, it should be borne in mind that the individual marine insurance contracts that are effected subject to the international uniform policy conditions will have the international conditions themselves as a backdrop. In other words, it is theoretically possible to construct a fully "self-contained" legal system in such international uniform policy conditions so that the practical risk of lacunae in the contractual relationship is virtually nil, or at least no greater than would be the case if part of the uniform policy conditions were transposed into statutory rules.

238. In the light of the various considerations drawn from the domestic law context that should be taken into account in establishing a statutory legal framework for the marine insurance contract, it is suggested that in respect of the proposed international uniform policy conditions there may not be a need for the creation of a detailed statutory legal framework as currently exists in

many national legislations. Rather, there would appear to be a need for statutory rules only to ensure international uniformity as to applicable mandatory legal rules that may exist in different countries. As to such mandatory rules, it is considered desirable to have international agreement so as to avoid the risk that the international uniformity achieved by developing a set of international uniform policy conditions would be offset by diverse mandatorily applicable domestic legislation.

239. The final issue remaining to be considered in this context is the form of such legislative provisions, should they be deemed desirable. There are two approaches commonly used in the international context: one involves the establishment of a legally binding international convention, and the other involves the creation of model legislative provisions to be enacted by each country as part of its domestic legislation. The ultimate effects of these two approaches can, in theory, be identical.

3. MARKET PRACTICES CONCERNING THE SETTLEMENT OF CLAIMS

240. In addition to the specific contractual provisions of the marine insurance policy and the statutory rules governing such policies, legal regimes governing marine insurance are also composed of informal and often formal rules, customs and practices concerning the transposition of loss of, or damage to, an insured object into a cash indemnity payable to the assured. As a result of the complexity and intricacy of maritime affairs and marine technology, it is not always possible to provide in legislation and the conditions of the policy all possible rules governing the adjustment of all possible claims that may arise. Thus, a certain degree of flexibility exists when adjusting a claim. Many insurance markets have sought to obtain a degree of standardization of some of the more important areas of flexibility, as is reflected in the respective "Rules of Practice" of the Associations of Average Adjusters of the United Kingdom, Canada, Japan and the United States of America.²¹⁶ Also, for example, the French insurance market maintains a national uniformity of claims adjustment practices through the operation of the Comité central des assureurs maritimes de France, which regulates the common interests of French insurers, including the adjustment of claims by the various *comités d'assureurs maritimes*.²¹⁷ In this respect, it would appear that a degree of uniformity of adjusting practices equivalent to that achieved by national rules of practice could be achieved by including internationally agreed adjusting rules in the proposed "commentary" to the international uniform policy conditions. Of course, as is the case on the national level, these rules could be amended and new rules added as the need arises.

²¹⁶ Additional means may be used to achieve uniformity; for example, in the Japanese market, the Claims Department of the Japanese Hull Insurers' Union draws up regulations standardizing the procedures of hull claim adjustment for the 20 member companies. *Marine and Inland Transit Insurance in Japan* (Tokyo, The Non-Life Insurance Institute of Japan, 1979), p. 111.

²¹⁷ See J. P. Govare, *L'assurance maritime française: étude des polices*, 2nd ed. (Paris, Argus, 1960), p. 32; and G. Ripert, *Droit maritime*, 4th ed., vol. III (Paris, Rousseau et Cie, 1953), p. 341.

Chapter VII

CONCLUSIONS

241. It was seen in chapters II and IV of this report that the conduct of marine insurance has changed dramatically in the last 30 years. Foremost among the changes is the growing tendency for nationally oriented markets to be more and more interested in accepting risks on an international basis, whether because of competition between markets to obtain the resulting increased premium income (on a direct or reinsurance basis), the increased insurance needs of more widely dispersed shipowning and cargo-owning clientele, or a need to spread risks internationally. Thus, what was once a relatively simple situation involving a few nationally-oriented marine insurance markets in developed countries has, as a result of the emergence of independent States from former colonial territories and the growth of indigenous assureds and insurers in these emergent States, tended to involve increasingly complex contractual relationships of assureds, insurers, co-insurers and reinsurers situated across numerous national and cultural boundaries.

242. Consequently, the international conduct of marine insurance is subject to new pressures not heretofore experienced. In this respect, the emergence of new markets has created new demands for legal regimes understandable and adaptable to local assureds and insurers. Many new generation insurers and assureds find the existing practices and conditions of cover in traditional markets unnecessarily variegated, cumbersome, complex and tied to ancient forms and procedures which they cannot readily assimilate into their own systems or appreciate as being relevant to their economic requirements. Yet at the same time the increasing degree of internationalization of marine insurance contractual relationships has created greater demands for international harmonization of the various legal regimes. As has been indicated in chapter VI of this report, there are distinct benefits to be gained from international harmonization of legal regimes, not only, in some cases, for insurers, but particularly for assureds, who may have to rely upon insurance coverage based on foreign marine insurance legal regimes. Without a degree of harmonization of such regimes, assureds would be forced to operate in their marine insurance affairs with insufficient information concerning the scope of their insurance coverage.

243. Above all, the emergence of new, widely diversified assureds and insurers is creating new demands for a meaningful role for them in determining the structure and functioning of marine insurance. Although the influence of a wider circle of insurers and assureds on the more traditional outlook of the dominant markets is still incipient, it is nonetheless of growing potential.

244. As has been shown in this report, the legal regime governing the contractual basis of marine insurance policies has not kept pace with the international develop-

ment of marine insurance. Despite the now profound international basis of marine insurance, there exist no formal international conventions or policy conditions to provide the necessary internationally harmonizing body of law for such contracts. As has been pointed out, a particular national marine insurance legal regime has been to a certain extent adopted as a *de facto* international legal regime for marine insurance by a large number of national markets in order to fill the gap created by the absence of any formal agreement.

245. Although the use of this national regime as a *de facto* international legal regime has alleviated some of the more deleterious effects of the complete lack of any international uniformity, its continued use on an indefinite basis presents certain problems. First, it was not created by an internationally representative forum, rather it is a legal regime created in a national context and designed to meet national needs. Thus, developing countries, as well as all other countries, both socialist and developed market-economy countries, have had no say in its original structure or its continued development.²¹⁸ As a result of the difficulties that may be experienced in using a legal regime not always easily adaptable or understandable in the local legal and economic context, the national character of this marine insurance legal regime inhibits it from successfully serving as a truly international legal base for marine insurance contracts adaptable to all members of the international community. In this regard, it was pointed out in chapter VI of this report that the absence of a formal international marine insurance legal base may foster the continued existence, if not the development, of additional, varied, national legal regimes. As was shown, even the existing variations between different national marine insurance legal regimes are of such complexity that it is an extremely difficult process to determine their effects on the rights and duties of the parties to the marine insurance contract, as well as the extent of the indemnity payable. Thus, the present report suggests that the development of a truly international legal base for marine insurance contracts, adapted to the varied legal and economic structures of the international community, would greatly facilitate the orderly international conduct of marine insurance.

246. An additional factor that may inhibit the successful long-term use of the current *de facto* international legal regime, aside from its national base, is the absence of regular, formalized consultations with representatives of assureds in the continued evolution of the regime.²¹⁹

²¹⁸ With the exception of a select few marine insurance markets which are consulted occasionally on an *ad hoc* basis as to the introduction or revision of some clauses.

²¹⁹ With the exception of the Special Trade Clauses referred to in chap. IV.

This unilateral, insurer-developed aspect of the legal regime, while possibly adequate for the national market in which it was intended to be used, does not, as has been shown in chapter V of this report, always result in a satisfactory balancing of interests between the parties, particularly in view of the widely dispersed and varied clientèle which utilize an international legal regime. Thus, as has been suggested in chapter VI, institutionalized international consultation procedures involving representatives of both parties to the marine insurance contract would appear desirable in order to ensure that an international legal base for marine insurance contracts adequately meets the needs of all parties to the contract throughout the world.

247. It should be stressed here that this report should not be interpreted as an attack on any particular marine insurance market or its legal regime, or as an attack on the conduct in general of marine insurers. Such an interpretation would ignore the contributions to the development and functioning of marine insurance that have been made by major traditional markets. Furthermore, the secretariat did not discover any universally expressed fundamental dissatisfaction with the overall manner in which marine insurers operate internationally.²²⁰

248. This report should also not be interpreted as suggesting that any particular legal regime is inadequate in its national context or to dictate changes which must be made. Although certain areas of the legal regime used by a prominent marine insurance market were analysed in chapter V, that analysis should be understood in its proper context. By far the greater part of the analysis undertaken in that chapter refers to specific aspects of the legal regime used by this particular market where it is felt that a greater simplicity and clarity in the contractual documentation or a better balancing of interests between the parties could be achieved in an international context. This analysis was undertaken because this national legal regime has become internationalized, and for purposes of its international use its form and content are of concern to the international community. In this respect the suggestions made as a result of this analysis may be of use to the international community in the development of a formal, internationally agreed legal framework for marine insurance contracts, as suggested in chapter VI.

249. In reference to the development of an international legal base for marine insurance contracts, chapter VI of this report in essence suggests that the current state of affairs, i.e. the use of a national regime as virtually a *de facto* international regime, is a stop-gap measure, satisfactory in the short term because on the whole it is a reasonably good, sophisticated national regime and is, partly for historical and partly for economic reasons, reasonably widely known, but above all because there has been no readily available satisfactory alternative. This report suggests that this satisfactory alternative is in fact available, not by rejecting all the

valuable development that has taken place to date, but by taking this particular widely-known national regime and building upon it, strengthening it by using its positive elements while interjecting positive elements from other legal regimes, and generally revising and simplifying it as suggested in this report in an international forum. By so doing it is felt that it would more satisfactorily meet the requirements of a wider range of countries, thereby reducing pressures to develop separate national regimes and hopefully fostering its even wider application, not as a particular national marine insurance regime but as an international legal base for all marine insurance contracts.

250. A last consideration which may be borne in mind concerning the development of an international legal base for marine insurance contracts involves an appreciation of the transport context in which marine insurance takes place. Specifically in the case of the insurance of goods in transport, it should be remembered that ocean carriage is only one aspect of a transport chain potentially involving land and air modes. Marine cargo insurance policy forms have generally responded to the need for a multimodal transport insurance by the development of a warehouse to warehouse cover (see paras. 82 and 198–199). However, these multimodal coverages are generally related to ocean transport and are, for the most part, based upon legislation directed to marine insurance. Thus, in connection with the development of an international legal base for marine insurance contracts, although the terms of reference of this report and its recommendations are directed to marine insurance, consideration should nevertheless be given, in the case of cargo insurance, to the desirability of a legal base for all transport insurance contracts taking into account all the various modes of transport and not dependent on the existence of a particular mode of carriage as a part of the overall transport movement. It may be considered in this context that such a legal base for transport insurance contracts might better meet the needs of the development of international multimodal transport.

251. In conclusion, it is suggested that further, more detailed study of the possibilities for the development of an international legal base for marine insurance contracts may be desirable. Accordingly, a possible first step might be to convene an *ad hoc* group of governmental and industry experts representing both hull and cargo insurers and assureds to study the subject further and to report to the Working Group on International Shipping Legislation. The task set forth for the *ad hoc* group of experts could be as follows:

- (i) To examine the existing national marine insurance policy conditions and practices, with a view to determining the desirability and feasibility of developing a set of comprehensive international uniform policy conditions agreed to, and amended as necessary, on an internationally representative, industry-wide basis, bearing in mind the suggestions concerning the possible content and format contained in chapters V and VI of the present report;
- (ii) To examine the existing national legislations on marine insurance, with a view to determining the desirability and feasibility of developing an international convention or agreement, bearing in mind the suggestions contained in chapter VI of the present report concerning the desirability of

²²⁰ In order to correct certain misunderstandings that have arisen since the original issuance of this report in connexion with the meaning of this sentence, it should be clarified that reference is made to the manner in which insurers *operate*—that is, how they conduct their general day-to-day business operations, whether they honour legitimate claims, etc.—and thus it is to be distinguished from complaints received concerning the insurance policy forms used.

establishing uniformity in the various national mandatory rules applicable to marine insurance contracts.

Furthermore the *ad hoc* group of experts might be

requested to consider, in the light of the previous discussion of cargo insurance in a multimodal context, the desirability and practicability of a legal base for all transport insurance contracts covering goods in transit.

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