

# NORWEGIAN MARINE INSURANCE PLAN 1996

Version 2007

## COMMENTARY



## **PREFACE**

Norwegian Marine Insurance Plan of 1996, Version 2007

This preface covers the work on the Norwegian Marine Insurance Plan of 1996, Version 2007. As regards the work on the 1996 Plan itself and on Version 1997, 1999, 2002 and 2003 of the Plan, reference is made to previous prefaces. During the preparation of the 1996 Plan, Version 2007, the Standing Revision Committee has comprised the following persons:

Chairman

Hans Jacob Bull, Professor, LL.D.

Secretary

Trine-Lise Wilhelmsen, Professor LL.D.

The Central Union of Marine Underwriters Norway (CEFOR)

Haakon Stang Lund, legal counsel

Einar Kvammen, Claims Director

Sveinung Måkestad, Adjusting Manager

Svein Ringbakken, Director

Coastal Marine Clubs' Mutual Company

Palmer Sjøholm, Managing Director

Norwegian Shipowners' Association

Skule Adolfsen, Vice President, Insurance/Claims

Hans Kristian Hønsvald, Director, Insurance

Karoline Böhler, legal counsel

Norwegian Average Adjusters

Bjørn Slaatten, Average Adjuster

The Revision Committee has adopted the following amendments for incorporation into the Norwegian Marine Insurance Plan of 1996, Version 2007:

§ 1-5: In subparagraph 4 a reference to § 12-2 has been added in connection with the amendment to this clause, see no. 10 below.

§ 2-8: The exclusion in (d) regarding the release of nuclear energy has been elaborated on and expanded through the incorporation of the Race II clause.

§ 2-9: The exclusion in subparagraph 2 (b) regarding the release of nuclear energy has also been elaborated on and expanded in the insurance against war perils through the incorporation of the Race II clause. The former special rule in subparagraph 3 regarding the expansion of perils covered if the ship is insured with the Norwegian Shipowners' Mutual War Risks Insurance Association has been amended and moved to chapter 15, section 9, where all the rules regarding insurance with this association have now been grouped.

§ 2-12: Subparagraph 3 has been amended in connection with the amendments to § 2-8 and § 2-9.

§ 2-13: Subparagraph 2 has been amended in connection with the amendments to § 2-8 and § 2-9.

§ 3-8: Subparagraph 2 has been amended by including the rules regarding change of classification society which have been moved from § 3-14. Such changes are now subject to the general rules regarding alteration of the risk and not the special, more stringent rules in § 3-14.

§ 3-14: The heading and subparagraphs 3 and 4 have been amended by moving the rules regarding change of classification society to § 3-8, subparagraph 2.

§ 3-15: A minor adjustment has been made in the text of subparagraph 2, and the amount has been increased. Some adjustments have been made in the Appendices to § 3-15 regarding excluded and conditional trading areas.

§ 3-17: Subparagraph 2 has been amended and moved to chapter 15, section 9, where all the special rules related to the insurance of ships with the Norwegian Shipowners' Mutual War Risks Insurance Association have now been grouped.

§ 3-22: The former provision regarding unseaworthiness has been deleted, since the term is no longer used in the new Norwegian Ship Safety Act. The reference to seaworthiness has similarly been deleted in the heading of section 3. The former § 3-24 regarding safety regulations has been moved to § 3-22. A new subparagraph 3 has also been added to the provision, to the effect that the rules prescribed by the classification society regarding ice class constitute a safety regulation.

§ 3-23: The former references to "seaworthy" have been reworded to bring them in line with the amendments to § 3-22 (see no. 10).

§ 3-24: The former provision regarding safety regulations has been moved to § 3-22 (see no. 10), and § 3-24 is thus now open.

§ 3-25: The reference in subparagraph 2 has been corrected in connection with the transfer of the former § 3-24 to § 3-22 (see no. 10).

§ 3-27: The former references to "seaworthy" have been reworded to bring them in line with the amendments to § 3-22 (see no. 10).

§ 9-2: The third sentence of subparagraph 1 has been deleted because it in practice gave rise to uncertainties.

§ 10-10: The first sentence of subparagraph 1 has been amended due to the deletion of the rules regarding seaworthiness, see no. 10.

§ 12-1: Subparagraph 4 has been amended due to the deletion of the rules regarding seaworthiness, see no. 10.

§ 12-2: Subparagraphs 1 and 2 have been amended so as to make entitlement to cash settlement for damage a general right, and to specify the time of settlement and the calculation of compensation. A new subparagraph 3 has been added regarding the relationship to total loss and condemnation. The former subparagraph 3, unamended, has become a new subparagraph 4.

§ 12-3: Subparagraph 2 has been deleted because it is no longer considered to have any practical significance.

§ 15-1: Subparagraph 3 has been moved to chapter 15, section 9, where all the special rules related to the insurance of ships with the Norwegian Shipowners' Mutual War Risks Insurance Association have now been grouped.

§ 15-3: The first sentence of (a) has been amended to the effect that owner's liability (P&I) and occupational injuries are now subject to a common sum insured. Furthermore, the second sentence has been deleted, with the result that the war risk insurer's liability for removal of wrecks pursuant to § 15-21 must now be covered within the sum insured.

§ 15-4: In the first part of subparagraph 1, the reference has now been amended to § 3-22, cf. no. 10.

§ 15-5: The last sentence of the provision has been moved to chapter 15, section 9, where all the special rules related to the insurance of ships with the Norwegian Shipowners' Mutual War Risks Insurance Association have now been grouped.

§ 15-6: The last sentence of the provision has been moved to chapter 15, section 9, where all the special rules related to the insurance of ships with the Norwegian Shipowners' Mutual War Risks Insurance Association have now been grouped.

§ 15-21 regarding cover of liability for the removal of war wrecks has been deleted, cf. no. 21 above.

Chapter 15, section 9 ( § 15-24 et seq.): All the special rules relating to insurance with the Norwegian Shipowners' Mutual War Risks Insurance Association have now been grouped in this section.

§ 15-24: This provision corresponds to the former provisions of § 2-9, subparagraph 3 (a), and § 3-17, subparagraph 2.

§ 15-25: This provision is new in the Plan, but is in accordance with the former conditions of the Norwegian Shipowners' Mutual War Risks Insurance Association. It limits cover under the general war insurance conditions in chapter 15.

§ 15-26: This provision corresponds to the former provisions of § 15-5 and § 15-6.

§ 15-27 - § 15-31: These provisions are new in the Plan, but are basically in accordance with the former conditions of the Norwegian Shipowners' Mutual War Risks Insurance Association. They

provide for limited cover for requisition by the ship's own state and for perils covered by the RACE II clause. Such perils are not covered by the ordinary insurance against war perils, see § 2-9, subparagraph 1 (b), third sentence, and subparagraph 2 (b). The range of losses covered under the limited cover is narrower than is otherwise the case, see § 15-28, and special limitation amounts apply, see § 15-31.

§ 15-32 - § 15-34: These provisions are new in the Plan, but are basically in accordance with the former conditions of the Norwegian Shipowners' Mutual War Risks Insurance Association. They provide for limited cover for certain types of costs, see § 15-33, within a special limitation amount, see § 15-34, when the insurance incident has been caused by a chemical, biological, bio-chemical or electromagnetic weapon, see § 15-32.

§ 16-7: Subparagraph 3 is new, and specifies the provision that applies if a separate deductible period has been agreed on for damage to machinery.

§ 16-12: Subparagraph 1 (b) has been amended due to the deletion of the rules regarding seaworthiness, see no. 10.

§ 17-4: The heading and the provision have been amended due to the amendment of § 3-14, cf. § 3-8.

§ 17-5: The heading has been amended because the former § 3-24 has been moved to § 3-22.

§ 17-7A: The provision has been amended to take into account the amendments made to conditions prescribed by the public authorities relating to fishing rights.

§ 17-12: The provision has been reworded but there have been no changes in its substance.

§ 17-15: The provision has been reworded and clarified. Minor changes in the substance of the provision have been made to bring it in line with the ordinary conditions of P&I associations concerning this point.

§ 17-44: The provision has been amended to the effect that necessary travel expenses for replacement crew are covered also for domestic travel.

§ 17-47: The heading has been amended because the former § 3-24 has been moved to § 3-22, see no. 10.

§ 18-6: The heading has been amended because the former § 3-24 has been moved to § 3-22, see no. 10.

§ 18-10: This provision has been deleted because it was rendered superfluous by the amendment of § 12-2, see no. 15.

§ 19-6: The heading has been amended because the former § 3-24 has been moved to § 3-22, see no. 10.

§ 19-25: Subparagraph 6 is new.

In connection with the above-mentioned amendments, amendments have also been made in the Commentary to the respective provisions. Similarly, amendments have been made to the Commentary to other provisions in which matters regulated in the amended provisions are discussed. Finally, certain amendments have been made to the Commentary to provisions that have not been amended, where the Committee has found that the former Commentary was misleading or could be misunderstood.

The amendments to the text of the Plan and the Commentary will come into force on 1 January 2007. The amendments in the printed version are marked in bold type, while in the Internet edition they are also marked in a different colour.

Det Norske Veritas is responsible for printing Version 2007 and for the Internet edition. The Internet address is <http://www.norwegianplan.no/>

Oslo, November 2006

Hans Jacob Bull, Chairman

Trine-Lise Wilhelmsen, Secretary

## ***PART ONE - RULES COMMON TO ALL TYPES OF INSURANCE***

### **General**

Part 1 of the Plan is based on Part 1 of the 1964 Plan, various insurance conditions and practice. The insurance conditions that are relevant to Part 1 are first and foremost Conditions for hull insurance issued by the Central Union of Marine Underwriters (CEFOR) and the Mutual Marine Insurance Associations' Premium and Insurance Conditions (PIC). These conditions were issued fairly frequently. In the general part of the Plan reference is initially made to the 1995 conditions. The abbreviation CEFOR therefore stands for CEFOR Form 246 A Oct. 1995, while PIC means the Mutual Marine Insurance Associations' Premium and Insurance Conditions 1 January 1995. On one point, viz. in relation to § 3-14 and § 3-22, subparagraph 2, relating to loss of class, change of classification society and periodic surveys, reference is, however, made to earlier conditions. This is due to the fact that the solutions adopted in the Plan on this point were incorporated in the conditions already in 1995, which means that it would create the wrong impression to refer to those conditions.

In some places, also solutions from other conditions have been incorporated or mentioned. In that case, the Commentary will provide a full reference to the relevant conditions.

The reference to practice concerns partly written and partly unwritten practice. Under the 1964 Plan parts of practice were embodied in a written set of rules, the so-called Rules of Practice. These rules related first and foremost to chapter 12 on damage, but also concerned questions regulated in the general part of the Plan. During the Plan revision due regard has been had to this practice, and it is in part dealt with directly in the Commentary on the Plan. Otherwise the intention has not been to make any changes in settlement practice related to the provisions in the Plan which have the same content as earlier.

Chapters 1 to 9 of the Plan apply to all the lines of insurance that are regulated in the Plan. However, the provisions have the greatest significance in relation to various forms of hull insurance, and the examples used reflect this fact.

## Chapter 1. - Introductory provisions

A number of provisions of a general nature, which are difficult to fit into the Plan's system in any other way, are compiled in this chapter. While the solutions in the 1964 Plan have essentially been maintained in the chapter, § 1-3 regarding contracts entered into through a broker is new, and § 1-4 regarding Norwegian jurisdiction and choice of law has been expanded.

### § 1-1 Definitions

This paragraph corresponds to § 1 of the 1964 Plan and Insurance Contracts Act (hereinafter referred to as "ICA") section 1-2.

Letters (a) to (b) remain unchanged. Letter (a) requires no comments. Letter (b) gives a definition of the term "the person effecting the insurance". Norwegian insurance law distinguishes between "the person effecting the insurance", who is the person entering into the contract with the insurer, and "the assured", who is the person entitled to compensation from the insurer, cf. letter (c). The person effecting the insurance and the assured will often be one and the same, but this is not necessarily the case, as for example where a charterer effects the insurance, whilst the shipowner is the assured.

The definition of "the assured" in letter (c) of the 1964 Plan is superseded by the corresponding definition in ICA. The decisive criterion for having status as an "assured" under the insurance is that the person in question is in a position where he may have a right to compensation under the policy, not that he does in actual fact have such a right under the relevant agreement. Hence, the shipowner will have status as an assured, even if, for example, the ship's mortgage loans exceed the ship's insurable value, and the mortgagee will be entitled to the entire sum insured in the event of an insurance settlement. This is of significance first and foremost in relation to the rules contained in the Plan which impose duties on the assured, cf. in particular the rules relating to the duty of care in Chapter 3 of the Plan.

In addition to the distinction between the person effecting the insurance and the assured, a distinction must be made between "the person effecting the insurance" and his authorised representative. A broker, agent or intermediary is not the person effecting the insurance, but the authorised representative of the person effecting the insurance.

Letter (d) defines "loss" as a common designation for total loss, physical damage, costs, liability for damages and other loss which the insurer covers according to the Special Conditions. The concept of "loss" is consequently a more comprehensive concept than "damage" which, according to ordinary usage, must be equated with physical damage. The word "loss" is, however, also used in a somewhat different sense in the Plan, viz. as a synonym for "total destruction". Here the Plan uses the term "loss of", cf. for example §2-15 (c), which refers to "loss of or damage to a life-boat caused by its having been swung out".

§ 1 (e) of the 1964 Plan defined damage as physical damage which does not constitute a total loss. This definition is without any practical significance and has consequently been deleted.

Letter (e) is equivalent to (f) in the 1964 Plan. The distinction between "particular loss" and loss which is indemnified in general average is deeply and traditionally rooted and requires no comments.

In accordance with the 1964 Plan, the Committee has not defined "casualty" because the word "casualty" is not used entirely unambiguously in the various provisions of the Plan. Although this means that the Committee has not attempted to give the concept a clear-cut content, there is hardly any reason to believe that the use of the word will create any practical difficulties. In practice, the concept has a certain established meaning, which will also provide guidance in the future. The core of the concept is "an event involving a loss which, according to its cause and nature, is covered by the insurance". In hull insurance "casualty" thus describes the contrast to general wear and tear, corrosion and other similar impairment. This is how the word must be interpreted, for example in §11-3 (the Condemnation Rules).

Sometimes the word "casualty" will be used where damage has arisen as a result of a peril that occurred at an earlier point in time, cf. the Hektor case, where the peril struck in the form of the falling bomb, (ND = Norwegian Judgements 1950.458 NH, cf. below under § 2-11). A casualty without damage arising is also conceivable. This would be the case where a grounding occurred which did not result in any damage. A grounding of this type would require the assured to perform his ordinary duties in the event of a casualty (cf. § 3-29 to § 3-31), even if it turned out later that the ship did not sustain any damage.

Definitions are also found in certain other places in the Plan, see e.g. § 2-8 (b), § 2-9 subparagraph 1 (b) and § 3-22.

#### § 1-2. Policy

This paragraph corresponds to § 2 of the 1964 Plan and ICA section 2-2.

Subparagraph 1, first sentence, remains unchanged. A “policy” according to the Plan corresponds to an “insurance certificate” under ICA section 2-2. However, the term “policy” is so firmly established in marine insurance that it was deemed expedient to retain it. In contrast to the provision contained in ICA section 2-2, the insurer has no obligation to issue a policy unless the person effecting the insurance requests him to. Frequently other documents will have been issued which replace the policy, cf. below under §1-3, in which event a policy would be superfluous.

Subparagraph 1, second sentence, relating to the content of the policy, corresponds to ICA section 2-2, subsection 1, first sentence, whilst the third sentence concerning the possibility of relying on the assumption that no other conditions apply than those appearing from the policy is derived from ICA section 2-2, last subsection. The rule to the effect that the insurer cannot invoke conditions to which no reference is made in the policy is a natural equivalent to the principle that the person effecting the insurance will be bound by the policy unless he raises an objection, cf. subparagraph 2. However, it would not be expedient to prevent the insurer entirely from invoking provisions that do not appear in the policy or the references contained in it. If the insurer can prove that the person effecting the insurance was aware of the relevant condition and that this was to form part of the contract, the parties’ agreement shall prevail over the written contract, cf. in this respect also the solution contained in ICA section 2-2, last subsection.

According to ICA section 2-2, subsection 2 a-e, detailed requirements concerning conditions must be incorporated in the policy. This part of ICA section 2-2 is not sufficiently flexible for marine insurance.

Subparagraph 2 corresponds to § 2, subparagraph 2, of the 1964 Plan, but has been amended.

ICA sections 2-1 and 2-3 also contain a number of rules relating to the insurer’s duty of disclosure. This type of rule is not required in marine insurance.

#### § 1-3. Contracts entered into through a broker

This paragraph is new and has no parallel in ICA.

The paragraph regulates the situation where the person effecting the insurance enters into a contract through a broker. According to the definition in § 1-1 (b) the person effecting the insurance is “the person entering into the contract with the insurer”, which means that he is a party to the contract. The actual formation of the contract will, however, often be done through a broker or some other intermediary on behalf of the person effecting the insurance. The broker thereby acts as the representative of the person effecting the insurance who will under contract law acquire status as principal. The broker is subject to special rules contained in the Broker Regulations of 24 November 1995 no. 923.

A broker is different from an agent; the latter normally acts on behalf of the insurer.

The provision merely deals with the broker’s functions in connection with the formation of the contract. However, the broker may also have other functions, in particular if a casualty has occurred. These functions are mentioned elsewhere in the Commentary on the Plan.

This provision concerns the procedure for the conclusion of an insurance contract used in the English market. Here the broker will always prepare a “slip”, which is a document containing all relevant insurance conditions, either in full text or in the form of references. The insurers sign and stamp the document. When the insurance is fully subscribed the broker issues a cover note, which is sent to the person effecting the insurance. This procedure entails that the parties to the insurance contract each retain their separate document: The insurer does not see the cover note and the person effecting the insurance does not see the “slip”. The policy is issued by the insurer on the basis of the “slip” independently of the insurance certificate.

According to the English procedure it is the “slip” with the insurer’s endorsement that constitutes the insurance contract. The insurance certificate is merely a confirmation from the broker to the person effecting the insurance that an agreement has been entered into. Normally the two documents will be identical; in the event of discrepancies, the underlying written insurance contract (the “slip” with endorsement) shall prevail. The insurance certificate is only of relevance in the relationship between the broker and the person effecting the insurance.

The English procedure is to a certain extent followed in the Norwegian market, even though we have hitherto lacked a document corresponding to the English “slip”. In the Norwegian market practice has so far been that a written insurance contract is first concluded between the broker on behalf of the person effecting the insurance and the rating leader. This contract is then sent out to the other insurers. When the market has supported the contract, the broker issues what is known as a “Provisional Insurance Bordereau” (PIB) to each individual insurer for his signature and return to the broker. The PIB is meant to make up for missing documentation and formal routines in connection with the conclusion of the contract, because this is often done by fax. The last step in this procedure is that the client is given a “cover note” which will contain the same information as the PIB. The PIB in the Norwegian market is meant to correspond to the English “slip”. There is nevertheless an essential difference between the two documents: a PIB with endorsement merely constitutes a confirmation that a binding insurance contract has been entered into, whereas a “slip” with endorsement represents the actual contract.

The Norwegian procedure contains an extra stage in relation to the English one in that the PIB is issued after a binding insurance contract has been entered into, whereas the “slip” with endorsement constitutes the actual contract. Consequently, a PIB does not provide any documentation to the effect that a binding agreement has been entered into, and this may lead to ambiguities as to what the broker and the insurer have in actual fact agreed. A further weakness common to the Norwegian and English procedures is that the person effecting the insurance does not get to see the terms of the insurance contract through the cover note until after a binding agreement has been entered into. The person effecting the insurance therefore has no possibility of objecting to the content of the insurance contract until the agreement is already binding.

During the revision of the Plan, it was agreed to base the new Plan on the English procedure, according to which it is the actual contract document which is sent to the insurer for his endorsement and which subsequently forms the basis of the cover note. The purpose of this procedure is to secure documentation showing that a binding insurance contract has been entered into, and documentation of the relevant conditions. However, it was also considered desirable for the person effecting the insurance to be given access to the contract text at an earlier stage of the process than both the English and the Norwegian procedures allow, making it possible to lodge a complaint before a binding agreement has been entered into. This may be achieved by sending the draft insurance contract (slip without endorsement) to the person effecting the insurance for his approval before it is sent to the insurer for endorsement.

The provision contained in § 1-3, subparagraph 1, therefore introduces a rule to the effect that the broker, when he has been instructed to take out an insurance, shall submit a written draft insurance contract to the person effecting the insurance for his approval. The draft insurance contract is meant to correspond to the English “slip” without endorsement from the insurer. Such a “slip” normally consists of a standard document of 2-3 pages. Due to the fact that the draft must be approved by the person effecting the insurance before it is sent to the insurer, the procedure becomes somewhat more formalised than the English one. It does, however, ensure that the person effecting the insurance gets the opportunity to see the intended conditions of the contract, as well as the chance to raise any objections he might have at an early stage.

It is a “written” draft insurance contract which is to be submitted. A verbal rendition of the contract is not sufficient, as such a procedure would not ensure the desired notoriety. However, an electronic confirmation is acceptable. In that event a transcript may be obtained, this will provide sufficient documentation.

The term “instructs ..... to take out an insurance” means standing instructions to take out insurance aimed at specific insurers and on specifically stated conditions. The intention is not to regulate the broker’s acknowledgement of an order when the instructions are received, or the communications between the parties during the negotiation stage. This means that once the first contact between the person effecting the insurance and the relevant broker has been signed, it will normally take some time until the draft insurance contract can be sent to the person effecting the insurance.

The draft contract shall be sent to the person effecting the insurance “for his approval”. Even if the provision does not impose on the person effecting the insurance any actual duty to lodge a complaint, it is presumed that he will react if he does not wish to enter into an agreement with the stated content. Passivity must therefore be regarded as “approval”. The consequence of the fact that the person effecting the insurance “accepts” the draft contract is that he accepts that the draft is to provide the basis for a binding insurance contract. This must apply regardless of whether or not the draft is in accordance with any earlier insurance instructions given to the broker. In other words, by the approval of the draft the broker is authorised to effect a binding insurance contract



with the content of the draft. However, the authority does not go any further than the content of the agreement; if, for example, the premium rate has not been included in the draft, this will have to be cleared with the person effecting the insurance before a binding agreement is entered into. However, if the person effecting the insurance does not approve the draft contract, the procedure described in subparagraph 1 must be repeated. In that event, the broker will not be authorised to enter into an agreement on the conditions stated.

Subparagraph 2 subsequently indicates a procedure that corresponds to the English one: after the draft insurance contract has been approved by the person effecting the insurance, this draft shall be submitted to the insurer, who shall give the broker a written confirmation of the agreement. This corresponds to the English “slip” with endorsement from the insurer and constitutes the actual contract document. This means that documentation is obtained as to both the existence of the agreement and its terms. If the insurer is not willing to enter into the contract on the conditions first put forward by the broker, it is understood that the entire procedure shall be repeated: A new draft insurance contract must be drawn up which shall be approved by the person effecting the insurance and subsequently confirmed by the insurer. This is necessary in order to achieve the purpose of the provision, viz. to give the person effecting the insurance the possibility of verifying that the insurance conditions are in accordance with his wishes, and to intervene if he believes that something is wrong.

The provisions in subparagraphs 1 and 2 are intended as regulations. This procedure is not mandatory in order for an agreement to be valid and no sanctions are imposed if the broker does not follow the procedure indicated. If the person effecting the insurance and the broker agree that the procedure is not expedient, they may resort to a simpler procedure. A verbal insurance agreement will be binding in the customary manner. However, a more informal procedure will result in a lack of notoriety and will therefore lead to uncertainty as to whether a binding agreement was entered into and what the applicable conditions are. A less formal procedure may also have consequences for any responsibility the broker may have towards the person effecting the insurance for the “correctness” of the insurance contract.

If several brokers are used (so-called “broker chains”) when the insurance is placed,

§ 1-3 is aimed at the broker who places the insurance. In the event of insurance cover in foreign markets, it will often be necessary to bring in foreign brokers. The foreign broker will in practice prepare his own “slip” or “Binder”, which he uses as a cover document in relation to his own market. Such a “Binder” is easy to fit into the procedure indicated in subparagraphs 1 and 2.

Subparagraph 3 of the provision regulates the insurance confirmation. According to subparagraph 3, first sentence, the broker shall, after the written agreement has been entered into, issue an identical insurance confirmation to the person effecting the insurance. The term “insurance confirmation” corresponds to a “Cover Note” in the English market. The duty to submit such an insurance confirmation is concordant with practice in the Norwegian as well as the English market. The insurance confirmation is a document between the person effecting the insurance and the broker; it cannot be invoked by the person effecting the insurance vis-à-vis the insurer or by the insurer vis-à-vis the person effecting the insurance.

If the rules contained in subparagraphs 1 to 3 are complied with, there should be concordance between the approved draft contract, the binding agreement and the insurance confirmation. However, it is conceivable that mistakes are made in the process, so that the person effecting the insurance has objections to the content of the insurance confirmation. In that event he has, according to subparagraph 3, second sentence, a duty to make a complaint to the broker. This rule will normally have independent significance if the cover note differs from the approved draft contract. If the person effecting the insurance has approved the draft contract, he has, as mentioned in the commentary on subparagraph 1, authorised the broker to enter into the contract on the stated conditions, and he is then not entitled to object to the content of the insurance confirmation later on. If, however, the insurance confirmation differs from the draft contract, he must notify the broker without undue delay. Otherwise, the insurance confirmation shall be regarded as approved, cf. subparagraph 3, third sentence.

The significance of the fact that the insurance confirmation must be regarded as approved will vary, depending on whether it is merely the cover note which is incorrect, or whether the underlying contract is also incorrect. If the situation is that both the insurance confirmation and the contract have been given a different content from that of the draft contract, then an agreement has been entered into between the insurer and the person effecting the insurance which varies from the draft contract. In that event, the broker has exceeded the authority he was given by the person effecting the insurance. In such a situation, the person effecting the insurance will normally not be bound by the contract. The point of departure is that the broker has an authority to carry

out certain instructions; in that event, the person giving the authority will not be bound by an agreement which is in contravention of the instructions (here the draft contract), cf. section 11, subsection 2, of the Contracts Act of 31 May 1918 No. 4 (Avtaleloven). If the person effecting the insurance fails to lodge a complaint against the insurance confirmation, it is, however, natural to assume that this makes up for the broker's missing authority, so that the person effecting the insurance will nevertheless be bound by a contract with the same content as that of the insurance confirmation. Even if the insurance confirmation applies to the relationship between the broker and the person effecting the insurance, the failure to lodge a complaint will in this case thus also have consequences in relation to the insurer by virtue of the fact that the underlying contract is considered binding.

However, in exceptional cases, it is also conceivable that the person effecting the insurance will be bound by the underlying insurance contract from the time the contract is entered into. Such a situation may arise if the broker has general authority, i.e. that he has a document of authority addressed to the insurer, cf. sections 14 and 16 of the Contracts Act. A general authority may give the broker more far-reaching authority than the instructions from the person effecting the insurance, and this may result in the person effecting the insurance being bound by an agreement which is in contravention of the draft contract. In that event, an objection to the content of the insurance confirmation has no consequences in relation to the insurer. However, the person effecting the insurance must lodge an objection if he wants to hold the broker liable for the mistake.

If it is only the insurance confirmation which is wrong, while the draft contract is identical to the contract, the failure to object to the insurance confirmation will basically be of less significance: the agreement between the insurer and the person effecting the insurance is correct and the insurer cannot invoke the insurance confirmation. A complaint to the broker regarding the error in the insurance confirmation is nevertheless important in order to prevent this mistake from recurring in the policy and creating problems in the relationship between the policy, the insurance confirmation and the underlying contract. This has to do with the duty of the person effecting the insurance to make a complaint under § 1-2, subparagraph 2, if he has any objections to the policy. If he fails to do so, he risks being bound by the "wrong" policy, even if the underlying contract is correct. In that event, the failure to object to the content of the insurance confirmation will result in the person effecting the insurance losing his right to hold the broker liable for the policy being given an incorrect content.

Subparagraph 4 must be seen in conjunction with § 2 concerning the policy. The first sentence imposes a duty on the broker to assist in obtaining a policy if the contract was entered into through a broker. Normally, the broker will be acting on behalf of the person effecting the insurance, and it is the insurers who issue policies for their shares. However, in exceptional cases, the broker may act on behalf of the insurers and issue a collective policy so that the person effecting the insurance will not be required to have a whole series of policies. In that event, it should appear clearly from the policy that it is issued by authority and on whose behalf the broker is signing, cf. second sentence. If the broker fails to state these facts, he risks becoming directly liable under the insurance contract. If the broker issues the policy on behalf of the insurer, he is acting as the representative of the insurer, and not of the person effecting the insurance. Any errors on the part of the broker in connection with the issuance of the policy will therefore be the insurer's risk.

If a policy is issued, the duty to raise objections set forth in § 1-2, subparagraph 2, shall apply. If the rules indicated in § 1-3 are complied with, this duty will, however, be of minor independent significance. To the extent that, under the rules contained in § 1-3, subparagraphs 1 to 3, the person effecting the insurance is bound by an agreement with the same content as the policy, it will not do him any good to object to the policy, cf. in this respect the comments above as regards objections to the content of the cover note. The failure to object to the draft contract or the cover note may thus have the effect that the person effecting the insurance will later have to accept a policy which is contrary to his original instructions. However, if the policy has been given a different content from that of the underlying agreement, an objection to the policy will be of significance in itself. If the person effecting the insurance fails to object, he risks that the policy takes precedence over the agreement.

Subparagraph 4, 3rd sentence, makes it clear that, in principle, the broker is not authorised to act on behalf of the insurer, unless he has written authority.

#### § 1-4. Reference to Norwegian jurisdiction and choice of law

This section corresponds to §§ 3 and 147 of the 1964 Plan and the jurisdiction clause in the introduction to the General Loss of Hire Insurance Conditions of 1972 (Revised 1993), CEFOR Form 237.

Subparagraph 1 and 2 concern insurance on Plan conditions with a Norwegian leading insurer, while subparagraph 3 concerns insurance on Plan conditions with a foreign leading insurer.

Subparagraph 1, (a) emphasises the principle of Norwegian jurisdiction and Norwegian background law for any conflict associated with an insurance contract effected on Plan conditions and with a Norwegian leading insurer. The requirement for Norwegian background law is in accordance with § 3 of the 1964 Plan, but that provision applied in general regardless of the leading insurer's nationality. However, for a foreign leading insurer the same solution follows from subparagraph 3, cf. below. The Norwegian jurisdiction requirement is new and is derived from the CEFOR Form 237. The formulations are almost identical, apart from the fact that the condition that the leading insurer must be Norwegian has now been specifically stated.

The requirement for Norwegian jurisdiction and choice of law applies only to "lawsuits" regarding disputes or disagreements between the parties, not to decisions where the courts are not involved, e.g. arbitration or conciliation proceedings. On the other hand, the provision covers any dispute that in any way concerns the insurance contract; provided that the dispute is between the parties to the insurance contract. It is furthermore irrelevant whether it is the assured or the insurer who initiates the legal proceedings. Both parties have to accept the institution of legal proceedings in Norway and with Norwegian background law. As regards lawsuits against the insurers, the rule is in accordance with the provision contained in Art. 8, nos. 1 and 3 of the Lugano Convention, which provides that both the leading insurer and the co-insurer may be sued in the leading insurer's State of domicile. The rule does entail, however, that the person effecting the insurance is precluded from applying the other venue rules contained in Art. 8 of the Lugano Convention, as well as the venue rules contained in Art. 9. This variation from the Convention is valid, however, because it concerns loss of or damage to ocean-going ships or offshore structures, cf. Art 12 A, (1) (a), (2) (a), (3) and (4) of the Lugano Convention.

The reference to Norwegian background law entails that ICA becomes applicable as non-mandatory background law. However, ICA is of little practical significance for this type of insurance and will only be applicable to a limited extent. § 3 of the 1964 Plan also contained a rule to the effect that Norwegian background law only became applicable where the solution did not follow from the parties' agreement and the Plan provisions. However, it is superfluous to state this in the Plan text. ICA must not only yield to explicit solutions in contract text and Plan conditions: solutions that must be interpreted into the Plan or the individual contract take precedence over ICA as well. Nor is it necessary to say that the individual insurance contract takes precedence over the provisions of the Plan. The reference to Norwegian background law also comprises Norwegian sources of law and methodology. Hence, when deciding a dispute the general principles for the "step sequence" between the various source-of-law factors must be complied with.

Subparagraph 1, (b) and (c) provide some further specifications regarding jurisdiction and venue as regards legal actions against the insurer(s). According to letter b), the insurers cannot be sued before a foreign court. Furthermore, the venue is limited: the insurer can only be sued in the venue where the leading insurer's head office is located, cf. letter (c). The relationship to the Lugano Convention is commented on in connection with letter (a).

The venue provision contained in letter (c) is relevant in connection with any insurance contract on Plan conditions, regardless of the parties' nationality. Reference to Norwegian jurisdiction and Norwegian background law in letter (a), and the limitation to Norwegian jurisdiction in letter (b) are, however, superfluous if it is a dispute between an assured and an insurer who are both residing in Norway and conduct their business activities there. However, the provisions may become relevant if both parties do not reside in Norway. It is quite common for a risk to be covered with a Norwegian leading insurer, while one or several of the co-insurers are foreign. In that event, the foreign co-insurer must accept Norwegian jurisdiction and background law, and furthermore the rule that he cannot be sued in any other courts.

On the other hand, letter (c) also entails that the person effecting the insurance cannot sue a foreign co-insurer in the home country of that insurer. On this point, the rule in the 1964 Plan was more flexible; under § 147, the person effecting the insurance had the right, but no obligation, to sue the co-insurer in the leading insurer's venue. However, the restrictions on the right of the person effecting the insurance to sue must be assumed to be of little significance. Normally, a foreign co-insurer will probably accept a Norwegian court decision, and a Norwegian judgment will

furthermore, according to the Lugano Convention, be enforceable in any other Convention State, cf. Art 31, i.e. in all EU and EFTA countries. However, a Norwegian judgment does not provide grounds for enforcement in all other countries, such as the United States. If an American co-insurer in exceptional cases refuses to recognise a Norwegian court decision, the person effecting the insurance will have to obtain a new judgment for enforcement in the United States. In that case, letter (c) will result in the person effecting the insurance having to take the route via litigation in Norway in order to obtain a judgment against the co-insurer in the United States.

The provisions also apply where a foreign person effecting the insurance enters into an agreement with a Norwegian leading insurer on Plan conditions. In such cases, it may nevertheless be practical to enter into a diverging agreement. In that event, the person effecting the insurance must obtain a written consent from the insurers as regards the question of jurisdiction as well as venue; in the event of a verbal agreement, letter (c) concerning the venue where the leading insurer's head office is located shall prevail, cf. subparagraph 2 and below. Nor is there anything to prevent the parties from agreeing in writing on the background law of another country. However, it must be emphasized that the Plan is very closely bound up with Norwegian insurance law, and that it will normally give rise to considerable difficulties to apply non-Scandinavian law as background law, although it will hardly cause any particular difficulties to apply, for example, Swedish or Danish instead of Norwegian law if the person effecting the insurance comes from another Nordic country.

Subparagraph 2 states that the provisions in subparagraph 1 may not be altered unless the insurer gives his written consent. The provisions taken from CEFOR Form 237 and applies both to agreements to use non-Norwegian background law and to use a different jurisdiction or venue.

Subparagraph 3 regulates insurance on Plan conditions with a foreign leading insurer and is taken from § 147 of the 1964 Plan. In such cases, it is not very natural to use Norwegian jurisdiction as a starting point. If the foreign leading insurer does not accept Norwegian venue, the assured may have to institute legal proceedings abroad. However, the solution from the 1964 Plan is maintained to the effect that Norwegian background law shall also apply in such a case. In the event of litigation abroad, the foreign court will therefore have to rely on Norwegian law, unless the parties have agreed that the background law of another country shall apply. Whether an explicit forum clause will also entail a reference to the substantive law of that country must be decided in accordance with general international rules of private law. The Plan also upholds the approach from § 147 of the 1964 Plan to the effect that the person effecting the insurance with a foreign leading insurer may sue the co-insurers in the leading insurer's venue, cf. subparagraph 3, i.f. However, in contrast to subparagraph 1, this is merely a right, and not a duty, of the person effecting the insurance. The provision is not only aimed at the leading insurer's general venue (home venue). It must also be possible to sue the co-insurers in all the venues where the leading insurer, according to law or contract, is obliged to accept lawsuits.

The Plan does not contain any explicit reference to the Commentary and its significance as a basis for resolving disputes. This is in keeping with the approach of the 1964 Plan. Nevertheless the Commentary shall still carry more interpretative weight than is normally the case with preparatory works of statutes. The Commentary as a whole has been thoroughly discussed and approved by the Revision Committee, and it must therefore be regarded as a part of the standard contract which the Plan constitutes.

## § 1-5. Period of insurance

This provision corresponds to § 4 of the 1964 Plan and ICA section 3. Subparagraph 4 was added in the 2003 version. **Subparagraph 4 was further amended in the 2007 version in connection with the amendment to § 12-2. Changes were also made in the commentary.**

The rule contained in subparagraph 1 is new and corresponds to ICA section 3-1, subsection 1, relating to term of liability. ICA contains in section 3-1, subsections 2 and 3, more detailed rules than § 4 of the 1964 Plan relating to the inception of the insurance. These do not fit in very well with marine insurance. This applies in particular to section 3-1, subsection 3, which governs the insurer's liability in those cases where it is clear that the request for insurance will be granted by the insurer.

Subparagraph 2 corresponds to § 4 of the 1964 Plan, but the wording is derived from ICA section 3-1, subsection 4. However, the time is tied to UTC (Coordinated Universal Time). This provision shall only apply if nothing else is agreed by the parties. If an insurance is transferred upon termination from one insurer to another, it is important that the parties take into account any differing hours in the insurance conditions in order to avoid creating periods of time with no cover.

ICA section 3-4 provides that the insurer cannot reserve the right to amend the conditions during the insurance period. However, this is not a mandatory rule for marine insurance. If the insurer wants to make such a reservation, this will accordingly take precedence over the rule contained in ICA.

The rule contained in subparagraph 3 is new, and relates to ICA section 3-6, which sets out the rule concerning the insurer's duty to give notice if he does not wish to renew the insurance. Failure to give notice results in the insurance contract being renewed for one year. In marine insurance the insurer should, however, be free to decide whether or not to renew the insurance, see first sentence, which introduces a reversed point of departure in relation to ICA. The insurance is terminated unless otherwise agreed. The reference to section 1-2 entails that the rules relating to documentation and the duty to file complaints are correspondingly applicable in the event of a renewal.

The question of an extension of the insurance when the ship has sustained damage which must be repaired with a view to seaworthiness and it is uncertain whether the assured is entitled to claim for a total loss is governed by § 10-10 and §11-8.

Rules relating to extension where the insurance terminates because of notice of termination or certain other circumstances are included in the relevant rules on termination, see § 3-14, subparagraph 2; § 3-17, subparagraph 1, third sentence; and §3-27. The duration of a voyage insurance is regulated in § 10-9.

If the ship has changed hull insurer and there is doubt as to whether damage is to be covered by the former or latter insurer, the question will normally have to be decided on the basis of the rules contained in § 2-11. Both insurers will, in that event, be obliged to make a proportionate payment on account, cf. § 5-7.

Subparagraph 4 was added in the 2003 version, and **a further addition was made to it in the 2007 version. The provision** solves a previously controversial issue concerning the period of insurance in connection with multi-year policies. Insurance normally runs for one year at a time, and many of the provisions in the Plan stipulate an insurance period of one year. Recently, however, multi-year policies have become increasingly common, giving rise to the question of whether the insurance period is to consist of the entire term of the policy, or whether the point of departure is to be an insurance period of one year.

The provision states that if the parties have agreed that the insurance is to attach for a period longer than one year, the insurance period shall nevertheless be deemed to be one year in relation to certain provisions. This applies to § 2-2 regarding the calculation of insurable value, § 2-11 regarding incidence of loss, § 5-3, last subparagraph, regarding calculation of rates of exchange, § 5-4, subparagraph 3, regarding calculation of interest on the compensation, § 6-3, subparagraph 1, regarding payment of premium in the event of total loss, **§ 12-2 regarding the right to cash compensation**, § 16-4, subparagraph 2, regarding calculation of the loss of time and § 16-14 regarding liability for repairs carried out after expiry of the insurance period. Further comments on the rule may be found under the respective provisions.

If the insurance period has been fixed in full years, the provision poses no problem. Starting from the time the insurer's liability attaches, the total period is then divided into two or more one-year periods. In practice, however, one finds examples of insurance periods consisting of one or more

full years with additional months, e.g. 1 ½ years, or 3 years and 3 months. In these cases, too, each full year or 12-month period is calculated individually from the date on which the insurance was effected; the “extra” time that does not constitute a full year then becomes a separate insurance period consisting of the relevant number of months.

On the other hand, the entire term of the policy must be regarded as the basic insurance period in relation to § 6-4 and § 6-5 of the Plan regarding the increase/reduction of premium, and § 10-10 and § 11-8 regarding extension of the insurance. The same applies with regard to the question of renewal, cf. § 1-5, subparagraph 3, and § 17-2. Under the 2003 version, this also applied to § 18-10 regarding the right to compensation for damage to offshore structures. However, the provision in § 18-10 was deleted in the 2007 version because it was rendered superfluous by the general rule regarding the right to compensation that was added in § 12-2 of the 2007 version. In relation to § 12-2, it has been decided that the “end of the insurance period” means the end of a one-year period, cf. the commentary on this provision.

The main rule, therefore, is to divide up the total term of the policy into several insurance periods or periods of one year in relation to certain provisions, while otherwise retaining the basic principle that the insurance period is the entire term agreed upon in the policy.

This provision only applies where an insurance period longer than one year is agreed. If an insurance period shorter than one year is agreed, this shorter period also applies in relation to the aforementioned provisions

## Chapter 2.- General rules relating to the scope of the insurance

### *Section 1 -Interest and insurable value*

#### General

This section corresponds to the 1964 Plan chapter 2, section 1.

§ 5 of the 1964 Plan contained a provision as to what interests were deemed to be covered. This provision has been deleted; the scope of the relevant insurance will appear from the rules relating to the individual lines of insurance. It is nevertheless not the intention to change the reality behind the provision, viz. that it is not the object itself, but the assured's economic interest in the object, which is covered by the insurance. The interest terminology is a practical means of creating flexibility and variation in the insurance. In particular, it must be emphasized that it is possible to let several persons insure each their separate interest in the object (e.g., owner and mortgagee), and it is relatively simple to state the items of loss in respect of which the assured may claim cover under each individual insurance (the interest in the ship's capital value is covered by hull insurance, the income interests by freight insurance).

However, attention should be drawn to the fact that the word "interest" is also used with a somewhat different meaning in marine insurance, viz. as a designation of certain capital or income interests which are not covered by the ordinary hull or freight insurance, cf. chapter 14 relating to hull and freight interest insurances.

#### § 2-1. Insurance unrelated to any interest

This provision is identical to § 6 of the 1964 Plan.

The provision establishes the traditional precondition for a valid insurance contract, i.e. that the assured must have an economic interest in the subject-matter insured. A "gambling insurance", where it has been clear from the outset that no insurable interest existed, is therefore invalid. Similarly, the assured must be precluded from invoking the insurance after the interest is no longer in his hands, for example, when the ship is definitely condemned in prize or passes to a new owner. Nor will the new owner of the ship normally acquire the position of assured under the insurance contract, cf. § 8-1, subparagraph 1, to the effect that the assured must be specifically named in the contract, and cf. § 3-21 relating to change of ownership.

The question regarding insurance unrelated to any interest is not currently regulated in ICA, but the same result follows from section 12 of Act no. 11 of 22 May 1902 relating to the coming into force of the penal code (Straffelovens ikrafttredelseslov). The fact that the corresponding provision has been lifted out of ICA could be an argument in favour of it also being deleted from the Plan. There is a need for some information on the interest as the subject-matter of insurance in the Commentary regardless, however, and the provision should therefore remain for pedagogical reasons, particularly with regard to those assureds who are not familiar with the Norwegian market.

The provision is based on the traditional principle that it is not the object itself, but the assured's economic interest in the object, which is the subject-matter of the insurance. It is, however, difficult to determine the requirements the interest must meet in order to be insurable. A point of departure may be that it must be possible to base the interest on any existing economic relationship between the assured and the ship (owner, mortgagee, charterer, user, requisitioner). Further, the interest must have economic value so that the assured will suffer an economic loss if the interest is destroyed. However, a certain margin must be given for subjective assessments in the valuation of the interest. Accordingly, it is not a requirement that the interest must have a value which is measurable according to objective criteria. When assessed insurable values are used, the assured's own assessment of the interest must carry substantial weight. The necessary guarantee against abuse is implicit in the rules relating to revision of the valuation, cf. § 2-3.

The provision contained in § 2-1 does not solve the question whether the interest is "legal", cf. former ICA section § 35, currently NL 5-1-2. This question is essentially solved in the Plan through § 3-16 relating to illegal activities. If the legality of the assured's interest is at issue in relation to other matters than the use of the vessel for illegal purposes, the question must be decided on the basis of the criteria that apply generally in insurance law, cf. NL 5-1-2. In the application of the rule, due regard must be had to the nature of the provisions that are breached, the extent of the illegal activities, the extent to which the assured is aware of the facts, the connection between the illegal matter and the interest insured, and whether there is causation between the illegal situation and the damage.

## § 2-2. Insurable value

This provision is identical to § 7 of the 1964 Plan.

The provision that the insurable value is the full value of the interest at the inception of the insurance differs from general insurance law, where the insurable value is determined at the time of loss, cf. ICA section 6-1. The reason for the special rule in marine insurance was that it might be difficult to determine the value at the time of loss if the ship was far away. With today's communications systems, it will cause no problems to determine the value at the time of the loss, regardless of where the ship might be. Nevertheless, the traditional solution in marine insurance has been maintained on this point.

Further rules governing the time for the "inception of the insurance" are contained in § 1-5 of the Plan. The time poses no problems for ordinary insurance policies with a term of one year. If it has been agreed that the insurance is to attach for a period longer than one year, it follows from § 1-5, subparagraph 4, which was added in the 2003 version, that the insurance period is to be deemed to be one year in relation to § 2-2. This means that the wording "inception of the insurance" refers to the inception of the one-year period during which the casualty occurs.

As regards some interests, the value will be explicitly regulated in the various insurance conditions. This is not the case with hull insurance, in which it is the market value which forms the basis for the calculation of the insurable value.

In loss-of-hire insurance, cf. chapter 16, it seems more natural to have an insurable value for the anticipated daily income, cf. § 16-5, and tie the total limitation of the insurer's liability to a certain number of days.

## § 2-3. Assessed insurable value

This paragraph corresponds to § 8 of the 1964 Plan ICA section 6-2.

The provision regulates the extent to which an assessed insurable value is binding on the insurer. Hull insurances and hull interest insurances are, in practice, always effected with an assessed insurable value. In loss-of-hire insurance as well, valuation is very often used in one form or another. For the shipowners, it is important that a valuation is unconditionally binding on the insurer: an expanding shipowner's building programme is based on the ships' current freight income or, if a ship is lost, on its sum insured, and also the mortgagees need to know that they can rely on the hull valuation.

Under § 8 of the 1964 Plan the valuation was not binding on the insurer if the person effecting the insurance had given misleading information concerning the properties of the objects insured which it was important for the insurer to know of in connection with the valuation. This has been changed to the effect that the insurer may only demand that the valuation be set aside "if the person effecting the insurance has given misleading information" about the relevant facts. The wording in the 1964 Plan was prompted by the prohibition against enrichment previously found in ICA section 75, subsection 3, cf. section 39, subsection 1, and was worded in such a way that it did not directly take any stance as regards the possibility of setting the valuation aside in cases other than when misleading information had been given. However, this was subject to the assumption that the provision would be interpreted antithetically, so that no revision of the valuation could take place unless misleading information had been given. The prohibition against enrichment has now been lifted, and the rule contained in § 2-3 has been rephrased in order to more clearly emphasize the principle that the valuation is binding. The reality of the new provision corresponds to ICA section 6-2, first sentence, but the wording is slightly different.

The provision applies to all types of insurance. The term "the subject-matter insured" must therefore in this connection be interpreted to be synonymous with "the interest insured".

Under this provision, the insurer may challenge the valuation even if the person effecting the insurance has given his information in good faith. As regards the determination of the valuation, the insurer should have an unconditional right to be given correct information, and the risk of any errors should lie with the person effecting the insurance.

If misleading information has been given about the properties which are material to the valuation, the valuation will be "set aside". This means that the agreed valuation ceases to be in effect in its entirety, so that the value of the object insured must be determined according to the rule relating to open insurance value in § 2-2, i.e. the full value of the interest at the inception of the contract. It is, in other words, not sufficient to reduce the valuation to the highest amount that would have been acceptable without conflicting with § 2-3.



In ICA section 6-2, second sentence, reference is made to the rules relating to the duty of disclosure in the event that the person effecting the insurance has given incorrect information of importance for the valuation. In marine insurance, however, the rules relating to the duty of disclosure in §§ 3-1 et seq. are not applicable to misleading information which is only of importance for the determination of the valuation. The consequences of the misleading information in such cases are exhaustively regulated in § 2-3; there is no need for further sanctions in the form of exemption from liability or cancellation of contract as allowed by the rules relating to the duty of disclosure. However, in the event of fraud, it follows from general rules of contract law that the agreement is void. And if information has been given which is misleading in relation to the valuation as well as significant for the actual effecting of the insurance, the insurer will obviously, in addition to a reduction of the valuation, have the right to invoke §§ 3-1 et seq. concerning exemption from liability for damage and, possibly, cancellation of the insurance.

The provision only regulates the setting aside of an excessively high valuation. The insurer should not have the right to demand that a valuation which is clearly too low be set aside with the effect that under-insurance will arise in the event of partial damage. Such a demand will hardly have any legitimate basis: to cover repair costs he has received a premium (casualty premium), which is, in principle, determined on the basis of the size, type and age of the ship, independently of the valuation.

Subparagraph 2 is taken from § 158 of the 1964 Plan, which authorized cancellation in the event of market fluctuations which resulted in material changes in the value of the ship. In practice, this provision was not applied. However, it has been customary for the shipowners to carry out ongoing assessments of the value of the ship during the insurance period, and for the fixed valuation to have been changed on the basis of negotiations in so far as it is no longer concordant with the value of the ship. The provision is based on this practice and establishes that both parties shall, in the event of a change in the value of the insured interest resulting from fluctuations in the economy, have the right to demand an adjustment of the assessed insurable value. It is only the valuation which can be changed in this manner; the insurance contract remains in force. In contrast to § 158 of the 1964 Plan, this provision applies to all forms of owner's insurance and not just to hull insurance.

If the parties do not agree whether or not the conditions for an adjustment of the valuation are met, or about a new valuation amount, subparagraph 3 provides that the decision shall be made by a Norwegian average adjuster designated by the assured.

#### § 2-4. Under-insurance

This paragraph is identical to § 9 of the 1964 Plan and corresponds to ICA section 6-1.

The provision maintains the principle of under-insurance if the sum insured is less than the insurable value, which means that the insurer shall merely compensate the part of the loss that corresponds to the proportion that the sum insured has to the insurable value, cf. first sentence.

Until 1989, the Plan rule relating to under-insurance was in accordance with the non-mandatory point of departure in section 40 of ICA 1930. The main rule in ICA has now been amended to insurance on first risk, section 6-1, subsection 1: "Unless otherwise provided in the insurance contract, the assured is entitled to full compensation for his economic loss". However, most non-marine insurance conditions maintain the principle of under-insurance. The Committee considered whether the solution in ICA should be followed in marine insurance, but reached the conclusion that the most expedient thing to do is to maintain the traditional point of departure of under-insurance. This is particularly due to the fact that, in marine insurance, co-insurance is normal, and that the combination of the first-risk principle as a non-mandatory point of departure and the pro-rata principle for co-insurance seems unnecessarily complicated.

In so far as the insurable value has been assessed, the question of under-insurance will have already been determined when the insurance is effected. Furthermore, the rule relating to under-insurance does not apply merely to the actual compensation, but also to the insurer's right to take over proceeds and claims for damages against third parties. This appears from § 5-13, subparagraph 2, and § 5-19, subparagraph 1, second sentence.

In relation to co-insurance, the rule applies only to co-insurance in the form of several parallel insurances where each individual insurer becomes liable for that proportion of the sum insured for which he is liable in relation to the aggregate insurable value. If the co-insurance is effected in the form of insurances in several layers, each layer must be regarded as an independent interest. It is therefore necessary to calculate a separate insurance value for each layer and look at the sum insured within the relevant layer in relation to the insurable value for that particular layer. The

rules relating to under-insurance are applicable to co-insurers within the same layer, but not to the relationship between several co-insurers who are each liable for their own layer.

The provision contained in § 2-4 does not regulate the question of the co-insurers' liability in the event of collision damage, in view of the fact that there is no insurable value for such liability. However, it is generally assumed that the distribution of liability among the co-insurers must be based on the hull value. It is not the intention to make any amendments to this principle in the revision.

#### § 2-5. Over-insurance

This provision is identical to the provision in § 10 of the 1964 Plan. The same result follows indirectly from ICA section 6-1, subsection 1.

Subparagraph 1 is identical to the earlier provision and requires no comments. Subparagraph 2 relating to fraud is not found in ICA, but is in accordance with non-marine insurance conditions.

#### § 2-6. Liability of the insurer when the interest is also insured with another insurer

The provision corresponds to § 11 of the 1964 Plan and ICA section 6-3.

Subparagraph 1 establishes the principle of primary joint and several liability in the event of "double insurance", i.e. when the same peril is insured with two or more insurers, and corresponds to the rule contained in § 11 of the 1964 Plan. Basically it corresponds to ICA section 6-3, subsection 1: "If the same loss is covered by several insurances, the assured may choose which insurances he or she wishes to use until the assured has obtained the total compensation to which he or she is entitled". However, the wording of ICA does not rule out subsidiarity clauses (clauses to the effect that one insurance is subsidiary in relation to another), while there is a desire in marine insurance to keep the door open for such clauses, cf. subparagraph 2 below. The earlier term that the insurer is liable "according to his contract" has therefore been maintained.

Subparagraph 1 is applicable to three situations. In the first place, it applies to double insurance in the form of ordinary co-insurance. Here the individual sums insured will in the aggregate correspond to the valuation and each individual insurer will be fully liable according to his contract, regardless of the fact that other insurances have also been effected (cf., however, chapter 9, where a number of aspects of the internal relationship between the co-insurers are regulated).

In the second place, the provision becomes significant when there is "double insurance" in the traditional sense, i.e. where several parallel insurances are effected which in the aggregate will give the assured more compensation than the loss he has suffered. The provision in § 2-6 establishes that, in this case as well, the insurers are primarily jointly and severally liable to the assured within the framework of the compensation to which he is entitled. The further settlement between the insurers is regulated in more detail in § 2-7.

The third situation where there is double insurance is when a loss is covered partly under the primary cover of an insurance, partly as costs to avert or minimise the loss under another insurance. In principle, this loss should be covered under the insurance which covers costs to avert or minimise the loss, cf. below under § 2-7. But also here the assured must initially be entitled to claim damages from both insurers according to § 2-6.

The size of the compensation to which the assured "is entitled" will depend on the insurance conditions. If the conditions authorize cover of varying amounts, it is the highest amount which is decisive for the size of the claim. Until the assured has recovered this amount, he may bring a claim against any of the insurers he wishes within the terms of the conditions which the relevant insurer has accepted.

The provision contained in subparagraph 1 is only applicable in the event of a conflict between two insurances covering the same peril. Hence, a conflict between an insurance against marine perils and an insurance against war perils is not a double insurance according to § 2-6. Nor is it double insurance if the cover is divided into several layers. In the event of layer insurances, each layer must, as mentioned above in § 2-5, be regarded as an independent interest. The insurer under one layer therefore does not become jointly and severally liable with the insurer under another layer, and a loss cannot be transferred from one layer to another if the insurer under one layer is, in exceptional cases, unable to cover a loss.

Subparagraph 2 is new and regulates the settlement if one insurance has been made subsidiary. The rule here is that the insurer who has subsidiary liability is only liable for the amount for which the assured does not have cover with other insurers. It should be superfluous to say this in the Plan text; the solution follows from the actual subsidiarity principle and does not give rise to any

particular problems. However, because of the special rule contained in subparagraph 3, see below, an explicit provision was found to be the most expedient.

If several insurances are made subsidiary, there is a risk that the assured may be left without settlement because both or all of the insurers may invoke their subsidiarity clauses. Accordingly, in such cases, there is a need for a rule to protect the assured. A rule of this type was previously contained in section 43 of ICA 1930, which imposed on the insurers a primary pro-rata liability or, in the alternative, joint and several liability. This provision was considered unnecessary under the system in ICA 1989. During the Plan revision, it was decided that in such cases a primary joint and several liability should be imposed on the insurers vis-à-vis the assured, see subparagraph 3, which makes subparagraph 1 similarly applicable.

§ 14 of the 1964 Plan contained a provision relating to the duty of the person effecting the insurance to disclose any other insurances he might have. The provision corresponded to section 44 of ICA 1930, which was deleted in the revision of ICA in 1989, inter alia on the grounds that the general provision relating to the duty of disclosure of the person effecting the insurance was sufficient to regulate the situation. The same will apply in marine insurance; furthermore, § 2-5, subparagraph 2, relating to fraudulent over-insurance applies. The provision has, therefore, been deleted. If the insurer in a recourse settlement should need to know about other insurances, he can ask the person effecting the insurance after the loss has occurred.

§ 2-7. Recourse between the insurers where the interest is insured with two or more insurers

This paragraph corresponds to § 12 of the 1964 Plan and ICA section 6-3, subsection 2.

Subparagraph 1 maintains the principle from § 12, first sentence, of the 1964 Plan of a proportional apportionment among the insurers in the recourse settlement. The formulation is, however, somewhat simplified in relation to the 1964 Plan and corresponds to the wording of ICA section 6-3, subsection 2: "If two or more insurers are liable for the assured's loss according to subsection 1, the compensation shall be apportioned on a pro-rata basis according to the extent of the individual insurer's liability for the loss, unless otherwise agreed between the insurers". The 1964 Plan furthermore contained an assumption to the effect that "the total amount of the compensations for which the insurers, each according to his contract, would be liable in respect of the same loss" exceeded the compensation to which the assured was entitled. This condition is obvious and has therefore been deleted.

Subparagraph 1 regulates the internal settlement among the insurers in case of "double insurance" in the traditional sense, i.e. that the same interest is insured against the same peril with several insurers in such a manner that the total amount of the assured's claims in connection with a certain loss exceeds the compensation to which he is entitled. When the assured has received what he is entitled to, the total amount of compensation shall be apportioned among the insurers according to the maximum amounts for which each of them was liable. This is an entirely internal settlement which does not concern the assured.

Within the individual type of insurance double insurance is not likely to arise very frequently. It would be by sheer accident that, for example, a shipowner were to take out hull insurance in excess of the valuation, or cover voyage freight twice. § 13 of the 1964 Plan contained a provision granting the assured the right to demand a proportional reduction of the sum insured in such situations. It has apparently not been applied in practice, and no corresponding rule is contained in ICA. This provision has therefore been deleted.

If a salvage operation concerns different interests covered by different insurers, there will seemingly be double insurance as regards costs of measures to avert or minimise the loss. However, here the rules in § 2-6 and § 2-7 are not applied; according to § 4-12, subparagraph 2, each of the insurers is only liable for that part of the costs which is attributed to the interest which he insures; in other words, there is no question of any apportionment under the rules of double insurance.

§ 12, subparagraph 1, second sentence, of the 1964 Plan contained a rule to the effect that if an insurer was unable to "pay his share of the compensations, it is to be apportioned over the others according to the above rules, but each insurer is never obliged to pay more than the amount for which he was liable to the assured". A similar provision in section 42, subsection 1, last sentence, of ICA 1930 was deleted in ICA, because it was regarded as unnecessary to encumber the statutory text with such detailed rules. The provision in the 1964 Plan is not referred to in the Commentary, and it has apparently not given rise to any problems in practice. It has therefore been deleted, also because the solution of a primarily pro-rata, in the alternative joint and several, liability follows from section 2, subsections 2 and 3, of Act no. 1 of 17 February 1939 relating to

instruments of debt (gjeldsbrevsloven) anyway, and must be considered to be the main rule relating to recourse liability in Norwegian property law.

The provision in subparagraph 2, is new and is attributable to the fact that joint and several liability is introduced for the insurers if all of them have reserved the right to subsidiary liability to the assured. In that event, a recourse settlement among the insurers will be necessary if one or more of them have initially been charged a higher amount than what their proportionate obligation indicates.

Subparagraph 3 regulates double insurance where a loss is partly covered by the primary cover of an insurance and partly by another insurance's cover of costs of measures to avert or minimise the loss. A corresponding regulation is contained in the hull insurance conditions, cf. CEFOR 1.4 and PIC § 5.10. In such cases, the loss should be covered under the insurance which is liable for costs of measures to avert or minimise the loss. It would therefore not be natural to apply the recourse rules contained in § 2-7, subparagraph 1, to this situation, cf. subparagraph 3, first sentence, which establishes that the insurer who covers costs of measures to avert or minimise the loss shall, to the extent of his liability, bear the full amount of compensation payments in the recourse settlement. If the insurer who covers costs of measures to avert or minimise the loss has explicitly made his liability subsidiary in relation to other insurers, this must be respected in keeping with the solution in § 2-6, subparagraph 2. If both the primary insurer and the insurer of costs of measures to avert or minimise the loss have reserved the right to full recourse against the other insurer, the situation will be as if both have declared subsidiary liability. The final loss must then be placed with the insurer who is liable for the costs of measures to avert or minimise the loss - so that the primary insurer will have full recourse against the insurer of costs of measures to avert or minimise the loss if he has initially had to compensate the assured's loss, cf. subparagraph 3, second sentence.

## *Section 2 - Perils insured against, causation and loss*

### General

This section deals with five problems of vital importance in marine insurance:

- (1) the question of the extent of the perils covered under marine insurance; i.e. whether there are perils of a general nature which must be excluded in all types of insurances;
- (2) definition of war perils and the scope of the liability of the insurers who cover marine and war perils, respectively;
- (3) the question of whether to apply the apportionment rule or the dominant-cause rule in cases of concurrent causes;
- (4) duration of the insurer's liability; the question of how to adapt the general maxim of insurance law that the insurer shall only be liable for losses which occur during the insurance period;
- (5) the principles for dividing the burden of proof between the insurer and the assured.

### § 2-8. Perils covered by an insurance against marine perils

**Letter (d) was amended in the 2007 version. The clause is otherwise identical to earlier versions of the 1996 Plan.** In accordance with former law, an insurance against marine perils covers "all perils to which the interest may be exposed", cf. subparagraph 1, first sentence. This paragraph stipulates four positive exceptions from this point of departure, viz.:

- (1) perils covered by war insurance,
- (2) "intervention by a State power",
- (3) "insolvency", and
- (4) "release of nuclear energy".

**In accordance with the traditional solution in marine insurance**, the perils are divided into two groups. A distinction is made between perils covered by the insurers against ordinary marine perils and perils covered by the insurers against war perils. The division is formally made by means of an exclusion of perils in the insurance against marine perils, cf. § 2-8 (a), and a cover of the excluded perils through a special war-risk insurance, cf. § 2-9. However, in reality the marine and war-risk insurances are two equal types of insurances on the same level which - with a few minor exceptions - each cover their part of a total range of perils. The perils covered by the war-risk insurance are specified, while the range of perils covered by the insurance against marine perils is negatively defined, covering any other form of perils to which the interest is exposed.

Because there is a negative definition of the range of marine perils, it is in reality described by reviewing the relevant exceptions. Such a review is given below, along with an overview of certain points where exceptions have been considered. However, initially it is deemed expedient to give a brief overview of the positive content of the range of marine perils, see for further details Brækhus/Rein: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), pp. 49-54.

An insurance against marine perils covers, in the first place, perils of the sea and similar external perils. Perils of the sea mean the perils represented by the forces of nature at sea seen in conjunction with the waters where the ship is sailing. Typical examples of these perils are where the ship runs aground, collides in fog, suffers heavy-weather damage or is broken down by wind and sea and goes down. Other external perils may be earthquakes, volcanic eruptions, lightning, etc.

Secondly, an insurance against marine perils covers perils in connection with the carriage of goods or other activities in which the ship is engaged. The cargo carried by the ship may threaten its safety; similarly, passenger traffic may entail special elements of perils.

Thirdly, weaknesses in the ship and similar "internal perils" are in principle regarded as perils covered by an insurance against marine perils. However, there are a number of exceptions and modifications here; in hull insurance, § 12-3 and § 12-4 thus constitute a significant curtailment on cover.

Fourthly, injurious acts by third parties will basically be perils that are covered by an insurance against marine perils. These may be collisions, explosions, fire or the like, which arise outside the insured ship, etc. It is irrelevant whether or not the person causing the damage is blameworthy; damage caused intentionally will also be covered. One important type of injurious act by a third

party will nevertheless be excluded from the cover against marine perils, viz. interventions etc. by a State power; such acts will instead to a large extent be covered by the war-risk insurance, see § 2-9, subparagraph 1 (b).

Finally, errors or negligence on the part of the assured or his employees will, in principle, be covered by an insurance against marine perils. However, there are important limitations to this cover. Most of the rules of this type are compiled in chapter 3.

Subparagraph 1 (a) excludes from the range of perils covered by an insurance against marine perils “perils covered by an insurance against war perils under § 2-9”. The perils thus excluded appear from § 2-9 and the relevant part of the commentary on that provision. As § 2-9 shows, the extent of an insurance against war perils may depend on where the ship is insured (with the Norwegian Shipowners’ Mutual War Risks Insurance Association or somewhere else), and where the ship is registered (in Norway or somewhere else). It is, however, clear that whether the ship has war-risk cover in one form or the other under § 2-9 will not affect the insurance against marine perils; the insurance against marine perils will thus not be extended if the ship does not have the maximum cover against war perils under § 2-9.

It has not been unusual for a ship to have hull insurance on Norwegian conditions against marine perils and on English conditions against war perils, and vice versa. There is reason to believe that such insurance practice will continue under the new Marine Insurance Plan. Such combinations entail a risk that the person effecting the insurance may have double insurance on the one hand and gaps in the cover on the other. Also, as it appears from § 2-8 and § 2-9, there are admittedly certain gaps in the system of cover, but these are gaps that are normally uninsurable. Furthermore, the entire purpose of § 2-8 and § 2-9 has been to make a co-ordinated system without double insurance or gaps. It would probably be safe to say that overlapping insurances are less dangerous to the person effecting the insurance than insurances with gaps in the cover. In the event of overlapping insurances, one “merely” risks having to pay additional premiums for the overlapping factor, whereas gaps in cover may entail the risk that the assured is left wholly or partially without cover. A few examples will show the gaps in the cover that may be the result of an injudicious combination of Norwegian and English conditions. It follows from § 2-8 (a), cf. § 2-9, subparagraph 1 (d), that piracy is regarded as a war peril and is consequently covered by insurances against war perils according to the Plan. Under English conditions piracy is - after some indecisiveness over the years - regarded as a marine peril, which means that a person with Norwegian insurance against marine perils and an English insurance against war perils will not be covered against piracy. Similarly, the Plan is based on a modified “dominant-cause” rule in the event of a combination of marine perils and war perils, see § 2-14, while English law in such a combination-of-perils situation would rely on a strictly “dominant-cause” criterion. If the person effecting the insurance has Norwegian insurance against marine perils and English insurance against war perils, he runs the risk that English courts will say that the marine peril must be regarded as “dominant”, and that the English war-risk insurer must consequently be free from liability, while Norwegian courts would perhaps reach the conclusion that both groups of perils must be deemed to have exerted equal influence on the occurrence and extent of the loss and, in keeping with § 2-14, second sentence, find the Norwegian insurer against marine perils liable for only 50% of the loss.

Subparagraph 1 (b) excludes from the marine perils “intervention by a State power”. It follows from § 2-9, subparagraph 1 (b), that an insurance against war perils covers certain types of intervention by a foreign State power, such as capture at sea, confiscation etc. **On the other hand, an ordinary war-risk insurance does not cover interventions in the form of requisition for ownership or use by a State power, cf. § 2-9, subparagraph 1 (b), last sentence.** It already follows from the exception in § 2-8 (a) that this type of intervention will not be covered by an insurance against marine perils. **However, if the ship is insured with the Norwegian Shipowners’ Mutual War Risks Insurance Association, the war-risk insurance will fully cover requisition for ownership or use by a foreign State power, cf. § 15-24 (a), and will provide limited cover for requisition for ownership or use by the State power in the ship’s State of registration or in the State where the major ownership interests are located, cf. § 15-27 (a). Requisition by a foreign State power was covered under the earlier versions of the 1996 Plans, but the limited cover for requisition by the ship’s “own” State power is new in the 2007 version. Neither the other war-risk insurers nor insurers against marine perils are prepared to assume corresponding cover. It is therefore necessary to maintain the exclusion in § 2-8 (b). Even if the wording now chosen results in a certain overlapping between (a) and (b), it clearly underscores the vital point, viz. that as a main rule the insurer against marine perils is not liable for interventions by State powers.**

As regards the definition of the term “State power” in (b), second sentence, reference is made to the commentary on § 2-9.

The term “intervention” is not defined in § 2-8; however, the use of the term in § 2-9, subparagraph 1 (b), cf. § 15-24 (a), and the commentary on those provisions provide the necessary background for understanding the term. Interventions made as part of the enforcement of customs and police legislation will thus, as a main rule, be covered by the insurance against marine perils to the extent the losses are recoverable in the first place. Because there might be doubt on one point as regards the extent of the term, subparagraph 1 (b), third sentence, contains a negative definition. Measures taken to avert or minimise a loss shall not be regarded as an intervention by a State power, provided that the risk of such loss is caused by a peril covered by the insurance against marine perils. This rule was introduced in Norwegian and English conditions after British authorities in 1967 considered bombing the “Torrey Canyon” following a casualty for the purpose of limiting the threatening oil spill. The way the rule is now worded, it is aimed not only at the pollution situation, but at any potential damage that the ship might cause, as long as the risk of the relevant damage can be traced back to a peril covered by the insurance against marine perils. There is no reason to believe that the wording of the Plan will entail any major extension. Frequently the costs of such measures will in any event be covered by the relevant insurer as costs of measures to avert or minimise the loss.

Subparagraph 1 (c) excludes “insolvency” from the range of perils of the insurer against marine perils. The exclusion applies to insolvency of the assured himself or a third party. A similar exclusion is also found in the range of perils of the insurer against war perils, see § 2-9, subparagraph 2 (a).

The typical loss resulting from the assured’s own insolvency is where the insurable interest is impounded by his creditors and sold at a forced action. The typical loss resulting from a third party’s insolvency is where the third party concerned is unable to meet his obligations to the assured, e.g., where a charterer suspends his payments, or where a building yard does not succeed in completing the ship.

It may at times be difficult to decide whether there is legally relevant causation between the insolvency and the casualty. If the ship is arrested as security for the shipowner’s debt and subsequently becomes involved in a collision or sustains damage during a storm, one might say that it would have avoided the collision or the heavy weather if it had not been delayed due to the arrest. However, there is nevertheless no relevant causation under insurance law between the arrest and the damage; the insolvency has merely been an external and completely accidental cause of the damage. The situation will be different, however, if the arrest in itself increases the risk that the ship may suffer a casualty. Thus, if the ship is arrested in late autumn in a port which will normally freeze over within a short period of time, and the ship sustains ice damage during departure, there may, in view of the circumstances, be a relevant causation between the arrest and the damage. In that event, the arrest will probably also be regarded as the only cause of the damage, and the rule relating to causation contained in § 2-13 would not be applied.

Subparagraph 1 (d) is new in the 2007 version, but tallies with the insurance conditions that have been applied in recent years. The provision was introduced as a result of the attitude of the reinsurance market as regards terrorism risk after the terrorist attack in New York on 11 September 2001. At that time the reinsurance market included the following clause in all reinsurance contracts (RACE II):

#### INSTITUTE EXTENDED RADIOACTIVE CONTAMINATION EXCLUSION CLAUSE

This clause shall be paramount and shall override anything contained in this insurance inconsistent herewith

1. In no case shall this insurance cover loss damage liability or expense directly or indirectly caused by or contributed to by or arising from

1.1 ionising radiations from or contamination by radioactivity from any nuclear fuel or from any nuclear waste or from the combustion of nuclear fuel,

1.2 the radioactive, toxic, explosive or other hazardous or contaminating properties of any nuclear installation, reactor or other nuclear assembly or nuclear component thereof,

1.3 any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter

1.4 the radioactive, toxic, explosive or other hazardous or contaminating properties of any radioactive matter. The exclusion in this sub-clause does not extend to radioactive isotopes, other than nuclear fuel, when such isotopes are being prepared, carried, stored, or used for commercial, agricultural, medical, scientific or other similar peaceful purposes.

### 1.5 any chemical, biological, bio-chemical, or electromagnetic weapon.

The insurance market insisted that corresponding provisions should be included directly in the wordings of individual insurance contracts. The Committee initially wanted to wait to include the clause in the Plan because they were uncertain as to whether it was a temporary reaction, or whether it would be permanent. Until 2006, therefore, the clause has been included in individual policies. Since there was still no sign that reinsurers were willing to assume the risks that are excluded in subparagraph 1 (d), the Committee considered it expedient to incorporate the exclusions in the Plan as from 2007.

The Committee considered “norwegianising” the clause in order to adapt it to the general structure of the Plan and the other clauses. Doing so would result in the simplification and generalisation of the more detailed, specific listing of exclusions in the English conditions. The reason why the clause has nevertheless been translated word-for-word into Norwegian in the Plan is, firstly, the desire to be entirely certain that the Norwegian exclusion clause is identical to the English clause. On the one hand, it is important to ensure that insurers do not have more extensive liability than they are able to have reinsured. On the other hand, an effort must be made to avoid making the Norwegian exclusion clause more comprehensive than the English reinsurance exclusions. The risk of such a situation arises from the fact that the detailed specification in the English conditions invites an antithetical interpretation, while a more general Norwegianised variant might include more than was intended. Secondly, cover should be reintroduced when and to the extent that it is possible to obtain reinsurance for it. This is simpler if the reinsurance can be linked to clauses with which the market is already familiar.

The basic principle in the Plan is that, in the event of a conflict between the Norwegian Plan text and the English translation, the Norwegian text shall have precedence. This does not apply in relation to § 2-9 (d). Here the point of departure is the English text, since it is identical to the underlying English clause. In the event of conflict between the Norwegian text and the English text, the English-language clause shall have precedence.

As far as nuclear risk is concerned, the new exceptions do not entail any material retrenchment compared with the 1996 Plan. The term “release of nuclear energy” in § 2-9, subparagraph 2 (b) of the 1996 Plan, in the narrow sense, means an atomic reaction or nuclear reaction involving the splitting or fusion of atoms. This corresponds to subparagraph 1 (d), nos. 2 and 3, of the 2007 version, which contains elements of the “normal” release of nuclear energy, i.e. the risk of a chain reaction (explosive release).

The term “release of nuclear energy” will also include radioactive radiation (released from an unstable atom). In a broad sense, the term also includes the toxicity and contamination of substances that are formed during and after such a “release”. This corresponds to subparagraph 1 (d), nos 1. and 4, of the 2007 version, which exclude the risk of radiation from various radioactive sources.

Subparagraph 1 (d), no. 4, last part, states that the exclusion also applies to radioactive isotopes from nuclear fuel, when such isotopes are being prepared, carried, stored, or used for peaceful purposes. This provision corresponds to no. 1.4, last sentence, of the English clause. Since the reinsurance market accepts this type of nuclear risk in peaceful activities, there is no reason not to include it in the Plan’s cover against marine perils.

Subparagraph 1 (d), no. 5, was also taken from the RACE II clause, which includes “biological, chemical, biochemical and electromagnetic weapons”. According to the English insurance market, the purpose of the wording “biological, chemical, biochemical” is to exclude nerve agents and viruses such as “sarin”, mustard gas, smallpox, etc. The formulation does not include explosives, or methods for detonating or attaching explosives. Nor does it cover use of the ship or its cargo for harmful purposes, unless the cargo itself constitutes a chemical or biological weapon that is covered by the clause. The term “electromagnetic weapon” refers to sophisticated mechanisms designed to destroy computer software, and not to methods for detonating or attaching explosives.

After 11 September 2001, the reinsurance market also introduced an exclusion for the use of computer technology for harmful purposes, the Cyber Attack Clause (CL 380). No such exclusion has been incorporated in the Plan because it is possible at present to reinsure this risk, and many insurers choose to do so. Insurers who do not have such reinsurance must therefore include this exclusion clause in their individual policies.

The wordings with regard to causation in the first paragraph of the English clause have been maintained by means of amendments to subparagraph 2 of § 2-13. The wordings as regard burden of proof have been incorporated in § 2-12.



One type of limitation of liability which must obviously be contained in every insurance is the one relating to negligence on the part of the person effecting the insurance or the assured. However, the crucial point here is that the assured's co-contractor, or someone else who derives a right from the insurance contract has breached its terms in a subjectively blameworthy way. The majority of the rules of this type are compiled in chapter 3.

There are also a number of other perils which insurers will normally not undertake to cover:

(1) Basically a marine insurance does not cover market fluctuations, i.e. a general decline in the market value of the interest insured. The assured cannot claim compensation merely on the grounds that due to the price trend, the object insured is not worth as much as he assumed it would be at the time the insurance was taken out. This already follows from the fact that the insurer's liability cannot be triggered without the occurrence of a casualty, i.e. an event which triggers liability under the conditions applicable in the relevant branch of insurance.

However, no general rule can be established to the effect that the assured will never be entitled to compensation for a loss resulting from a recession. The fact is that in many cases when an assured suffers a casualty the particular insurance conditions will provide him with compensation for a recession loss which he would otherwise have suffered. A clear example is the rule in § 2-2 to the effect that the insurable value is the value of the interest at the inception of the insurance. If ships' prices have fallen during the insurance period, the shipowner will, in the event of a total loss, obtain compensation for a value which he could not have obtained by selling the ship. In this light it would not be expedient to have a separate formal exclusion of perils in the event of a recession.

(2) Certain English conditions contain explicit exceptions for "loss through delay". However, it is not possible to establish such a general exception without getting into difficulties every time a delay has been the external cause of a recoverable loss.

Another matter is that the insurer does not, without an explicit agreement, cover "loss of time", i.e. a loss exclusively connected with the delay and increasing proportionally with that delay. Thus, as a general rule, the hull insurer will not be liable for the shipowner's general operating costs relating to the ship during repairs. This rule is worded as an exception in § 4-2. However, it should be noted that in certain cases the hull insurance does provide partial cover of loss of time; moreover, separate insurances are often taken out against loss of time (see Chapter 16).

(3) As a general limitation of the range of perils, it is sometimes stipulated that the insurer does not cover losses caused by the assured having entered into a contract with unusual conditions. As a rule, the loss will consist in the assured having undertaken to pay damages to a third party to a greater extent than he might have been held liable to pay under general rules of law or under common conditions in the trade in question. Such liability clauses may be found, for example, in contracts for towage or carriage of goods. The "unusual conditions" may also make it easier for a third party to cancel the contract (termination of a contract of affreightment by reason of force majeure) or to go back on an exceptionally high remuneration or other contractual advantages (e.g., in a contract for the repair of a ship). The loss may also consist of the assured renouncing a right of recourse which he would otherwise have had against a third party.

Questions of this nature should preferably be subject to special regulation in each individual area where contractual clauses may affect the insurer's liability. Such limitations of liability are incorporated in § 4-15 (liability clauses) and in § 5-14 (clauses relating to the waiver of rights to claim damages from a third party). With respect to contracts for the repairs of casualty damage to the ship, the hull insurer will get into the picture to such a great degree through the rules relating to surveys, invitations to submit tenders, approvals of invoices, etc., that he will be able to exercise the necessary control through that channel.

(4) The insurer will normally limit his liability if the interest insured is used to further an illegal undertaking. A similar limitation is implicit in the requirement that it must be a "lawful interest"; as mentioned above in § 2-1, however, it is difficult to specify exactly what this means.

In the Plan, illegal undertakings are regulated in § 3-16. Subparagraph 1 provides that the insurer is not liable for loss resulting from an illegal use of the ship of which the assured was aware and which he could have prevented. This limitation of liability is very moderate, requiring both causality and subjective blameworthiness of the assured himself or anyone with whom he might be identified (cf. below in Chapter 3, Section 6). However, this rule is supplemented by subparagraph 3 which provides that the entire insurance terminates if the ship, with the consent of the assured, is essentially used for the furtherance of illegal purposes.

(5) The purpose of insurance is to provide protection against unforeseen losses. The foreseeable loss in the form of maintenance, regular operating expenses, etc. must be covered by the assured

himself. The dividing line between which losses are “foreseeable” and which are “unforeseeable” is far from clear and may cause doubt in all branches of marine insurance. This question can hardly be solved by an explicit provision in the general part of the Plan, however.

The conditions of the various types of insurances contain a number of provisions which shed light on the dividing line between ordinary expenses and losses which are covered by the insurance. From hull insurance § 10-3 and § 12-3 should in particular be mentioned. The provision in § 10-3 excludes “loss which is a normal consequence of the use of the ship, its tackle and apparel”. §12-3 addresses damage due to wear and tear and similar causes. Costs of repairing a part which is worn or corroded are never paid by the insurer, but wear and tear is not an excluded peril. Casualties caused by wear and tear are therefore in the same category as other casualties. In other contexts as well, the provision goes far in imposing liability on the insurer for costs which, under the conditions in effect in other countries, would be regarded as operating expenses for the shipowner’s account. This will be discussed in further detail in Chapters 10 and 12.

#### § 2-9. Perils covered by an insurance against war perils

Subparagraph 2 was amended in the 2007 version, and subparagraph 3 was moved to § 15-24. Some additions were also made in the commentary on subparagraph 1. The provision was formally amended in the 2002 revision, when the term “acts of terrorism” was added in subparagraph 1 (c). The paragraph is otherwise in accordance with earlier versions of the 1996 Plan.

As mentioned in § 2-8, the total range of perils in marine insurance is divided into two. Separate insurances must be taken out against perils related to war and against general marine perils. In practice the terms “war perils” and “marine perils”, “war-risk insurance” and “marine-risk insurance” are used. The Plan has adopted this terminology and therefore uses the term “marine perils” to cover the “non-military” perils which occur in the shipping trade.

The Plan maintains the **traditional** division of the range of perils into war-risk insurance and marine-risk insurance. Due to the fact that the exception for war perils in marine-risk insurance relates to the range of perils in war risk insurance (cf. § 2-8 (a)), no gaps in cover will occur other than those that follow from explicit provisions.

Formally speaking, war perils constitute an exception in general marine insurance. The insurer against marine perils is liable for “all perils to which the interest insured is exposed”, with the exception of inter alia war perils. However, in war-risk insurance the range of perils is positively determined, and will (as a rule) comprise most of the perils excluded by the war-risk exception. However, this wording does not entail that general principles of insurance law, such as the principle that excluded perils should be subject to strict interpretation and that the insurer has the burden of proving that the loss is caused by a peril which is explicitly excluded from the cover, cf. § 2-12, subparagraph 2, shall apply. War-risk and marine-risk insurances shall in every respect be regarded as equal types of insurances on the same level. The excluded war peril shall not be subject to a strict interpretation to the disadvantage of the marine-risk insurers and, from an evidential point of view, there is no difference.

Subparagraph 1 of § 2-9 states the range of perils in war-risk insurance under four headings.

Subparagraph 1 (a) states the “classic” war peril. The crucial element is obviously the perils caused by a war in progress. To give an exhaustive enumeration of the events which may be relevant here is not possible. Primarily there is the use of implements of war by the powers at war (or neutral powers) - bombs, torpedoes and other conventional firearms, chemical or biological implements of war, and the like. If the damage is directly attributable to the use of such an implement of war used for the purpose of war, the loss is subject to the special causation rule contained in § 2-13, cf. below. But also otherwise, the use of implements of war may be the cause of a loss as, for example, when the ship has to pass through dangerous waters in order to avoid a mine field or, in order to stay away from an area where a sea battle or an air raid is taking place, and in the process runs aground.

An implement of war may be the cause of damage also after the war where the implement was used has ceased, e.g. where a ship runs into a mine. Also such damage shall be regarded as “a peril attributable to war”, regardless of whether or not the mine explodes. If the impact does not result in an explosion it may, however, be difficult to prove whether the impact is attributable to the implement of war or a common marine peril, e.g. a log. In that event the rule of apportionment in § 2-16 may have to be applied.

Generally, all such measures that are regularly taken by powers at war as well as by neutral powers and which affect shipping, such as the extinguishing of lighthouses, the withdrawal of old navigation marks and the putting out of new ones, the organising of convoys where the freedom to

manoeuvre is more or less restricted, orders to sail without navigation lights, etc., will constitute war perils, due to the fact that they are attributable to the war, cf. the wording of the Plan.

As for condemnation in prize, capture at sea, requisitions and the like undertaken for the purpose of war, and sabotage carried out to further the purpose of a power at war, these are perils directly attributable to the war and therefore come under the definition in § 2-9 (a). However, these perils are also covered by the special enumeration in letter (b); between (a) and (b) there will thus be an overlapping as far as war-motivated measures are concerned. However, if the measure is taken by the ship's own (not "foreign") State power, the special rule contained in letter (b) must prevail. Such measures will therefore fall outside the cover, regardless of whether or not they are war-motivated. If, in exceptional cases, the war-risk insurer has not accepted liability for the perils mentioned in letters (b) and (c), it will be a matter of construction to decide whether he must nevertheless be liable under letter (a) for war-motivated measures by a foreign State power and war-motivated sabotage.

The term "war-like conditions" is used to imply that the decisive point is not whether war has broken out or threatens to break out, but how war-like the measures are which a State has instituted. Whether there are "war-like conditions" may, of course, be difficult to decide, but in practice the term will hardly be of any great significance. As a rule, the loss will have been caused either by military manoeuvres or by measures taken by State power, and in either case it will be covered by the war-risk insurer, even if there are no "war-like conditions". If a ship which is in international waters or within the territorial borders of a foreign state, becomes the subject of a simulated or real air raid by the relevant foreign state, this must normally be regarded as a war peril. Exceptions are nevertheless conceivable where the action must be viewed as part of the enforcement of the relevant state's police or customs legislation, see below under letter (b).

The war-risk insurer is also liable for "the use of arms or other implements of war in the course of military manoeuvres in peacetime or in guarding against infringements of neutrality". The main problem here will be to decide when there is a case of "use of . . . other implements of war". If a ship collides with a naval vessel sailing in a perfectly ordinary manner, this will not constitute any use of implements of war. The same applies if, for example, a military plane crashes in a harbour due to engine trouble, or an ammunition depot blows up as a result of an ordinary "civilian" fire. The "use of implements of war" presupposes that the naval vessel (the aircraft, the ammunition) is used in a manner typical of its function as an implement of war, e.g., that during exercises the naval vessel disregards the rules relating to navigation at sea, that the aircraft crashes during dive-bombing exercises, or the ammunition stores blow up as a result of a failure to comply with the relevant safety regulations.

An important question is how to evaluate the mistakes which the crew makes under the influence of the war situation. A war will normally make navigation conditions much more difficult than in times of peace. More concentration and alertness are required of the crew (e.g., while sailing in waters where lighthouses and navigation marks are out of operation), and an insignificant and excusable misjudgement may easily have disastrous consequences. To this must be added that the physical and mental pressure involved in wartime sailing may easily cause exceptional fatigue or other indisposition among officers and crew.

In the extensive case law during and after World War II it was regarded as clear that any faults or negligence committed by the master or crew relating strictly to their service as seamen should be regarded as an independent peril which fell within the marine-risk insurer's area of liability. In this respect international tradition was followed. This approach was maintained in the 1996 Plan. Faults or negligence committed by the master or crew shall therefore be regarded as an independent causal factor, a peril which falls within the marine-risk insurer's area of liability. As the chances of faults and negligence being committed will, as a rule, be far greater in times of war than in times of peace because navigation is that much more difficult, this in actual fact means that also the marine-risk insurer must accept a general increase in risk owing to the war situation.

However, it is conceivable that faults or negligence on the part of the master or crew must be covered by the war-risk insurer, viz. where such fault or negligence is very closely bound up with the war peril or consists in a misjudgement of this peril. It is, for example, conceivable that the officers are exhausted after having been subjected to the pressure of war for a long period of time and, as a result thereof, make a clear navigational error, or that the crew leaves the ship under the misapprehension that there is an impending risk of war (cf. the "Solglimt case", Rt. 1921. 424). In practice, it is also conceivable that the reasons given for the judgment will be that the crew's conduct in the given circumstances must be regarded as excusable; in other words, that no actual "fault or negligence" has been committed.

Moreover, when applying § 2-9 (a), guidance will be found in the abundant case law relating to those ships that sailed in Norwegian and other German-controlled waters during World War II.

Subparagraph 1 (b) of § 2-9 of this paragraph deals with both measures that are related to a war in progress or an impending war, and those that have no direct connection with war or war perils. As mentioned above, strict war measures - such as condemnation in prize – will, according to the wording, also be covered as manifestations of the general war perils under letter (a). However, as a special provision, letter (b) will prevail.

The term “capture at sea” covers the situation where the insured ship is stopped at sea by a battleship or some other representative of the relevant State power using power or threatening to do so, and taken into port for further control.

The term “condemnation in prize” means an appropriation of the ship without compensation by a warring power invoking international or domestic confiscation-in-prize rules.

The term “confiscation” is an appropriation of the vessel by a State power without compensation.

The term “requisition” is also an enforced acquisition of the ship by government authorities, but the difference between requisition and confiscation is that, in principle, compensation is payable for the loss caused by the acquisition. This means that requisition is in actual fact the same as expropriation. As will appear from letter (b), third sentence, requisition for ownership or use will, as a rule, not be covered by a war-risk insurance. If the relevant ship is insured with The Norwegian Shipowners' Mutual War Risks Insurance Association, however, § 15-24 (a) provides that requisition by a foreign State power will be covered according to the normal rules, and § 15-27 (a), cf. § 15-31, provides for limited cover for requisition by a State power in the ship's State of registration or in the State where the major ownership interests are located.

Requisition as an intervention typically occurs in times of war or in times of war-like conditions, or during a political crisis. A general criterion for defining requisition as a war peril is therefore that the intervention is politically motivated. If the State expropriates the ship for other reasons, for instance, pursuant to quarantine provisions to prevent the spread of a virus, this does not constitute “requisition” in accordance with this provision.

The term “other similar interventions” indicates that the enumeration in letter (b) is not exhaustive, and that also other types of interventions by a State power may be included. At the same time, the term implies a limitation as regards the nature of the interventions covered. The wording is aimed at excluding from the war-risk cover the types of interventions that are made as part of the enforcement of customs and police legislation. The war-risk insurance therefore does not cover losses arising from the ship being detained by the authorities because there may be doubt as to her seaworthiness, or because the crew is suspected of smuggling. Obviously, losses arising from the ship being detained or seized as part of debt-recovery proceedings against the owners are not covered, either. This follows from the fact that “insolvency” has been excluded in subparagraph 2 (a). This means that losses arising from measures taken by the police authorities must be covered by the ordinary marine-risk insurance to the extent that these losses are recoverable, cf. the comments above on § 2-8 (b). The loss will often consist of loss of time or general capital loss, for which the insurer is not liable. However, assuming, for example, that the vessel sustains damage during an extensive customs examination, the hull insurers against marine perils must cover the damage, provided that the examination was not caused by the assured's own negligence.

That difficult borderline problems may arise is demonstrated by two arbitration awards (the Germa Lionel award and ND 1988.275 the Chemical Ruby), and a case that was settled (the Wildrake case). All of these are cited and commented on in Brækhus/Rein: Håndbok i kaskoforsikring (Handbook of Hull Insurance), pp. 73-76. These decisions show that cover under the war-risk insurance is contingent on the shipowner being divested of the right of disposal of the ship, the authorities clearly exceeding the measures necessary in order to enforce police and customs legislation, and the intervention being motivated by overall political objectives. Under the 1964 Plan, insurance against war perils did not cover interventions by Norwegian authorities, or by authorities of countries allied with Norway. However, under the definition in the paragraph of “a foreign State power”, interventions by persons or organisations who unlawfully passed themselves off as a Norwegian or allied State power (e.g., a Quisling government) were covered by the war-risk insurance. During the revision of the 1996 Plan, the issue of whether it would be possible to extend the war-risk cover to include interventions from Norwegian or allied State powers was considered. However, The Norwegian Shipowners' Mutual War Risks Insurance Association and the other war-risk insurers reached the conclusion that it would be difficult to cover interventions from Norwegian government authorities. One thing was that the existence of such an insurance might

easily influence the assured's position in relation to the authorities. According to ordinary principles of expropriation law, the requisitioner must pay full compensation for the subject-matter requisitioned or - in the case of requisition for use - cover liability and any damage and reduction in value which the subject-matter of the requisition has suffered during the period of requisition. In this manner the losses caused by the intervention are distributed through society in general. If the loss had already been apportioned by means of insurance, there would be an obvious risk that the authorities (or the legislator) would attach less importance to the economic settlement with the person who was the victim of the intervention. However, it was of even greater importance that such extension of the range of perils under the war-risk insurance would require a guarantee that the reinsurance market was willing to accept it. Such a guarantee was unobtainable. However, the war-risk insurers felt that there was nothing to prevent an extension of the cover as regards interventions from allied State powers.

Based on an overall assessment, where also the insurance pattern currently seen in war-risk insurance was taken into account (see above for further details), the Committee decided on the arrangement outlined in § 2-9, subparagraph 1 (b), seen in conjunction with § 2-8 (b), under which interventions by foreign State powers are covered by the war-risk insurer.

The term "State power" is defined in § 2-8 (b). It also comprises persons or organizations exercising "supranational authority". Hence, if an intervention is implemented by representatives of a league of States (alliance, group, block), it must be regarded as an intervention by a State power. A requisition by NATO or a similar organization will accordingly not be covered by the insurance against marine perils under § 2-8 (b). The requisition will, however, be covered by the war-risk insurance, provided that this is effected with The Norwegian Shipowners' Mutual War Risks Insurance Association, regardless of whether or not the State of registration (possibly the State where the controlling ownership interests are located) is a member of the relevant league of States, see § 15-24 (a).

The term "foreign State power" is defined in § 2-9, subparagraph 1 (b), second sentence. The concept is structured so that on the one hand it covers all States with some exceptions. These exceptions apply, firstly, to the State power in the ship's State of registration and, secondly, to State powers in the country where the controlling ownership interests in the ship are located. The term "State of registration" is not without its ambiguities in the event of so-called double registration in connection with bareboat chartering. However, in the event of double registration in both the owner State and the bareboat-charterer State, both States must be regarded as "the State of registration" for the purpose of this provision. As regards the term "controlling ownership interests", the vital question will normally be in what country the largest proportion of the ownership interests are located. However, the term opens the door to a discretionary assessment, where other elements, such as limitations on voting rights, the composition of the ownership interests, co-operation arrangements etc. may lead to the conclusion that the controlling ownership interests are located in another country.

On the other hand, not only ordinary State powers are brought in under this term, but also all persons and organisations which unlawfully pass themselves off as being authorised to exercise public or supranational authority. In the case of interventions by groups of rebels and usurpers it may at times be doubtful whether the situation is covered by the wording or whether it is a case of pure piracy. However, in practice this will normally not create difficulties, as § 2-9, subparagraph 1 (d) also refers piracy to the war-risk insurer's scope of cover.

Letter (b) deals only with restrictions on the owner's rights in the object insured. Actions leading to an infliction of physical damage fall within the scope of general war perils set forth in letter (a), there is accordingly no limitation applicable to actions by authorities of the State of registration or the State of ownership. If the object is destroyed by entities from these States during acts of war, the insurance against war perils will have to indemnify the loss. This must apply both where the destruction is an unintentional consequence of the acts of war, and where it is a result of military orders for the furtherance of military objectives of the State of registration or the State where the controlling ownership interests are located. In this connection, it makes no difference whether the military authorities have themselves effected the destruction, have ordered it, or have even used a formal requisition. In all of those cases, the assured's loss will be recoverable. Only interventions by Norwegian authorities aimed at divesting the assured temporarily or definitively of his use of the object are irrecoverable. However, what the authorities are going to use the ship for is irrelevant.

Letter (b), third sentence, provides that if the ship is requisitioned for ownership or use by a State power, this is not regarded as an intervention in relation to § 2-9, subparagraph 1 (b). The consequence of this is that, as a rule, such requisition will neither be covered under insurance against marine perils nor insurance against war perils. As § 15-24 (a), cf. also § 15-27 (a) shows,

however, this applies only if the ship is insured with an insurer other than The Norwegian Shipowners' Mutual War Risks Insurance Association. The fact that the result varies depending on which insurer the ship is insured with is due to the fact that the reinsurance market is not prepared to offer reinsurance cover of requisitions.

Letter (c) **originally covered riots, strikes, sabotage and the like**. In the 2002 revision, however, the term "acts of terrorism" was added to highlight the fact that such acts constitute a war peril. The terrorist attacks against the USA on 11 September 2001 caused uncertainty among reinsurers, etc. as to whether corresponding acts against ships, etc. would be covered under § 2-9 of the 1996 Plan. Although the answer was obviously affirmative, it was deemed appropriate in the revision to make this explicit.

By "riots" is meant violence in the form of unlawful actual harm to people or property, caused openly and by a large number of people. The definition of regular criminal acts, for which the marine-risk insurer is liable, must first and foremost depend on whether the background to the riots is political, social or attributable to similar circumstances.

"Strikes" occur where employees in one or more enterprises cease work according to a joint plan and with a joint motive.

"Lockout" entails that one or more employers shut the employees out from the work place, normally as part of an ongoing wage conflict.

By "sabotage" is primarily meant wilful destruction which does not form part of the conduct of war, but which is connected with, for example, labour conflicts. War sabotage is a war peril which will also be covered under letter (a). The sabotage need not be aimed at the actual object insured. A "go slow" action among dock workers or seamen is aimed at the employers' interests in general, but if the action involves recoverable damage to the assured's property, the war-risk insurer will be liable for the damage under letter (c). Destruction carried out by a ship's crew as an act of vengeance or a protest demonstration against the owner must be regarded as vandalism of property and is covered by the insurance against marine perils. The same applies to wanton destruction of property carried out by someone of unsound mind or under the influence of alcohol. The term "sabotage" presupposes that the action pursues a definite political, social or similar goal, see ND 1990.140 NV PETER WESSEL, where the court based its decision on the assumption that the costs of interrupting the ship's voyage etc. in connection with a bomb threat must be covered by the hull insurer against marine perils as costs of measures to avert or minimise the loss. The external circumstances of the threat clearly indicated that this was an act that had no background in political, social or similar circumstances.

As mentioned above, the term "acts of terrorism" was added in the 2002 revision. The addition does not entail any material change, since under the 1996 Plan acts of terrorism would either fall within the scope of the term "war or war-like conditions" in letter (a) or the terms "sabotage" or "and the like" in letter (c).

A typical act of terrorism is one in which one or more representatives of a resistance group or the like carry out or threaten to carry out acts that are intended to exert influence on a government or another political body or to frighten all or parts of the population of a country. The purpose is to promote a political, religious or ideological cause. The act of terrorism may directly affect an opponent's persons and/or interests, such as when bombs are placed in vehicles or on board ships, when aircraft are set on fire, when oil pipelines are cut, etc. However, there is nothing to prevent nor, moreover, is it uncommon for a terrorist act to be directed against a third party; in such case the purpose is usually to draw attention to the cause for which the terrorists are fighting. Acts of terrorism are often characterised by the fact that they endanger the lives of many people, or cause extensive material damage. We have seen a number of examples of terrorist groups in recent years.

As is the case for sabotage, acts of terrorism will under certain circumstances fall within the scope of the term "war or war-like conditions". This will primarily be the case when acts of terrorism occur in connection with a war between several States. One example may be acts committed by resistance groups in an occupied country with a view to hurting or weakening the enemy, for instance through acts of terrorism against ordinary merchant ships. "War-related terrorism" will therefore - like war-related sabotage - constitute a war peril that is covered by both letter (a) and letter (c). It is probably necessary to go one step further: acts of terrorism carried out in peacetime by resistance groups may also be so extensive that a "war-like condition" must be said to exist, see Brækhus/Rein, *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 78. However, whether the act in question is regarded as an act of terrorism or as part of the conduct of war or a war-like act has no significance in practice for the cover.



Similarly, it may be difficult to draw a distinction between "sabotage" on the one hand and "acts of terrorism" on the other. However, the way the act in question is characterised will have no significant effect on the insurance cover in this case either. In Brækhus/Rein, *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 78, it is pointed out that in the case of certain acts of terrorism against ships, typically where a terrorist group announces that a time bomb has been placed on board the ship and will explode unless a substantial ransom is paid, it may be difficult to talk about "sabotage". While it was previously necessary to resort to the term "and the like" to bring such a situation within the scope of the war peril cover, the introduction of the term "acts of terrorism" in the provision will make this unnecessary. As in the case of "sabotage", however, it is necessary to maintain that an act of terrorism must have or purport to have its basis in a more comprehensive struggle of a political or social nature. Thus a distinction must be drawn between such acts and ordinary criminal acts, including blackmail, using bomb threats, etc., purely for the purpose of gain, cf. for instance ND 1990.140 NV PETER WESSEL.

Letter (d) covers piracy and mutiny. During the 1996 revision, consideration was given to moving piracy to the range of marine perils in line with what was done in the English market some time ago, but the decision was made to maintain the earlier system.

By "piracy" is understood illegal use of force by private individuals on the open sea against a ship with crew, passengers and cargo. The use of force may take place by means of another ship, but the pirates may also have come aboard as members of the crew or passengers on the ship which they subsequently plunder. The purpose will normally be economic profit, but also an action that merely results in property damage or personal injury may constitute piracy. Piracy will often be organized by people who purport to exercise government authority (e.g., an exile government that captures vessels to call global attention to their cause or in order to finance their revolt). The practical difficulties that would arise if a distinction had to be made between "piracy" and "measures by a foreign State power" are avoided by piracy being covered by the war-risks insurance, cf. letter (b).

"Mutiny" means insurrection by the crew against the officers, cf. section 312 of the Norwegian Penal Code. This alternative will hardly be of any major practical significance. It has been placed within the range of war risks inter alia because it may be difficult to distinguish between mutiny and piracy, typically where bandits who have signed on as ordinary crew members incite mutiny.

Letter (e) corresponds in its entirety to § 2-8 (b) third sentence.

Subparagraph 2 (a) is identical to § 2-8 (c) and reference is made to the comments above.

Subparagraph 2 (b) was amended in the 2007 version in accordance with the commentary on § 2-8 (d), nos. 1-5. The exceptions in § 2-9, subparagraph 2 (b), are identical to the exceptions in § 2-8 (d), except for cover of the use of radioactive isotopes for peaceful purposes, which is not relevant in a war-risks insurance. Reference is otherwise made to the commentary on § 2-8 (d), nos. 1-5.

§ 2-9, subparagraph 3, of the 1996 Plan regarding special cover for ships insured with the Norwegian Shipowners' Mutual War Risks Insurance Association was amended and moved to a new section 9 in chapter 15. The cover of requisition by a foreign State power, cf. § 2-9, subparagraph 3 (a), of the 1996 Plan was maintained, cf. § 15-24. On the other hand, the cover in § 2-9, subparagraph 3 (b), of the 1996 Plan regarding losses that are a direct and immediate consequence of an explosion caused by the use of nuclear arms was replaced by a limited cover related to the perils that are now excluded in subparagraph 2 (d), cf. § 15-27 et seq.

§ 2-10. Perils insured against when no agreement has been made as to what perils are covered by the insurance

This paragraph is identical to § 17 of the 1964 Plan.

In practice, it will almost always be clear between the parties whether it is an insurance against war perils or an insurance against marine perils which is effected. Even though the provision is thus rendered less significant, the clarification was considered appropriate.

§ 2-11 - Causation. Incidence of loss

This provision corresponds to § 18 of the 1964 Plan.

§ 18 of the 1964 Plan contained rules relating to causation and the incidence of loss, i.e. the time of the casualty. According to subparagraph 1, the point of departure was that the insurer was liable for loss incurred when the interest insured was struck by an insured peril during the insurance period. This point of departure was modified in subparagraph 2 in respect of casualties resulting

from latent defects or damage which the ship had at the inception of the insurance. Such casualties were to be borne by the insurer against marine perils for the period during which the new casualty arose or was discovered. However, the undiscovered damage was to be governed by the basic rule in subparagraph 1 and be referred back to the time when the peril struck.

This provision has been criticised in practice, partly because the point of departure in subparagraph 1 was contrary to international marine insurance and general Norwegian insurance law, and partly because subparagraph 2 caused technical problems in terms of law and settlement. Consequently, during the revision, there were extensive discussions as to whether to adopt a new system. Two alternative solutions were considered: the time when the damage is discovered or the time when the damage or casualty arises.

The advantage of holding the insurer liable for damage discovered during the insurance period is the establishment of a technical rule which is simple in terms of law and insurance in that it excludes the possibility of referring damage back to an earlier insurer: the assured obtains cover from the insurer who is liable at the time the damage becomes known within the assured's organization, and there will never be any need to refer damage back to a previous insurance. On the other hand, this rule is also in contravention of international marine insurance and general Norwegian insurance law. It must also be added that insurers can hardly accept that, on effecting an insurance, they assume liability for any and all damage which the ship has sustained but which has not yet been discovered. The result of such a solution might be that the insurers, in order to protect themselves, demand docking of the ship before each new insurance period, which would be highly impractical. The time of discovery as a criterion for the incidence of loss might also open the door to a considerable moral risk because the criterion entails a temptation for the assured to "transfer" the discovery of the damage to the following period of insurance while taking out better cover for that period before the insurer becomes aware of the damage. The conclusion is therefore that the time when the damage becomes known is not very suitable as a criterion for deciding the time of casualty in marine insurance.

Another alternative was to rely on the time when the loss or damage occurs. The advantage of such a solution is that it concords with general Norwegian insurance law and international marine insurance, at the same time as it avoids the legally complicated regulation in § 18, subparagraph 2, of the 1964 Plan, to prevent the transfer back of any latent damage. The disadvantage of this point of departure is that it leads to unfortunate solutions in situations where the peril strikes during an insurance period, and it is obvious that the ship will be damaged, but the damage does not occur until during the next period of insurance. The rule further presupposes that each incident of loss or damage is to be dealt with separately; this raises questions regarding the relationship between the concepts of loss and damage and the traditional casualty concept. This problem could be solved by using the casualty as the entity for determining which insurance period should carry the loss, but in that event latent damage would have to be transferred back to the cause of the damage, and the advantage of the allocation rule contained in § 18, subparagraph 2, would be lost.

The conclusion was therefore to essentially maintain the solutions from the 1964 Plan and the related practice. This means that the Plan maintains "the peril struck" as the time of casualty, see subparagraph 1. Subparagraph 2 retains the "anti-Hektor" clause from the 1964 Plan, but the provision has been rephrased to make it easier to understand, and one point has been clarified.

The advantage of maintaining the solutions from the 1964 Plan is that they are well known and established in practice, and that it may cause difficulties for surveyors and insurers' claims departments if a new and untried wording on such a vital point of the insurance conditions was to be introduced at this point. Even if it may be difficult to decide when "the peril struck", it will be possible on this point to rely on practice all the way back to the 1930 Plan where this criterion was first introduced. On the other hand, the questions of doubt raised in connection with the "anti-Hektor" clause will be fairly easy to solve by minor clarifications in the Plan text and Commentary.

The adherence to the solutions of the 1964 Plan entails that Norwegian marine insurance law will still appear to have solutions on this point which are different from what applies under general Norwegian insurance law and English marine insurance law. However, the differences should not be exaggerated. The incidence-of-loss problem has, on the one hand, not received much attention in general Norwegian insurance law, presumably because the problem is of little practical significance. On the other hand, the solutions in English marine insurance law are not automatically obvious once you get down to the more detailed problems. The best argument in favour of switching from "the peril strikes" criterion to a "the loss arises" criterion is therefore probably that the latter criterion gives an immediate and clearer indication of what the question consists of and what the solution is. During the revision, the Committee did not find this argument strong enough to justify



throwing overboard the more well-established and proved criterion of “the peril strikes” as a basis for the solutions.

Subparagraph 1 is unchanged and establishes when “the peril struck” as the time when the casualty occurs in marine insurance. The rule entails that it is sufficient that the interest insured has been “struck by a peril” for the insurer’s liability to be triggered; it is not necessary for damage to have occurred. In most cases, the peril will strike at the same time as the damage occurs, which means that there is no reason to distinguish between the time of the peril and the time of damage as a basis for the insurer’s liability. This applies in particular to incidents of damage where the course of events is known, for example, when the ship runs aground and sustains damage to the hull. But also in many cases of unknown damage, the peril will strike at the same time as the damage occurs, for instance, in the event of hull damage etc., which the ship accumulates over a long period of time but which is not discovered until the ship is docked. Even though it may be difficult to document the exact time when the peril struck and the damage occurred in such cases, the situation is that the damage occurs concurrently with the peril striking.

However, the association with the “time of the peril” acquires independent significance for the insurer’s liability in those cases where the ship, on expiry of an insurance period, is struck by a peril and it is obvious that damage will occur but the peril does not cause damage until the next insurance period. If, for example, the ship is ice-bound at the end of the year, but without ice damage having yet occurred, any ice damage occurring after the turn of the year must be transferred back to the time when the ice-peril struck, i.e. to the December insurer.

Once the peril has struck, subparagraph 1 entails that all damage attributable to this peril shall be allocated to the insurer who was liable at the time the peril struck. It is, however, a prerequisite that the peril does not consist of an unknown defect or damage, cf. the exception in subparagraph 2 and below.

Subparagraph 2 corresponds to § 18, subparagraph 2, of the 1964 Plan, but the text has been rephrased and simplified to a certain extent and furthermore clarified on one point. The provision retains the so-called “anti-Hektor” clause from the 1964 Plan, according to which the insurer is not liable for consequential damage that an unknown defect or damage has caused.

The provision regulates damage resulting from “defects or damage” which the ship had at the inception or expiry of an insurance, but which was unknown at the time. The term “defect” comprises each and every defect the ship may have, regardless of the cause of the defect. In practice, there was some uncertainty as to whether the regulation in § 18, subparagraph 2, of the 1964 Plan covered a situation where the ship during construction was “struck by” a fault in construction, material or workmanship, and where this fault subsequently resulted in damage to the ship. This provision was interpreted by some to mean that primary damage resulting from a fault arising during the construction of the ship must be transferred back to the time when the peril struck, which would mean that it might be the construction risk insurance that would have to cover this type of damage. This was an unfortunate solution from the shipowners’ point of view, because it was uncertain whether and to what extent they would be entitled to indemnity under the construction risk insurance for such damage. This interpretation was, however, hardly correct and it is in any event not the intention to continue with such a solution. The word “defect” covers any defect in the ship, including faults in construction, material and workmanship, both during the building and any later repairs of the ship. If such a fault or defect results in damage to the ship, this will not be a case of “primary damage” which must be transferred back to the insurer who was liable when the peril struck. The defect in the ship arising from faults in connection with the building or repairs of the ship is regarded as a marine peril to the extent that it becomes the cause of a subsequent casualty, and it is the insurer during whose period of insurance the casualty occurs who becomes liable for the entire loss, cf. further details below.

The term “unknown damage” covers each and every form of damage, regardless of the nature or cause of the damage. It is only the damage itself which has to be unknown; it is irrelevant whether the damage derives from a previously known casualty, cf. ND 1950.458 NH Hektor, or whether also the actual harmful event is unknown, for example, where the ship sustains unknown damage during repairs.

Subsection 2 only regulates unknown defects in and damage to the ship itself. System faults in the form of wrong chemicals in the boiler water, substandard bunkers, etc. will, however, be covered by subparagraph 1. Damage resulting from such faults must therefore be transferred back to the time when the peril struck, i.e. when the contaminated material was first used.

The insurer’s liability for consequences of unknown defects or damage is excluded when the unknown defect or damage “results in a casualty or an extension of the damage to other parts”. On

this point, there is a certain difference in the wording in relation to the 1964 Plan, which tied the exclusion of liability to the situation where the unknown defect or damage became the cause of a "new casualty". The purpose of this modification is merely to make it quite clear that the transferring of consequential damage is not contingent upon the occurrence of a new cause and a new casualty. A strict extension of the primary damage is covered by the regulation in subparagraph 2 as well. This is a question that has been disputed in theory as well as in practice, see Brækhus/Rein: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 282. The fact is that it has been alleged that a "new casualty" presupposed the occurrence of a "distinctively new event"; if it was simply an extension of the original damage, then everything was to be transferred back in accordance with subparagraph 1. Compared to this understanding of the 1964 Plan, the clarification in the new Plan will result in fewer cases where loss will be allocated back to an earlier policy.

The term "casualty" primarily refers to the situation where a latent "defect" results in damage to the ship. If the ship is sailing with a latent fault or defect, there is no damage that may extend to some other part of the ship. This is why the term "casualty" is needed to emphasize that loss or damage resulting from a latent defect shall be brought forward to the time when the damage or loss (the casualty) occurred. If, for example, a defect resulting from an error in design or faulty material during the building of the ship results in damage to part of the ship, the defect must be regarded as a "marine peril which strikes the ship at the time when the casualty occurs". The damage shall in that event be covered by the insurer who was liable when the casualty occurred and shall not be transferred back to the construction-risk insurer, cf. above regarding the term "defect". However, liability is contingent upon the fault or defect having resulted in a "casualty"; in order for the insurer to become liable, the occurrence of, e.g., a fault in material in the form of a blister in the castings is not sufficient. If the blister is discovered before the fault has resulted in a casualty, the assured will be liable for any costs of replacement or repairs. "Casualty" in this connection means physical damage to the ship resulting from the fault, for example, in the form of a part having cracked or broken. It is, however, not necessary for the crack to be visible to the naked eye; it is sufficient for it to be ascertainable by means of advanced technical methods.

The same rule concerning incidence of loss must apply if a fault is committed during repairs of an earlier casualty and this fault does not result in any immediate damage. The fault must then be regarded as a latent defect; if the latent defect subsequently results in a casualty in the form of damage to the ship, the fault will be regarded as a marine peril which strikes the ship on the occurrence of the casualty. Consequently, this latter damage shall not be transferred back to the insurer who was liable when the original casualty occurred, but be brought forward to the insurer who was liable when the new damage occurred. The costs of redoing the repairs must, however, be transferred back to the insurer who was liable for the first casualty.

If it is a question of fault committed during owner's repairs, the solution will be the same as regards the casualty that results from the fault, unless the fault is of such a nature that it falls outside the scope of the insurance in accordance with the rules contained in §12-3. However, there will then not be any question of transferring the repair costs back: they are the assured's own risk.

It is conceivable that a fault results in damage which is not discovered when it occurs. In that event, a division into two parts occurs: when the unknown fault results in damage, the fault is regarded as a "marine peril" which strikes the ship when this first damage occurs. This (primary) damage will, accordingly, be placed at this point in time. If the primary damage is still unknown at the commencement of the next period of insurance and extends to new parts of that period, the consequential damage must, however, be allocated to the insurer who was liable when the extension of the damage occurred, cf. below.

The term "an extension of the damage to other parts" refers to a development of damage which originates with latent damage, possibly latent damage resulting from a fault or defect in the ship which occurred in connection with the building of or repairs to the ship. The distinction between a transfer back and a bringing forward shall, in such cases, be based on a part concept. The costs of repairing and restoring the part that was originally damaged shall, in other words, be transferred back to the insurer who was liable at the time the peril struck. Costs of repairing damage to other parts of the ship shall, however, be brought forward to the insurer who was liable at the time the consequential damage occurred. Hence, if a water-leakage results in unknown extraordinary corrosion damage to a shaft, which in turn results in a rupture of the propeller shaft and damage to the related bearings, the damage to the bearings must be regarded as damage to "other parts" and be brought forward to the insurer who was liable when this damage occurred. The repairs of the shaft itself must, however, be transferred back to the insurer who was liable when the corrosion damage occurred.

In accordance with what applied under the 1964 Plan, it is a prerequisite for the application of the rule concerning incidence of loss in subparagraph 2 that the defect or damage is "unknown" at the inception or expiry of the insurance. That the defect or damage is "unknown" means that neither the insurer nor the assured is aware of it. As far as the assured is concerned, there must be an identification with a larger circle of people than is usual in marine insurance, cf. *inter alia* § 3-36. If the damage was, on expiry of the period of insurance, known to a person whose duty it was to report the matter, the replacement costs as well as any consequential losses must be borne by the earlier insurer and not by the one during whose period of insurance the replacement took place. Hence, if cracks are beginning to form in the shaft and this is known to the chief engineers but has not been reported to the shipowner, this must be the solution; this is necessary in order to counter any fraudulent collaboration between shipowner and crew for the purpose of obtaining better insurance cover before the new insurer comes into the picture. There should be no reason, however, to attach importance to the fact that the damage may accidentally have been known to a subordinate member of the crew who is unaware of its significance for the insurance. The term "is unknown" has been chosen with the very view in mind that in practice it is possible on this point to choose the solution which, in individual cases as well as in general, furthers the purpose of the rule, viz. to counter disloyal suppressions of facts in the relationship between the parties to the insurance contract.

The rule relating to a transfer back of the consequential damage where the primary damage was known on expiry of the term of insurance must also apply to the in practice important situation where all parties during period no. 1 have been fully aware of the latent damage, but the ship has been given permission to sail for a period of time before repairs are carried out. For example, a cracking of the propeller shaft or engine foundation is discovered, and the assured is ordered to have repairs carried out within 6 months. If a fracture occurs in the part before it has been repaired, but after expiry of the term of insurance, liability shall be transferred back in full to the earlier insurer, who must cover the replacement as well as any consequential damage.

If the damage was, on expiry of the term of insurance, known to the assured or to a person with whom he must in this connection be identified, the "old" insurer will, in the event of fraudulent misrepresentation on the part of the assured, have the right to invoke the six-month time-limit for reporting the casualty set forth in § 5-23. In that event he must be entitled to refuse to cover not only the primary damage but also the subsequent consequential loss.

The unknown defect shall be regarded as "a marine peril" which strikes the ship at the time the casualty or the extension of the damage occurs. This part of the rule is also in accordance with the 1964 Plan. Regardless of what the original cause of the defect or damage was, it is the insurer against marine perils who bears the risk of it subsequently becoming the cause of a casualty or an extension to other parts of the ship. An undiscovered war damage (cf. the *Hektor* case) is thus transformed into a marine peril at the beginning of a new insurance period. The point of view here is that the insurer against marine perils takes over the ship itself with any unknown defects or damage it may have. A similar transformation of the damage may, however, also be conceivable in principle in the relationship between two successive insurers against marine perils.

The principles as regards incidence of loss in subparagraph 2 are linked to damage and defects that were unknown at "the inception or expiry of an insurance". This poses no problem in the case of insurances that attach for one year at a time. For insurances that attach for a period longer than one year, on the other hand, the question could arise as to whether "the inception or expiry of an insurance" refers to the times of the main insurance, or whether the insurance should be divided up into several one-year periods. There was previously uncertainty about this question, but it has now been solved by an addition to § 1-5, subparagraph 4. In relation to § 2-2, each one-year period is to be considered individually. The decisive factor when applying the incidence of loss principles will therefore be that the ship already had the unknown defect or damage at the commencement of the one-year period during which the consequential damage occurred, or during which the defect or damage became known. If the defect or damage became known during an earlier one-year period, the consequential damage must be referred back to this period.

The last part of subparagraph 2 regulates the situation where the latent defect or damage is discovered before new damage or a casualty occurs. In accordance with the solution under the 1964 Plan, any consequential damage shall, in that event, be transferred back to the insurer who was liable when the defect or damage was discovered.

The principle in subparagraph 2 applies to all types of loss or damage covered by the insurance. This means that also costs to avert or minimise the loss in connection with a later casualty, possibly an extension of the original damage, shall be carried forward to the "new" insurer.

The rules concerning incidence of loss contained in subparagraph 2 do not say anything about whether the primary damage and the consequential damage represent one or several casualties, or possibly new casualties in relation to an earlier one. The rules allocating liability to the new insurer relate to the situation where a defect results in a casualty in the form of damage, or where a damage extends to another part. The problem of distinguishing between one and several casualties must therefore be solved on the basis of the general rules of the Plan. The question regarding the number of casualties acquires special significance in relation to the rules relating to deductible, cf. §12-18. In a number of situations it will be unfortunate and unreasonable to deem that a "new casualty" has occurred, entailing two deductibles, simply because the primary damage and the consequential damage under the rules in subparagraph 2 shall be covered by two sets of insurers, possibly by one or more new insurers, where it is a question of fault on the part of the shipyard in connection with repairs of an earlier casualty. This is particularly clear where the consequential damage in question is caused solely by a further extension of the unknown primary damage. However, where a fault committed by the yard during the repairs of an earlier casualty results in damage to the ship, it may be natural in that case as well to look at the entire course of events collectively in relation to the deductible, cf. for further details the commentary on § 12-18. This must apply regardless of whether the fault by the repair yard consists in damage to the ship and therefore constitutes latent damage to be transferred back, while the consequential damage shall be carried forward, or whether the fault constitutes a defect which subsequently results in damage, and it is this damage, i.e. the primary damage, which shall be transferred. The obvious solution in such situations must be that one deductible is calculated, and that this is allocated among the relevant insurances. If different deductibles have been agreed for the individual periods, it may be necessary to make a pro-rata allocation.

A problem which has been discussed in practice is how to deal with latent damage which develops continuously over time, so-called "slow motion" damage. Such continuous damage development is relatively common, for example, in connection with extraordinary corrosion. This may happen to all types of latent damage, regardless of the original cause of the damage, and regardless of whether it is an extension of damage within the part that was originally affected by a fault or damage, or an extension of damage that also includes other parts. In practice, the costs of repairing this type of damage have, in certain cases, been allocated on a pro-rata basis over the insurances that have been in effect while the damage developed. It is not the intention to prevent such practice where such an allocation may be seen as expedient.

In the event of damage that develops over time, it may be difficult to establish the periods during which the individual incidents have arisen. If the assured is unable to prove during which period an incident has arisen, he runs the risk that no insurer will be willing to cover the damage. In practice associated with § 18, subparagraph 2 of the 1964 Plan, this problem has been solved by the insurer of the consequential damage also having covered the primary damage if it has not been possible to pinpoint in time when the peril that resulted in the primary damage occurred. The Committee also wishes to maintain this practice.

#### § 2-12. Main rule relating to the burden of proof

Subparagraph 2 was amended in the 2007 version. The paragraph is otherwise identical to earlier versions of the 1996 Plan.

The provision deals with the burden of proof, i.e. which of the parties bears the risk that a certain fact cannot be established. If the judge, after having evaluated all the evidence adduced in the case, does not find one fact more probable than another, the doubt shall be to the disadvantage of the party who has the burden of proof on the point in question.

According to subparagraph 1, the assured has the burden of proving "that he has suffered a loss of the kind covered by the insurance and of proving the extent of the loss". The provision is based on the general principles of the burden of proof in insurance contracts. It is established law that the assured has the burden of proving that he has an insurable interest, that this interest has sustained a loss as a result of a peril covered by the insurance, and of establishing the extent of the loss. Due to the all-risk principle, the assured's burden of proof is relatively easy; if a loss, which is covered by the insurance, has occurred, it is up to the insurer to prove that the cause is a peril excluded from the cover.

The assured's burden of proof also includes the fact that the peril has struck at a time when the insurer covers the risk, cf. § 2-11. When an older incident of damage is discovered, there are sometimes no certain indications as to whether it arose during one or the other insurance year. In such cases, it would not be reasonable to invoke the burden-of-proof rule contained in § 2-12 against the assured. If both insurances are taken out on Norwegian conditions, there will in all

probability not be any problems in this connection, cf. inter alia the rule relating to advance payments contained in § 5-7.

According to subparagraph 2, the insurer has the burden of proving that the loss arose from conditions that are not covered by the insurance. This, too, is concordant with general insurance law. However, this rule applies merely as a point of departure; any special rules relating to the burden of proof take priority over the main rule contained in § 2-12, subparagraph 2, cf., e.g., § 3-3, subparagraph 2, § 3-9, subparagraph 2, § 3-18, subparagraph 3, § 3-23, subparagraph 2, § 3-25, subparagraph 1, and others. As mentioned in the commentary on § 2-9, the provision shall not be applied to the relationship between cover against marine perils and cover against war perils.

Subparagraph 3 was amended in the 2007 version, and must be seen in conjunction with the new exclusion rules in § 2-8 (d) and § 2-9, subparagraph 2 (b). Pursuant to the provision, the assured has the burden of proving that a loss is not attributable to excluded perils such as mentioned in § 2-8 (d) and § 2-9, subparagraph 2 (b). This solution is concordant with the former rule in so far as the burden of proof has been reversed for loss caused by the release of nuclear energy. Since the scope of the exclusion has now been extended, a similar extension must also be introduced in relation to the burden of proof. The solution is in accordance with the RACE II clause and the exclusion for biological and chemical, etc. weapons, cf. the wording "in no case" in the introduction to the clause.

#### § 2-13. Combination of perils

Subparagraph 2 was amended in the 2007 version. The paragraph is otherwise identical to earlier versions of the 1996 Plan.

The provision maintains the rule of apportionment as the causation principle when a loss is caused by a combination of perils, i.e. when a loss is caused partly by a peril covered by the insurance and partly by a peril which is not covered by the insurance.

The question of the insurer's liability in the event of a combination of causes is a general problem. General Norwegian insurance law is based on what is known as the "dominant-cause doctrine". The dominant-cause doctrine is established through case law from the turn of the century and onwards, partly in connection with cases where an assured who has an accident insurance has died as a result of an accident as well as an illness (see in particular Rt. 1901.706, 1904.600 and the overview in Rt. 1933.931) and partly in cases concerning a combination of war perils and marine perils in marine insurance, cf. below. The causation principle entails establishing which peril constitutes "the dominant-cause factor" or "the dominant peril". The entire loss shall be allocated to the peril which is thus designated as the dominant cause. For the assured this means that he will either receive full cover or none at all, depending on which peril insured against is regarded as dominant.

In theory it has been assumed that the content of the dominant-cause doctrine varies, depending on the relevant stage in the course of events leading up to the damage. If it is a question of a combination of two or more perils on the way to a loss or damage, it is alleged that the traditional basis for the dominant-cause doctrine is followed and the relationship between the various perils is evaluated in order to find the "strongest" or "most significant" cause. However, if it is a situation where a loss or damage has occurred in combination with a new peril, which results in an increase in the loss or damage in relation to a situation where the insurable incident had been isolated, the conclusion is that the insured incident is the dominant cause if it has been a necessary triggering factor and has contributed to the loss to such an extent that it would seem reasonable to let the assured benefit from the protection which the insurance was intended to provide. Only in a situation where the loss or damage could have occurred in the same way regardless of the incident insured against will the new peril be characterised as the dominant cause.

In marine insurance the problem of the combination of causes arises in three situations, viz.:

(1) if the loss is attributable partly to perils covered by the insurance and partly to perils excluded from cover by an objective exclusion. The most common situation in practice is a combination of marine and war perils, but one might also mention the case (from hull insurance) where a part is damaged partly because of faulty installation and partly because of events in connection with a casualty;

(2) if the loss is partly attributable to perils covered by the insurance and partly to factors for which the assured, because of his subjective position, must bear the risk himself (undisclosed risk factors, breaches of safety regulations of which the assured was aware, gross negligence on the part of the assured during the rescue operation);

(3) if the loss is attributable to the materialization of perils insured against during several insurance years. For example, the ship sustains latent damage by a casualty in 1994, and this damage, combined with heavy weather or some other peril in 1995, causes a new casualty.

In marine insurance the problem of a combination of perils was first noticed in cases involving a combination of marine and war perils. During World War I (1914-18), a large number of casualties of this nature took place. In a judgment of fundamental importance (ND 1916.209 Skotfos) the Admiralty Court, with the support of the Supreme Court, established that the entire loss was attributable to "the factor which is regarded as the dominant cause of the accident". During the subsequent years a series of judgments were given in conflicts between insurers against marine perils and insurers against war perils. A feature common to these decisions was that it required a very strong war peril for the court to regard that peril as the dominant cause. If faults of any significance had been committed by the crew, such faults were practically always regarded as the dominant cause, with the result that the casualty in its entirety fell upon the marine-risk insurer.

The marine-risk insurers objected to the fact that this led to an essential part of the increase of the marine risk attributable to a war situation (darkened lighthouses, removal of navigation marks, sailing in convoys etc.) being imposed on them. In connection with the revision of the Plan in 1930 it was therefore decided to adopt a rule of apportionment. In the event of a combination of causes, the relative strengths of the various perils were to be evaluated and the loss apportioned, taking into consideration the significance of the individual causal factors. Instead of a choice between two extreme solutions (either A or B being liable for the entire loss), this method offered a whole range of middle-of-the-road solutions, making it possible to choose in each individual case the apportionment which would seem to best fit in the specific circumstances of the case.

The point of departure for the introduction of the rule of apportionment in 1930 was the conflict between the insurers against marine and war perils, respectively. However, the rule of apportionment contained in the 1930 Plan was worded in very general terms, and was to be applied to all cases where there was a combination of perils insured against and uninsured perils, unless otherwise provided by other provisions of the Plan. However, the 1930 Plan also contained a number of rules which excluded the application of the rule of apportionment. They concerned first and foremost the limitations of liability relating to neglect or negligence on the part of the person effecting the insurance or the assured.

During World War II (1940-45), the rule of apportionment was applied in a very large number of cases concerning casualties which were partly attributable to war perils and partly to general marine perils. These questions are discussed thoroughly by Bugge in AfS 1.1 et seq. As regards ships sailing in German-controlled waters, the question of apportionment had to be decided by litigation in some 100 cases.

On account of this high incidence of litigation, the decision was made in the revision of the Plan in 1964 to revert to a dominant-cause rule in respect of the combination between war and marine perils, although in a modified version, cf. below in § 2-14. The free rule of apportionment was retained, however, for other combinations of causes and also made applicable in the event of a combination of perils insured against and perils which had arisen due to neglect or negligence on the part of the person effecting the insurance or the assured. The reason was that the rule of apportionment had gradually become part of the general conception of justice, and that it was applied fairly often in practical settlements. It was rarely used in case law, however.

During the revision, the issue of whether to revert to a dominant-cause rule for combinations of causation other than a combination of war and marine perils as well was considered. The advantage of such a solution would be to have a causation rule that concurred with general Norwegian insurance law as well as with international marine insurance. Technical considerations of law also point in favour of the dominant-cause rule: with a dominant-cause rule it is possible to build up a judicial precedent doctrine for typical cases, while it is necessary when using a rule of apportionment to make a discretionary apportionment, depending on the specific circumstances of each individual case. The high incidence of litigation during World War II in connection with a combination of war and marine perils illustrates this point. It may also be submitted that the rule of apportionment will probably give the assured a less favourable solution than the dominant-cause rule as regards a combination of a casualty that has taken place and subsequent perils. As mentioned above, the general tendency, in practice and theory, has been to go to great lengths to characterize the earlier casualty as the dominant cause. However, in the event of an apportionment, the assured will have to accept that the risk for the proportion of the loss or damage that corresponds to the significance of the uncovered peril falls upon him.

The conclusion was nevertheless that the most expedient approach would be to keep the rule of apportionment. The advantage of this solution is that the premium is in "correct" proportion to

coverage in that the insurer is not held liable for the effect of causal factors that fall outside the scope of cover of the insurance. Also considerations of fairness favour such a solution: the assured has paid a premium to be covered against certain risk factors and has no reasonable claim to be covered against other perils.

A third advantage is in the relationship to the rules relating to the duties of disclosure and care: under ICA, a reduction system as regards the assured's breach of the duty system contained in ICA chapter 4 has been established, which entails that the indemnity may be reduced if the assured's breach of duty has contributed to the damage. Such a system is less expedient in marine insurance: it is regarded as unfortunate for the insurer to be allowed to make a discretionary reduction based on inter alia considerations of degree of fault. By retaining the rule of apportionment, a more or less equivalent possibility of reduction is, however, achieved by virtue of the fact that a breach of the duty of disclosure or care in the event of a combination of causes can be allocated such a proportion of the loss as indicated by the significance of the breach. A flexibility in the claims settlement is thereby achieved which may put less of a strain on the relationship between the insurer and the assured than a strict reduction based on an evaluation of fault.

The rule of apportionment shall apply in all cases where "the loss has been caused by a combination of different perils". It shall therefore apply to both a combination of two or more objective causal factors and to a combination of objective causal factors and subjective negligence. It shall also apply regardless of whether it is a combination of two independently acting causal factors which result in a casualty, or a combination of causes where a casualty is combined with a subsequent event and results in new damage, cf. ND 1977.38 NH Vestfold I. In this light, all the rules in the Plan aimed at negligence on the part of the person effecting the insurance or the assured are formulated as strict causal rules and must be supplemented with the rule of apportionment contained in § 2-13.

The most important situation from a practical point of view - a combination of marine and war perils and similar perils - is, however, subject to separate regulation in § 2-14.

The last area where it may be relevant to apply the rule of apportionment is when the casualty is caused by a combination of perils that have struck the interest during different insurance periods. This problem has been subject to in-depth discussions, and the solution follows from the special rules explained in § 2-11.

On the basis of case-law concerning the rule of apportionment from 1930 up until today, legal theory has deduced a number of criteria for the application of this rule, see Brækhus/Rein: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), pp. 262 et seq. These criteria are still relevant. This means, in the first place, that it is necessary to distinguish between relevant and non-relevant causes. The prerequisite for applying the rule of apportionment is that the loss is "caused" by a combination of several perils. It is not sufficient for an apportionment that a peril has been a necessary condition for the loss. If the peril has been rather insignificant, the count should be set at zero; § 2-13 in other words also opens the door to an apportionment where one peril is given the count zero and the other 100. This applies both when there is a combination of two perils which cause a casualty, cf. for example ND 1942.360 VKS, and where there is a combination of the casualty and a new peril which results in further losses, cf. ND 1977.38 NH Vestfold I. The lower limit required for a peril having a bearing on the apportionment may on a discretionary basis be set at 10-15%.

If it is clear that several perils must carry weight for the apportionment, it is more difficult to deduce criteria from current practice. In the event of two objective concurrent causes occurring on the way to the time of the casualty, it would presumably be correct to say that where there has been a combination of an earlier acting cause and a later direct cause of a loss, the most weight shall be attached to the latter cause. If the former cause shall carry any weight, it must have increased the probability of a subsequent loss. The greater the risk, the greater the importance to be attributed to the earlier cause.

If the loss is a result of a combination of two objective causes in a causal chain in the sense that a new cause interferes in the course of events after a casualty has occurred and results in a further loss, the first cause - i.e. the casualty - shall carry the most weight, cf. ND 1941.378 NV Veslekari and ND 1977.38 NH Vestfold I. Here the loss should be apportioned according to the degree of probability of the first casualty triggering the subsequent peril and consequently the new damage. The higher the degree of probability, the greater the weight to be attributed to the first peril.

In both of the combination situations referred to above, the loss may also have occurred by a combination of objective perils covered by the insurance and subjective negligence. As mentioned, the rule of apportionment may, in such cases, have a similar function as the reduction system has

in the event of subjective negligence under ICA. The element of deterrence will be better served if it is possible to make some deduction from the compensation instead of having more rigid rules according to which the assured loses the entire cover in the event of any fault on his part. In connection with minor faults, it would otherwise be tempting for the judge to reach the conclusion that "it has not been proved to his satisfaction" that the assured has shown negligence if the alternative is a loss of the entire cover. Here it would also be natural to base the apportionment on an evaluation of probability, and attach weight to the subjective negligence depending on the degree of probability that it would result in a loss. This will normally be concordant with an evaluation of the degree of fault: the higher the probability of a given action leading to a loss, the more serious the fault will normally be deemed to be. ND 1981.347 NV Vall Sun gives an example of a combination of dereliction of duty and other causal factors.

Subparagraph 2 was amended in the 2007 version, and must be seen in the context of the new exclusions in § 2-8 (d) and § 2-9, subparagraph 2 (b), cf. also the amendment to § 2-12, subparagraph 3. The provision is concordant with the rules that formerly applied to the exclusion for nuclear perils, and prescribes that if an excluded peril related to nuclear risk and biological, etc. weapons has contributed to the loss, the entire loss shall be attributed to this peril. Thus there is no question of partial cover in accordance with the basic principle in subparagraph 1. This solution is in accordance with the introduction to the RACE II clause, which provides that any contribution by the excluded perils shall have the effect of exempting the insurer from liability.

The provision in § 2-13 contains a new subparagraph 2 relating to losses that are wholly or partly caused by a nuclear peril. This provision must be seen in the context of the limitation of liability relating to the release of nuclear energy in § 2-8 (d) and § 2-9, subparagraph 2 (b), and is taken from the Special Conditions.

#### § 2-14. Combination of marine and war perils

This paragraph is identical to § 21 of the 1964 Plan.

The provision maintains the solution from the 1964 Plan with a modified dominant-cause rule for a combination of war and marine perils. The rule was introduced in connection with the revision in 1964 because the "free" rule of apportionment had resulted in a very high frequency of litigation between the war risk and marine insurers during World War II. When each individual case had to be evaluated concretely, it was difficult to develop guiding rules through case law. Unlike during World War I, no typical cases crystallised which were attributable to the area of liability of either one insurer or the other. Instead, each individual case became more or less doubtful because it was never possible to predict exactly the percentage of the loss that the court would allocate to war and marine perils, respectively. At the same time, the total losses, which amounted to approximately NOK 36.6 million, showed an almost equal distribution between the two groups of insurers. It was assumed that a more schematic rule of apportionment would, to a large extent, lead to the same economic result in a simpler and less expensive manner. During the revision, there was general agreement about this assessment, and the solution from 1964 has therefore been maintained.

The provision establishes that, in the event of a combination of war and marine perils, the dominant-cause rule shall in principle apply. This is expressed by the term that the whole loss shall be deemed to have been caused by the class of perils which was the "dominant cause". If the application of this rule gives rise to doubt, in other words, if it is difficult to say that one of the classes of perils is "dominant", the loss shall be divided equally.

As mentioned above under § 2-13, when the dominant-cause rules are being applied, a distinction must normally be made between the situation where a casualty is the result of two independent concurrent causes and the situation where a casualty in combination with a new causal factor results in further loss or damage. While there will, in cases of concurrent causes on the way to the time of the casualty, presumably be a weighing of the impact of the individual causes, where there has been a combination of a casualty and a subsequent cause in a causal chain, it will be deemed that the casualty is the dominant cause, provided that it has contributed to the subsequent damage. A corresponding distinction must be relied on when the "dominant cause" is to be identified under § 2-14. However, in practice, the most frequent situation of combinations of war and marine perils is concurrent causes on the way to a loss. In such cases, a strictly objective evaluation must be made of which cause has had the greatest impact on the course of events. As regards a combination of the casualty and a subsequent cause, an exception is furthermore made from the rule as regards an increase in costs of repairs, cf. below.

In the evaluation of the relationship between war perils and marine perils, due regard must be had to the fact that the insurances against marine and war perils are two equal types of insurance



which every shipowner has, or will at any rate have the opportunity and reason to effect. There is therefore no reason to use the regard for the shipowner's need for safety as an argument for considering the marine peril to be the "dominant cause" in a situation where the owner has not taken out any war-risk insurance and therefore has to cover damage resulting from war perils himself. The decision must, in other words, be made irrespective of the owner's actual insurance coverage.

Case law concerning tanker casualties in the Persian Gulf during the Iran-Iraq war shows that the dividing line between the first and second sentence of § 2-14 may cause considerable problems, cf. arbitration award of 30 June 1987 and ND 1989.263 NV Scan Partner. There is nevertheless reason to assume that in practice it is easier to draw this line than to apply a free discretionary rule of apportionment.

It is difficult to give general guidelines as to when to apply the first and second sentences respectively. The use of the term "dominant cause" shows, however, that a relatively considerable predominance is required in order to characterize a peril as the "dominant cause". It is not sufficient to reach the conclusion - perhaps under doubt - that one peril is slightly more dominant than the other; it is precisely the arbitrary choice between two causes which carry approximately the same weight that should be avoided. On the other hand, a 60/40 apportionment should probably constitute the upper limit for an equal distribution. If we get close to 66%, one of the groups of perils is after all considered twice as "heavy" as the other, cf. Brækhus/Rein: Håndbok i kaskoforsikring (Handbook of Hull Insurance), pp. 269 et seq., which also reviews a number of judgments from World War II in relation to these guidelines.

As mentioned above, an exception must, like the solution under the 1964 Plan, be made as regards the situation where there is a combination of several causes in a causal chain: As regards repair costs, only the perils that materialized before the casualty in question, and which have had a bearing on the physical damage sustained by the ship, shall be taken into consideration. By contrast, the increase in the cost of repairs caused by the war situation shall not be taken into consideration, regardless of whether the price increase was a fact at the time of the casualty or did not occur until later (cf. ND 1943.417 NV Haarfagre). Otherwise the war-risk insurer might be held liable to pay 50% of the repairs of a strictly marine casualty, provided that the increase in prices of repairs has been sufficient.

The rule of apportionment is also subject to another limitation in the relationship between war-risk and marine-risk insurance. As under the 1964 Plan, certain types of losses are allocated to the scope of liability of the war-risk insurer, regardless of whether marine peril has been a contributory cause, cf. § 2-15. In such cases, the marine peril will never be regarded as the dominant cause, nor will there ever be any question of an equal distribution. For further details, see below under § 2-15.

#### § 2-15. Losses deemed to be caused entirely by war perils

This paragraph is identical to § 22 of the 1964 Plan.

As mentioned above, the application of the modified dominant-cause rule in § 2-14 will entail that the war peril must be deemed to be the dominant cause in all cases where the war peril must be accorded 60% weight or more in the course of events. In other cases, an equal distribution shall be made, unless the war peril has been so modest as to not carry any weight at all.

However, certain loss situations reflect war perils so strongly that they should be ascribed to the war-risk insurance, even if there was also a reasonably strong element of marine perils in the course of events. These situations are described in letters (a) - (c).

Letter (a) establishes that the war peril shall be deemed to be the dominant cause when "the ship is damaged through the use of arms or other implements of war", and this use is either motivated by war or takes place during military manoeuvres in peacetime. However, in most cases the perils mentioned here will be deemed to be the dominant cause already pursuant to § 2-14. However, the possibility cannot be ruled out that the marine peril may in such situations interfere in a manner that entails that it would be accorded more than 40% weight: for example, the ship suffers an engine breakdown and is carried by current and wind into a mine-field, the existence of which crew is fully aware. The loss caused by the ship hitting a mine would, pursuant to § 2-14, second sentence, have been divided on a 50/50 basis between the marine insurer and the war-risk insurer. However, under the current special rule, the war-risk insurer has to bear the entire loss.

The provision shall only apply if the use of the implement of war is the direct and immediate cause of the damage to the ship. In situations where the use of the implement of war takes place at an earlier stage of the course of events, while the direct cause is a marine peril, the question of

liability must be resolved under § 2-14. Another matter is that the use of implements of war may be deemed to be the dominant cause, even if it does not constitute the direct cause of the damage, for example, where the implement of war, an aircraft bomb, damages a dock gate so that the lock is emptied, something that in turn results in the assured ship running into another ship in the dock.

There may sometimes be some doubt as to what constitutes an “implement of war”, see, for example, ND 1946.225 NV Annfin (damage by collision with a submarine in action deemed to be “war damage” pursuant to the corresponding provision in § 42, item 2 of the 1930 Plan), ND 1944.33 NV Vestra (damage caused by the paravane on the warship with which the ship collided, not deemed to be “war damage”) and ND 1947.465 NV Rogaland (damage resulting from the blowing up of explosives which another vessel was carrying to German fortifications, not deemed to be “war damage”). However, this question is of less significance today than under the 1930 Plan, because the dominant-cause rule is now the point of departure in case of a combination of marine and war perils.

If the implement of war leaves latent damage that is not discovered until a later insurance year, the actual damage must obviously be covered by the war-risk insurer during the year it occurred. However, in relation to the further losses to which the latent damage gives rise, it must, under § 2-11, be deemed to be an ordinary marine peril that strikes the ship in connection with the casualty.

Under letter (b), the war peril shall also be deemed to be the dominant cause when the loss is “attributable to the ship, in consequence of war or war-like conditions, having a foreign crew placed on board which, wholly or partly, deprives the master of free command of the ship”. The rule entails that the war-risk insurer bears full liability, provided that it is an established fact that the acts of the foreign crew have been a contributory cause to the damage. However, if the casualty is due entirely to marine causes, for example, heavy weather on a stretch of open sea which the ship would any under circumstances have to pass through, the marine insurer will be liable.

The term “foreign crew” has been thoroughly reviewed in case law from World War II (see in particular ND 1943.452 NV Ringar). In principle, the decision as to whether the foreign crew’s instructions and conduct may be deemed to “wholly or partly deprive the master of the free command” must be based on a case-by-case evaluation. If the ship, following orders from the relevant authorities, receives on board a mandatory pilot or a mine pilot in waters where the war peril manifests itself, the provision will not apply merely because the pilot is authorized to indicate the sailing course. If the pilot makes a mistake with the result that the ship runs aground, the normal causation rules shall apply. The “foreign crew” must be placed on board for the purpose of exercising control that goes beyond securing the navigation of the ship. The purpose may for example be to ensure that the ship puts into a control port, or prevent it from escaping to the enemy.

The application of letter (b) is not subject to the condition that the foreign crew takes over the command of the navigation or manoeuvring of the ship. Other situations where the foreign crew interferes with the master’s activities and takes decisions in his place will also be covered by the provision, for example, where a foreign control officer issues orders concerning handling of the cargo and this leads to an explosion which causes damage to the ship.

Letter (c) covers “loss of or damage to a life-boat caused by it having been swung out due to war perils”. Under the 1964 Plan, loss of or damage to life-boats while swung out was not compensated, unless this was caused by a war peril, cf. § 176 (j). This exception has been deleted because it is not very practical for ships to sail with life-boats swung out in cases other than during a war situation. However, in such cases the marine peril will also normally contribute to the loss of the life-boat (it will be torn loose or damaged in heavy weather), and the situation might easily arise that the loss would have to be divided under § 2-14. It would be reasonable to attribute these losses in their entirety to the war-risk insurer, in accordance with practice during World War II.

The provision in letter (c) does not merely comprise loss of or damage to the life-boat itself, but also damage which the life-boat causes to the ship in general, for example, to davits and deck house. However, the rule does not apply to other losses which are more indirectly caused by the fact that the boat has been swung out, e.g., liability for damages in connection with a collision which, wholly or in part, is due to a life-boat having been swung out and reduced visibility from the bridge. However, in view of the circumstances, such loss may become the subject of an equal distribution pursuant to the rule in the preceding paragraph.

If a life-boat which is swung out damages a crane or a warehouse when the ship is putting alongside a quay, liability to a third party will normally be borne by the marine insurer; the failure to have the life-boat brought back in again before putting alongside will constitute an error by the master or his crew in the performance of their duties.

#### § 2-16. Loss attributable either to marine or war perils

This paragraph is identical to § 23 of the 1964 Plan.

Special problems arise when the casualty has occurred under such circumstances that it is uncertain whether it is attributable to marine or war perils. The 1964 Plan introduced a rule of apportionment which is maintained in the new Plan. If it is impossible to decide whether the casualty is attributable to war or marine perils, liability shall be divided equally between the two insurers.

As regards the term "the more probable cause", this must be interpreted in the same way as the criterion "dominant cause" in § 2-14. This means that a 0-100 distribution shall only take place in the event of a distinctly greater probability that one of the two categories of perils has been the cause of the loss. If there is more than 60% probability that one of the categories has caused the loss, this category shall be deemed to be the "more probable cause", and there will be no allocation of liability, see in this respect ND 1989.263 NV Scan Partner, where it was found that the marine peril (a gas explosion) was "the more probable cause".

## **Chapter 3 - The duties of the person effecting the insurance and the assured**

### *General remarks*

This chapter deals with the effects of a breach by the person effecting the insurance or the assured of the duties imposed on them by the insurance contract. These matters are also subject to detailed regulation in CA. The rules in ICA have been modified substantially in relation to the previous ICA dating from 1930, which was used in drawing up the 1964 Plan. The modifications in the ICA concern the criteria for both the sanction threshold and the sanction. As a general rule, it can be said that the amendments give greater protection to the person effecting the insurance and the assured in the event of breach of the duty of disclosure or the duty of care. The most important change is probably the one concerning the sanction, with the move from complete loss of cover to discretionary reductions in many situations.

The statutory provisions are not, however, mandatory for ships subject to registration which are used in commerce, cf. ICA section 1-3, second paragraph, letter c. One is, therefore, free to choose whether the Plan should be adapted to follow the provisions of ICA or not.

The general approach during the revision has been that the Plan should be follow the provisions of ICA as far as possible. This is, however, not very practical as regards the duty of disclosure and the duty of care. Even though they apply generally, the rules in ICA are aimed primarily at protecting consumers. In marine insurance, on the other hand, the person effecting the insurance is often a business concern; additionally, Norwegian shipowners have considerable expertise in insurance matters at their disposal. This means that the extensive protection provided by ICA is unnecessary. Nor are the sanctions in ICA, with their considerable emphasise on discretionary decisions, entirely appropriate for a field like marine insurance. Given the considerable sums involved in marine insurance, allowing discretion to play such a large part in the sanction, could easily lead to exponential growth in the number of lawsuits.

Although it was natural, as a starting proposition, to continue the approach of the 1964 Plan and the changes introduced by the conditions since then, there has been a need to achieve better co-ordination of the sanctions in the rules in this chapter. Under the 1964 Plan, for example, the nature of the sanction to be applied depended upon which of the rules in chapter 3, the fault of the shipowner could be categorised under. These differences have not always appeared to be well-founded. It has not, however, been possible to co-ordinate the sanctions completely. If an act of negligence by the assured can be subsumed under several provisions of the Plan at the same time, and the sanctions are different, the insurer will, in principle, be free to invoke the rule which gives him the most favourable result.

### *Section 1 - Duty of disclosure of the person effecting the insurance*

#### § 3-1. Scope of the duty of disclosure

The provision corresponds to § 24 of the 1964 Plan and ICA section 4-1.

Subparagraph 1 imposes on the assured an obligation to disclose all information which is material to the insurer. The obligation placed on the assured is an independent, active one; it is not enough for the assured to simply answer the questions asked by the insurer. ICA section 4-1, by contrast, has introduced a passive duty to respond, with the active duty to provide information as the exception. In marine insurance, however, it is natural to retain the Plan's approach with the active duty to disclose information. The person effecting the insurance is usually a professional and will, accordingly, have knowledge about what kind of information the insurer requires.

The approach of the 1964 Plan, namely that the duty of disclosure in § 24 is to be determined using objective criteria, that is, independently of whether the assured knew of a certain situation or whether the assured ought to have realised that the insurer would consider it important, has also been retained. Subjective knowledge is thus of no direct significance to the scope of the duty of disclosure, but is relevant to the nature of the sanction that the insurer may invoke in the event of breach of the obligation. The provisions of § 3-2 and § 3-3 which allow the insurer to limit his liability in the event of breach thus assume that the assured is in some way to blame for the breach of the duty of disclosure. The significance of having an objective duty of disclosure becomes evident in the insurer's right to cancel the insurance contract, cf. § 3-4. If the insurer has not received material information, the insurer is entitled to cancel the agreement by giving fourteen days notice, even though the person effecting the insurance cannot be blamed for the fact that the information is incomplete. The Plan follows ICA sections 4-1 and 4-3 on this point.

When determining whether the insurer has received incomplete information, thereby opening the door to the right to cancel the insurance contract under § 3-4, what the insurer himself maintains would have been material to him at the time the contract was concluded cannot be given decisive weight, as the insurer's view can have become influenced by subsequent developments. The deciding factor must be which information an insurer usually can and will demand prior to accepting an insurance risk of the type in question. The need for information will vary from one type of insurance to another, and it is not possible to give an exhaustive enumeration here. One particular situation which has been the subject of theoretical discussion is the extent to which the person effecting the insurance should be obliged to disclose past criminal matters: see Brækhus/Rein: *Håndbok i Kaskoforsikring* (Handbook of Hull Insurance), p. 123, and Selmer: *Lov, dom og bok* (Statute, Judgment and Book), p. 467 et seq., in particular pp. 471-472.

If the insurance contract is entered into through a broker, it becomes the broker's task, as the agent of the person effecting the insurance, to pass on all the information given by the person effecting the insurance. A mistake made by the broker which results in the insurer receiving erroneous or incomplete information will be regarded as a breach by the person effecting the insurance and may prejudice his position. Similarly, if the person effecting the insurance is in good faith, but the broker knows that the information from the person effecting the insurance is incomplete or incorrect; a failure by the broker to correct the information can prejudice the position of the person effecting the insurance. This means that the broker has an independent obligation vis-à-vis the insurer to correct or supplement the information given by the person effecting the insurance. If the broker negligently breaches this obligation, the insurer may invoke § 3-3 against the person effecting the insurance.

The duty of disclosure applies "before the contract is concluded". Subsequent changes must be judged according to the rules concerning alteration of risk, cf. § 3-8 et seq. The difference is illustrated in the case ND 1978.31 Sandefjord ORMLUND, where a Norwegian second engineer with a dispensation to sail as a chief engineer was, after the conclusion of the insurance contract, replaced by another Norwegian who did not have a valid certificate or any type of dispensation. The court treated the change as an issue of breach of the duty of disclosure, although the correct approach would have been to treat it as an alteration of the risk: see Bull: *Sjøforsikringsrett* (Marine insurance law), pp. 103-104, and Brækhus/Rein: *Håndbok i Kaskoforsikring* (Handbook of Hull Insurance), pp. 120-121.

The person effecting the insurance will also have a duty of disclosure when the contract is being renewed. The insurer can be expected to keep the information given earlier, so there can be no new duty of disclosure for information conveyed previously. However, the person effecting the insurance must give information relating to any new matters, e.g., changes in the nationality of the crew or in the ship's trading pattern.

The information is to be given to "the insurer". This includes both the leading insurer and the individual co-insurers. In principle, the person effecting the insurance is entering into separate agreements with each individual co-insurer, with the necessary consequence that all of them may invoke any breach of the duty of disclosure. As a result, it is the responsibility of the person effecting the insurance to ensure that all co-insurers receive correct information. If, however, the leading insurer makes independent inquiries about the risk and obtains incorrect information which is then passed on to the other insurers, the position of the person effecting the insurance will not be prejudiced. This does not, however, apply if the person effecting the insurance knows that the insurer is relying on incorrect, material information.

Subparagraph 2 corresponds to ICA section 4-1, and has been partially reformulated to concord with ICA. The rule will apply in situations where, for example, the person effecting the insurance becomes aware that the vessel is considerably older than what was stated at the time the insurance contract was concluded. The duty to correct information will only apply to circumstances which existed at the time the contract was concluded. Circumstances arising later must be considered according to the rules on alteration of the risk.

When the person effecting the insurance subsequently corrects the information about the risk, the insurer may cancel the insurance contract pursuant to § 3-4. If the person effecting the insurance later becomes aware of certain facts and negligently fails to report them, the insurer's liability will be limited according to § 3-3, subparagraph 2, second sentence.

### § 3-2. Fraud

This paragraph corresponds to § 25 of the 1964 Plan and ICA section 4-2, first paragraph, and section 4-3, last sentence.

The provision sets out the rules governing fraudulent misrepresentation. The corresponding rule in § 25 of the 1964 Plan applied to both fraudulent and dishonest conduct. ICA section 4-2, first paragraph and section 4-3, last sentence apply only to fraudulent conduct. Dishonest conduct, however, is covered by the provision dealing with negligent breach of the duty of disclosure. The Plan follows the ICA approach on this point. In keeping with ICA, however, a rule on cancellation in the event of fraudulent misrepresentation has been introduced which is more stringent on the person effecting the insurance than the current rule.

The consequence of fraudulent misrepresentation on the part of the person effecting the insurance is that the contract is not "binding". This is in accordance with general principles concerning void contracts. At the same time, it is important that the insurer reacts in such a way that the person effecting the insurance is informed unequivocally that there is no insurance coverage. The obligation of the insurer to inform pursuant to Plan § 3-6 has therefore been expanded and, in the event of failure to inform, cover will continue, cf. below. ICA has opted for a somewhat different wording, but the result is, in practice, largely the same.

It does not matter, for the purposes of § 3-2 of the Plan, what significance the information in question would have had for the insurer's acceptance of the risk. The issue of whether it is reasonable that incomplete or incorrect information about a factor of lesser importance should avoid the contract has been raised: Brækhus/Rein: *Håndbok i Kaskoforsikring* (Handbook of Hull Insurance), p. 125. ICA, for its part, does not take into account what the fraudulent misrepresentation was about. Since the contract does not become void in the event of dishonest conduct, the need for different levels of sanction is reduced, and the absolute sanction has therefore been maintained.

Subparagraph 2 is new, and gives the insurer the right to cancel other contracts with the person effecting the insurance on giving 14 days' notice where there has been fraudulent misrepresentation. The provision corresponds to ICA section 4-3, except that the cancellation under ICA takes immediate effect. The Committee found it appropriate to follow ICA in allowing the insurer to cut all ties with a client who has acted fraudulently. The period of notice in ICA is, however, not sufficient for marine insurance, and so has been set at 14 days, in keeping with other notice periods in the Plan.

### § 3-3. Other breaches of the duty of disclosure

This paragraph corresponds to § 26 of the 1964 Plan and ICA section 4-2, second and third paragraphs, and section 4-3, first sentence.

Both the sanction threshold and the sanction in ICA differ from the Plan's provision. The sanction threshold is higher in ICA and there are different levels of sanction. There is no reason, however, to raise the sanction threshold to "more than just a little blame attaching" in marine insurance. Here

also, the starting principle for the sanction threshold in the event of misleading information should be that the insurer be put in the same position as he would have been in had he been given correct information. A sliding sanction scale of the kind found in ICA is not very appropriate in marine insurance.

Subparagraph, 1 applies when the person effecting the insurance has "in some other way breached the duty of disclosure", i.e. there has been fault but the conduct cannot be characterised as fraudulent. Under the amendment to § 3-2, the provision will encompass any case of negligent breach of the duty of disclosure, from ordinary, negligent breach to demonstrated gross negligence where the conduct would be characterised as dishonest.

If the insurer would not have accepted the risk if the person effecting the insurance had provided the information which should have been given, the contract is "not binding". Under the 1964 Plan, the sanction was that the insurer was "free from liability". The amendment corresponds to the approach adopted for fraudulent misrepresentation, cf. Plan § 3-2. The reality in both cases is that the insurer is not liable when the event insured against has occurred, and it is therefore better to be consistent as regards the words used. Moreover, the wording "not binding" seems more consistent in relation to the rules concerning the insurer's right to cancel and obligation to inform. Under § 29 of the 1964 Plan required the insurer give notice of his intention to invoke § 26, first subparagraph, but it was not clear if the insurer had to cancel the contract to be free from liability for future losses. The wording to the effect that the contract is not binding makes it perfectly clear that there is no need to cancel, while at the same time § 3-6 of the Plan requires the insurer to give notice of his intention to deny coverage.

Since the contract is not binding if the insurer would not have entered into it if correct information had been given, the insurer is put in the same position as he would have been in had correct information originally been given. The insurer has the burden of proving that he would in no way have entered into any contract. It is sufficient to demonstrate, on a balance of probabilities, that the particular insurer would not have accepted the risk; what other insurers might be expected to have done is irrelevant.

If the insurer would have accepted the risk, but on different conditions, then subparagraph 2 allows the insurer to avoid liability where there is a causal connection between the loss and the matter that should have been disclosed. The term "conditions" refers to both the contract with the person effecting the insurance and the other arrangements the insurer would have made with full knowledge of the facts. If the insurer would have taken out higher reinsurance, for example, the insurer will not be liable if the casualty is due to a circumstance about which he was not informed. If it is clear that the person effecting the insurance has acted negligently, either at the time the contract was concluded or subsequently, the person effecting the insurance will have the burden of proving that the undisclosed risk factor was not material to the occurrence of the loss, or that it occurred before he was in a position to correct the information supplied.

It could be said that the sanction of the Plan is not sufficiently differentiated for situations in which an insurer with correct information would have, for example, introduced a safety provision or charged a higher premium. An absolute exemption from liability for the insurer in such cases would seem unreasonable. Since the rules on the duty of disclosure are not frequently used in practice, it appears unnecessarily complicated to introduce new sanctions.

If the casualty is due to a combination of risk factors about which the insurer knew, and about which the person effecting the insurance has negligently failed to give information, liability must be limited according to the general rule on apportionment in § 2-13. The apportionment rule opens the door to attaining results close to those which would have been obtained under the sliding scale system in the ICA, by which the indemnity is reduced depending on how much the undisclosed factors have influenced the course of events.

Even though the insurer is protected by the principle of causation, he may have an interest in coming out of the insurance relationship, for example, because the evidence for the cause of a casualty may be unclear. Under subparagraph 3, the insurer may cancel the insurance contract by giving fourteen days notice. As elsewhere in the Plan, "notice" here refers to the period of notice for cancellation. Also as elsewhere, the notice period referred to here starts to run from the time the person effecting the insurance has received the notice.

#### § 3-4. Innocent breach of the duty of disclosure

This paragraph is identical to § 27 of the 1964 Plan and corresponds to ICA section 4-2, cf. section 4-3, first sentence.

If information about the risk is incorrect or incomplete, and the person effecting the insurance is not to blame for this, the insurer is liable according to the terms of the contract, but may cancel the insurance contract by giving 14 days notice. Under § 117, subparagraph 1 of the 1964 Plan, the insurer could, in these situations, also charge an additional premium for the period he had borne the risk. This provision was of no practical significance, and has therefore been deleted. Moreover, according to general principles of contract law, the insurer in this type of situation is entitled to an additional premium corresponding to the additional risk which must be borne when the risk is different from what is assumed in the contract.

The question of when information must be considered incomplete or misleading is discussed above under § 3-1, where the relationship between § 3-1 and § 3-4 is also discussed.

#### § 3-5. Cases where the insurer may not invoke breach of the duty of disclosure

This paragraph corresponds to § 28 of the 1964 Plan and ICA section 4-4.

The first sentence states that the insurer loses the right to rely on incorrect or incomplete information as grounds for invoking one of the sanctions in this section if he was aware of the true facts at the time the contract was concluded. The wording "ought to have known" is new, and is taken from ICA section 4-4, first sentence. This approach also fits in well with the rules of the Plan: when § 3-1 imposes an objective duty of disclosure on the person effecting the insurance, it is natural that § 3-5 should impose on the insurer a duty to show due diligence with respect to the information he has received. If the person effecting the insurance gives certain information about which the insurer wishes to have greater detail, then he must request it.

The rule also applies in the event of fraudulent misrepresentation. There is little reason to give the insurer the opportunity to speculate at the expense of the person effecting the insurance if the insurer, at the time the contract is concluded, knows that the person effecting the insurance is fraudulently giving incorrect information, but nonetheless accepts the risk.

There are also minor differences as regards the time which is relevant when considering the extent of the insurer's knowledge: the relevant point in time in ICA is when the insurer receives the erroneous information, while the Plan refers to the time when the information should have been given. The Plan thus allows the person effecting the insurance to invoke the knowledge of the insurer right up to the time the person effecting the insurance should have corrected the information pursuant to § 3-1, second sub-paragraph. Under the second sentence, the insurer may not invoke incomplete information about facts which are no longer material to him, unless there has been fraudulent misrepresentation. This is in accordance with the approach of the 1964 Plan, while ICA section 4-4 does not allow the insurer to invoke this type of factor, even in the event of fraudulent misrepresentation. Once the insurer has become aware that the person effecting the insurance is in breach of the duty of disclosure, he should react within a reasonable time, so that the person effecting the insurance may take out new insurance. A different approach might open the way for the insurer to speculate in the situation, cf. the comments on the first paragraph.

#### § 3-6. Duty of the insurer to give notice

This paragraph corresponds to § 29 of the 1964 Plan and ICA section 4-14.

The provision imposes on the insurer an obligation to inform the person effecting the insurance if he intends to invoke a breach of the duty of disclosure. In the corresponding provision in the 1964 Plan, the insurer had no duty to give notice in the event of fraudulent or dishonest conduct. ICA section 4-14 imposes a duty to give notice even in the event of fraudulent conduct, and a corresponding rule has been introduced in the Plan.

Under the 1964 Plan, the insurer's duty to notify was not subject to any specific requirements as to form. ICA requires the notice to be in writing, and this requirement has been included in the new Plan.

#### § 3-7. Right of the insurer to obtain particulars from the ship's classification society, etc.

The provision corresponds to § 30 of the 1964 Plan and CEFOR I, 19 and PIC § 5, no. 4.

In marine insurance, the information held by the vessel's classification society is of crucial importance. This is true at the time the contract is concluded and also during the period of insurance, e.g., if the insurer is considering exercising its right to cancel the contract pursuant to § 3-27.

Subparagraph 1 imposes on the person effecting the insurance an obligation to obtain for the insurer all information which the classification society may at any time have regarding the condition of the ship. The duty to obtain information assumes that the insurer has requested it. In practice,



to the extent that the classification society requires the prior permission by the owner, this obligation will usually be fulfilled by the shipowner giving the insurer written permission to obtain the information. The Plan cannot, of course, require the classification society to release information which it otherwise would withhold; this is indicated by the requirement that the particulars must be "available".

Refusal by the shipowner to assist the insurer in obtaining the particulars he wants from the classification society will constitute fundamental breach of the contract and allow the insurer to cancel the contract even without an express provision. To avoid any discussion, however, the right to cancel the contract has been explicitly set out in subparagraph 2. The notice period is 14 days, but the insurance does not in any event lapse until the ship has reached the closest safe port according to the insurer's instructions. "Port" is understood to mean the closest geographical point of call, not the destination of the ship. If the assured does not agree with insurer's instructions on a safe port, it must be decided, based on an objective assessment, whether the port is safe for the ship in question.

If the insurer wishes to obtain information from the classification society in connection with settlement of a claim following a casualty, e.g., to support an assertion that that he had not received complete information at the time the contract was concluded or that the person effecting the insurance knew the ship was not seaworthy, § 5-1 will apply.

Subparagraph 3 is new, and gives the insurer authority to obtain particulars referred to in subparagraph 1 directly from the classification society and from relevant government authorities in the country where the ship is registered or has undergone Port-State control. The provision is taken from the insurance conditions, cf. CEFOR I, 19 and PIC § 5, no. 4. It has been reformulated somewhat, but the substantive content is largely the same. The person effecting the insurance is to be informed no later than when the particulars are obtained.

Subparagraphs 1 and 3 may appear superfluous when subparagraph 3 allows the insurer to go straight to the classification society. This is correct insofar as the classification society accepts the rule in the third paragraph. But because one cannot be sure that this will always be the case, there is still a need for the rules in subparagraphs 1 and 2 as a supplement to subparagraph 3.

### *Section 2 - Alteration of the risk*

This section corresponds to §§ 31-44 of the 1964 Plan and ICA section 4-6 and section 4-7.

The provisions of the ICA only deal with the general rules relating to change of risk while this section deals with general rules as well as special rules concerning change of class, breach of trading limits and rules of a similar nature such as, § 3-16 on illegal activities, § 3-17 and § 3-18 concerning the effect of requisition, § 3-20 on removal of a damaged vessel and § 3-21 on change of ownership. § 43 of the 1964 Plan also contained rules which gave the insurer the right to limit liability in the event of the ship being removed to a different location to avoid condemnation. This rule is superfluous now that the claims leader has been given authority to decide the issue of removal on behalf of the whole group of insurers, cf. § 9-4.

The ICA rules on alteration of the risk give the insurer the right to limit liability in the event of alteration of the risk or changes in circumstances which are material to the calculation of the premium. The relevant sanctions are total or partial exemption from liability, or a proportionate reduction in liability. For the insurer to be able to react, however, the requirements of fault and causal connection must be met. Not all of these provisions from ICA can be transplanted to marine insurance, however. Accordingly, the relevant rules from the 1964 Plan have been for the most part retained.

The general rules on the effect of alteration of the risk are found in § 3-8 to § 3-13. The chances of their being invoked frequently are not great, as the practical instances of alteration of the risk are dealt with by specific provisions. In addition, the rules on seaworthiness and safety regulations in chapter 3, section 3 encompass a number of cases which otherwise would have been decided according to the general rules on alteration of the risk.

The rules in this and succeeding sections are aimed at the assured and link legal consequences to his actions or omissions. The assured is the party who is entitled to an indemnity or the amount insured, cf. Plan § 1-1, letter (c), i.e. the party who owns the financial interest which has been affected by the casualty. A single casualty can give rise to indemnity claims from several assureds under a single insurance contract, e.g., where the ship is co-owned. The main principle is that each assured shall be judged separately. Negligence on the part of one will not affect the others, although exceptions can be envisaged. It is not necessary for the assured to have acted personally for the rules to apply, however. The assured must be identified to a certain extent with those people who act on his behalf. Issues such as the extent to which there will be established an identity between several assureds or between an individual assured and his servants are dealt with under one heading in chapter 3, section 6.

#### § 3-8. Alteration of the risk

Subparagraph 2, second sentence, has been added in the 2007 version. Subparagraph 2 was amended in the 2003 version. The provision is otherwise identical to earlier versions of the 1996 Plan and corresponds to § 31 of the 1964 Plan and ICA sections 4-6 and 4-7.

The general rules on alteration of the risk correspond to ICA sections 4-6 and 4-7, but the definitions of alteration of the risk, the sanction threshold and the nature of the sanction are all different. As mentioned earlier, the issue of harmonisation with ICA provisions has been examined, but it was decided to retain the rules of the Plan.

An insurance contract is one under which an insurer is to bear the risk of specified perils to which the insured interest is exposed. If one of these perils increases in intensity, this will not constitute an alteration of the risk which the insurer can then invoke. Thus, § 3-11 does not require the assured to notify the insurer if the ship runs into extremely bad weather or ice-filled waters.

Accordingly, it is necessary to distinguish between alterations of the risk which constitute a relevant condition which triggers the provisions of the insurance contract, and ones which do not. Subparagraph 1 sets out two general conditions which must be met: there must have been a change in the factual circumstances which affect the nature of the risk and this must amount to a breach of the implied conditions upon which the contract was based. For both aspects, the decisive factor will be the interpretation of the insurance contract in question. The issue becomes one of whether the insurer should be bound to maintain the cover without an additional premium in the new situation which has arisen, or whether it would be reasonable to give the insurer the opportunity to employ the sanctions provided in the Plan. On this point it becomes necessary to fall back largely on general principles of insurance and contract law; exhaustive exemplification is not possible here.

Like ICA, the Plan uses the wording "alteration of the risk" and not "increase of the risk". This expression was chosen out of consideration for situations where there is clearly a change in the risk due to evolving external circumstances, but it is difficult to determine whether the risk has in fact become demonstrably greater.

§ 31, subparagraph 2 of the 1964 Plan contained a rule on loss of class as an alteration of the risk, while the additional insurance conditions dealt with loss of class and change of class under separate rules, cf. Cefor I. 23, and PIC § 5, 5. During the revision, the view was taken that the general rules on alteration of the risk did not provide a suitable regulatory framework for dealing with classification problems. Accordingly, the issue was specifically regulated in § 3-14 of **the 1996 Plan**. **In the 2007 revision, however, change of class was removed from the specific regulation in § 3-14 and moved back to the rules regarding alteration of the risk, cf. below.**

Subparagraph 2 provides that a change of the State of registration, the manager of the ship or the company which is responsible for the technical/maritime operation of the ship shall be deemed to be an alteration of the risk as defined by subparagraph 1. This provision was amended in 2003 through the addition of the words "a change of the State of registration". The addition corresponds with the English ITCH rules, as well as with a number of continental conditions.

The provision is based on a presumption that a change of the State of registration, manager or operating company will be of significance to the insurer. On the other hand, automatic termination of the cover, which is the solution in many other countries, will be an unnecessarily severe sanction. A milder solution is obtained by explicitly classifying a change of the State of registration, the manager or the company responsible for the technical/nautical operation of the ship as an alteration of the risk. The assured must notify the insurer of this type of change pursuant to § 3-11, and the insurer has the right to terminate the contract regardless of whether notification is given, cf. § 3-10. If an event insured against occurs, the insurer will be free from liability if it can be assumed that the insurer would not have accepted the risk had he known that the change would take place, cf. § 3-9, subparagraph 1. If it can be assumed that the insurer would have accepted the risk but on other conditions, the insurer will only be liable to the extent it is established that the loss is not due to the alteration of the risk, cf. § 3-9, subparagraph 2. This type of sanction structure gives the insurer sufficient protection against this kind of change.

The term "State of registration" refers to the State in which the ship is registered. It makes no difference if the ship is registered in another register in the same State, such as in the case of a change from NOR to NIS. The expression "manager" has a long tradition in marine insurance law, and covers the company which has the overall responsibility for the ship's technical/maritime and commercial operation. A change of manager will thus entail a change in all management functions, i.e. technical, maritime and commercial management. The term "manager", by contrast, does not encompass a company which is only responsible for part of the ship's operation. If the management function is shared, it will be crucial for the purposes of insurance which company is responsible for the "technical/maritime" operation. The technical/maritime management function will usually be combined in one company, and the functions must be combined in this way for the change to automatically constitute an alteration of the risk pursuant to § 3-8, subparagraph 2: if the technical and maritime functions are split up among more than one company, a change of one of these companies will not automatically constitute an alteration of the risk but may, depending on the circumstances, constitute a general alteration of the risk under § 3-8, subparagraph 1. Likewise if there is a change of the company which is only responsible for the commercial operation of the ship, or for the crewing of the ship. As the threshold for a relevant change under subparagraph 1 is high, an insurer wishing to protect his position where there is a change of the company which takes care of functions other than technical/maritime operation must include a specific clause to that effect.

**Subparagraph 2, second sentence, is new in the 2007 version. According to § 3-14, subparagraph 2, of the 1996 Plan, the rule was that the insurance terminated in the event of a change of classification society unless the insurer explicitly consented to a continuation of the insurance contract. As a result of this rule, the shipowner's simply forgetting to give notification of such a change could result in the termination of the insurance, even if the insurer himself would have approved the continuation of the insurance had he been notified of the change of classification society. It is therefore more expedient to use the general rules governing alteration of the risk in respect of this point. The amendment entails that the rule that cover does not terminate until the ship has reached port no longer applies in relation to a change of classification society. Thus, if the insurer would not have approved the change, he is not liable for casualties that occur after the change took place, cf. § 3-19, subparagraph 1.**

### § 3-9. Alteration of the risk caused or agreed to by the assured

This paragraph is identical to § 32 of the 1964 Plan.

See the Commentary on § 3-3 with respect to the burden of proof and causal connection.

### § 3-10. Right of the insurer to cancel the insurance

This paragraph is identical to § 33 of the 1964 Plan.

The rule corresponds to ICA section 3-3, first paragraph, second sentence, although ICA also requires that the notice of cancellation be reasonable. ICA also contains rules on how the cancellation is to be carried out. These rules are superfluous in marine insurance.

### § 3-11. Duty of the assured to give notice

This paragraph corresponds to § 34 of the 1964 Plan.

The first sentence imposes on the assured an obligation to inform the insurer in the event of an alteration of the risk. The second sentence allows the insurer, in the event of a failure to notify, to cancel the contract or take other action. The period of notice has been changed to 14 days, in keeping with the rules for the duty of disclosure.

ICA section 4-7, second paragraph, contains a rule to the effect that the rules on alteration of the risk may not be invoked if the assured has taken reasonable steps to notify the company as soon as the assured knew about the change. This provision does not fit very well into the Plan system.

### § 3-12. Cases where the insurer may not invoke alteration of the risk

This paragraph is identical to § 35 of the 1964 Plan, and has its counterpart in ICA section 4-6, first sentence.

Subparagraph 1 sets out the same rule for alteration of the risk as that in § 3-5, second sentence regarding the duty of disclosure. It is only the rights referred to in § 3-9 and § 3-10 that the insurer loses once circumstances have returned to normal, however, and not the right under § 3-11. The obligation to give notice of relevant alterations of the risk is so important from the insurer's standpoint that an assured who has been negligent in this respect must be prepared to face cancellation on 14 days' notice, even if the original situation has subsequently been restored.

Subparagraph 2, first sentence, prohibits the insurer from invoking an alteration of the risk when measures have been taken to save human life. This provision corresponds to ICA section 4-13. The rules are somewhat different when there is an alteration of the risk due to measures taken to salvage items of material value: under the Plan, the insurer must accept an alteration of the risk occurring for the purpose of saving a ship or goods "during the voyage", while the rule in ICA section 4-13 applies unqualifiedly to salvaging items of material value. Allowing the ship to be used unconditionally in salvage operations at the expense of the insurer is not appropriate in marine insurance. Coverage of the alteration of the risk in salvage operations to save items of material value must be limited to the occasional salvage operation decided upon more or less spontaneously, and which it is natural for a commercial vessel undertake. This limitation is expressed in the requirement that the salvage operation must take place "during the voyage". The salvage operation takes place "during the voyage" when the disabled ship is located in the immediate vicinity of the route. The formulation also encompasses the situation where the ship leaves a port at which it has called to go out and assist a disabled ship, if the casualty has occurred in proximity to the port and the insured ship is the closest vessel for the purposes of attempting to salvage the disabled ship, cf. ND 1966.200 Lyngen NINNI.

It does not matter, for the purposes of insurance coverage, whether the assured has consented to the salvage operation or not. A requirement of consent on the part of the assured might make the master hesitate to give notice at all of a salvage operation which he found natural and correct to carry out. As long as the salvage operation takes place "during the voyage", it is permitted.

The salvage operation will often involve the insured ship being used for towing. This would normally affect the liability coverage under the hull policy but, under § 13-1, second subparagraph, letter (a), the coverage will remain in force when the salvage operation is permitted pursuant to § 3-12, subparagraph 2.

If the salvage operation is not permitted, the insurer may invoke § 3-9 and § 3-10. Cancellation by giving 14 days notice is not very practical in this kind of situation. Consequently, the insurer's main protection will come from § 3-9: if the insurer would not have accepted the risk, the entire contract lapses, and the insurer is free from all liability arising from the salvage attempt. Accidental damage occurring completely independently of the salvage operation will still be covered. The alternative

would have been to suspend the insurance cover while the salvage operation was being carried out, but this would have been too stringent.

A salvage operation which the assured opts to carry out contrary to § 3-12, subparagraph 2, will alter the risk so that he will have a duty to give notice under § 3-11. If the assured neglects this duty, the insurer may use that negligence as a basis for cancelling the insurance contract, even though the salvage is completed without damage to the ship, cf. the comments above on subparagraph 1.

In determining the salvage reward, consideration shall also be given to damage and loss sustained by the salvor, cf. Norwegian Maritime Code (Sjøloven) section 442, no. 1 letter (f). Under section 446, first paragraph, damage sustained by the salvor shall receive first priority when the salvage reward is distributed. Insofar as the salvage reward is sufficient to cover the assured's loss, the insurer should be free from liability, cf. 1996 Plan § 5-18, which applies *mutatis mutandis* to the rules on claims.

#### § 3-13. Insurer's duty to notify

This paragraph corresponds to § 36 of the 1964 Plan and has a parallel in ICA section 4-14.

The provision is identical to the one regarding the duty to notify in § 3-6 above.

#### § 3-14. Loss of class

The heading and subparagraph 2 were amended and subparagraph 4 was added in the 2007 version. The paragraph is otherwise identical to earlier versions of the 1996 Plan.

During the 1996 revision of the Plan, there was agreement that it was necessary that both loss of class and change of classification society should cause insurance cover to terminate. In the course of the 2007 revision, however, it was concluded that the rules of § 3-14 are too strict with regard to change of classification society. Change of classification society was therefore moved to the rules regarding alteration of the risk, cf. subparagraph 4 below. Consequently, the heading was also amended to "Loss of class".

Subparagraph 1 sets out the principle that, at the time the insurance cover commences, the ship shall be classed with a classification society approved by the insurer.

In earlier versions of the 1996 Plan, the rule under subparagraph 1 was that both loss of class and change of classification society led to automatic termination of the insurance. In the 2007 version, this was amended to the effect that only loss of class causes the insurance to terminate, subparagraph 2, first sentence. A change of classification society has been made an alteration of the risk, cf. § 3-8, subparagraph 2. The rule that the insurance cover will not terminate if the insurer expressly consents to the insurance continuing thus only applies in relation to loss of class. The provision ensures that the assured may not argue that he has informed the insurer, who has then given tacit acceptance. Furthermore, cover is maintained in any event until the ship reaches the nearest port, subparagraph 2, second sentence. In keeping with the formulation of § 3-7, subparagraph 2, the closest safe port in accordance with the insurer's instructions is specified, cf. also the commentary on § 3-7. Subparagraph 3 sets out what is to be deemed a loss of class. Because some classification societies cancel the ship's class when a casualty has occurred, it is explicitly stated that suspension or loss of class resulting from a "casualty which has occurred" is not to be deemed a loss of class. In this situation the assured should, obviously, not be deprived of cover. It does not matter in this connection whether the casualty is covered by insurance or not. The insurance remains intact, even if the class is suspended following a casualty which is not covered, e.g., because the ship was not seaworthy.

The loss of class need not result from a formal decision by the classification society for the insurance to lapse. The trend among classification societies is to introduce rules on automatic suspension of class when the assured has failed to carry out one of the three periodic surveys: Renewal Survey (every five years), Intermediate Survey (every second or third year) and the Annual Survey. Class can thus be suspended without a formal decision on the part of the administration in the classification society.

In accordance with the earlier versions of § 3-14 of the 1996 Plan, the provision concerned both loss of class and change of classification society. Change of classification society has now been moved to the rules regarding alteration of the risk, cf. § 3-8, subparagraph 2, second sentence, and § 3-14, subparagraph 4.

## § 3-15. Trading limits

Subparagraph 2 was amended in the 2007 version. The provision is otherwise identical to earlier versions of the 1996 Plan.

The rules are based on a tripartite division: ordinary trading limits, excluded trading limits (areas where there is no cover unless express prior dispensation has been given), and conditional trading limits (areas in which the ship may sail subject to an additional premium). Subparagraph 1, first sentence gives a negative delimitation of the ordinary trading limits, which comprise all waters except those which are defined as excluded or conditional areas. The description of the three categories of trading area has been incorporated into the Plan by way of a separate appendix. Subparagraph 1, second sentence, sets out the rule that the person effecting the insurance is under an obligation to notify the insurer whenever the ship is sent beyond the ordinary trading limits. The sanction for failure to notify will depend on which type of trading limit has been exceeded, as stated in subparagraphs 2 and 3. § 3-15 is intended to be exhaustive as regards the consequences of sailing outside the trading limits, and the general rules regarding alteration of the risk in §§ 3-8 to 3-13 thus do not apply to this special type of alteration of the risk.

Subparagraph 2, deals with navigation in conditional trading limits. The ship may still sail in these areas, but the insurer may charge an additional premium and impose other conditions, cf. the first sentence. In earlier Norwegian versions the rule stated that an additional premium shall be paid; in the 2007 version this wording has been replaced by "the insurer may require", but this does not entail any change in points of substance. The additional premium is conditional on there being a genuine increase in the risk. If the ice in the Baltic Sea in a mild winter has formed later than the date stipulated in the appendix to the Plan, the conditions for imposing an additional premium are not present during the ice-free period. If the person effecting the insurance does not want to accept the additional premium or the special conditions, he may request suspension of cover while the ship is in the area subject to the additional premium. If the insurer has not been given prior notice as required by subparagraph 1, second sentence, the additional premium and any special conditions must be set when the insurer is informed at a later time that the ship has sailed in a conditional area. In these cases, the person effecting the insurance must simply accept any additional premium and special conditions the insurer might impose. Failure to notify will not have any other consequences for the person effecting the insurance unless damage occurs, cf. subparagraph 2, second sentence. If damage occurs in a situation where the ship navigates into a conditional area with the consent of the assured and notification has not been given, the damage is recoverable subject to a deduction of 1/4. In earlier versions of the 1996 Plan, a maximum amount of USD 150,000 was stipulated; in the 2007 version this was increased to USD 175,000. This provision is new, and the rationale is that the assured would have nothing to lose if there was no sanction for a failure to give notice. This might lead to the assured being tempted to wait and only report to the insurer in the event of damage occurring. The deduction here applies only to damage, cf. chapter 12, and not total loss. It is also a precondition for application of the deduction that the assured has consented to the trading limit being exceeded. If the ship enters into the conditional trading limit without the consent of the assured, e.g., where the master or crew makes a mistake, or ice brings the ship into a conditional trading limit, any damage occurring will not trigger the extra deduction. The insurer will, however, be entitled to charge an extra premium or impose special conditions.

The deduction pursuant to subparagraph 2 is applicable in addition to the ordinary deductions prescribed in § 12-15, § 12-16 and § 12-18. When calculating the deduction, the provision in § 12-19 shall apply correspondingly, cf. § 3-15, subparagraph 2, third sentence.

Subparagraph 3 sets out the rules for navigation in excluded trading areas limits. The first sentence allows the assured to sail in excluded trading areas provided he has obtained advance permission from the insurer. The permission may be subject to certain conditions, e.g., payment of an additional premium. If the assured does not accept the conditions or has not requested dispensation, cover will be suspended from the moment the ship enters the excluded area. For the insurance to be suspended, however, the master must have acted intentionally in exceeding the trading limit. Suspension pursuant to subparagraph 3 will apply only as long as the ship is inside the excluded area, cf. second sentence.

Cover will not be suspended if the ship navigates into an excluded area as part of measures being taken to save human life or to salvage ship or goods, cf. the reference to § 3-12, subparagraph 2, in the third sentence.

If a casualty has occurred after insurance cover has resumed following a deviation, the general rules on causation in § 2-11 apply. If it is clear that the ship sustained damage while it was outside the trading limits, the insurer will not be liable for new casualties occurring as a result of that



**damage.** These casualties must be attributed to the ship having been "struck by a peril" during the suspension period, cf. § 2-11, subparagraph 1. Since the damage is known, the special rules on unknown damage in subparagraph 2 would not apply. If separate hull cover was taken out during the deviation, new **casualties** will be covered by that policy. If, however, the ship had sustained damage while it was outside the trading limits **which had not been discovered**, new **casualties** arising from the undiscovered damage will fall entirely under the ordinary hull insurer's liability.

Here, as elsewhere, the rules on apportionment apply. If a subsequent casualty is partly due to known damage which occurred during the suspension period and partly due to perils to which the ship is exposed at a later time, the insurer will only be liable for a proportionate share of the loss, cf. § 2-13.

The rules on trading limits in an insurance policy are, in principle, independent of the rules in the ship's trading certificate governing the area where it is permitted to trade. For smaller vessels, a trading certificate issued by the ship's flag state is used instead of class approval and loss of the ship's trading certificate is dealt with specifically in § 17-4, subparagraph 2. However sailing outside the areas permitted by **the** trading certificate would, in relation to the insurance contract, be a breach of a safety regulation regulated by § 3-22, or in the case of fishing vessels and smaller coasters, § 17-5 (b).

**In the 2007 version a number of amendments were also made to the appendix to the Plan regarding trading limits. The appendix contains further comments on these amendments.**

### § 3-16. Illegal undertakings

This paragraph corresponds to § 40 of the 1964 Plan.

The provision has no direct parallel in ICA.

Subparagraph 1 establishes that use of the ship for illegal purposes or activities constitutes a special alteration of the risk. Subparagraph 3, according to which the insurance terminates if the ship is substantially used for the furtherance of illegal purposes, has its origins in the 1930 ICA section 35, which prohibited insurance of an "illegal interest"; see also the commentary on § 2-1 and § 2-8 above. NL 5-1-2, which forbids contracts which offend decency, is based on somewhat different criteria, but leads to substantially the same result.

Under subparagraph 1 the insurer is free from liability for "loss that is a consequence of the ship being used for illegal purposes". Judging the causation issue may give rise to difficulty. It is not sufficient that the ship runs aground on a voyage with an illegal purpose about which the assured knew. The damage must, to a certain extent, be a foreseeable consequence of the illegal undertaking, e.g., where the vessel must venture into hazardous waters in connection with a smuggling operation and runs aground. The more detailed application of this rule is a matter which must be left to the courts.

It is also a requirement that the assured "did not know nor ought to have known" of the illegal nature of the undertaking at a time when it would have been possible for the assured to intervene. If the crew uses the ship for illegal purposes without the knowledge of the assured, this is a risk against which the assured should be protected. Once the assured learns of the matter, however, the assured must intervene promptly, failing which the insurer may cancel the insurance contract on 14 days' notice, pursuant to subparagraph 2. The period of notice was three days under the 1964 Plan, but this has now been amended to conform with the other notice periods. The burden of proving good faith lies with the assured.

An activity or undertaking is illegal not only when it violates the laws of the flag State, but also when it is unlawful under the laws of the State which has authority over the ship in the situation in question. The issue of whether the ship had a duty to comply with prohibitions or orders of another country's authorities must be determined in each situation, cf. also the comments to § 3-22.

When the ship is being used for illegal purposes without the knowledge of the assured, the consequence will often be that government authorities intervene. If the ship sustains damage as a result of a customs search, this will have to be indemnified by the marine hull insurer. Likewise if the ship is definitively seized because of the illegal undertaking. Damage and intervention of this nature do not fall under § 2-9, letter (b), cf. the comments to that provision, and are therefore not excluded from the perils covered by the marine insurer. Temporary intervention which does not involve damage to the ship is not an appropriate risk for cover by the hull insurer. Nor would loss-of-hire insurance taken out under Plan conditions cover loss occasioned by this kind of temporary intervention.

There may sometimes be some doubt as to whether it is the marine perils insurer or the war risks insurer which must pay for a loss that is the consequence of an illegal action undertaken without the knowledge of the assured. The deciding factor will be what falls under the expression "other similar intervention" in § 2-9, letter (b).

The rule in subparagraph 3 will apply, e.g., if the assured puts the ship to use in regular smuggling traffic. If so, it should not matter that the ship also carries some legal cargo. The decisive factor will be whether the ship is used principally for the purposes of the illegal undertaking.

#### § 3-17. Suspension of insurance in the event of requisition

Subparagraph 2 was moved to § 15-24 (b) in the 2007 version. The paragraph is otherwise identical to earlier versions of the 1996 Plan.

The title of the paragraph has been changed from "requisition" to "suspension of insurance in the event of requisition" to better reflect the contents of the provision.

#### § 3-18. Notification of requisition

This paragraph corresponds to § 42 of the 1964 Plan.

Subparagraph 1 imposes on the assured a duty to notify the insurer if the ship is requisitioned or is redelivered, while subparagraph 2 gives the insurer authority to demand a survey of the ship when the requisition is over and the ship has been returned. When the insurance comes into effect again after a requisition, the same types of causation problems arise as when the insurance cover has been suspended due to the ship navigating beyond the trading limits. The Plan's general rules on causation also apply in the event of requisition, cf. § 2-11. If the ship has sustained unknown latent damage during the requisition period, the insurer will bear the risk of the later effects of that damage. Consequently, the insurer has a specific interest in receiving notice of the return of the vessel, so that a demand for a survey may be made pursuant to the second subparagraph. Latent damage discovered in the survey shall be deemed to be "known" for the purposes of § 2-11. If the survey reveals that the ship is a significantly worse risk than prior to the requisition, the insurer may then cancel the insurance pursuant to § 3-17, subparagraph 1, second sentence.

If the ship sustains a casualty after it is returned, and the insurer wishes to plead that the casualty is due to a casualty or circumstance which occurred while cover was suspended, the burden of proof will be on the insurer, cf. § 2-12, subparagraph 2. If the shipowner fails to report the return of the vessel, thereby depriving the insurer of the opportunity to obtain evidence, it is reasonable to then place the burden of proof on the assured. The last subparagraph is to this effect.

#### § 3-19. Suspension of insurance while the ship is temporarily seized

This paragraph corresponds in part to § 16 of the 1964 Plan, subparagraph 3.

If the ship is temporarily seized by a foreign State power, without there being a requisition within the meaning of § 2-9 and § 3-17, it is appropriate that the insurance against marine perils be suspended, as in the event of requisition under § 3-17, although suspension of the war risks cover is not necessary. On the contrary, in keeping with § 16, subparagraph, 3 of the 1964 Plan it is natural to let the war risks cover take over the risk of marine perils as well.

#### § 3-20. Removal of ship to repair yard

This paragraph corresponds to § 44 of the 1964 Plan.

Subparagraph 1 imposes on the assured an obligation to notify the insurer if a removal of the ship to a repair yard entails an increase in the risk. The provision reproduces § 44, subparagraph 1 of the 1964 Plan with the addition that the risk must be increased due to the damage. Notice is necessary to give the insurer the opportunity to assess whether to object to the removal, cf. below. It is sufficient to give notice to the claims leader, cf. § 9-6.

A "removal" of the ship means that it will undertake a voyage, under its own propulsion or under towage, exclusively for the purpose of being brought to a dry-dock or repair yard. The voyage will not be regarded as a removal if the ship is in such good condition that it takes a new cargo to the port where the survey or repairs are to be carried out. It may be deemed a "removal", however, even if the ship retains a cargo which was on board at the time the casualty occurred; the decisive factor will be whether the ship is in such condition that the shipowner may incur liability for unseaworthiness if a new cargo were to be taken on board after the casualty has occurred.

A ship will not usually be given permission by the relevant authorities to sail when there is a seaworthiness problem which affects the safety of the vessel. For "removal", however, the authorities will usually grant dispensation based on an assessment of the situation, in which the



economic aspects of a removal will play a certain role. As long as the assured takes up the matter with the authorities and obtains the necessary papers, the insurer who is liable for the casualty may not invoke unseaworthiness of the vessel during the removal. However, if the assured deceives the insurer on this aspect, all cover relating to the ship will be lost (cf. rules on breach of safety regulations).

Subparagraph 2, first sentence gives the insurer the right to object to a removal to a repair yard which creates a substantial increase of the risk. This provision must be read in conjunction with the Plan's other provisions relating to removal. Under § 11-6, the insurer may, in response to a request for condemnation, request that the ship be moved to a port where it may be properly surveyed. The risk thereof shall be transferred to the insurer who requests that the removal be carried out, cf. § 11-6, subparagraph 2; it is not possible to object to the removal in this situation. It will not normally be possible to object to a removal to a repair yard under § 12-13, either. A removal of this nature is an entirely ordinary use of the vessel which any marine insurer must be prepared to expect during the period of insurance. Consequently, the removal should be able to take place without any extra premium being charged (insofar as all papers attesting to seaworthiness have been obtained).

Even an ordinary removal to a repair yard may involve a substantial increase of the risk, if the assured opts to have the vessel repaired at a particularly remote repair yard or at a place that can only be reached by sailing through hazardous waters. In that case, it is reasonable that the assured bear the extra risk that a removal of this type entails. This is achieved in the second subparagraph, under which the insurer may impose a veto in certain situations, with the effect that the insurance cover is suspended and the assured must take steps to obtain other insurance to cover the risk.

The provision may be invoked by any insurer who has granted cover for the ship in question, cf. § 12-13, subparagraph 3, which expressly states that the provision may also be used by a hull insurer which is liable for the damage to be repaired.

For the insurer to be able to disclaim liability during the removal, it must entail a "substantial increase of the risk". If this is the case, a determination must be made in relation to each insurer invoking the provision. A hull insurer against marine perils will be able to object to a particularly hazardous removal of a ship damaged by war perils, for example, or to a removal which requires the vessel to be towed across open stretches of sea.

If a hull insurer who is liable for the ship's damage is to be able to invoke the provision, there must be other, less perilous options available. If there is only one possibility of repair which involves a perilous removal, the alternative can be that the ship may be condemned where it lies. If the hull insurers do not want the ship condemned, then they must bear the risk during the removal. On the other hand, a hull insurer who is not liable for the casualty may, depending on the circumstances, invoke § 3-20.

Subparagraph 2, second sentence, provides that an insurer who has objected to the removal will not be liable for "loss that occurs during or as a consequence of the removal". The insurer will not be liable for any loss which occurs while the removal is under way, even though the loss may be unconnected to the increase of the risk. Likewise, the insurer may disclaim liability for loss arising later on, although only to the extent he proves that the loss is due to the removal. A certain functional connection between the removal and the loss is required here. The insurer may not disclaim liability for a casualty which occurs purely by chance at the port to which the ship has been removed, on the grounds that the casualty would not have occurred had the ship remained where it was.

The liability disclaimed by the insurer in question is transferred to those insurers who are liable for the ship's damage, and who have not disclaimed liability during removal of the ship pursuant to § 12-13, second subparagraph. The assured will in that case have neither a greater nor a lesser risk during the removal than would have been the case during a normal voyage: if a new loss occurs, the assured must bear the deductions and deductibles agreed to under the insurance policy in question. If, however, an insurer who is liable for the damage has disclaimed liability during the removal, the assured alone must bear the risk during the removal, and the assured's liability may become even greater if the assured fails to give notice of the removal, cf. below. In addition, under § 9-6, a disclaimer of liability by the claims leader will also protect the co-insurers.

The assured must be notified of a disclaimer of liability under subparagraph 2, first sentence, before the removal is commenced, so that the assured and the other insurers may arrange necessary additional insurance. If the assured has failed to notify the insurer pursuant to subparagraph 1, the insurer has no opportunity to object to the removal, and thus will not be liable for any loss arising during or as a consequence of the removal, cf. subparagraph 2, second

sentence. The risk is, in that case, transferred to the assured and not to another insurer, cf. wording of § 12-13, subparagraph 2. This may seem a rather stringent sanction for negligence on the part of the assured, but it is difficult, from a legal standpoint, to come up with any other satisfactory rule. A rule freeing the insurer in question from loss due to the extra risk during the removal, for example, would create major difficulties in evaluating causation.

#### § 3-21. Change of ownership

This paragraph corresponds to § 133, subparagraph 1 of the 1964 Plan, and the conditions, cf. CEFOR I, 22 and PIC § 5, 13.

As mentioned under § 3-8, subparagraph 2, § 133 of the 1964 Plan contained a rule on change of ownership (subparagraph 1), and on transfer of shares in the holding company and change of manager (second subparagraph). The rule was modified in the conditions, cf. CEFOR I, 22 and PIC § 5, 13, pertaining to change of ownership, share transfer and change of the managing or operating company. The provisions on share transfer have been deleted, and change of operating company, etc., has been moved to § 3-8, subparagraph 2. By contrast, the provision on change of ownership is now treated separately in this paragraph.

The provision continues the approach of § 133, subparagraph 1 of the 1964 Plan and subparagraph 1, *litra a* of CEFOR I, 22 and PIC § 5, 13, under which the insurance cover automatically lapses in the event of a change of owner. In reality, the issue of cover in the event of a change of ownership is usually one of cover of a third party's (the purchaser's) interests in the ship. The Plan's approach in this connection differs from ICA section 7-2, which gives the purchaser, as a starting premise, automatic co-insurance cover. Cover is even mandatory for the first 14 days after the transfer for insurance subject to ICA's compulsory rules. In marine insurance, however, the risk is usually so closely related to who is controlling the ship's management and other matters, that a change of ownership should result in termination of insurance cover.

The provision only applies in the event of a transfer to a "new owner". Thus, if a transfer is simply part of an intra-company re-organisation which does not entail a change in the actual ownership interests, the insurance will continue in effect in the usual manner. Nor will a change in the shareholder structure of a shipowning company be covered by the rules.

The provision affects all types of insurance relating to the ship, and not just the hull insurance.

The insurance will lapse only as regards casualties which occur after the change in ownership. If the ship has known, unrepaired damage at the time of the transfer for which the insurer is liable, the vendor has a conditional claim against the insurer which can be transferred along with the ship, cf. the commentary below on § 12-2.

When the insurance terminates pursuant to § 3-21, the person effecting the insurance may claim a reduction of the premium pursuant to § 6-5.

### *Section 3 - Safety regulations*

Until the 2007 version the title of this section was "Seaworthiness. Safety regulations". In the 2007 version, however, significant amendments were made to the section. The rule regarding unseaworthiness (§ 3-22) was revoked in its entirety. As a result, the rules regarding the insurer's right to demand a survey of the ship (§ 3-23) and the rules regarding the insurer's right to cancel the insurance (§ 3-27) were rewritten to some extent. The rules regarding safety regulations (§ 3-24) were moved to § 3-22 and a new subparagraph 3 regarding ice classes was added.

The reason for these amendments was the entry into force of the Norwegian Ship Safety Act of 2006 on 1 January 2007. The Ship Safety Act replaced inter alia the Seaworthiness Act of 1903, in which the concept of seaworthiness played a prominent role, cf. first and foremost § 2. It was therefore logical, and in keeping with general traditions in marine insurance law, that marine insurance plans made seaworthiness a key factor. At the same time, subsequent developments, particularly the growing significance of safety regulations issued by the public authorities or by classification societies, showed that there was a declining need for a separate rule on seaworthiness, and that the overlapping of such a rule with the system of safety regulations could, on the contrary, have unfortunate consequences.

In the Ship Safety Act, the legislature has chosen to no longer apply the concept of seaworthiness. Instead, the statute sets out – in a more concrete, explicit manner – the requirements that must at all times be satisfied by the ship. These requirements relate to four specific matters, each of which is covered in a separate chapter of the Act: Technical and operational safety (chap. 3), Personal safety (chap. 4), Environmental safety (chap. 5) and Safety and Terrorism Preparedness (chap. 6). Furthermore, the Act lays down a general principle of safety management (chap. 2), whereby the shipowner must ensure that a safety management system, which can be documented and verified, is established, implemented and maintained in his organisation and on each ship. The safety management system must be used to identify and control risks, and ensure compliance with requirements laid down in or pursuant to statutes or set out in the safety management system itself. The latter also entails compliance with all provisions of the other chapters of the Ship Safety Act and appurtenant regulations.

In connection with the 2007 version, the question was considered of whether a separate rule should be incorporated in the Plan, making explicit the requirement of a safety management system in the shipowner's organisation and on individual ships. The intention was that a breach of such a requirement should have the same consequence as that for loss of class, cf. § 3-14, subparagraph 2, i.e. termination of the insurance, unless the insurer explicitly consented to the continuation of the insurance. A solution of this nature would be in accordance with the solution in the English conditions. However, the general view was that such a solution would be perceived as being too stringent in respect of the assured. In this connection, it was pointed out that the provision in § 3-14, subparagraph 2, regarding loss of class will result in automatic termination of the insurance in cases where the class is suspended or withdrawn as a result of the assured's serious infringement of the requirement to establish and maintain a safety system in the shipowner's organisation and on individual ships.

At the same time, the statutory requirement that a safety management system be established in the shipowner's organisation and on individual ships constitutes a safety regulation within the meaning of the Plan. If the safety regulation has been infringed and a casualty has occurred, the insurer will therefore in principle be able to invoke the infringement in respect of the assured and avoid liability. In practice, however, this will not be the situation. For the insurer to be free of liability, there must be a causal connection between the infringement of the safety regulation regarding a safety management system and the casualty that has occurred. A causal connection of this nature will normally be difficult to prove.

Given the revocation of the former § 3-22 on unseaworthiness in the 2007 version, it has been natural to rearrange the provisions in the chapter to a certain extent. At the same time, it has been important not to make more changes than are strictly necessary. In the 2007 version, the former § 3-24 on safety regulations has become § 3-22, with the addition of a new subparagraph 3. The former § 3-23 on the right of the insurer to demand a survey of the ship is in the same place in the 2007 version, but certain minor corrections have been made in the provision. Because the former § 3-24 has been moved to § 3-22, § 3-24 remains open in the 2007 version. On the other hand, the subsequent provisions, § 3-25 to § 3-28, remain where they were. However, some minor corrections have been made in § 3-25 and § 3-27.

### § 3-22. Safety regulations

This paragraph corresponds to earlier versions of § 3-24 of the 1996 Plan, but was moved in connection with the revocation of the former § 3-22 on unseaworthiness. Subparagraph 3 is new in the 2007 version.

The paragraph corresponds to ICA, section 1-2 (e). It defines the concept of "safety regulations"; sanctions in the event of infringements of such regulations are prescribed in § 3-25 and § 3-27 (b).

Subparagraph 1 defines safety regulations as "rules concerning measures for the prevention of loss". This definition is somewhat more concise than the definition set out in ICA section 1-2 (e). Such rules can be expressed in a number of ways. They may be issued by public authorities, set out in the insurance contract, prescribed by the insurer pursuant to the insurance contract or issued by the classification society. On this point, too, the Plan differs from ICA, which assumes that the rule has been included in the insurance contract. In marine insurance, it is impractical if rules issued by the classification society or by public authorities should have to be included in the insurance contract in order to have the status of safety regulations. International provisions, such as the SOLAS Convention of 1 November 1974 and subsequent amendments (e.g. the ISM Code of 4 November 1993), will also constitute safety regulations under the scope of this provision, through the Norwegian Ship Safety Act and regulations laid down thereto and through requirements imposed by classification societies. How a rule issued by a public authority has come into existence is in itself of no importance, cf. the case of ND 1973.450 NH RAMFLØY, which held that the concept of safety regulations could also include rules set out in legislation.

Some regulations, etc. provide for safety management systems based on the shipowner having his own comprehensive controls. The ISM Code is perhaps the best example of this. Under the Code, the shipowner is required to establish, implement and maintain a safety management system that can be documented and verified in the shipowner's own organisation and on individual ships in order to identify and control risks and to ensure compliance with requirements laid down in or pursuant to statute or in the safety management system itself. The shipowner will be issued a Safety Management Document of Compliance and the ship will receive a Safety Management Certificate. As shown by the commentary on § 3-25, infringements of such regulations, etc. will not necessarily have consequences for insurance cover, because it is the establishment of the safety management system per se that constitutes the safety regulation and not the individual provision. Furthermore, it will be difficult to prove the necessary causal connection between the infringement of the regulation and the casualty.

Government regulations and orders from classification societies receive the status of safety regulation from the time they are adopted or issued, regardless of whether this happens before the insurance contract is entered into or while it is in effect. Requirements in the insurance contract, by contrast, must necessarily be stipulated at the time the contract is entered into; the insurer will not usually have authority to impose new requirements unilaterally while the contract is in effect. However, the provision in subparagraph 1 also opens the door to the insurer being able to issue requirements at a later time, if done "pursuant to the insurance contract". Authority for an extremely limited exercise of this power is found in § 3-28. If the insurer wishes the insurance contract to confer powers beyond this during the period of insurance, then there must be specific provision to that effect in the individual insurance contract. In practice, this will mean that the contract (i.e. the policy) must contain written authority and set out clear parameters for subsequent safety regulations. If authority is not found in the contract, the insurer must then resort to the rules on alteration of the risk, in which case he may only impose new requirements if a situation which has arisen constitutes an alteration of the risk within the meaning of § 3-8. In that case, the insurer may exercise his right to cancel the contract, and establish a new contractual relationship with new requirements.

A fundamental requirement in order for a rule to have the status of safety regulation is that it is intended to prevent loss. A regulation may sometimes pursue several purposes. If one of them is to prevent casualties or mitigate their effect then a breach may be relevant under the Plan's rule. Thus, a class-related requirement will always have the status of safety regulation, as will requirements primarily aimed at preventing oil spills, e.g., marine pollution rules. If, however, the requirement is linked to an entirely different purpose (immigration or customs regulations, for example), it is difficult to envisage a relevant causal connection between a breach of a rule committed by the assured and damage sustained by the ship. Cases like this must come under the rule against illegal undertakings in § 3-16.

For the breach to come under the rule, the regulation must be binding for the assured. It can be especially difficult to determine whether the assured had a duty to comply with the regulation when it has been issued by a government authority. Regulations and requirements issued by authorities

in the country of the assured or the ship are, of course, binding. The assured must, however, comply with many of the requirements imposed by foreign authorities as well: canal regulations and rules governing handling of dangerous cargo are two examples. If there is a conflict between a requirement of a flag State and a foreign State, a concrete assessment of the requirements in question must be made to determine whether the assured must comply with the more stringent of the two. If the assured has reasonable grounds to believe that the stricter requirement was not applicable, there is a possibility that the breach may not be invoked by the insurer because the assured has not demonstrated the required fault.

The provision in subparagraph 2 emphasises that the requirement of periodic surveys imposed by public authorities or the classification society constitutes a safety regulation under subparagraph 1. The provision is basically superfluous: requirements issued by the classification society, including orders to carry out a Continuous Machinery Survey, will automatically constitute a safety regulation under § 3-22, subparagraph 1. However, it is necessary to be able to extend the scope of identification in such cases for breaches of this duty, like the one that applies to "a special safety regulation, laid down in the insurance contract", cf. § 3-25, subparagraph 2. This is achieved by making explicit mention of such surveys in subparagraph 2, at the same time, in a new second sentence in § 3-25, subparagraph 2, making the rules in the first sentence as regards extended identification applicable in the event of breaches of the rules on periodic surveys.

The provision imposes a duty on the assured to carry out the survey by the stipulated deadline. A breach of this safety regulation will arise as soon as the deadline is exceeded; no reaction is required on the part of the classification society in the form of a reminder or even withdrawal of class, cf. the above commentary regarding § 3-14.

If the classification society grants a postponement of a periodic survey, the provision will not be triggered; in such case no breach of any safety regulation will have occurred. However, a postponement must in fact have been granted; it is not sufficient that the classification society would have granted a postponement if the assured had requested it.

The provisions regarding periodic surveys in § 3-22, subparagraph 2, cf. § 3-25, subparagraph 2, are a supplement to § 3-14. The classification society may at any time cancel the class in the event of breach of the duty to carry out periodic surveys, with the result that the insurance cover lapses in its entirety.

Subparagraph 3 is new in the 2007 version. The classification society's ice class is a voluntary supplementary classification. Consequently, it is doubtful whether these rules qualify as safety regulations under subparagraph 1. Subparagraph 3 therefore expands the definition of a safety regulation in subparagraph 1 to include ice classes.

#### § 3-23. Right of the insurer to demand a survey of the ship

This paragraph was amended in the 2007 version, in connection with the deletion of the former § 3-22 regarding unseaworthiness.

Subparagraph 1, gives the insurer authority to demand a survey of the ship at any time during the insurance period for the purposes of ascertaining that the ship meets the technical and operational safety regulations that are prescribed by public authorities or by the classification society. Until 2007 the purpose of the survey was to "verify that the ship is in seaworthy condition". Since seaworthiness is no longer a concept applied in Norwegian ship safety legislation, compare the introduction to the commentary on Section 3. Safety regulations, it was necessary to change the wording of the first sentence of subparagraph 1. The expression "technical and operational safety" was taken from the heading of Chapter 3 of the Norwegian Ship Safety Act, and in principle covers all the matters dealt with in this chapter. Because the former concept of seaworthiness was somewhat unclear, it is an open question whether the new wording fully covers the same matters as the former wording. The advantage of the new wording is that it has a clear reference framework, in addition to covering the matters that the insurer is most concerned to have in complete order. The provision will hardly be of any great practical importance, because it is assumed that insurers will continue to exercise the utmost caution in using the provision.

The insurer must always bear the cost of any survey he requests. If the survey reveals that the ship has defects which must be rectified and for which the insurer is liable, the Plan's other rules on liability of the insurer during repairs will be triggered, and the insurer will be liable for related expenses under the usual rules, although not for the assured's operating expenses for the ship or other financial loss incurred as a result of the repairs (but see § 12-13 on the ship's operating expenses during removal to a repair yard). The result is the same regardless of whether the immediate reason for the survey was a casualty.

If no damage is found which must be repaired for the purposes of the **ship's technical and operational safety**, the issue arises as to whether the assured should be indemnified for his loss. If a casualty or other similar circumstance covered by the insurance has occurred previously, the assured has, under general principles, the obligation to allow the ship to be inspected for the purpose of ascertaining whether there is damage. The expenses of the inspection may be claimed from the hull insurer, but the assured must bear the operating costs and loss-of-hire for the time the inspection is carried out (unless separate loss-of-hire insurance has been taken out, cf. Chapter 16). The expenses of unloading for a survey following a casualty are indemnified under special rules, usually general average, but also under § 4-12, particular measures taken to avert or minimise the loss. If no event has occurred which requires the assured to allow the ship to be inspected, but the insurer requests the survey due to a general suspicion of poor maintenance, it is reasonable to have the insurer bear the full liability if the suspicion turns out to be unfounded. Accordingly, subparagraph 3, provides that the insurer shall, in such cases, indemnify the assured for costs as well as loss resulting from the survey.

In practice, the insurance contract sometimes contains a provision under which the insurer reserves the right to have the ship undergo a condition survey, instead of a pre-entry survey, because the shipowner contacts the insurer so close in time to the annual renewal that there is not time for a survey before the contract is to be renewed. If a condition survey has been agreed upon, the insurer does not need authority under § 3-23 to request a survey of the ship. Usually, the reservation in the insurance contract will also provide sanctions the insurer may invoke if the ship turns out **not to meet the requirements as regards technical and operational safety**, e.g. rules regarding the right of the insurer to require that repairs be made, as well as sanctions if the necessary repairs are not carried out. If the contract does not provide for any sanctions, one then falls back on the general rules of the Plan, i.e. the right to cancel under § 3-27. The insurer may not invoke other or more stringent sanctions in the absence of clear authority to do so in the contract. This means, for example, that the insurer may not cancel the contract due to other circumstances or on shorter notice than that prescribed in § 3-27.

§ 3-24. (open)

**In earlier versions of the 1996 Plan, this provision contained rules on safety regulations. In the 2007 version, the paragraph was moved to § 3-22 and in that connection slightly amended.**

§ 3-25. Infringement of safety regulations

**The second sentence of subparagraph 2 was amended in the 2007 version. The paragraph otherwise corresponds to the earlier versions of the 1996 Plan and ICA section 4-8.** Under ICA section 4-8, the assured must be more than a little to blame if an infringement of a safety regulation is to be invoked. The sanction is total or partial exemption from liability. Under the Plan, it was sufficient to have ordinary negligence for sanctions to be applied, and the sanction was complete exemption from liability. Under subparagraph 1, first sentence, the assured will lose insurance cover if he can be blamed for infringement of the safety regulation and there is a causal connection between the infringement and the loss. The approach in ICA section 4-8 has not been adopted in the Plan: sanctions may therefore be applied to all forms of negligence. In deep-water hull insurance, the fault of the assured will often manifest itself by the assured failing to supervise his staff's compliance with applicable rules. The extent of the assured's obligation must be determined on a case to case basis, cf. ND 1980.91 Hålogaland TOTSHOLM. If the assured has delegated supervision duties to the captain or officers on board, or to certain persons on shore (cf. the "designated person" in the ISM Code), he may be identified with them within the meaning of § 3-36, subparagraph 2.

**The requirement of a causal connection between the breach of the safety regulation and the loss will often be difficult to meet in the case of regulations like the ISM Code, cf. section 7 of the Norwegian Ship Safety Act, which requires the shipowner to ensure the establishment, implementation and maintenance of a safety management system that can be documented and verified in the shipowner's own organisation and on individual ships, and under which breaches of these formal requirements will less frequently be the cause of the casualty in question.**

**Once a breach of a safety regulation has occurred, it follows from the provision that the assured will lose all insurance cover. This is a more stringent approach than under ICA, which provides for a discretionary scaling-down of liability. The provision in § 2-13 on concurrent causes will, in some situations, lead to the same actual result, i.e. a reduction of the insurer's liability. A typical example of this is when a breach of a safety regulation has combined with an error committed by a member of the crew in his service as a seaman, cf. § 3-36, subparagraph 1, to cause the loss. Breaches of safety regulations such as the ISM Code and similar rules prescribed by national authorities, etc., are probably good examples of situations where there can be a question of a**



combination of causes, assuming of course that there is a causal connection between the infringement of the **duties related to the safety management system and the loss sustained**.

The assured has the burden of proving that the infringement has not caused the loss and that there has been no demonstrated error or negligence, cf. the wording "it is proved".

Subparagraph 1, second sentence makes an exception from the rule in the first sentence in cases where a master or crew member is also the shipowner. In those cases, it would be too stringent a sanction to let every infringement entail loss of cover. Thus the rules in the first sentence do not apply when the negligence of the assured is "of a nautical nature". In that case, one falls back on the general rules applicable when the assured brings about the casualty, in § 3-32 and § 3-33. The concept "of a nautical nature" comprises not only the rules of navigation as such but, depending on the circumstances, may also include port and canal regulations, regulations for passing minefields and other obstructions, regulations on the use of radio equipment in emergencies, etc.

If, however, the insurer has found it necessary to impose a special safety regulation at the time the contract is entered into, e.g., that the vessel must be used in sheltered waters, or that there must be special equipment on board for safety reasons, then there is reason to have more stringent rules. In those cases, the insurer must be able to invoke negligence committed by anyone who is under a duty on behalf of the assured to comply with the regulation or ensure that it be complied with, cf. subparagraph 2, first sentence. Generally speaking, people who work in a senior position in the service of the assured will have a duty to comply with the regulation or ensure that it be complied with. The shipmaster, mates and engineers in particular are crew members who will be covered by the rule. In addition, the nature of the regulation in question will, to a certain extent, determine how far down in the ranks identification will take place.

If a special safety regulation is to be considered as being "stipulated in the insurance contract", it must be included in the policy or in another document which sets out the conditions of the insurance cover.

**In view of the comprehensive nature of the concept of a safety regulation under § 3-22, the question might be asked whether the shipowner could be exempted from liability on the grounds that he was unaware of, for instance, regulations issued by public authorities. If it is a question of regulations issued by the flag State, this must be answered in the negative, cf. ND 1986.226 Namdalen SYNØVE. On the other hand, depending on the circumstances, it must be possible to accept as a defence that the assured has misinterpreted the regulations, provided the interpretation is justifiable, cf. ND 1982.328 Kristiansund HARDFISK. With respect to alleged ignorance of regulations issued by another State, the question must be considered on a case-by-case basis.**

The provision in subparagraph 2, second sentence, must be read in conjunction with the rule in **§ 3-22, subparagraph 2**, to the effect that periodic surveys constitute a safety regulation. Thus, as mentioned earlier, § 3-25 will automatically be triggered: the insurer may disclaim liability if the assured can be blamed for the infringement and there is a causal connection between the infringement and the casualty. **Because these safety regulations were laid down in the Plan and not in the insurance contract, and because there is a need to make them special safety regulations with the resulting extended identification, the second sentence stipulates that the first sentence of subparagraph 2 shall apply correspondingly to these safety regulations.** The requirement of a causal connection implies that the assured must demonstrate that the casualty would have occurred even if the periodic survey had been carried out, i.e. that the casualty is in no way connected with circumstances which would have been revealed during the periodic survey.

#### § 3-26. Ships laid up

**This paragraph is identical to earlier versions of the 1996 Plan.**

**The provision introduces special safety regulations for ships that are laid up; the insurer may also invoke other safety regulations, in so far as they are applicable to situations where ships are laid up.**

The first sentence imposes on the assured an obligation to prepare a plan for the lay-up and submit it to the insurer for approval. It is sufficient that the lay-up plan be forwarded to the claims leader, cf. § 9-3. The assured has an obligation to comply with the approved plan.

A lay-up plan should resolve four issues: it should state where the ship is to be laid up, set out guidelines for mooring while the ship is laid up, provide guidelines for supervision of the ship, and contain rules on minimum crew. It is not necessary, however, to impose any requirement that the ship must maintain its class. In practice, the periodic class survey will be postponed for the time

the ship is laid up, and the ship will be able to keep its class provided it is inspected before being operated again.

The provision concerning the lay-up plan will only be applicable when the ship is to be "laid up". Brief stays in port for the purpose of loading or unloading or bunkering will not trigger the requirement to prepare a lay-up plan. For that to happen, the ship must be taken out of operation and the crew reduced. If the ship lies in port for awhile with full crew, it is not "laid up". It is virtually impossible to set a limit for how long a stay must be before it constitutes "lay-up"; sometimes a ship will abruptly end a lay-up period because it has obtained a cargo assignment.

As a rule, a lengthy stay accompanied by a request from the person effecting the insurance for a reduction in premium will constitute "lay-up".

If the assured has prepared a lay-up plan and forwarded it to the insurer, and the insurer does not respond with any objections, this will usually be taken as tacit acceptance of the plan by the insurer. The insurer may not then invoke the provision if the assured follows the plan during the lay-up period.

The second sentence prescribes the sanctions that apply if the assured fails to prepare a lay-up plan or to have it approved by the insurer, or fails to follow the lay-up plan while the ship is laid up. In such case, § 3-25, subparagraph 1, will apply correspondingly. In practice, this means that unless the assured can prove that he cannot be blamed for negligence and that the casualty that occurred would have happened even if a lay-up plan had been prepared or even if the lay-up plan had been followed, the insurer is not liable for the loss sustained. Since a lay-up plan is not a special safety regulation that is included in the insurance contract, the rules regarding extended identification set out in § 3-25, subparagraph 2, will not apply.

#### § 3-27. Right of the insurer to cancel the insurance

This paragraph was amended in the 2007 version, in connection with the revocation of the former 3-22 on unseaworthiness. The provision corresponds to ICA § 3-3, subparagraph 1, last sentence, but contains no explicit requirement that the cancellation must be reasonable in order for the cancellation to be valid.

Letter (a) corresponds to the former letter (a), but makes the insurer's right to cancel the contract contingent on the ship not being in compliance with technical and operational safety regulations, cf. Chapter 3 of the Norwegian Ship Safety Act, instead of, as before, linking the assessment to the ship's seaworthiness. This rule is applicable regardless of whether any degree of blame can be attached to the assured. In practice, it mainly has significance in the case of older, poorly maintained ships, or ships in which construction defects have been discovered, as a result of which the ship cannot be considered technically and operationally safe.

The former letter (b), which allowed the insurer to cancel the insurance if, after a casualty, the ship has lain unrepaired for a long time, has thus been revoked, but it now follows from letter (a) that the insurer has the right to cancel if the ship, due to a casualty, is not in compliance with technical and operational safety regulations. Even if this is not explicitly stated, it is self-evident that the insurer will not have the right to cancel the insurance after a casualty if the assured, within a reasonable period of time, takes steps to have the ship repaired so that it is in compliance with the prescribed safety regulations.

Letter (b) corresponds in full to the former letter (c). Cancellation under this provision is conditional on it being a question of an intentional or grossly negligent infringement of a safety regulation, and on this regulation being of fundamental significance. It makes no difference what kind of safety regulation it is. The insurance may also be cancelled if the infringement has been committed by a subordinate of the assured, provided that it is the duty of the person in question to comply with the regulation or to ensure that it is complied with. In this connection, the regulation concerned does not necessarily have to be of the type referred to in § 3-25, subparagraph 2.

The notice period for cancellation is 14 days, but cancellation may not take effect until the ship arrives at the nearest safe port. In accordance with the rules set out in § 3-7, § 3-14 and § 3-17, it is specified that the insurer shall issue instructions regarding such a port.



### § 3-28. Contractual terms

This paragraph **corresponds to earlier versions of the 1996 Plan**. The provision gives the insurer authority to impose safety regulations during the period of insurance, cf. § 3-22, **subparagraph 1**. The rule is of particular significance for the hull insurer's cover of collision liability, e.g., in connection with entering into contracts of towage or contracts for calling at privately-owned quay facilities.

The sanction for infringement of safety regulations issued pursuant to this paragraph is expressly regulated in § 4-15. The effect of the infringement is that the insurer is not liable for liability which the assured may incur and which the assured would have avoided had he not entered into the contract in question. The assured will be fully identified with his employees, even though the regulation in question may not have been in effect at the time the contract was entered into.

*Section 4 - Measures taken to avert or minimise loss, etc.***§ 3-29. Duty of the assured to notify the insurer of casualties**

This paragraph is identical to § 52 of the 1964 Plan and corresponds to ICA section 4-10, third paragraph.

Under Subparagraph 1, the insured has a duty to inform the insurer when a "casualty threatens to occur or has occurred". The rule corresponds to ICA section 4-10, third paragraph, but the duty to notify under ICA applies only when the event insured against has occurred; nor does ICA contain any requirement that the insurer be kept informed on an ongoing basis, as the Plan does. If there are several co-insurers, notice must be sent to each of them, although not if a claims leader has been appointed, in which case § 9-4 will apply, giving the claims leader authority to receive notice on behalf of the co-insurers.

The duty to notify is extended in subparagraph 2 to apply to the master as well, meaning that negligence on the part of the master may be invoked under § 3-31.

**§ 3-30. Duty of the assured to avert and minimise the loss**

This paragraph corresponds to § 53 of the 1964 Plan and ICA section 4-10, first paragraph.

The first sentence places on the assured a duty to avert or minimise the loss, while the second sentence requires the assured to consult with the insurer. The provision corresponds to ICA section 4-10, first paragraph, although that provision does not contain any duty to consult with the insurer. It is somewhat superfluous to impose a duty on the assured to consult with the insurer, since it is already part of the duty to notify and the duty to keep the insurer informed of further developments under § 3-29. The provision serves as a good signal, however, and has, accordingly, been maintained.

In the 1964 Plan, the duty of the assured to act was formulated as encompassing "what he can" do to avert and minimise the loss. In accordance with ICA section 4-10, first paragraph, this wording has been replaced with "what may reasonably be expected of the assured".

The duty to take measures to avert or minimise the loss will be present when there is an impending danger of a casualty occurring, and when the loss is to be minimised after the situation has been brought under some degree of control.

Under § 53, third sentence of the 1964 Plan, the assured was under a duty to comply with the requirements imposed by the insurer, unless the assured ought to have known that they were based on incorrect or insufficient information. This provision has been deleted because it raised the possibility of difficult conflicts of interest between the assured and the insurer, and possibly also between insurers inter se. For example, a situation could be envisaged where the ship had small cracks in the cylinder liners or other minor damage which did not make the ship unseaworthy, but which nonetheless had to be repaired. Under § 53, last sentence, the loss-of-hire insurer could require that the shipowner request a seaworthiness certificate and continue to sail to avoid loss-of-hire. On the other hand, the shipowner would have a clear interest in having the repair carried out at once, particularly if he had a high daily indemnity under the loss-of-hire insurance. If there was a danger that the cracks could develop and cause a casualty, then the hull insurer would also have an interest in having repairs carried out promptly. The assured could then find itself in the position of receiving conflicting requirements from different insurers, a most unfortunate situation. Moreover, circumstances such as these should really be assessed under the rules in § 3-22, and it would be unfortunate if the insurer would instead be able to use § 3-30 as authority to impose requirements on the assured.

A situation can be envisaged where the insurer needs to give separate instructions, e.g., in connection with salvaging the ship. Special rules are not needed for this; it is implicit in the requirement that the assured listen to the recommendations of the insurer. If the assured chooses to take other action which later turns out to be less expedient, there is the risk that he will be judged to have acted with gross negligence pursuant to § 3-31.

In a conflict of interest between the assured and the loss-of-hire insurer as to whether the ship is so damaged that it cannot sail, the view of the classification society will usually be determinative. If the classification society is in doubt and different experts have divergent views on the matter, then the assured must make a decision based on what he believes is best in light of all of the interests involved.

Under § 5-21, the duty to avert and minimise the loss continues after the object insured has been taken over by the insurer, if the insurer does not himself have the opportunity to take care of its interests.

#### § 3-31. Consequences of the insured neglecting his duties

This paragraph corresponds to § 54 of the 1964 Plan and ICA section 4-10, fourth paragraph.

If the assured neglects his duty to report a casualty under § 3-29 or implement measures to prevent a casualty or salvage the ship under § 3-30, the insurer shall be free from liability for loss which would not have occurred if the assured had fulfilled his obligations, cf. subparagraph 1. The sanction threshold is the same as in ICA, although the sanction is different. ICA uses a sliding scale in the same way as the other rules in Chapter 4 of ICA, while the Plan starts with the principle that the insurer shall not cover loss resulting from the negligence. Even though the attitude in principle during the Plan revision has been not to go over to the sliding scale rules based on the ICA pattern, consideration was given as to whether it would lead to greater consistency in the Plan rules generally if a system similar to that in ICA was to be adopted. The conclusion was that the existing system should be maintained.

Under § 54, subparagraph 1, last sentence of the 1964 Plan the assured had a duty to compensate loss sustained by the insurer as a result of the negligence. ICA contains no such rule, and it has therefore been deleted. This implies that the insurers may only set off their expenses in the assured's claim for indemnity, and not claim compensation from the assured. Subparagraph 2 makes it clear that it is only in the event of breach of the duty to notify under § 3-29 that negligence by the master has any significance.

### *Section 5 - Casualties caused intentionally or negligently by the assured*

The rules in this section deal with cases where a loss has been caused by an intentional or negligent act of the assured. The rules are virtually identical to the provisions in the 1964 Plan: intentional acts of the assured are dealt with in § 3-32, while § 3-33 deals with gross negligence. There is no rule that deals in general terms with cases where the insured event is caused by ordinary negligence of the assured. The insurer thus remains entirely liable for the loss. This concords with ICA section, 4-9, third paragraph.

Sections 3 and 4 also deal with negligence on the part of the assured, but the rules in those sections regulate cases where the negligence of the assured relates to certain specific obligations, namely, negligence with respect to seaworthiness, breach of safety regulations, and gross negligence in breach of the duty to notify and to take measures to avert or minimise the loss. When the rules in this section are applied to an event which has been caused by the negligence of the assured, the question is not one of whether there has been a breach of a special obligation. Instead one must consider whether the assured's conduct generally was grossly negligent in relation to the occurrence of the damage. In contrast to many of the rules in sections 3 and 4 a higher degree of fault is required before the insurer is relieved of liability.

#### § 3-32. Intent

This paragraph is identical to § 55 of the 1964 Plan and corresponds to ICA section 4-9, first paragraph.

The provision confirms the traditional principle in insurance law to the effect that the insurer is not liable if the assured has intentionally brought about the event insured against. ICA section 4-9, first paragraph, second sentence, has relaxed the principle somewhat by allowing for partial liability if the conduct has been intentional but without fraudulent intent. The ICA provision reflects a wish to protect the person effecting the insurance, and is not applicable to marine insurance.

The question of whether the assured acted intentionally must primarily be considered in the same manner as in criminal law. Intent will be present when the assured deliberately brings about the casualty so as to receive indemnity under the insurance policy, i.e. fraudulent intent, and when the assured realises that his conduct will, on a balance of probabilities, bring about the casualty. The concept of intent will also encompass the situation where the assured foresaw the occurrence of the casualty as a possible consequence of his conduct and accepted the risk of that consequence (i.e. was willing to accept it as part of the bargain).

The rules on intent do not apply to measures taken to avert or minimise the loss, cf. § 3-30.

#### § 3-33. Gross negligence

This paragraph is identical to § 56 of the 1964 Plan and corresponds to ICA section 4-9, second paragraph.

The paragraph regulates cases where the assured brings about the casualty through gross negligence. Gross negligence lies somewhere between ordinary negligence and intent. Ordinary negligence occurs when the assured has not acted as a competent and reasonable person would have done in an equivalent situation. Gross negligence is a more specific form of negligence: the deviation between the conduct of the assured and the relevant norm is more pronounced. In case law, the courts have found gross negligence in the following cases: ND 1971.350 NH KARI-BJØRN, ND 1976.132 Gulating TUVÅ, and ND 1977.138 OSLO.

Both the Plan and ICA operate with a progressive reduction of the insurance cover when the casualty has been caused by gross negligence. ICA section 4-9 sets out a number of factors which are to be specifically taken into account in assessing the reduction: the degree of fault, the course of events relating to the damage, whether the assured was in a state of self-induced intoxication, and circumstances generally. § 3-33 of the Plan refers simply to "the degree of fault as well as the prevailing circumstances generally". "Circumstances generally" is such a wide-ranging expression that it includes the other factors listed in ICA. In deep-water hull insurance, it will be especially the "course of events relating to the damage" which will be of significance for the reduction of the insurer's liability. The factor of "self-induced intoxication" is more relevant to coastal hull insurance, but can also become relevant for deep-water hull cover, especially if there has been a delegation of the ship owning functions which entails that the assured must be identified with the ship's captain or officers, cf. § 3-36. "Intoxication" means that intoxicating substances have influenced the user in such a way that he or she acts in a way other than would have been the case had he or she not consumed the intoxicating substances. It is not possible to link the definition of "intoxication" to a

set alcohol percentage in the blood, as is done, for example, in section 22 of the Road Traffic Act (veitrafikkloven), which sets the limit for "influenced by alcohol" at 0.5 per thousand. A review must be made in each case of the effect of the intoxicating substance on the individual to determine whether the assured acted while intoxicated. It is thus possible to be "under the influence" within the meaning of the road traffic act without being "intoxicated" within the meaning of the Plan.

If one of the subordinates of the assured, be it someone in the shipowner's management staff or one of the people on board, has caused the casualty through an error which must be deemed gross negligence, a decision must be made using the rules in chapter 3, section 6 of the Plan as to whether the insurer may invoke the error against the assured. Errors committed by the master or crew in their service as seamen on the insured ship can never be invoked by the insurer, cf. § 3-36, subparagraph 1. Moreover, the result will depend on whether decision-making authority has been delegated in areas which are of essential significance for the insurance, cf. § 3-36, second subparagraph. Cases where the error has been committed on board another of the assured's ships than the one covered by the insurance are dealt with under the "sister ship rule" in § 4-16.

In cases where the owner works as master or a member of the crew on board, § 59 of the 1964 Plan assumed that the courts would take account of the special position of the assured in their application of the discretionary scaling-down provided for in § 56 of the 1964 Plan relating to gross negligence. The assured was thus to be awarded full or nearly full indemnity when there was no reason to suspect that the casualty was intentionally brought about. This assumption has been used in practice: see, for example, ND 1971.350 NH KARI-BJØRN; and the intention has been to maintain this approach in the Plan.

If the assured has brought about the casualty through ordinary negligence, the insurer will always be fully liable, cf. corresponding rule in ICA 4-9, third paragraph. This will not apply, however, when the negligence can be brought under the scope of other rules, e.g., the rules on breach of safety regulations. In cases where the gross negligence has related to a breach of a safety regulation, the courts have had a tendency to prefer to apply the rules on gross negligence instead of the rules on breach of safety regulations. The rationale has probably been that the rules on gross negligence offer the possibility for a discretionary reduction of cover, while the sanction for **breaching a safety regulation** is loss of cover in its entirety. It would be unfortunate if the same sort of tendency were to spread to deep-water hull insurance.

#### § 3-34. Right of the insurer to cancel the insurance

This paragraph corresponds to § 57 of the 1964 Plan and ICA, section 3-3, first paragraph, second sentence.

Subparagraph 1, first sentence gives the insurer the right to cancel the insurance without notice if the assured has intentionally brought about or attempted to bring about the event insured against, while the second sentence sets the period of notice at 14 days if the assured has brought about the casualty through gross negligence. The provision in subparagraph 1 is unmodified, apart from the seven-day notice period for gross negligence being increased. The period of notice in the first sentence, which in reality allows for an element of punishment, has been maintained, even though ICA has no special rules for this type of situation.

The provision in subparagraph 2 is new, and gives the insurer an general right of cancellation if the assured intentionally brings about the casualty: the insurer may cancel all insurance arrangements with the assured. This corresponds to the rule on fraudulent breach of the duty of disclosure, cf. above regarding § 3-2, second subparagraph; the rationale is the same.

#### § 3-35. Circumstances precluding the application of § 3-32 to § 3-34

This paragraph corresponds to § 58 of the 1964 Plan, ICA § 4-9, fifth paragraph, and section 4-13.

The provision lists a number of cases where the assured will not lose cover despite having brought about the casualty intentionally or negligently. The 1964 Plan also contained a letter (c), which only became relevant for war risks insurance which has been deleted as it was unnecessary.

Letter (a) applies when the assured has a mental disorder or is otherwise not able to judge his own actions. The provision corresponds to ICA section, 4-9, fifth paragraph, although the formulation is somewhat different.

An exception from letter (a) will nonetheless apply if the abnormal state of mind is due to "self-induced intoxication". This type of rule is necessary to make it clear that self-induced intoxication is never an excuse. In addition, as mentioned under the commentary on § 3-33, self-induced

intoxication can have consequences for the assessment of whether there has been gross negligence, and for the discretionary reduction of liability.

Letter (b) corresponds to ICA section 4-13, but is designed somewhat differently due to the reference to § 3-12. The reference means that the assured has an unconditional right to expose the object insured to any peril for the purpose of saving human life, and that, "during the voyage" the assured may risk the object insured for the purpose of salvaging goods of material value. In the latter case, of course, one must consider the nature of goods the assured attempted to salvage when deciding whether or not the action was justifiable. The thing the assured attempted to salvage must normally have a fairly substantial value. But if the assured was under a pardonable delusion, the action must be accepted.

Under general legal principles, the insurer will have a right of recourse against the owner (insurer) of the goods that benefited from the salvage. If the ship sustains damage to salvage its own cargo, the insurer will have a right of recourse against the goods owner (goods insurer) if the shipowner would not have been liable for the damage to the cargo. In these types of situation, the action will usually be aimed at saving both vessel and goods, in which case the rules on general average, chapter 4, section 2, will come into play.

A relevant provision in this connection is § 4-12, subparagraph 2 of this Plan, which sets out the rules to be applied when the assured has taken measures to avert or minimise the loss which are aimed simultaneously at protecting more than one of his insurers.

## *Section 6 - Identification*

### General remarks

The rules on the duty of disclosure and duty of care are aimed directly at the person effecting the insurance and the assured, respectively. However, there will often be other persons who act on behalf of the person effecting the insurance or the assured. The person effecting the insurance and the assured will often be different people or companies, and there may also be several assureds covered under one insurance contract. The difficult question which then arises is to what extent the insurer may invoke against the person effecting the insurance or the assured, errors or negligence committed by someone else, i.e. to what extent are the assured and the person effecting the insurance to be identified with their helpers, employees etc. (Translator's note: This problem is referred to in Norwegian insurance law as the problem of "identification" (identifikasjon) and this term has been used in the translation of both the Plan text and the Commentary although it will not be immediately familiar to people who are used to Anglo-American legal terminology.)

The issue of identification must, in principle, be kept separate from the issue of who is the person effecting the insurance or the assured. If a limited liability company is stated as being the person effecting the insurance or the assured, actions taken by the management (Board of Directors/Chief Executive Officer) of that company will be deemed to be actions of the company itself; the company management is the company. By contrast, the issue of whether action taken by other persons in the company can prejudice the position of the company is one of identification; those employees are not the company.

Problems of identification in marine insurance arise in four different relationships:

#### 1. Identification between the person effecting the insurance and his servants

The 1964 Plan contained no direct regulation of the issue of identity between the person effecting the insurance and his servants, although § 61 had a general reference to "general rules of law" with respect to problems of identification which were not directly regulated in the Plan. The rule also applied to identification between the person effecting the insurance and his servants.

Identification between the person effecting the insurance and his servants is not regulated in ICA, either, although the commentary states that general principles of contract law are to apply.

During the revision, there was agreement that the issue of identification between the person effecting the insurance and his servants was not to be regulated specifically in the Plan. In marine insurance, this problem will arise particularly when the insurance contract is entered into through a broker, and then primarily in the area of the duty to disclose, cf. § 3-1, for further details, see the commentary on that provision. The main rule is that the person effecting the insurance must simply accept that he will be identified with the broker; if the broker makes a mistake during the conclusion of the contract, for example, by not forwarding information from the person effecting insurance to the insurer, then the person effecting the insurance will have to bear any consequences that follow.

Moreover, the issue of identification between the person effecting the insurance and his servants must be resolved according to general principles of contract law. The starting proposition is that if the person effecting the insurance uses an agent during the conclusion of the contract, there will be full identification between the person effecting the insurance as principal and the agent. This will apply regardless of whether it is an employee from the organisation of the person effecting the insurance who enters into the contract with the insurer (internal identification), or whether the contract is entered into by an organisation other than the shipowner, e.g., charterer's organisation (external identification).

#### 2. Identification between the assured and his servants

In the 1964 Plan, identification between the assured and his servants was regulated generally in § 59 with respect to the ship's master and crew. The Plan also contained special rules, for example § 18, subparagraph 2, § 49, subparagraph 2 and § 52, subparagraph 2. In addition, § 175 on limitation of liability for damage resulting from inadequate maintenance, etc., meant that the assured had to accept that his position would be affected if the master or crew were responsible for lack of maintenance. In other cases, it became necessary to fall back on the reference to general rules of law in § 61.

ICA contains a complete regulation of these matters in section 4-11. Section 4-11, third paragraph, applies to commercial insurance, and opens up the possibility of identification with specified

persons or groups, provided they are stated specifically in the contract. This means that in marine insurance of merchant ships, one is free to regulate the issue of identity in the insurance conditions. ICA assumes, however, that no identification may take place beyond what is stated in the contract. Consequently, there can be some doubt in marine insurance as to how far identification can be taken if it is not specifically regulated in the insurance conditions.

During the Plan revision, there was agreement that the specific rule on the crew and master in § 59 of the 1964 Plan should be retained, see § 3-36, subparagraph 1 of the new Plan. At the same time, the broad reference to general rules of law in § 61 of the 1964 Plan is no longer sufficient. Given the current regulation in ICA, it is uncertain whether there are any "general rules of law" on the matter anymore. Accordingly, the Plan must go further in setting out which servants the assured must accept that he will be identified with. § 3-36, subparagraph 2, attempts to resolve this.

### 3. Identification between the assured and the person effecting the insurance

The issue of identification between the assured and the person effecting the insurance was not regulated explicitly in the 1964 Plan, but the commentary stated that there was to be full identification between the assured and the person effecting the insurance in areas where sanctions were linked to negligence on the part of the person effecting the insurance (duty of disclosure/premium). In addition, § 129 contained a specific rule for situations where the object insured was in the custody of the person effecting the insurance: the rules on the duties of the assured then applied to the person effecting the insurance, and a co-insured third party was to be identified with the latter.

In ICA the starting premise is the opposite: there is to be no identification between the assured and the person effecting the insurance, see section 7-3, first paragraph. Exceptions are possible, however.

During the Plan revision, there was a wish to retain the 1964 Plan solution on this point. Since ICA now has another approach, it was found most expedient to incorporate express authority for identification on this point as well, cf. § 3-38. Co-insured third parties are covered by the references in § 7-1 and § 8-1 of the 1996 Plan.

### 4. Identification of assureds inter se

The 1964 Plan had no general rule governing the relationship between assureds, although § 60 contained a rule on identification between the assured and co-owners of the insured ship. In addition, Chapter 7 (primarily § 129) and Chapter 8 (primarily § 134, subparagraph 1) contained rules on identification between the assured and third parties and mortgagees, respectively. The issue of identification, in other cases, had to be resolved through a reference to general rules of law as provided for in § 61.

ICA has solved the identification problem by taking as a starting point that co-assureds are not to be identified with each other, see section 7-3, first paragraph, although some exceptions are also possible here.

As mentioned earlier, since the new ICA has come into force, some uncertainty prevails as to what general rules of law are. Accordingly, during the Plan revision it was necessary to undertake a general regulation of identification between assureds. The decision was made to group the relationship of assureds inter se and between the assured and co-owners under a common rule, see § 3-37. This approach implies that the provision also regulates the relationship between the party who has the decision-making authority for the operation of the ship and a mortgagee or other co-insured third party. To prevent any possible misunderstanding references to the rules governing identification have been made in § 7-1 and § 8-1.

### § 3-36. Identification of the assured with his servants

This paragraph corresponds to § 59 and § 61 of the 1964 Plan.

Subparagraph 1 sets out the important principle that there shall be no identification with the master or crew in respect of faults or negligence committed "in their service as seamen". The provision corresponds to § 59 of the 1964 Plan. The background for the provision is that faults or negligence committed by the master and crew are one of the risks for which the shipowner should have unconditional marine insurance cover. The wording "faults or negligence ... in connection with their service as seamen" indicate the contrast with errors touching on the commercial functions which the ship's master may sometimes carry out on behalf of the shipowner. Identification issues with respect to commercial errors must be resolved using the general rule in subparagraph 2. The crucial factor will then be whether the master or crew have been given decision-making authority



in matters of material significance for the insurance. However, insofar as the error is committed "in connection with their service as seamen", it is of no import whether it is the master or the crew who has been entrusted with the authority. For example, the master is responsible for the seaworthiness of the ship pursuant to Norwegian Maritime Code section 106, first paragraph. There will, however, not be identification in respect of negligence relating to the seaworthiness of the ship, because this is an error "in connection with [his] service as [seaman]". The same will apply if authority has been delegated to the master in relation to implementation of safety regulations, unless the specific identification rule in § 3-25, subparagraph 2 applies. Faults and negligence relating to delivery of cargo in a general average situation are discussed in greater detail in the commentary on § 5-16.

Technical developments have led to better and better communication possibilities between the shipowners organisations on land and people on board. As long as the master or crew have acted according to instructions from the organisation on land or with its consent, any error or negligence must be assessed as though it was committed by the land organisation itself. If the insurer does not manage to provide the proof to the contrary, it must be assumed that the error or negligence has been committed by the people on board.

The provision applies to any insurance taken out under Plan conditions, and thus also includes war risks insurance. In this case, it is important to note that an error on the part of the crew must possibly be judged as an element of war risk in relation to the rules on causation § 2-14, cf. above under § 2-9.

Subparagraph 2 of § 3-36 corresponds to § 61 of the 1964 Plan. While the latter provision applied to both the relationship between the assured and its servants and the relationship between the person effecting the insurance and its servants, subparagraph 2 of § 3-36 only aims to regulate the relationship between the assured and his servants, cf. the wording "against the assured".

The provision states that the assured shall be identified with "any organisation or individual to whom the assured has delegated decision-making authority concerning functions of material significance for the insurance, provided that the fault or negligence occurs in connection with the performance of those functions". The purpose of the provision is to state what is regarded as established law by specifying in somewhat more detail how far identification is carried in current marine insurance. There is no intention to introduce any changes to the rules that have applied so far.

The criterion for identification is that decision-making authority has been delegated "concerning functions of material significance for the insurance". Delegation of decision-making authority denotes the power to act on behalf of the assured in the area in question. Authority will usually be indicated on the organisation chart, but this will not always be the case. Nor is there any requirement that the power has been delegated expressly. De facto delegation is sufficient if the organisation or person in question in reality has the crucial decision-making authority.

Whether the delegation involves "functions of material significance for the insurance" must be determined as a matter of fact. It was not believed expedient to attempt to set out precisely which persons or organisations the assured is to be identified with. Ship operations are organised in a wide variety of ways, ranging from limited partnerships in which the owners are not involved in operations at all and have organised everything in separate companies, to large, professional shipping companies which take care of all or most operational functions. There are also big differences in how operational responsibility is placed internally in a single company. Most shipowners have a central operational organisation on land, but some have a small land-based organisation with wide-ranging powers delegated to the superintendent level. In some cases, there may also be shipowners with a small land-based operational organisation or none at all, where the captain is given wide-ranging powers in relation to the operation of the ship. This need not be blameworthy: modern management philosophy places great emphasis on decentralisation of the management function, and in some cases it may be natural to make the ship's officers part of the management. One consequence of this is that it becomes impossible to give a general rule that there shall be identification with certain groups of person or companies.

The criterion for identification in subparagraph 2 is based on the view that the shipowner must be free to organise ship operations as he sees fit, but that the assured must bear the consequences of the management model chosen. If the assured chooses to delegate a large portion of the management to others, the assured must also accept responsibility for faults or negligence committed by the organisations or persons in question within the area of authority they have been given. The determining factor in relation to identification then becomes who has real authority in areas which are of significance for the insurance. "Functions of material significance for the insurance" refers to all types of management function regardless of whether they are grouped

together or exist separately. If the operations are organised through a separate management company or similar entity which has the overall responsibility for the ship's technical/nautical and commercial operation, then of course the assured must be identified with the manager. Likewise, if the management function is divided into technical, nautical and commercial operations, there must be identification in relation to the person who has been given responsibility for the different functions, insofar as these functions are of material significance for the insurance. The same will be true for the person or company who is responsible for crewing.

If the individual management function is split up as well, it becomes more difficult to pinpoint what will trigger identification. On the one hand, it is clear that the assured may not avoid liability by dividing up management functions into as many units as possible. Here, as elsewhere, the assured must take responsibility for the management model chosen. On the other hand, not each and every element of the management responsibility will constitute a basis for identification, for example, if a subordinate employee in the company is given responsibility for an operational function on one occasion. The borderline for identification in these types of cases must be drawn based on practice under the 1964 Plan. As mentioned earlier, the intention is not to open the door to a greater degree of identification than is usual practice today; but rather to try and set out somewhat clearer guidelines. Accordingly, the approaches adopted in case law in recent years must stand. In ND 1973.428 NH HAMAR KAPP-FERGEN, the company was identified with its manager and general manager who, on behalf of the company, were to arrange for the ship to be laid up and for supervision during the lay-up period. The same approach was adopted in ND 1991.214 MIDNATSOL, where the holding company was identified with a board member who had authority to arrange for supervision while the ship was laid up for refitting.

Identification applies in relation to "organisations or individuals". The provision thus encompasses identification both externally and internally, although the most relevant in practice is external identification. External identification refers to all cases where authority of importance for the insurance is entrusted to organisations other than the assured's own, e.g., where one or more central operational functions are transferred to other companies.

Internal identification refers to cases where the assured must be identified with those persons in his own organisation who have authority to make decisions concerning matters which are important for the insurance. This implies that whether or not there is identification is a relative matter: a technical inspector will not usually have sufficient authority for him to be identified with the assured, but it is possible if the land-based organisation is limited in certain areas.

The provision must also be read in relation to subparagraph 1 with respect to internal identification. The starting premise in relation to the master and crew is that there shall be no identification in respect of faults or negligence committed in connection with their service as seamen, cf. *supra*. The approaches which have crystallised in practice under § 59 of the 1964 Plan will thus set a limit for the application of § 3-36, subparagraph 2. There will not usually be identification with the master or crew in other areas, either, although exceptions may be envisaged where the shipowner has no land-based organisation having authority for the area in question, and has thus left management functions of importance for the insurance with the captain. In that case, it would seem obvious that the shipowner must be identified with the captain to the extent he or she makes mistakes in the performance of those functions.

Another condition for identification is that the error be committed in connection with the exercise of the delegated authority. cf. the wording "provided that the fault or negligence occurs in connection with the performance of these functions". This means that it is necessary to distinguish between faults or negligence committed in the exercise of the delegated authority, and faults or negligence committed in the performance of other tasks. The assured must accept being identified with a senior employee who has responsibility for organising supervision for a laid-up ship and if the employee is at fault, cf. ND 1973.428 NH HAMAR KAPP-FERGEN. There will not be identification, however, if the same employee commits an isolated error while personally carrying out supervision, cf. ND 1973. 428 NH HAMAR KAPP-FERGEN, where the Supreme Court left the question open. In other words, identification presupposes that the error is committed during the performance of management functions on behalf of the assured.

Moreover, identification will only arise in the relationship between the assured who has responsibility for the operation of the ship and the party to whom the assured hands over decision-making authority. The provision does not resolve the issue of identity between a mortgagee or other co-insured third parties and the assured who is responsible for the operation of the ship. In other words, identification applies only downwards in the organisational hierarchy linked to the operation of the ship, and not laterally among several parties because of their status as assureds under the policy. Identity between assureds is regulated in § 3-37. On the the other hand it follows

from the provision that delegation of the kind referred to in § 3-36 also has effect in relation to other assureds, cf. below.

As mentioned earlier, the purpose of § 3-36 is to continue the approach taken under the 1964 Plan. The intention is not, however, to "freeze" development. The provision is aimed at resolving the questions which have been relevant under the 1964 Plan and which have been raised during the revision. Development may lead to other types of identification problems arising than those referred to, which might make some modification of the rules necessary.

§ 3-37. Identification of two or more assureds with each other and of the assured with a co-owner

This paragraph corresponds to § 60, § 129 and § 134, subparagraph 2 of 1964 Plan.

The provision regulates faults and negligence committed by the assured or co-owners of the insured ship and, to a certain extent, brings together and expands on 1964 Plan § 60, § 129 and § 134, subparagraph 2. It also has its counterpart in ICA section 7-3, first paragraph.

Unlike § 3-36, which concerns identification between the assured and his servants, § 3-37 regulates the issue of identification between several assureds, and between the assured and co-owners of the ship.

The provision deals with the issue of identification in relation to any assured, cf. the wording "against the assured". It makes no difference what kind of right in the ship provides the basis for acquiring status as an assured. The provision thus encompasses § 60 of the 1964 Plan, which regulated identification in relation to insured co-owners, § 129, which regulated identification in relation to co-insured third parties, and § 134, subparagraph 2, which regulated identification in relation to mortgagees. The approach in relation to mortgagees and other co-insureds has been retained as a matter of form through references in § 7-1 and § 8-1.

The starting point for § 37 is that there is to be no identification in respect of faults or negligence of "another assured or co-owner". The phrase "another assured" must be read as referring to any other assured than the assured who is claiming under the policy. The phrase "co-owner" refers to another owner than the insured owner; in relation to a co-insured mortgagee the rule must be read as referring to any owner. The special rule governing faults or negligence of the assured's "co-owners in the insured ship" is necessary because the owner/co-owner might not be an assured. This can happen when the shipowner is organised as a shipping partnership or a limited partnership and where the company, as opposed to the co-owners, are listed as assured. Faults or negligence on the part of a co-owner will not then be those of the assured.

The purpose of the basic rule is to protect all (other) assureds in cases where the fault or negligence is committed by a co-owner or an assured who does not have overall decision making authority in relation to the operation of the insured ship. It would be quite extraordinary and unusual for a co-owner/co-assured who does not have such authority to intervene in the operation of the ship and it does not seem reasonable that the other assureds should suffer for faults he might commit in such a situation.

On the other hand if the other assured or co-owner is the person with ultimate authority in relation to the insured ship, then identification shall apply in relation to other assureds as stated in the last part of § 37. The rule is a generalisation of the rule in § 60 of the 1964 Plan which applied to the assured's co-owners only. § 60 only applied directly to the assured. However, the same result applied for mortgagees since § 134, subparagraph 2 provided that the mortgagee should be identified with the owner. In relation to other co-assureds the rule in § 37 replaces the rule in § 129 of the 1964 Plan which provided that they were to be identified with the person effecting the insurance if the vessel was in his custody.

The criterion for identification is that the assured or co-owner has "decision-making authority for the operation of the ship". The criterion is taken from § 60 of the 1964 Plan, but there the requirement was that the co-owner be a "manager". The wording "decision-making authority for the operation of the ship" means the ultimate decision-making authority for the ship. Unlike § 129 of the 1964 Plan, there is no requirement that the error be committed by someone who has the ship in his or her "custody". The relevant authority will often be with the owner, cf. the rule in § 134, subparagraph 2 of the 1964 Plan, but this is not necessarily the case. The crucial factor will be who has the ultimate authority to decide how the operation is to be organised and resources allocated. When people or organisations with that authority commit a fault or act negligently, it is natural that there be identification in relation to all assureds: the assured or co-owner responsible has been charged with taking care of the interests of the group and has been entrusted with the formal competence to act on behalf of all. As regards the co-owner, this type of approach is also necessary to avoid a situation where the organisational form of the shipowner is the determining

factor in the identification issue. Parties having status as assureds should all be in the same position, regardless of whether the shipowner is organised as a limited liability company and leaves the management with a manager, or there is a holding company in which one of the partners is responsible for the operation of the ship.

Unlike § 3-36, which deals with cases where several person or organisations may have been given authority resulting in identification downwards through the organisational hierarchy, the decision-making authority under § 3-37 is concerned with the situation where one person or organisation has the overall or ultimate authority. If operational responsibility is shared, the crucial factor will be who has organised the division, and who has the ultimate responsibility for allocation of resources between the persons or organisations responsible.

The identification provision in § 3-37 must be read in light of § 3-36. If an assured who has the overall decision-making authority for the operation of the ship delegates authority to other organisations or persons, that assured must accept being identified with them provided that the conditions under § 3-36, subparagraph 2, are met. At the same time, each of the other assureds must accept being identified with the assured who has delegated the authority in question pursuant to § 3-37. This means that there will be identification with all assureds in all cases where errors are committed by persons or organisations who have authority in relation to functions of importance for the insurance and the conditions for identification under § 3-36, subparagraph 2 are fulfilled.

The connection between § 3-36, subparagraph 2 and § 3-37 relates prima facie only to assureds and not to co-owners. A co-owner in the ship who does not have status as an assured is not entitled to claim under the policy so that it is not necessary to consider to what extent he will be identified with faults or negligence of the assured or other persons to whom the assured has delegated authority. If, however, a situation were to arise where the co-owner had decision-making authority for the operation of the ship, including authority to delegate authority to others, then it would be natural to apply § 3-36, subparagraph 2, by analogy so that the owner in question is identified with his servants/helpers who have committed the fault in accordance the rules in § 3-36, subparagraph 2.

It is sufficient for identification under § 3-37 that an assured or co-owner has the necessary overall decision-making authority. Unlike § 3-36, § 3-37 does not require that errors of the person responsible occur in connection with the exercise of the authority in question. This difference becomes particularly evident if the person or organisation responsible makes a mistake in a connection other than the exercise of authority which is of essential importance for the insurance cover. In that case, there will not be identification under § 3-36, but there may be identification under § 3-37 if the person or organisation committing the error has overall responsibility for the operation of the ship. This approach concords with § 60 of the 1964 Plan, under which it was sufficient that the co-owner in question was "the ship's manager"; there was no requirement that the person or organisation was acting within its sphere of authority.

#### § 3-38. Identification of the assured with the person effecting the insurance

The provision is new.

As mentioned earlier, the 1964 Plan contained no rules on identification between the person effecting the insurance and the assured. However, the system of the Plan did provide that there was to be full identity between the person effecting the insurance and the assured, an approach which has been retained in the new Plan. Negligence which might be committed by the person effecting the insurance would relate primarily to the duty to give correct information and to pay the premium. Negligence relating to these matters may be invoked against anyone insured under the contract. The same will apply if the negligence is committed by a servant of the person effecting the insurance, for example, an agent charged with the task of entering into the agreement with the insurer on behalf of the person effecting the insurance. This is not stated explicitly, but follows from general rules of contract law.

The assured also has a duty of disclosure in one situation, cf. § 8-2 concerning third parties who are expressly named in the policy. In that case, however, there will not be automatic identification in relation to the other assureds if this one assured breaches his duty of disclosure, cf. § 8-2, subparagraph 2. Identification of this type will only take place if the criteria stated in § 3-37 are met, i.e. that the named co-assured is the party who has overall decision-making authority for the operation of the ship.

The relationship to mortgagees and other co-insured third parties is dealt with through the references in § 7-1 and § 8-1.

## **Chapter 4 - Liability of the insurer**

### *General*

Chapter 4 contains a number of general rules relating to various forms of loss which are indemnified by the insurer. The rules are not exhaustive, and must in each type of insurance be coordinated with the provisions contained in the special parts of the Plan and in the relevant policy. Generally speaking, the rules which are relevant to more than one of the various branches covered by the Plan have been compiled in this chapter, while provisions that are relevant to only one branch are dealt with in the special parts of the Plan.

Under § 2-11, subparagraph 1, the insurer is liable "for loss incurred when the interest insured is struck by an insured peril during the insurance period". This means that in the event of a casualty occurring as a result of a peril covered by the insurance, the insurer is liable for any loss that is not explicitly excluded from cover. However, it must be emphasised that this does not mean that each and every loss is recoverable provided that there is a causal relation between the loss and a peril covered by the insurance. The Plan contains a number of provisions relating to losses that are not recoverable, and these provisions must, depending on the circumstances, also be applicable by analogy. In cases of doubt, the solution must therefore be found through an interpretation of the rules of the Plan relating to the scope of liability, supplemented by other sources of law, in particular the legal tradition in marine insurance law.

### *Section 1 - General rules relating to the liability of the insurer*

#### **§ 4-1. Total Loss**

This paragraph is identical to § 62 of the 1964 Plan.

The provision establishes the traditional principle in insurance law that the assured, in the event of a total loss, is entitled to claim the sum insured, however, not in excess of the insurable value. In the event of a total loss, the insurer's liability is thus subject to a double limitation: it can neither exceed the sum insured nor the insurable value. The sum insured is the amount for which the interest is insured, and on the basis of which premium is calculated. The sum insured does not, however, say anything about the value of the interest insured; this value is determined by the "insurable value". The insurable value is set at the full value of the interest at the inception of the insurance, cf. § 2-2, or by agreement between the parties about the assessed insurable value, cf. § 2-3. Normally, the insurable value will have been assessed and be identical to the sum insured. In that case the insurer will, in the event of a total loss, pay the valuation amount.

However, it is important to keep the concepts of sum insured and insurable value apart in the policy, and the policy should therefore specify both the insurable value and the sum insured. If only one value is given, for example, a "sum insured", this may create uncertainty as to whether this value shall apply both as the assessed insurable value and as the sum insured, or whether the intention is merely to state the sum insured. In the latter event, the sum insured must be evaluated in relation to an open insurable value under § 2-2. This will entail under-insurance (with a pro-rata reduction of the compensation) if the insurable value is higher than the "sum insured", cf. § 2-4, and over-insurance if the "sum insured" is higher, cf. § 2-5. However, in hull insurance for ocean-going vessels it is presumed that where only one value is given in the policy, the intention is to state both the assessed insurable value and the sum insured.

The question as to what events will entitle the assured to compensation for total loss must be resolved in the conditions for the special types of insurance. In hull insurance the question also arises as to what will happen when the ship, before it becomes a total loss, has sustained damage which has not been repaired. This matter has been solved in § 11-1, subparagraph 2, cf. also § 5-22.

Total losses occur only in those types of insurance that cover an asset belonging to the assured (hull insurance, freight insurance). In a situation where the insurer covers the assured's future obligations (cover of collision liability under the hull insurance), it will merely be a question of the liability of the insurer being limited to the sum insured, and only if a sum insured has been agreed.

No general rule can be laid down relating to the insurer's liability for damage and other partial loss: liability will depend entirely on the conditions of the individual types of insurance.

#### **§ 4-2. General economic loss and loss resulting from delay**

This paragraph is identical to § 63 of the 1964 Plan.

The question concerning the interest insured will normally be regulated under the individual type of insurance. However, it should also be contained in the general part of the Plan for pedagogical reasons.

The provision reflects the fact that the marine insurer's liability is normally limited to losses consisting of destruction or reduction in value of the actual interest insured. Consequential losses sustained by the assured as a result of the casualty are not recoverable. However, the paragraph does no more than indicate a general principle, and must in many situations be read in conjunction with the liability rules in the chapters relating to the particular types of insurance.

The exception for "general economic loss" is aimed at any general loss the assured may suffer in his trade as a result of a casualty. The casualty may result in his being forced to reorganise his business or to re-route other ships, whereby his earnings are reduced or his administration and operating expenses are increased. Such losses are not recoverable.

The other main group of non-recoverable losses are losses arising from the delay of the insured ship caused by the casualty. The term "loss of time" is aimed at the assured's operating expenses and his loss of freight. However, the Plan provides a special rule for compensation on a number of points in this respect as well, see §12-11 and § 12-13 relating to loss of time in connection with the invitation to submit tenders and operating expenses during removal of the ship to a repair yard, §12-7, § 12-8 and § 12-12 which, in different contexts, take into consideration the loss of

time which the assured suffers as a result of the casualty, and the rules relating to the special types of insurance aimed at covering loss of time, in particular chapter 16.

The terms “loss due to unfavourable trade conditions” and “loss of markets” contemplate the situation where the ship, due to a casualty, will miss the opportunity to benefit from favourable trade conditions and can only be put into service in a lower freight market. Losses of this nature are never recoverable. To avoid any misunderstanding, the limitation of liability is extended to comprise also “similar losses resulting from delays”.

#### § 4-3. Costs of providing security, etc.

This paragraph is identical to § 64 of the 1964 Plan.

Under § 5-12, the insurer is not obliged to provide security for claims brought by a third party against the assured, which are covered by the insurance. However, if the assured incurs expenses in order to obtain such security, these must, according to the first sentence, be recoverable as expenses incurred due to the casualty. That the expenses must be “reasonable” implies *inter alia* that the assured cannot claim compensation of the costs incurred by providing security for amounts which clearly and considerably exceed the third party's claim.

§ 5-7 allows the assured, under certain conditions, the right to demand payment on account. Thus, before providing security for a third party's claim, he must submit to the insurer the question of whether the claim should be met by a payment on account. If he has failed to do so, the insurer will not be liable for the costs in connection with the provision of security, cf. second sentence.

If it is uncertain whether the insurer is liable for an invoice from the repair yard, the insurer is not obliged to make any payment on account under § 5-7. If the shipowner in such situations does not have money to pay the repair invoice, a bank guarantee may have to be provided pending a settlement from the insurer. If the insurer later proves to be liable, the question arises as to whether the insurer must also pay the commission on the bank guarantee. In practice, the provision has been interpreted to mean that it only concerns costs in connection with the provision of security for liability to third parties. However, during the revision of the Plan, there was general agreement that the insurer should have an obligation to cover costs in the above-mentioned situation as well. If the shipowner had raised a loan and paid the repair yard in cash, the insurer would have had to pay the interest on the compensation under the rules set out in the insurance contract. To be consistent, it seems reasonable that in such an event, the insurer must also pay the costs of providing security. However, it is not necessary to amend the provision in order to authorize this solution; it is covered by the wording as it was in the 1964 Plan.

If owner's repairs are carried out concurrently with casualty repairs, the commission must be apportioned on a proportional basis. If some of the work is paid for in cash, while a bank guarantee is provided for the balance, the cash portion as well as the guarantee must be apportioned according to the proportion of owner's repairs/deductible to the amount for which the insurer is liable.

#### § 4-4. Costs of litigation

This paragraph is identical to § 65 of the 1964 Plan.

There may be doubt as to who shall bear the litigation costs in the event of a dispute between the assured and the insurer as to whether a case against a third party shall be taken to court. In such situations, several insurers with conflicting interests will normally be interested in the question. § 5-11 is an attempt to solve the difficulties that may arise in such cases.

#### § 4-5. Costs in connection with settlement of claims

This paragraph is identical to § 66 of the 1964 Plan.

Subparagraph 1 establishes that the insurer is also liable for the necessary costs of investigating the loss and calculating the compensation. The provision covers all expenses incurred after the casualty which are necessary in order to establish whether any damage has occurred and, if so, its extent, or which are necessary in order to secure any recourse against third parties. Thus the insurer shall pay costs in connection with the conduct of a ship's protest and maritime accident inquiry, provided that these measures are attributable to a casualty which resulted, or could have resulted, in recoverable losses.

The term “necessary costs” has, according to long-standing and uniform practice, been subject to a relatively strict interpretation. Costs connected with the shipowner's surveyor are only recoverable if the insurer has had the opportunity to participate in the survey, and liability is normally limited to the expenses of one technical consultant from the shipowner's company. The insurer's liability for

the technical consultant is furthermore limited to the time the repairs take, and include maintenance expenses in connection with travelling to and from the place of repairs. Travel expenses in connection with the settlement of repair invoice are also recoverable, but planning of repairs before the ship's arrival and administration costs are not.

As regards other costs, practice has been that the insurer does not cover internal costs or the costs of hiring someone to draw up a general invoice or retaining legal or expert assistance. During the Plan revision, it was agreed that internal costs and expenses for external assistance that should have been obtained internally should not be recoverable. However, the cost of obtaining outside expert opinions in order to clarify technical or legal questions, for example, an opinion from the University of Trondheim to document that corrosion damage had in reality been caused by wet rot, should be covered. On this point "necessary costs" must therefore be subject to a slightly wider interpretation than former practice. The same applies to expenses for external legal assistance, provided that the legal assistance is in the nature of expert assistance. It cannot be a condition that the issue is taken to court; other legal assistance must be covered as well. However, if a conflict concerning the insurance ends up in court, the recovery of litigation costs is subject to the condition that the case is won. If the assured loses the case, he has no claim against the insurer, and in that event the insurer is obviously not liable to pay the litigation costs, either. If the assured partly wins the case, a reasonable amount of costs should be covered.

Nevertheless, the recovery of expenses in connection with the claims settlement is subject to the condition that it is clear in advance that the claim exceeds the deductible, or that the claim is doubtful. If it is perfectly clear that the casualty is not relevant to the insurance, the insurer cannot be held liable for the costs.

In the event of what is known as "aggregate deductibles" the assured will, in addition to the ordinary deductible per loss, bear a risk for a certain period of time. Under certain such clauses the assured must cover any damage occurring within the stated period of time until the amount of damage exceeds the amount of the aggregate deductible. In that event, until the entire aggregate deductible has been "consumed", it may be alleged that the casualties occurring are not relevant to the insurance. This is not correct, however: an overview of the casualties occurring is needed in order to know when the aggregate deductible has been exhausted and the insurer's liability arises. Accordingly, the insurer should cover expenses in connection with the claims settlements for such casualties, even if he, due to the aggregate deductible, does not incur any liability for the actual loss.

#### § 4-6. Costs in connection with measures relating to several interests

This paragraph is identical to § 67 of the 1964 Plan.

The provision confirms the principle of apportionment when costs are incurred in connection with measures relating to several interests. The principle of apportionment is of great practical significance for litigation costs and costs in connection with the claims settlement. In a collision case both the hull insurer and the P&I insurer will often be interested on the side of the assured; in that event the litigation costs shall be apportioned taking into account the maximum amounts for which the two insurers may be held liable as a result of the legal proceedings. Likewise, the counterclaims filed by the assured in the proceedings will partly accrue to him and partly to his hull insurer. The costs involved in the pursuit of the counterclaims will then have to be apportioned between them in proportion to their interests in the litigation.

According to practice, the term "several interests" does not comprise the assured's uninsured interests, for example in the form of under-insurance or deductible. If the assured has such uninsured interests, the insurers will cover the costs in their entirety without making any apportionment. This nevertheless does not apply to costs associated with the pursuit of a counterclaim; the counterclaim shall be distributed between the assured and the insurer, depending on the proportion between the insured and the uninsured interests, and the costs must then be apportioned in the same proportion.

In practice, exceptions have also been made from the principle that regard shall not be had to uninsured interests if it is a question of large deductibles in the form of insurances in layers in the assured's hands. Even if the point of departure should be that no apportionment is to be made over such uninsured interests, regardless of how large they are, it must be correct to distribute the costs between the insurer who is liable for the deductible and the other insurers if the deductible is insured.



The rule of apportionment in § 4-6 applies regardless of whether it should prove later that the claim is lower than the deductible. In such cases the assured's claim will not be recoverable as such, but his costs will be recoverable in full, cf. § 12-18, subparagraph 3, which provides that these costs are recoverable without any deductible. However, if it is already clear from the start that the loss or liability is lower than the deductible, the insurer will not be liable for the costs.

§ 12-14 contains a special rule relating to the apportionment of accessory costs of repairs.

## *Section 2 - Costs of measures to avert or minimise loss, including salvage and general average*

### General

The rules relating to costs of measures to avert or minimise loss, including salvage and general average, establish whether the assured is entitled to recover costs he has incurred by initiating measures to avert or minimise loss. It is a fundamental principle in all non-life insurance that costs incurred in order to avert or limit a casualty are recoverable, provided that the measures causing the costs are deemed to be reasonable and sensible. The certainty of obtaining cover will give the assured an additional motive to initiate measures to avert or minimise loss. Furthermore, general considerations of fairness suggest that the insurer should cover such costs since he is the one who will greatly benefit from such measures being taken.

However, the rules relating to the recovery of costs of measures to avert or minimise loss are far more complicated in marine insurance than in other types of insurance. This is due to the fact that in marine insurance these costs are recoverable on the basis of two different sets of rules. The first set of rules is based on general average law, which regulates the relationship between the ship and its owner on the one hand, and the cargo and its owner on the other, where ship and cargo are exposed to a common danger or inconvenience. The costs that are incurred and apportioned over ship, cargo and freight according to the rules of general average are recoverable as costs of measures to avert or minimise loss under the hull insurance, the cargo insurance and the voyage freight insurance, respectively. It is thus first and foremost the underlying general average rules which decide if, and to what extent, the assured shall recover his costs of measures to avert or minimise loss in such situations. At the same time, the general average rules serve to apportion the relevant costs among the insurers involved.

The general average rules provide a complete regulation of most of the questions that arise in connection with measures to avert or minimise loss for a ship carrying a cargo. They decide both whether the general conditions for carrying out measures to avert or minimise loss are satisfied (whether a sufficient degree of danger exists), and determines what sacrifices and costs are recoverable and how the compensation shall be calculated.

The main source for general average settlements is the York-Antwerp Rules (YAR). The latest rules are from 1994. This is a private international set of rules incorporated in Norwegian law by legislation and thereby made part of Norwegian law, cf. section 461 of the Norwegian Maritime Code, which establishes that YAR shall be applied in general average settlements unless otherwise agreed. In international shipping, it is very rare for alternative settlement rules to be agreed, even though alternative clauses do exist. Market agreements may also have been entered into between several insurers' associations concerning an apportionment, cf. e.g., Lloyd's Open Form 1995 - Funding Agreement, which is referred to in further detail below under § 4-8 and § 4-12. To the extent that the insurers have acceded to such agreements, these will obviously take precedence over YAR in the event of a conflict of rules.

The other set of rules is the traditional insurance law system, which is inter alia reflected in ICA section 6-4. The insurer shall cover the costs incurred by the assured in connection with extraordinary and reasonable measures to avert or minimise loss for the insurer. Normally it will be a question of measures taken to cover one interest insured. This is why the term particular costs of measures to avert or minimise loss is used here. However, it is conceivable that measures are taken aimed at saving several interests insured without the general average rules becoming applicable. It is therefore also necessary in connection with the "particular" costs of measures to avert or minimise loss to have rules that apportion the costs among several insurers involved.

The two sets of rules stipulate somewhat different requirements as to what constitutes a relevant measure, and each uses a different basis for calculating recoverable costs. The rules relating to general average costs and the rules relating to the particular costs may, on certain points, result in different solutions for factual situations that are fairly similar. This has been resolved by, on the other hand, giving the general average rules a certain extended application when a measure is only aimed at salvaging the ship. On the other hand, a situation which is in principle regulated under general average law, viz. damage to the ship as a result of a general average act has been moved over to be covered by the ordinary damage rules, provided that these rules afford better cover for the assured than the general average rules.

The new Plan retains on the solutions from the 1964 Plan, based on the traditional system in marine insurance. However, the heading has been changed so that it emerges clearly that the section in reality also comprises salvage awards, even though this is only reflected indirectly in the individual provisions. The sequence and content have furthermore been adjusted in order to

achieve a certain simplification. In an introductory provision, § 4-7, the general criteria for covering loss arising from measures to avert or minimise loss are established. The scope of the insurer's liability for general average contributions etc. appears from § 4-8 to § 4-11, while the scope of liability for costs of particular measures to avert or minimise loss is placed in a new provision, § 4-12, at the end of the section.

#### § 4-7. Indemnification of the costs of measures to avert or minimise loss

This paragraph is new.

The provision states the general criteria for compensation of costs of measures to avert or minimise loss, including salvage awards and general average.

The first part of the provision corresponds largely to § 68 of the 1964 Plan as regards the criteria for the costs being recoverable. The decisive criterion is that a "casualty threatens to occur or has occurred". This is a fundamental condition for compensation of costs of particular measures to avert or minimise loss. Under the rules of general average, this condition corresponds to the "common safety" principle, which states that if the interests involved are exposed to a common risk during the voyage, the costs in connection with averting that risk shall be apportioned among those interests in proportion to the value each of them represents. An example of a common peril is where the ship takes a heavy list and threatens to go down. Relevant costs may, for example, be a salvage award paid to a salvor or compensation to a cargo owner who suffers a loss because his cargo is jettisoned in order to right the ship.

However, under the rules of general average, extraordinary costs incurred in a port of refuge for the common benefit of the interests involved with a view to continuing the voyage will also be covered ("the common benefit" principle). The interests are not exposed to any common peril but, under the rules of general average, the costs incurred, e.g., costs of discharging, handling, storing and reloading of cargo while the ship is being repaired, are nevertheless apportioned. This compensation is not covered by the wording in § 4-7, and the provision is therefore not quite accurate in relation to the general average regulation. It is, however, expedient to confirm in § 4-7 the fundamental requirement that a casualty must have occurred or threaten to occur. Furthermore, through the provision in § 4-8, it emerges with sufficient clarity that if common benefit costs constitute part of the general average contribution, they shall be covered by the insurance.

The last part of the provision corresponds to the wording of § 68 of the 1964 Plan, but is somewhat simplified in accordance with the corresponding wording in ICA, section 6-4.

A main problem in applying the rules relating to costs of measures to avert or minimise loss is distinguishing between the measures which are in the nature of measures to avert or minimise a loss for which the insurer is liable, and the measures which the assured must take for his own account as part of the general obligation to safeguard and preserve the object insured. In general average law, the solution is based partly on detailed provisions, partly on established average-adjuster usage. These solutions may often provide a basis for analogous conclusions in relation to the particular measures to avert or minimise loss. The following presentation is not aimed at completeness, but merely highlights a number of relevant elements. The presentation is based on the rules relating to particular measures to avert or minimise loss. As regards general average, some of the principles must be distinguished in accordance with the general average rules. Some of these adjustments are referred to in the presentation:

(1) As mentioned, particular measures to avert or minimise a loss are subject to the fundamental condition that a casualty has either occurred or there is imminent danger that a casualty will occur. The first alternative does not give rise to any difficulties. It is very difficult, however, to indicate the degree of danger required in order to entitle the assured to counter the danger at the insurer's expense. As a rule, an increase in the general maritime risk will not give the assured such a right, unless something else has occurred at the same time which can only be averted through extraordinary measures, cf. under (2) below. In general average law, this principle is reflected in the "common safety" standard, which will, for example, entail that the insurer is not liable for additional consumption of bunkers or other costs incurred by heaving to or putting into a port of refuge during a heavy storm, unless an accident or the like has occurred which may jeopardise the seaworthiness of the ship during the further voyage.

(2) In addition to the imminent danger mentioned above under (1), a further requirement is that the assured or a third party has initiated measures of an extraordinary nature. Whether the measures are of such a nature must be decided on a case-to-case basis. On this point, the 1964 Plan contained an explicit enumeration of a number of elements, in relation to which the question of the extraordinary nature or foreseeability of the measure was to be evaluated, viz. "the ship's

voyage, the nature of the cargo and the circumstances prevailing when the voyage was commenced". These elements were included primarily with a view to P&I insurance. Given the fact that the Plan no longer applies to P&I, there is less need for such an enumeration. This part of the provision has therefore been deleted, but the elements may, of course, still carry weight in the concrete evaluation of the type of measures that are deemed to be extraordinary. Losses arising through an ordinary and foreseeable use of the ship and its equipment do not entail compensation under the rules relating to measures to avert or minimise loss, and the same applies to costs the assured must expect may arise in the course of the voyage. It is hardly possible to give any further guidance; the decision must be made on a case-to-case basis.

In practice, the distinction between ordinary and extraordinary measures has particularly caused problems in connection with what has traditionally been described as "increased ordinary voyage expenses", cf. the exception for operating expenses referred to in the commentary on § 4-2, and under item 10 below. These are expenses that must be anticipated from time to time during the voyages of a ship, e.g. due to problems relating to weather and currents, or minor technical problems regarding the ship. One example is where the ship's stern tube is damaged with the result that oil is leaking out. The voyage may nevertheless be continued by refilling new oil as and when necessary, but the question is whether the expenses of extra oil shall be regarded as "extraordinary". Practice has been fairly restrictive as regards the compensation of this type of expenses. It has been alleged that practice is too strict, but during the Plan revision it was decided that the best course was still to leave the distinction between ordinary and extraordinary measures to be settled by existing practice.

(3) Only losses which the assured has suffered as a result of an intentional act by the assured or others will be recoverable as costs of measures to avert or minimise loss. For further details, see below under (5). Damage caused by forces of nature or injurious acts by outside third parties without any intentions to avert or minimise loss is only compensated under the general indemnity rules in the insurance conditions. However, at any rate for particular measures to avert or minimise loss, it must be sufficient that the intent comprises the actual action that caused the damage. It is thus not necessary that the person in question realized that the act entailed a risk of damage, nor that the intent comprised all or parts of the loss that occurred, cf. ND 1978.139 NV Stolt Condor and ND 1981.329 NV Lintind.

(4) In order for a loss to be covered by the rules relating to measures to avert or minimise a loss, it must have been sustained for the purpose of averting or reducing a loss covered by the insurance. This was earlier expressed by the wording that the measures had to be implemented "in order to avert or minimise losses covered by the insurance". This wording is superseded by the words "on account of a peril insured against", which are taken from § 70 of the 1964 Plan. It is not necessary that the person causing the loss realizes that he is safeguarding the insurer's interests. It is sufficient that he acts with the intention of averting the actual loss. The insurer will therefore be liable under the rules relating to measures to avert or minimise loss, even if the loss is caused by a third party who did not know that an insurance had been effected in respect of the object he was attempting to save, or by the assured himself in cases where he did not realize that he was covered against the loss he was attempting to avert. The deciding factor is whether the insurer, under the insurance conditions, would have had to compensate the loss which it was attempted to avert, and not whatever the assured or any third parties may have imagined in this connection. However, their subjective conceptions may become significant in another way, cf. below under (6).

(5) It is furthermore irrelevant whether it is the assured himself, his own people or an outside third party who have implemented the measures to avert or minimise the loss.

(6) A further requirement is that the measures "must be regarded as reasonable". The text has been somewhat simplified on this point as well. In the 1964 Plan, the requirement of reasonableness was linked to "the prevailing circumstances at the time they were implemented". This simplification is also not intended to change any points of substance. The requirement must be regarded as a sort of safety valve for the insurer and plays a very minor role in practice. It is obvious that the assured must have a wide margin for misjudgements once the casualty is a fact or the risk of a casualty is imminent. In this connection reference is made to § 3-31, where gross negligence on the part of the assured is required in order for the insurer to be entitled to plead that the insured has neglected his duty to avert and minimise the loss.

Whether or not the measures taken were justifiable must be judged in the light of the situation as it appeared to the assured when the peril struck. That the subsequent course of events showed that he was mistaken is therefore in principle irrelevant. It is thus not necessary that there was a de facto situation that warranted the implementation of measures to avert or minimise the loss; the deciding factor is that the assured believed that the situation was that serious. However, it is a

prerequisite that the assured has shown due diligence. If he was wrong, his conduct must be judged under the rules in Chapter 3, Section 5, of the Plan relating to casualties caused intentionally or negligently by the assured. If he has, through gross negligence, misjudged the situation, the compensation may be reduced or be forfeited altogether under § 3-33.

Measures to avert or minimise loss will often be implemented by others acting on behalf of the assured, in particular the master and other members of the crew. If they implement measures that must be described as unjustifiable in the situation in question, this will normally constitute faults or negligence committed in connection with their service as seamen, against which the assured is covered under § 3-36. The insurer must also normally accept liability if the misjudgement is attributable to an outsider who intervenes on his own initiative in order to safeguard the assured's interests.

(7) It is irrelevant that the measures prove to be in vain. In principle, the insurer compensates both the costs of the measures to avert or minimise the loss and the loss which it was in vain attempted to avert. The only limitation is implicit in the requirement that the costs must be reasonable.

(8) The principle that the insurer shall cover both the damage and the costs of measures to avert or minimise loss is, however, subject to certain limitations in terms of amount, cf. § 4-18. In such cases, the insurer's liability is limited to twice the sum insured apportioned among damage and costs according to the rules in § 4-18. On this point, the Plan differs somewhat from ICA section 6-4, which contains the principle that the costs of measures to avert or minimise a loss shall be compensated in full, in addition to the whole sum insured for damage sustained. A similar rule applied under § 80 of the 1964 Plan. However, this rule was amended in the Special Conditions, and this solution has been maintained in a somewhat modified form in the new Plan, cf. § 4-18 below for further details.

(9) In earlier case law, a limitation was established to the effect that the loss was not recoverable unless "a real sacrifice" has been made, cf. ND 1918.513 NV Vega and ND 1947.122 Bergen Justi. In the commentary on the 1964 Plan, this limitation was specified: "the assured cannot claim compensation under the special rules relating to measures to avert or minimise the loss of an object which, at the time it was sacrificed was exposed to a special peril which would have resulted in its loss regardless of what happened to the ship". The Plan maintains this solution.

(10) Under the cover of costs of measures to avert or minimise loss, the insurer is liable for all types of loss and not just those for which he would have been liable under the general primary cover rules of the relevant insurance. The idea is that the assured shall be indemnified for any loss that he suffers due to the said measures. The insurer is therefore liable for damage to or loss of the object insured, or other objects belonging to the assured, for costs incurred and for liability incurred vis-à-vis a third party. However, a limitation follows from § 4-12, cf. § 4-2: the insurer is not liable for a general economic loss nor for loss of time due to unfavourable trade conditions, loss of markets and similar losses resulting from a delay.

It follows from the principle that the insurer covers all losses in connection with measures to avert or minimise loss that the loss is also covered without deductible, cf. § 12-18, subparagraph 3. This also applies to the cover of general average contributions. The general average rules contain special rules, however, relating to new for old deductions, which indirectly involve a certain limitation of the cover of costs of measures to avert or minimise loss.

#### § 4-8. General average

This paragraph corresponds to § 70 of the 1964 Plan.

As mentioned in the introduction to this section, the insurer will very often be liable for losses incurred by measures to avert or minimise loss in the sense that he covers the general average contribution imposed on the assured, cf. subparagraph 1, first sentence. As with the particular measures to avert or minimise loss, it is a condition that the general average act is carried out with respect to a peril which is covered by the insurance. This requirement was explicitly stated in § 70 of the 1964 Plan, but has now been moved to § 4-7, which provides a common introduction to the entire Section 2 relating to loss incurred by measures to avert or minimise a loss. If the measure is taken in order to avert war perils, the war-risk insurer will thus be liable for the contribution. However, it is not necessary to verify whether the insurer would have been liable for each and every loss that the (preventive) measures were meant to avert. Thus, the hull insurer is also liable for the contribution the assured is called on to pay to cover the so-called "common benefit" expenses, despite the fact that they are not aimed at averting any loss which is covered by the hull insurance. Thus, once a general average adjustment has been made, it is regarded as an entity in relation to the insurer. In the event of a pure T.L.O insurance under §10-5, however, a verification

must be made as to whether there was any risk of a total loss when the general average act was carried out, and the contribution shall only be paid in so far as it covers losses in connection with measures to avert a total loss.

Subparagraph 1, second sentence, is new. This is an extension of cover in relation to previous Plans. While subparagraph 1 makes the insurer liable for general average contributions which are apportioned on the insured interest – the ship – the insurer will under the second sentence also be liable for general average contributions which are apportioned on an otherwise uninsured interest – freight or charterparty hire – provided that the assured is the owner of the said interest. The extension will in practice hardly be of any great economic importance. Normally, the freight will be for the cargo owner's risk and thereby be included in the value of the cargo due to the fact that through clauses such as "freight non-returnable, ship and/or cargo lost or not lost" it has been prepaid with final effect. Under the 1964 Plan the freight's general average contribution was covered under a voyage freight insurance. However, rules relating to this type of insurance have not been maintained in the Plan, first and foremost because the insurance was practically never used. By now adding the freight's general average contribution to the hull insurance cover, a small gap has been filled.

The contribution is recoverable on the basis of a lawful average adjustment, cf. subparagraph 1, third sentence. In the event of minor casualties the insurer will often agree to an informal general average adjustment, which is not drawn up by an average adjuster. The general average adjustment must be drawn up in accordance with current rules of law, or conditions considered customary in the trade concerned. Normal procedure would be for the general average adjustment to be drawn up on the basis of the York-Antwerp Rules, but in principle there is nothing to prevent other conditions, which are considered customary in the trade in question, from being applied.

The contribution is recoverable regardless of what items of loss are included in the general average adjustment, as long as the adjustment as such is correct. The Plan does not make exceptions for compensation of general average expenses. However, a more detailed regulation of the insurer's liability may follow from market agreements, if the Norwegian market has explicitly supported these, cf. e.g. the market agreement concerning the Funding Agreement linked to Lloyds Open Form 1995 which is mentioned above in the introduction to this section. The agreement concerns the apportionment of the remuneration in connection with an environmental salvage operation according to articles 13 and 14 of the Salvage Convention of 1989. The solution also follows from YAR 1990 and 1994, rule VI.

The contribution is recoverable according to the general average adjustment, even if the contributory value exceeds the insurable value of the interest, cf. subparagraph 1, fourth sentence.

In practice, the question concerning the assured's interest claim in connection with general average adjustments has caused problems. Under YAR 1994 rule XXI, interest on disbursements, etc. is now recoverable up to three months after the date of the average adjustment. From that time onwards, the assured must be entitled to interest under the general rules of the Plan, cf. § 5-4.

Under subparagraph 2, the insurer is liable for the contributions which according to the rules of general average fall on the interest insured, even if the assured is precluded from claiming contributions from the other participants in the general average adjustment. The rule is concordant with the solution in the 1964 Plan, and is relevant if the assured (normally the shipowner) is liable to the other interested parties for the event that has made the general average act necessary, cf. in this respect ND 1993.162 NH FASTE JARL. In that event, the assured cannot claim contributions from those parties. This applies e.g. if the ship must be considered unseaworthy in relation to the cargo, or if it has deviated from the route it was bound to follow according to the contract of affreightment. However, the gravity of the assured's conduct will rarely be such as to result in his forfeiting his right to compensation from the insurer under the insurance conditions as well. This will only be the case if the unseaworthiness was of such a nature **as to also constitute a breach of safety regulations in relation to § 3-22**, or the deviation has taken the ship outside the trading areas, cf. § 3-15, subparagraph 3. Where the assured has maintained his rights vis-à-vis the insurer, the traditional solution is to impose on the insurer liability for the losses that must be deemed to have been incurred in order to save the interest insured. The loss suffered by the assured due to the fact that his right to claim general average contribution from the cargo is forfeited will be covered by the P&I insurer.

An outcome such as this is less logical, however, if measures to avert or minimise loss have resulted in damage to or loss of the actual object insured. The consequence would then be that the assured would only obtain partial compensation under the hull insurance for damage incurred through measures to avert or minimise loss because he had breached a contract of affreightment. Liability for the excess loss would then have to be transferred to the P&I insurance. As long as the

assured has not disregarded the insurance contract in such a manner that his cover is reduced or forfeited, the hull insurer should provide full cover for the damage which the ship sustains, regardless of whether the damage is due to measures to avert or minimise loss or has arisen by way of an accident. § 4-10 of the Plan, which gives the insured an unconditional right to claim compensation for damage to or loss of the object insured under the rules relating to particular loss will therefore prevail over §4-8 and entitle the assured to full compensation. The limitation rule in subparagraph 2 will first and foremost be of significance for salvage, port of refuge expenses and "common benefit" costs.

When a salvage award has been incurred for a ship carrying a cargo, this amount will sometimes be apportioned twice, first during the salvage award case and subsequently in connection with the general average adjustment. These apportionments may differ from each other because the contribution value may differ from the value of ship and cargo on which in the salvage-award case was bound. The same applies if one or more of the interested parties have negotiated separately with the salvors, and thereby achieved a better apportionment under the salvage award settlement than under the average adjustment. In the final settlement between ship and cargo, the subsequent general average apportionment will normally be decisive, and it is also that apportionment which shall form the basis of the hull settlement. Nor has any rule been issued stipulating a duty for the insurer to pay the proportion of the salvage award that the shipowner may be ordered to pay in the salvage award case. Here recourse must be had to the rule relating to payment on account in § 5-7.

Where the insurer is liable to the assured for a loss that is also covered by the contribution from the other interested parties, he will be subrogated to the contribution claim to a corresponding extent, cf. § 5-13. Whether or not any contribution claim exists will often depend on whether the owner of the cargo has accepted personal liability when the goods are delivered to him (signed an average bond). If the assured has not obtained an average bond and can be blamed for this, the insurer may invoke § 5-16 concerning the assured's duty to maintain and safeguard the claim.

In a number of situations it is obvious that carrying out a general average adjustment would be uneconomical. If the assured has in that event failed to claim contributions from the other interested parties, the hull insurer has in practice compensated the losses that would have been recoverable in the general average adjustment. This practice will be carried on; it is to the advantage of the assured as well the insurer.

However, the insurance contract has often been taken one step further and what is known as a "GA-absorption clause" has been included in the contract. This entails that the hull insurer is liable for losses which would have been recoverable in general average up to an agreed maximum amount in all cases where the assured chooses not to claim contributions from the other interested parties. This is a clear simplification seen from the assured's point of view, and an explicit clause to that effect has now been included in subparagraph 3, see letter a). This means that the principle will apply regardless of whether an individual agreement has been entered into concerning this question. However, the application of the rule is subject to the condition that the policy contains a maximum amount for such settlement.

Normally the losses which the insurer shall cover under subparagraph 3 a) will have been incurred by the assured himself as sacrifices or expenses resulting from the general average act. If, in exceptional cases, the cargo owner has incurred a loss for which he may claim compensation in general average, e.g., where cargo has been sacrificed in order to salvage a grounded ship, the insurer will, however, in principle also be liable for such a loss. The point is that another solution would involve a risk that the cargo owner might demand an ordinary general average adjustment in order to recover parts of his loss. The condition for the insurer being liable for the cargo owner's loss is nevertheless that the assured is able to prove that he has in actual fact had to cover it, e.g., as a result of a clause in the contract of affreightment, in other words that it arises as a liability for the assured.

As an alternative to cover under the "GA-absorption" clause in letter (a), letter (b) instead entitles the assured to claim compensation for the ship's general average contribution, as this appears in a simplified general average adjustment. In that event, the assured will recover the general average contribution that would have been apportioned on the ship, but without any contribution being claimed from the cargo-owner side. However, the assured must choose between a settlement based on the rules in letter a) or in letter b). He cannot combine the solutions, e.g., by first claiming compensation within the agreed sum under item a) for losses incurred, and subsequently the ship's general average contribution under item b). However, he will always be entitled to claim compensation for damage to or loss of the object insured under the rules in § 4-10 if he finds that this gives him more favourable cover.

When deciding whether and to what extent loss, expenses etc. are recoverable under subparagraph 3, it follows from subparagraph 3, second sentence, that the provisions in the York-Antwerp Rules 1994 shall be used as a basis, regardless of what rules the contract of affreightment might contain relating to general average. Cover under YAR does not, however, apply to interest and commission, the costs of which will have to be recovered under § 4-3 and § 5-4 of the Plan, cf. the reference to §4-11, subparagraph 2, second sentence.

#### § 4-9. General average apportionment where the interests belong to the same person

This paragraph is identical to § 71 of the 1964 Plan.

The provision is necessary in order to implement the apportionment among the insurers with whom the assured has taken out his insurances. For the uninsured interests, the assured shall bear his own proportionate share.

#### § 4-10. Damage to and loss of the object insured

This paragraph is identical to § 72 of the 1964 Plan.

The provision authorizes compensation for general average damage to the ship under the rules relating to particular average if this leads to a more favourable result for the assured. In practice, the question has also been raised as to whether the assured may choose particular average where these rules do not give a more favourable result, but where the general average adjustment takes a long time. This problem may be solved, however, by the assured demanding payment on account in respect of the particular settlement under § 5-7, and possibly receiving a supplementary settlement if it should prove later that the general average adjustment leads to a more favourable result.

When the rules in § 4-10 are being applied, the hull damage to the ship must be considered collectively to the extent the incidents of damage are attributable to one and the same general average act. The assured cannot demand that some damage shall be recoverable under the general average rules whilst other damage shall be subject to the particular rules.

In the decision of whether compensation under the rules relating to particular loss is more favourable than compensation under the general average rules, the question of whether the contributions in general average from the other participants are irrecoverable shall not be taken into consideration. This was previously explicitly stated in the Special Conditions, cf. CEFOR 1.15, subparagraph 2, and PIC, §5 no. 6, subparagraph 2. Giving the assured the right to settlement under the rules of particular average because, for example, the cargo owner can refuse to contribute, would be interference in the established apportionment between the hull and P&I insurers.

Nor shall interest be included in the calculation as to which settlement will be the more favourable for the assured.

For the items of loss which are not comprised by this rule - i.e. salvage awards, "common benefit" expenses and other costs - an ordinary general average adjustment must take place. The insurer will thus be liable for the costs that are apportioned to the assured's interest, and the assured must claim from the other interested parties for their contributions. Here as well, however, the assured is entitled to payment on account for his own contribution in accordance with § 5-7.

Where the insurer indemnifies hull damage according to the rules relating to particular average, he is subrogated to the assured's claim against the other participants in the general average, but not in respect of the difference between a settlement according to the rules relating to particular average and a settlement according to the general average rules. This was earlier stated explicitly in the conditions (cf. CEFOR 1.15, subsection 1, third sentence, and PIC § 5, no. 6, subparagraph 1, third sentence), but still applies. Nor will the insurer be subrogated to the assured's claim against the P&I insurer for the hull damage if the contributions are irrecoverable, irrespective of whether the loss of or damage to the object insured is recoverable under the rules relating to general average or under the rules relating to particular damage. This was also explicitly stated in the Special Conditions (cf. CEFOR 1.15, subparagraph 3 and PIC § 5, subparagraph 3) but, on this point as well, the intention has not been to make any changes.



#### § 4-11. Assumed general average

This paragraph corresponds to § 73 of the 1964 Plan.

As mentioned in the introduction to this section, the general average rules shall also apply when measures have been taken to save a ship in ballast ("assumed general average"), cf. subparagraph 1. The rules also apply to losses incurred in order to complete the ballast voyage even though the costs were not incurred to save the ship, e.g. expenses accruing during the ballast voyage where the ship has to put into port for the purpose of carrying out repairs necessary for the safe completion of the voyage. The general average rules become decisive both for the question whether the degree of the peril was sufficient for the assured's sacrifices to be recoverable, and for the question as to what sacrifices are recoverable.

The same rules shall be applied for the purposes of calculation of the compensation as if the ship had carried a cargo. Thus, with respect to hull damage, the assured shall receive settlement in accordance with the rules that altogether give the most favourable result for him, whereas the settlement in respect of other losses shall be in accordance with the general average rules.

By applying the general average rules to measures to avert or minimise loss for ships in ballast, the cover will be the same regardless of whether the ship is carrying a small cargo or is completely empty. In practice, however, this principle is not carried into full effect. Under subparagraph 2, there are certain limitations to the assured's right to claim wages and maintenance for ships in ballast under the general average rules. Under the general average rules, the shipowner shall receive compensation for part of the loss of time during the final repairs of the damage, cf. YAR XI. The shipowner is not entitled to this advantage when permanent repairs of damage the ship has sustained while in ballast are carried out, cf. subparagraph 2, first sentence. On this point the 1964 Plan contained an addition to the effect that the limitation also applied to "expenses in substitution of such outlays". This part of the provision had been incorporated in order to eliminate an earlier unfortunate practice that has now ceased, and it has therefore been deleted. According to established practice, the limitation does not comprise any waiting time before repairs are commenced, but does include waiting time that arises during the repairs because necessary parts are missing. The special rules relating to commission and interest applicable in general average have been set aside as well, cf. subparagraph 2, second sentence, of this paragraph.

#### § 4-12. Costs of particular measures taken to avert or minimise loss

This paragraph corresponds to §§ 68 and 69 of the 1964 Plan and ICA section 6-4.

As mentioned in the commentary on § 4-7, during the Plan revision, the view was that it was expedient to state the criteria for the insurer's liability for costs of particular measures to avert or minimise loss in a separate provision. The provision in § 4-12, subparagraph 1, corresponds to those parts of § 68 of the 1964 Plan which deal with the scope of the insurer's liability, but the wording in the Plan has been partly replaced by the corresponding wording in ICA section 6-4. Reference is otherwise made to the commentary on § 4-7 as regards the principles for compensation of costs of particular measures taken to avert or minimise loss.

A question that arises in the relationship between § 4-12 concerning particular measures to avert or minimise loss and § 4-8 concerning general average is whether the entire settlement is to be effected in accordance with the general average rules in the event of a general average, or whether there is room for elements being settled under § 4-12. In ND 1979.139 NV Stolt Condor the arbitration tribunal reached the conclusion that the same measure could be regarded both as a general average measure and a measure with a view to saving other considerable interests insured. However, the solution does not appear to have been followed up by the industry. The main rule should be that once there is a general average situation, the entire settlement shall be effected according to the general average rules. Exceptions should only be made where there is either an explicit different regulation in the separate insurance conditions, e.g. based on a market agreement among the relevant insurers, or where the other interests insured have the predominant interest in the relevant measure taken to avert or minimise loss. An example of a relevant market agreement is the "Funding Agreement" linked to Lloyds' Open Form 1995, which concerns the apportionment of the remuneration in connection with an environmental salvage operation according to articles 13 and 14 of the Salvage Convention of 1989. If measures to avert or minimise loss that would have been covered by another insurer have struck interests that are covered under the insurance, the insurer will be subrogated to the assured's claim against the other insurer. In that event, § 5-13 of the Plan will become similarly applicable. In other words, the loss shall end up with the insurer who is liable for the costs to avert or minimise a loss. This solution was earlier established in the conditions, cf. CEFOR I.4, and PIC § 5.10, and is now explicitly stated in § 2-7, subparagraph 3.

Subparagraph 2 regulates the situation where a measure to avert or minimise loss is aimed at saving several interests without the general average rules becoming applicable. In that event, there shall be a proportional apportionment of the loss among all of those who have benefited from the measures in accordance with the principle on which the general average is based. The provision corresponds to § 69 of the 1964 Plan, but has been moved, cf. the commentary on § 4-7. ICA contains no corresponding rule, but the principle of apportionment is regarded as a general principle in insurance law.

However, the apportionment of the loss under this paragraph is not entirely consistent. In the first place, it is established practice that the separate insurances against total loss (hull and freight interests) are not brought into such an apportionment settlement, cf. the commentary on § 5-13. Secondly, the principle is subject to certain limitations if a measure is aimed at saving the ship, and if the assured in the event of a loss of the ship would also have suffered a loss that was not covered under any insurance. In that case, the insurer will in principle be liable for the entire loss resulting from the measure. Thus, the fact that the ship is valued at a lower amount than the market value (cf. above under § 4-8) is not taken into account, nor will the assured have to bear the portion of the loss which would by an apportionment have fallen on his uninsured income interest. If a liability covered by the insurance has been averted, the fact that a deductible has been agreed which would have resulted in the assured having had to cover part of the liability himself shall not be taken into account, either. However, on one point an exception has been made in practice and the rule of apportionment applied, viz. where the ship's accessories are lost and later saved. The Plan does not aim at making any change to the principles on which this practice is based.

In loss-of-hire insurance, however, the principle of apportionment shall be applied in full, in relation to uninsured interests as well, cf. § 16-11.

Special problems arise in connection with measures to avert or minimise loss which aim at averting partly liability which the P&I insurer would have had to cover, and partly liability or damage which the hull insurer or another insurer would have had to cover. The most common example in practice is the aversion of collision liability. Such liability will, according to the rules in chapter 13 of the Plan, be covered by the hull insurer to the extent that it falls within the sum insured, and does not concern personal injury, loss of life or other types of loss which are specifically excluded in §13-1. Liability which the hull insurer (or the hull-interest insurer, cf. 14-1) does not cover, will be covered by the P&I insurer. Liability for life injuries is the most important. When measures are taken to avert a collision, it will often be possible to establish with a high degree of certainty that liability has been averted for the hull insurer as well as for the P&I insurer, but it will normally be very difficult to establish how large a proportion of the liability each of the insurers would have had to cover. It is not possible to give any simple guidelines for this apportionment; it must be resolved on the basis of the estimated extent of "the interests threatened".

### Section 3 - Liability of the assured to third parties

#### § 4-13. Main rule

This paragraph is identical to § 74 of the 1964 Plan.

#### § 4-14. Cross liabilities

This paragraph is identical to § 75 of the 1964 Plan.

Under § 4-14, first sentence, the Plan maintains the principle of cross-liabilities in connection with liability of the assured to third parties. The principle is in accordance with established customary Norwegian marine insurance law, cf. Brækhus in AfS 4.468-69 with references, and is of the greatest practical importance in connection with collision settlements. This is best illustrated by a somewhat stylised example:

The insured ship A has collided with ship B. The blame fraction is one half. A's hull damage is 300, the time loss 120, a total of 420. B's loss totals 350. The settlement between the ships under section 161, subsection 2, of the Norwegian Maritime Code can be drawn up in two ways. One could either say that the total loss is 770, that each of the parties shall bear one half, i.e. 385, and that this is achieved by the ship having sustained the smallest loss, B, pays 35 to A. Such a single-liability settlement results in a single claim. Or A could also be held liable to pay half of B's loss, i.e. 175, and B to pay half of A's loss, i.e. 210. These two claims are set off against each other, with the result that B must pay the balance of 35 to A. This is the cross-liability settlement.

In the relationship between the parties, the result will be the same regardless of which principle is adhered to. In the ensuing settlement between the individual shipowner and his insurers, the choice between the two methods of settlement will, however, be of great importance. The reason for this is that the compensation obtained from the other ship will often, to a greater or lesser extent, be credited to other persons than those who shall bear the liability of the oncoming ship. The compensation from the oncoming ship shall, as regards the loss of time, fall to the shipowner (if appropriate, the loss-of-hire insurer, cf. chapter 16), whereas the compensation for hull damage shall normally be divided proportionately between the hull insurer and the owner, cf. §5-13, subparagraph 2. Liability towards the oncoming ship, however, shall as a rule be covered in its entirety by the hull insurer, cf. chapter 13 (sometimes the P&I insurer will also come into the picture, see below). If the settlement between the shipowner and the insurer is based on the cross-liability principle, it is the gross liability amounts before the set-off that shall be debited and credited respectively under these rules. If, however, the single-liability principle is adopted, there will be only one amount, the liability balance, to be apportioned. If the balance is in the oncoming ship's favour, it shall be debited to the hull insurer as liability insurer. If it is in the insured ship's favour, it shall be divided proportionately between the owner and the hull insurer. In the light of the cross-liability settlement, the single-liability settlement may lead to the result that a claim from the oncoming ship, which shall accrue to a person, e.g., compensation for loss of time payable to the owner, is used as a set-off to cover the liability of the oncoming ship which, under the insurance conditions, should be covered in full by the hull insurer.

If we assume in the numbers example above that A's hull insurer indemnifies A's hull damage with 240, and that A has to pay the outstanding 60 himself, plus the loss of time of 120, a cross-liability settlement of the collision liability between A and his hull insurer will be as follows:

	A's hull insurer	A	B and/or B's insurers
Hull damage	240	60	
- 1/2 refund from B	- 120	- 30	
	= 120	= 30	150
Loss of time		120	
- 1/2 refund from B		- 60	
		= 60	60
Liability for 1/2 of B's	175		- 175
Final total charge	295	90	35

In the event of a single-liability settlement, there will only be one amount, viz. the balance of 35 in A's favour, which shall be divided proportionately between A and his hull insurer. As A's total loss was 420, this means that the compensation from B gives a refund of  $35/420 = 1/12$ , and we get the following settlement:

	A's hull insurer	A	B and/or B's insurers
Hull damage	240	60	
- 1/2 refund from B	- 20	- 5	
	= 220	= 55	25
Loss of time		120	
- 1/2 refund from B		- 10	
		= 110	10
Liability to B			0
Final total charge	220	165	35

There can be no doubt that the cross-liability settlement is preferable; it gives the shipowner exactly the refund from the other ship warranted by the portion of blame. In the event of a single-liability settlement, the refund is reduced, in our example from 1/2 to 1/12, despite the fact that the oncoming ship has been held liable for one half of the loss.

The collision settlement will sometimes also affect the P&I insurer: firstly where the liability of the oncoming ship exceeds the limit of the hull insurer's liability, cf. § 13-3 and, secondly, in the event of so-called indirect personal-injury and cargo liability. For personal injury caused by a collision, both ships are jointly and severally liable, cf. section 161, subsection 3, of the Norwegian Maritime Code; under US law the same also applies to liability for cargo damage. It is therefore conceivable that the oncoming ship B must pay compensation for personal injury, or for damage to the cargo on board the cargo-carrying ship A and that, in the settlement with A, B attributes half of the compensations paid to A. A may again have suffered far more extensive damage from the collision than B, which would mean that a settlement of the hull damage alone would give a substantial profit in A's favour. However, this is wholly or partly set off by B's refund claim in connection with the personal injury and cargo damage compensations. In this case as well, the final balance that emerges from the external settlement must be divided into claims and counterclaims according to the cross-liability principle, given that the indirect liability for personal injury and damage to the insured ship's own cargo shall be attributed to the P&I insurer, cf. § 13-1, subparagraph 2 (b), (c) and (i). See also Brækhus 1. c. pp. 482-97.

Special difficulties arise where one or both of the colliding ships limit their liability. In the relationship between the ships, the limitation will, under the laws of most countries, be effected in respect of the liability balance, in other words, on the basis of the single-liability principle, cf. the Limitation of Liability Convention of 1976, Art. 5 and section 172, last subsection, of the Norwegian Maritime Code. In consequence hereof, the calculated gross liability will not concord with the balance which is in actual fact paid, and the normal cross-liability settlement in the relationship between the shipowner and his insurers will not be correct. In English marine insurance, which is based on cross-liability as the principal rule, this has led to a switch to single liability as soon as one of the involved ships limits its liability, cf. I.T.C., Hulls, no. 8.2.1. However, this solution results in an unfortunate discontinuity. An insignificant increase in liability, making limitation applicable, may result in a very substantial reduction of the reimbursement of the owner's loss of time. Danish and Norwegian practice has instead adopted a modified cross-liability settlement in the limitation cases by reducing the largest gross amount of liability in the insurance settlement by the same amount by which the liability balance in the external settlement has been reduced as a result of the limitation rule, see further Brækhus, 1. c., pp. 469-82 and 497 et seq. This method of settlement was also approved by the Norwegian Supreme Court in the Fernstream case, ND 1963.175, and it is explicitly adopted as a basis in the Plan, cf. § 4-14, second sentence. For the sake of clarity, the third sentence of the paragraph specifies how the settlement shall be effected when the limitation is applied to the liability balance.

Incidents causing mutual damage and liability that affect the insurance settlements do not occur only in connection with collisions between ships, although collision cases are probably predominant. The cross-liability principle must also be applied in a case such as the following: a cargo of slimes which is carried by the insured ship becomes liquid. The ship, which does not have the necessary longitudinal bulkheads, takes a list and ends up turning over and going down. The accident was due partly to negligence of the cargo owner: he had failed to say that the slimes were of a particularly difficult type, and partly to negligence of the ship: even when carrying ordinary slimes, the ship should have had longitudinal bulkheads. In the claims settlement, the cargo owner's (partial) liability for the loss of the ship will, to some extent, be offset by the owner's (partial) liability for the loss of the cargo. In the ensuing insurance settlement, the balance must be broken down as follows: the compensation the cargo owner pays for the loss of the ship must be covered by the hull insurer, while the compensation to the cargo owner for the loss of the cargo must be paid by the P&I insurer.

In the above example, it is assumed that both the assured's own loss and his liability to third parties are covered by insurance. However, the cross-liability principle must be applied, even if it is only the assured's own loss, or only the liability, which is insured. The individual insurer's liability shall not depend on how the assured has covered his other interests. For this reason, the application of the cross-liability principle has been authorised specifically with a view to liability insurance in this paragraph and with a view to the apportionment of subrogation claims in § 5-13, subparagraph 1.

#### § 4-15. Unusual or prohibited terms of contract

This paragraph is identical to § 76 of the 1964 Plan.

The collision liability covered by the hull insurer will normally have been incurred vis-à-vis a third party with whom the assured does not have any contractual relationship. However, it is conceivable that the assured's contracts may be of significance, especially in connection with liability to owners of tugboats or quays, canals and similar installations the ship has used.

Under letter (a), the insurer shall always cover liability based on terms of contract that must be considered customary in the trade concerned. In offshore contracts, it is customary to use limitations of liability in the form of "knock-for-knock" clauses, which entail that the contracting parties shall cover damage to their own objects, even if the other contracting party may be held liable for the damage under general law of damages. Such clauses must in this context be considered "customary". However, limitation of liability clauses in offshore contracts are often linked to a waiver-of-subrogation clause in the claimant's insurance contract, whereby the insurer waives the right to seek recourse against the assured's contracting party. In that event, the question whether such limitation of liability clauses are customary is of little independent significance.

The limitation of liability in letter (b) relates to § 3-28, which authorizes the insurer to prohibit or require the use of certain contractual forms.

In contracts for repairs, it is not unusual to find clauses to the effect that everything that is scrapped during repairs shall accrue to the repair yard, without compensation. Such clauses are also binding on the insurer according to custom and practice and by analogy from § 4-15, cf. Brækhus/Rein: Håndbok i kaskoforsikring (Handbook of Hull Insurance), pp. 603-6064

#### § 4-16. Objects belonging to the assured

This paragraph is identical to § 77 of the 1964 Plan.

If two of the assured's ships collide, the ships' hull insurers will cover the damage they have sustained. If the ships had belonged to different legal entities, the ship that was at fault would have also had to cover the other ship's loss of time, deductions, deductibles concerning the hull damage and other economic losses that the owner has suffered because of the collision. This liability would normally have been covered by the hull insurer of the ship at fault. No such liability can arise when both ships belong to the same person. The assured will suffer a corresponding reduction in his cover and the hull insurer of the ship at fault will not be liable for loss of time, etc. for which he otherwise would have been liable. This is not reasonable. The Plan therefore prescribes, in conformity with earlier law, that a fictitious collision settlement shall be effected between the ships. Compensation shall be calculated as if they had belonged to different persons. This so-called "sister-ship rule" is customary in international marine insurance.

The same applies where the ship has run into other objects belonging to the assured, e.g., a quay or a wharf. In this case, the insurer shall cover the liability the assured would have incurred if the

quay or wharf had belonged to a third party, based on the view that the insurer's liability should not be reduced because of the coincidence that the ship has run into the assured's own property.

The sister-ship rule represents a positive extension of the liability cover. Hence, it cannot be invoked against an insurer who has only insured the "innocent" ship. He will only be liable for the ship's hull damage in accordance with the insurance contract. On the other hand, liability under this provision for the insurer of the ship at fault is subject to the condition that he would have been liable under the rules of the Plan if the claimant had been an outside third party. Accordingly, if the insurer would not have been liable for the collision liability, etc., on account of the rules in chapter 3, including the identification rules, he will also be free from liability to the assured under the current provision.

Another question is whether the insurer of the "innocent" ship will have recourse against the assured in his capacity as owner of the ship at fault. The question is first and foremost of interest when the ship at fault is not insured and is, accordingly, not of any great practical significance. The correct solution must be that his position as assured under the innocent ship's insurance protects him against such a recourse claim to the same extent that he has a claim against his own insurance. This means that it is the general rules in chapter 3 of the Plan which decide the question.

If a fault was committed on board both of the colliding ships, the application of the sister-ship rule must be "based on the calculated gross liabilities before any set-off", cf. § 4-14.

The extended cover under § 4-16 applies only to loss of or damage to objects other than the insured ship and its supplies and equipment, cf. second sentence. Damage to such objects is not recoverable under these rules.

A corresponding "sister-ship rule" is applied when the ship is salvaged or receives assistance from another vessel belonging to the assured, cf. § 10-11.

#### § 4-17. Determination of the liability of the assured

This paragraph corresponds to § 78 of the 1964 Plan and ICA section 7-8, subsection 1.

ICA section 7-6 contains a provision which gives an injured third party a direct claim against the wrongdoer's liability insurer. This provision is not appropriate in marine insurance. Consequently, for insurances taken out on the basis of the Plan, an injured third party will have no such right to direct action. This is reflected in subparagraph 1 of the provision.

However, an injured third party under ICA section 7-8, subsection 1, is protected against the compensation being paid to the assured without the latter having proved that the injured party's claim has been honoured. Furthermore, the injured party will have a direct claim against the insurer if the assured is insolvent, cf. section 7-8, subsection 2. These provisions are mandatory in marine insurance as well, cf. ICA section 1-3, subsection 2.

Subparagraph 2 is based on § 78, subparagraph 1 of the 1964 Plan. However, the 1964 Plan laid down a requirement that the assured's claim had to be determined in certain specific ways in order for the insurer's liability to be triggered. This has been modified to a certain extent: the provision now sets out a number of procedures the assured may follow in order to document his claim. The deciding factor for the insurer's liability is, however, that the claim is justified, not that the relevant procedure has been complied with. This is reflected in subparagraph 3. Consequently, if the assured has, contrary to the umpire's decision, cf. §15-11, accepted that a dispute shall be decided by arbitration, the insurer must cover the assured's liability under the arbitration decision, provided that the assured is able to prove that he would have incurred liability even if he had complied with the umpire's decision, cf. Brækhus/Rein: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 572.

*Section 4 - The sum insured as the limit of the liability of the insurer***§ 4-18. Main rule**

This paragraph corresponds to § 79 of the 1964 Plan, and CEFOR I.3 and PIC § 5.7.

This provision establishes the principle that the insurer is liable up to the sum insured for each individual casualty and shall apply in all branches where a sum insured is agreed.

Subparagraph 1, first sentence, is based on § 79 of the 1964 Plan, subparagraph 1. The insurer is liable with up to one sum insured for "loss caused by any one casualty". The term "any one casualty" is discussed in further detail below.

Subparagraph 1, second sentence, is based on the Special Conditions (CEFOR I.3, and PIC § 5.7), but with certain amendments. The provision is bound up with the traditional principle in insurance law that the insurer, in addition to the sum insured, is liable for costs of measures to avert or minimise loss. Under the 1964 Plan, the insurer originally had unlimited liability for these costs. However, this liability was limited in the Special Conditions (CEFOR I.3, and PIC § 5.7) so that the costs of measures to avert or minimise loss basically had to be covered up to the sum insured under § 79, subparagraph 1, or possibly the separate sum insured under § 196. There was nevertheless a certain extension of the cover: if the separate sum insured under § 196 of the Plan was not used to cover costs of collision or measures to avert or minimise such liability, the balance could be used to cover costs of measures to avert or minimise damage to or total loss of the ship to the extent that such measures exceeded the sum insured.

According to this, the cover under the Special Conditions of costs to avert or minimise loss were more limited than the corresponding cover under ICA. Under ICA section 6-4, the rule is that the insurer is fully liable for costs of measures to avert or minimise loss. During the revision of the Plan, there was general agreement that the limitation in the Special Conditions went too far. The intention was originally that the P&I insurers were to cover the costs of measures to avert or minimise loss which were not recoverable under the hull insurance. However, this applied only to the Norwegian P&I insurers, and the assured therefore ran the risk of being without cover if he had a foreign P&I insurer. Nor was the solution laid down in any agreement, and it was therefore uncertain to what extent it would be complied with in practice. The regard for the interests of the assured therefore warranted a certain expansion of the scope of cover. Out of regard for the reinsurers, however, cover of costs of measures to avert or minimise loss had to be subject to a limitation. These conflicting interests have been resolved by the introduction of a separate sum insured for the costs of measures to avert or minimise loss stipulated in subparagraph 1, second sentence. This sum insured comprises the total costs of measures to avert or minimise loss for the relevant insurance under the Plan. For hull insurance, this means that both costs of measures to avert or minimise loss associated with the property insurance, as well as costs of measures incurred to avert collision liability, are included. Such a solution concords with the solution in the English conditions.

If the sum insured for property damage under a hull insurance has not been exhausted by compensation paid for such damage, it should be possible to use the excess of the sum insured to cover costs of measures to avert or minimise loss that exceed the separate sum insured for such costs. This solution is reflected in subparagraph 1, third sentence. On the other hand, it should not be possible to transfer the separate sum insured for the collision liability under subparagraph 2 and § 13-3 for the purpose of covering costs of measures to avert or minimise loss in this way. The provision relating to a separate sum insured for collision liability contained in subparagraph 2 and § 13-3 is bound up with the regulation of the owner's liability. According to the Limitation of Liability Convention of 1976, the owner is liable up to a certain amount per tonn, regardless of the fate of the ship. Without a separate sum insured for collision liability, collisions with extensive damage to both ships may result in the P&I insurer having to cover a substantial part of the collision liability.

The fact that the insurer covers collision liability "separately" means that he does not cover collision liability within the actual hull insurance sum. Thus, whatever might be left of the ordinary sum insured after the damage to the ship has been covered shall not be used to cover liability. The separate sum insured for collision liability has been fixed at an amount equal to the sum insured under the hull insurance, cf. § 13-3.

It follows from the regulation in § 4-18 that the limit in terms of amount of the insurer's liability is connected with "any one casualty". The question whether one or more casualties occurred will rarely give rise to problems. Difficulties do not arise until a series of events occur in rapid succession or with a strong mutual causal connection. In that event, the distinction between one

and several casualties must be decided on a case-to-case basis. Some guidance may be found in practice in connection with § 12-18 concerning deductibles; also the deductible shall be calculated for the individual casualty. However, the content of the casualty concept will not necessarily be the same in both connections.

The question as to when successive events constitute one or more casualties may arise in three standard scenarios:

1. One and the same peril materializes several times. By way of example, a ship sustains hull damage while navigating in ice on a number of clearly separate occasions, cf. e.g. ND 1974.103 NH Sunvictor, which concerned the question relating to the number of deductibles under an Anglo-American deductible clause. As a rule, this problem will concern the number of deductibles. The ship will normally be a constructive total loss if several incidents of damage exceed the sum insured. However, in principle it may in such situations also be a question whether the insurer shall be liable up to more than one times the sum insured.

2. Damage caused by one event interacts with new circumstances and results in further damage. By way of example, the steering gear of a ship is damaged in a collision with the result that the helm is locked in a starboard position. Before the crew manages to stop the engine, a new collision occurs. As regards property-damage cover, in this group of events as well, it will be the question of deductibles which is the most interesting. However, in the event of several successive collisions, the total collision liability may become so extensive that the question of whether the insurer is liable for up to one or several times the sum insured becomes relevant.

3. One incident of damage requires several repairs. The typical example is that the first repairs were inadequately performed, or that they were not thorough enough, cf. ND 1977.38 NH Vestfold I, which concerned the question whether new damage resulting from errors committed during the repairs of the engine after a grounding was to be regarded as a consequence of the grounding. If the first damage has been repaired before the next one occurs, there may also be a need for more than one sum insured.

There is no case law regarding the distinction between one and several casualties in relation to the sum insured. Certain elements may be taken from ND 1974.103 NH Sunvictor and ND 1977.38 NH Vestfold I, cf. above. In addition, some guidance may be found in case law concerning limitation of liability under section 175 no. 4 of the Norwegian Maritime Code, which ties the limit of liability to "the sum total of all claims arising from one and the same event". If it is a situation where the ship collides with several other ships in quick succession, causing a total loss exceeding the sum insured for the collision liability, the natural thing to do would be to tie the solution to the decision regarding the owner's right to limit his liability to third parties. However, also in other cases where a limitation of liability under the Norwegian Maritime Code is relevant, the interpretation of the term "one and the same event" in the Norwegian Maritime Code may help shed some light on the question concerning the distinction between one and several casualties in relation to the sum insured. Reference is made to ND 1984.129 Tønsnes, where damage to seven net loops in the course of roughly one hour was regarded as caused by one event; and ND 1987.160 Ny Dolsøy, where it was regarded as one event that contaminated bunkers delivered with an interval of 24 hours to two ships within the same fishing area caused damage to the machinery of these vessels.

Accordingly, the question whether one or several casualties have occurred in relation to the sum insured must be the subject of a case-to-case evaluation, where the following elements may come into play:

1. Is there a close connection in terms of location and time between the successive incidents of damage, or are the new accidents of a totally independent nature? Taking the two limitation of liability judgments referred to above as a point of departure, it is nevertheless hardly possible to stipulate very strict requirements as to connection in time and place in order for several incidents of damage to be regarded as one casualty. As long as the incidents occur within a delimited area, it must be accepted that they occurred at certain intervals.

2. What possibilities did the assured have of averting the last damage? As regards this element, a distinction must, however, be made between the number of deductibles and the number of sums insured. If it is a question of whether new damage shall trigger several deductibles, the assured's negligence must be regarded as a new and independent cause that breaks the chain of causation from the first incident. This follows from the view that the deductible shall have a deterrent effect. However, in relation to the number of sums insured, the deterrence aspect may suggest that negligence on the part of the assured does not give rise to a new sum insured. Deterrence considerations might, in other words, suggest that the distinction between one and several



casualties varies depending on whether it is a question of more than one sum insured or more than one deductible.

3. Does the initial damage or its cause entail an increased risk of new damage, or is the last incident a result of a "generally prevailing risk of damage" which would have occurred with the same effect independently of the first damage or its cause?

#### § 4-19. Liability in excess of the sum insured

This paragraph corresponds to § 80 of the 1964 Plan and ICA section 8-4, subsection 6.

It is a traditional principle in marine insurance that the assured, in addition to the cover which the insurance affords him within the limits of the sum insured, is entitled to separate cover of a number of accessory expenses and other losses which the casualty has caused him. In the 1964 Plan, all these expenses were stated in § 80. In the new Plan, loss caused by measures to avert or minimise loss has been isolated for separate regulation in § 4-18, cf. above. The other accessory costs, however, are still mentioned in § 4-19.

Letters (a) and (b) state the expenses that are to be covered in addition to the sum insured: costs of providing security, of filing suit against or defending a suit filed by a third party, costs in connection with the claims settlement, costs of necessary measures to preserve the object insured and interest on the compensation.

It furthermore follows from § 15-21, which concerns liability for the removal of war wrecks, that the war-risks insurer covers such liability even if the sum insured is exceeded.

#### § 4-20. Limit of liability where loss is caused by a combination of perils

This paragraph corresponds to § 81 of the 1964 Plan.

The provision is based on ND 1956.323 NH Pan, where the question was how the limitation up to the sum insured was to be applied in the event of a casualty with a "mixed cause". Liability for the damage to the ship was apportioned, with the marine insurer covering 40% and the war-risks insurer 60%. The costs of repairs, etc. exceeded the hull valuation, but the assured demanded full compensation, alleging that each of the insurers was liable for his share of damage to the ship up to his sum insured. The Supreme Court rejected the claim on the grounds that the assured shall not "in a case of a combination of different perils, be in an economically more advantageous position than if there had been no combination of different perils". This solution has been adopted as a basis in § 4-20.

#### § 4-21. Right of the insurer to avoid further liability by payment of the sum insured

This paragraph corresponds to § 82 of the 1964 Plan.

Under subparagraph 1, the insurer may avoid further liability by paying the sum insured. There is no time-limit on the insurer's right to limit his liability.

The principle in subparagraph 1 is only applicable in property insurance. The insurer cannot invoke the provision if the assured, contrary to his wishes, wishes to institute legal proceedings regarding liability covered by the insurance. In that case, it is necessary to resort to the rules contained in § 5.11. If the assured in such a case is supported by the umpire, but liability which absorbs the entire sum insured is nevertheless imposed on the assured in the legal proceedings, the insurer shall cover the litigation costs under the general rules.

If the insurer pays the sum insured in accordance with § 4-21, the further salvage operation will be for the assured's own account and risk. If the salvage operation is successful, the assured will keep the wreck, but he must pay the full cost. However, he may claim compensation for the costs he has incurred before he was informed that the insurer had decided to pay the sum insured. The measures the assured has implemented prior to that time are for the insurer's account, even if the costs do not accrue until later.

This apportionment of risk has caused certain problems where the assured has entered into a salvage contract before the insurer has paid the sum insured. If the contract does not allow the assured to cancel the contract without paying salvage, the insurer will be liable for the salvage expenses; here the measure has been "implemented", cf. subparagraph 2. If, however, the assured has the right to get out of the salvage contract, the insurer has the right to order him to do so, and may in that event pay the sum insured according to subparagraph 1, and avoid further liability. These principles must apply regardless of whether the salvage contract has been entered into on a no-cure-no-pay basis or is based on an hourly rate.

Subparagraph 3 establishes that the insurer has no right to take over the object insured under § 5-19, where he chooses to pay the sum insured under subparagraph 1.

## Chapter 5. - Settlement of claims

### *Section 1 - Claims adjustment, interest, payments on account, etc.*

#### § 5-1. Duty of the assured to provide particulars and documents

This paragraph corresponds to § 83 of the 1964 Plan, CEFOR I.29, and PIC § 5 no. 8, and ICA section 8-1, subsection 1.

Subparagraph 1 is identical to the 1964 Plan and also corresponds to ICA section

8-1, subsection 1. The provision establishes the duty of the assured to provide the insurer with such information and documents as are required for the purpose of settling the claim. It is irrelevant whether the insurer has specifically requested such information; the duty concerns any and all information the insurer, from an objective point of view, requires. The duty of disclosure applies both in relation to the claims leader and in relation to the co-insurers.

In practice, the insurer often raises a series of specific questions related to the settlement. Incorrect answers to these questions represent a clear breach of § 5-1, subparagraph 1. However, the provision shall also apply where the assured, on his own initiative, gives incorrect information or withholds information which he should understand is of significance for the insurer. The duty of the assured to provide information is, in other words, an active and not a passive duty of disclosure.

The requirement to provide information may vary in the different types of insurance. In loss-of-hire insurance, the duty of disclosure under § 5-1 entails that the assured shall make all accounting material that shows the ship's earnings, relevant bills, invoices, etc. available to the insurer in so far as this is necessary in order to calculate the correct compensation.

If the assured neglects his duty under subparagraph 1, he risks forfeiting his right to claim interest for the time lost, cf. § 5-4, subparagraph 2. However, loss of interest would normally only be a reasonable sanction where the assured has failed to comply with an explicit request from the insurer for a specific item of information or a specific document. However, an exception must be made for the general invoice. If the assured fails to submit this, he risks forfeiting his right to claim interest under § 5-4, subparagraph 2, even if he has not received any specific request from the insurer.

Subparagraph 2 is new and regulates the insurer's sanctions if the assured, intentionally or through gross negligence, fails to fulfil the duty to provide information stipulated in subparagraph 1. The 1964 Plan did not contain any sanctions against the failure to comply with this duty of disclosure through intentional or gross negligence, although the 1964 Plan subparagraphs 2 of § 92 and § 99 (cf. currently subparagraphs 2 of § 5-9 and § 5-16), contained such sanctions for certain special situations. However, there is no reason why the failure to fulfil the general duty to provide information under § 5-1 should result in a more lenient reaction than the failure to comply with the other provisions. Accordingly, subparagraph 2 establishes that, in the event of the assured, intentionally or through gross negligence, failing to fulfil the duty of disclosure, the insurer is not liable for any loss that would have been averted if the duty had been fulfilled.

If the assured has acted fraudulently in connection with the claims settlement, the traditional point of departure in insurance law is that the assured forfeits any claim against the insurer. This point of departure had been softened in the 1964 Plan, where § 83, subparagraph 2, merely stated that compensation might be reduced or lapse altogether where the assured had fraudulently or dishonestly neglected his duty of disclosure. However, this rule was considered important in practice, and the alternative, a reduction of liability was therefore abolished in the Special Conditions, cf. CEFOR I.29 and PIC § 5.8, which stated that liability lapsed where the assured had fraudulently or dishonestly neglected his duty of disclosure.

The solution in the Special Conditions has been maintained in the new Plan, cf. subparagraph 3, first sentence. This rule may seem strict if the fraud is of secondary importance and concerns only certain losses, and there is consequently a risk that the courts may in such cases fail to hold that fraud has been committed. However, the loss of all rights concords with the point of departure in ICA, section 8-1, section 2.

In the 1964 Plan, fraud was placed on a par with "dishonesty". This is in accordance with the solution in ICA, which applies to an assured who, in connection with a claims settlement, deliberately gives incorrect or incomplete information which he knows or must understand may result in the payment of a compensation to which he is not entitled. This solution has not been

maintained in the new Plan, under which a total loss of rights will only be relevant in the event of fraud. This is the most consistent procedure in relation to the other rules relating to subjective duties, and also makes it unnecessary to decide the difficult question as to what the term “dishonest” implies.

§ 83, second sentence of the 1964 Plan equated fraud and dishonesty with the situation where the assured refused to provide information from the classification society. This rule has been amended and moved to § 3-7, subparagraph 3.

Subparagraph 3, second sentence, is new and gives the insurer the right to cancel any agreement with the assured by giving 14 days’ notice if the assured has acted fraudulently. This provision is taken from ICA section 8-1, subsection 3, although that section stipulates only one week’s notice. Because it is important that the assured be given clear information as to where he stands as soon as possible, it follows from the third sentence that the insurer shall act without undue delay after he has become aware of the fraudulent act, cf. the corresponding rule in § 3-6.

## § 5-2. Claims adjustment

This paragraph corresponds to § 84 of the 1964 Plan and ICA section 8-2, subsection 1.

The first sentence to the effect that the insurer shall issue the claims adjustment as promptly as possible is identical to the 1964 Plan. However, the second sentence of the 1964 Plan contained more detailed time-limits: In the event of a settlement under the rules relating to a total loss, the claims adjustment was to be issued at the latest within 14 days, and in other cases at the latest within 3 months after the insurer had received the necessary particulars and documents. The provision was connected with § 89 relating to due dates, which was tied to the time-limits in § 84 and § 86 relating to interest, which authorized penalty interest plus 1% in relation to the ordinary rate of interest if the due date is not adhered to. However, in the Special Conditions the system of interest on overdue payments had been superseded by a common rate of interest.

The approach of the new Plan is to establish a due-date and interest system that is somewhere in between the solution in the 1964 Plan and the solution in the Special Conditions. On the one hand, there is reason to show caution when it comes to imposing interest on overdue payments. The sharp calculation of time-limits in subparagraph 1, second sentence, in the 1964 Plan has therefore been taken out of the Plan text and does not have any direct impact on the due date. The insurers should nevertheless endeavour to meet a deadline of 14 days for total losses and 3 months for other settlements.

On the other hand, a common rate of interest before and after the due date will not give the insurer very much of an incentive to be quick about the claims adjustment if the market rate is higher than the policy rate. The possibility cannot be disregarded that the courts may in such a situation apply the Act relating to interest on overdue payments (Morarenteloven), even if the Plan did not contain any rules relating to interest on overdue payments. The due date in § 5-6 therefore refers to the criterion “as promptly as possible” in § 5-2, first sentence, and a rule relating to interest on overdue payments has been introduced in § 5-4, subparagraph 4. An insurer who fails to pay compensation within six weeks after the “as promptly as possible” period has expired must pay overdue interest.

The provision in the second sentence is taken from § 84, subparagraph 2, first sentence of the 1964 Plan. The 1964 Plan also contained a provision to the effect that the insurer had one month to decide whether or not to accept the average adjuster’s calculation. This rule was deemed to be superfluous and has been deleted.

## § 5-3. Rates of exchange

This paragraph corresponds to § 85 of the 1964 Plan, CEFOR I.12 and § 5.2 of PIC.

Subparagraphs 1 and 2 are unchanged. It is standard international practice that the conversion from one currency to another in the claims adjustment is based on the rate of exchange on the date of the assured’s disbursement, cf. subparagraph 1, first sentence. This means that the assured bears the exchange risk for the period of time between the disbursement and the final claims settlement.

As regards general average as well, it is standard international practice for the conversion of currencies to be based on the rate of exchange on the date of disbursement. If, in exceptional cases, a different rate of exchange has been applied, the insurer has the right to attempt to have the actual average adjustment changed. If the adjustment is confirmed by the courts of the country concerned, the settlement should be made on the basis of the average adjustment.

Subparagraph 2 regulates the conversion of costs that have not been paid when the settlement takes place. The claims adjustment is "issued" when the completed adjustment is sent from the insurer to the interested parties. Hence, if there is a change in the rate of exchange during the intervening period from the time the actual adjustment is completed until it is ready for issue, a supplementary adjustment must be made.

Subparagraph 3 is new and is taken from the insurance conditions, cf. CEFOR I.12, and § 5.2 of PIC. The provision regulates the conversion of NOK amounts in the policy in the event of the sum insured being in a foreign currency; the conversion to the currency of the policy is based on the banks' latest official selling rate before the insurance took effect. The rule relates to the fact that the policies may contain deductibles stipulated in Norwegian Kroner, and that a conversion into the currency of the policy may therefore be required.

The content of the wording "the insurance takes effect" is further regulated in § 1-5 of the Plan. The time at which it takes effect poses no problems for ordinary insurance policies which attach for one year. If it has been agreed that the insurance shall attach for a period longer than one year, it follows from § 1-5, subparagraph 4, which was added in the 2003 version, that the insurance period shall be deemed to be one year in relation to § 5-3, subparagraph 3. This means that the time "the insurance takes effect" in relation to the conversion rate refers to the beginning of the one-year period during which the casualty occurs.

#### § 5-4. Interest on the compensation

This paragraph corresponds to § 86 of the 1964 Plan, CEFOR I.14, and § 5.9 of PIC and ICA section 8-4.

According to § 86, subparagraph 1, first sentence of the 1964 Plan, the assured could claim interest as from one month after the date on which notice of the casualty was received by the insurer. The basis for the time-limit was changed in the Special Conditions in accordance with Act of 17 December 1976 No. 100 relating to interest on overdue payments to "the date on which notice of the casualty was sent to the insurer", cf. CEFOR I.14 no. 1 and § 5.9 no. 1 of PIC. This solution has now been incorporated in the Plan, cf. subparagraph 1, first sentence. This provision concords with ICA section 8-4, subsection 1, but here interest does not accrue until two months from the date indicated.

In the event of a total loss, it is therefore the notice of the casualty, and not the claim for total loss, that forms the basis of the duty to pay interest. This also applies to condemnation, even if it takes a long time to decide the question of condemnation. If the matter is delayed because the assured is late in submitting the request, the question of applying the rule in subparagraph 2 may arise.

Under § 11-7, subparagraphs 1 and 2, the assured's right to compensation for total loss will, in certain cases, be contingent on the expiry of a certain time-limit. However, under § 11-7, subparagraph 3, he may claim compensation without awaiting the expiry of the time-limit if he can prove that he will not recover the ship. In such cases, the obligation to pay interest will accrue one month after the assured proves that he has definitively lost the ship.

In the event of the insurer having to refund the assured's disbursements, interest does not accrue until the date of the disbursement, cf. subparagraph 1, second sentence, which is identical to the 1964 Plan. Thus, no interest is charged on costs that have not yet been incurred. Under ICA section 8-4, subsection 2, interest does not accrue until two months after the disbursement.

If the assured has had disbursements at different times, interest shall be calculated separately for each disbursement. In such cases, the deductible shall be apportioned over the various disbursements on a proportional basis so that the assured can only claim interest on that part of the disbursement which exceeds the relevant proportion of the deductible, cf. the commentary on § 12-18.

The provision in subparagraph 1, third sentence, is new, and states that in the case of loss of hire insurance the interest accrues from one month after expiry of the period for which the insurer is liable. This rule is taken from ICA section 8-4, subsection 3. The Loss of Hire Conditions contained a similar provision in CEFOR Form 237, § 14, subparagraph 1, but the starting point there was one month after the completion of the casualty repairs. However, there is no reason why the duty to pay interest shall be postponed until the repairs have been completed if the insurer's liability is limited to a shorter period.

The provision in subparagraph 2, first sentence, is unchanged and regulates the duty to pay interest if the assured fails to provide information under § 5-1; in that event, he cannot claim

interest for the loss of time resulting from the delay. This provision corresponds to ICA section 8-4, subsection 4, first sentence.

By making payments on account the insurer will, to a large extent, eliminate the duty to pay interest. If the assured refuses to accept such payments on account, or if he unrightfully refuses to accept settlement, wholly or in part, he cannot claim interest for the resulting loss of time, cf. subparagraph 2, second sentence, which is new and taken from ICA section 8-4, subsection 4, second sentence.

§ 86, subparagraph 3, of the 1964 Plan set the rate of interest at the savings bank rate of interest. The provision was tied to the mandatory rule in section 24 of the 1930 ICA. However, under the Act relating to interest on overdue payments, the rate of interest in section 24 was tied to the rate of interest of the said Act. Given that the provision was also mandatory for hull insurance for ocean-going vessels, the rate of interest laid down in the Special Conditions was changed accordingly. In ICA 1989, section 8-4, subsection 5, the reference to the rate of interest in the Act relating to interest on overdue payments has been retained, but the provision is no longer mandatory in insurance for ocean-going vessels. Since 1989, the determination of interest in the Special Conditions has been based on collective, annual negotiations, where the rate of interest has, in some cases, been substantially lower than the statutory rate of interest.

During the Plan revision, there was agreement that the annual negotiations concerning the rate of interest should be avoided, due to the constant fluctuations in the market rate of interest. In order to establish a calculation system where the Plan rule automatically reflects the general level of interest at the time in question, the rate of interest has been tied to NIBOR (Norwegian Interbank Offered Rate) if the sum insured is given in Norwegian Kroner, and LIBOR (London Interbank Offered Rate) if the sum insured is in some other currency, cf. subparagraph 3, first sentence. By NIBOR is meant the interest offered by the leading Norwegian banks for interbank loans in NOK for the interest period in question in the Norwegian Interbank Market, i.e. the market where the banks can obtain deposits in Norwegian Kroner through the international swap market. NIBOR will vary depending on the life of the loans. In the Plan, the six-month NIBOR has been adopted as a basis, because it is somewhat more stable than the three-month rate of interest.

If the sum insured is in another currency, the six-month LIBOR shall be used. By LIBOR is meant the rate of interest determined for interbank loans in the relevant currency for the corresponding period in the London Interbank Market. The rate of interest is determined at 11:00 a.m. London time with effect from and including spot, i.e. two banking days after the setting of the rate of interest. Average rates of interest for various periods are easily available in all major banks.

The mark-up on NIBOR and LIBOR is calculated at 2%.

As regards the time to which the rate of interest shall be tied, there are basically three alternatives. The rate of interest may be tied to the time when compensation is paid. This is the logically correct solution, but it is complicated, because it is necessary to calculate the interest for each individual payment. Another alternative is to tie the interest to the time of loss. This solution is also complicated, however: there will be a rate of interest for each insured event, and it may also be difficult to pinpoint the individual incident in time. A final alternative is to tie the rate of interest to the time when the insurance contract was entered into. This is the simplest solution, and the one on which the Plan is based, cf. subparagraph 3, second sentence. The rate of interest shall be determined as at 1 January "of the year the insurance contract comes into effect". By this is meant the time when the individual insurance policy takes effect. If the insurance has been renewed with the same insurer, the time of renewal is decisive.

The time when the insurance contract comes into effect poses no problems for ordinary insurance policies which attach for one year. If it has been agreed that the insurance shall attach for a period longer than one year, § 1-5, subparagraph 4, which has been added in the 2003 version, provides that the insurance period shall be deemed to be one year in relation to § 5-4, subparagraph 3. This means that the time "the insurance comes into effect" in relation to the fixing of the rate of interest refers to the beginning of the one-year period during which the casualty occurs.

In order to prevent the rate of interest becoming dependent on major, random fluctuations in the market, the Plan Committee has relied on an average rate of interest for the last two months of the year preceding the coming into effect of the insurance contract. The relevant average rate of interest will be calculated on request by most banks.

Subparagraph 4 is new, and states that, after the due date, interest on overdue payments accrues according to section 3, subsection 1, of the Act relating to interest on overdue payments. This provision corresponds to ICA section 8-4, subsection 5, but it also refers to section 2, subsection 2, of the Act relating to interest on overdue payments.

Pursuant to ICA section 8-4, subsection 6, interest shall be covered in addition to the sum insured. This rule follows from § 4-19 (b).

If the claims leader has had disbursements on behalf of the insurers, he will be entitled to charge interest under § 9-11.

#### § 5-5. Disputes concerning the adjustment of the claim

This paragraph is identical to § 87 of the 1964 Plan.

Subparagraph 1 sets out a right for both parties to demand that the adjustment be submitted to an average adjuster before the matter is brought before the courts. The average adjuster shall not make any arbitration award, but merely give his opinion as to how he believes the claims settlement should be effected. Experience shows that this provision has had a litigation-detering effect, because the assured will often accept the opinion of the average adjuster he has designated himself even if he does not support his claim. Also the insurer will normally accept an average adjuster's decision that is not in his favour.

Subparagraph 2 states who shall bear the costs of submitting the matter to an average adjuster. When the average adjuster submits his opinion, he must also decide this question.

Even if no claims adjustment exists, there may be grounds for litigation between the assured and the insurer, viz. when the latter has refused a request for condemnation, or has repudiated a claim on the ground that no recoverable casualty has taken place. Subparagraph 3 makes the provisions contained in subparagraphs 1 and 2 similarly applicable to such situations.

If the assured and the insurer, after having obtained the average adjuster's opinion, cannot reach an agreement about the claims settlement, the dispute must be referred to the ordinary courts. The Plan does not contain any general rule relating to arbitration or to the application of the rule of apportionment in § 2-13. However, there is obviously nothing to prevent the parties from agreeing on arbitration in connection with a dispute.

#### § 5-6. Due date

This paragraph corresponds to § 89 of the 1964 Plan.

The time-limit stipulated in the 1964 Plan was one month, but in practice this turned out to be too short. It has therefore been extended to six weeks. The time-limit takes effect from the claims adjustment "is or should have been issued", cf. for further details § 5-2. If the time-limit is exceeded, the calculation of interest will be affected, cf. § 5-4, subparagraph 4.

#### § 5-7. Duty of the insurer to make a payment on account

This paragraph corresponds to § 90 of the 1964 Plan. The provision has a parallel in ICA section 8-2, subsection 2, which provides that the insurer shall make a payment on account if it is clear that it is liable for at least part of the claim.

Subparagraph 1, first sentence, gives the assured contractual entitlement to a payment on account. In § 90 of the 1964 Plan, the obligation to make a payment on account to the assured was made subject to "substantial disbursements to cover loss". This has been amended to "major expenses or losses" in order to emphasize that this duty also applies to loss-of-hire insurance. The duty to make payments on account applies only to "major" expenses or losses; in that event, the assured is entitled to an "appropriate" payment on account. The criteria are discretionary, and leave a lot of latitude. If the assured requests a payment on account concerning expenses which he has not yet paid, the insurer has the right to pay the amount directly to the third party in question, cf. second sentence.

However, an unconditional legal duty to make payments on account may not be advisable for the insurer. If he refuses to make a payment on account in a case that later turns out to involve major recoverable damage, he may become liable for the loss which his refusal to make a payment on account may have caused the assured, e.g. by his vessel being sold by forced auction. In order to protect the insurer against such a risk, subparagraph 2, first sentence states that the duty to make payments on account shall only exist if the insurer does not have "reasonable doubts as to his liability". It goes without saying that a payment on account does not decide anything with regard to the question of liability, but to avoid any misunderstanding, this has been stated explicitly in subparagraph 2, second sentence.

The insurer may deduct outstanding premiums from the payment on account and from the final claim, without this having to be stated explicitly.

Under § 90, subparagraph 3, of the 1964 Plan, the insurer was entitled to claim interest at the rate in force for savings banks on payments on account. This has been changed to the same rate as the policy rate, cf. the reference to § 5-4, subparagraph 3, first sentence. For payments on account of amounts recoverable in general average, it follows from the second sentence that the rate of interest for the average adjustment shall apply as long as the general average interest accrues, cf. YAR 1994, rule XXI.

The insurer's interest claim under subparagraph 3 will normally be deducted from the final claim. However, if the interest exceeds the assured's outstanding claim, the insurer may claim a corresponding reimbursement.

In practice, it has turned out that owners have from time to time received excessive payments on account. In that event, the payment on account must be considered equivalent to a loan from the insurer, and interest shall be charged in the usual manner on the entire excess amount. The rate of interest should be the same on the payment on account and the claims amount.

The provision in subparagraph 3, third sentence, is new and establishes that in loss-of-hire insurance the insurer may demand interest on payments on account from the same time as the policy interest accrues, i.e. one month after expiry of the period for which he is liable. The reason for the rule is that the assured's loss under loss-of-hire insurance accrues as the period of repairs progresses, even if the insurer, formally speaking, starts to pay interest only as of one month after expiry of the period for which he is liable. In real terms, a payment made during the period of repairs is more in the nature of compensation rather than a payment on account.

§ 5-8. Payment on account when there is a dispute as to which insurer is liable for the loss

This paragraph is identical to § 91 of the 1964 Plan.

According to the first sentence, the insurers shall make a proportionate payment on account of the compensation if there is a dispute as to which one of them is liable. A dispute as to which insurer is liable for a certain loss should not be to the detriment of the assured. Until it has been finally decided which of the insurers is liable for the loss, the assured may not demand any payment on account under § 5-7, and special authority is therefore required in order for him to claim a payment on account from the insurers who may conceivably be liable. The wording to the effect that the insurers shall make a "proportionate payment on account" means that the disputed claims amount shall be divided equally among them. The duty to make payments on account applies only in the relationship between insurers who have in principle accepted liability, but who do not agree which one of them has to pay. If one of the insurers has any other objections to the claim, e.g. that the loss was caused by the assured by an act which is in breach of the insurance conditions, none of the insurers is obliged to make any payment on account, cf. second sentence.

Where the insurers' contingent liability for the loss does not represent the same amount, the payment on account shall be based on the lowest liability in order to avoid the assured having to repay the proportion of the payment on account which refers to a compensation he will not be awarded.

This provision may become applicable in a number of situations. It will apply to the relationship between the marine- and war-risks insurers if it is a question of an apportionment of the loss under § 2-14 or § 2-15. Further, the principle will be applicable if it is a question of referring the liability for damage back to a former insurer in accordance with § 2-11, subparagraph 2. Also conceivable is a dispute as to which of several successive casualties has caused a certain loss where the casualties occurred during the insurance periods of different insurers.

Similar conflicts may also arise in the relationship between the hull insurer and the P&I insurer. If the provision is to apply in such conflicts, however, it is a prerequisite that the P&I conditions contain a reference to the Plan.



*Section 2 - Liability of the assured to third parties*

§ 5-9. Duties of the assured when a claim for damages covered by the insurance is brought against him

This paragraph corresponds to § 92 of the 1964 Plan.

The provision is closely bound up with § 3-29 concerning the duty of the assured to notify the insurer of a casualty.

Subparagraph 1 applies first and foremost where the assured is held liable for a loss which he has caused a third party, but it may also become applicable where a third party makes a claim for a salvage award or payment for repairs. Accordingly, the first sentence of the paragraph uses the term "liability" and not "liability to pay damages".

In the event of a dispute with third parties, the assured and the insurer will normally have common interests. However, there may be cases where a certain conflict exists, first of all in the event of fault on the part of the assured. Consequently, the insurer must have unconditional and immediate access to all documents and other evidence, cf. third sentence.

Under the 1964 Plan, the insurer also had the right to be represented by his own counsel. This provision has been deleted. As a party to the litigation, the assured may, pursuant to section 43, subsection 2, of the Civil Procedure Act (Tvistemålsloven), only be represented by one counsel. If the insurer wishes to be joined as a party to the action, the ordinary rules relating to joinder of causes of action and accessory intervention apply.

Under subparagraph 2, the insurer may only plead that the assured has been in breach of his duty if the assured has shown intentional or gross negligence, cf. also §3-31 as regards failure to fulfil the duty to avert and minimise loss.

§ 5-10. Right of the insurer to take over the handling of the claim

This paragraph is identical to § 93 of the 1964 Plan.

The first sentence states that the insurer may, subject to the consent of the assured, take over the handling of a claim brought against him. From the insurer's point of view, it will always be desirable to be able to take over the handling of the assured's disputes with third parties. In this area the insurer has the widest experience, and it will therefore normally also be in the assured's own best interest to give his consent. That the insurer takes over the case obviously does not imply acceptance on his part of any obligation to pay the amount for which the assured may be held liable; in order to avoid any misunderstanding, this is stated explicitly, cf. second sentence.

The insurer does not have an unconditional right to take over the handling of the claim, nor to bring an action in the name of the assured. Such a solution could be unreasonable vis-à-vis the assured in situations where he himself has interests in the dispute, which are of greater economic importance than the insurer's, for example, in connection with his own counterclaims concerning loss of time. It is also conceivable that both the hull insurer and the P&I insurer will want to take over the case when it is evident that they will be covering each their part of the assured's liability. In that event, the most reasonable procedure will be for the assured himself to conduct the case on behalf of both insurers.

§ 5-11. Decisions concerning legal proceedings or appeals

This paragraph corresponds to § 94 of the 1964 Plan.

Difficult questions may arise where the assured and his liability insurer disagree as to how to handle a dispute with a third party, for instance, whether to accept an offer of an out-of-court settlement, or whether to accept or appeal against a court decision. Relevant questions are: who is authorized to make the decisions, the insurer's liability if the assured refuses to comply with his decision, and liability for litigation costs in connection with the various outcomes the dispute may have. The situation is made even more complex by the fact that there will often be two liability insurers behind the assured - the hull and the P&I insurer, respectively - and the fact that their interest in the outcome of the assured's dispute with a third party may differ. The following example shows how the conflict may arise: insured vessel A has collided with vessel B, which is lost with a valuable cargo and many passengers. The cargo on board vessel A is also damaged. Disputes arising from the collision are to be tried under American law. By a judgment of a court of first instance, the fault has been attributed entirely to A, but the owner has been granted the right to limit his liability. The owner and the hull insurer want to appeal against the judgment with a

view to obtaining an apportionment of fault, under which the owner would obtain partial cover of his loss of time, and the hull insurer would obtain a reduction of the collision liability and partial cover of the repair costs. The P&I insurer objects to an appeal for two reasons: partly because an apportionment of fault would impose an indirect liability on him for half of the damage to A's own cargo and partly because he fears that the superior courts would not only place the entire fault with vessel A, but would also find this to be a case of fault, which would deprive the owner of the right to limit liability. Unlimited liability for damages would first and foremost affect the P&I insurer, given that the hull insurer's liability for collision damages is limited to the sum insured, cf. § 13-3.

Normally the parties will reach an agreement. In case of disagreement, the parties will as a rule consult internal expertise. However, if one of the parties brings the matter to a head, there must be rules to fall back on.

Under subparagraph 1, conflicts between the assured and the insurer about the filing of suits or appeals shall be decided with binding effect by an arbitrator designated by the Association of Norwegian Average Adjusters.

Subparagraph 2 lays down certain principles the arbitrator shall adhere to in his decision. The basic rule is that he must choose the solution which, in his opinion, will in all probability result in the least overall loss for the assured and his insurers, cf. first sentence. A crucial point in this connection will be the risk of the assured being denied the right to limit his liability by the court of appeal. However, subparagraph 2, second sentence, also indicates a factor which the arbitrator shall not take into account. As evidenced by the example given above, the P&I insurer will sometimes prefer the fault for a collision to be placed solely with the assured, in view of the fact that he will thus avoid the so-called "indirect cargo liability". The assured will have a similar interest in relation to the hull insurer if he has not taken out P&I insurance. However, attempting to have the degree of fault of the insured vessel reduced through a hearing of the case by a higher court must at all events be a legitimate interest worth protecting. A rule has accordingly been incorporated to the effect that the arbitrator shall not take into account the advantage which the assured or his P&I insurer may have through an acceptance of, or an attempt to be allocated, a higher degree of fault than necessary in a collision case.

The arbitrator shall decide the conflict of interest between the assured and his insurers with final effect, but there are no enforcement measures vis-à-vis the assured if he does not comply with the arbitrator's directions. The assured's failure to do so will affect both the liability of an insurer in whose favour the arbitrator's decision was made, and the payment of the litigation costs, cf. subparagraph 3. If the insurer wants to accept an offer of an out-of-court settlement or a court decision and is supported on this point by the arbitrator, he shall cover the liability which would have been imposed on the assured by the out-of-court settlement or a court decision, cf. first sentence. If the insurer wishes to lodge an appeal and is supported by the arbitrator, he will cover the liability he anticipated would be imposed on the assured by a superior court and which he has accordingly offered to cover. It is therefore important that, during the arbitrator's consideration of the matter, the insurer makes it clear to him exactly what he wants to achieve by lodging an appeal. As mentioned in § 4-21, the insurer does not in such situations have the right to pay out the sum insured for the liability and refuse any further involvement in the case.

Should it turn out that the arbitrator was wrong, and the assured's choice was justified so that the insurer in actual fact incurs less extensive liability than that which he had declared himself prepared to accept, it is reasonable that he shall also pay his proportionate share of the litigation costs. This is explicitly stated in the second sentence.

#### § 5-12. Provision of security

This paragraph is identical to § 95 of the 1964 Plan.

Under subparagraph 1, the insurer has no legal obligation to provide security. Such an obligation could result in liability for him vis-à-vis the assured in cases where the security is provided too late, or where no security is provided at all due to unforeseen difficulties. However, in practice the claims leader will, to a large extent and at the assured's request, provide security for liability covered by the insurance, and this practice will obviously continue. If the insurer refuses to provide security, and the assured is able to document that this refusal constitutes arbitrary discrimination, he may claim compensation from the insurer.

Subparagraph 2 states explicitly that the provision of security does not imply an acceptance of liability.

The costs involved in the provision of security constitute an expense that follows from the fact that liability has been invoked against the assured. If the insurer covers the liability, he must also cover these costs. However, if it turns out that the liability does not concern him, the assured shall refund him his expenses, cf. subparagraph 3.

The questions which arise in the relationship between the claims leader and the co-insurers in connection with the provision of security are discussed in § 9-7.

*Section 3 - Claims by the assured for damages against third parties***§ 5-13. Right of subrogation of the insurer to claims by the assured for damages against third parties**

This paragraph is identical to § 96 of the 1964 Plan.

Subparagraph 1 establishes the insurer's right to be subrogated to the assured's claims against third parties. When the assured has a claim for damages against a third party on account of a loss, either wholly or in part, e.g., as a general average contribution or as compensation for collision damage, the insurer will automatically be subrogated to the assured's claim against the third party when he pays compensation under the insurance contract.

The insurer is subrogated to "the rights of the assured against the third party concerned". This entails that he takes over the claim for damages regardless of the basis on which it is founded. However, this does not apply where the assured has a claim by virtue of another insurance contract. Here the special rules relating to double insurance contained in § 2-6 and § 2-7 shall apply. If one of the insurers is liable by virtue of the rules relating to costs of measures to avert or minimise loss, however, the entire loss shall be covered by that insurer, cf. § 2-7, subparagraph 3.

The insurer is subrogated to the claim as it is in the assured's hands. If there is a maritime lien or some other security connected with the claim, the insurer may exercise this right, cf. ND 1939.269 NH Congo.

The insurer only takes over claims for damages that are connected with the interest insured and refer to the very losses that the insurer has covered. If the assured has suffered any other loss that is not covered under the insurance (e.g., loss of time in connection with a collision), he retains the claim for damages or the claim for contribution in respect of these items.

The rule in subparagraph 1, second sentence, is referred to in connection with § 4-14.

Subparagraph 2 regulates the situation where the insurer is only partly liable for the loss. In marine insurance the situation will often be that the insurance conditions provide that the assured shall bear part of the loss in the form of deductions or deductibles. In that event, the assured shall retain a proportion of the claim for damages against the third party concerned equivalent to the loss he has sustained himself, cf. first sentence. The claim shall also be divided when the value of the interest affected by the loss is estimated to be a higher amount in the relationship between the assured and the third party than in the relationship between the assured and the insurer, and the third party is only liable for a proportion of the loss, or is unable to cover the full value of the interest, cf. second sentence. Hence, the claim for damages shall be divided proportionately if the ship becomes a total loss as the result of a collision and its value is estimated to be higher than the hull valuation, whilst the third party, due to the rules relating to limitation of liability, pays a smaller amount in damages than what the insurer has paid to the assured. Conversely, if the value of the ship in a collision case is estimated to be an amount equivalent to or lower than the hull valuation, the insurer shall keep the entire claim for damages, unless the assured has also suffered other losses.

It is the assured's claim against third parties which may be subjected to a proportionate division, and not the amount of damages which may be paid. The insurer shall invoke his proportion of the claim in his own name. If the assured does not wish to pursue his part of the claim, he is free to drop it. If both the insurer and the assured invoke their claims, it would be natural to try these claims in the same action; such action shall then be conducted in the names of both parties.

Where it is the assured's claim that is divided, it is superfluous to issue rules relating to the apportionment of the costs of recovery. Each of the parties shall bear the costs that have been necessary in order to recover his own claim.

If the claims brought by the assured and the insurer against the third party concerned are not met in full, for example because the third party only has limited liability or is insolvent, the assured competes on a par with the insurer. The Plan has not adopted the rule that is common in types of insurance of a more social nature to the effect that the assured's claim for damages prevails over that of the insurer in the event of the relevant third party's bankruptcy.

If the value of the interest insured is set at a higher amount in the relationship between the assured and the third party than in the relationship between the assured and the insurer, and the third party is furthermore liable for the full loss and is able to pay the entire amount, the insurer's proportion of the claim will be larger than the compensation he has paid to the assured. It would

not be reasonable for the insurer to make a profit from his right of subrogation in this way, and subparagraph 3 therefore establishes that such profit shall be transferred back to the assured. There will obviously be no question of any profit until the insurer has been reimbursed the expenses covered in connection with the recovery of the claim and the interest accrued on the compensation he has paid to the assured. The loss of interest for the period following the claims settlement with the assured must also be taken into account.

If the third party's liability is stipulated in another currency than the one set out in the insurance contract, the insurer shall bear the risk of any exchange loss during the period between the event involving liability and the enforcement of the recourse claim. On the other hand, the insurer shall also have the advantage of any exchange gain. Hence, the rule in subparagraph 3 shall not apply here.

A special question arises where several insurers are entitled to a proportion of the claim for damages. The problem poses no difficulties if the various insured interests are assessed separately in the claims settlement. However, if the ship is a total loss as a result of a collision, the compensation will be fixed at one specific amount, representing the value of the ship, including the value of a lost charterparty, if relevant. In practice, it has been disputed how the compensation received shall be apportioned among the hull insurer, the hull-interest insurer and the freight-interest insurer. One solution is to make an apportionment also among the total-loss insurers. In the alternative, the traditional layer distribution of the total-loss insurances may be adopted, and the hull insurer must be given first priority to compensation to the extent of his claim. The hull-interest insurer will then be given second priority, whilst the freight-interest insurer will only get his share if there is still anything left of the compensation. The reason for this solution is that it would not be reasonable if, in the event of a total loss, the hull insurer's claim for damages were to be affected by the extent of the freight-interest insurance that the shipowner has taken out.

During the revision, there was general consensus that in the normal situation where the hull value is equal to or higher than the market value, the hull insurer should be given priority. In the event of a total loss with a subsequent refund from the party causing a loss of NOK 3 million and a hull valuation of NOK 18 million, the hull insurer should receive the entire compensation if the market value is lower than NOK 18 million. In these cases, the hull interest and the freight-interest insurers will not get anything. If, however, the hull valuation is lower than the market value, an apportionment must be made so that each insurer receives a proportion of the compensation equivalent to his share of the market value. The excess amount accrues to the assured. If the market value in the example above is NOK 25 million and the hull interest is insured at NOK 4.5 million, the hull insurer will thus receive 18/25 of NOK 3 million, the hull-interest insurer 4.5/25 of NOK 3 million, and the owner 2.5/25 of NOK 3 million.

The insurer's right of subrogation to claims by the assured for damages against third parties is also regulated in § 5-22. The relationship between these provisions appears from the commentary on that provision.

#### § 5-14. Waiver of claim for damages

This paragraph is identical to § 97 of the 1964 Plan.

The paragraph regulates the effect of the assured's waiver of his right to claim damages from a third party. It is primarily applicable in connection with damages in a contractual relationship where the assured has waived in advance his right to claim damages from the other party to the contract.

As mentioned in § 4-15, the question of whether the waiver can be considered customary in the trade in question must be evaluated on a case-to-case basis. An advance waiver of the right to claim damages may, for example, occur in contracts concerning pilotage or towage. In some cases, the ship may be able to obtain a contract where the other contracting party undertakes greater liability for any faults that may be committed, in return for higher remuneration. It is difficult to make any general statements about the assured's right to choose the less expensive alternative. Whether it would have been reasonable to demand that he, by incurring a somewhat higher expense, obtain a contract which would have been more satisfactory from the insurer's point of view must be decided on a case-to-case basis.

Sometimes clauses are used where the party to a contractual relationship who is likely to sustain damage waives any and all claims for damages to the extent his loss is covered by an indemnity insurance. When such a "benefit-of-insurance" clause becomes applicable between the parties, no claim for damages arises which the insurer can take advantage of. The clause will accordingly have to be evaluated under this paragraph.

If the waiver is not made until after the claim for damages has arisen, the situation will be covered both by this paragraph and by § 5-16. The assured will obviously always have the right to waive the proportion of the claim that accrues to him. If he waives the insurer's proportion, the deciding factor must be whether the insurer would have had to accept the waiver if it had been made before the claim arose, cf. Brækhus/Rein: Håndbok i kaskoforsikring (Handbook of Hull Insurance), p.600.

The provision does not cover the situation where the assured has waived the entire claim for damages after the insurer has exercised his right of subrogation. In that event, the assured is not entitled to waive the claim.

#### § 5-15. Duty of the assured to assist the insurer with information and documents

This paragraph corresponds to § 98 of the 1964 Plan.

As regards the interpretation of subparagraph 1, reference is made to what is stated in § 5-1, subparagraph 1.

§ 98, subparagraph 2, second sentence, of the 1964 Plan, contained a provision to the effect that, in the event of litigation between the assured and a third party, the insurer would be entitled to be represented separately. This provision has been deleted. This is a question that should be solved in accordance with the law of procedure in the country where the case is being tried by the courts, cf. in this respect the commentary on § 5-9.

#### § 5-16. Duty of the assured to maintain and safeguard the claim

This paragraph is identical to § 99 of the 1964 Plan.

Under subparagraph 1, the assured shall secure a claim against third parties on behalf of the insurer. The provision is particularly relevant where the owner has the right to claim general average contributions from the cargo. The owner has the right to refuse to surrender the cargo unless the consignee assumes personal liability for the contribution (signs an "average bond") and, possibly, provides security. This provision implies that it is the owner's duty to obtain a general average bond before the cargo is surrendered.

If the assured, intentionally or through gross negligence, breaches subparagraph 1, the assured is liable for the loss incurred by the insurer due to such failure, cf. subparagraph 2. If the assured realized that it was a case of general average, surrendering the cargo without taking care of the necessary formalities with a view to securing the right of recourse will normally constitute gross negligence. In that event, the owner cannot lodge a claim for the entire general average damage against the hull insurer, cf. the comments on § 4-9. If the fault was committed by the master of the ship, the question arises as to whether the assured is to be identified with the master, cf. § 3-36. Normally, it will be a question of the delegation of the decision-making authority that provides the basis for identification. If the hull insurer is to cover the entire general average by agreement, normally in the form of a GA-absorption clause, cf. § 4-8, subparagraph 3, this problem will admittedly not arise. In that event, the owner will be entitled to claim compensation for the entire damage from the hull insurer, even though it would not have been covered in general average.

#### § 5-17. Decisions concerning legal proceedings or appeals

This paragraph is identical to § 100 of the 1964 Plan.

When the assured has a claim for damages against a third party, the latter will very often have a counterclaim against the assured. Such counterclaims must often be covered by the P&I insurer, whereas the claims for damages will usually accrue to the hull insurer. Accordingly, in such situations, there is the same need for an impartial decision on the litigation issue as when a third party brings a claim for damages against the assured.

The provision does not apply when the disagreement between the assured and the insurer merely consists of differing assessments of the chances of getting the claim for damages upheld, taking into account the costs involved in enforcing it. As mentioned in § 5-13, the assured and the insurer will, in such a situation, have the right to pursue or waive their share of the claim, at their own discretion.

#### § 5-18. Salvage award which entails compensation for loss covered by the insurer

This paragraph is identical to § 101 of the 1964 Plan.

Under section 446 (f) of the Norwegian Maritime Code, the material loss sustained by the salvor in connection with the salvage operation shall be taken into account when the salvage award is determined. Under section 451, subsection 1, of the same Code, any damage to the ship or cargo caused by the salvage operation shall be paid for out of the salvage award before anything is

distributed among owner and crew. The payment of a salvage award does not entail that the insurer's liability ceases, but that the salvage award shall be considered in the same way as an ordinary claim for damages. However, it would not be correct to say that the insurer "is subrogated" to the salvage award claim, cf. § 5-13. The claim for a salvage award is not a "claim for damages"; the assured does not have an unconditional right to receive a salvage award covering the damage the ship has sustained in connection with the salvage operation. It must therefore be stated explicitly that the assured shall, to the extent that the salvage award includes the cost of repairing damage to the vessel, refund the insurer whatever the latter has paid in settlement of the assured's loss, cf. subparagraph 1. The assured's obligation to reimburse the insurer will, first of all, comprise the proportion of the salvage award with which he is credited in advance in a settlement under section 451, subsection 1, of the Norwegian Maritime Code, to cover damage to the ship. If this part of the salvage award is not sufficient, for instance, because damage to the ship was underestimated during the salvage award case, the assured shall also be obliged to reimburse the insurer out of the remainder of the salvage award which he has received.

The reference to §§ 5-13 et seq. entails that the assured's share of the salvage award shall be divided between him and the insurer according to the same rules as those applicable to ordinary claims for damages. The assured is therefore entitled to retain a proportion equivalent to deductions and deductibles that he himself has borne. Furthermore, the assured shall, in relation to the insurer, be obliged not to waive the right to claim a salvage award to any exceptional extent, nor to neglect to pursue any claim to recover a salvage award which has arisen.

## Section 4 - Right of the insurer to the object insured upon payment of a claim

### § 5-19. Right of the insurer to take over the object insured

This paragraph corresponds to §§ 102 and 103 of the 1964 Plan.

Subparagraph 1 is a merger of subparagraphs 1, first sentences, of §§ 102 and 103 of the 1964 Plan, and confirms the principle that, upon payment of compensation, the insurer is subrogated to the assured's rights in the object insured or such parts thereof as he has indemnified. The rule applies to damage as well as to total loss, and entails that the insurer takes over all the objects which are comprised by the sum insured or the compensation which is paid, cf. first sentence.

In case of damage, the greatest practical significance of the principle is in hull insurance, where repair work will often result in a quantity of scrap iron becoming available, in addition to damaged parts of a certain value. However, in a number of cases such parts will be left with the repair yard, either in return for the assured being credited for the value of the material in the repair settlement, or because a clause is incorporated in the repair contract to the effect that everything that is scrapped during the repairs will accrue to the repair yard without compensation, cf. Brækhus/Rein: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 604. This will normally reduce the repair invoice for the insurer, and this means that there shall be no transfer to him under § 5-19. However, the rule becomes applicable if the remaining parts do not accrue to the repair yard, but are sold to a third party. In that event, the proceeds must accrue to the insurer, or possibly be divided between the insurer and the assured under § 5-13, cf. below.

In the event of a total loss, the insurer is subrogated to the title to the wreck. The title comprises the wreck with all appurtenances that were covered under the insurance at the time the total loss occurred.

The insurer is entitled to waive ownership if he has explicitly made a statement to that effect no later than upon payment of the compensation. The insurer is therefore able to protect himself against the burdens that may be associated with owning what is left of the object insured or parts thereof and disposing of same. Under the 1964 Plan, this rule applied only to total losses; now it also covers the damage situation. This right will, however, be particularly relevant in the event of a total loss, where wreck-removal and pollution liability may be imposed on the owner of the wreck. In hull insurance, where the question is most relevant, the risk is admittedly limited by § 5-20, subparagraph 1, which states that the insurer shall not bear the costs of removal that are not covered by the sale of the wreck. However, the position as owner of the wreck may expose the insurer to the risk of incurring liability for damages to third parties.

In practice, there have been cases where the insurer has wanted to take advantage of the value of the wreck without taking over the title to the wreck, inter alia for fear of potential pollution liability, cf. below. The Plan does not open the door to such a solution. If the insurer wants to take advantage of the value of the wreck, he will also have to take over ownership. There is, however, nothing to prevent the insurer and the assured from agreeing to the assured selling the wreck to a third party and having the proceeds deducted from the total loss compensation, or paid to the insurer if the total loss compensation has already been paid to the assured. However, the insurer does not have any right to demand this procedure if the assured refuses to co-operate.

If the insurer takes over the ship, a change of ownership will in principle take place, with the consequence that the ship's insurances will cease, cf. § 3-21. If the ship subsequently causes pollution liability, this will accordingly be the insurer's own risk, cf. below in § 5-20, unless the risk of a pollution liability had already struck the ship at the time when the title to the ship passed to the insurer.

In practice, it is conceivable that the wreck is sacrificed (is sunk or bombed) in order to avoid pollution liability. If the wreck had a certain value when it was sacrificed, it may be alleged that the hull insurer's interest in the wreck value of the ship was sacrificed in order to safeguard the interests of the assured and the P&I insurer in avoiding pollution liability. In that event the assured, and subsequently the P&I insurer, should be liable for the wreck value in relation to the hull insurer. If the hull insurer has taken over the wreck after having paid total-loss compensation, or having clearly indicated before the ship was sacrificed that he is willing to take over the wreck, he must accordingly have a claim against the assured. However, the hull insurer will normally hesitate to do this because of the risk of having to cover pollution liability. Thus, if the hull insurer has adopted a wait-and-see approach before the wreck is sacrificed, he is only entitled to claim a refund for the wreck value from the assured or the latter's P&I insurer, if he establishes that he would have taken over the wreck.



The insurer is only subrogated to the right to the whole or parts of the object insured to the extent that he has covered the loss. In case of a total loss, the sum insured becomes payable without any deductions or deductibles. The insurer then takes over the full title to the wreck, unless there is under-insurance, cf. the reference to § 2-4. Such a situation will rarely arise in hull insurance for ocean-going vessels when using assessed policies, but the exceptional cases it is reasonable that the assured is entitled to his proportionate share of what is left. Under the 1964 Plan, the reference to § 9 concerned only total losses - after the merger of the two provisions, it also comprises cases of damage.

In the event of damage, however, the assured will often have to bear a proportion of the loss himself, in which case he will have to keep a corresponding proportion of the value of the parts or objects which have been replaced or compensated. The apportionment must be effected in the same way as when the assured has a claim for damages against a third party in connection with the damage, cf. the reference to § 5-13 in subparagraph 3.

#### § 5-20. Charges on the object insured

This paragraph corresponds to § 104 of the 1964 Plan.

Subparagraph 1 regulates the position where the insurer is ordered to remove objects (wreck, equipment) which he has taken over. In the 1964 Plan, the rule applied only to the insurer's take-over of the wreck; now it also applies to damage, e.g., where the insurer has taken over ownership of a lost anchor or other parts according to § 5-19 and has later been ordered to remove them.

Under section 18, subsection 3, cf. section 20, of Act no. 51 of 8 June 1984 relating to port authorities (Havne- og farvannsløven), the port authorities may remove a wreck which constitutes an inconvenience to the port or impedes general traffic. The costs of removal may be covered by the wreck and, if this is not sufficient, by the owner who will, however, normally have only limited liability. Similar rules apply in most countries.

The hull insurer does not cover the assured's liability in these cases, cf. § 4-13. However, liability for the removal of the wreck may arise after the insurer has taken over title thereto under § 5-19. Given that the hull insurer is entitled under the Plan to waive title to the wreck, one might think that he should also be fully liable for the costs of removal in the cases where he has decided to take over the wreck. However, there is a long-standing tradition in marine insurance law that the assured (in reality his P&I insurer) shall refund the insurer the proportion of the costs which exceeds the value of the removed wreck. In practice, an order to refund the costs of removal will only be issued where the wreck is worthless and the responsibility for the removal could appear to be a trap for the hull insurer if he has failed to waive title to the wreck.

If the wreck founders after the insurer has taken it over, but as a consequence of the same casualty which resulted in the payment of the total-loss claim, the assured (his P&I insurer) shall pay the removal costs, if any. The liability must here be regarded to have arisen as a consequence of a casualty that occurred while the insurance was in effect. If, however, the wreck founders in consequence of a new casualty which occurs after it was taken over by the hull insurer, the assured (his P&I insurer) will not be liable for the removal costs under subparagraph 1. A hull insurer who takes over a wreck that is afloat should therefore consider taking out separate P&I insurance for the wreck-removal risk. As regards what constitutes a "new casualty", reference is made to the comments in § 4-18.

If the wreck suffers a new casualty after the insurer has taken it over, and the impaired condition of the ship after the first casualty is a contributory cause, the wreck-removal liability should nevertheless lie entirely with the hull insurer, cf. also Brækhus/Rein: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p.605.

Under certain P&I insurance conditions, the insurance coverage ceases in the event of a casualty. In practice, such provisions have been applied as an authority for the P&I insurer to withdraw from the insurance contract before the details of the casualty have been finally clarified. The question then arises whether the hull insurers by taking over the wreck risk also taking over increased liability for the removal of the wreck, possibly also a pollution liability, as owners of the wreck. If the Plan has been used as background law for the P&I insurance, such a clause cannot exempt the P&I insurer from liability. A deciding factor must be when "the peril struck", not when liability arose and, as regards wreck-removal liability and pollution liability resulting from a total loss, the peril will have struck when the casualty occurred. Consequently, the fact that the insurance ceases before the wreck has to be removed or the actual pollution occurs is irrelevant to the P&I insurer's liability.

If the P&I insurance is effected on conditions with a background law other than the Plan, other solutions may well be reached as regards the P&I insurer's liability. However, it is difficult to see how the liability of the hull insurer as owner of the wreck can be increased even if the P&I insurer withdraws. If liability for the wreck-removal and potential pollution is a foreseeable consequence of the casualty that triggered the total loss, this must basically be the liability of the assured as the person causing the damage. The fact that the P&I insurer refuses to cover this liability means that the assured is left without insurance cover, but it cannot imply that liability is transferred to the new owner, viz. the hull insurer. Another matter is that it may be difficult to decide what are foreseeable consequences of the total loss and what constitutes a new casualty. The solution to this question must follow the general principles for the distinction between one and several casualties, cf. above.

Charges that do not concern the insurance, e.g. maritime liens for claims not covered by the insurance, do not concern the insurer, cf. subparagraph 2. The assured must cover such charges, regardless of whether or not he is personally liable for the claim.

The provision concerns only charges that have arisen before the title to the object insured passed to the insurer. If the wreck, after having become the property of the insurer, causes damage for which the owner becomes liable, it is the insurer, and not the assured, who must cover this liability. Nor will the insurer be entitled to claim cover under the assured's P&I insurance.

Under the laws of some countries, the owner of the wreck has the right to abandon it to cover his liability for damages to a third party. If the owner is held liable after the title to the wreck has passed to the hull insurer, the owner must nevertheless be able to exercise his right to limit liability in the event of abandonment. A rule to this effect is explicitly stated in subparagraph 3. The rule of abandonment entails that the hull insurer loses the proceeds from the wreck, but it must apply even if the hull insurer does not cover the liability which attempts are made to limit, cf. Brækhus/Rein: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 602.

The provision presupposes that the ship is "abandoned". If the ship is sunk as a measure to avoid pollution liability, this does not constitute "abandoning the ship". Such loss shall therefore be charged to the P&I insurer as costs of measures taken to avoid pollution liability.

#### § 5-21. Preservation of the object insured

This paragraph is identical to § 105 of the 1964 Plan.

Under § 3-30, it is the assured's duty to take measures to avert or minimise loss, and under § 4-12 the insurer shall cover the costs involved in such measures. However, it may be doubtful whether these rules are applicable if it has already been established that a total loss has occurred, e.g., that the ship will be condemned. The paragraph therefore establishes that it is the assured's duty to preserve the wreck for the insurer's account until the insurer gets the opportunity to safeguard his own interests, irrespective of whether or not the total-loss claim has been paid. This also applies if it takes time to decide the total-loss question, and considerable costs are incurred in keeping watch, paying port fees, etc. If, however, the insurer has accepted liability for the total loss vis-à-vis the assured, but stated that he is not willing to incur costs involved in preserving the object insured, the assured must respect this decision. Any expenses incurred will, in that event, be his risk.

If the assured fails to perform his duties, he may, depending on the circumstances, incur liability for damages to the insurer.

If the insurer refuses to take over the wreck, he will not be liable for costs involved in measures that are subsequently taken.

#### § 5-22. Right of subrogation of the insurer in respect of damage to the object insured

This paragraph is identical to § 106 of the 1964 Plan.

When the insurer takes over the object insured, the question arises as to what will happen to the claims for damages the assured has against third parties in connection with damage to the object insured. If a claim has arisen from the casualty that has resulted in a total loss, the matter is clear. The insurer will be subrogated to the claim under the general rules contained in Chapter 5, section 3, of the Plan. However, it is conceivable that the ship has some older damage for which a third party is wholly or partly liable, or that new damage occurs after the occurrence of the casualty entitling the assured to a total-loss compensation, but before the compensation has been paid. In those cases, it may be doubtful whether the insurer can also be considered to have compensated the damage when he pays the total-loss claim, so that the rules in Chapter 5, section 3, may

become applicable. To avoid any misunderstanding, it is therefore stated explicitly in the first sentence that the insurer shall also take over such claims.

However, the insurer cannot make any deductions in the total-loss claim if the assured has already received compensation in advance from a third party. The economic results may therefore vary, depending on whether or not the assured at the time of the loss has received compensation from a third party. Nevertheless, no reason has been found to introduce a rule that leads to a different result. It is not very realistic to think that a hull insurer, when paying a total-loss claim, will demand information from the assured, e.g., about what compensation he has received in recent years from his time-charterers in connection with unrepaired stevedore damage etc.

Another question is whether third-party liability for the damage shall cease to be in effect because the person suffering the damage (the assured) is also entitled to total-loss compensation under his insurance. This is a question that comes under the law of torts, cf. ND 1942.449 Bergen Bjønn, where a claim for damages was not considered to have lapsed because of the subsequent total loss.

The second sentence establishes that the insurer does not have any right of subrogation to the assured's claim against third parties under insurance contracts. As regards insurance claims relating to older damage, the provision is bound up with the rule in § 11-1, subparagraph 2, to the effect that the hull insurer cannot make any deductions for unrepaired damage when he pays compensation for a total loss, and with the fact that, according to standard practice, he furthermore does not have recourse against the insurer who may be liable for the damage, cf. the commentary on § 11-1. As regards casualties which occur after the casualty entitling the assured to total-loss compensation, the result also follows from § 11-9, subparagraph 1, according to which the insurers who are not liable for the total loss are not liable for new casualties occurring after the casualty that resulted in a total loss, either. Thus, if the ship has suffered an extensive casualty as a consequence of marine perils, and the insurer against marine risks wants a war-risk cover of the value which the wreck will represent to him in case of condemnation, he will have to take out a separate war-risk insurance from the moment the assured requests condemnation.

## Section 5 - Limitation etc.

### General

Section 5 concerns questions relating to limitation. It follows from the Limitations Act of 18 May 1979 no. 18, section 28 (Foreldelsesloven), that the parties cannot, before the claim has arisen, agree on longer limitation periods than the law provides. The provision comprises agreements on the commencement and length of the limitation period as well as requirements to prevent it from running. The regulation of these questions in the new Plan must therefore not result in longer limitation periods in relation to the insurer than that what would follow from section 3 no. 1 of the Limitation Act, which provides that a claim becomes statute-barred three years from the earliest date when the claimant is entitled to satisfaction of his claim. However, section 30 of the Limitations Act opens the door to special regulation in special legislation, and such special regulation is contained in ICA section 8-6. ICA section 8-6 is not a mandatory provision in marine insurance for ocean-going vessels. However, if the regulation in ICA on this point is departed from, the mandatory protection of the insurer in the Limitations Act will nevertheless become applicable.

In the Plan it was decided to take the rules of ICA for a basis in this area. This entails a number of amendments and simplifications in relation to the rules of the 1964 Plan. §107 of the 1964 Plan relating to time-limit for notification of casualty has been retained, but amended. 1964 Plan § 108 contained a rule relating to time-limits for taking legal action where the insurer had refused the claim. In that event, the claim became time-barred if the assured had not taken legal action or demanded that the dispute be submitted to an average adjuster under § 87 within one year of receiving the insurer's notification of the refusal. If the dispute was submitted to an average adjuster, and his opinion went against the assured, the claim became time-barred, unless the assured had taken legal action within six months of receiving notification of the average adjuster's decision. At the same time § 110 of the Plan indicated that the limitation period would not commence while the dispute was pending before the average adjuster. This solution was probably in violation of the Limitations Act with the result that the assured ran the risk of the claim becoming time-barred under § 110 before the time-limit under § 108 had expired, if more than two years had elapsed between the casualty and the insurer's refusal. This could come as quite a surprise for the owner, and the rule has therefore been deleted.

§ 109 of the 1964 Plan contained a provision relating to an extension of the time-limit on account of hindrance on the part of the assured. This problem is today regulated in section 10, nos. 2 and 3, of the Limitations Act. Through a reference to the Limitations Act in § 107, subparagraph 3, the former § 109 has therefore become superfluous. Also this provision has therefore been deleted.

The real limitation rules were contained in § 110 of the 1964 Plan (three years' limitation) and § 111 (ten years' limitation ). These provisions have now been combined into one limitation rule patterned on ICA section 8-6.

### § 5-23. Time-limit for notification of a casualty

This provision corresponds to § 107 and § 109 of the 1964 Plan, cf. CEFOR I.27, PIC5.11 and ICA section 8-5.

The paragraph does not contain any actual limitation rule, but a passivity rule which supplements § 3-29 and § 3-31.

According to subparagraph 1, notice of the casualty shall be given to the insurer within six months of the assured, the master or the chief engineer of the ship becoming aware of it. The time-limit of six months concords with § 107 of the 1964 Plan as well as the Special Conditions, cf. CEFOR I.27 and PIC 5.11. Under ICA section 8-5, subsection 1, however, the time-limit is one year. Due to the assured's duty of notification under § 3-29, it will only rarely occur that the insurer has not been notified at an earlier stage. At the same time the purpose of the time-bar rules, viz. to prevent the assured from delaying notification in order to destroy evidence, thereby making it more difficult for the insurer to refuse the claim, indicates that the time-limit should be short. The six-month time-limit has therefore been retained.

The time-limit commences from the moment "the assured, the master or the chief engineer of the ship" became aware of the casualty. This gives greater possibilities for identification than the 1964 Plan did, where the only criterion was the assured's knowledge, but it concords with the Special Conditions. On the other hand, the time-limit in the Special Conditions also commenced if "the assured ought to have become aware of" the casualty. This rule invited difficult discussions between the parties and has therefore been deleted.

A failure by the assured to notify the insurer of a casualty will often be due to the fact that he has not himself received any notification of the casualty from the master. Such failure will under § 3-36 be regarded as a fault committed by the master in connection with his service as a seaman, which cannot be invoked by the insurer. This provision entails greater possibilities for identification in that the assured bears the risk of the master or chief engineer of the ship failing to give notification.

The words "the chief engineer of the ship" must be read literally. In the coastal trade the chief engineer will often be replaced by an "engine man". The knowledge of an engine man is not sufficient to trigger the time-limit under § 5-23.

The time-limit commences from awareness of "the casualty". When the insurer becomes liable for the assured's liability to a third party, "the casualty" is the actual event causing the damage. The assured must notify the insurer of this event within six months, provided that he had reasonable grounds for believing that a claim for damages would be brought against him.

Subparagraph 2 stipulates an absolute time-limit for notification of 24 months regarding anything other than hull damage below the light waterline. This provision is new in relation to the 1964 Plan, but was contained in the Special Conditions, cf. CEFOR I.27 and PIC 5.11, both subparagraph 2. If this rule should have an unfortunate consequence in a particular situation, section 36 of the Contracts Act may become applicable.

Subparagraph 3 refers to section 10, nos. 2 and 3, of the Limitations Act and, as mentioned above, covers problems which were earlier regulated in § 109 of the 1964 Plan. The relevant provisions in the Limitations Act regulate the fact that the limitation period cannot be prevented from running because of Norwegian or foreign law or some other insurmountable obstacle. In that event, a claim becomes time-barred at the earliest one year after the obstacle ceased, however, always provided that the limitation period cannot be extended by more than a total of 10 years. The extension rules do not apply to claims for damages. The reference to the Limitations Act implies a departure from § 109 of the 1964 Plan on two points: In the first place, the Limitations Act stipulates, in contrast to the former § 109, a final limitation period (10 years according to no. 3); secondly, the limitation period in section 10, no. 2 of the Limitations Act is one year after the obstacle ceased, whereas the time-limit in the Plan was "as soon as it was possible" to exercise the assured's rights. The reference to the Limitations Act furthermore corresponds to ICA section 8-5 in fine.

#### § 5-24. Limitations

This paragraph corresponds to §§ 110 and 111 of the 1964 Plan, and ICA section 8-6.

The 1964 Plan operated with two limitation rules: § 110 stipulating a limitation period of three years and ten years according to § 111. As mentioned above, the limitation rules of the 1964 Plan have been superseded by solutions based on the system of ICA. This entails that §§ 110 and 111 of the 1964 Plan have been combined to form one joint limitation provision patterned on ICA section 8-6. At the same time, certain adjustments have been made and a new provision introduced in subparagraph 2 relating to the limitation of the assured's liability for damages. The most important de facto amendment is that the limitation period runs even if the claim is pending before the average adjuster. This amendment is due to the fact that it is doubtful whether the limitation rules in the Limitations Act and in ICA provide legal authority for making an average adjustment affect on the limitation period. The way the rules are worded now, the limitation rules in the Plan become ordinary limitation rules, where the limitation period can only be prevented from running by the assured taking legal action to prevent this. If the insurance is divided among several co-insurers, the assured has to prevent the limitation period from running vis-à-vis all the co-insurers, cf. the commentary on § 9-4.

The main rule concerning limitation is contained in subparagraph 1, first and second sentences, which stipulate that the limitation period is three years from the end of the calendar year during which the assured acquired the necessary knowledge of the facts on which the claim is based. The term "acquired the necessary knowledge of the facts on which the claim is based" is taken from ICA and the Limitations Act and must be interpreted to mean that it is sufficient for the assured to know that a claim exists - he is not required to have knowledge about its extent. The assured therefore cannot invoke that he does not possess the necessary knowledge merely because the claim is pending before an average adjuster. On the other hand, both ICA and the Plan must be interpreted so that the assured must understand that he has a claim. The limitation period will therefore not start running until the assured becomes aware of the fact that the damage is caused by an incident that is covered by the insurance. It is also important to emphasize that the insurer will often recognize - explicitly or tacitly - that the assured has a claim, at the same time as there is uncertainty, and perhaps disagreement, concerning its magnitude. In that event, the recognition of the existence of a claim of the assured will in itself be sufficient to prevent the limitation period

from running. Accordingly, if, for example, the ship's damage following a casualty has been surveyed and temporarily repaired, and an estimate has been made of the costs of postponed permanent repairs, this must be interpreted as a recognition on the part of the insurer of the assured's claim, unless he makes explicit reservations against any liability at all.

Subparagraph 1, third sentence, stipulates an absolute limitation period of 10 years, and concords with § 111 of the 1964 Plan, and ICA section 8-6, subsection 1, second sentence.

The provision in subparagraph 1 must, as far as hull insurance is concerned, be seen in conjunction with the rule relating to a five-year time-limit for repairs of damage, cf. § 12-6. This is not a real limitation rule, because it implies that also the insurer's liability for costs that he has in actual fact accepted will cease. In practice, it will nevertheless to a large extent have the same effect.

The reference to the rules relating to limitation of the assured's liability for damages in subparagraph 2 is taken from ICA section 8-6, subsection 2. While the insurer's liability under ICA becomes time-barred under the same rules as those applicable to the assured's liability for damages, the assumption in the Plan is that this shall only apply if the rules relating to the assured's liability for damages provide a longer limitation period than the ordinary limitation rules. This specification is bound up with the special limitation rules in Chapter 19, notably section 501, of the Norwegian Maritime Code. Of particular relevance in relation to hull insurance is section 501, no. 3 relating to claims for compensation arising from collision, which become time-barred two years from the day the damage was caused. If the claim against the insurer became time-barred at the same time as this claim for damages, this would result in a shorter limitation period than the ordinary one, whilst the purpose of the provision in ICA was to allow the assured to benefit from a possibly longer limitation period for the claim for compensation.

If the limitation period for the assured's claim for compensation is equal to or longer than the ordinary limitation period, the limitation period for the insurance claim will run in parallel with the limitation period for the claim for compensation. If the assured receives and pays the claim from the claimant immediately before it becomes time-barred, he risks that the claim against the hull insurer becomes time-barred before he has had time to lodge a claim against him. However, neither ICA nor the Limitations Act opens the door to introducing any further time-limits for the assured in this situation.

Subparagraph 3 is identical to ICA section 8-6, subsection 3, and refers to the Limitations Act. However, on one point the rules of the Limitations Act do not apply: The ten-year time-limit under § 5-24, subparagraph 1, second sentence, cannot be extended on account of ignorance or other obstacles according to section 10 of the Limitations Act.

## Chapter 6 - Premium

### General

Chapter 6 contains rules on the payment of premium, additional premiums and reductions of premiums in certain situations. The chapter has been greatly simplified in relation to the 1964 Plan, which contained a number of provisions that in practice were seldom or never applied. Accordingly, the following provisions have been deleted:

1. § 114 of the 1964 Plan, which contained rules on premium reminders as an alternative to the ordinary procedure in the event of non-payment of a premium in § 113 (now § 6-2). The provision corresponded to ICA section 5-2, subsection 1, cf. section 5-1, but under ICA the premium reminder is obligatory. The detailed and formal procedure was not very appropriate for shipowners' insurance, however, and the provision was thus not used in practice.

2. § 115 of the 1964 Plan on fraud and dishonesty, subparagraph 1 of which affirmed that the full premium was to be paid in the event of invalidity due to fraud or dishonesty, conflicted with declaratory background law. In addition, the provision was of minor practical significance and of hardly any preventive effect.

Subparagraph 2, which conferred on the insurer entitlement to the full premium if the liability lapsed partially or in its entirety in the event of breach of the rules in Chapter 3 or § 83, subparagraph 2, was superfluous. If the first breach led to the contract not being binding, it followed that no premium was paid either, cf. above. If, however, the consequence of the breach was that the insurer was entitled to disclaim liability for a casualty which had occurred, the contract ran in the usual manner, in which case a full premium was, of course, payable. If breaches of duties of disclosure or care led to the insurer terminating the contract, it would already follow from § 121 (now § 6-5) that no premium would be paid for the time after the cancellation.

3. § 117 of the 1964 Plan on additional premiums when the risk became greater than originally assumed due to incorrect information or an alteration of the risk, without the insurer being able to invoke §§ 26 or 32, was viewed as impractical.

4. Also § 119 of the 1964 Plan, on lapse of the entitlement to the premium when no risk attaches to the insurer, and § 120, on the reduction of the premium when the sum insured is greater than the insurable value, were impractical. Most situations in which the risk is reduced can be resolved using the provision in § 6-5. If an exceptional situation arose which could not be brought within the provision or resolved through negotiations, background law, i.e. the Contracts Act (Avtaleloven) section 36: the doctrine on failure implied basic assumptions, (translator's note: roughly equivalent to frustration in Anglo-American law) could possibly be used to resolve the most inequitable situations.

5. §§ 123-125 of the 1964 Plan on the calculation of return of premium during a stay in port were unnecessarily comprehensive and detailed, but the solutions have been worked into the commentary on § 6-6 on return of premium in the event of a stay in port.

In practice, the payment of the premium will often take place through a broker. Under English law, the broker is, in that case, liable to the insurer for the premium. By contrast, the 1964 Plan assumed that the issue of premium was a matter between the person effecting the insurance and the insurer and that the broker simply acted as the agent of the person effecting the insurance when the premium was paid through the broker. This approach has been maintained in the new Plan. Since the broker is an intermediary and not a party to the contract, there is no need for a broker's cancellation clause as is used in English insurance conditions to allow the broker to cancel the contract if the person effecting the insurance does not pay the premium. The broker's status as an intermediary also makes it unnecessary to regulate the broker's relationship to the premium in the Plan text, although the use of a broker for paying the premium is referred to below in the commentary where it is natural to do so.

In practice, it has been problematic that current payment routines lead to brokers being in possession of premiums and thereby earning interest income. This problem has been solved with the new broker regulations of 24 November 1995 no. 923.

### § 6-1. Payment of premium

This paragraph corresponds to § 112 of the 1964 Plan, as well as ICA section 5-1, first sentence.

Under subparagraph 1, first sentence, the person effecting the insurance is "liable to pay the premium". The rule in § 112 of the 1964 Plan was that the premium was to "be paid by" the person

effecting the insurance. The premium may, however, be paid by another party, for example the assured. The key point of the provision is thus that responsibility for the payment rests with the person effecting the insurance.

For a person to have the status of "person effecting the insurance" and thus be liable for payment of the premium, it is a precondition that the person acts in his own name and becomes, in his own capacity, a party to the contract. If the insurance has been taken out as an agent in the name of another, then the principal is the person effecting the insurance. If a manager takes out hull insurance on a ship which is co-owned by several shipowners, the manager will often act as an agent for the owners, giving the owners the status of persons effecting the insurance. In bareboat chartering, however, the bareboat charterer will most often be listed as the person effecting the insurance, for example because the charterer wishes to have the status of co-assured under the insurance contract. In the mutual associations the status of person effecting the insurance will usually depend on who has been accepted as a member on the association and not on whose account the insurance has been taken out, cf. ND 1983.79 DH FRENDØ, where the owners of the insured ships were listed in the policy and given status as members of the association. As such, they were deemed to be persons effecting the insurance and held liable for the premium, despite the fact that, under the charterparty, the bareboat charterer was to keep the ship insured for his own account and was responsible for effecting the insurance and for all contact with the insurer.

Subparagraph 1, second sentence states that the premium falls due on demand in the absence of any agreement to the contrary. Under the 1964 Plan, the premium was due "on the day on which the insurance comes into force". In practice, notice that premium is due is always sent out later than the time the insurance comes into effect. Linking the deadline for payment of the premium to the time when the insurance comes into effect ostensibly gave the insurer the opportunity to charge interest for late payment and possibly cancel the contract due to non-payment before a notice of premium was even sent out. Furthermore, the amendment is in line with the insurance conditions in terms of advance premiums and additional premiums, cf. PIC § 4, 2, and is substantially equivalent to ICA section 5-1, first sentence. ICA section 5-1, second sentence also contains a rule on premium notices and payment deadlines. In marine insurance there is no need for an additional deadline of this nature, as the premium is due immediately on demand.

It follows from what has been said by way of introduction that the rules on payment deadlines establish to when the insurer is to have received payment of the premium. Accordingly, it is not sufficient that the person effecting the insurance has paid the amount to the broker.

Subparagraph 2 contains a provision on interest on overdue payments and refers to the rules in the Act Relating to Interest on Overdue Payments of 17 December 1976 no. 100. The provision is taken from the Special Conditions, cf. CEFOR I, 14, no. 3, and PIC § 5, 9 no. 3. The reference to the Act Relating to Interest on Overdue Payments implies that interest begins to run one month after demand for payment pursuant to subparagraph 1.

#### § 6-2. Right of the insurer to cancel the insurance in case of non-payment of premium

This paragraph corresponds to § 113 of the 1964 Plan.

The provision corresponds to ICA section 5-2, with the difference that the ICA provision contains detailed rules on obligatory premium reminders, cf. also § 114 of the 1964 Plan, and rules on protection of the person effecting the insurance if the non-payment is due to unforeseen impediments for which he cannot be blamed. There is no need for such comprehensive protection in marine insurance, and ICA section 5-2, including subsection 2 on unforeseen impediments is, accordingly, not applicable to insurance based on the Plan.

By contrast, ICA section 5-3, on when payment is deemed to have taken place, does apply to marine insurance as well. For the person effecting the insurance to be able to invoke the provision in the event of late payment, however, the premium must have been sent to the insurer. A delay in sending the amount from the person effecting the insurance to the broker is, accordingly, irrelevant, cf. the general comment above.

#### § 6-3. Premium in the event of total loss

This paragraph corresponds to § 116 of the 1964 Plan.

Subparagraph 1 is identical to § 116 of the 1964 Plan, and is in line with established international practice in shipowners' insurance to the effect that the full premium is to be paid for the current insurance year when a total loss has occurred. In loss-of-hire insurance, total loss occurs when the entire liability period is expended.



Shipowners' insurance is usually taken out for a year at a time, meaning that the insurer will be able to demand one year's premium. In mutual insurance the rule has been adapted to the insurance conditions. The same applies, however, if it has been agreed that the insurance is to attach for a period longer than one year. In such case, it follows from § 1-5, subparagraph 4, which was added in the 2003 version, that the insurance period is to be divided up into one-year periods in relation to, *inter alia*, § 6-3, subparagraph 1.

A precondition for the application of the provision in subparagraph 1 is that the insurer actually pays total loss compensation during the insurance period. If the insurer is able to disclaim all or part of the liability because the total loss is due to a peril which is not covered by the insurance, the insurer should only be able to demand full premium for that period during which he bore the risk. This is expressed in subparagraph 2. If the loss is caused by a combination of marine perils and war perils and liability is to be shared equally between the two groups of insurers pursuant to § 2-14, the marine perils insurer may only demand half of the premium for the remaining portion of the insurance period. If the loss is partly caused by another peril that is expressly excluded and liability is apportioned according to the general apportionment rule in § 2-13, the reduction in premium must be adjusted to reflect the apportionment fraction.

Under the 1964 Plan it was assumed that the exception in § 116, subparagraph 2, only applied in the case of objective exclusion of perils. In the event of breach of the duties of disclosure or of care, the person effecting the insurance was to pay the full premium regardless, pursuant to § 115, subparagraph 2. This provision has now been deleted, cf. the introduction to this chapter, with the consequence that the exception in § 116, subparagraph 2, will also cover a situation in which the total loss is totally or partially due to breach of the duties under Chapter 3. Consequently, the person effecting the insurance will always be entitled to a reduction of or to be released from the obligation to pay premium for the remaining insurance period, in so far as the insurer can disclaim liability for the total loss, wholly or in part. Full premium shall always be paid for the time up to the casualty, unless the contract is invalid, cf. above.

In the event of an ordinary total loss, the ship's insurances lapse at the time of the loss. Accordingly, the premium shall only be paid up to that time, unless either the insurer in question is liable for the total loss, or there is a specific provision in the insurance conditions on the right of the insurer to receive a premium. However, in the event of condemnation or abandonment, or if the insurer wishes to avail himself of the deadline under § 11-2, subparagraph 2, to attempt to salvage the ship, there will be a period of uncertainty during which one will not know whether total loss compensation will be paid, or whether the other insurances will lapse or continue to run in return for full premium during the period of repairs, cf. ND 1945.433 Oslo HAAKON JARL. If, in such cases, it turns out that total loss compensation is to be paid, it followed from subparagraph 2, second sentence in § 116 of the 1964 Plan, that the risk for the other insurers had to be deemed lapsed at the time of the casualty. This provision has been deleted, although the intention is not to effect any changes on points of substance. If the ship has been abandoned, the risk must be deemed to have lapsed at the last time there was any information about the ship.

The 1964 Plan also contained a rule on depositing the premium until the issue of total loss was finally settled. This has also been found to be superfluous and has, accordingly, been deleted. If the issue is still not resolved at the expiry of the insurance period, the issue of a possible extension of the insurance, and the issue of the insurer's entitlement to a premium, must be resolved under the rules in §§ 11-8 and 6-4.

#### § 6-4. Additional premium when the insurance is extended

This paragraph is identical to § 118 of the 1964 Plan.

Subparagraph 1 must be viewed in connection with the right to an extension of the insurance period. The provision is of significance in relation to both hull insurance and the separate insurance for total loss, cf. reference to the hull insurance rules in § 14-3.

If, after arriving in port, the ship turns out to be condemnable, an insurer who is not liable for the total loss will not be liable for new casualties occurring after the casualty which caused the total loss, cf. paragraph 11-9, subparagraph 1. In cases such as this, the insurer may only demand a premium for the time up to the casualty, cf. the commentary on § 6-3. There can accordingly be no question of extending the insurance.

Under § 11-9, subparagraph 2, the insurer who is liable for the total loss shall cover all collision liability occurring after the casualty but before compensation is paid and which falls under the hull insurer's liability pursuant to the rules in Chapter 13. In this case, however, the insurance will not be "extended pursuant to § 10-10", cf. subparagraph 1 of this paragraph, and the insurer cannot demand a separate premium for this liability cover. As soon as it is discovered that the ship is

condemnable, it is clear that the insurer who is liable for the total loss is to receive a full year's premium, cf. § 6-3, subparagraph 1. The liability of the other insurers is deemed to have lapsed as at the time of the casualty.

Subparagraph 2 regulates the entitlement of the insurer to a premium when it is not known at the expiry of the insurance period whether the assured will be entitled to demand compensation for total loss under the rules in § 11-2, subparagraph 2, § 11-7 and § 15-11. The wording "at the expiry of the insurance period" must in this case be interpreted as meaning the expiry of the agreed insurance period regardless of whether it has been agreed that the insurance period is to attach for one year or for more than one year, compare § 1-5, subparagraph 4, which explicitly mentions the provisions under which a multi-year policy shall be divided up into one-year periods. The present provision is not included. If, at the expiry of the insurance period, the ship is stranded, but the insurer wishes to avail himself of the right to attempt to salvage it pursuant to § 11-2, subparagraph 1, no premium shall be paid as long as it is not known whether the salvage attempt will be successful. If the ship is salvaged before expiry of the deadline, it will normally have sustained damage that would make the extension rules in § 10-10 applicable. The premium will then begin to run again from the time the assured "gained control of the ship", which in this situation will mean that it has been re-floated and can once again commence moving to a repair yard. If, however, it turns out that the ship is condemnable, the rules set out in the preceding paragraph will have to be applied.

Under §§ 11-7 and 15-11, the assured may demand compensation for total loss upon expiry of certain specified time periods when the ship has disappeared, been abandoned by the crew or been taken from the assured. If, at the expiry of the insurance period, it is not known whether compensation for total loss will be demanded under one of these rules, all payment of premiums is to cease. If compensation for total loss is subsequently paid, the settlement of premiums must take place along the lines described above pertaining to a case of condemnation.

Even though the time limit under one of the above-mentioned paragraphs has expired, the assured may, however, still keep the issue of compensation open if, due to economic factors, he prefers to have the ship back rather than receive total loss compensation. This will be particularly relevant in wartime. If the ship is found before the assured has claimed compensation for total loss, the insurance shall under § 11-8 be extended until the ship has reached port, and the rules in § 10-10 shall apply after that. Under the present paragraph, subparagraph 2, the premium will begin to run again from the time the assured, or someone on his behalf, gains control of the ship.

If the ship becomes a total loss after it has been found but before the extended insurance extension has expired, the insurer may not demand a new, full year's premium. What the insurer may claim pursuant to § 6-3 in the event of total loss is the entire "agreed premium", but an extension of insurance does not imply any agreement on insurance for a new insurance year. In this case, an additional premium shall only be paid for the period as of when the assured gained control of the ship until it was lost.

#### § 6-5. Reduction of premium

This paragraph corresponds to § 121 of the 1964 Plan and ICA § 3-5 relating to termination of the insurance during the insurance period.

The term "insurance period" must be interpreted here as the expiry of the agreed insurance period regardless of whether the insurance period agreed upon is for one year or for several years, compare § 1-5, subparagraph 4, which explicitly mentions the provisions where a multi-year policy is to be divided up into one-year periods. The present provision is not included.

Under the 1964 Plan, a pro-rata reduction of the premium could only be claimed if the insurance period became shorter than agreed upon or if the insurance was rendered inoperative pursuant to §§ 37, subparagraph 3, 41 and 44. The authority for the pro-rata reduction is now generalised, so that a pro-rata reduction may also be effected when the suspension is due to circumstances attributable to the assured or the person effecting the insurance, e.g. when the ship navigates into an excluded trading area with the consent of the assured, cf. § 3-15, subparagraph 3.

The paragraph only applies to a reduction of the contractually agreed charge for the insurance. This does not, of course, exclude the insurer being entitled to demand compensation from the person effecting the insurance or the assured, if he has sustained an economic loss due to the circumstance which has caused the insurance to lapse and the conditions for compensation are otherwise met.

During the revision, there was also discussion as to whether the shipowner needs to have the possibility of terminating the insurance if the risk becomes less than agreed upon or disappears altogether. Out of consideration for the insurer's reinsurance cover, however, it is difficult to give

the shipowner general authority to terminate the contract in these types of situations. If there is an obvious disparity between the agreed premium and the risk incurred, the parties will usually agree on some premium reduction. If not, the issue may have to be resolved under the rules on failure of implied basic conditions or in the Contracts Act (Avtaleloven), section 36.

#### § 6-6. Reduction of premium when the ship is laid up or in similar situations

This paragraph corresponds to § 122 of the 1964 Plan, CEFOR V.1, subparagraph 1, and PIC § 9.

§ 122 of the 1964 Plan did not contain any basis for a return of premium, but stated that if the parties had entered into an agreement on the matter, the premium reduction was to be calculated according to the rules in §§ 123-125. These rules were modified somewhat in the Special Conditions, cf. CEFOR V 1, subparagraph 1, and PIC § 9. The present paragraph is based on the solutions in the Special Conditions, with some modifications.

The condition in subparagraph 1, to the effect that the entitlement to a return of premium is subject to the ship having been in one location for an uninterrupted period of at least 30 days with no cargo on board, is taken from the Special Conditions. The date of arrival and the date of departure are not to be included in the calculation of the length of stay. It makes no difference, for the purposes of the calculation, if the old insurance policy expires and a new one begins to run while the ship is in port; the decisive factor is the cumulative stay.

The provision assumes that the ship is lying "at one location for an uninterrupted period". Moving the ship within a port area is not to be deemed an interruption, unless the move is part of the voyage and the ship is held up before final departure. The issue of whether there is one or more locations (ports) must be decided as a question of fact according to the geographic and commercial circumstances at the place in question. §§ 123 and 124 of the 1964 Plan and CEFOR V.3 and PIC § 9.3 contained detailed regulation on these and other questions. Even though the provisions are not repeated in the text of the Plan, it is assumed that the calculation method in future shall be based on the same principles.

The provision in subparagraph 1 only applies when the ship is laid up or more or less laid up, cf. the condition "with no cargo on board". This is a somewhat more narrow formulation than in the Special Conditions, which set out common rules for lay-up and other stays in port, etc. The ordinary reduction of premium rules should not usually be applied, however, in the case of a stay in port which occurs more or less by chance, during which the ship is earning full freight, cf. the criticism of the Special Conditions in Brækhus/Rein: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), pp. 340-341. Nevertheless, it is not a precondition for negotiations for a premium reduction that the ship is without freight income. Negotiations must also be possible in a situation in which a rig is laid up with full freight income but with orders to reduce operating expenses as much as possible.

The Special Conditions also contained a prerequisite that the ship be laid up "under safe conditions" and detailed provisions as to how these requirements were to be met. This has been deleted. Given that the provision now applies only to lay-up and similar stays, because under § 3-26 the insurer is to approve the lay-up plan, and the requirement for safe conditions thereby becomes superfluous. In addition, the issue of safe conditions should affect the scope of the premium reduction and not be a condition for the return of premium.

When the conditions have been met, the assured is entitled to "demand negotiations" for a reduction of premium. This is a change in relation to earlier practice. While § 122 of the 1964 Plan assumed that the scope of the premium reduction was a subject for negotiation, the Special Conditions operated with set return-of-premium rates. The general rule was that the return of premium was to be 90% with a minimum premium of 0.35% p.a. During the revision, there was agreement that the issue of return of premium had to be a subject for negotiation and not a general and automatic right for the assureds, inter alia because a set rate might possibly be in conflict with the rules on price collaboration in the Competition Act (Konkurranseloven). Accordingly, the return of premium rates must be agreed upon individually. This may be done either at the time the insurance contract is entered into or at a later time when lay-up, etc. enters the picture. This last approach is the most practical because that is when one has the best overview of the factual circumstances, although it does give the insurer a clear advantage in negotiations.

Particular return-of-premium issues arise when the ship is laid up at a shipyard. It follows from the general rule that the assured will not be entitled to a return of premium in such cases, but may negotiate with the insurer for a premium reduction if the conditions in subparagraph 1 are met. It is nevertheless as common to obtain a return of premium in the case of a stay at a shipyard as it is in the event of ordinary lay-up. Even though the navigation risk will be reduced, the total risk

may in fact increase caused by to the increased risk of damage due to fire or explosion. In certain circumstances the question may therefore rather be whether an additional premium should be paid for the stay at a shipyard. This issue must be resolved by applying the ordinary rules on alteration of the risk. If the stay at the shipyard is a relevant alteration of the risk under § 3-8, the insurer may cancel the insurance pursuant to § 3-10 and then demand an increase in premium to resume the cover.

Subparagraph 2 corresponds to § 125 of the 1964 Plan, but letter (b), which stipulated that the insurer was entitled to the full premium during a stay in port when the ship was in a port at which it could only call subject to an additional premium, has been deleted. This is also an issue that must be left to the parties to negotiate.

#### § 6-7. Claim for a reduction of premium

This paragraph corresponds to § 126 of the 1964 Plan.

§ 126 of the 1964 Plan contained deadlines for the bringing of claims for a reduction of premium, but made no provision for sanctions if the deadline was not complied with. The deadline provision has, accordingly, been amended to become a pure time-bar rule, so that the claim lapses if the deadline is not complied with. The provision applies whenever the duty to pay premium of the person effecting the insurance lapses wholly or in part under the rules in Chapter 6.

The "insurance year" means a period of one year, starting at the time the insurance came into effect. If the insurance contract is continuous, the insurance year will be a period of one year, starting from the time of expiry of the preceding insurance year. The insurance year may coincide with the calendar year, but need not do so.

Subparagraph 2 of the 1964 Plan provision conferred on the insurer the right to charge a reduction fee if the claim for a premium against the person effecting the insurance lapsed. This provision was of little significance in practice and has been deleted.

## Chapter 7 - Co-insurance of mortgagees

### General

Co-insurance of a mortgagee's interest is part of a larger set of problems concerning co-insurance of the interests of third parties. The new Plan is based mainly on the rules of the 1964 Plan. The reason for this is that the rules on cover of a mortgagee's interest in the 1964 Plan enjoy the acceptance of at least Norwegian financial institutions and a new round of discussions on how far the cover of the mortgagee's interest should go was not deemed desirable.

In the 1964 Plan, the rules were developed so that there was one set of rules for co-insurance of a third party in Chapter 7 and a chapter on co-insurance of mortgagees in Chapter 8. In principle, Chapter 7 established independent co-insurance cover, while the cover under Chapter 8 was not independent. However, § 129 contained a provision on the loss of the rights of the assured owing to acts or omissions of the person effecting the insurance which cut so deeply into the independent cover that the two types of cover were, in reality, quite similar. The differences were, in reality, also very minor in relation to the other rules in the two chapters.

In the new Plan, the sequence of the chapters has been reversed so that insurance of a mortgagee's interest is placed first in Chapter 7, while Chapter 8 contains rules on insurance of other third-party interests. The rules on cover of a third party's interest have also been brought more in line with the rules on insurance of a mortgagee's interest, so that the rules are now substantially simplified. The provision in § 133 of the 1964 Plan on change of ownership has been moved to Chapter 3, section 2, on alteration of the risk, cf. § 3-21.

ICA chapter 7 contains rules on co-insurance of a mortgagee's interests in non-life insurance. The general rule in ICA is that the holder of a registered charge on a vessel is automatically co-assured under the owner's insurance, cf. § 7-1, and also has an independent claim against the insurer, cf. § 7-3. This means that the mortgagee is co-assured, regardless of whether the insurer has received any declaration to that effect, and that the mortgagee does not lose his protection due to acts or omissions on the part of the person effecting the insurance or other assureds. Under this provision, the rights of the mortgagee would remain intact if, for example, the shipowner brought about the casualty intentionally or through gross negligence. From the point of view of the mortgagee, the rules of ICA give a very satisfactory solution. However, marine insurers have not been willing to bear the extra risk which this solution implies, which is why the ICA rules are not followed in § 7-1, subparagraph 1.

Since the Plan proceeds from the assumption that mortgagee cover is not independent, in some cases there may be a need for expanded cover of the mortgagee's interest. This can be resolved by giving the mortgagee independent co-insurance, or by establishing completely independent cover for the mortgagee, i.e. cover which is not linked to the owner's insurance. In Chapter 8 a provision has been incorporated which allows for the possibility of independent cover of a third party's interest linked to the shipowner's insurance, see. § 8-4.

#### § 7-1. Rights of a mortgagee against the insurer

This paragraph corresponds to § 134 of the 1964 Plan and ICA section 7-1.

Subparagraph 1, initially sets out the rule on automatic co-insurance of the mortgagee's interest. The mortgagee is co-assured even though notice is not given pursuant to subparagraph 2; the consequence of failure to give such notice is simply that the mortgagee cannot have the benefit of the protection provided for in §§ 7-2 to 7-4. This approach is in line with ICA section 7-1, which carries automatic co-insurance for holders of registered charges in the absence of any agreement to the contrary.

The paragraph applies when the ship is "mortgaged", i.e. it is only aimed at charges created by agreement. Maritime liens and enforcement liens are not covered by co-insurance under the shipowner's policies. At the same time, there is no requirement that the charge be registered, but if the mortgagee's right on the ship is not legally protected, his right as a co-assured will not be protected as against the creditors of the shipowner, cf. Rt. 1939.343 NH. The protection under ICA section 7-1 is based on slightly different criteria: that provision applies to any charge or other form of security interest, but assumes that the right is legally protected.

Subparagraph 1 also establishes the principle that the co-insurance is not independent. On this point the Plan deviates from the solution in section 7-3, cf. section 7-1, of ICA which grants the holder of a registered mortgage an independent right against the insurer, independently of the assured. In the revision of the Plan it was not deemed expedient to go that far.

In the 1964 Plan, this principle was expressed by stating that the mortgagee's rights against the insurer did not exceed those of the owner. In insurance law, however, one speaks of the "person effecting the insurance" as the party to the insurance contract and of the "assured" as the one who is entitled to compensation, cf. § 1, letters (b) and (c) of the Plan. Consequently, from a purely terminological point of view, it is not wise to bring the concept of "owner" into this three-way relationship; the insurer does not deal with the "owner" in an insurance contract. Moreover, linking the mortgagee's right to the owner's creates a lack of clarity regarding the cover. The mortgagee is one of several assureds under the contract; the issue is with whom the mortgagee is to be identified. The owner will normally also be the assured, but this need not be so, in which case it is of little use to link the mortgagee's right to that of the owner.

Instead of linking the mortgagee's right to the owner's right under the contract, the choice has been made to resolve the identification problems generally in §§ 3-36 to 3-38 and refer to those provisions in § 7-1. The rule in § 3-37 implies that the mortgagee must be identified with the assured or co-owner who has decision-making authority for the operation of the ship. This means that the mortgagee does not acquire any greater rights than the person who is responsible for the operation of the ship. If the party in charge of the operation of the ship is responsible for a breach of safety regulations or sends the ship into excluded trading areas without giving notice to that effect, the mortgagee will thus have to accept a loss of cover under § 3-22 or § 3-15, subparagraph 3, provided that the other conditions for sanctions on the part of the insurer are met.

§ 136 of the 1964 Plan contained a special rule on navigating outside the trading area to the effect that if the mortgagee expressed a willingness in advance to pay an additional premium and provided security for that purpose, the insurer could not invoke failure to give notice or failure to pay premium on the part of the assured against the mortgagee. This provision has been deleted: if the ship navigates into a conditional trading area without giving notice, the sanction is that the assured, in the event of damage, only receives compensation subject to a deductible of one fourth, however, up to a maximum of USD 175,000, cf. § 3-15, subparagraph 2, and this should also apply as regards the mortgagee.

If the responsible assured have delegated decision-making authority which is of material significance for the insurance to another organisation or person, § 3-36, subparagraph 2, cf. § 3-37, entails that the mortgagee must also be identified with that person or organisation. If responsibility for the operation of the ship has been delegated to several parties, the mortgagee must be identified with all of those responsible parties. Nor does the mortgagee acquire any greater rights than the assured if the insurer has paid out compensation to which it subsequently turns out the assured was not entitled. If the *condictio indebiti* rules lead to the assured having to pay the compensation back to the insurance company, the mortgagee must do so as well, cf. ND 1985.126 NH BIRGO and Rt. 1995.1641 TORSON.

However, the cover is independent in relation to other co-assureds who are not responsible for organising the operation of the ship, for example co-owners without such responsibility or other mortgagees. If they make a mistake, the cover of that mortgagee remains intact.

It also follows from the reference to § 3-38 that the mortgagee must be fully identified with the person effecting the insurance. If the person effecting the insurance breaches his obligation to give correct and complete information or to pay the premium, the mortgagee will not have any rights against the insurer, either. General principles of contract law dictate that the mortgagee must also be identified with any assistants the person effecting the insurance may use, for example, if the contract is entered into through a broker.

Naturally, the mortgagee does not acquire any greater rights than the assured in relation to limitations of liability that are not linked to the issue of breach of obligations for the assured, for example, the war risk exclusion in an insurance against marine perils or the exclusion for insolvency. This is true even though the limitation of liability may seem like a reaction to negligence on the part of the assured, but is drawn up completely objectively, e.g., the limitation of liability for damage caused by inadequate maintenance in § 12-3. It is unnecessary to spell this out explicitly in the Plan text.

The principle of dependent co-insurance leads to a degree of uncertainty for the mortgagee. If, for example, the ship is lost due to breaches of safety regulations for which the assured must be blamed, the mortgagee risks being left without cover. For insurance of ocean-going ships, this "subjective risk" is extremely small. It is, however, conceivable that the mortgagees may wish to insure themselves against this risk as well. This can be resolved through independent mortgagee cover in connection with the shipowner's insurance, cf. § 8-4. For ships trading in American waters, the mortgagee may also need to take out Mortgagee Interest Additional Perils (Pollution) insurance (MAP) to ensure priority for his mortgage in situations where clean-up costs, etc. in relation to the

American Oil Pollution Act give maritime liens on the ship priority over charges created by agreement.

The fact that the mortgagee's cover is not independent does not mean that the person effecting the insurance may arbitrarily terminate give up his, and thereby the mortgagee's, rights under the insurance. Several provisions in §§ 7-2 to 7-4 serve to protect the mortgagee against this eventuality and against the prospect of compensation being paid out by the insurer without it benefiting the mortgagee. To achieve this protection, however, the mortgagee must arrange for the insurer to receive notice of the creation of the charge, see subparagraph 2 of the paragraph. If the mortgagee fails to give notice, but the insurer learns of the creation of the charge in some other way, this must be sufficient for the expanded protection to apply, however.

The rule in subparagraph 3 is a regulation: the mortgagee is covered pursuant to §§ 7-2 to 7-4 even if the insurer neglects to give the prescribed notice.

#### § 7-2. Amendments and cancellation of the insurance

This paragraph corresponds to § 135 of the 1964 Plan and ICA section 7-4, subsection 1. It was amended in the 2002 revision, see subparagraph 1, second sentence.

The provision states that amendments to or cancellation of the insurance contract may not be invoked against the mortgagee unless he has been notified by the insurer. This expands somewhat the mortgagee's protection in relation to the general rule in § 7-1, and goes slightly further in protecting the mortgagee than did the 1964 Plan, cf. below. The wording has also been simplified in accordance with the formulation in ICA section 7-4, subsection 1. In the 2002 revision, however, it was emphasized that, upon cancellation of a war risk insurance contract, the position of the mortgagee is no better than that of the person effecting the insurance himself, see the reference to § 15-8, subparagraph 1, second sentence.

Under § 135, subparagraph 1 of the 1964 Plan the rule was that the "owner" could not "amend, cancel or terminate the insurance contract" with binding effect. In the new Plan, the reference to the "owner" has been deleted since the "owner" is not a party to the contract with the insurer, cf. above. Instead, the text states directly that amendments or cancellations may not be invoked against the mortgagee, cf. the formulation in ICA section 7-4, subsection 1. The reality of the approach is intended to be the same as under § 135, subparagraph 1 of the 1964 Plan.

§ 135, subparagraph 2 of the 1964 Plan imposed a duty on the insurer to notify the mortgagee in the event of cancellation and when the insurance lapsed pursuant to the rules concerning premium reminders. The rules concerning premium reminders have been deleted in the new Plan, so that this part of the provision has been rendered superfluous. In addition, the insurer's duty to notify has been expanded in the new Plan, in line with ICA section 7-4, subparagraph 1 to apply to amendments to the insurance as well. The provision implies that the mortgagee is entitled to be notified in the event of amendments to the insurance contract during the insurance period and in the event of renewal of the insurance. He will not be notified, however, if the insurance expires because it is not renewed, cf. below. The duty to notify rests with both the leading insurer and the co-insurers. The notice period is the same as in the 1964 Plan § 135, subparagraph 2, i.e. 14 days, while the notice period in ICA section 7-4 is one month.

The provision in ICA section 7-4, subsection 1 applies to expiry as well as to amendments and cancellations. In marine insurance, however, it is not expedient to require the mortgagee to be notified when the insurance expires. A marine insurance contract signed on the terms of the Plan lapses automatically upon expiry of the insurance unless it is renewed by the person effecting the insurance, cf. § 1-5, subparagraph 3, and a duty to notify would have required the insurer to keep track of failures to renew. Furthermore, the Plan contains a number of rules to the effect that the insurance expires automatically or is suspended without the insurer having to be aware of this, cf. § 3-14 on loss of class, § 3-15 on trading area and § 3-21 on change of ownership. In such cases, it will not be possible for the insurer to give notice before he received notice himself of the reason for the expiry, which can take a long time. The issue of expanded protection of the mortgagee's interest upon sale of the ship is usually resolved by the purchaser always taking out new insurance as of the time of take-over.

### § 7-3. Handling of claims, claims adjustments, etc.

This paragraph corresponds to § 137 of the 1964 Plan and ICA section 7-4, subsection 2.

Subparagraph 1 corresponds to the 1964 Plan which, however, linked the right to negotiate to the owner. As mentioned in the commentary on §§ 7-1 and 7-2, it is not always the "owner" who is entitled to compensation. Consequently, the rule has been modified so that the relevant decisions may be taken without the participation of the mortgagee.

Under ICA section 7-4, subsection 2, the insurer may not negotiate the settlement of claim with the person effecting the insurance or pay compensation to him with binding effect on the mortgagee. In marine insurance, by contrast, it is most practical for the person effecting the insurance or the person who is responsible for the operation of the ship to have authority to negotiate with the insurer. It would be inexpedient and bothersome to involve the mortgagee in every single settlement of a claim. Moreover, § 7-4, which ensures the mortgagee reasonable control over the payment of compensation, gives his interests sufficient protection. If, exceptionally, the mortgagee wishes to be in a better position in relation to the claims settlement, this must be agreed separately with the insurer. An agreement of this type may be reached right up to the time of payment of the compensation.

Under subparagraph 2, the right to compensation for total loss may not be waived, in full or in part, to the detriment of the mortgagee. The rule is taken from § 137, subparagraph 2 of the 1964 Plan, which, however, was only aimed at the owner, cf. the comments above. During the Plan revision, an assessment was made as to whether to expand the protection of the mortgagee to apply to every payment of cash compensation (including compromised total loss), cf. § 12-1, subparagraph 4 and § 12-2, but this was deemed unnecessary. The mortgagee will in such cases have the protection afforded by § 7-4, subparagraph 3.

### § 7-4. Payment of compensation

This paragraph corresponds to § 138 of the 1964 Plan and ICA section 7-4, subsection 2, and section 8-3, subsection 2, first sentence.

The provisions in subparagraphs 2 to 4 correspond to ICA section 7-4, subsection 2 although the Plan rules are somewhat more detailed. Subparagraph 1 gives the mortgagee priority in the event of total loss. The rule follows § 138, subparagraph 1 of the 1964 Plan which, however, only applied in relation to the owner. Parties other than the owner may also be entitled to compensation and the rule was accordingly made more general.

Subparagraph 2 regulates the settlement of partial losses. This provision has also been taken from the 1964 Plan. If the insurer arranges for the compensation to go towards the cost of repairs or to cover possible liability towards a third party, the mortgagee's interest will normally be protected, since the value of the object mortgaged is usually restored in such cases. Consequently, the mortgagee should not be able to object to such a payment and there is therefore no reason to require his consent. The threshold for payment is 5% of the insured value. Under the 1964 Plan, a maximum limit of NOK 200,000 also applied. This limit has been removed, for practical reasons. If a lower amount is needed, a separate agreement must be reached for that purpose.

A particular issue arises when the shipowner goes bankrupt after the repairs have been carried out but before the shipyard has received payment. If the ship is still at the shipyard, the shipyard may retain the ship to enforce payment of the entire repair invoice. The insurer will, in relation to the mortgagee, not be able to pay out the amount to the bankrupt estate unless the shipyard has been paid in full, cf. the wording "upon presentation of a receipted invoice for repairs carried out". The natural course of events may then be that the insurer pays the shipyard directly in such cases. If, however, the shipyard has not exercised its possessory lien and has let the ship sail, it is difficult to see why it should be in a better position than an ordinary creditor. In these types of situations, it is better to fall back on general rules of bankruptcy law, which implies that the insurance compensation goes into the bankrupt estate and that the shipyard only has a claim for a dividend. This approach should not create particular problems for the mortgagee.

Subparagraph 3 also corresponds to the 1964 Plan which, however, only applied in relation to the owner. The provision has been made general so that the mortgagee's right to give consent applies in relation to everyone, cf. the comments above.

The provisions in subparagraphs 1 to 3 only apply in relation to mortgagees holding security in the capital value of the ship. During the revision, a new subparagraph 4 has been introduced to give a mortgagee holding security in the ship's freight income the same security in the event of loss-of-hire as other mortgagees have in relation to payments under the hull cover. However, mortgagees



holding security in the value of the ship or other security have no claim to protection in relation to payment under the loss-of-hire insurance.

Subparagraph 5 concerning payment upon presentation of a receipt is, strictly speaking, superfluous under Norwegian law. Under ICA section 7-8, subsection 1, the insurer is liable towards third parties if he pays compensation to others without having ascertained whether the claims of the third parties have been covered. It has nonetheless been retained out of consideration for the international market.

Subparagraph 6 relates to the insurer's right to set-off. The provision is taken from § 138, last subparagraph, of the 1964 Plan and corresponds to ICA section 8-3, subsection 2, but here the right to set-off is limited to the premium (as opposed to claims) from the same insurance contract during the last two years. Since set-off may be relevant to claims other than the premium, for example, for disbursed advances for previous damage which exceeds the repair invoice, the expanded right to set-off in the Plan has been retained. However, it is reasonable to limit the right to set-off to claims which arise from the insurance contract for the ship in question, since it is not possible to require the mortgagee to keep abreast of premium arrears or other claims which arise for the assured's other ships. Furthermore, it is reasonable to operate with a certain time frame. The rule implies that, with respect to premium arrears, the insurer may not count on the right to set-off against future compensation for more than two years' premium arrears.

The time limit is linked to payment of the compensation. This may entail some inconveniences if there are two years of premium arrears at the time of the casualty. In that case, the insurer will not simply be able to deduct these arrears in the compensation to be subsequently paid. The insurer must, however, have the opportunity to draw up an advance calculation as soon as the extent of the casualty has been established, and set off two years' arrears in that calculation. It is furthermore a condition that the right to set-offs may only be used once per casualty. The insurer may not, in the middle of a dragged-out settlement of claim, prepare successive advance calculations and compensate more than two years' premium arrears altogether.

The limitation on the right to set-offs does not only apply to payment of total loss compensation when the mortgagee is to be paid in full, but also to payment of compensation for damage. From the point of the view of the mortgagee, it is of fundamental importance that the insurance ensures at all times that the shipowner has the necessary funds to carry out repairs so that the ship may be kept in operation.

Section 8, subsection 1, of the ICA also contains a provision which limits the insurer's right to set off claims against the assured. Only due premiums from the same or other insurance contracts with the insurer may be set off. This provision does not fit into marine insurance and has therefore not been adopted in the Plan. Consequently, the insurer must therefore have the right to set off any claims according to the ordinary set-off rules.

## Chapter 8 - Co-insurance of third parties

### § 8-1. Rights of third parties against the insurer

This paragraph corresponds to § 127 of the 1964 Plan and ICA section 7-1, subsection 3, and section 7-2.

Under ICA section 7-1, subsection 3, insurance relating to ships is for the benefit of any holder of a registered title, a mortgage or other registered security in the ship. In the event of a sale of the object insured, a mandatory co-insurance protection furthermore covers the buyer under ICA section 7-2. Co-insurance for the benefit of other categories of third parties must be explicitly agreed, cf. ICA section 7-5.

In the Plan, ICA's solution has been maintained as regards mortgagees, regardless of whether the right is registered, cf. § 7-1 of the Plan. However, for other third parties the basic principle of the Plan is that these third parties are not co-insured unless co-insurance has been explicitly agreed, cf. § 8-1, subparagraph 1. This applies also to those third parties who have an automatic co-insurance protection under ICA section 7-1, subsection 3, and section 7-2. The solution concords with § 127, subparagraph 1 of the 1964 Plan. It is based on a wish to protect the owner from a situation where parts of the compensation have to be paid to co-owners or others with registered rights in the ship without the assured having cleared this in advance.

Questions of relevance for the protection of contractual mortgagees are exhaustively regulated in chapter 7. The rules in chapter 8 essentially apply when, in exceptional cases, a specific and explicit agreement is concluded to the effect that the insurance shall also apply for the benefit of other third parties than the contractual mortgagees, cf. subparagraph 1. The most frequently occurring example is in connection with insurance of drilling rigs and other offshore installations, cf. § 18-9. Also owners of equipment etc. which, according to § 10-1, subparagraph 1 (b) is comprised by the ship's hull insurance may, however, also want status as a co-insured, cf. below.

As mentioned initially in chapter 7, the basic principle in the 1964 Plan was that third parties who were co-insured under §§ 127 et seq. had an independent protection in relation to the insurer. The new Plan adopts the reverse point of departure: co-insurance under § 8-1 is not independent, which means that a co-insured third party must accept identification in accordance with the same pattern as the mortgagee, cf. the reference to the identification rules in § 3-36 to § 3-38. The reference is the same as the one used in § 7-1 for a mortgagee, and reference may therefore be made to the commentary on this provision. Additionally, as regards identification with the helpers of the responsible assured, and between the co-insured third party and the person effecting the insurance, reference may be made to the commentary on § 7-1. The same goes for the insurer's right to invoke limitations of strict liability vis-à-vis a co-insured.

Nor will a third party who is co-insured under chapter 8 obtain any rights at the expense of the mortgagee's rights under chapter 7.

In marine insurance third party interests will in particular be relevant for hull insurance. In this connection there may be a whole series of third parties with economic interests in the ship's capital value, for example, a buyer who has taken over the ship, or who has entered into an agreement to buy the ship at a price which is lower than the valuation, a long-term charterer who has entered into a contract on favourable conditions, a repair yard which has a lien on the ship as security for the repair invoice, or a holder of a maritime lien. If any of these categories are to be co-insured under the owner's insurance, this must thus under §8-1, subparagraph 1, be explicitly agreed. The same applies to third parties who own or have a security interest in equipment on board the ship. According to §10-1, such equipment will be covered by the ship's hull insurance. However, the question whether the relevant third party is co-insured will have to be decided by §8-1.

Subparagraph 2 states which rules in chapter 7 will be similarly applicable to co-insurance according to § 8-1. The reference to § 7-3, subparagraph 1, relating to claims handling and determination of compensation supersedes § 131 of the 1964 Plan. Under § 131 of the 1964 Plan, the rule was that the assured was not bound by decisions related to the claims adjustment or the claims payment if the insurer knew, or ought to have known, who the assured was. This rule has been deleted. If the assured wants a better position, this has to be agreed with the insurer. If not, the insurer may pay the compensation without the contribution of the co-insured.

The reference to § 7-4, subparagraph 6, relating to the insurer's right to set offs, supersedes § 132, subparagraph 3 of the 1964 Plan. This entails that a co-insured third party will have the same right as the mortgagee to limit the insurer's right to claim a set-off. Under the 1964 Plan, his rights

were more extensive, given that there was no two-year time limit in contrast to the provision in § 7-4, subparagraph 6.

#### § 8-2. Duty of disclosure

This paragraph corresponds to § 128 of the 1964 Plan.

Where a third party is co-insured, his rights will depend on the existence of a valid insurance contract. A failure to fulfil the duty of disclosure on the part of the person effecting the insurance may invalidate the insurance contract wholly or in part, cf. chapter 3, section 1, of the Plan, and a co-insured third party must accept that the insurer invokes this rule, despite the fact that no fault attaches to the third party.

The provision in § 8-2 regulates the case where a third party is in possession of information that has a bearing on the insurer's assessment of the risk. If the third party knows that the insurance is being effected in his favour, he has the same duty as the person effecting the insurance to give the information he has to the insurer, and his negligence will be assessed under the general rules relating to the duty of disclosure contained in the Plan, cf. subparagraph 1. This provision is taken from §128, subparagraph 2 of the 1964 Plan. The rule means that on this point there will be a difference between mortgagees and other co-insured parties, given that a mortgagee will not be subject to any duty of disclosure under chapter 7.

§ 128, subparagraph 1 of the 1964 Plan imposed a duty on the person effecting the insurance to inform the insurer whether the assured knew that the insurance was effected. If the person effecting the insurance intentionally or negligently had failed to give the information he should have given, the relevant third party was to be regarded as being aware of the insurance and having failed to disclose the information which he should have disclosed, cf. § 128, subparagraph 2, second sentence. These provisions have been deleted. It is sufficient to establish a duty of disclosure for the co-assureds who are aware of the fact that the insurance is effected: if a co-assured is unaware of the insurance, it is hardly conceivable that he has failed to comply with the duty of disclosure (or other duties) in a blameworthy manner. In that event, the insurer can only invoke § 3-4 relating to cancellation of the insurance.

The effect of a co-assured's failure to fulfil his duty is that he risks losing his insurance cover according to the same rules that apply in relation to the person effecting the insurance. This concords with the solution in the 1964 Plan. The rules in § 128 of the 1964 Plan, however, did not take a direct stand on the question of whether other assureds would lose their right under the insurance if the co-assured concerned neglected his duty of disclosure. In such cases other assureds should not be identified with the one who neglects his duties, unless the co-assured in question is the one who has the decision-making power concerning the running of the ship, cf. the reference to § 3-37 in § 8-2, subparagraph 2. In that event, the identification rule in § 3-36 shall also apply: if the co-assured has delegated all or part of his authority so that the conditions for identification under § 3-36 are met, faults on the part of the person who has been given such authority must be placed on a par with faults on the part of the co-assured himself in relation to the other co-assureds. The provisions in § 3-37 and §3-36 basically do not apply to the duty of disclosure, but the reference entails that the criteria for identification shall apply similarly. Normally, however, the co-assured will not be in such a situation that there is any question of identification.

The provision only governs the co-assured's neglect of his duty of disclosure. This has to do with the fact that these rules are aimed at the person effecting the insurance, and that a special authority is therefore required to impose a duty of disclosure on the co-assured. The rules relating to the duty of care, on the contrary, are aimed directly at the assured. If a co-insured third party fails to comply with any of these duties, the insurer will therefore be entitled to invoke these rules directly.

According to § 129 of the 1964 Plan, the rules relating to the loss of the assured's rights vis-à-vis the insurer were similarly applicable to acts and omissions on the part of the person effecting the insurance if the object insured was in the custody of the person effecting the insurance or with someone holding it on his behalf. This rule applied regardless of whether the assured was at fault. This rule is superfluous, given that the co-insurance of a third party's interests is, as a rule, not independent, cf. above under § 8-1. In that event, the assured will under any circumstances lose his rights if the person effecting the insurance neglects his obligations.

#### § 8-3. Amendments to and cancellation of the insurance contract

This paragraph corresponds to § 130 of the 1964 Plan and ICA, section 7-4, subsection 1.

According to ICA section 7-4, subsection 1, a co-insured third party has, as mentioned, a far-reaching protection against the assured or the insurer amending or cancelling the contract. In the Plan, however, it has, in accordance with the solution in the 1964 Plan, been decided to give the person effecting the insurance a far-reaching authority on behalf of a co-insured third party. However, under the 1964 Plan, the authority was limited to such situations where the insurer neither knew nor ought to have known that the person effecting the insurance was not authorised to make any decisions regarding the insurance. This rule has been superseded by a general rule to the effect that amendments or cancellation may be invoked vis-à-vis the co-insured party. Where the co-assured appears in the policy, the insurer will always know who he is. The limitation under the 1964 Plan to the right of the person effecting the insurance to make decisions regarding the insurance will therefore not be of any great significance in itself. If the co-insured party wants a stronger position, this will have to be agreed with the insurer.

§ 132, subparagraph 1, first sentence of the 1964 Plan, contained a rule to the effect that the insurer could, vis-à-vis the assured, invoke his rights against the person effecting the insurance when the latter defaulted on his obligation to pay premium. This provision has been deleted. It follows from the reference to § 3-38 in § 8-1, subparagraph 1, that there shall be full identification between the co-insured third party and the person effecting the insurance. It furthermore follows from the current paragraph that the insurance contract may be cancelled with effect for a co-insured third party.

§ 132, subparagraph 2 of the 1964 Plan, dealt with § 119 and § 120 regarding the lapse of the right to premium. These provisions have been deleted, and § 132, subparagraph 2, consequently becomes superfluous.

#### § 8-4. Co-insurance of third parties. Extended cover

This paragraph is new.

The provision gives extended protection compared to chapter 7 and §§ 8-1 et seq. due to the fact that the co-insured third party is not identified with the negligence of the person effecting the insurance or the negligence of the assured. The independent cover may be used both in relation to a co-insured mortgagee and a co-insured party with other interests.

The wording is taken from ICA, section 7-3, subsection 1, but the provision also and in actual fact concords with the supplementary covers that already exist in the market under the title "Extended insurance on mortgagee's interest". The purpose of this provision is to protect third parties against the insurer invoking faults or negligence that are regulated in chapter 3 and in § 5-1. This means that the insurer can neither plead breach of the duty of disclosure on the part of the person effecting the insurance, nor a failure to meet the obligations of care on the part of the other assureds, e.g. the violation of a safety regulation. If the insurer cannot invoke breach of the duty of care on the part of the other assureds, he obviously cannot invoke breaches of such regulations by someone who has been delegated a decision-making authority from the assured, so that in relation to the latter assured an identification shall be made in accordance with § 3-36. However, the co-insured party must accept an identification under § 3-36, subparagraph 2, if he himself has the decision-making authority for the running of the ship and in this connection delegates functions of significance for the insurance to others.

Nor does the provision contain any protection of the position of co-insured parties if the person effecting the insurance fails to pay premium. In that event, the insurance will lapse according to the ordinary rules in chapter 6.

Furthermore, the rules in chapter 7 shall apply if the third party is a mortgagee, and the rules in chapter 8, if the insurance concerns anything other than the mortgagee interest.

Like co-insurance under § 7-1 or § 8-1, co-insurance according to § 8-4 is limited to the owner's insurance. If a third party needs a cover which stands on its own feet, he must take out an independent insurance of the mortgagee interest or any other interest, if relevant.

## Chapter 9 - Relations between the claims leader and co-insurers

### General

An addition was made to the general commentary in the 2007 version.

Chapter 9 contains rules relating to the relationship between the claims leader and the co-insurers. In practice, both hull insurances and the separate insurances against total loss are covered with a number of insurers who separately take on a portion of the risk. Each of these partial insurances is based on an independent agreement and the insurers issue separate policies.

As a main rule, an owner does not want to negotiate the insurance conditions with each individual insurer, but confines himself to reaching an agreement with one individual insurer (the rating leader), or with a few insurers. Such agreements are normally accepted automatically by the others. The relationship between the rating leader and the other insurers is not regulated in the Plan.

Additionally, as regards questions which arise during the insurance period - first and foremost questions in connection with casualties, salvage and the claims settlement - one of the insurers (the claims leader) will normally represent all of the insurers vis-à-vis the assured. The basis for this is often contained in what is known as a claims-leader clause. However, the 1964 Plan established a few explicit rules relating to the relationship between the claims leader and the other insurers, and these rules have essentially been retained in the Plan. § 147 of the 1964 Plan, which provided the right to sue the co-insurers at the claims leader's venue, has, however, been incorporated in § 1-4, subparagraph 1 (c) of the Plan for insurances with a Norwegian claims leader, and in subparagraph 3 for insurances with a foreign claims leader. Furthermore, the claims leader's authority has been expanded, see first and foremost § 9-3, and new rules have also been introduced relating to the question as to how to deal with the claims leader's disbursements in the event of the co-insurer's bankruptcy, and relating to the claims leader's right to interest on disbursements in §9-10 and §9-11, respectively.

Questions that have not been regulated must, as before, find their solution on the basis of business considerations on a case-to-case basis. In the event of conflicts, it will be necessary to fall back on any agreements that may have been entered into, possibly supplemented with general background law.

If the insurance has been effected on Plan conditions, the co-insurers will be aware that the claims leader chosen by the assured is authorised to act on their behalf under the rules of Chapter 9. If they wish to change this authorisation, they may include a "claims leader following clause". However, the standard clause is not intended for use in combination with Plan conditions.

The rules contained in this chapter will only be applicable with respect to co-insurers who have also given insurances on Plan conditions.

### § 9-1. Definitions

This paragraph corresponds to § 139 of the 1964 Plan.

Subparagraph 1 defines the term "claims leader" as the one who is stated as claims leader in the policy. In practice, "claims leader" is used as the designation of the insurer who is to have contact with the assured in case of a casualty, who is to be in charge of the salvage operation and effect the claims settlement. The powers which under §9-3 to § 9-9 are conferred on the claims leader are essentially in accordance with what has in practice been deemed to fall within his scope of competence.

Under English law a distinction is normally made between "rating leader" and "claims leader". The Norwegian term "hovedassurandør" under the Plan comes closest to "claims leader".

Subparagraph 2 deals with the other co-insurers.

The provisions in chapter 9 concern all types of insurance covered by the Plan, but they are most relevant for hull insurance. If several types of insurance have been effected for the ship, one claims leader must be designated for each type of insurance. The claims leader for hull insurance therefore only binds the hull insurers, not the insurers who have taken out hull or freight-interest insurance, war-risk insurance or loss-of-hire insurance.

As the rules in § 10-13 and chapter 14 show, however, there is a close connection between the ordinary hull insurance and the hull- and freight-interest insurances. It would therefore be practical if the decisions made in the relationship between the assured and the hull insurers were binding on

a certain extent on the interest insurers as well. According to § 14-3, subparagraph 4, a certain community has therefore been established between the claims leader under the hull insurance and the interest insurers as well.

The possibility of entitling the claims leader for hull insurance to bind the loss-of-hire insurer was discussed during the revision, but rejected as inexpedient.

In exceptional cases, an owner may choose an insurance package with one claims leader for all the insurances. The rules in chapter 9 shall apply in such cases as well. Normally, the claims leader for the hull insurance will then be designated as the overall claims leader, with the result that he will bind all other insurers, even if he himself merely has a share in the hull cover.

The rules contained in this chapter 9 are based on the assumption that one of the insurers has explicitly been designated as claims leader when the insurance is effected. The assured is thus free to decide whether he wants to cover all parts of the interest with independent insurers, who will in that case not be mutually dependent on each other. If he wants the advantages that the claims-leader arrangement entails, he must therefore designate one of his insurers as the claims leader and notify those among the other insurers whom he contacts. It is not a condition that the claims leader knows who the co-insurers are, however, although certain rules will not become effective unless the assured has notified the claims leader about who the co-insurers are, see in particular § 9-4 about notifications of casualties.

#### § 9-2. The right of the claims leader to act on behalf of the co-insurers

Subparagraph 1 was amended in the 2007 version. The paragraph is otherwise identical to earlier versions of the 1996 Plan.

Subparagraph 1, first sentence, establishes the general principle that the claims leader has the right to bind the co-insurers in relation to the assured to the extent that this follows from §§ 9-3 et seq. The arrangement is based on an extensive relationship of trust between the insurers, and it is therefore emphasised in the second sentence that when acting on behalf of all the insurers, the claims leader shall, as far as possible, take into consideration all the insurers' interests. Under earlier versions of the 1996 Plan, subparagraph 1, third sentence, he was also required to consult the co-insurers whom he knows of, provided that time permitted and that it was a matter "of importance". In the Commentary, this provision was followed up with the following wording: "If it turns out that there is a predominant desire among the insurers to resolve the matter in a specific manner, the claims leader is obliged to respect the majority's point of view. If not, he may become liable for damages vis-à-vis the co-insurers." This wording is not in keeping with the text of the Plan: the rule was a "should" rule and concerned consultation, not an obligation to take a poll to determine the majority opinion. Both the wording of the Commentary and the provision regarding consultation in the third sentence have given rise to problems in practice. Since the main point is that the claims leader has a duty to look after the interests of the insurers, both the rule on consultation and the statement in the Commentary have been deleted.

How far the duty to look after the co-insurers' interests goes must be determined on the basis of past practice and the purpose of the other provisions of Chapter 9. The commentary on § 9-8 explicitly states that the claims leader must submit questions relating to the institution of legal proceedings or the lodging of an appeal to the co-insurers. The co-insurers are obviously interested in being consulted in such situations and this should not cause any problems in terms of time.

With regard to the claims adjustment, on the other hand, the basic principle is that it is binding under § 9-9 "provided that it is in accordance with the insurance conditions". An insurance settlement that is not in accordance with the insurance conditions is, on the other hand, not binding on the co-insurers and thus falls outside the scope of the claims leader's authority to act on their behalf, cf. also the commentary on § 9-9.

Otherwise, in keeping with the purpose of the provisions of Chapter 9 the claims leader normally does not need to consult the co-insurers in order to look after their interests. For instance, some of the point of the authority provided by § 9-3 whereby the claims leader may approve the lay-up plan required under § 3-26 will be lost if the claims leader is required to involve the co-insurers.

With regard to the claims leader's authority to make decisions in connection with salvage pursuant to § 9-5, it will normally not be expedient to consult the co-insurers in connection with initiating a salvage operation. On the other hand, it is conceivable that the claims leader should notify the co-insurers before possibly abandoning a salvage operation, and should also keep the co-insurers informed about the salvage operation once it has commenced so that they have an opportunity to abandon the operation by paying the sum insured and limiting their liability for costs in accordance with § 4-21. This applies in any case to more extensive salvage operations. Salvage can lead to

great expense for insurers and the co-insurers therefore have a legitimate need to be informed about the situation in order to be able to limit their liability. The insurers who wish to continue the salvage operation may do so, provided the six-month time-limit laid down in § 11-2 has not expired.

As far as removal and repairs are concerned, as well, the authority of the claims leader under § 9-6 normally allows him to take action without consulting the co-insurers.

Even if the duty of the claims leader to safeguard the interests of the co-insurers normally does not entail any obligation to consult them, he is of course free to seek advice. It must be left to the discretion of the claims leader whether to consult the co-insurers in connection with questions relating to lay-up plans, salvage operations, removals and repairs.

Subparagraph 2 contains a rule concerning the authority of the claims leader that is of great importance. If the claims leader has vis-à-vis the assured taken a decision that falls within his scope of authority under § 9-3 to § 9-8, the decision will be binding on all co-insurers in relation to the assured.

This authority shall only apply within the area where the rules contained in this chapter confer authority on the claims leader. However, there is nothing to prevent a provision in the agreement with the assured to the effect that the claims leader shall have either a wider or a more restricted scope of authority than indicated by the Plan. The extent of this authority will depend on an ordinary interpretation of the agreement. According to the general principles of the law of contract, the steps taken by the claims leader vis-à-vis the assured will be binding, provided they come within the agreed scope of authority, and the assured does not have any reason to believe that the interests of the co-insurers have been disregarded.

Steps which fall outside the scope of authority will, however, never be binding on the co-insurers, regardless of what the assured might believe about the claims leader's right to act.

If the co-insurers wish to reduce the authority that the claims leader has under the rules in this chapter, they must make an explicit reservation to that effect on the conclusion of the agreement.

If the claims leader, or one of the other co-insurers, due to special circumstances is prevented from reacting to negligence on the part of the assured or the person effecting the insurance, this will obviously not affect the legal position of the other co-insurers.

#### § 9-3. Lay-up plan

This provision is new.

According to § 3-26, the assured shall if the ship is to be laid up draw up a lay-up plan and submit it to the insurer for his approval. It is not practical to send this plan to all the co-insurers; it must be sufficient that it is approved by the claims leader. Other notifications pursuant to chapter 3, e.g., if a ship proceeds beyond the trading areas according to §3-15 must, however, be sent to all insurers.

#### § 9-4. Notification of a casualty

This paragraph corresponds to § 141 of the 1964 Plan.

According to § 141, subparagraph 1, of the 1964 Plan, the assured could only bind the co-insurers by giving notice to the claims leader if he had in advance requested the claims leader to pass on any notifications to the co-insurers. This provision has been amended: the point of departure is now that notifications of a casualty may be given to the claims leader with binding effect on the co-insurers, cf. subparagraph 1. It is of great practical importance for the assured that, in the event of a casualty, he can look to the claims leader. If the co-insurers want a stronger position, this must accordingly be agreed separately.

Subparagraph 2 regulates the claims leader's obligation to pass on notifications to the co-insurers. This provision corresponds to the 1964 Plan, but it is emphasised that the notice shall be passed on "as soon as possible". The provision is in the nature of a regulation. No sanctions are imposed if the claims leader procrastinates. Under the rule in subparagraph 1, such procrastination will be for the co-insurers' risk and accordingly of no concern to the assured. A failure to give notification will accordingly not affect the assured's claim against the co-insurers. If a co-insurer suffers a loss as a result of the failure to give notification, e.g., due to the fact that he does not manage to submit his objections to the claim in time, he may have to claim compensation from the claims leader under the general rules of the law of damages.

In practice, it will often be the broker who notifies the claims leader of the casualty, and the broker will then normally notify the co-insurers at the same time. If there is an assumption or it has been agreed with the co-insurers that notifications to the co-insurers under subparagraph 2 may be passed on through the assured's broker, delay on the part of the broker will be the co-insurers' risk. If they suffer a loss, they will have to lodge a claim against the broker. They cannot recover the loss from the claims leader and refer him to recourse against the broker.

The paragraph is first and foremost aimed at notification of casualties, cf. § 3-29, the submission of claims for compensation, cf. § 5-23, and demands that the claims adjustment be submitted to an average adjuster, cf. § 5-5. But the provision also becomes significant during the further proceedings in connection with claims settlements. A co-insurer who is within the scope of the paragraph cannot plead that the assured has forfeited a right by passivity, provided that the assured has vis-à-vis the claims leader done whatever is necessary to maintain his right.

However, the provision does not apply in relation to § 5-24 relating to limitation. The limitation period must therefore be prevented from running in relation to each individual co-insurer. A different rule would be inexpedient and would in reality have to be based on the assumption that a judgment in an action against the claims leader would also have effect vis-à-vis the co-insurers. Nor is it sufficient to prevent the limitation period from running in relation to the co-insurers that the claims leader grants the assured an extension of the limitation period. However, the assured may stop the period from running by bringing a collective action against all the co-insurers in the venue of the claims leader, cf. § 1-4, subparagraph 1 (c) and subparagraph 2.

#### § 9-5. Salvage

This paragraph corresponds to § 142 of the 1964 Plan.

The provision authorises the claims leader to decide if, and in the event how, a salvage operation shall be conducted, and to decide when to abandon the salvage operation or whether the insurer shall exercise his authority to limit his liability for the salvage costs by paying the sum insured. The claims leader's authority on this point is in accordance with standard practice.

§ 142 of the 1964 Plan furthermore authorised the claims leader to decide what regulations should be issued in accordance with § 53. This authority to issue regulations has, however, been deleted in the new Plan, and the provision has therefore been deleted.

#### § 9-6. Removal and repairs

This paragraph corresponds to § 143 of the 1964 Plan.

The provision authorises the claims leader to grant requests for removal to a repair yard under § 3-20 and to make decisions concerning repairs.

The claims leader's decision-making authority in relation to § 3-20 is new and is based on practical considerations. The decision-making authority relating to repairs, however, is taken from the 1964 Plan and concords with established practice. However, § 143, second sentence, of the 1964 Plan stipulated an exception as regards the question whether the ship was to be repaired at all, or whether the assured's request for condemnation should be granted. The reason for the exception was that the insurers might have conflicting interests, in particular where the claims leader had granted the owner a loan which he could perhaps only be expected to repay in the event of a total loss. The individual co-insurer had therefore been given an independent right to have the question of condemnation further elucidated by a removal of the ship for a survey under § 166, or by inviting tenders. The provision had to be seen in conjunction with § 43 of the 1964 Plan, which gave the co-insurers the right to limit their liability for damage resulting from the removal by refusing to accept it. In practice, the relationship between insurers who had and insurers who had not approved the removal caused problems: if the removal later proved successful with the result that the ship was not condemned, the question arose as to whether an insurer who had not approved the removal was to benefit from the result of the removal despite the fact that he had not borne any part of the risk associated with it. The co-insurers' right to make an independent evaluation of the question of removal furthermore raised a communication problem: when the decision regarding a removal was to be taken, all the insurers concerned had to be notified. This could result in delays in a situation where quick decisions were of the essence. In order to prevent such conflicts of interest between the insurers and delays as regards the condemnation decision, the Plan has authorised the claims leader to decide also this question of removal on behalf of all the insurers.

It follows from § 9-2, cf. § 14-3, that the claims leader's authority according to



§9-6 applies both in relation to the co-insurers under the hull insurance and in relation to the insurers under the separate total-loss insurances. However, the authority does not apply in relation to the insurers under other insurances. These insurers may therefore demand that the ship be removed according to § 11-6. The co-insurers' claims leader must in that event have the right to choose whether the hull insurers and the separate total-loss insurers shall participate in the removal or avoid further liability by paying the sum insured, cf. § 4-21.

#### § 9-7. Provision of security

This provision corresponds to § 144 of the 1964 Plan.

Subparagraph 1 regulates the claims leader's right to commission from the co-insurers upon the provision of security. Under § 5-12 the insurer does not have any obligation to provide security for the assured's liability to third parties. However, in practice the hull insurer will to a large extent provide security for the assured's liability for salvage awards and collision compensation whenever required in order to prevent an arrest of the insured ship. Such security will normally be provided by the claims leader. The 1964 Plan did not contain any rules relating to commission for the claims leader when he in this manner in the interests of all the insurers provided guarantee for collision liability vis-à-vis the person suffering the loss or for salvage award vis-à-vis the salvors. However, it was accepted in practice that the claims leader was entitled to a commission, and this practice has now been explicitly established in the Plan. The commission is set at 1% and is charged once and for all, not on a per annum basis.

The claim for commission is subject to the condition that the guarantee is provided in "the interest of all the insurers". This will be the case if the person suffering the loss or the salvor demands a bank guarantee, and the claims leader is required to provide a guarantee vis-à-vis the bank because the assured is unable to obtain a guarantee himself against ordinary commission, cf. in this respect former practice.

Subparagraph 2 corresponds to § 144, subparagraph 1, of the 1964 Plan, but has been somewhat simplified. The provision discusses the effect of the claims leader informing the co-insurers that he has provided security for the assured's liability for collision compensation or salvage award. Such notification deprives the assured of his position as creditor as regards cover of the liability invoked against him. If a co-insurer who has received such notification pays compensation in connection with the liability directly to the assured, he risks having to pay all or part of the amount again to the claims leader to the extent that the latter's provision of guarantee has become effective.

Subparagraph 3 corresponds to § 144, subparagraph 2 of 1964 Plan and limits the co-insurer's right to plead a set-off when security has been provided. As mentioned in the commentary on § 7-4, the insurer has the right to set off any claims against the assured in respect of insurances on Plan conditions. This applies to outstanding premiums as well as to any other claims arising from the insurance contract. Unless otherwise agreed, a co-insurer's right to plead a set-off against the assured may also be exercised against the claims leader when the guarantee has become effective and the claims leader has a right of recourse. However, according to the Plan, the co-insurer's right is subject to the condition that he has reserved the right to plead a set-off prior to the provision of security. In practice, the claims leader will normally decide the question regarding security alone, which means that a co-insurer cannot expect to have the opportunity to make a reservation in connection with a notification of the provision of security according to §9-7. Accordingly, a co-insurer who wants at all times to be certain that his claims against the assured can be set off must keep the claims leader continuously informed of the magnitude of his claim.

It is only against the claims leader that the right to plead a set-off may be forfeited. If the assured himself covers the liability and the guarantee is released, the co-insurer may, of course, plead a set-off, cf. ICA section 8-3. Subparagraph 3 applies to all types of claims arising out of the insurance contract, including claims pertaining to other vessels.

It is conceivable that a creditor directs his claim against another ship that belongs to the assured, and that the claims leader for the ship to which the liability pertains provides security in order to obtain the release of the other ship. The rules in this paragraph shall also apply to such a situation, given that no express condition has been stipulated to the effect that the purpose of providing security is to prevent the arrest of the insured ship.

The rules shall only apply, however, where the provision of security concerns a claim of the type described in this paragraph, i.e. collision liability and salvage award. If the claims leader has provided security for a claim of a different type, e.g., a repair yard's outstanding claim, the co-insurers have an unconditional right to plead a set-off without making any special reservation in accordance with subparagraph 3.

## § 9-8. Disputes with third parties

This paragraph is identical to earlier versions of the 1996 Plan. The Commentary was amended in the 2007 version in accordance with the amendment to § 9-2.

The claims leader should also be empowered to represent all the co-insurers in the event of legal proceedings against a third party. The paragraph authorises him to make the necessary decisions in connection with the legal proceedings and may be invoked vis-à-vis the courts as a basis for a general power-of-attorney to conduct the case. According to earlier versions of the 1996 Plan, "the question of commencing legal proceedings or lodging appeals will constitute 'matters of importance' and, as there will in those situations always be time for discussions among the insurers, it will invariably be the duty of the claims leader to submit the questions to those co-insurers of whom he is aware, cf. § 9-2". This statement is not accurate now that the duty to consult the co-insurers has been revoked. It also follows from the rule prescribed in § 9-2 that the claims leader has a duty to look after the interests of all the insurers that he must consult the co-insurers concerning the institution of legal proceedings or the lodging of appeals.

## § 9-9. Claims adjustment

This paragraph is identical to earlier versions of the 1996 Plan. The commentary was amended in the 2007 version.

The provision establishes that it is the claims leader who is responsible for the claims adjustment. In accordance with established practice, this is binding on the co-insurers, provided that it is in accordance with the insurance conditions. This implies that the claims leader's discretionary decisions are binding, provided that the discretion is deemed to have been exercised within the framework of the conditions. If, on the other hand, he, for example, includes as recoverable a loss which, according to a correct interpretation of the Plan and the policy, must be considered to be excluded, the co-insurers will not be bound. The co-insurers must also be entitled to contest a discretionary decision if the discretion has been exercised in such a manner that it must in reality be regarded as a departure from the conditions in favour of the assured.

In practice, the claims leader's authority is sometimes specified in a so-called claims-leader clause. In such clauses, the claims leader's authority will often be extended in relation to § 9-9, e.g. to also cover "settlements" or "compromised total loss settlements". An extension of the claims leader's authority has been regarded as a market question which must be solved in the individual insurance, and not through a general extension of the scope of § 9-9.

If there is no such claims-leader clause, agreed settlements fall outside the scope of the claims leader's authority under § 9-9. An agreed settlement might, for instance, entail payment of a large amount in cash compensation in cases where the ship does not qualify for condemnation (in English often called "compromised" or "arranged total loss" under § 11-3 of the Plan or the insurance conditions. Such settlements are not "in accordance with the insurance conditions" and are therefore not binding on the co-insurers. In such cases, the claims leader therefore acts at his own risk. Therefore, if the claims leader is to get the co-insurers to agree to such settlements, he must consult them. If they agree, the settlement will also be binding on the co-insurers. If not, each individual insurer is free to do as he pleases as far as his own share of the insurance cover is concerned.

In connection with the claims settlement, the question may arise of whether the insurers can or should invoke the provisions of Chapter 3 of the Plan regarding breaches of the duty of disclosure, alteration of the risk, breach of safety regulations, etc. This type of decision lies outside the scope of the claims leader's authority, and the co-insurers will therefore not be bound by the views of the claims leader. In practice, the claims leader and the co-insurers will often discuss the question and come to an agreement as to the stance that they wish to adopt in relation to the assured. If, however, they do not agree, a majority of the insurers cannot be binding on a minority. Any disagreement regarding the facts or the application of the law must, in the customary way, be brought before the courts in accordance with the provision regarding jurisdiction in § 1-4 of the Plan or be decided by arbitration if arbitration has been agreed in advance or is agreed in connection with the dispute.

A judgment in favour of the insurers is only binding on the insurers who are a party to the case. Insurers who have made full or partial payment as part of a compromise settlement with the assured will be bound by this agreement regardless of the outcome of the judgment. Similarly, a judgment in favour of the assured will not affect agreements that have already been concluded. The assured may not claim any additional settlement from insurers with whom he has entered into compromise agreements even if the latter entail payments that are lower than what the court has found to be correct.

Should the concluded agreements be contested by the assured or the insurer in accordance with the ordinary rules on the invalidity of agreements, a dispute concerning the validity of the agreement would have to be the subject of separate negotiations and court decisions.

Even if the assured is represented by a broker, and the claims leader has communicated with the co-insurers through the broker, the insurers may communicate with one another directly without going through the assured and the broker. In difficult cases involving important principles or of financial significance, the claims leader will often seek to establish a direct dialogue with the co-insurers.

#### § 9-10. Insolvency of a co-insurer

This paragraph is new.

The provision regulates the risk of a co-insurer becoming insolvent when the claims leader has had disbursements, part of which the co-insurer should have paid.

According to the first sentence, the assured bears the risk of a co-insurer's insolvency if the claims leader has had disbursements on behalf of the assured. This concords with what has been assumed in practice, and may be justified by considerations of consequences. If no claims leader had been appointed, the assured would have had to bear the risk of the co-insurer's insolvency, because the other co-insurers would merely have had pro-rata liability in proportion to their share of the insurance. This would have applied both to the actual payment of compensation and to the disbursements which were made by the assured to third parties in connection with the claims settlement, and which were recoverable under the insurance, e.g., disbursements for survey. The claims-leader system should not give a different result in an insolvency situation. The system indicates that the assured is the claims leader's principal, which means that under general rules of contract law he is liable for disbursements made by the claims leader on his behalf.

Disbursements made by the claims leader on behalf of all the co-insurers, on the other hand, are in principle no concern of the assured's. In that event, it must therefore be the joint risk of all the insurers if one of the co-insurers becomes insolvent. The second sentence establishes that the insolvent co-insurer's share of these disbursements shall, at least initially, be borne by the claims leader. Whether and to what extent the expenses shall subsequently be distributed among the solvent co-insurers will depend on market practice.

The provision raises the question of the distinction between disbursements made on behalf of the assured and disbursements made on behalf of all the insurers. Disbursements related to the claims leader's consideration of, e.g. questions regarding salvage award, collision liability or grounding liability, are made on behalf of the assured. The same applies to the guarantee commissions. These are disbursements which might just as well have been made by the assured himself, but which the claims leader has undertaken on his behalf as a service. The same must apply to expenses for technical or legal assistance, and for that part of the claims leader's claim for a fee that is tied to an average adjustment, if any. The rest of the claims leader's fee claim in connection with the claims adjustment and expenses for survey is, however, claims or disbursements on behalf of all the insurers. If the claims leader leaves it to an average adjuster to make a claims adjustment in accordance with § 5-2, the average adjuster's fee must also be no concern of the assured's.

#### § 9-11. Interest on the disbursements of the claims leader

This paragraph is new.

In practice, the claims leader will often make disbursements on behalf of all the insurers, e.g. for surveys. Accordingly, there is a need for a rule which entitles him to charge interest on these disbursements. For disbursements made by the claims leader on behalf of the assured, the duty to pay interest for the co-insurer is in actual fact already implicit in the assured's right to interest under § 5-4. However, it has sometimes been difficult in practice to gain acceptance for this view in the international insurance market. The provision therefore explicitly establishes that the duty to pay interest also applies to disbursements made by the claims leader on behalf of the assured.

It is the duty of the claims leader to show loyalty as regards the recovery of outstanding disbursements. If the policy interest rate according to § 5-4 is for a period of time higher than the market rate, he may not sit on the claim in order to thus increase the interest payable by the co-insurers.

## **PART TWO - HULL INSURANCE**

### **Chapter 10 - General rules relating to the scope of the hull insurance**

#### **General**

Chapter 10 basically corresponds to chapter 10 of the 1964 Plan. However, certain adjustments have been made as regards the question of the scope of the insurance, cf. § 10-1 and § 10-2. Furthermore, 1964 Plan § 158 concerning the right of cancellation in the event of fluctuations has been converted to a rule relating to the right to adjust the assessed insurable value and moved to § 2-3, subparagraph 2. Certain amendments have also been made to 1964 Plan § 160 relating to reduction of liability in consequence of separate total loss insurances, cf. § 10-12.

#### **§ 10-1. Objects insured**

This paragraph corresponds to § 148 of the 1964 Plan, § 5.15 of PIC and CEFOR I.5.

The heading has been changed in connection with the extension of the scope of the Plan to include also bunkers and lubricating oil, cf. subparagraph 1 (c) and below.

Subparagraph 1 states the objects covered by hull insurance. Letters (a) and (b) distinguish between "ship", "equipment" and "spare parts". "The ship" comprises the hull as well as the engines. "Equipment" is a collective term for loose objects that accompany the ship in its trade, but which cannot be deemed to be part of it, e.g. radio and radar equipment, search lights, loose shifting beams, furniture and other fixtures and fittings. The prerequisite for covering equipment and spare parts under the ship's hull insurance is nevertheless that they are normally on board, cf. the term "on board", which indicates that the object in question shall be on board for an indefinite or prolonged period of time. Objects brought on board while the ship is in port and taken ashore when the ship is leaving, such as a fork-lift truck to be used during loading and discharging, are therefore not covered whilst on board, cf. ND 1972.302 NV Balblom, notwithstanding the fact that the object is used only on board this one particular ship.

As under the 1964 Plan, ownership is irrelevant. The hull insurance also covers equipment and spare parts that the owner has borrowed, rented or bought with a seller's lien or similar reservations. This means that an owner does not have to take out a separate property insurance for equipment that he does not own, but for which he bears the risk. Under the 1964 Plan, reference was made to "retention of ownership". However, the concept "purchase with retention of ownership" has been superseded in Norwegian law by "purchase with a seller's lien". The term "or similar reservations" has been incorporated in order to cover similar systems under the laws of other countries. According to the Plan, the cover of third parties' interests also includes spare parts; this is new in relation to the 1964 Plan.

The fact that the relevant objects are automatically included in the ship's hull insurance nevertheless does not mean that the ownership interest or the mortgagee interest is automatically co-insured under the insurance. If a third party is to acquire status as a co-assured, this has to be agreed specifically, cf. § 8-1. A third party's rights will in that event be determined by the provisions in §§ 8-1 et seq. Chapter 7 shall not apply where the mortgage rights only concern equipment or spare parts.

Under Norwegian law, the provision relating to the cover of third parties' interests is of little practical importance concerning the purchase of equipment or spare parts with a seller's lien. Under section 45 of the Norwegian Maritime Code, mortgages and other encumbrances on ships that shall or may be entered in the ship's register shall also comprise equipment which is on board or which has been temporarily removed. No special encumbrances on such equipment can be created. For ships that are insured on the conditions for ocean-going vessels of the Plan, this provision accordingly rules out liens on the equipment, cf. Brækhus: Omsetning og Kreditt 2 (Sales and credit), pp. 173-174. Actual leasing of ship's equipment is accepted, however, provided the notice period satisfies the requirements of the law, cf. the six-month time-limit stipulated in section 45, subsection 2, of the Norwegian Maritime Code. Thus, in the event of such short-term leasing, the rule relating to the cover of third parties' interests may become relevant. This rule may also be practical when it comes to the cover of ships where the flag State's laws open the door to a separate provision of security in the equipment.

New equipment or new spare parts will be included in the ship's hull insurance from the time the object concerned "is swung over the railing" to be placed on board.

Subparagraph 1 (c) is new and extends the cover in relation to the 1964 Plan to also comprise bunkers and lubricating oil on board. The extension represents a harmonisation in relation to Anglo-American marine insurance conditions, cf. MIA schedule I, no. 15. It is first and foremost of significance where bunkers and lubricating oil are lost or contaminated in connection with a major casualty. If the casualty merely results in loss of bunkers and/or lubricating oil, the fact is that the economic loss will rarely exceed the deductible. If the owner wants an extended cover in respect of these consumer articles, he will therefore either have to take out a separate insurance, or agree on a lower deductible for them.

The cover in letter (c) concerns bunkers and lubricating oil regardless of ownership. Thus, bunkers belonging to a time-charterer is also covered by the ship's hull insurance. If a time-charterer is to have status as a co-assured party, however, this must be reflected in the policy, cf. § 8-1 and above concerning equipment, etc.

Subparagraph 2 lists the objects that are excluded from hull cover and which may have to be covered by an insurance for fishing vessels, cf. chapter 17, sections 4 and 5, or some other separate insurance.

Firstly, supplies, deck accessories and other articles intended for consumption are excluded. Paint will be a typical example of "other articles intended for consumption" in the same way as zinc and magnesium blocks, etc. for protection against corrosion were excluded under the 1964 Plan, cf. § 176 (k) of the 1964 Plan, which stated this explicitly. However, as mentioned, it follows, from subparagraph 1, that the hull insurance now covers bunkers and lubrication oil.

The exclusion of articles intended for consumption does not comprise objects that are fixtures on the ship, even if they are of such a nature that they have to be replaced fairly often; fixed ceilings in the holds, insulation and other fixed installations in connection with the carriage of cargo are thus covered by the insurance.

Secondly, excluded in concordance with the 1964 Plan are boats and whaling, sealing and fishing tackle. However, even if a boat is used for one of those purposes, it will be covered by the insurance if it was under any circumstances required to be on board as a lifeboat.

Thirdly, the Plan excludes "loose objects exclusively intended for securing or protecting the cargo". The exclusion is limited to objects that are merely necessary in order for the cargo to arrive in as good a condition as possible. If, on the other hand, the objects are also intended for the protection and safety of the ship, they are covered by the hull insurance. Thus, loose ceilings which protect the cargo against dampness from the ships' side, and dunnage, which prevents the various types of cargo and units from damaging each other during the voyage, qualify as equipment that falls outside the scope of the hull insurance. However, hull insurance will cover objects such as hatches, tarpaulins and loose bulkheads which are used for the carriage of bulk cargoes. Similarly, hull insurance will also cover objects which must be regarded more as a means of rationalising the transport operation than as a protection of the cargo, such as fork-lift trucks used in the hold. However, the prerequisite is that the objects constitute "equipment" as defined in subparagraph 1 of the provision, cf. above and ND 1972.302 NV Balblom.

Finally, loose containers intended for the carriage of cargo are excluded from the hull cover. According to the Commentary on the 1964 Plan, such containers were covered by the hull insurance, but this solution was abandoned in the Special Conditions. Such containers must in any event be covered by property insurance during the period of time that they are on shore and not just temporarily removed from the ship, cf. § 10-2, which makes it unnecessary to cover them under the ship's hull insurance as well.

#### § 10-2. Objects, etc. temporarily removed from the ship

This paragraph corresponds to § 149 of the 1964 Plan and CEFOR Forms 243 C 3 and 244 A 5.

Subparagraph 1 corresponds to § 149 of the 1964 Plan and establishes an extensive cover for objects that are temporarily removed from the ship. This becomes applicable in connection with loading and discharging, routine overhauling of special equipment, and when machinery or equipment is sent to special repair yards. The practical significance of the provision is limited, however, because the value of the objects in question will often be lower than the deductible, cf. above regarding bunkers and lubricating oil.

The provision must be seen in conjunction with § 10-1. The text has therefore been amended slightly in order to include the extension of the scope of cover in §10-1 (c). Insurance of objects removed from the vessel is linked to "objects referred to in § 10-1, subparagraph 1". This must be interpreted to mean that it covers everything mentioned there, including bunkers and lubricating

oil, even if these are not normally referred to as “objects”. The prerequisite for cover under § 10-2 is that the relevant object has been on board, and that the intention is to put it back on board after it has been ashore, cf. ND 1972.302 NV Balblom. New equipment on its way to the ship from the manufacturer is therefore not covered by the hull insurance, cf. what is stated in §10-1 concerning conditions for the inclusion of new equipment in the ship’s hull cover. Nor does the cover extend to joint stocks of spare parts maintained by an owner for several of his ships.

It is a further condition that the objects are removed in connection with the operation of the ship or due to repairs, rebuilding, etc. Fork-lift trucks and other objects which accompany the ship will therefore have to be indemnified by the hull insurer if they are damaged whilst ashore in connection with loading or discharging. However, the hull insurance will not cover objects which are stored ashore while the ship is laid up, since in that situation they have no connection with the running of the ship.

There are no limits as to the distance the objects may be sent, provided that they are brought back on board again before the ship’s departure. An object that is sent to a special repair yard will therefore be covered by the hull insurance during transport as well as during the stay at the repair yard.

The insurance of objects removed from the vessel is subject to the absolute condition that the objects are brought on board again before the ship’s departure from the port in question. If the ship is repaired in the port, “departure” must be interpreted to mean that the ship, after completed repairs, commences a voyage. If, as part of the repair work, a ship is towed or sails under its own steam to a repair yard in another port, the insurance will not cease to be in effect for the objects, etc. which are ashore. Nor does the insurance terminate if the intention was to bring the object back on board again before departure, but where this was prevented, e.g. due to delayed repairs or transport of the object, cf. the wording “are intended to be put back on board”. However, it is a prerequisite that the objects are put back on board “before” departure: the hull insurance therefore does not cover objects, etc. which were brought ashore for repairs or the like while the ship is making a round-voyage.

Subparagraphs 2 and 3 are taken from CEFOR Forms 243 C 3 and 244 A 5, which concern insurance of fishing vessels and freighters. Insurance of fishing vessels and freighters is regulated in chapter 17 of the Plan. Because a number of such vessels are insured on the general hull conditions of the Plan, however, it is necessary to include the extended insurance provision here. In relation to the provisions in CEFOR Forms 243 C 3 and 244 A 5, a certain re-editing and simplification have taken place.

Subparagraph 2 corresponds to subparagraph 1, first sentence, of the Special Conditions. Like subparagraph 1 of the provision, it is an absolute prerequisite for the insurance that the object has been on board before it was stored ashore. However, subparagraph 2 provides an extended insurance in relation to subparagraph 1 in that there is no requirement that the object concerned shall be put back on board before the ship’s departure. But this extension of the insurance applies only to the explicitly stated objects, viz. fixed equipment for fishing vessels. Nor is there any question of automatic insurance, given that the insurer must be notified about what equipment has been brought ashore, its value and where it is stored in order for it to be covered. Lastly, the insurance of objects removed from the vessel under subparagraph 2 also has a relatively narrow area of risk; the cover only extends to fire and burglary.

Subparagraph 3 corresponds to subparagraph 2, second sentence, of the Special Conditions and establishes that in the event of a total loss of the vessel, a deduction shall be made from the total-loss compensation for the value of the stored equipment.

#### § 10-3. Loss due to ordinary use

This paragraph is identical to § 150 of the 1964 Plan.

The provision reflects a central principle of insurance law, viz. that the insurance shall only cover unforeseeable or unpredictable losses.

The paragraph excludes from the insurance cover certain losses which are regarded as regular operating expenses and which must therefore be borne by the owner. What constitutes a “normal consequence of the use of the ship and its equipment” is a question of discretion that must be decided on the basis of traditional solutions. The deciding factor is that the assured has deliberately used the ship in a manner or in a trade where damage is foreseeable. Examples of non-recoverable damage are foreseeable stevedore damage and foreseeable contact damage by navigation through locks or in a shallow river. On the other hand, damage will be recoverable if the ship strikes a rock

in the river, or suffers a major collision with a lock wall. The same must apply if the ship, whilst carrying an isolated cargo of sulphur, sustains extensive and extraordinary corrosion damage.

Traditionally, heavy-weather damage has in practice been kept outside § 10-3, even if it is in certain trades quite foreseeable that the ship will over a certain period of time sustain heavy-weather damage of a certain extent, cf. ND 1990.50 HovR.V.S. Takis H, concerning the corresponding Swedish provision.

#### § 10-4. Insurance “on full conditions”

This paragraph is identical to § 151 of the 1964 Plan.

Insurance “on full conditions” means that the assured has the full normal cover that follows from the rules of the Plan relating to hull insurance. Any limitations to this cover must be agreed specifically. On the other hand, “full conditions” does not imply that the insurer shall indemnify each and every incident of damage in full, in view of the fact that the normal cover includes rules which in some cases provide for substantial deductions, cf. § 12-15 to § 12-19 and § 13-4.

Most ships will be insured on “full conditions”. The mortgagees will normally not accept that a mortgaged ship is insured on less comprehensive conditions. The deductible may nevertheless vary.

#### § 10-5. Insurance “against total loss only” (T.L.O.)

This paragraph is identical to § 152 of the 1964 Plan.

Insurance “against total loss only” occurs in very special situations, e.g. in connection with the towage of a ship that is to be sent to the breaker's yard. In that event the insurer will only be liable for total loss in accordance with the rules in chapter 11, i.e. where a ship is lost or so badly damaged that it cannot be repaired, is a constructive total loss, etc.

Where the ship is insured against total loss only, the consequence in relation to loss in connection with measures to avert or minimise the loss is that the insurer is only liable for such loss if it is attributable to measures taken to avert a relevant risk of a total loss. This principle follows from the rules in chapter 4, section 2, of the Plan, and it is therefore unnecessary to have any special rule on this in § 10-5.

Where a case of general average has occurred, it is therefore necessary to split up the general average statement and cover the contribution to the extent that it refers to measures taken to avert or minimise the risk of a total loss. Contributions to so-called “common benefit” expenses are never recoverable; expenses in connection with putting into a port of refuge if the ship has suffered minor engine damage would perhaps be more doubtful.

If the ship has been damaged in consequence of an act of general average (or a similar act to save a ship in ballast), the damage under § 4-10 is recoverable in accordance with the rules relating to particular loss, if such settlement is more favourable for the assured. This rule shall not apply in the event of T.L.O. insurance, given that, in that situation, no indemnity would have been agreed for the damage. The compensation will therefore always be calculated on the basis of the general average rules.

Furthermore, the rules contained in the general part of the Plan on accessory expenses shall apply. The insurer is liable for interest on the claim according to §5-4, and for costs in connection with the claims settlement, cf. § 4-5. Furthermore, the insurer is liable for costs of providing security and costs of litigation, cf. § 4-3 and § 4-4, where the providing of security or the litigation is connected with events that would otherwise involve liability, thus primarily in connection with measures to avert a total loss. Costs in excess of the sum insured are recoverable in accordance with § 4-19.

#### § 10-6. Insurance “against total loss and general average contribution only”

This paragraph is identical to § 153 of the 1964 Plan.

As mentioned in the preceding paragraph, it is necessary under a “pure” total-loss insurance to split up each general average statement and only cover the contribution to the extent that it concerns sacrifices that have been made in connection with a relevant risk of a total loss. Similarly, it is necessary in connection with an “assumed general average” to verify whether there was a risk of a total loss when the measures to avert or minimise the loss were taken. This complicates the claims settlements, and the assessment of the degree of risk may cause considerable uncertainty.

These difficulties are avoided by insurance in accordance with § 10-6, under which the insurer shall indemnify general average contributions and costs incurred by measures to avert or minimise the loss in the event of an assumed general average to the extent that he would have done so if the

insurance had been effected “on full conditions”. The insurer is therefore liable for every general average contribution apportioned to the ship and every sacrifice made while the ship is in ballast, regardless of whether or not the measures were aimed at averting a total loss.

Otherwise, reference is made to the comments on the preceding paragraph.

#### § 10-7. Insurance “against total loss, general average contribution and collision liability only”

This paragraph is identical to § 154 of the 1964 Plan.

Hull insurance under this paragraph covers the same as insurance in accordance with the preceding paragraph, plus collision liability to third parties, cf. chapter 13 of the Plan. The insurer’s liability for loss in connection with measures to avert or minimise the loss, litigation costs, etc. will then be extended correspondingly, given that he will be liable for losses resulting from measures taken to avert a collision, which would have resulted in liability to a third party, or to limit the liability for damages.

#### § 10-8. Insurance “on stranding terms”

This paragraph is identical to § 155 of the 1964 Plan.

This provision affords the same cover as § 10-7, plus a limited cover against damage and against loss in connection with measures taken to avert such damage. The provision will hardly be of any great significance in connection with ordinary hull insurance, but barges and dories are to a considerable extent insured on stranding terms.

Letter (d) defines “stranding”. In the event of grounding, it is a condition that the ship is unable to re-float by its own means. If the ship has capsized, it must have heeled over to such a degree that the masts are in the water. Thus, the insurance does not cover damage to the ship if it has heeled over but is supported by a quay, a barge, or the like. However, the costs involved in righting the ship will be recoverable in such a case, provided that it was an established fact that the stability limit was exceeded and that the ship would have overturned completely if there had been nothing to support it. In case of fire or explosion, damage in the engine room is excluded from cover, provided that the fire or the explosion occurred there. Such damage is relatively frequent and very comprehensive, and the exclusion is necessary in order to retain insurance on stranding terms as an inexpensive insurance.

#### § 10-9. Duration of voyage insurance

This paragraph is identical to § 156 of the 1964 Plan

Hull insurance is normally effected for a specific period of time, and the provision will consequently not be of any great practical significance.

When deciding whether discharging “is proceeding with reasonable speed”, the issue of whether the assured has due grounds for withholding the cargo on board the ship, e.g. for the purpose of enforcing payment of the freight, must also be taken into consideration. As long as it can be regarded as a commercially justifiable part of the voyage to have the cargo on board, the voyage insurance will remain in effect. However, the assured may not let the ship assume the function of becoming a semi-permanent warehouse.

#### § 10-10. Extension of the insurance

Subparagraph 1 was amended in the 2007 version in accordance with the amendments to the rules regarding seaworthiness and safety regulations in § 3-22. The paragraph otherwise corresponds to earlier versions of the 1996 Plan.

Under subparagraph 1 in the earlier versions, the insurance was to be extended if the ship upon expiry of the insurance period had damage for which the insurer was liable and which affected its seaworthiness. In the 2007 version the rules on seaworthiness were removed. In accordance with the new Norwegian Ship Safety Act, use is now made instead of the wording “technical and operational safety”, cf. in that respect § 3-23, subparagraph 1. The wording “to make the ship seaworthy” in subparagraph 1 has therefore been replaced by “to make the ship compliant with technical and operational safety requirements”. The basis for the rule is to avoid difficult questions of causation if new casualties occur before the situation has again become “normalised”. Moreover, salvage, removal, repairs, etc. as part of dealing with the earlier casualty entail an additional risk which should be borne entirely by the insurer who is liable for the casualties.

The wording “upon expiry of the insurance period” must be interpreted here as meaning expiry of the agreed insurance period regardless of whether an insurance period of one year or more than one year has been agreed upon, compare § 1-5, subparagraph 4, which explicitly mentions the



provisions under which a multi-year policy shall be divided up into one-year periods. The present provision is not included.

The extension of the insurance is automatic; no action is required by the parties. It remains in effect until the ship has arrived at the first place where permanent repairs may be carried out and the damage has been repaired, if the repairs are carried out at that location. If the ship is instead moved to a different port for repairs, the question of insurance has to be clarified before the removal.

The extension of the insurance is subject to the condition that the ship is in actual fact repaired. If it is laid up with unrepaired damage, both parties shall have the right to cancel the insurance contract as soon as it is established that the conditions for applying subparagraph 1 of this provision have not been met.

Under subparagraph 2, first sentence, the time of commencement of a new insurance shall be adjusted in accordance with the extension of the old insurance. Pursuant to § 1-5, the old insurance will remain in effect until 2400 hours on the day the repairs are completed, and the new insurance will consequently take effect as of the same time. If, however, the ship leaves the port of repairs earlier in the day, it would be reasonable to let the new insurance take effect as of departure, cf. subparagraph 2, second sentence.

The question of an extension of the insurance also becomes relevant where the ship, on expiry of the insurance period, is reported missing or abandoned, and is later recovered without the conditions for claiming for a total loss being met. This question is regulated in § 11-8.

Under § 6-4, the insurer may demand an additional premium when the insurance is extended under this paragraph.

§ 10-11. Liability of the insurer if the ship is salvaged by the assured

This paragraph corresponds to § 159 of the 1964 Plan.

Under section 442, subsection 2, of the Norwegian Maritime Code, a salvage award may be claimed even if the salvaging ship and the salvaged ship belong to the same owner. The rule allows the crew to claim their share of the salvage award under section 451, subsection 2, of the Norwegian Maritime Code, but it probably also allows the owner to claim a salvage award from his insurer. There is good reason to state the rule explicitly in the Plan, however.

§ 159 of the 1964 Plan concerned salvage or “assistance”. The assistance concept, however, has been deleted from the Norwegian Maritime Code, and has therefore also been deleted from the Plan.

The provision applies, according to its wording, only when the salvage operation is performed by a vessel. If, however, the salvage operation is carried out in a different way, e.g. by the use of a crane on shore, and a third party would have been entitled to a salvage award in such a situation, it would be logical to apply § 10-11 by analogy.

§ 10-12. Reduction of liability in consequence of an interest insurance

This paragraph corresponds to § 160 of the 1964 Plan, PIC § 5.28 and CEFOR I.13,

Under § 160 of the 1964 Plan, the hull insurer's liability was reduced if the assured received compensation under a hull-interest insurance in an amount that exceeded 25% of the assessed hull value. For freight-interest insurance, there was a similar provision in the Special Conditions, cf. PIC § 5.28 and CEFOR I.13. The limitation was applied in order to prevent a major part of the hull cover from being shifted to the separate total loss insurances. This might undermine the premium foundation of the ordinary hull insurance, at the same time as an excessive total sum insured might also conceivably create a temptation for the assured to cause an event insured against. Finally, the limitation had a certain connection with the condemnation rules, because the condemnation limit is basically decided by the proportion of the costs of repairs to the ordinary assessed hull value, at the same time as condemnation under the hull insurance triggers the interest insurance. Thus, in the event of a low ordinary assessed hull value and high interest insurance, the assured would apparently be able to obtain a high aggregate total loss cover in case of relatively modest damage to the ship. Admittedly, the latter case is countered by the fact that the condemnation rule establishes that if the market value is higher than the assessed value, it shall be incorporated into the condemnation formula instead of the assessed value. Moreover, a low assessed hull value and high interest insurance may also be unfortunate, for other reasons, for the owner because there is a risk that the assessed hull value is not sufficient to cover partial damage to the ship. Thus, if the ship's market value is 100, the assessed hull value 50 and the

interest insurances 50, the owner will be without cover for partial damage between 51 and the condemnation limit of 80.

In this light, the Plan affirms the rule from the 1964 Plan and the Special Conditions prohibiting interest insurance for more than a certain percentage of the assessed hull value. Neither the hull interest insurance nor the freight interest insurance may be worded so that the assured under the relevant insurance may receive an indemnity which represents more than 25% of the assessed value in connection with the hull insurance against the same peril.

Elimination of the excess portion of the total loss interest insurance would be sufficient to enforce the prohibition. Such a rule has been laid down in § 14-4, subparagraph 2. It is, however, conceivable that total loss interest insurance is not effected on Plan Conditions and that it is consequently not subject to this reduction rule. In such situations the hull insurer needs a reaction against violations of the prohibition, viz. a right to reduce his liability. Such a rule is contained in §10-12.

## Chapter 11 - Total loss

### § 11-1. Total loss

This paragraph is identical to § 161 of the 1964 Plan. **The commentary was amended in the 2007 version in connection with the amendment to § 12-2.**

Subparagraph 1 states when the assured may claim compensation for a total loss. The provision covers both actual loss and so-called "unrepairability". There will be a gradual transition from an absolute loss (the ship has foundered in such deep waters that it cannot be reached) to cases where it is a question of economic assessment whether or not to undertake salvage and repair work. Such assessment will depend on the extent to which the probable salvage and repair costs will exceed the assessed hull value. If the assessed hull value is high, it is under special conditions of the market conceivable that it will pay for the insurer to build a new ship around the remains of the old one. However, under subparagraph 1, the strictly economic evaluation of the repair question shall also be supplemented by a technical assessment. That the ship "cannot be repaired" implies that it must be considered destroyed as a ship, making repairs seem meaningless from a technical point of view. "Repairs" in this connection mean repairs which meet the conditions under § 12-1, i.e. repairs which will restore the ship to the state it was in prior to the damage, and a state which is expected to last. The question whether it is technically possible to repair the ship is an ordinary question of evidence, which will ultimately have to be submitted to the courts.

Subparagraph 2 establishes that no deductions shall be made in the total-loss compensation for unrepaired damage sustained by the ship in connection with an earlier casualty. If a total loss has occurred, the assured may under § 4-1 demand payment of the sum insured, however, not in excess of the insurable value. Where this has been defined as "the full value of the interest at the inception of the insurance", cf. § 2-2, it will not be affected by the damage which the ship sustains during the insurance period, and the assured will consequently be entitled to the full assessed hull value, regardless of any unrepaired damage which the ship may have sustained in connection with earlier casualties. However, the assured may not in addition claim separate compensation for such damage; this would give him an unjustified gain at the insurer's expense. **This has now been explicitly laid down in § 12-2, subparagraph 3, in connection with the generalisation of the right to compensation.** According to the traditional principle that "a total loss absorbs partial damage", an insurer who has paid compensation for the total loss will not have recourse against the insurer who would have been liable for the repair costs if the repairs had been carried out, cf. subparagraph 2 hereof, and § 12-1, subparagraph 2, which state that the insurer's liability for repair costs will normally not arise until the repairs have been carried out.

The principle that "a total loss absorbs partial damage" may appear to confer an unanticipated advantage on the former insurer who was liable for the unrepaired damage, or possibly on the assured if the damage was not covered by insurance. However, in the relationship between the insurers it will, in principle, even out in the long term. There are also strong practical considerations in favour of this system: it will often be difficult to establish the exact extent of damage after the ship is lost. A rule to the effect that unrepaired damage should be referred back to an earlier insurer might therefore easily give rise to a dispute between the insurers.

If the assured has claims for damages against third parties in connection with the unrepaired damage, they accrue to the insurer who pays the total loss claim.

### § 11-2. Salvage attempts

This paragraph is identical to § 163 of the 1964 Plan. **The commentary was adjusted in the 2007 version in accordance with the amendments to § 3-22 and § 12-2.**

The paragraph constitutes a necessary supplement to the preceding paragraph and regulates the situation where the ship is lost under such circumstances that it is uncertain whether it can be salvaged. The time-limit within which the salvage operation must be carried out is basically six months, cf. subparagraph 2, first sentence. The time-limit is extended to a maximum of 12 months if the salvage operation is delayed due to difficult ice conditions, cf. second sentence.

### § 11-3. Condemnation

This paragraph is identical to § 163 of the 1964 Plan.

Subparagraph 1 sets out the principle that the total-loss cover also extends to condemnation of the ship. The rest of the provision contains the main rules on the material terms for condemnation.

According to subparagraph 2, first sentence, the conditions for condemnation shall be deemed met and the assured entitled to claim for a total loss if the cost of repairing the ship will amount to at least 80% of the insurable value. If the ship is undervalued so that its real value in repaired condition is higher than the assessed insurable value, the de facto value shall be taken for a basis. Using the higher of the two values means that it will not be easier for the assured to obtain a condemnation by using a particularly low assessed insurable value, and that the assured may not obtain condemnation above a low market value and subsequently be paid the higher assessed insurable value.

In accordance with the 1964 Plan, the wreck value shall not be brought into the condemnation formula, even though it might be said that this may lead to results which do not make good economic sense, cf. Brækhus/Rein: Håndbok i kaskoforsikring (Handbook of Hull Insurance), p. 434. However, an amendment on this point would entail that Norwegian condemnation conditions differed from international marine insurance practice.

The rules in subparagraph 2, second sentence, regulate the not very frequent situation where several hull insurances have been taken out against the same peril with different assessed insurable values, e.g. by the shipowner after an upturn in the economy increasing the assessed insurable value of the ship and taking out an additional insurance for the difference between the old and the new assessed insurable values. In that event, the higher of the two values shall be taken for a basis. The situation where there are different assessed insurable values in connection with the insurances against marine perils and war perils respectively is regulated in § 11-4, subparagraph 2.

When a ship is declared a constructive total loss, not only the hull insurance but also the hull-interest insurances fall due for payment. These interest insurances are in effect hull insurances against total loss which are effected in addition to the regular hull insurance. In accordance with the solution under the 1964 Plan, however, only the assessed hull value is to be taken into consideration when the question of condemnation is decided.

According to subparagraph 3, it is the time when the assured makes his request for a condemnation that is decisive for the determination of the value if the alternative "value of the ship in repaired condition" is used. However, the determination of value must be based on an "objective" market value of the relevant type of ship. Consequently the question whether the casualty may have resulted in a special reduction in value of the ship concerned in the form of "bad reputation", or the like, shall not be taken into consideration.

Subparagraph 4 gives a further definition of "casualty damage" and "costs of repairs". As regards what casualty damage shall be included in the condemnation formula, the question is whether the evaluation shall only take into account the damage which was caused by the latest casualty, or whether earlier unrepaired casualty damage to the ship should also be taken into account. By taking into consideration all casualty damage, the decision would be based on a realistic assessment of the possibility of restoring the ship to a seaworthy condition on a sound economic basis, and the assured and his insurers would not be forced to make unprofitable investments in a ship which should in reality have been declared a constructive total loss. At the same time, it did not seem like a good idea to take into consideration all old dents, etc., which the ship had sustained through a long life. Consequently, as under the 1964 Plan, a three-year time-limit has been set, so that casualty damage which has not been reported to the relevant insurer and been surveyed by him in the course of the three years preceding the casualty which caused the condemnation request shall not be taken into consideration. The three-year time-limit shall be calculated from the time of the actual casualty. The requirement that the damage must be surveyed does not apply to a situation where the owner has made a survey possible, but where the insurer chooses not to undertake such survey.

In exceptional cases, it is conceivable that compensation has been paid for unrepaired damage. However, the fact that a former owner has received compensation for such damage pursuant to § 12-2, subparagraph 1, will not exclude the damage from being taken into account when the question of condemnation is being decided. *If, on the other hand, the assured has received such compensation earlier, no importance can be attached to the damage when deciding the question of whether the ship qualifies for condemnation.*

The term "casualty damage" also includes damage which is not recoverable under the insurance because it does not exceed the deductible or because of other forms of self-insurance. However, only damage which according to its nature is covered by the insurance shall be taken into account, and not damage consisting of rust or corrosion. The assured shall not be able to obtain a constructive total loss by ignoring the upkeep of the ship. However, if the damage is of such a

nature as to make the insurer liable under § 12-3 or § 12-4, this will also have to be taken into consideration when determining the question of condemnation.

As will appear from § 11-1, subparagraph 2, the principle that “total loss absorbs partial damage” entails that the insurer who pays a total-loss claim does not have recourse to the insurer or insurers who should have indemnified the unrepaired damage which the ship had when it was lost. As under the 1964 Plan, this principle also applies in the event of a condemnation of a ship, given that a different solution might have resulted in very complicated settlements. Consequently, the assessed hull value shall be paid in its entirety by the insurer who is liable for the casualty giving rise to the condemnation without any deductions for earlier, unrepaired damage.

The condemnation is based on a discretionary assessment of the future expenses that will be incurred in connection with complete repairs of the ship. The basis of the assessment is the ship in the state and at the place where it is at the moment when the assured makes his request for a condemnation. Thus, costs that have already been invested, e.g. in connection with temporary repairs, shall not be taken into consideration, in contrast to all foreseeable future costs. Salvage awards shall not be taken into account, however, cf. below.

Costs of “removal and repairs” comprise, in the first place, all costs for which the insurer would be liable if repairs were carried out. Furthermore, account must be taken of expenses the assured must cover himself in connection with the repairs, e.g. in the form of deductions or deductibles, or because the damage in question is specifically excluded from cover, e.g. in accordance with § 12-5 (b) and (d)-(f). However, costs that do not refer directly to removals, repairs and similar measures, shall not be taken into account. Thus, the assured’s general operating costs concerning the ship during the period of repairs, or expenses in connection with bringing passengers ashore shall not be considered. The calculation of the probable costs shall be based on the prices at the time when the request for a condemnation was made.

The fact that removal costs are included in the calculation means that the decision of the question of condemnation is founded on a more realistic basis than if the damage to the ship were the sole decisive factor, regardless of where the ship was. As regards the question of condemnation, there will, realistically speaking, be a material difference between a damaged ship that is in a port, e.g. Svalbard, and a ship with similar damage in a port with good possibilities of repairs.

If this line of thought were to be followed through, the salvage award that would foreseeably accrue before the ship could be moved to a repair yard would also have to be taken into account. However, it will always be very difficult to estimate the salvage award in advance, and this would introduce a serious element of uncertainty in the condemnation formula. In addition, it is difficult to get the damage surveyed properly as long as the ship has not been salvaged. Thus, under the Plan, a salvage award that will accrue before a removal and repairs shall not be taken into consideration. The distinction between “salvage award” and such expenses as shall be included, especially removal costs, must be based on general maritime law criteria. The decisive factor must be the situation which the ship was in when the salvor was given the assignment, and not whether the remuneration agreed to on a “no cure - no pay basis” was determined in advance or shall be paid according to accounts rendered.

Even if the salvage award is not included in the condemnation formula, the insurer must in practice also take the salvage award into consideration if the assured claims for a total loss (or a condemnation, as the case may be) before the ship has been salvaged. If the insurer wants to salvage the ship in such a situation, he must proceed according to § 11-2. The significance of the condemnation request being made while the ship is still at the place of stranding lies in the fact that this is the point in time that will be decisive for the assessment of the costs and the market value of the ship.

According to § 12-1, subparagraph 4, the insurer has the right, subject to certain conditions, to refuse to cover in full the costs of repairs that restore a ship to its former condition. In that case, he must pay special compensation for the depreciation in value caused by the fact that the ship will not be fully repaired. However, according to subparagraph 4, last sentence, the decision of the condemnation question shall not take into account the compensation for the depreciation in value which the insurer would have had to pay if he had been entitled to invoke § 12-3, subparagraph 4. This rule is necessary to avoid a situation where a compensation for, e.g. damaged works of art or decorations based on a discretionary assessment would constitute the decisive amount that brings the costs of repairs above the condemnation limit. Nor would it be very reasonable if damage which does not affect the **ship's ability to comply with technical and operational safety requirements** and therefore does not need to be repaired in the first place were to be taken into account in the decision whether the ship, on a realistic basis and from an economic point of view, is “worth repairing”.

The question whether the conditions for condemnation are met is a question of fact that must be decided according to ordinary rules of evidence. The Plan does not authorise any specific procedure for deciding this question. If it is not possible to solve the question by means of negotiations, it will have to be submitted to the courts, cf. also § 5-5, subparagraph 3. Nor does the Plan provide any guidance in terms of special rules of procedure relating to the survey of damage or the invitation of tenders, as is the case in the event of repairs of damage, cf. § 12-10 and § 12-11. In ND 1992.172 *Gulating Berglift* it was held that these rules could not be applied analogously for deciding the question of condemnation.

#### § 11-4. Condemnation in the event of a combination of perils

This paragraph is identical to § 164 of the 1964 Plan.

The provision regulates the position where the casualty which gives rise to the condemnation is partly due to perils not covered by the insurance, cf. § 2-13, § 2-14 and § 2-16. The situation may be that the assured has violated safety regulations or has sent the ship out to sea in an unseaworthy condition, and that the insurer is therefore only partly liable for the casualty, or that the casualty is attributable to a combination of marine and war perils under such circumstances that the rule of equal distribution contained in § 2-14, second sentence, or § 2-16, shall apply. In such cases, the insurer is only liable for a proportionate share of the total-loss claim. If liability is to be divided between the insurer against war perils and the insurer against marine perils, each of them shall pay half of the assessed value under the insurance in question.

In practice, the insurance against war perils is often effected with a higher assessed value than the ordinary hull insurance. With a view to the combination-of-perils cases, subparagraph 2 provides that the valuation applicable to the insurance against marine perils shall be taken for a basis when deciding the question of condemnation.

#### § 11-5. Request for condemnation

This paragraph is identical to § 165 of the 1964 Plan.

Subparagraph 1 regulates the conditions for the request for condemnation. The provision must be interpreted antithetically: It is only the assured who can request condemnation. Hence, the insurer may not take advantage of an upward turn in the market to speculate by paying out the sum insured and taking over a damaged ship for the purpose of repairs and sale.

On the other hand, the insurer must be protected against the assured demanding that the ship be repaired, despite the fact that it is in reality fit for condemnation. Under § 12-9, the insurer's liability for repair costs in such a situation is limited to the amount he would have had to pay if the ship had been declared a constructive total loss, in other words, the sum insured less the value of the wreck.

If the assured wants a condemnation, he must make a request without undue delay after the ship has been salvaged and he has had an opportunity to inspect the damage, cf. first sentence. He can not keep the question open and see how the market develops. If he does not make a decision, he will only be entitled to indemnity under the rules relating to damage, cf. inter alia the insurer's right to limit his liability for the costs of repairs under § 12-9. However, this does not apply if the ship is in actual fact so severely damaged that it must be regarded as a total loss, cf. the comments on § 11-1, subparagraph 1. In that event, the assured's right to claim for a total loss is not subject to any time-limit (apart from the standard limitation rules and rules on duty of notification).

On the other hand, the request for condemnation is not an irrevocable offer to the insurer which he may invoke. Thus, according to subparagraph 1, second sentence, the request may be withdrawn as long as it has not been accepted by the insurer. However, if a final agreement for a condemnation has been concluded, it will be binding on both parties.

Until the ship has been salvaged and the assured has had an opportunity to inspect the damage, it will often be uncertain whether a condemnation will be requested. It would be most unfortunate if the assured during this period of time were to take a passive approach to the salvage operation out of fear that an active approach would be interpreted as a waiver of his right to demand a condemnation. Subparagraph 2 therefore establishes that salvage or failure to salvage the ship by one of the parties shall not be regarded as an approval or a waiver of the right to condemnation.

#### § 11-6. Removal of the ship

This paragraph is identical to § 166 of the 1964 Plan.

When the assured makes a request for condemnation, it is important that the insurer be given the opportunity to conduct an examination of the ship in a proper manner, e.g. in dock. The insurer therefore has an unconditional right to demand that the ship be moved to wherever he wants in order to have a proper survey conducted, cf. subparagraph 1, first sentence. According to the second sentence, this demand must be made without undue delay; the insurer should not be able to procrastinate later on, during the negotiations with the assured, by demanding a removal for a further survey. Consequently, the insurer must inspect the ship as soon as it has been salvaged and decide what type of survey he wants carried out.

A removal results in costs and may also entail a risk of loss. Such liability shall be borne by the insurer who demands the removal, cf. subparagraph 2. A removal for the purpose of a survey is undertaken as a defensive move by an insurer who has been presented with a claim for a total loss. If the ship is condemned, despite the new survey, the insurer will bear the risk of all losses that may arise after the casualty, cf. § 11-9 and the commentary on that provision. Under § 43 of the 1964 Plan, an insurer who did not wish to bear the risk of removal could limit his liability for losses incurred during such removal. This provision has been deleted, and the claims leader has now been authorised to decide the question of removal, cf. § 9-6. The co-insurers are therefore jointly liable for damage that arises during a removal decided by the claims leader. The claims leader's decision to remove a ship will also be binding on the interest insurers, cf. § 14-3, subparagraph 4. If the other insurers wish to limit their liability for such damage, they may have to exercise the right in § 4-21 to avoid further liability by paying the sum insured. If this is done, the insurer who causes the removal shall not only bear the costs, but also the risk of any loss that arises during or as a result of the removal, and which is not covered by other insurers, cf. subparagraph 2. The insurer who demands a removal of the ship will thus bear the risk of losses which should otherwise have been covered by other insurers (e.g. war damage or liability for damages to third parties). In relation to the assured, he also bears the risk of losses which would normally have been uninsured. In practice this will mean that the insurer must take out the necessary supplementary insurances during the removal. If the risk is of such a nature that it is uninsurable, this is in itself an indication that the removal should not be carried out.

The costs incurred during the removal and the survey are incurred after the request for a condemnation is made and must be taken into account when deciding the condemnation question, cf. § 11-3, subparagraph 4. However, any liability to third parties that may arise during the removal shall not be taken into consideration. If the ship is damaged, such damage shall be taken into account if the assured submits a new formal request for condemnation after the damage has occurred. It will then be the repair prices as that time which will be decisive for the assessment of the ship's total damage, cf. § 11-3, subparagraph 4, second sentence.

#### § 11-7. Missing or abandoned ship

This paragraph corresponds to § 168 and § 170 of the 1964 Plan.

The 1964 Plan contained rules on missing or abandoned ships in § 168, on seizure, requisition and piracy in § 169 and joint rules for the two groups of cases in § 170. In the new Plan, rules on seizure, etc. have been moved to the chapter on war-risk insurance, cf. § 15-11. § 168 and § 170 of the 1964 Plan have been combined into this paragraph.

According to subparagraph 1, the assured may claim for a total loss if the ship is reported missing and three months have elapsed from the date on which the ship was, at the latest, expected to arrive at a port. If there is reason to believe that the ship may be icebound, the time-limit is 12 months. According to subparagraph 2, the same applies if the ship has been abandoned by the crew at sea, but the point of departure for the time-limit is slightly different. In view of current means of communication at sea, the provisions will be of little practical significance, given that the assured will, as a rule, have the right to demand payment of the total-loss claim at an earlier point in time under subparagraph 3. It is nevertheless considered expedient to retain subparagraphs 1 and 2 as a point of departure.

The rule in subparagraph 3 corresponds to § 170, subparagraph 1, of the 1964 Plan and may be of considerable practical significance, e.g. if the ship is reported missing and survivors or wreckage from the ship are found before expiry of the time-limit.

If the ship or the wreck causes striking damage during the period before a total-loss claim has been paid according to § 11-7, the hull insurer must be liable under chapter 13 in the ordinary manner, provided that the damage is a result of a peril that struck during the insurance period, cf. ND 1990.8 S. *dispasch vinca gorthon*. If the wreck causes damage after the total-loss claim has been paid, however, the hull insurer must be exempt from liability, unless he has taken over the right to the wreck according to § 5-19.

Under subparagraphs 1 and 2, the ship must be "reported missing" or "abandoned ... without its subsequent fate being known" at the time when the request for a total-loss claim is presented. If the ship has been recovered or released, the assured obviously can not submit a claim for total-loss compensation. However, subparagraph 4, which is taken from § 170, subparagraph 2, of the 1964 Plan regulates the situation where the conditions for a total-loss claim are met when the claim is presented, but where the ship is subsequently recovered or released before the compensation has been paid. In that event, the insurer can not deny the request on the grounds that the ship has been recovered or released. The reason the assured submits the request will often be that he is making other arrangements in order to acquire a new ship. He should therefore, in the light of the request, have acquired an irrevocable right to total-loss compensation.

If it is an established fact that the assured will not get the ship back before expiry of the time-limits under subparagraphs 1 and 2, the limitation period in § 5-24 will take effect from 1 January of the year after the fact has become clear and the conditions for the payment of total-loss compensation under subparagraphs 3 and 4 have been met.

#### § 11-8. Extension of the insurance when the ship is missing or abandoned

This paragraph corresponds to § 171 of the 1964 Plan.

Subparagraph 1 states that the insurance will be extended if the ship, on expiry of the insurance period, is missing or abandoned and is subsequently recovered without the assured being entitled to claim for a total loss. The provision is based on practical considerations: if, for the expiring insurance year, the insurer was not made liable for the damage which the ship turns out to have when it is again recovered, it would be necessary to establish the exact time when this damage occurred, which may be difficult or impossible. Furthermore, the assured will rarely have taken out any new insurances in such a case. The insurance is extended according to rules similar to those that apply when the ship has sustained serious damage, cf. § 10-10, and the extension applies to all the ship's insurances under the Plan.

The wording "upon expiry of the insurance period" must be interpreted here as meaning expiry of the agreed insurance period regardless of whether an insurance period of one year or more than one year has been agreed upon, compare § 1-5, subparagraph 4, which explicitly mentions the provisions under which a multi-year policy shall be divided up into one-year periods. The present provision is not included.

When a time-limit under § 11-7 has expired, the assured obtains a right, but not an obligation, to claim for a total loss. Under the Plan he may keep the question open until he recovers the ship or it is later established that the ship is definitively lost. Under § 6-4, subparagraph 2, he shall not pay premium for the period of time from expiry of the agreed insurance period until he regains control of the ship. Subparagraph 2, however, establishes that the old insurance shall not be extended beyond two years from expiry of the insurance period. If the assured recovers the ship at a later point in time, he will not be entitled to claim compensation for damage to it without proving that it occurred less than two years after expiry of the original insurance. Moreover, he must take out a new insurance in order to be covered while the ship is brought into port and the damage repaired.

#### § 11-9. Liability of the insurer during the period of clarification

This paragraph corresponds to § 172 of the 1964 Plan.

If the ship has sustained extensive damage as a result of a casualty and the assured claims for a total loss, there will be a period of uncertainty when it is not known whether or not the condemnation conditions under § 11-3 are met. The same applies when the ship is stranded and the insurer wishes to use the time-limit to which he is entitled under § 11-2, subparagraph 2, to attempt to salvage it, or when it has been abandoned or reported missing but the time-limits under § 11-7 have not yet expired. If the end result is that the ship is not considered a total loss - its damage is not sufficiently extensive, or it is recovered before expiry of the stipulated time-limits or before the assured has lodged a claim for a total loss - no problems will arise. In that event, all insurances will have been continuously in effect throughout the period of uncertainty (see § 11-8 regarding an extension of the insurance when the period of uncertainty extends beyond the agreed insurance period).

If, however, the end result is that a total-loss claim shall be paid, the insurer who is liable for the total loss shall take over the wreck in view of the payment of the claim, cf. § 5-19. If there has been a further depreciation in the value of the wreck as a result of new events during the period of uncertainty, the risk shall be borne by the insurer concerned. Under § 5-22, he is also barred from exercising any rights the assured might have under an insurance contract as regards such subsequent events. Thus, the insurer who is liable for the total loss will in actual fact bear the risk



in respect of everything that happens to the wreck as from and including time of the casualty which gave rise to the total loss, whereas the other insurers, by contrast, will not bear any risk as of that same moment. This is explicitly set out in subparagraph 1. Under § 6-3, subparagraph 2, the other insurers are also barred from claiming premiums for the period during which they did not bear any risk.

However, during the period of uncertainty there is a risk, not only of a further depreciation in the value of the ship, but also of the assured incurring liability for damages, which is covered by the insurance. Such liability may, depending on its nature, fall outside the scope of cover of the insurer who is liable for the total loss. It is, for example, conceivable that the ship has sustained extensive bombing damage that later proves to have made the ship condemnable. During the manoeuvring of the wreck to or in a port, the master makes a clear nautical error, which imposes a collision liability on the assured. A liability of this nature must be covered by the insurer who is liable for the total loss, cf. subparagraph 2. He must be regarded as having assumed the risk for the wreck in every respect after the casualty which gave rise to the total loss. The justification of the rule may be that there will often be a certain connection between the damage to the ship and the event entailing liability. In this way the difficult questions of causation which might otherwise arise are avoided.

The fact that the insurance period has expired when it is established that a total-loss claim may be lodged is irrelevant for the insurer's cover of collision liability. However, it has been established that liability shall not remain in effect for more than two years from expiry of the original period insurance, cf. § 11-8, subparagraph 2. After that point, the assured must arrange for liability cover himself. The insurer can not demand any additional premium for the period for which the liability insurance is extended under this paragraph, cf. § 6-4, subparagraph 1.

## Chapter 12 - Damage

### General

Chapter 12 on damage is essentially based on the provisions of the 1964 Plan with the amendments that have been made in the Special Conditions. However, amendments have been made on three points: in the first place, certain changes have been introduced in the right to compensation, cf. § 12-2 (formerly § 174). In the second place, the rules relating to the cover of maintenance damage and damage resulting from error in design or faulty material (formerly § 175) have been amended and re-edited, cf. § 12-3 and § 12-4. In the third place, the exclusion clause in the former § 176 has been simplified, cf. § 12-5.

§§ 191-193 of the 1964 Plan contained rules relating to new-for-old deductions. These rules are of little practical significance for hull insurance for ocean-going vessels, and have therefore been deleted.

As regards the incorporation of practice in the Plan, reference is made to the introduction to the General Part of the Plan.

### § 12-1. Main rule concerning liability of the insurer

Subparagraph 4, first sentence, was amended in the 2007 version. The paragraph is otherwise identical to earlier versions of the 1996 Plan. Certain adjustments were also made in the commentary as a result of the amendments to § 12-2.

The paragraph contains the substantive main rules concerning the extent of the insurer's liability for repair costs and supersedes ICA section 6-1 to the effect that the assured shall receive full compensation for his economic loss. According to subparagraph 1, the rules shall apply when the ship has sustained damage for which the insurer is liable without the rules relating to total loss "being applicable". For the rules relating to total loss to become applicable, it is required that both the conditions for a total loss are met and that the rules are invoked. If the ship is declared a constructive total loss, but the assured has it repaired, the insurer's liability will therefore in principle be regulated by the rules in this chapter, cf., however, § 12-9, which in this case limits the insurer's liability for the costs of repairs.

That the ship has been "damaged" means first and foremost that it has sustained physical damage. However, pollution of the ship itself is also within the term so that the insurer will cover the costs of removal and cleaning.

The main rule is contained in the statement that the ship shall be "restored to the condition it was in prior to the occurrence of the damage". This means first and foremost that the repairs shall satisfy the classification requirements. Certain qualifications must nevertheless be pointed out. On the one hand, the assured may not demand that the ship's standard after repairs shall satisfy the classification requirements if it did not do so prior to the casualty. On the other hand, the insurer must cover the extra costs caused by the fact that special materials or designs beyond the requirements of the classification society had been used when building the ship, unless the insurer can limit his liability under subparagraph 4, second sentence of the paragraph.

That the ship, as a result of the damage and the repairs, has a lower market value than it had before the damage, e.g. because a buyer is afraid that there may be latent damage, is not in itself decisive if the repairs must be regarded as complete from a technical point of view and are approved by the classification society, see unprinted judgment by the Oslo City Court of 30 January 1996. Accordingly, in such cases, there is no room for the rules in subparagraph 4.

A special question arises if the requirements of the classification society have been made stricter in relation to the requirements in effect when the ship was built or at the time of earlier repairs. If the owner, independently of the casualty, would have had to replace the damaged part at a later point in time, he may not claim compensation for the costs of the increase in standard. However, if transitional rules would not have required him to make a replacement if the casualty had not taken place, he must be entitled to claim compensation for his entire costs. But if the replacement, etc. results in a "special advantage for the assured because the ship is strengthened or the equipment improved", the assured will have to accept a deduction under subparagraph 3, cf. below.

The requirement that the ship be restored to the condition it was in prior to the occurrence of the damage cannot be taken quite literally. The assured must, to a large extent, accept that damaged parts are repaired and not replaced by new ones, even if this entails that the ship will not be restored to exactly the condition it was in before. An example of this is when damage to the

crankshaft is repaired by grinding the crank pin to a size below standard, see also Brækhus/Rein: Håndbok i kaskoforsikring (Handbook of Hull Insurance), p. 458. If the classification society accepts the repairs, the assured will not be entitled to compensation for a new crankshaft, unless he is able to establish that the repairs will result in depreciation in value. Moreover, a new part would often result in an increase in standard, to which the assured is not entitled, cf. subparagraph 3.

The assured must also, to a certain extent, be content with used components when older parts are damaged, e.g. in case of damage to an auxiliary engine. However, he shall have the right to demand that the used component is clearly at least as good as the damaged one, and that the classification society approves the used part. In addition, it must normally be a requirement that the component is newly overhauled.

Regardless of whether the repairs are carried out with used or new parts, it is a prerequisite that the part is obtainable within a reasonable period of time. The question as to what is "a reasonable period of time" must be decided on a case-to-case basis depending on the type of ship and the place of repairs. If the part cannot be obtained within a reasonable period of time, this means that there is a situation of "unrepairability", and the insurer must cover new and/or more expensive parts to the extent that this is necessary. If the waiting time is not so long as to entail unrepairability, the use of new parts in order to save time may have to be regarded as a cost in order to expedite the repairs according to §12-8.

In situations where casualty repairs presuppose the purchase of special tools and such tools are kept on board, it has been customary in practice to cover 50% of the costs of the tools if such tools could not ordinarily be expected to be found on board. This practice should be maintained where new parts presuppose the purchase of new tools, or if the repairs require special tools that cannot be expected to be on board. On the other hand, the costs of tools which, according to good seamanship, should have been on board before the casualty should not be indemnified. The same must apply to the rental of such tools.

Decisive for the insurer's liability are repair costs that have in actual fact been incurred, unless one of the special limitation rules applies. An advance approximate estimate under § 12-10, subparagraph 3, will only affect the insurer's liability if the repairs are not carried out and cannot be used to limit the insurer's liability for the costs of repairs.

Foreign insurance conditions and YAR limit the liability to "reasonable costs of repairs". Because of the wide international distribution of the Plan, the issue of whether a corresponding limitation should be incorporated in the Plan text was considered, but it was decided that this was not a very good idea. In the first place, discussions might arise concerning the interpretation of "reasonable costs of repairs", in particular in relation to the identical formulation in the English conditions. It has been assumed that those conditions may, in certain cases, conceivably provide somewhat more extensive cover than the 1964 Plan, and it was not considered expedient to introduce a corresponding extension of the cover in the Plan. In the second place, such limitation may have an unreasonably adverse effect for the assured. If he has no option but to have the ship repaired at a repair yard which enjoys a monopoly at the location concerned, the invoice may, from an objective point of view, be unreasonably high in relation to the work carried out. The insurer should nevertheless cover the full cost of the repairs in such cases. The insurer must be entitled to refuse to accept the invoice to a certain extent, however, e.g. if the yard has charged more for the recoverable casualty work than for maintenance work, or if the calculation of prices is in conflict with public price regulations in the country concerned. If in the latter case the assured does not succeed in having the invoice reduced through negotiations or litigation, the insurer must cover it in full, provided, however, that the assured's conduct has been loyal in relation to the insurer. Generally accepted business standards suggest that the discussion concerning the amount of the cost of repairs be clarified with the insurer in advance by having the insurer's surveyor participate in the negotiations with the repair yard and stating his opinion. If the assured negotiates and accepts the invoices for the recoverable repairs without inviting the surveyor to the negotiations, he has the burden of proving that the repairs were carried out in the most reasonable way possible. If the insurer is otherwise able to document that the owner has not made any effort to obtain the least expensive repairs possible, or has in some other way been disloyal to the insurer, it follows from general principles of contract law that the insurer will not have to pay the additional costs. Depending on the circumstances, the insurer will in such cases also be able to invoke the rules relating to fraud during the claims settlement.

The insurer's liability covers not just the actual invoice from the repair yard, but also other expenses necessary to have the repairs carried out. These are expenses particularly associated with the repairs in question, as well as accessory expenses applicable to any and all repairs which

must be apportioned as common expenses pursuant to § 12-14 if non-recoverable work is carried out at the same time. According to general practice, the insurer is therefore liable for the bunkers required for testing the engines, costs of a trial run, oil used for “flushing”, and the crew’s overtime work in connection with their direct participation in the recoverable repairs.

Another category of costs necessary in order to carry out the repairs to the ship is the cleaning of tanks and, possibly, the removal and destruction of oil residue from the tanks. Costs in connection with the removal and destruction of contaminated bunkers, lubricating oil, etc. must also be covered, even though practice has here gone in the opposite direction. Removal and possible destruction of oil that must be regarded as part of the cargo are not covered, however, cf. § 12-5 (b). Expenses of this nature are covered by the P&I insurer.

Also gas-freeing of gas tankers sailing in ballast which have retained a small quantity of gas in the tanks in order to cool them down must be regarded as necessary accessory expenses. In practice, it has been alleged that gas-freeing represents a loss of cargo and therefore falls outside the scope of the hull insurer’s liability. However, the correct approach must be to see this as a loss of a cooling agent. Given that the rule of the Plan is that the ship shall be restored to the same condition as it was in prior to the casualty, the missing cooling agent must be replaced. The same applies to additional expenses for cooling down the tanks after the repairs. The loss of gas carried as a cargo is, however, not covered.

However, as regards a number of the accessory expenses, the insurer’s liability is regulated by special provisions, cf. § 12-5 (a)-(c) and § 12-13.

Another category of expenses that must be covered in addition to the actual repair invoice are expenses in connection with foreseeable consequences of docking and repairs, e.g. the removal, discarding and destruction of minor oil spills inside the dock. However, oil spills outside the dock must fall outside the hull cover. If the oil spill is of such an extent that it penetrates beyond the dock, it will normally be due to an accident or a misjudgement during the docking, which the P&I insurance must cover.

In the event of a risk of oil spill, the assured may receive an order from the port authorities to carry out temporary repairs of the ship. If the pollution risk is acute and immediate, the costs of such repairs must be covered by the P&I insurer as costs of measures to avert or minimise loss. In practice, however, there are examples of port authorities having demanded temporary repairs also in other cases, e.g. in connection with underwater welding of cracks out of fear of oil spill. If such temporary repairs are a condition for letting the ship into the port of repairs, it must be regarded as part of the costs of repairs under the hull insurance.

A difficult question is to the extent to which the insurer must cover expenses that must be regarded as a substitute for another loss which according to its nature had to be covered under the hull insurance, i.e. so-called “substituted expenses”. A starting proposition under the 1964 Plan was that this type of expense was not covered, unless there was a special authority, cf. also Brækhus/Rein: Håndbok i kaskoforsikring (Handbook of Hull Insurance), p. 417. During the revision of the Plan, extended cover of such expenses was considered, but rejected. The content of the term “substituted expenses” is difficult to establish and, if basic cover of such expenses were allowed, the door would be opened to a discussion of a whole series of claims. If the insurer has to cover such expenses, this must be on the basis of an advance agreement between the parties, or the Special Conditions must provide a clear authority. The Plan itself contains a number of rules that explicitly preclude cover of such expenses, cf. e.g. § 4-2, § 4-12 and § 12-5 (a).

Costs common to repairs that are recoverable and repairs that are not shall be apportioned according to § 12-14. Access work is not a common expense to be apportioned under § 12-14; it constitutes part of the actual repair work. If the access work has been necessary for the recoverable as well as the non-recoverable repairs, practice has, however, been to apportion all common access work on a 50/50 basis.

Subparagraph 2 maintains the traditional principle in hull insurance that the insurer does not cover damage unless the damage has been repaired. **In the 2007 version, however, a general right to claim compensation has been introduced, cf. § 12-2.** The situation where the assured goes bankrupt before the invoice has been paid is referred to in the commentary on § 7-4, see also Brækhus/Rein: Håndbok i kaskoforsikring (Handbook of Hull Insurance), p. 326.

The provision in subparagraph 3 is in reality superfluous in view of subparagraph 1. The Committee has nevertheless decided to leave it. Deductions are subject to the condition that “the ship is strengthened or the equipment improved”, and that this has entailed “special advantages” for the assured. If, in connection with the repair work, the assured takes the initiative himself to have the ship strengthened or the equipment improved, it is obvious that he must bear these additional

costs himself. The same must apply where a classification society issues a general recommendation that, concurrently with repairs, work to strengthen a specific type of vessel shall be carried out. However, the provision will also apply where orders are issued to carry out repairs in a specific manner which entails that the ship will be better than it was, e.g. where a damaged iron propeller is ordered replaced by a propeller of bronze. A deduction is nevertheless always subject to the condition that the strengthening or the improvement has made the repairs more expensive.

The "special advantages" requirement indicates some specific benefit or gain. As a starting proposition, it is natural to assume that the assured will have obtained an advantage if there has been an increase in standard. It is nevertheless not sufficient to justify a deduction that the replacement of a worn part by a new part, generally speaking, represents an advantage to the owner. For instance, the insurer may not claim a deduction under subparagraph 3 where an entirely new engine following an engine breakdown replaces an older, but still functional, auxiliary engine. But a deduction must be made if a part is installed with higher performance or better quality than the old part, e.g. where a new engine has greater active power or lower fuel consumption than the old one. This nevertheless presupposes that an engine of the "old" quality is obtainable. If that is not the case, and the improvement is inevitable, no deduction shall be made, regardless of whether or not the assured is able to take advantage of the improvement.

It is not considered an "advantage" under subparagraph 3 that an error from earlier recoverable repairs is corrected in connection with the repairs of a casualty which is a result of the error, provided that the relevant part was approved by the classification society, cf. § 12-4.

Subparagraph 4, first sentence, of the paragraph was amended in the 2007 version. Under earlier versions, if it was impossible to repair the damage completely, but the ship could be made seaworthy and fit for its intended use by less extensive repairs, the insurer was only liable for the depreciation in value in addition to the repair costs. However, the rules regarding seaworthiness were removed from the Plan in the 2007 version. Accordingly, the wording "the ship can be made seaworthy" has been replaced by "the ship satisfies the requirements as regards technical and operational safety", cf. in that respect the wording in § 3-23. If the repairs are feasible, but will be disproportionately expensive, the insurer has the right to limit his liability to the amount that less extensive repairs would cost, plus the depreciation in value, cf. subparagraph 4, second sentence. Typical situations where this provision may be applied is where the ship has sustained a dent in its keel, or where artistic decorations on board put in by the assured have been damaged. The situation is more doubtful when the bottom frame of the engine has been damaged and the choice is between welding it or replacing it. In such a situation it is hardly possible to indicate a general solution.

It is only the insurer who can invoke the rule in subparagraph 4, second sentence. It may also be in the interest of the assured to make do with less extensive repairs, if complete repairs of the ship would result in a considerable loss of time for him, particularly if he is granted the right to claim compensation for the depreciation in value represented by the unrepaired damage. However, such a right for the assured entails a risk that claims for damages for a depreciation in value will be lodged very frequently, and these claims will be difficult to assess and might lead to the insurer being subjected to a great deal of pressure.

The fact that the assured has the ship restored to its prior condition at his own expense obviously does not mean that he is not entitled to claim separate compensation for the depreciation in value.

The claim for supplementary compensation arises when the repairs have been completed.

#### § 12-2. Compensation for unrepaired damage

This paragraph was amended in the 2007 version.

According to ICA section 6-1, the main rule is that the assured is entitled to full compensation for his economic loss, regardless of whether or not the damage is repaired. The 1996 Plan adopted a different system: the basic principle in § 12-1 was that the insurer's liability did not arise until the damage had been repaired, whereas § 12-2 provided a limited right to compensation for unrepaired damage, namely when ownership of the ship passed from the assured by sale. In the 2007 version, the solution in § 12-1 was maintained, but the right to compensation was made general. This solution concords with the English conditions, as well as with the solution for offshore structures, cf. the wording of § 18-10 of the Plan prior to the 2007 version.

§ 12-2, subparagraph 1, of the 1996 Plan provided that the assured could claim compensation for the damage when the ownership of the ship passed from the assured by sale, enforced auction, seizure or requisition that did not give rise to compensation under § 15-11. This limited right has now been replaced by a general right to claim compensation when the insurance period expires, cf.

subparagraph 1. As mentioned above, this approach concords with the non-mandatory rule in ICA section 6-1, and with the solution that is widely practised in Norwegian non-marine insurance. The solution also concords with ITCH. Even though it is primarily in a sale situation that the assured needs a right to claim compensation for unrepaired damage, it is therefore appropriate to generalise the rule. “(W)hen the insurance period expires” will as a rule mean upon the ordinary expiry of the insurance period. If the ship is sold, the insurance period expires at the time of sale, cf. § 3-21. In the case of multi-year policies, on the other hand, each year constitutes an individual period which expires at the end of the year. Thus the assured does not need to wait until the entire multi-year period has expired, cf. § 1-5, subparagraph 4, to which a reference to § 12-2 has been added as one of the provisions under which a multi-year policy is to be divided up into periods of one year.

As was the case under the 1996 Plan, only the assured is entitled to claim compensation. The insurer may not demand to pay compensation if the assured or the person to whom he transfers the ship wishes to repair it. The insurer’s interests are deemed to be sufficiently well protected by the Plan’s general rules regarding tender, etc.

Under subparagraph 2, compensation is “calculated on the basis of the estimated reduction in the market value of the ship due to the damage at the time of expiry, but shall not exceed the estimated costs of repairs”. This provision concords with ITCH, and is a change in relation to earlier versions. The former solution was that compensation was to be calculated on the basis of the estimated costs of repairs at the time of the change of ownership, but was limited to the reduction in the proceeds of sale that is attributable to the damage. In addition, however, there were special presumption rules: in the event of a sale for scrapping, the damage was assumed not to have reduced the proceeds, and in other sale situations to have reduced the proceeds by the estimated cost of repairs. These special rules have now been deleted. The rule in subparagraph 2, however, must be expected to lead to the same substantive result.

The basis for the calculation is the significance of the damage for the ship’s market value. However, the reduction in market value will only be significant if it is lower than “the estimated costs of repairs”. In practice, therefore, the estimated repair costs will normally be decisive for the settlement. The amount of the estimated repair costs will vary depending on the location to which the assessment is to be tied. The point of departure must be the lowest price in the area in which it would have been natural to repair the ship if the repairs had been carried out. Under the rules of § 12-12, subparagraph 3, the shipowner must have the right to demand that the price tendered by a yard be disregarded. Furthermore, the removal costs must be taken into account. If the ship is trading between a high-cost area and a low-cost area, only the prices in the low-cost area shall be taken into consideration, provided that it is feasible to carry out the repairs in the latter area.

As a basic principle, compensation must be based on the repair prices at the time the insurance period expires. In the case of multi-year policies, the expiry of the individual policy year is decisive. If the ship is sold, the insurance will terminate at the time of sale, cf. § 3-21 of the Plan, and valuation must be carried out at that time. If no valuation was made at the time the insurance terminated, the damage must be assessed in another way, primarily on the basis of the survey reports. If the insurer wants to have a discretionary assessment of the repair costs carried out in connection with the survey of the damage, § 12-10, subparagraph 3, gives him authority to require that this be done. Such assessment of unrepaired damage is not binding in relation to the settlement under § 12-2, but it will be a very important element of evidence, particularly in the absence of a subsequent valuation. In the event of the ship being sold for scrapping, moreover, the limitation of liability due to the reduction in the market value of the ship as a result of the damage will normally make it superfluous to assess the damage with a view to repairs.

In the event of unrepaired damage, in accordance with practice 50 % of (estimated) dock rent and berth rent is covered, while other common expenses are not recoverable.

Subparagraph 3 is new in the 2007 version and states that no compensation may be claimed if the ship, later in the same period, becomes a total loss or qualifies for condemnation under § 11-3 of the Plan. Although the provision is new in the Plan, the principle has traditionally applied that “a total loss absorbs partial damage”, cf. the commentary on § 11-1. However, this principle becomes more relevant when the right to compensation is made a general entitlement, and it is therefore logical to formulate it as a separate rule. The provision concords with ITCH. The rationale is that a claim for compensation for unrepaired damage in addition to compensation for total loss would give the assured an unjustified gain at the expense of the insurer. This rationale poses no problem in connection with condemnation under § 11-3 because the assured is then clearly entitled to a condemnation settlement. However, this provision also applies if the total loss is not covered. In such case, there is no question of double compensation, whereas in this situation it follows from

subparagraph 1 that the right to compensation is not triggered. Moreover, as a result of the subsequent total loss, the unrepaired damage will not affect the ship's market value. If the ship becomes a total loss or qualifies for condemnation in a subsequent insurance period, on the other hand, no deduction shall be made for compensation related to damage sustained in an earlier period. This solution applies regardless of whether or not the compensation has been disbursed.

Under subparagraph 4, the assured may, in the event of a transfer of ownership of the ship, transfer claims for known damage to the new owner. This provision is in accordance with § 12-2, subparagraph 3, of the 2003 version. Although the right to compensation has been made a general entitlement, it is appropriate to retain certain limitations on the right to transfer ownership in the event of the sale of the ship. It is also an advantage to have a clear rule on this point because there is some uncertainty as to what follows from background law as regards the right to transfer such a claim. The right to transfer the claim applies only to damage that was known at the time of transfer. If the ship is sold with undiscovered recoverable damage, the insurance settlement must be seen in conjunction with the regulation of liability between the parties under the contract of sale. If the damage is the assured's risk, he will be subject to the sanctions applicable under the law of sales. Insofar as the damage is a result of a risk for which the hull insurer is liable, the assured must subsequently be entitled to demand that the hull insurer who covered the ship when the peril struck cover any price reduction (or possibly repair costs) that he must pay to the buyer. Most contracts of sale relating to ships are, however, on "as is" terms, and in that event the undiscovered damage will be the buyer's risk. If damage is discovered, the buyer will not have any claim under the contract of sale against either the assured as seller or the assured's hull insurer. Nor is he entitled to cover under the assured's hull insurance through a transfer of the claim, neither in the form of transfer of a claim for unknown damage in connection with the sale, nor in the form of a later transfer when the damage is discovered. By accepting an "as is" condition, the buyer has taken a risk as regards this type of damage – the fact that the damage is insured should not put him in a better position. By making it a requirement that the damage must be known at the time of transfer, the transfer of unknown damage is thus precluded.

Where the damage is known at the time of transfer of the ship, the claim will normally be transferred at the same time. Should the need arise for a subsequent transfer of the claim for such known damage, however, the insurer must accept such transfer. Under § 5-23, the assured has a time-limit of six months within which to give notice of known damage. Where a ship is transferred before expiry of this time-limit, the assured should nevertheless notify the insurer of the damage as well as of the transfer of claim without the Plan stipulating any explicit requirement to that effect.

The basic principle when a claim is transferred is that the buyer is placed in the same position as the seller. The buyer may thus choose to have the ship repaired if it is sold in an unrepaired condition. In so far as the buyer decides to claim compensation, subparagraph 2 applies in the usual manner.

§ 12-3. Inadequate maintenance, etc.

Subparagraph 2 was deleted in the 2007 version. The paragraph otherwise corresponds to earlier versions of the 1996 Plan. The commentary was also amended in the 2007 version in connection with the amendments to § 3-22..

The provision regulates the extent to which the assured is entitled to compensation where wear and tear, corrosion, rottenness, inadequate maintenance and similar causes have resulted in one or several parts becoming defective.

Subparagraph 1 divides the risk of maintenance damage between the insurer and the assured. The provision establishes that the insurer is not liable for the costs of renewing or repairing the part or parts of the hull, machinery or equipment, which were in defective condition as a result of wear and tear, corrosion, rottenness or inadequate maintenance.

Given the way the provision is worded, the crucial question will be the technical condition of the ship at the time the casualty occurred. It must thus be established which parts of the ship, its machinery and equipment were in defective condition because of wear and tear, corrosion, rottenness or inadequate maintenance. The question whether the part or parts concerned were in a proper condition before the occurrence of the casualty will have to be evaluated by the surveyors and the technical experts. Only if they do not agree, will it be necessary to resort to the procedures available for deciding such disputes.

In the determination of whether one or several parts are "in defective condition", the minimum requirements of the classification society will normally provide good guidance. Thus, if frames and shell plating have become thinner than the minimum requirements of the classification society, the



insurer is not liable for the costs of renewing or repairing them. In this connection, it will be irrelevant whether the assured can demonstrate that he probably would have been able to continue sailing the ship until the next classification renewal without having to make replacements or repairs if the casualty had not occurred. Thus, if a ship has sustained cracks or dents in a bulkhead in bad weather and it is revealed that parts of the bulkhead were corroded below the minimum requirements of the classification society, it will be necessary to measure the parts of the bulkhead that fall below the minimum of the classification society and exclude the costs of renewing the steel in this area from cover. On the other hand, the insurer shall cover the costs for those parts of the bulkhead that meet the classification society's minimum requirements.

The actual identification of what must be regarded as "part or parts" for the purpose of the provision shall be based on technical and economic considerations. If the classification society refuses to accept a partial renewal of a steel plate that is merely corroded in a limited area, the hull plate must thus be regarded as excluded from cover. The same will apply in relation to parts and components of the ship's machinery or equipment. If it is technically or economically justifiable and sensible to carry out a separate renewal or repair of one or several parts of the machinery or equipment, it is only that part or parts that are excluded from cover. If, however, the most expedient procedure from a technical/economic point of view is to replace a larger component, and not merely the part or parts which were in defective condition, the entire component will be excluded from cover.

Neither the size of the relevant part nor its value will be of significance. Thus, if a nut or bolt in the machinery has rusted to pieces and it would have been possible to replace it without any major problems, it is only the costs of the renewal of the nut or bolt that are excluded. The precondition is nevertheless that other parts of the machinery which have been damaged as a result of the breakdown of the bolt or nut concerned are not in defective condition. If they are, the insurer shall not cover the costs of replacing these parts either. Nor will the size of the ship in question be of any relevance. The fact that the rudder on smaller ships consists of one steel plate, whereas in larger ships it consists of several plates, is therefore irrelevant. If, in the latter case, it is technically and economically possible to repair the rudder by replacing the plate that was in a defective state, it is merely the costs of replacing the plate that are excluded.

As long as one or several parts cannot be regarded as being in proper condition, the costs of repairs or replacements shall be excluded from cover, regardless of their position or significance in the causal chain. It is therefore irrelevant whether the part concerned was the first that was struck and consequently triggered the casualty ("primary damage"), or whether the casualty can be traced back to another factor, where the part concerned was struck as a result of this factor ("consequential damage"). Thus, the surveyors will, in connection with any settlement, have to evaluate whether any of the parts for which compensation is now claimed, were in defective condition as a result of factors set forth in the provision.

If damage is caused to the machinery as a result of contaminated oil and feed water, the formal point of departure will be that if the oil, etc. is contaminated as a result of inadequate maintenance, resulting damage to the machinery must be recoverable under § 12-3, since the exclusions in § 12-3 do not apply. However, the special exclusion rule relating to contamination of lubricating oil, cooling water and feed water in § 12-5 (f) might become applicable, as a result of which loss that can be attributed to such contamination would not be covered.

The "costs" which are excluded from cover under the provision are, in addition to the costs of purchasing or processing a new "part" to replace the defective one, the expenses incurred in access work and installation of "the part", plus a reasonable proportion of the common costs of repairs, cf. § 12-14.

By "corrosion" is meant the generation of rust and other attacks to which the material is exposed under the influence of chemical processes, whether or not humidity has been a contributory factor in the process. The exclusion is, however, limited to corrosion that occurs naturally of its own accord and over a certain period of time. "Corrosion" which can be traced back to a casualty must be regarded as recoverable damage, unless the assured can be blamed for not having prevented the corrosion. If the steel in hull or machinery is subjected to corrosion due to heat during a fire, the corrosion must be regarded as a consequence of the fire. The same applies if the packing around the propeller shaft is defective, either as a result of an error on the part of the repair yard, or following a casualty, and seawater penetrates and corrodes shaft or bearings. In that case, corrosion must be regarded as a result of a casualty or inadequate work on the part of the yard. Furthermore, the insurer should cover more spontaneous corrosion damage if the corrosion is in itself in the nature of a "casualty". An example is where the ship, whilst in port or laid up, is lying for a prolonged period of time in a place where external corrosion occurs to hull or propeller to an



entirely unanticipated and abnormal extent due to chemical pollution of the water, electrolythical corrosion, etc.

The exclusion for parts that are in defective condition due to "inadequate maintenance" presupposes the existence of a standard for "adequate maintenance". Such a standard should be tied to the condition of the parts that are damaged. As regards most of the ship's components, there are technical norms determining when a part should be replaced. Once the damage has occurred, the part or parts in question which are in a defective state must be examined to establish whether the norm for replacement has been exceeded. The fact that the defective part exceeds the norm for replacement is nevertheless not sufficient to constitute "inadequate maintenance". If the owner is able to document that he has followed a planned and proper maintenance programme, but the part is nevertheless worn out, this will not be a case of "inadequate maintenance". However, the damage will not be recoverable from the insurer if he can demonstrate that it is the result of normal wear and tear arising from the ordinary use of the ship. If, on the other hand, the damage is the result of extraordinary wear and tear due to special circumstances, it must be regarded as a casualty.

By a proper maintenance programme is meant that the assured has complied with the norms and rules associated with the maintenance of the part in question. Norms and rules on maintenance may partly follow from recommendations and rules from the classification society, partly from the ISM Code, and partly from the user's manual from the supplier. The user's manual will normally contain information as to the type of checks that should be carried out in order to prevent damage from wear and tear, the frequency of such checks and the extent and time of the actual maintenance. Wear and tear which it was impossible to detect by means of the prescribed check or which could not have been prevented with the prescribed maintenance programme must basically be the insurer's risk, provided that it has the character of a casualty, c.f. the remarks above.

Also a less comprehensive maintenance programme than the one required by the recommendations and rules of the classification society, the ISM Code and the user's manual must, however, be justifiable in a specific case. However, in that event the assured must document that he has sufficient empirical material to have a less comprehensive maintenance programme than indicated above.

It is not a condition for establishing "inadequate maintenance" that the assured is aware of the risk of wear-and-tear damage. On the other hand: If the assured by means of the stipulated check, or in some other way, discovers irregularities, it is not sufficient that he follows the prescribed maintenance programme. In that event, he has a duty to act within a reasonable period of time.

A difficult problem relating to the definition of the term "inadequate maintenance" is the borderline for faults or negligence committed by the ship's master or crew, which are covered under § 3-36, subparagraph 1. Generally speaking, it may be said that inadequate maintenance presupposes a certain lapse of time, and that it is not a question of an isolated fault, but of a failure of the system. The clearest example of "inadequate maintenance" is therefore inadequate routines for monitoring and carrying out maintenance. An isolated error in the performance of maintenance routines, e.g. forgetting to drain cooling water from an auxiliary engine - does not, however, constitute inadequate maintenance, but a fault on the part of the crew. The same applies in the event of an isolated incident where instructions relating to the maintenance were forgotten. However, an isolated fault may become inadequate maintenance if the fault is of such a nature that it should have been rectified quickly as part of the maintenance program, and this is not done. The problem is illustrated by ND 1988.21 Agder Ionio, even though both judgments applied the standard for adequate maintenance too strictly. In the Ionio case the failure to preheat the fuel oil on a number of occasions was regarded as inadequate maintenance because the requirement was that the fuel oil should always be preheated before use. In ND1990.442 Stavanger Mare Pride, it was regarded as inadequate maintenance when they had failed to correct an earlier faulty connection of the fuel line on board and to clean the fuel oil that had become contaminated through the faulty connection. It follows from the way the standard for adequate maintenance is outlined above that in order for a failure to rectify faults to amount to inadequate maintenance, a norm must exist which stipulates the relevant duty to act, e.g. a daily check of fuel oil or regular inspections of couplings. These judgments give therefore little direct help in establishing the contact of "inadequate maintenance".

Given the definition of inadequate maintenance, the exclusion for "wear and tear" acquires less independent significance. If ordinary wear and tear results in a part being in defective condition, this will typically be a consequence of inadequate maintenance. On the other hand, if a part is worn in spite of adequate maintenance, wear and tear must normally be regarded as extraordinary. Ordinary wear and tear is therefore often excluded by virtue of the exclusion for inadequate

maintenance. The exclusion of ordinary wear and tear will acquire independent significance where it is not caught by the relevant maintenance routines, e.g. because they are based on wrong assumptions as to a parts durability in normal use. However, such extraordinary wear and tear will frequently have to be regarded as casualty damage, e.g. where the extraordinary wear and tear can be traced back to earlier, unrepaired casualty damage, or to negligence on the part of master or crew which does not provide a basis for identification under § 3-36, subparagraph 1.

The term “similar causes” is aimed at causes of damage such as rats, mice, worms, fungus and marine growth. However, faulty workmanship cannot automatically be equated with the causes mentioned in § 12-3. Faulty workmanship refers both to faults committed in connection with the building or repairs of the ship. If such errors were committed in connection with the repairs of damage covered under the insurance, the costs of rectifying the errors must be covered by the relevant insurer. By contrast, errors in performance committed in connection with non-recoverable work must in certain cases be equated with inadequate maintenance, viz. if the faulty workmanship is a result of the fact that the assured has chosen an incompetent repair yard or has failed to follow up the yard's work. In that event, the error must be considered in accordance with § 12-3. If, however, it is a question of other faulty workmanship relating to non-recoverable work which is not in the nature of inadequate maintenance or the like, and which result in a casualty, the insurer must be liable in the normal way for both the damage to the part which was originally affected by the error, and for any consequential damage. The costs incurred in doing the repairs over again, i.e. by rectifying the actual error, will, however, not be recoverable. In that event, the assured would in reality obtain an improvement of the ship in that case, cf. the principle in § 12-1, subparagraph 3.

The exclusion for “inadequate maintenance”, etc. is worded as a rule of causation. This means that the general rule on apportionment in the event of a combination of several perils in § 2-13 applies. The insurer may therefore be held partly liable for replacing a defective part where the defect must in part be attributable to inadequate maintenance or to some other excluded cause of damage, and partly to the strain to which the part has been exposed in connection with a casualty.

The limitation of liability refers to the costs of repairing the parts that are in defective condition due to wear and tear, etc. It is irrelevant whether the wear and tear, etc. has resulted in a casualty. If, following an ordinary casualty, parts are discovered that are so worn that the classification society would have demanded a replacement, the repairs or replacement of these parts are the owner's liability, even if the relevant part may also have been damaged in the casualty. By way of example may be mentioned collision damage to hull plates that are corroded to a state below the classification society's minimum requirements prior to the casualty, despite the fact that the ship has full class without recommendations.

The rules in subparagraph 1 must be seen in connection with the general rules relating to the insurer's liability. The insurer's liability for repairs or renewal of those damaged parts that were in defective condition therefore presupposes that the lack of maintenance or the like is not so serious or extensive that the ship **is not compliant with technical or operational safety requirements**. In that event, it is the rules in § 3-22 et seq. that will decide whether and to what extent the insurer is liable. The exclusion in § 12-3, subparagraph 1, is on the one hand less far-reaching than the **rules regarding breaches of safety regulations under § 3-22, cf. § 3-25**, but shall - in contrast to § 3-22, cf. **§ 3-25** - on the other hand apply regardless of the assured's subjective conduct. If the defective condition was of such a nature as to threaten the **technical or operational** safety of the ship, and **blame for this could be ascribed to** the assured, the insurer may disclaim liability under **§ 3-25**, not just for the replacement of the defective part, but also for the further consequential damage and losses. It is, however, a condition for applying the **rules regarding breaches of safety regulations that the concrete breach of the regulations can be ascribed to the assured**. If he can only be blamed for a general failure in the instructions and the checking routines regarding maintenance, the situation will have to be evaluated under § 12-3.

The limitations of liability in § 12-3 apply only to chapter 12 on damage. If these perils result in a total loss, the insurer will be fully liable under chapter 11, unless some of the exclusions in chapter 3 become applicable, e.g. that the ship due to inadequate maintenance **was not compliant with technical or operational safety requirements**, cf. § 3-22, cf. **§ 3-25**..

Subparagraph 2 in the earlier versions contained a rule to the effect that the insurer was not liable for the costs of renewing or repairing parts of the outer hull which were lost or damaged because frames or similar supporting and reinforcing elements were in defective condition as a result of inadequate maintenance or the like. This provision was deleted. The reason for the provision was that problems arose in practice as regards requiring timely maintenance to prevent parts of the

ship's side from loosening or falling off. These problems now appear to have been solved, and there is therefore no need for a specific rule of this nature, which does not exist in other conditions.

#### § 12-4. Error in design, etc.

This paragraph corresponds to § 175 of the 1964 Plan. **The commentary was amended in the 2007 version.**

The provision regulates the extent to which the assured is entitled to compensation for damage attributable to error in design or faulty material. The rule is a continuation of (parts of) the 1964 Plan § 175, but the cover for error in design has been somewhat extended.

As mentioned above in § 12-3, the solution in § 175 of the 1964 Plan was that the insurer was fully liable for damage resulting from faulty material, provided that the ship was classified and the classification society had approved the part in question. For errors in design, certain prerequisites had, in addition, been stipulated regarding the nature and location of the damage (a boiler or a part of the main engine had to be broken or cracked). If the said prerequisites were not met, the insurer was only liable for the consequential damage, not for the costs of replacing the relevant part.

The condition that the ship must be classified is satisfied in the new Plan through the rules in § 3-14 to the effect that the ship shall be classed with a classification society approved by the insurer and that the insurance cover terminates in the event of a loss of class. During the revision, there was also agreement that the requirements regarding the nature and location of the damage could be deleted with respect to cover for error in design. These requirements have been of little economic significance because the parts for which the assured did not obtain cover in case of other types of damage resulting from error in design in practice represented increasingly smaller units. Deleting the entire provision was therefore considered, which would mean unlimited cover as regards damage resulting from error in design and faulty material on the basis of the all-risk principle in § 2-8. The advantage of such a solution was an avoidance of the part concept with respect to this damage. However, it is expedient to retain the prerequisite that the part concerned requires approval by the classification society. In practice, the requirement will not be of any great significance, see below, and the part concept will thereby not constitute any major problem. Because § 12-4 in reality affords substantially better cover for errors in design than what is normal internationally speaking, it is also an advantage that the cover is "visible", and not hidden away in the all-risk provision.

The provision regulates damage resulting from error in design and faulty material. As regards "faulty material", the cover is the same as under the 1964 Plan: Such damage is covered in full, unless the faulty part has not been approved by the classification society. In that event, the assured has to cover the costs incurred in renewing or repairing the part that was in defective condition, while the insurer is liable for the consequential damage.

The wording "faulty material" means that the material in a part of the ship (hull or machinery) is of a quality inferior to the presupposed standard. Such a quality deficiency may, for example, be due to a defect in casting or some other fault in the structure of the material which occurred during processing, or to the supplier of the material having delivered a quality which is not in accordance with the specifications he has stated (e.g. that the steel supplied is too brittle). Thus, "faulty material" will have been present from the outset when the ship was delivered from the shipyard, or from the repair yard, if the part was incorporated in the ship at a later date. If the defect is attributable to a casualty, it is not a question of faulty material, but a latent concealed casualty damage, and repairs must be covered by the insurer who was liable when the peril struck. If such latent damage results in further losses, this will have to be assessed according to the general rules of causation in § 2-11.

Faulty material will normally be concealed in the sense that it is not detectable by a superficial examination. It will normally require more complex methods, such as load tests, etc. However, faulty material may also be attributable to an "external influence", e.g. where the part falls to the floor during processing at the building yard and sustains a flaw.

Cover for damage resulting from an error in design has, as mentioned, been somewhat extended in relation to the 1964 Plan in that the requirements regarding the nature of the damage have been deleted. Under the new Plan, the insurer assumes the risk for the part affected by the error in design, regardless of which object is affected and how the damage occurs, provided that the part has been approved.

"Error in design" means that the design of a part of the ship proves to be unfortunate, or that the degree of strength proves to be inadequate. An "error in design" may be "subjective" in the sense

that the design of the part in question is weaker than it ought to have been, given the knowledge available at the time of construction regarding material strengths, production methods and the stress factors to which the part may be exposed. In order for an error in design to be regarded as subjective, however, measures must have been initiated to remedy the error before the ship was delivered if the error had been discovered. This means that the fact that the ship does not meet the designer's expectations in terms of its commercial utilisation and overall profitability as an investment or how well it will function in its intended operating conditions is not sufficient to call it an error in design

However, "objective" errors in design are also conceivable, i.e. cases where the structure is sufficiently sturdy based on experience at the time it was designed, but where it later proves not to stand up to loads which, under the circumstances, must be deemed to be within the limits of what may be expected of the part in question. Errors of this nature occur not infrequently in new types of ships and engines. However, in order for an error in design to be regarded as objective, new knowledge must show a need to revise the perception of how a ship of the type in question should be designed in order to ensure the ship's safety. Similarly, in the case of machinery and equipment, there is an objective error in design if changes are required in order to prevent accidents during its operation. As a consequence of the new knowledge, the classification societies or shipyards, as the case may be, must change their rules or routines for ensuring ship safety in the future.

The term "error in design" therefore does not cover cases where the person who placed the order has deliberately chosen a solution that entails a degree of uncertainty as regards functionality or useful lifetime, or new technology that has not yet been fully tested, or has failed to carry out an analysis or taken other measures in order to save money.

An error in design will normally become apparent relatively early in the ship's planned lifetime, unless the error in question causes problems only in rare cases or in very special circumstances. The fact that parts of the ship become defective after three years due to previously unknown circumstances is an indication that an error in design is involved. If, however, the ship functions satisfactorily for more than ten years before it starts to show signs of wear and tear, this suggests that the effect of the ship's normal use may have been underestimated or that the ship has sailed in a trade that is more demanding than anticipated.

The factors that are significant when determining whether there is an error in design are therefore whether the error is of such a nature that steps would have been taken to correct it if it had been discovered, how much time has elapsed since the ship was delivered, and whether the damage is a result of a gradual process or has occurred suddenly as a result of very special circumstances.

The term "design" comprises not only the drawing of the part in question, but also specification of types of materials and dimensions as well as a specification of the process of manufacture. If an incorrect specification of the process of manufacture is given, the resulting defects must be regarded as errors in design. Defects attributable to a performing link in the manufacturing chain having failed to comply with the specifications given, however, cannot be classified as errors in design. The definition of the term is by no means clear-cut, however.

The requirement that the part concerned shall be approved by the classification society is taken from the 1964 Plan. This requirement must be tied to the general supervision of the building or repair work. It does not imply that a special approval must be obtained for the part in question. The part must be included in the classification society's checking procedure in connection with building or repairs, and no replacement or repairs of the part which result in the setting aside of the classifications supervision regulations may subsequently be made for the owner's account. As regards vessels that sail under the control of and with certificate from the Maritime Directorate there will not normally be any approval of building and repair work from a classification society, and they will accordingly not be entitled to cover under this provision. However, a few such vessels are built in accordance with requirements from their classification society, even though they are operating under the control and certificate of the Maritime Directorate. In relation to § 12-4 the deciding factor must in that event be whether the relevant part was originally approved by the classification society, and not whether the ship has class.

If the requirement for approval by the classification society is met, the insurer is liable for both the repairs of the part that was in defective condition and for the consequential damage. However, the insurer is not liable for the additional costs incurred in order to rectify the actual error, such as costs of strengthening a part which was too weak from a design point of view, cf. the principle in § 12-1, subparagraph 3, and above in § 12-3 concerning errors in performance.

If the relevant part has not been approved, the assured must cover the costs incurred in replacing or repairing the part which was in defective condition, including costs of rectifying the actual fault. In other words, the insurer's liability is limited to covering the consequential damage to other parts of the ship. As regards the definition of the part concept, reference is made to the commentary on §12-3. The term "in defective condition" must be interpreted in a wide sense: the provision covers both the situation where the error results in defects in the part in question as such, and the situation where there is in actual fact nothing wrong with the part, but it has been installed incorrectly, or parts with incorrect dimensions or properties have been used.

The cover of damage resulting from error in design or faulty material is, as mentioned, effective regardless of the nature of the damage. It is, however, a fundamental prerequisite for cover that a "casualty" has occurred in the form of demonstrable damage. Accordingly, the insurer's liability does not arise until the occurrence of a visible physical defect. However, no minimum requirements are stipulated regarding the physical defect that makes replacement or repairs necessary. The initial signs of cracks, which it is only possible to ascertain by means of fluoroscopy or other similar methods, will also be sufficient. However, a mandatory replacement is not recoverable if the background for the requirement from the classification society is a strong suspicion that the part in question is under-dimensioned. An exception must nevertheless be made on this point, however, as regards errors in workmanship in connection with repairs that are covered by the insurance. In such cases, the insurer is liable for the costs of rectifying the error, even if no casualty has occurred.

The cover of damage resulting from error in design or faulty material must be seen in conjunction with the exclusion for "inadequate maintenance", wear and tear and corrosion in § 12-3. The exclusion for "inadequate maintenance" rules out compensation for any fracture damage, etc. which must be regarded as a normal and foreseeable consequence of the use of the engine, and which could have been prevented by proper maintenance. If the manufacturer of the engine has given instructions to the effect that certain parts must be replaced after a certain period of operation or after a certain amount of wear, the insurer will not cover a replacement effected after the parts in question have been used during the prescribed period of time. Further, the exclusion for inadequate maintenance may rule out the cover for faulty workmanship during repairs, if the assured's choice of repair yard may in itself be characterised as inadequate maintenance. On the other hand, if extraordinary wear and tear or corrosion are attributable to an error in design or faulty material this falls outside the scope of § 12-3, and must be considered under § 12-4.

Also where § 12-4 is applied the rule of apportionment in § 2-13 may be applicable. By way of example, a fracture in an engine part may be attributable partly to the fact that it is under-dimensioned and partly to the fact that the prescribed care and maintenance have been neglected. In such a situation, partial compensation for the replacement costs is conceivable.

#### § 12-5. Losses that are not recoverable

This paragraph corresponds to § 176 of the 1964 Plan and CEFOR I.25 and PIC §5.20. Letter (a) was amended in the 2002 version.

1964 Plan § 176 contained a number of limitations in the hull insurer's liability for damage to the ship. Furthermore, the Special Conditions contained provisions relating to bottom painting, which replaced § 176 (d) and relating to loss resulting from contamination of lubricating oil, etc., which replaced § 176 (m). The provisions relating to bottom painting in letter (d) and CEFOR I.16 and PIC § 5.14 are of little practical significance and have therefore been deleted. This means that bottom painting in hull insurance for ocean-going vessels must henceforth be treated in the same way as other painting, and that the insurer shall always cover bottom painting in the damaged area. Letter (e) contained a provision relating to the caulking of hull and deck. This provision is of little practical significance in hull insurance for ocean-going vessels and has therefore been moved to chapter 17 on insurance of fishing vessels and freighters, cf. § 17-11 (c). The rules in letters (g) to (l) and (n) were considered unnecessary alongside the general provision in § 12-1 and have therefore been deleted.

The limitations in the provision apply first and foremost to compensation for particular damage. However, the provision shall also apply where general average under § 4-10 is recoverable according to the rules relating to particular average, because this is more favourable for the assured.

The limitation in letter (a) is taken from § 176 (a) of the 1964 Plan, but the term "similar direct expenses" is replaced by "other ordinary expenses". Ordinary operating expenses during repairs are normally no necessary consequence of the repairs, and have traditionally not been covered by the hull insurer. Crew's wages and maintenance and other ordinary operating expenses have,

however, been covered during the period of time it takes to move the ship to the repair yard in accordance with §12-13.

The exception applies only to operating expenses that are incurred independently of the repairs, e.g. the cleaning of tanks on a chemical tanker, which would have been required regardless of the casualty. Expenses relating to the repairs, however, must be covered, such as bunkers consumption during testing of the engine and during a trial run, maintenance of a repair crew staying on board, and expenses for fire watch or any other special watch required by the repair yard or the authorities. The same applies to expenses for accommodation ashore for the crew where the damage to the ship makes it impossible for them to stay on board. According to practice, maintenance of the crew is nevertheless not covered in such cases, based on the point of view that the assured would have had to pay these expenses if the crew had stayed on board.

Until 1996, in practice, the crew's overtime in connection with recoverable repairs was covered, but not maintenance and ordinary wages. In the 1996 revision this practice was explicitly maintained. Since then, however, it has proved to be difficult to make a distinction between ordinary working hours and overtime. Moreover, it has been the opinion that both the shipowner and the insurer benefit from the crew carrying out recoverable repairs during ordinary working hours. When preparing the 2002 version, therefore, it was agreed to leave room for a change in practice on this point. Such a change in practice could in itself have been carried out without changing the wording, because "ordinary expenses connected with the running of the ship" may be interpreted as meaning that they do not cover expenses relating to the crew's participation in recoverable repairs during ordinary working hours. To prevent confusion and discussion concerning claims settlement, it has nonetheless been stated explicitly that "this must be specially agreed". This ensures that the assured and the insurer agree in advance on what is to be done and how much time is to be spent. For the assured and the claims leader, it is also an advantage to be able to refer to an explicit provision. However, a fundamental precondition for cover is nonetheless that the insurer benefits from the repairs in the form of a reduction in the cost of repairs.

However, the insurer shall not cover maintenance and wages of the crew in connection with the necessary cleaning of tanks prior to the repairs.

Nor does the insurer cover the more indirect expenses incurred while the repairs are carried out, such as interest on mortgage loans, insurance premiums, general administration costs, etc. It is unnecessary to state this explicitly.

The limitation in letter (b) is identical to § 176 (b) of the 1964 Plan and is founded on the basic point of view that whether or not the ship carries a cargo shall, in principle, have no bearing on the hull insurer's liability. Expenses for discharging, warehousing, etc. of cargo necessitated by the repair work are therefore no concern of the hull insurer's. This provision applies both where the work in connection with the cargo has become more expensive because of the damage to the ship and where the cargo has sustained damage requiring special measures in order to remove it. It is furthermore irrelevant if the cargo has, due to the damage, shifted and moved to areas of the ship where it does not belong, or if the ship has to be discharged after the casualty in order to make a survey possible. Extraordinary discharging expenses may be recoverable under P&I insurance.

In practice, it has been assumed that the necessary thorough cleaning of bulkheads, etc. shall not be regarded as the removal of "cargo", and no changes are intended on this point.

The exclusion in letter (c), which concords with the corresponding provision in § 176 of the Plan, is based on the same idea as letter (b) as regards the passengers.

Letter (d) is taken from § 176 (f) of the 1964 Plan, and excludes objects used for mooring, towage, etc., as well as tarpaulins, provided that certain specific conditions are met. Often such objects will fall outside the scope of cover simply due to the identification of articles intended for consumption in § 10-1, subparagraph 2. However, for equipment covered in § 10-1, subparagraph 1, the exclusion acquires independent significance. The term "etc." shall not be given a wide interpretation to include loading and discharging equipment.

In contrast to what applied under the 1964 Plan, the exclusion applies only if the object in question has been used. Thus, if a reserve mooring rope is soiled by paint before use, the damage shall be covered. The burden of proving that damaged objects have not been used is on the assured. The term "which must normally be replaced several times during the expected life of the ship" is also new in relation to the 1964 Plan. Anchor, chain and other equipment with a long life expectancy will therefore be within the cover, in contrast to a "pennant wire" which is used in connection with dropping and weighing the anchors on drilling vessels, and a tow wire on salvage vessels, etc.

Letter (e) is identical to § 176 (k) of the 1964 Plan. The provision covers all types of blocks and anodes that will be corroded over a period of time. This means that silver anodes also fall under this provision, even though this differs in certain respects from earlier practice on this point. Electric anodes, however, fall outside the scope of cover. The exclusion covers every cause, including theft of the blocks.

Letter (f) is taken from letter (m) of the 1964 Plan and the Special Conditions. The solution in the Special Conditions implied a substantial tightening of the 1964 Plan, and this solution is retained in the current Plan. Loss resulting from contamination of lubricating oil, cooling water or feed water is not covered, unless proper measures against the contamination have been taken within fixed time-limits. The provision in this connection operates with a two-track time-limit system tied to the knowledge which the assured, the master or chief engineer had of the contamination. If the assured, the master or the chief engineer “became, or must be deemed to have become, aware of the contamination”, the measures must be taken “as soon as possible”. The wording “must be deemed” indicates both a reduced requirement of proof as regards positive knowledge and gross negligence as regards a failure to clarify the situation. If, however, the assured, the master or the chief engineer cannot be deemed to have become aware of the contamination, but “ought to have become aware” of it, a three-month time-limit will take effect. The time-limit will run from the time when one of the them ought to have acquired the necessary knowledge. However, if ultimately the assured, the master and/or the chief engineer have shown due care and are in good faith with regard to the contamination, the damage must be covered.

In the Special Conditions only the knowledge of the master and the engineer was regulated. This has been extended to comprise the assured’s knowledge. This will hardly imply any substantive changes in the event of intent or gross negligence, because the assured’s conduct will then normally fall within the scope of § 3-33. In the event of ordinary negligence, however, the extension is necessary in order to cover the situation where the assured, but not the master or the chief engineer, had access to knowledge about the contamination.

In line with what was explicitly stated in the Special Conditions, the reference to contamination of lubricating oil also includes a reduction in quality over time due to waste products, sediments, etc., and to contamination of “feed water” covers the situation where the feed water does not have a satisfactory water quality upon delivery on board. “Proper measures” mean first and foremost cleaning, but the term also covers - in line with the Special Conditions - the removal of the source of contamination and the establishment of a satisfactory quality of the feed water.

#### § 12-6. Deferred repairs

This provision corresponds to § 177 of the 1964 Plan, cf. CEFOR I.26 and PFV § 5. The provision was amended in the 2002 version.

In the 1996 version, the rule was formulated as an absolute time-limit for carrying out repairs, setting the time-limit at five years after the damage occurred, cf. § 12-6, first sentence, of the 1996 version. If the repairs were carried out later, the insurer was not liable for any costs. However, in practice this provision could give rise to problems in relation to the limitation rules in § 5-24 of the Plan, because the period of limitation and the five-year time limit for repair of damage were not coordinated. It was therefore asserted that the assured might run the risk of the claim being time-barred under § 5-24, subparagraph 1, before the five-year time-limit under § 12-6 had expired. Attempts to coordinate the provisions proved to be difficult because it was then also necessary to take into consideration repairs of unknown damage and total loss.

To avoid this type of coordination problem, it was agreed to revert in the 2002 version to the solution for deferred repairs that was used in the 1964 Plan. Consequently, the rule is that the liability of the insurer does not terminate after five years, but that the insurer shall not be liable for any increase in the cost of the repairs that may occur after expiry of the five-year time-limit. The absolute time-limit of five years was introduced into the Special Conditions when the conditions were made more stringent at the end of the 1980s, but the insurers have now concluded that there is no longer need for such a strict rule, and that the solution in the 1964 Plan was acceptable.

Thus, as before, the insurer is liable for the full costs of repair for repairs that are carried out within the time-limit of five years. For repairs that are carried out later, however, liability is limited to such costs as would have been incurred if the repairs had been carried out before expiry of the time-limit. Any increase in cost that may be incurred after expiry of the five-year time-limit thus becomes the risk of the assured. The deduction for the cost increase must be calculated on the basis of either an estimate of the repairs upon expiry of the five-year time limit or the ordinary index for repair costs.

§ 12-6, second sentence, of the 1996 version of the Plan contained a rule regarding extension of the time-limit for repairs if the classification society accepted a period of more than five years between each docking. The new rule renders this provision superfluous.

#### § 12-7. Temporary repairs

This paragraph corresponds to § 178 of the 1964 Plan, CEFOR I.7 and PIC § 22.

Subparagraph 1 is identical to § 178 of the 1964 Plan and imposes full liability on the insurer for “necessary temporary repairs”. Temporary repairs are “necessary” when permanent repairs cannot be carried out in a satisfactory manner at the place where the ship is lying, or where such repairs would be unreasonably costly. In such cases, it will be in the best interests of the assured as well as the insurer that temporary repairs of the damage are carried out, and the insurer will normally consent to such repairs being carried out and cover the full costs. If the insurer does not give his explicit consent, the assured may have the temporary repairs carried out for the insurer’s account if permanent repairs cannot be carried out at the place where the ship is at the time.

The term “temporary repairs” comprises all measures necessary to get the ship to the repair yard, but which are not intended to be permanent. This includes renewal of parts of the ship or its equipment and in some cases also rental of equipment, e.g. the rental of a mobile generator. If parts are installed in the ship which are to be replaced later, e.g. a rented generator, this must be regarded as a temporary repair. This nevertheless presupposes that the ship sails to a repair yard. If the assured, after having received a rented generator to enable it to proceed to a repair yard, instead chooses to sail on without having repairs carried out, he forfeits his right to cover. In that event, the rented generator is no longer a part of necessary temporary repairs, and the cover lapses.

Destruction may also be regarded as temporary repairs if such destruction is necessary in order to get the ship to a repair yard, e.g. where part of a propeller blade has partly fallen off in connection with a casualty and the opposite blade is cut off as a provisional solution in order to reduce the vibrations, thus enabling the ship to proceed until it is convenient to replace or repair the propeller.

That repairs “cannot be carried out” means that no repairs that meet the requirements in § 12-1, subparagraph 1, can be carried out. The provision is first and foremost aimed at a situation where repairs are physically impossible, i.e. that there is no repair yard that can carry out the work in a satisfactory manner. However, waiting time at the repair yard may, depending on the circumstances, also constitute “unrepairability” if the waiting time is long enough. The distinction between “unrepairability” and more ordinary waiting time, which is governed by subparagraph 2, must be decided on a case-to-case basis. Basically, the owner must accept a waiting time of 1-2 weeks, but not 3-4 months. The dividing line will, however, depend on the type of ship and the nature of the repairs. A high-cost ship cannot be expected to lie still for months waiting for some small part to be manufactured ashore. It is therefore not possible to stipulate any absolute upper or lower limits. In extreme cases, even two weeks’ waiting time may have such unfortunate economic consequences for the owner as to qualify as “unrepairability”.

Subparagraph 2 regulates the situation where there is no “unrepairability”, but where the assured is nevertheless interested in postponing the permanent repairs and is content with a temporary alternative. This will first and foremost be the case where the more extensive work in connection with permanent repairs cannot be carried out without waiting time, whereas it is possible to have temporary repairs taken care of immediately. However, it is also conceivable that, due to the general operation schedule of the ship, the assured is interested in postponing prolonged and permanent repairs, e.g. until the ship has to undergo a classification survey in any event, and will therefore be content with temporary repairs which can be effected quickly. If it is also to the insurer’s advantage to have such temporary work carried out, e.g. because it makes it possible to have the permanent repairs done at a less expensive repair yard, subparagraph 2 makes the insurer liable for the costs of the temporary repairs within the framework of what he has saved.

The normal situation, however, is that the costs of temporary repairs are wasted from the insurer’s point of view. In that event, the insurer will prefer that the damage to the ship is repaired immediately. This is just one aspect of a problem that may arise in several connections, viz. the conflict of interests between the assured and the hull insurer when the assured wishes to avert a loss of time. The assured normally wants repairs carried out as promptly as possible and at a time where it does not interfere with the operation of the ship. He may therefore be interested in choosing the tender that offers the shortest time of repairs, even if it is not the cheapest. He wants to use methods that expedite repairs, and he will be interested in temporary repairs of the damage if this makes it possible to postpone the permanent repairs to a more convenient time. As for the



hull insurer, he is not liable for the loss of time and therefore wants the total costs of repairs to be as low as possible, provided that the quality of the work is up to standard.

The 1964 Plan solved these problems by requiring the insurer to consider the assured's interest in averting a loss of time in most of the situations where this question might arise. The rules were worded somewhat differently in the various situations, but the common denominator was that the value of the loss of time suffered by the assured, or which he averted through special measures, was set at 20% p.a. of the assessed hull value, which corresponds to approximately 0.55 per thousand per day.

During the revision, discussion took place as to whether the current solution with a limited loss-of-time cover in connection with temporary repairs, costs of accelerating the repair work and inviting tenders should be retained, or whether this element of the cover should be transferred to loss-of-hire insurance. In contrast to the situation in 1964, loss-of-hire insurance is now so common that it may be natural to consider the cover of loss of time collectively for hull and loss-of-hire insurance, and attribute the essential part of the cover to the loss-of-hire insurance. The fact that the solution from the 1964 Plan was nevertheless maintained was due to several factors. One thing is that not all owners have loss-of-hire insurance, and that at any rate the fact must be faced that such insurance may become less common again if the loss-of-hire insurance premium increases. The elements of the loss-of-time cover which fall within the scope of the hull insurance will furthermore often represent such modest amounts that they will fall below the deductible in the loss-of-hire insurance, so that a transfer of the cover to the loss-of-hire insurer will in practice mean that the owner will not have his loss covered. Furthermore, it is a fact that it will, from a market point of view, be difficult to offer a hull insurance where the loss-of-hire element is significantly inferior to the situation in comparable markets.

As under the § 12-7, subparagraph 2, second sentence, of the 1964 Plan, therefore imposes a certain liability on the insurer for "unnecessary" temporary repairs, even if they are wasted from the insurer's point of view. The insurer shall, under any circumstances, cover the costs within the framework of the "normal loss of time" which the assured avoids by choosing such a procedure. When looking into the question as to how much time has been saved, it is, on the one hand necessary to look at the time the temporary, and later the permanent, repairs took and, on the other hand, the time it would have taken if the ship had carried out the permanent repairs immediately.

A condition for applying the rule is that, from an overall point of view, the assured has saved time. Consequently, it will first and foremost be applicable where the ship would have had to lie and wait for repairs if such repairs were to be permanent. If a repair yard could in actual fact have taken the ship immediately, but the assured preferred short, temporary repairs in order to take the loss of time at a more convenient time, the final settlement will have to wait until it has been established how long the total repair time will be.

In the evaluation of whether the assured has saved time, not only the time for repairing the damage of the casualty in question shall be taken into account but, contrary to earlier practice, the time for other work shall also be included.

An example illustrates the problem: The ship is lying in port (A), where temporary repairs take 10 days and permanent repairs 20. The assured chooses to postpone permanent repairs to a planned stay of 15 days at a repair yard for routine maintenance and classification work in 12 months in port (B). In port (B) it turns out that the casualty damage can be repaired permanently in 15 days. According to earlier practice, classification work was not taken into account, only the time for the casualty repairs was considered. Temporary repairs in (A) plus permanent repairs in (B) would then give 25 days of repairs, while permanent repairs in (A) would give 20 days of repairs. The assured would thus not save anything on the temporary repairs and did not get any compensation for the temporary repairs under the 20% rule. Under the Plan, however, the casualty repairs and the classification work shall be considered collectively. In that event, the assured will, by choosing temporary repairs in (A) and permanent repairs plus classification work in (B) have a total time of repairs of 25 days, whilst permanent repairs in (A) and classification work in (B) give a total repair time of 35 days. The assured will in that event save 10 days by having temporary repairs carried out in (A).

§ 178, subparagraph 2, of the 1964 Plan made the principle of the insurer's liability for loss of time applicable to all cases of "temporary repairs" which were not "necessary". In the Special Conditions, however, this solution was limited so that the 20% rule in subparagraph 2 was not to apply "where part of the ship or its equipment is renewed in order to save time for the assured". It has, moreover, been established practice to refuse compensation under subparagraph 2 in the event of rental of objects, e.g. mobile generators, in order to save time. These limitations have

been generalised by subparagraph 2 now only applying to “temporary repairs of the damaged object”. This means that, contrary to subparagraph 1, the term “temporary repairs” in subparagraph 2 only comprises repairs in a strict sense, i.e. the actual repair of the damaged part, but not the renewal of a part for the purpose of saving time, nor the rental of substitute machinery.

If the assured is also granted full or partial compensation for the temporary repairs in general average, the insurer will be subrogated to the assured’s claim in the general average according to the normal rules. It is not necessary to state this explicitly.

To the extent that the temporary repairs are recoverable, this will be without ice damage or machinery damage deductions, cf. § 12-17 (c).

#### § 12-8. Costs incurred in expediting repairs

This paragraph corresponds to § 179 of the 1964 Plan, CEFOR I.7 and PIC § 5.22.

The paragraph is based on the view of the loss-of-time problem which was discussed in the preceding paragraph. When the assured takes extraordinary measures to save time during the repairs, the insurer should be liable for the additional costs that the assured thereby incurs within the limits of the normal loss of time that he has averted. The rule may lead to the assured initiating extraordinary measures in exceptional cases, even if the possibilities of the ship making a profit are slight. Based on an overall evaluation, it will nevertheless normally be worthwhile from an economic point of view to use overtime.

The provision is based on a distinction between “ordinary” and “extraordinary” measures to expedite repairs. The dividing line is, however, far from clear-cut, cf. Brækhus/Rein: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 493, and may also be adjusted over time if the methods of repair change. The provision therefore opens the door to discretionary evaluations, where the individual solutions must vary in accordance with technical developments. In the current situation, it is common practice to carry out certain types of work by means of mobile repair teams. Sending spare parts by charter plane is “extraordinary”, however. Overtime payment to the repair yard will also normally be “extraordinary”. A bonus paid to the repair yard is “extraordinary” if overtime or other extraordinary measures have been used to obtain the bonus - in other cases such a bonus is ordinary.

As regards the dividing line between “increased ordinary travel expenses” and “extraordinary measures”, reference is made to the discussion concerning § 4-7.

§ 179 of the 1964 Plan concerned the expediting of “repairs”. In the Special Conditions, however, it was emphasized that the provision did not apply where part of the ship or its equipment was renewed in order to save time for the assured. In practice, time saved by renting equipment has not been recoverable. The Plan maintains these limitations, and has therefore replaced the term “repairs” with “repairs of the damaged object”. Other measures, such as rental of a generator, consequently fall outside the scope of § 12-8. The same applies if the assured chooses to buy a new and more expensive part in a situation where the part in question could be obtained at a more reasonable price after some waiting time. This latter point implies a restriction in relation to earlier practice. However, the assured shall, as in the past, be allowed to buy more expensive components for a part in order to save time. Here we are still dealing with repairs of the damaged part.

“Repairs of the damaged object” comprise all the time that will be required in connection with the repairs, including waiting time. In other words, the insurer’s liability cannot be limited to the time when the repairs are in actual fact in progress. The deciding factor is the total period of time during which the ship would have been forced to lie idle in connection with the repairs if the extraordinary measures had not been initiated, compared with the period of time during which the ship in actual fact lies idle. Thus, if another ship is taken out of dock in order to allow space for repairs of the insured ship and save waiting time, expenses in connection with the other ship leaving and entering the dock are covered under the 20% rule. The narrowing of the repair concept applies only to the specification of the actual repairs, and not to the time frame of what constitutes “repairs”.

If the repairs are carried out by mobile repair teams without causing delays in the ship’s schedule, the loss of time must be set at zero. As mentioned above, the use of mobile repair teams will, however, normally fall outside the scope of the provision for the simple reason that today this form of repairs cannot be regarded as extraordinary.

Even though the provision applies to the time saved, practice has been that when overtime is used to save dock rental, the overtime costs have been covered up to the saved rental amount. The intention is not to make any change in this practice.

Often several repair jobs will be carried out concurrently, each of which could be expedited by separate measures. According to the second sentence of this paragraph, the total repair time the assured saves by having the repairs carried out in this manner must in such cases be checked, and the total additional costs within the limits of the normal loss of time during the period of time saved shall be covered. If the ship is ready 10 days earlier by having the hull work done on overtime and sending a new propeller by air, the additional costs incurred by these measures are recoverable within the limits of the normal loss of time for 10 days.

As regards general average, the same applies under this paragraph as under § 12-7. If the assured has received compensation for the additional costs as "substituted expenses" in general average, the insurer will be subrogated to his rights in the general average to the extent compensation has been paid for the same costs under this paragraph.

#### § 12-9. Repairs of a ship that is condemnable

This paragraph is identical to § 180 of the 1964 Plan.

The provision is intended as a defence for the insurer if the assured insists on repairing. If the assured repairs the ship because the insurer refused to approve a claim for condemnation, or the parties agree that repairs are expedient, the insurer can not invoke § 12-9 if the actual costs of repairs exceed the sum insured plus additional costs. The provision is furthermore commented on in further detail under § 11-5 above.

#### § 12-10. Survey of damage

This paragraph corresponds to § 181 of the 1964 Plan.

Subparagraphs 1-3 are identical to the 1964 Plan and concern survey of damage and the submission of survey reports by the parties' representatives prior to repairs. In practice, subparagraphs 1 and 2 concerning survey are often not adhered to because the assured either has not had his own representative present, or because the representative fails to submit a report. This type of conduct on the part of the assured must be interpreted to mean that he accepts the report from the insurer's representative. If he later wishes to contest it, he has the burden of proving that it is incorrect.

Subparagraph 3 gives both parties the right to demand the submission of preliminary reports with an approximate estimate of the costs of repairs. The significance of the provision is that each of the parties may demand that also the other party's representative submit such a preliminary report. For the assured, this right will be particularly relevant if he is in doubt as to whether it is worthwhile repairing the ship. The conclusions in the survey reports are not decisive in the claims settlement, but they will, of course, carry a great deal of weight. The surveyors' evaluation as to when and how the individual incidents of damage occurred may therefore in actual fact ultimately be decisive for the question of compensation.

Under the 1964 Plan, if the representatives of the assured and the insurer disagreed about these questions, they were to obtain a reasoned opinion from an arbitrator. Subparagraph 4 leaves this decision to the parties and their discretion, cf. the fact that the word "shall" has been changed to "may". Like the parties' representatives, the arbitrator shall not make any binding decision, but his opinion will, of course, carry great weight as evidence in the event of a subsequent litigation.

Again under the 1964 Plan, if the parties disagreed as regards the choice of arbitrator, he was to be appointed by a notary public or the Norwegian consul if the ship was abroad. This system did not work very well in practice: if the parties disagreed to begin with, they would normally not manage to agree on the appointment of an arbitrator either, and it turned out that frequently the notary public or the consul appointed someone who did not command confidence in the relevant circles. In the event of disagreement, the arbitrator should therefore be appointed by a Norwegian average adjuster, see subparagraph 4, second sentence. This may be done regardless of whether the claims settlement has already been submitted to an average adjuster. The right to demand an arbitrator will furthermore remain in effect until the claims settlement has been brought to its conclusion. It is therefore no precondition that the arbitrator be given an opportunity to inspect the damage before the repairs have been completed.

As regards cover of the expenses of the assured's representative, reference is made to § 4-5.

According to subparagraph 5, private surveys are the normal procedure for the assessment of damage. Judicial valuation of the damage may only be undertaken when required by mandatory rules of law. See also section 487 of the Norwegian Maritime Code.

If the assured has the ship repaired without first conducting a survey where the insurer has had the opportunity to attend, this will affect the assured's burden of proof, cf. subparagraph 6. The assured is required to notify the insurer well in advance as to the time and place of the repairs so that he can take the appropriate measures. If the assured notifies the insurer of the survey so late that his representative is unable to form a definite opinion as to the cause and extent of the damage, this must be equated with repairing without giving the insurer the opportunity to survey the damage. The assured will, in that event, have the burden of proving that the damage is not attributable to causes excluded from the cover by separate provisions, e.g. inadequate maintenance, etc., cf. § 12-3, that it did not occur during an earlier insurance year, or was not attributable to causes which are subject to special deductions.

As regards the problems that may arise if the assured accepts the repair invoices without the insurer's surveyor having attended the negotiations with the repair yard, or agreeing about the amounts of the invoices, reference is made to the commentary on §12-1.

#### § 12-11. Invitations to tender

This paragraph is identical to § 182 of the 1964 Plan.

Subparagraph 1, first sentence gives the insurer the right to demand that tenders be obtained. If the insurer is aware of the casualty, it must be his duty to clarify with the assured whether or not he will demand invitations to tender. If he fails to do so, he may not react if the assured commences repairs without further notice. If, on the other hand, the insurer has demanded invitations to tender and the assured fails to follow up, the second sentence establishes the insurer's right to obtain tenders himself, possibly after the repairs have been carried out. The same applies if the assured repairs the damage without having notified the insurer.

Given that the invitation for tenders from several repair yards is first and foremost in the insurer's interest, the insurer should not be allowed to cause the assured any further loss of time through the invitation to tender without being liable for a normal rate of compensation for the time that is in actual fact lost. However, it is normal procedure in connection with repairs of major damage that tenders are invited, and the assured must therefore in any event accept a certain delay. For this reason, the insurer's liability for loss of time does not start to run until after 10 days. It is also a precondition that the loss of time is exclusively a consequence of the fact that tenders are to be invited. If there is any waiting time at all for the relevant repair yards, the invitation to tender will not in itself have caused the assured any loss.

#### § 12-12. Choice of repair yard

This paragraph is identical to § 183 of the 1964 Plan.

According to subparagraph 1, the tenders received shall be adjusted by adding the costs of removal when ascertaining which tender is in actual fact the lowest.

It is a basic rule in Norwegian hull insurance that it is the assured himself who decides where his ship is going to be repaired, cf. subparagraph 2. However, if the insurer has obtained a less expensive tender from another repair yard than the one chosen by the owner, he can not be held liable to pay the full costs of repairs at a yard that has submitted a more expensive tender. As mentioned above in connection with § 12-7, however, the insurer shall consider the assured's interest in having the ship repaired at a yard which is expensive, but works fast, thereby reducing the loss of time. When it has been established which tender is in real terms the lowest, the insurer shall cover the assured's additional costs in choosing a faster repair yard within the limits of the "normal value of the time" which the assured saves. The additional liability will obviously be contingent on equivalent additional costs having accrued. The insurer is never liable to pay loss-of-time compensation as such in addition to the invoice for repairs, but in some cases a share of the assured's increased repair costs incurred because of his wish to use a faster repair yard.

Subparagraph 3 regulates the situation where the assured does not want to have the ship repaired at a particular repair yard. Provided that the assured "due to special circumstances" has "justifiable reason to object to the repairs", he may demand that the tender from that yard be disregarded. An example of circumstances which give the assured "justifiable reason" to object to the repairs being carried out at one of the yards is justifiable doubt as to whether the yard's technical and economic capacity is sufficient, cf. Brækhus/Rein: Håndbok i kaskoforsikring (Handbook of Hull Insurance), p. 491. The fact that the assured is not on good terms with the repair yard due to disputes concerning the payment for earlier assignments is normally not relevant, unless the assured is able to prove that the disagreement is due to dishonesty or the like on the part of the repair yard. An actual threat of strike at the yard will also be relevant, as will a situation where the yard has relatively recently been the victim of repeated strikes and there is reason to fear that the conflict has not

been resolved. The assured's objections to the yard must be made as soon as he becomes aware of the relevant circumstances, and of the fact that the insurer intends to invite the yard to submit a tender. If the assured has himself requested the yard to submit a tender, he may not normally raise objections concerning circumstances of which he was, or ought to have been, aware when he requested the yard to submit a tender.

#### § 12-13. Removal of the ship

This paragraph corresponds to § 184 of the 1964 Plan. **The commentary was amended in the 2007 version.**

The removal of the ship to the repair yard constitutes part of the repairs, and the costs of the removal must therefore be covered by the insurer, cf. subparagraph 1. The costs of removal first and foremost cover costs of bunkers, towage if the ship has to be towed, canal and port expenses, etc. The assured also has a limited cover of his loss of time during the removal, in that the insurer is liable for the "necessary" crew's maintenance and wages throughout the period of time involved. The requirement that the crew must be necessary is new in relation to the 1964 Plan. In the consideration of this question, regard must be had to what is necessary with a view to the removal. The maritime crew will obviously be covered; however, normally not hotel and shop staff on a passenger liner, or mobile repair teams who work temporarily on board. However, the provisions must be implemented with some caution: it is not the intention to force the assured to empty the ship of crew for shorter voyages.

"Bunkers and similar direct expenses in connection with the running of the ship" include supplies and similar "out-of-pocket expenses". To this must be added expenses for the rental of objects necessary to get the ship to the repair yard, such as a rented generator. If it is necessary to take out additional liability insurance to cover any liability the ship may incur in relation to a rented tug, the premium must be regarded as removal expenditure. This shall also apply where the liability insurance shall cover the assured's liability for any damage which the tug may sustain whilst sailing to the place where the ship is moored. Liability for costs of removal does not, however, include interest on debt, general insurance premiums, or any share of the owner's general administrative costs.

**In the offshore sector, there are often two crews per ship because the crew alternates between work and leisure time. The question whether the insurer is liable for the pay of one or both crews during removal has therefore been discussed. However, the issue is not quite to the point: the crew that is on board the ship during removal earns, in addition to the wages paid for work during the removal period, wages for its leisure time, but this part of its wages is not paid until the period of leisure time. If the crew had only been paid wages during the period in which it worked and nothing had been paid during the time when the crew was not working, the wages would have been twice as high. Thus it is not correct in this situation to say that it is a question of wages for two crews, but rather of pay earned for time off related to a period of work. This pay must therefore be covered in its entirety.**

The "removal" covers the entire deviation to and from the repair yard. However, the expenses which the assured saves through the fact that the removal places an employed ship in a more favourable position, cf. subparagraph 1, second sentence, must be taken into consideration. Other advantages shall not be deducted, e.g. where the ship because of casualty damage has been removed to a repair yard where owner's repairs were less expensive than they would have been if the ship had followed its normal docking schedule. Nor shall any advantage the assured obtains by an unemployed ship getting into a more favourable position for chartering be taken into account. On the other hand, the assured will not be compensated for the disadvantage that arises if the ship gets into a less advantageous position.

In certain cases the ship is moved to the port of delivery in connection with a sale and has the casualty repairs carried out in that port. If the sale and the port of delivery were agreed on prior to the commencement of the removal, the removal must be regarded as strictly an owner's expense, even if the ship was in ballast during the removal. The call at the port must in that event be regarded as ordinary in connection with the running of the ship.

The removal costs must be regarded as accessory costs of repairs to be apportioned among recoverable and non-recoverable work under §12-14. Here as elsewhere, the Plan is based on the rules of apportionment that have established themselves in practice.

During a removal to a repair yard, all insurances concerning the ship will normally be in effect on the conditions agreed on. However, according to § 3-20, any of the insurers may exclude liability for any loss arising during or as a result of the removal, if the removal involves a significant increase of the risk. According to subparagraph 2, liability is transferred to the insurer who is liable

for the damage to the ship, unless he has also excluded liability, cf. subparagraph 3. If a claims leader has been appointed under the hull insurance, he has, as mentioned in the commentary on § 3-20, the right to decide the question of removal on behalf of the hull insurers under the hull insurance as well as the interest insurers, cf. § 9-6 and § 14-3, subparagraph 4. If the claims leader decides that liability for the removal shall be excluded, the removal will normally have to take place at the assured's own risk. If, however, the ship is moved as the result of damage covered by the war-risks insurance, and the marine-risk insurer, but not the war-risk insurer, has rejected liability for the removal, the war-risk insurer is also liable for marine perils during the removal. Reference is furthermore made to the commentary on §3-20.

In accordance with practice, no portion of the removal expenses will normally be attributed to damage arising during the removal to the repair yard. By contrast, a proportion of these expenses shall be attributed to damage that is not discovered before the ship is at the repair yard, but which clearly existed before the removal commenced.

#### § 12-14. Apportionment of common expenses

This paragraph is identical to § 185 of the 1964 Plan, but the heading has been changed from apportionment of expenses to apportionment of common expenses.

According to the first sentence, expenses that are common to recoverable and non-recoverable work shall be apportioned on a discretionary basis taking into account the cost of each class of work.

The second sentence indicates an apportionment of expenses which are time-related taking into account the length of time each of the two classes of work would have taken if they had been carried out separately. However, in practice only dock and quay rental is apportioned over the length of the time of repairs. Other time-related common expenses are normally so minor that it is not worthwhile making an extra calculation of them. However, if it seems unreasonable to apportion other time-related costs by reference to the costs of the respective classes of work, such costs should also be apportioned over time.

In practice, certain special principles of apportionment have developed which give a more detailed regulation of the Plan's rules. The Plan makes no changes in these principles. Here there is merely reason to point out that as regards the basis of apportionment, the docking expenses and parts that have been used for the repairs must be included along with the actual costs of repairs.

#### § 12-15. Ice damage deductions

This paragraph is identical to § 186 of the 1964 Plan.

The ice damage deduction is based on the view that the assured may, through his actions with the ship, influence the risk of it sustaining ice damage. A general ice damage deduction must therefore be considered to have a certain deterrent effect.

If the Plan's solution with deduction of a fraction is used, it is unnecessary to introduce special rules on the calculation of deductions for the situation where the ship is navigating in ice for several days on end. Such special rules should possibly be agreed on individually if the owner wants the ice damage deduction in the form of a fixed amount, cf. below regarding the deductible.

The ice damage deduction shall also be applied in those cases where the assured has paid additional premium to be able to proceed beyond the ordinary trading areas. If the parties want another solution, this has to be agreed in connection with the notification that the ship will proceed beyond the trading limits, cf. § 3-15, subparagraph 1.

The same repair costs fall outside the scope of the ice deduction as are excepted from the scope of the machinery damage deduction, cf. § 12-17. As regards the basis for calculating the deduction, reference is made to § 12-19 and the commentary on that provision.

#### § 12-16. Machinery damage deductions

This paragraph corresponds to § 187 of the 1964 Plan. **The commentary was amended in the 2007 version.**

Like the 1964 Plan, the Plan operates with a machinery damage deduction in addition to the standard deductible, cf. subparagraph 1. It is assumed that such deduction has a certain deterrent effect. The deduction first and foremost concerns "machinery and accessories", but in order to avoid difficult problems of definition, the provision also covers pipelines and electrical cables outside the machinery.

Under the 1964 Plan, the deduction was the same in all cases and was one fourth of the claim. The Special Conditions, however, made the amount of the deduction subject to negotiations between the parties, and this is the solution on which the Plan is based. For the sake of clarity, it is emphasised that the machinery damage deduction comes in addition to the general deductible under § 12-18, subparagraph 1, cf. second sentence.

The commentary on the 1996 version states that “the description in subparagraph 2 of nautical casualties where no deductions shall be made remains unchanged. However, the wording “nautical casualty” is not accurate in relation to the provision in subparagraph 2 (b), which prescribes that no deduction shall be made if the damage is a consequence of “the engine room having been completely or partly flooded”. According to this wording, the exclusion in (b) also covers an ordinary leak in the engine room or an incident where a crew member has forgotten to turn off a tap on board. This is an expedient solution, and it is therefore misleading to refer generally to this type of casualty as a “nautical casualty”.

According to subparagraph 2 (a), no deduction shall be made if the ship has been involved in a “collision or striking”. In practice, the term “striking” has caused a number of problems in relation to the machinery damage deduction. The purpose of the deduction is that it shall apply to damage to the machinery attributable to defects in machinery or inadequate maintenance, wear and tear, etc. All damage that has an “external” cause and where it is a question of contact with foreign objects from the outside should therefore not be subject to a deduction. “Striking” therefore occurs in situations where the propeller strikes drift wood or drift ice, where pieces of ice or a plastic bag or the like are sucked up against the cooling water inlet obstructing the water circulation with the result that the machinery is overheated and damaged, and where a thin fishing line or the like gets twisted around the propeller shaft between propeller and stern tube and subsequently penetrates into the stern tube stuffing causing leakage and damage. On the other hand, deductions must be made if damage from overheating or vibration occurs in consequence of prolonged sailing through ice. However, doubtful borderline cases may arise in connection with damage caused by sailing through ice.

A prerequisite for “striking” is nevertheless that the ship strikes a foreign object. It will therefore never constitute “striking” when parts of the ship strike other parts of the ship, e.g. where the rudder or the nozzle loosens and gets into contact with the propeller. This applies regardless of whether or not the propeller moved. On the other hand: If the ship strikes its own fishing tackle or its own equipment outside the ship, this will constitute “striking”.

A nautical casualty furthermore occurs in the event of “the engine room having been completely or partly flooded”, cf. subparagraph 2 (b). This will normally be casualties of a more serious nature. Thus, if the crew has forgotten an open tap with the result that water pours out into the engine room and causes damage to the machinery, such damage shall normally be subject to a machinery damage deduction.

Damage resulting from fire or explosion shall always be subject to a machinery damage deduction if the fire broke out in the engine room, cf. subparagraph 2 (c). According to practice, the “engine room” must be understood to mean the room where the propulsion machinery is located. Separate rooms for pumps, fire pumps, etc. in front of the engine room bulkhead, or unconnected with the propulsion machinery in general, are not “engine rooms”. If the engine room behind the engine room bulkhead has for practical reasons been split up into separate rooms, e.g. control room, pump room, auxiliary engine room, internal funnel with exhaust boiler, etc., the individual rooms form part of “the engine room”, unless they are separated by bulkheads which constitute a protection against the spreading of fire corresponding to the engine room bulkhead.

The 1964 Plan stipulated a short time-limit for the detection and reporting of damage to avoid machinery damage deductions. This provision has been deleted. The question whether it is a case of a nautical casualty or a machinery casualty must henceforth be decided on the basis of general burden-of-proof rules. If it has been demonstrated that certain damage detected later is probably attributable to an earlier grounding, no deductions shall be made, even if the damage is discovered more than three months after the casualty.

Deductions under this paragraph shall be made in connection with repairs of: main engine with shafting, bearings and propeller, auxiliary engines, starting air tanks, exhaust pipes for main and auxiliary engines, electric motors (however, with the exception of household appliances, nautical instruments, etc.), generators, converters, steam boilers with flue outlet and internal funnels, condensers, coolers, pre-heaters, refrigeration machinery, steering gear, pumps, anchor windlasses, winches, deck cranes, pipelines with valves and cranes, electric panels and wires, as well as paint and installation of parts which come within the scope of this paragraph.

Deductions shall also be made for accessory costs of repairs, see further the Commentary on § 12-7.

#### § 12-17. Compensation without deduction

This paragraph corresponds to § 188 of the 1964 Plan.

Certain losses are covered without deductions. This applies to depreciation in value under § 12-1, subparagraph 4, normal loss of time under § 12-11, subparagraph 2, costs of removal under § 12-13, unused spare parts and temporary repairs.

In practice, "shifting" within the port area is not regarded as removal and accordingly falls outside the scope of § 12-13. Bunkers consumed during such "shifting" shall therefore be subject to deductions.

Furthermore, all accessory costs of repairs shall be subject to deductions, provided the costs are directly related to the repair work carried out. Costs which are recoverable in accordance with the general part of the Plan, e.g. survey or litigation costs, are, however, fully recoverable. In practice, no deductions have been made in costs incurred in classification surveys, but such expenditure has been subject to a deductible.

Costs of measures to avert or minimise loss, such as a salvage award for a ship in ballast and general average contributions, need not relate to any specific damage to the ship and are therefore recoverable without deduction. If, during the rescue operation, the ship sustains damage that is recoverable under general average, deductions will be made in accordance with YAR and a corresponding proportion of the repairs will be charged to the assured. Deductions shall also be made under § 12-15 and § 12-16 if the general average damage to the ship is settled under § 4-10; the same applies to assumed general average, cf. § 4-11. The reason is that the compensation for a certain type of damage to the ship shall be approximately the same regardless of the cause of the damage. This reasoning means that deductions must also be made where damage to the ship is recoverable under the general rule on particular measures to avert or minimise loss in § 4-12, subparagraph 1, e.g. where the ship sustains damage solely for the purpose of averting liability, or a minor casualty which does not endanger the safety of the ship, cf. § 12-19, subparagraph 2.

#### § 12-18. Deductible

This paragraph corresponds to § 189 of the 1964 Plan, CEFOR I.9 and PIC § 5.24.

In § 189, subparagraph 1, of the 1964 Plan the deductible (formerly "the franchise") was set at one-thousandth of the sum insured, however, not less than NOK 1,000 and not more than NOK 10,000. The Special Conditions left the deductible to the parties' negotiations, however, and this approach has now been adopted in the Plan. This means that the amount of deductible will appear from the individual insurance policy, cf. subparagraph 1.

As under the 1964 Plan, the deductible is to be calculated for "each individual casualty". The purpose is to achieve a clear-cut limit for the size of the recoverable casualty, thereby eliminating the claims settlements for the minor casualties. It is also assumed that one deductible per casualty has a deterrent effect. However, the result may cause the assured economic problems if several casualties occur at short intervals. This is something the assured may have to take into consideration during the negotiations concerning the size of the deductible.

Normally, the distinction between one and several casualties will not cause any problems. If a fire in the engine room spreads and results in damage to other parts of the ship, this is clearly one casualty. On the other hand: if the ship sustains damage by a grounding and later during the voyage sustains damage to the superstructure as the result of a hurricane, this will constitute two casualties. When several casualties are connected in terms of time and place, it may, however, be difficult to decide whether there has been one or several casualties. Reference is made to the description of relevant type cases concerning the corresponding problems associated with the insurer's liability for the sum insured, cf. § 4-18.

The question regarding the dividing line between one and several casualties must be decided by a discretionary assessment of the same factors as those mentioned in relation to § 4-18. However, the factors stated must be combined with the real considerations behind the provision regarding a deductible. Thus, it is not a foregone conclusion that the delimitation of the individual casualty will be identical under the two sets of rules.

In practice, the question has been raised regarding the extent to which a new deductible shall apply where there has been a further development of damage which the assured could have averted, e.g. damage to the stern tube due to postponed repairs of damage to the propeller, or



where an error in design has been discovered which will lead to more and more cracks in the main engine unless it is repaired. The deciding factor for the number of deductibles in such cases must be when the assured's negligence acquires the nature of an independent damage cause which "breaks" the causal chain from the first damage. Such a new cause occurs if the assured's conduct can be characterised as negligent in relation to the development of the damage after the first damage was discovered. New damage must then give rise to a new deductible. This must apply even if the insurer has failed to object to a postponement of the repairs, but not, however, if the insurer has confirmed directly to the assured that it is safe to proceed without repairing.

It is also irrelevant to the question of the number of deductibles whether the classification society has approved the postponement, unless it is a question of damage that may have a bearing on the safety of the ship, e.g. certain types of engine damage. If the classification society has given approval for the ship to proceed with damage that may threaten the safety of the ship, it must be assumed that the further development was not foreseeable, and that the assured was not guilty of negligence. As long as the requirements of the classification society are complied with, the further development should in such cases be recoverable without any new deductible.

In the type of situation where one incident of damage requires several repairs, a deciding factor for the number of deductibles must be whether the error committed by the repair yard is foreseeable, cf. ND 1977.38 NH Vestfold I: Only where the repair yard's error is unforeseeable, e.g. because it is a question of gross negligence on the part of the repair yard, shall the new damage be deemed to constitute a new casualty which gives rise to a new deductible. An example of repair yard errors which may under the circumstances be considered unforeseeable is where the repair yard forgets tools or the like inside an engine resulting in damage when it is started. By contrast, it is not necessarily unforeseeable that a part is installed the wrong way in an engine, cf. the Vestfold I case. Sub-standard work, e.g. poor welding work, will normally also be foreseeable. If the yard's error is foreseeable, both the repairs of the same damage and the further development of the damage must be recoverable without any new deductible.

In the event of new damage caused by errors by the repair yard, considerable problems of evidence may arise, e.g. where welds in the propeller break open after a long period of time. If the period of time from the damage was repaired until it reoccurs or new damage develops is lengthy, strict evidential requirements must be imposed before it is decided that the cause is the original damage and that no deductible shall apply. The assessment of evidence must also be stricter the more the part in question is exposed to damage.

A situation that has given rise to considerable problems in relation to the number of deductibles is where there is an error in design or the like in the cylinder linings from the factory which causes them to crack after a certain period of use. There may not necessarily be any pattern to when the cracks occur. In some cases it is discovered at the same time that several linings have cracked, whereas in other cases weeks or months may pass between each time a lining cracks. The deciding factor for the question regarding the number of deductibles in such cases must be the extent to which the cracks can be traced back to the same cause. If the cracks are attributable to the same cause, they must be regarded as one casualty, which only gives rise to one deductible. Elements in this evaluation include whether there is a close connection in terms of time or place between the incidents of damage, or whether the new incidents are of a totally independent nature, and whether the common underlying factor increases the risk of new damage, cf. above under § 4-18. Cracks that may be traced back to the same error on the part of the manufacturer should be regarded as one casualty and only give rise to one deductible. The incidents described here take place within the same area in the ship and, in the event of an error in manufacture, it is foreseeable that the error will affect several of the manufactured units until the error is discovered. If, however, there are several separate errors, or it is clear that the manufacturer should have discovered the error and done something about it, the incidents will constitute several casualties in relation to the deductible.

At the same time, it is clear that if the assured can be blamed for not having averted the damage, this warrants the calculation of a new deductible from the time the assured should have intervened. If the assured has shown negligence in failing to replace the linings that have not yet cracked, new cracks should give rise to a new deductible. In that event, each new crack should be regarded as a new casualty in relation to the deductible, based on the view that the assured's motivation to replace the rest of the linings increases with each new crack that arises.

The deductible shall apply to the overall compensation for each casualty. If the casualty results in several invoices, the deductible must therefore be apportioned over all invoices, and not be settled on the basis of the initial costs. This is necessary in order for the calculation of interest and the apportionment of refund settlements not to be affected by the manner in which the decision is

made to organise the repairs of the ship based on practical, technical and commercial considerations. The apportionment of the deductible results in the assured getting a proportionately equal share of policy interest on all invoices subject to deductibles, regardless of whether the invoice is received at an early or late stage of the repairs of the ship. In connection with refund settlements, an apportionment of the deductible over all invoices will result in the assured benefiting from the proportion of the refund claim that corresponds to the proportion of the deductible for the relevant claim.

Subparagraph 2 creates an exception to the rule that the deductible is to be applied to each casualty in cases where it may be difficult to decide whether there have been one or more casualties. Under the 1964 Plan, the exception was limited to damage due to "heavy weather". The exception has now been extended to include damage caused by "navigating in ice". The extension is taken from § 4.6 of the Loss-of-Time Conditions in CEFOR Form 237, and may be justified by the fact that the legal considerations constituting the background to the exception for heavy-weather damage are just as applicable to continuous navigation in ice.

So-called "ranging damage", which occurs in the event of bad weather lasting for several days while the ship is berthed, has in practice been recoverable with one deductible. This practice shall be continued.

The exception for damage sustained between the departure from one port until arrival at the next shall apply, regardless of the nature of the calls. Heavy-weather damage that occurs between a port of loading and a port of refuge will thus be subject to one deductible.

For voyages on The Great Lakes, CEFOR IV, B 4, subparagraph 5, contained a clause to the effect that for damage caused by collision or striking "one deductible was to be calculated for the round voyage up from and down to Montreal". This rule has not been maintained. Previous experience with voyage franchises shows that they create problems of interpretation and evidence and are therefore likely to be abused.

Subparagraph 3 is identical to the 1964 Plan and states that the costs of measures to avert or minimise loss and certain accessory costs are recoverable without deductible. As the assured will never know the extent of the damage which might have been caused by the casualty which he has averted, it is important that he shall under any circumstances receive compensation for the losses he suffers through measures to avert or minimise loss. Similarly, the insurer should cover in full the expenses incurred after a casualty for the purpose of ascertaining the extent of the damage.

Cover of the relevant costs without deductible shall not apply if it is clear in advance that the costs incurred in repairing the damage are lower than the deductible, cf. the commentary on § 4-6 and Brækhus/Rein: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p.588.

If the ship is docked in order to establish whether damage has occurred after a grounding, the normal procedure has been to apply a deductible even if no damage is found. According to clause 12.1 of the English hull conditions (ITCH), such survey is recoverable without deductible if the survey was "reasonable". Today it is usually unnecessary to dock a ship to carry out such surveys. Normally a diver's inspection will be sufficient. If, in exceptional cases, the classification society demands docking, the costs should be regarded as survey expenditure, which is recoverable without deductible. The situation is different where docking is demanded and damage is in actual fact found. In that event, the docking expenditure follows the casualty and gets its share of the deductible, even if the repairs are not carried out the first time around due to the assured's commercial decisions.

§ 12-19. Basis for calculation of deductions according to §§ 12-15 to 12-18 and § 3-15

This paragraph corresponds to § 190 of the 1964 Plan.

Subparagraph 1 is identical to the 1964 Plan, but a reference to § 3-15, subparagraph 2, which contains a new deduction provision relating to the situation where a ship proceeds beyond conditional trading areas, has been introduced. The provision entails that all deductions shall be made from the gross costs before any other deductions. To the extent that machinery damage deductions and ordinary deductibles are calculated in the form of fixed amounts of money, the provision is only relevant to the ice damage deduction and the deduction for proceeding beyond the trading limits.

Subparagraph 2 is discussed in further detail under § 12-17.

## Chapter 13 - Liability of the assured arising from collision or striking

### General

Hull insurance is first and foremost an insurance of property. In the absence of general liability insurance for the shipowners, however, the hull insurer also assumed cover of the assured's collision liability. However, eventually P&I insurance has become just as common as hull insurance, at any rate for hull insurance of ocean-going vessels, and an international trend is also seen in the direction of the P&I insurer assuming the entire collision liability. It would therefore seem natural to ask whether the collision-liability risk should not be transferred to the P&I insurer, which would establish a more clear-cut dividing line between the hull insurer as property insurer and the P&I insurer as liability insurer.

There are practical reasons for letting the hull insurance include collision liability, however. Collisions will normally cause mutual damage. If both sides are at fault, the assured will have a claim against the oncoming ship's owner for a fraction of his own damage concurrently with being liable for a corresponding fraction of the oncoming ship's damage. The hull insurer's right under § 5-13 to be subrogated to the claim against the oncoming ship gives him an interest in the collision settlement. This will often be the largest claim in the event of litigation. By also placing the collision liability vis-à-vis the oncoming ship on the hull insurer, it will normally be one and the same insurer (group of insurers) who are interested on both the "aggressive" and the "defensive" side in the collision proceedings. If collision liability were to be covered by the P&I insurer, both the hull insurer and the P&I insurer would have to act in practically every single collision settlement. During the revision of the Plan, the approach of grouping cover of collision liability under the hull insurance has therefore been maintained.

Even if the hull insurer covers collision liability, however, there will still also be a need for P&I insurance. This is first and foremost due to the fact that the hull insurer's collision liability is limited with regard to the nature of the liability covered. A line must therefore be drawn between the collision liability which belongs under the hull insurance, and the collision liability which shall be entirely covered under the P&I insurance. The new Plan essentially follows the pattern from the 1964 Plan, but a few adjustments have been made, see further § 13-1 and the commentary notes to that provision. The predominant view has been that the dividing line should be made as clear-cut and as easy to implement as possible. Whether certain types of liability shall come under hull cover or P&I cover is of less importance.

In addition to the fact that the P&I insurance covers certain types of collision liability in full, this insurance is also needed as a supplement to the cover of collision liability under the hull insurance. This is related to the principle that the hull insurer's liability is maximised to the sum insured, including as regards the cover of collision liability. A potential liability in excess of the sum insured, so-called "excess collision liability", may possibly be covered under a hull interest insurance with a special assessed value, cf. § 14-1, but this insurance also has a limited sum insured. Liability in excess of the sum insured under the hull insurance, and possibly the hull interest insurance, is covered under the P&I insurance, where limitation of the cover is tied to the owners' right to limitations of liability. However, because the Plan operates with a separate sum insured for the cover of collision liability under the hull insurance and the hull interest insurance, it will rarely be necessary to impose excess collision liability on the P&I insurer, see § 13-3 and the commentary on that provision.

### § 13-1. Scope of liability of the insurer

This paragraph corresponds to § 194 of the 1964 Plan.

The provision was amended in the 2003 version. Subparagraph 1 contains a specific statement of the liability the hull insurer shall cover.

(1) The insured ship, (with accessories, etc.) must have caused a loss "through collision or striking". The word "striking" in actual fact also covers "collision", i.e. striking against another ship, but the expression "collision or striking" is well established in practice and has therefore been maintained.

"Striking" presupposes that the physical contact between the ship and another object is a consequence of a (relative) movement so that the movement energy results in a pressure. "Striking" also includes pressure against or the touching of another object, e.g. where the ship causes damage by bumping or pressing against a quay. "Striking" may be the result of "pulling" or "sucking", e.g. where the ship sucks or draws an object towards itself. However, "pulling" is not in

itself "striking", and is traditionally covered under P&I insurance. Pulling without striking contact with the insured ship will not normally result in any mutual damage, and it is therefore not expedient to involve the hull insurer in the liability settlement.

Damage caused by waves or backwash cannot be described as damage caused by striking.

(2) The object against which the insured ship strikes may be another ship or another object floating in the sea, e.g. logs from timber rafting, or an installation on shore, e.g. a quay, a bridge or a dock gate. Grounding is also "striking".

Normally the object against which the ship strikes will belong to a third party. This is not a requirement, however. Objects owned by the assured or ownerless objects are also covered, in principle. This is first and foremost of practical significance if the assured becomes liable towards a third party because the striking against an ownerless object or an object belonging to the assured is transmitted to an object belonging to a third party. An example is where the insured ship strikes an ice floe that in turn bumps against a quay that is damaged. In such cases the hull insurer is liable.

(3) It is the insured "ship, its accessories, equipment or cargo" which must have struck against another object. The term "equipment" is new and is included in order to cover equipment trailing after the ship, such as seismic cables and fishing equipment, and where there may be doubt whether the objects can be classified as "accessories". The ship's "accessories" include everything that the ship has on board, whether or not the object is co-insured under § 10-1, subparagraph 1, and regardless of whether it is a shipowner or a third party who owns the relevant accessories or equipment.

The wording "the ship, its accessories" etc. implies that the hull insurer is only liable for striking damage caused by the ship's movements being transmitted via the accessories, equipment and cargo. Striking damage which accessories and cargo cause by independent movements must be covered by the P&I insurer. If, for example, a lifeboat, a derrick or the deck cargo juts out over the ship's side, thereby causing damage to a shore installation during the ship's manoeuvring to go alongside the quay, liability will be covered by the hull cover. If, however, a crate or a bale or the like slips out of the heave during discharging and hits a car on the quay, or a wire snaps with the result that a derrick falls down on top of and damages a crane, liability must be covered under the P&I insurance. Where equipment strikes against another object, there is nevertheless reason to be somewhat more liberal and cover the collision liability, even if the striking cannot be deemed to have been caused by the ship's movements. An example of such a situation would be where the ship is lying with its engines switched off and the ship's nets drift down onto another net and damage it.

If the ship has suffered a casualty that gives rise to total-loss compensation, the question is whether the hull insurer is liable for a possible subsequent collision liability. The point of departure must be that the hull insurer covers collision liability resulting from a peril that struck during the insurance period, as long as total-loss compensation has not been paid, and the insurer has not exercised his right under § 4-21 to pay the sum insured. The hull insurer may therefore become liable for collision liability if the ship in a sunken state causes damage to cables on the sea bottom, see ND 1990.85 "Dispasch" Vinca Gorthon. However, after a total-loss compensation has been paid, the insurer is no longer liable, unless he has taken over the title to the wreck under §5-19.

(4) The hull insurer must further cover the liability imposed on the assured due to the fact that the tug used by the ship causes damage by collision or striking. Such liability may be imposed on the assured according to the general liability rules under maritime law, or as a result of more far-reaching liability provisions in the towage contract. However, the insurer is protected by the limitation in § 4-15 as regards unusual or prohibited contractual terms. The provision also includes the assured's liability towards the tug if the ship collides with it. However, in practice, liability under the towage contract for loss incurred by the tug by a collision with a third party has not been covered. In such cases, the hull insurer has covered the damage to the third party, while the P&I insurer has covered the damage to the tug. To simplify matters between the hull insurer and the P&I insurer, however, the hull insurer shall cover all liability for collision damage which the tow may incur under a towage contract on ordinary terms, cf. ND 2000.442 NV SITAKATHRINE. The wording "caused through collision or striking" must therefore also include liability for damage to the tug resulting from its collision with a third party.

(5) The insurer must (within the limits of the sum insured) cover the assured's liability for the loss caused by the striking. In contrast to the English conditions where hull insurers are liable for 3/4 of the collision liability, the Plan operates with a 4/4 liability.

The cover includes not only liability for damage to objects which are, directly or indirectly, affected by the striking, and damage which affects interests connected with these objects, but also liability for consequential damage resulting from the striking, provided that the assured is held liable for this.

(6) The insurer is only liable for liability that may be imposed on the assured according to the laws of the country under which the collision is judged. It is irrelevant whether it is liability based on fault, strict liability, or liability pursuant to agreement, cf. however, § 4-15 concerning unusual or prohibited contractual terms. The assured must furthermore exercise any right he might have to demand limitation of liability.

It is not a requirement that the liability is established by judgment, cf. § 4-17.

(7) The rules of the Plan on measures to avert or minimise loss shall apply in the normal manner. The hull insurer must therefore cover expenses, e.g. in the event of damage or liability incurred in order to avert collision liability.

Subparagraph 2 lists under letters (a) to (j) exceptions to the main rule in subparagraph 1.

Letter (a) excludes liability arising while the ship is engaged in "towing". Towing of other vessels, a dry dock, a raft, etc., limits the towing vessel's freedom of movement and creates a corresponding increase of the risk of collision.

Under the Plan, the hull insurer's cover of collision liability is suspended for the duration of the towage. The insurer is therefore free from liability, even if there is no causal connection between the towage and the damage. The purpose is to avoid discussions about difficult questions of causation where the significance of the towage in the course of events is uncertain.

The insurer is further free from liability where the collision occurs before towage has commenced, i.e. before the towage connection has been established, or after the towage has been concluded, if it is proved that the collision was caused by the towage. The insured ship collides, e.g. with the ship that is to be towed during an attempt to establish the towing connection, cf. "caused by the towage".

The limitation in the cover of liability does not apply where liability arises in connection with a salvage operation or a salvage attempt undertaken by the insured ship, provided that the salvage operation or salvage attempt is "permitted" under §3-12, subparagraph 2. The insurers' general interest in encouraging salvage operations makes it natural that they should automatically give the assured normal liability cover in such cases.

Collision liability which falls outside the scope of the hull insurance is, as mentioned above, normally covered by the P&I insurer. However, liability referred to in letter (a) may be covered by the hull insurers by special agreement, possibly in return for an additional premium.

Letter (b) excludes "liability for personal injury" from the hull cover. This liability is traditionally covered by the P&I insurer regardless of whether the injured persons were on board the insured ship, on board the oncoming ship, or ashore.

According to letter (c), liability for "other loss suffered by passengers or crew on the insured ship" also falls outside the scope of the hull insurance. Examples of such liability include liability for the loss of time which the passengers suffer as a result of the collision, liability for the crew's repatriation expenses (cf. section 28, no. 3 of the Seamen's Act), and liability for loss of luggage and crew's effects. As regards the latter case, it will also follow from letter (d) that liability falls outside the scope of the hull cover.

Letter (d) excludes liability for cargo, other effects on board "the insured ship", or equipment which the ship uses. Liability for damage to the cargo of the insured ship is a typical P&I risk which should be covered by the P&I insurer, including cases where it is a result of collision or striking. The wording "equipment which the ship uses" is new and is aimed at covering seismic cables and other equipment trailing after the ship which are consequently not on board.

Collision liability in respect of own cargo will rarely occur. If the collision is judged under Scandinavian law or other rules based on the Collision Convention of 1910, the cargo owner will only have a claim against the oncoming ship for such proportion of the loss as is equal to the degree of fault of that ship. There will be no question of any recourse claim from the oncoming against the transporting ship. As regards the relationship between the cargo owners and the transporting ship, the Hague Rules as well as the Hague-Visby Rules will normally exclude liability. Any errors committed by the assured are normally errors "in the navigation or handling of the ship", and the assured will in that event be protected against liability, cf. section 276, subsection 1,

no. 1, of the Norwegian Maritime Code. However, direct liability is conceivable, e.g. where the collision is due to unseaworthiness which existed at the commencement of the voyage and of which the master of the ship was aware, cf. section 276, subsection 2, of the Norwegian Maritime Code. Furthermore, liability for damage to a ship's own cargo may arise in connection with collisions that are judged under American law. The United States have not ratified the Collision Convention of 1910 and do not have the Convention's rule to the effect that the colliding ships only have pro-rata liability to the cargo owners. In principle, the cargo owners may hold the ships jointly and severally liable. The transporting ship is first of all protected by the Hague Rules (US COGSA 1936). However, if the cargo owners bring a claim against the oncoming ship, the transporting ship will in the recourse round be allocated a share of the liability that corresponds to the transporting ship's share of fault. Traditionally, it is assumed that such "indirect" liability shall be regarded as liability vis-à-vis own cargo in relation to the rules regarding the hull insurer's cover of collision liability, cf. ND 1936.237 NH Terje, cf. also ND 1959.19 NV Fernside and ND 1963.175 NH Fernstream. This must also, from a realistic point of view, be regarded as the most fortunate solution, cf. Brækhus: Cross liabilities-oppgjør i sjøforsikring (Cross-liabilities settlements in marine insurance) in AfS 4.488-494. It has therefore been explicitly maintained in letter (j) of this subparagraph.

Letter (e) excludes liability to charterers or others who have an interest in the insured ship. A collision may lead to a more or less lengthy suspension of the running of the ship, and hence to a loss for cargo owners who have to wait for the cargo, or for time-charterers, who are forced to charter replacement tonnage at higher freight rates, etc. If the collision is wholly or partly attributable to the assured's people, the assured will, according to general rules of maritime law, be liable for the loss. Such liability is a typical contractual liability and does not belong under the hull cover. Furthermore, the assured will normally have excluded liability in the contract of affreightment.

According to letter (f), liability for pollution damage and damage from fire or explosions caused by oil or other liquid or volatile substances and contamination damage caused by radioactive substances is excluded from the hull cover. This provision is new and taken from the Special Conditions, cf. CEFOR I.11 and PIC § 5.26. It shall in any event apply in connection with collisions or striking, including grounding, and regardless of where the damage-causing substance is derived from. It may be oil that leaks out of the insured ship, an oncoming ship, a shore tank, etc. The leak does not necessarily have to be a direct consequence of the striking damage. The provision shall also apply if the collision results in an explosion that causes a ship to spring a leak or emit oil.

The term "pollution damage" includes both damage caused by soiling and damage from contamination of cargo. Pollution damage shall have been caused either by oil or by other liquid or volatile substances. By "oil" is meant first and foremost petroleum products, but the term also includes animal and vegetable oils. The wording "other liquid or volatile substances" is aimed at substances that pollute in the same way as oil, e.g. chemicals.

The provision also excludes liability for "damage resulting from fire or explosion caused by oil or other liquid or volatile substances". This covers first and foremost cases where the fire or the explosion of the relevant substance is a direct consequence of the collision. However, in cases where a collision results in fire or explosion of oil or other substances, and this fire or explosion subsequently leads to fire or explosion in another cargo, the total damage shall also be regarded as "caused" by oil, etc. However, the provision does not apply where the collision leads to fire in another cargo, which in turn results in "oil or other liquid or volatile substances" igniting, with ensuing fire or explosion. In such cases, there will be major practical difficulties in singling out the part of the damage that is attributable to the oil fire.

The exception for damage caused by radioactive substances is limited to "contamination damage", and accordingly does not cover all nuclear damage. Nuclear damage is, however, excluded on a more general basis in § 2-8 (d) nos. 1 - 4..

It follows from the second sentence that an exception from the exclusion is stipulated in cases where the insured ship has collided with another ship. In that event, the hull insurer's collision liability shall cover the liability of the assured for pollution damage, etc. set forth in the first sentence, provided that the damage is inflicted on the oncoming ship with equipment and cargo.

According to letter (g), liability for loss caused by cargo or bunkers after grounding or striking against ice is excluded from the hull cover. The provision is identical to §194, subparagraph 2 (f) of the 1964 Plan. Given the new exception for contamination, etc. in letter (f), this exclusion will be of little practical significance, but it has nevertheless been maintained unchanged.

In the event of collision or grounding, the ship's cargo will often be damaged and spill out of the ship, causing damage to the surroundings. The most frequent examples are pollution damage or

fire and explosion resulting from oil or similar substances spilling out or igniting. This type of damage is excluded under letter (f). However, it is also conceivable that another type of cargo may cause damage, e.g. dynamite which may explode in the event of collision damage, emission of prussic acid, cargo being washed over board and obstructing traffic, etc. In the event of a collision with another ship, striking against a quay, etc. the hull insurer shall cover the liability of the assured for damage caused by such cargo. This is the most expedient solution in these types of situations because the hull insurer is already liable for the actual striking damage. If cargo causes damage following grounding or striking against ice, however, normally no liability to third parties for striking damage will arise. Accordingly, liability for damage caused by the cargo should come under the P&I cover in this situation.

In this respect as well, however, the rules relating to liability for measures to avert or minimise loss prevail over the special rules of cover. If cargo is thrown overboard in order to make the ship lighter after a grounding, liability for damage caused by the cargo may have to be covered by the hull insurer according to the rules in chapter 4 of the Plan, subject to the limitations following from YAR 1994, Rule C.

Letter (h) excludes liability for loss caused by the ship's use of anchor, mooring lines, etc. The provision was amended in the 2003 version by changing the wording "loading and discharging pipes" to "loading and discharging appliances" in order to bring it into conformity with the term used in the Regulations of 17 January 1978 No. 4 concerning Cargo-Handling Appliances in Ships. The purpose of this exclusion is to avoid difficult borderline questions between damage caused by striking by "the ship, its accessories, equipment or cargo", where liability under §13-1, subparagraph 1, shall be covered by the hull insurer, and the situation where objects on board cause "striking damage" on their own. The latter situation falls outside the scope of the hull cover. Especially as regards equipment which in one form or another is connected to the ship, typically anchor and chain or gangways, it may be difficult to distinguish between damage caused by the ship's use of the equipment and damage caused by the equipment on its own. Liability for loss caused by the ship's use of such objects is therefore excluded in general. This liability will rarely arise in connection with actual collisions. Realistically speaking, it is therefore quite remote from ordinary collision liability, and it is thus natural for it to be covered by the P&I insurer.

The exclusion applies whether the object belongs to the assured or to a third party, and comprises both liability for the damage inflicted on others by the use of the object and liability for damage to the object itself as a result of the use. The latter is relevant where it is a third party who owns the object, e.g. where the insured ship by pulling or dragging severs a loading line belonging to the cargo consignee. However, as a result of the rule in § 4-16, the limitation will also be of significance where damage is caused to objects belonging to the assured.

It is only liability for damage caused "by the ship's use of" the anchor, etc., which is excluded from the hull cover. The anchor is in use when it is not in the hawsepipe. As regards the gangway, the cover shall apply as long as the gangway has not been hoisted up and fastened to the ship's side. Thus, if a gangway which has been hoisted up and fastened causes damage by striking against an oncoming ship, this does not constitute damage caused by the use of the gangway.

The wording "caused by the ship's use of" must further be interpreted to mean that it presupposes that the object has been physically implicated in the transmission of the striking from the ship to the object that is damaged. The damage is only caused by the use where the striking (or dragging) is caused by or transmitted through the anchor or the mooring lines, etc. If the insured ship, by an incorrect manoeuvre, tightens the towing line with the result that the tug is pulled under, or tightens the mooring line with the result that a bollard is torn loose and the quay damaged, this will constitute damage caused by the use of the towing or mooring line, and liability is no concern of the hull insurer's. If, however, the insured ship collides with the tug during towage, or while manoeuvring away from the quay and, before the mooring lines have been released, strikes against the quay, the striking damage shall not be regarded as caused by "the ship's use of" the towing or mooring lines, even if it must be assumed that the collision or striking would have been averted if the ship's freedom of movement had not been hampered by the towing or mooring lines.

If the casualty results partly in damage caused by striking, and partly in damage caused by the use of an object as mentioned in letter (h), the total damage must be divided between the hull insurer and the P&I insurer. If, however, striking damage is a direct result of the use of an object referred to in letter (h), the damage must be covered entirely by the P&I insurer, cf. ND 1976.263 NV Mosprince/Biakh.

Lastly, the wording "by the ship's use of" presupposes that the relevant object is used in accordance with its purpose. Mooring lines must be used to moor the ship, not e.g. to secure deck cargo. However, if the object has been used according to its purpose, it must be deemed to be in

use from the time preparations for use commence and until the use is completed, cf. ND 1976.263 NV Mosprince/Biakh.

The exclusion applies to the use of anchor, mooring and towing lines, loading and discharging pipelines, gangways, etc. It shall therefore also apply to objects that are not explicitly mentioned, if such objects may be equated with them (*ejusdem generis*). Characteristic of the objects mentioned is that they are to be used in connection with operations relating to the running of the ship, and whose purpose it is to transmit physical contact between ship and shore. A mobile gantry must be equated with a "loading pipeline", cf. ND 1976.263 NV Mosprince/Biakh, but not the ship's derricks or mobile cranes on board or ashore.

The provision in § 13-1, subparagraph 2 (h), is not aimed at regulating a situation where the relevant objects are used in connection with measures to avert or minimise loss in the hull insurer's interest. In such cases, the rules in §§ 4-7 et seq. will prevail, and liability will (wholly or in part, cf. the general average rules) have to be borne by the hull insurer. Thus, if the ship picks up a cable while using the anchor in order to avoid running aground, the hull insurer will be liable for covering the assured's liability, cf. ND 1981.329 NV Lintind, in contrast to ND 1969.1 NV Midnatsol.

The exclusion in letter (i) concerns liability for "removal of the wreck of the insured ship and for obstructions to traffic created by the insured ship". The exclusion of liability for removal of the wreck of the insured ship is taken from §194, subparagraph 2 (h) of the 1964 Plan and has a long-standing tradition in hull insurance. The wreck-removal liability is covered by the P&I insurer. It is irrelevant whether the removal is a consequence of the ship constituting a danger to navigation or an obstruction to traffic.

The exclusion of liability for obstruction to traffic is new. Obstructions to traffic may result in a loss for the owner of a port or a waterway because traffic comes to a standstill, for owners of other ships due to delays, for pilots, etc. who lose income, etc. In many cases, the cover of such consequential loss for the injured parties will admittedly be precluded, because the loss is considered unforeseeable, or because their interests are not considered protected under the law of tort. However, to the extent that the assured is held liable, such liability should be considered in the same way as the wreck-removal liability and be covered by the P&I insurance. The exclusion shall apply in all situations where the ship creates an obstruction to traffic. The extent of the damage to the ship is irrelevant.

According to letter (j), final refund of amounts which a third party has paid by way of compensation for loss as mentioned under letters (a) to (i) is excluded. This provision is identical to § 194, subparagraph 2 (i) of the 1964 Plan, and is primarily aimed at indirect cargo liability under American law, see further the commentary on letter (d). However, the provision may also be applicable to other cases where the assured is jointly liable with someone who pays compensation to the injured party and subsequently claims recourse against the assured. An example is the above-mentioned liability to passengers who are injured in a collision where both ships are at fault. The two shipowners are jointly and severally liable for the personal injuries. If the owner of the oncoming ship pays compensation for such injuries, he may claim a proportionate refund from the owner of the insured ship of the amount paid equivalent to the insured ship's degree of fault. (Possible exclusions of liability are disregarded in this connection, cf. section 161, subsection 4, of the Norwegian Maritime Code). Like direct personal injury liability, such indirect personal injury liability falls outside the hull insurance, cf. letter (b).

#### § 13-2. Limitation of liability based on tonnage or value of more than one ship

This paragraph is identical to § 195 of the 1964 Plan.

Where a tug and tow, or a string of barges, become involved in a collision, the calculation of the liable shipowner's limit of liability may cause problems. In certain cases, the owner will be liable along with several of the involved vessels, insofar as the limit of liability is calculated on the basis of the value or tonnage of several vessels. See further Brækhus in ND 1949.633-51. If the vessels are insured with different insurers, it will be necessary to have a rule that regulates the apportionment of the total insurer liability among the various vessels. In accordance with the 1964 Plan, the apportionment shall be based on the tonnage or value of the individual vessels (depending on whether the limitation is based on tonnage or value).

When the limitation of liability is based on the value of the vessels, freight is also taken into consideration (e.g. under American law) or an additional amount is calculated which is to represent the freight (under the Brussels Convention of 1924, set at 10% of the value of the ship prior to the collision). When applying this provision, the increase of the individual ship's liability limit, which the freight or the equivalent additional amount represents, shall be disregarded.



### § 13-3. Maximum liability of the insurer in respect of any one casualty

This paragraph is identical to § 196 of the 1964 Plan.

In addition to the commentary on the paragraph contained in the commentary on § 4-18, the following should be mentioned:

Practical considerations seem to call for using the ship's limitation amount as a limit for the hull insurers' liability for collision compensation. In that event, the need to involve the P&I insurer would be limited to cases of the assured's fault. However, because of reinsurance, it is essential for the hull insurers that their liability is limited. Consequently, a special sum insured has been stipulated for collision liability.

### § 13-4. Deductible

This paragraph corresponds to § 197 of the 1964 Plan.

The provision is worded in accordance with the same principles as the provision concerning deductible for hull damage, § 12-18, and reference is made to the Commentary on that paragraph. A provision has furthermore been added in § 13-4 to the effect that the insurer is liable for litigation costs, regardless of the deductible. However, this is subject to the condition that the claim for compensation presented against the assured exceeds the deductible.

## **PART THREE - OTHER INSURANCES FOR OCEAN-GOING SHIPS**

### **Chapter 14 - Separate insurances against total loss**

#### **General**

The 1964 Plan used two types of "interest" insurances in addition to the ordinary hull and freight insurances, i.e. hull interest insurance and freight interest insurance. Both of these types of insurance had to be viewed as an extension of the total loss cover under the hull insurance and, accordingly, were triggered only in the event of total loss. The hull interest insurance was aimed at covering that part of the capital value of the ship which was not covered under the ordinary hull insurance. The arrangement was used because the insurable value for hull insurance is assessed and, consequently, does not necessarily correspond to the ship's "full value .. at the inception of the insurance", cf. § 2-2. Thus there is room for setting a capital value for the ship which is not covered by the assessed insurable value under the hull policy. In practice, insurers have also been willing to provide hull interest insurance in situations where the assessed insurable value under the hull policy corresponded to - or was even higher than - the full value of the ship at the time of inception of the insurance.

A freight insurance policy was linked to loss arising from expiry of a pre-determined, long-term contract of affreightment which the owner had entered into or to a pre-determined form of employment for the ship and was taken out in addition to ordinary freight insurance, which covered loss of isolated freight amounts or loss-of-hire in the event of damage to the ship.

Even though the two interest insurances concerned different interests, they were closely related. The capital value of the ship, which is covered through hull and hull interest insurance, will depend primarily on the earning capacity the market believes the ship will have in future. The value of the ship can be said to consist precisely of the future income the ship can generate, capitalised down to current value. In other words, a hull interest policy which covers the market value of the ship includes part of the freight interest value. Strictly speaking, the object of the freight interest insurance is therefore only that portion of the freight income which is attributable to the fact that the ship is hired at a rate above the market rate. Nonetheless, in practice, higher assessed values have been accepted than what the foregoing might indicate.

Certain limitations have applied to the right to take out interest insurances, however. Under the 1964 Plan, § 223, cf. § 160, hull interest insurance was limited to 25% of the assessed insurable value under the hull policy, but no limit was set on freight interest insurance. Limitations in freight interest cover were incorporated into the Special Conditions, however, which developed a two-track system for setting the freight interest: either the insurable value (which was identical to the sum insured) was assessed at 25% of the assessed value under the hull policy (assessed insurable value) or, alternatively, there was an open insurable value based on an existing time charterparty or charterparty for a series of voyages. This type of freight interest insurance, with its open insurable value, could either be linked to "the assured's expected net freight earnings for 18 months based on a general and reasonable business assessment of the outlook at the time the casualty occurred", cf. PIC IV, § 15, or be set at 50% of the gross freight for up to 18 months of the remaining portion of an actual charterparty, cf. CEFOR Form no. 248, 2 and 3. Under the latter alternative, an indirect "daily amount" was standardised at 50% of the gross freight per 24-hour period. When the time frame is known this approach therefore means that the parties will at all times know the magnitude of the freight interest amount. The insurable value is, however, open in that the parties do not know at the time they enter into the contract what amount will have to be paid out in the event of loss.

The rules for freight interest insurance corresponded to a provision in the hull conditions to the effect that the hull insurer's liability was limited if the freight interest insurance exceeded 25% of the assessed insurable value under the hull policy or 50% of gross freight for up to 18 months of the remaining portion of an actual charterparty, cf. PIC § 5, 28 and CEFOR I, 13.

Since the two interest insurances partly overlap and the purpose of both is to "catch" loss items which do not arise in the event of partial damage to the ship and are not covered by the ordinary freight insurance on the ship, a strong case can be made for combining them. The approach of using two separate forms of total loss cover is well established in practice, however, and traditional hull interest insurance has a somewhat wider scope of cover than freight interest insurance. The new Plan maintains the approach of having two interest insurances, but sets them out in a chapter together. The rules have also been re-written and somewhat simplified.

#### § 14-1. Insurance against total loss and excess collision liability (hull interest insurance)

The paragraph corresponds to §§ 220 and 221 of the 1964 Plan.

Under the 1964 Plan, § 219 contained a definition of hull interest insurance in relation to ordinary hull insurance and ordinary freight insurance. With the approach of the Plan to the separate forms of total loss cover, it is not necessary to draw a sharp dividing line between the interests covered under the various types of insurance. The primary issue will be one of expediency as to how the total capital value of the ship is to be apportioned between the ordinary hull insurance and the separate total loss policies.

The provision states what a hull interest insurance covers. The first part of the provision is new and specifies that the insurable value in a hull interest insurance is assessed and given in the form of an amount stated in the policy. This provision must be read in the light of the restrictions rule in § 14-4. If the sum insured is lower than the insurable value, this will lead to a further reduction in the insurer's liability under the general rules in § 4-18.

Letter (a) is taken from § 220, subparagraph 1 of the 1964 Plan and sets out the principle that hull interest insurance is cover against total loss. Any casualty giving rise to entitlement to total loss compensation under Chapter 11 under hull insurance, or under § 15-10 under war risk insurance, will also constitute total loss under hull interest insurance. Conversely, a compromised total loss will not trigger hull interest insurance.

Letter (b) sets out the liability of the hull interest insurer for excess collision liability. The provision is taken from § 221 of the 1964 Plan and is related to the liability of the P&I insurer for collision liability, which only applies to collision liability which exceeds the market value of the ship. If the assessed insurable value under the hull policy is lower than the market value of the ship, the shipowner is insured cover for its liability for the difference between the assessed insurable value under the hull policy and the market value. However, the provision applies regardless of the relationship between the assessed insurable value under the hull policy and the market value in the actual situation.

Like the hull insurer, the hull interest insurer is liable "separately" for collision liability, i.e. for a separate sum insured for that liability. The deductible is not calculated under the separate cover. The rule implies that there is to be no transfer of collision liability over to the P&I insurer before the separate sums insured under both the hull insurance and the hull interest insurance have gone towards covering the liability.

If several separate insurances have been effected, each of the insurers will only be liable for excess collision liability in relation to their respective portions of the aggregate of the separate insurances, cf. § 221, subparagraph, 2 of the 1964 Plan, which must still apply. Consequently, if any of the insurances have been effected on non-Norwegian terms without cover for excess collision liability, a corresponding portion of this liability will be uninsured, unless the P&I insurer covers it.

#### § 14-2. Insurance against loss of long-term freight income (freight interest insurance)

The paragraph corresponds to §§ 277 and 278 of the 1964 Plan, CEFOR 248, no. 2 and PIC IV § 15.

§ 277 of the 1964 Plan contained a definition of freight interest insurance. As mentioned in relation to § 14-1, it is unnecessary to define which interest is covered under the different insurances against total loss. Consequently, it is sufficient to state what freight interest insurance covers. The provision is taken from § 278, subparagraph 1, first sentence of the 1964 Plan and specifies that freight interest insurance like hull interest insurance is total loss cover, cf. further on the reference to Chapter 11 above under the commentary on § 14-1 (a).

As mentioned in the introduction to this chapter, it was possible earlier to effect freight interest insurance with either assessed or open insurable values. The new Plan, however, regulates only freight interest insurance with assessed insurable values, cf. CEFOR 248, No. 2.1. The rationale is that there is deemed to be a limited need for an open freight interest insurance based on an existing charterparty. If the shipowner has especially favourable freight contracts, this will usually be reflected in the assessed insurable value under the hull policy and thereby indirectly also in the interest insurances in that the maximum amounts for the latter will be based on the assessed insurable value under the hull policy, cf. § 14-4. If, in an actual situation, it nonetheless becomes necessary to have an open insurable value for freight interest, § 14-4, subparagraph 3 allows for this type of insurance being effected in addition to the assessed interest insurances, if need be.

As under § 14-1 for hull interest insurance, § 14-2 specifies that freight interest insurance has a separate assessed amount. The provision in CEFOR 248, No. 2.1 also contained a maximum

amount, set at 25% of the assessed insurable value under the hull policy. The maximum amounts and the effect of exceeding them are the same for hull interest and freight interest insurances, however, and, consequently, the rules imposing restrictions have been grouped together under § 14-4.

#### § 14-3. Common rules for separate insurances against total loss

The paragraph corresponds to § 220, subparagraph 2, § 222, § 278, subparagraph 2, and § 279 of the 1964 Plan.

A fundamental prerequisite for cover under the separate insurances against total loss is that the assured claim compensation for total loss from the hull insurer, cf. subparagraph 1, first sentence, which is in keeping with §§ 220 and 278, subparagraph 2, first sentence of the 1964 Plan. Thus, the assured can not demand payment under the separate insurance for total loss while at the same time demanding that the ship be repaired pursuant to Chapter 12. The insurer need not take over the wreck, however; it is sufficient that the assured claims compensation for total loss.

The provision only applies to the insurer's liability "for total loss". Cover of excess collision liability is not contingent on whether a claim for total loss has been filed with the hull insurer.

In one situation, however, it is not necessary that the assured has brought a claim for total loss: when the assured wishes to salvage the ship, but the hull insurer pays the sum insured pursuant to § 4-21, cf. subparagraph 1, second sentence, which corresponds to §§ 220 and 278, subparagraph 2, second sentence of the 1964 Plan. If the salvage later proves to be unsuccessful, the assured is also entitled to payment under the separate total loss insurances. In that case, however, the separate total loss insurers will be entitled to take over the wreck under the rules in chapter 5, section 4 of the Plan. If separate insurances have been effected under both § 14-1 and § 14-2, the hull interest insurer has a first claim to the wreck, cf. subparagraph 1, third sentence, which is taken from § 278, subparagraph 2, second sentence of the 1964 Plan.

The provision in § 14-3, subparagraph 2, is taken from § 219, subparagraph 2, second sentence, and § 278 subparagraph 1, second sentence of the 1964 Plan, and specifies that the insurance does not cover loss caused by measures taken to avert or minimise loss. It is established practice that the hull insurer covers both general average contributions and particular costs of measures taken to avert or minimise loss concerning the ship, and does not draw the separate total loss insurers into a proportional sharing of the loss under § 4-12, subparagraph 2.

Under the subparagraph 3, the general rules on hull insurance must be given corresponding application to the separate insurances against total loss to the extent they are appropriate, cf. §§ 222 and 279, subparagraph 1 of the 1964 Plan.

Subparagraph 4 is taken from §§ 222 and 279, subparagraph 2 of the 1964 Plan, and also gives application to some of the rules on the leading insurer's competence and authority in the relationship between the leading insurer under the hull insurance and the insurers of the separate total loss insurances. In keeping with the approach of the 1964 Plan, this applies to rules on notification of casualty, proceedings against third parties for the assured's liability or claims for damages, as well as rules on jurisdiction. The Plan does expand the competence of the leading insurer in relation to the separate insurers by giving corresponding application to § 9-5 on salvage and § 9-6 on removal and repairs. This means that the separate total loss insurers are bound by the leading insurer's decision on removal in connection with a claim for condemnation and measures in connection with a salvage operation. However, the leading insurer's decision to abandon a salvage operation will not bind the interest insurers, cf. § 14-3, subparagraph 4, which only refers to § 9-5, first sentence.

#### § 14-4. Restrictions on the right to effect separate insurances against total loss

The paragraph corresponds to § 223 of the 1964 Plan, CEFOR I, 13 and PIC § 5, 28.

As mentioned earlier, § 223 of the 1964 Plan contained a restriction on the scope of hull interest insurance, set at 25% of the assessed insurable value under the hull policy, while PIC § 5, 28 and CEFOR I, 13 contained a corresponding limitation for freight interest insurance. These two limitation rules have been brought together in § 14-4, subparagraph 1, which maintains the approach of the Special Conditions with a maximum amount of 25% of the assessed insurable value under the hull policy for each of the insurances. Accordingly, if either hull or freight interest insurance has been effected for an amount exceeding 25% of the assessed insurable value under the hull insurance against the same peril, the provision for the excess amount is void.

The restriction is aimed at discouraging parties from moving significant portions of hull cover over to the separate total loss insurances. This is explained in more detail in the commentary on § 10-

12 above, which sets out the impact on the hull cover of the assured possibly being paid an amount higher than 25% of the assessed insurable value under the hull insurance either under the hull interest insurance or the freight interest insurance, or both.

Subparagraph 2 regulates the settlement when several hull interest or freight interest insurances have been effected and their aggregate cover exceeds the restrictions set for hull interest and freight interest insurances, respectively, pursuant to subparagraph 1. In principle, this constitutes double insurance, cf. § 2-6, but the provision rules out the joint and several liability which otherwise applies to double insurance, and states that instead there is to be a proportional reduction of liability.

As mentioned earlier in relation to § 14-2, the Plan contains no rules on freight interest insurance with an open insurable value. However, subparagraph 3, first sentence, specifies that the restrictions rule in subparagraph 1 does not preclude having an open freight interest insurance like this based on an actual charterparty. This may be a possibility for a ship for which the assessed insurable value under the hull policy does not reflect the earnings of the ship, for example, a gas ship with a low market value and a favourable charterparty which expires in the event of total loss. Usually, a freight insurance like this with an open insurable value will be based on a time charterparty or a charterparty for a series of voyages (charterparty for consecutive voyages), but this type of insurance may also be used when a contract to ship a certain quantity of goods is, exceptionally, performed using a single ship, cf. the term "contract" for a series of voyages.

It follows from the second sentence that any compensation under a freight interest insurance with an open insurable value is to go towards reducing the compensation the assured may claim under a freight interest insurance with an assessed insurable value effected pursuant to § 14-2.

## **Chapter 15 - War risk insurance**

### **General**

The 1964 Plan did not contain a separate chapter on war risk insurance, but there were a number of provisions, in both the common rules (part one) and the hull insurance rules, which were primarily of significance for war risk insurance.

War risk insurance for Norwegian-registered ships has, almost without exception, been effected with the Norwegian Shipowners' Mutual War Risks Insurance Association, a mutual association established in 1935. The association also covers war risk insurance for ships registered in countries other than Norway. It is, however, possible to take out war risk insurance for ships on the ordinary "commercial" market, and this type of insurance has also been offered by Norwegian insurers.

The Norwegian Shipowners' Mutual War Risks Insurance Association has effected insurance on its own conditions (referred to below as Wpol.). The conditions conform substantially to what is offered on the "commercial" market, although the association's cover is, on a few minor points, better for ships registered in Norway.

During the Plan revision, it was deemed expedient to add a separate chapter on war risk insurance in the Plan. Existing conditions have been used as the basis for drawing up the chapter. Coordination with the other rules of the Plan has made it possible to make the structure and content considerably simpler and, on a few minor points, changes of substance have also been made. The perils covered under war risk insurance have been kept in the general part of the Plan, see primarily § 2-9. These rules are closely related to the rules on perils covered for marine insurance and, consequently, it is most appropriate to place them together.

Commercial war insurance conditions have often been used by foreign shipowners, who then may have combined war risk insurance on Norwegian conditions with marine perils covered by foreign (usually English) conditions. Since chapter 15 has been adapted to marine perils cover in accordance with the other conditions of the Plan, the combination of war risk insurance under the conditions in chapter 15 and marine perils insurance on foreign conditions may lead to gaps in the overall insurance cover or to double cover in certain areas.

### *Section 1 - General rules relating to the scope of war risk insurance*

#### § 15-1. Perils covered

Subparagraph 3 was moved to § 15-24 (a) in the 2007 version. The provision otherwise accords with earlier versions of the 1996 Plan.

Subparagraph 1 sets out the perils covered under the war risk insurance and is, strictly speaking, unnecessary, since the same effect follows from the general part of the Plan. For pedagogical reasons, however, it is a logical step to have a separate provision on perils covered in the introductory part of the war risk chapter.

Under subparagraph 2, war risk insurance also covers marine perils if the marine perils insurance has been suspended under such circumstances as are specified in § 3-19. This will apply in relation to all of the perils covered under § 15-2 and not just in relation to the hull cover. Subparagraph 3 was moved to § 15-24 (a) in the 2007 version.

#### § 15-2. Losses covered

The provision corresponds to Wpol. § 4, subparagraph 2, but has been somewhat reformulated and expanded. In Wpol. "crew liability" was included as a separate category. In the new Plan, cover for this has been moved in part to P&I cover in section 7, and partly to occupational injuries, etc., in section 8. The concept "loss-of-hire" also encompasses the types of loss which were covered by Wpol. §§ 11-14, see the commentary on section 6 below.

#### § 15-3. Sum insured

Letter (a) was amended in the 2007 version. The provision otherwise corresponds to earlier versions of the 1996 Plan.

Letter (a) prescribes that there is to be a separate sum insured for P&I cover and occupational injuries, which must be indicated in the policy in the same way as the other sums insured. The requirement that this special sum insured must also cover occupational injuries was added in the 2007 version. No sum insured was previously assigned to this element of cover. As mentioned in the commentary on § 15-2 and § 15-18, crew liability has been placed directly under P&I cover.

In the earlier versions of the Plan under letter (a), second sentence, liability for wreck removal under § 15-21 was covered as part of war risk hull cover even if the sum insured was exceeded. Both this provision and § 15-21, which imposed unlimited liability for wreck removal on the war risk insurer, were deleted. This was done on the ground that this unlimited liability represents a considerable risk in view of the current focus on environmental pollution. Wreck removal operations are required more often than before and can be very costly.

Wreck removal is covered accordingly by the sum insured for owner liability and occupational injuries in war risk insurance. The P & I clubs' cover against war and terrorism, which has amounted to USD 500 million since 2005, comes in addition to this. Letter (b) corresponds to letter (b) in earlier versions and, in line with the Plan system, encompasses both hull interest and freight interest.

Letter (c) corresponds to letter (c) in earlier versions.

#### § 15-4. Safety regulations

Subparagraph 1 was amended in the 2007 version in accordance with the amendments to the rules regarding safety regulations, cf. § 3-22 et seq. The provision is otherwise identical to earlier versions of the 1996 Plan. Subparagraph 1 gives the insurer the right to stipulate safety regulations while the insurance is running. In earlier versions the provision referred to § 3-24; this was amended to § 3-22 in accordance with the rewritten rules on safety regulations. The regulations will, in reality, be an instruction to the assured to do or refrain from doing certain things. The provision sets out a number of aspects which the instruction may consist of or be aimed at. The enumeration is not exhaustive, however, cf. the wording "inter alia". As long as the instruction can be said to be "measures for the prevention of loss", cf. § 3-22, it will fall within the scope of the provision.

Subparagraph 2 sets out the effect of the stipulated safety regulations not being followed. The general principles are reflected in the reference to § 3-25, subparagraph 1: the assured loses cover if negligence is demonstrated and there is a causal connection between the breach and the loss. It must be emphasized in connection with the reference to § 3-25, subparagraph 2, that safety

regulations under § 15-4 are to be viewed as special safety regulations, with the consequence that expanded identification is to apply.

It follows from § 15-18, cf. § 15-13, that if the insurer's instructions under that provision lead to loss of time for the assured, he will be entitled to be compensated for that loss of time and possibly also to total loss compensation if the loss of time lasts for more than six months.



## Section 2 - Termination of the insurance

### General

Wpol. § 5 stipulated suspension of the insurance under certain circumstances. During the Plan revision, it was thought, on the one hand, that one of the grounds for suspension, namely when the ship is used for fishing, whaling or sealing, could be deleted, since it was impractical and ill-judged. On the other hand, it was concluded that the rules should be expanded on other points and formulated as termination rules instead of suspension rules.

The Plan still contains some rules on suspension of war risk insurance, see § 3-17. The content of these rules varies, depending on whether or not the ship is insured in the Norwegian Shipowners' Mutual War Risks Insurance Association, *cf.* § 15-24 letter b.

### § 15-5. War between the major powers

*In the 2007 version, the last sentence was moved to § 15-26, subparagraph 1. The provision otherwise accords with earlier versions of the 1996 Plan.* In reality, it is in accordance with the Automatic Termination of Cover clause used for war risk insurance in the English market.

The provision means that if war or war-like conditions arise between two or more of the superpowers, the insurance terminates immediately. The expression "war-like conditions" is used to indicate that a formal declaration of war is not necessary for the provision to apply; it is sufficient that a state of war exists in reality.

*According to the last sentence in the earlier versions, the provision did not apply if the ship is insured with the Norwegian Shipowners' Mutual War Risks Insurance Association. This provision was moved to § 15-26, subparagraph 1.*

### § 15-6. Use of nuclear arms for war purposes

*In the 2007 version, the last sentence was moved to § 15-26, subparagraph 1. The provision otherwise accords with earlier versions of the 1996 Plan.* In reality, it accords with the nuclear arms clause used in the English market.

It follows from the first sentence that the insurance terminates immediately if nuclear arms are used for war purposes. The ship need not be involved in the use of the nuclear arms for the provision to apply; nor need it be in an area which is excluded or subject to an additional premium under the insurance.

The second sentence *in earlier versions* set out an exception to the rule in the first sentence, if the ship is insured with the Norwegian Shipowners' Mutual War Risks Insurance Association. *This provision was moved to § 15-26, subparagraph 2.*

### § 15-7. Bareboat chartering

The provision corresponds to Wpol. § 5, subparagraph 2, but is given a wider sphere of application. Firstly, the insurance will terminate - and not just be suspended - if the ship is chartered out under a bareboat charterparty. Secondly, the provision applies to all forms of bareboat chartering, not just bareboat chartering to foreign charterers. The expansion is of little practical significance, as the assured must review the ship's insurance anyway in the event of bareboat chartering.

### § 15-8. Cancellation

The provision has no counterpart in Wpol., but concords with the approach in the English war risk insurance conditions. The provision was amended in the 2002 revision through the addition of the second sentence of subparagraph 1.

Subparagraph 1, first sentence, gives both the person effecting the insurance and the insurer the right to cancel the insurance in the event of changed circumstances. The cancellation is subject to seven days' notice. The provision is primarily of interest to the insurer, as it ensures him the possibility of coming out of the insurance relationship quickly, including its premiums and conditions, when the risk has changed in relation to what it was when the insurance was effected. Consequently, the provision must be seen as a supplement to, on the one hand, § 15-5, § 15-6 and § 15-7, which entail automatic expiry of the insurance under certain circumstances and, on the other hand, § 15-9, which gives the insurer wide-ranging powers to amend the content of the trading areas and thereby delimit the risk he will run.

It follows from § 15-5 in fine and § 15-6, second sentence, that the war risk insurance will not necessarily terminate automatically in the event of a war between the major powers or use of

nuclear arms if the ship is insured with the Norwegian Shipowners' Mutual War Risks Insurance Association. Viewed in connection with this provision, however, the reality will be that the association will always have to reply within seven days, but will thereafter have the opportunity to cancel the insurance contract.

The right to cancel under subparagraph 1 may also be of interest to the assured. If, for example, a war situation has apparently calmed down, but the assured finds that the insurer, compared with other insurers, has a very conservative view of the significance this should have for trading areas, premium, etc., the assured can get out of the insurance contract quickly.

The second sentence was added in the 2002 revision. It previously followed from § 7-2 that cancellation of an insurance contract would not affect the rights of the mortgagee, unless the insurer had given him at least fourteen days' specific notice of the situation. In relation to war risk insurance, however, such a solution is untenable, because it might entail an insurer being bound in relation to the mortgagee for longer than the period for which he in fact has reinsurance cover. Adding the second sentence underscores the fact that in relation to war risk insurance, cancellation - by either the person effecting the insurance or the insurer - will also affect the rights of the mortgagee. Consequently, the insurance cover terminates with seven days' notice, even if the mortgagee himself has not received notice. In the last part of the second sentence, it is nonetheless stated as a standard procedure that the insurer shall immediately notify the mortgagee of the cancellation, regardless of whether it was initiated by the person effecting the insurance or by the insurer.

Subparagraph 2 supplements the subparagraph 1 and requires the insurer to provide the assured with an offer for continued insurance containing any new conditions and a new premium. This applies regardless of whether it was the insurer or the assured who cancelled the insurance under subparagraph 1. The provision does not give any guidance to the insurer as to what the offer is to consist of, making the practical significance of the provision minimal.

*Section 3 - Trading limits***§ 15-9. Excluded and conditional trading areas**

The provision is based on Wpol. § 8, but has been formulated somewhat differently.

The provision starts with the general trading areas set out in § 3-15 and is based on the assumption that they will also apply to war risk insurance. In addition, the provision opens the door to the war risk insurer being able to determine different trading areas at any time. This implies, firstly, that the insurer may stipulate more limited trading areas than in § 3-15 at the time the insurance contract is entered into and, secondly, that the war risk insurer will be entitled to change a previously-established trading area while the insurance is running. The change may mean a (further) limitation of the trading area or an expansion in relation to what applied at the time the insurance was effected.

The provision is based on the fact that there are two types of limitations in the trading area. Some areas may have the status of conditional areas, where the ship may continue to sail subject to an additional premium, while others may have the status of excluded areas, where the ship will be without insurance cover.

### *Section 4 - Total loss*

#### § 15-10. Relationship to chapter 11

The provision is new and is, strictly speaking, unnecessary, but it does provide an appropriate bridge between chapter 11 and the other rules in the section.

#### § 15-11. Intervention by a foreign State power, piracy

The provision corresponds to §§ 169, 170, 171 and 172 of the 1964 Plan, cf. Wpol. § 9, no. 9, but is somewhat simplified.

Subparagraph 1 states that the assured is entitled to total loss compensation if the ship is taken from him due to intervention by a foreign State power and he has not received it back within twelve months. It does not matter whether the intervention may be characterised as a "permanent" or "temporary" intervention. The rules were different under the 1964 Plan, under which the deadline was six months following "permanent" intervention and two years following "temporary" intervention. However, the difficulty in determining whether an intervention is intended as being "permanent" or "temporary" justifies the same deadline in both cases. The deadline has been set at twelve months to coincide with the deadline for permanent intervention under Wpol. § 9, no. 9. The wording "for which the insurer is liable under § 2-9" has been incorporated to serve as a reminder that the perils covered may vary, depending on which war risk insurer is involved.

Subparagraph 2 uses the expression "similar unlawful interventions" which encompasses first and foremost mutiny and war-motivated theft, cf. ND 1945.53 NV IGLAND. Ordinary theft is covered by the marine perils insurer. Even though there is no corresponding provision in chapter 11, it is logical to refer to the deadlines in this provision when assessing whether or not there is total loss under § 11-1.

Only the assured may bring a claim for the ship to be deemed a total loss under the rules in subparagraphs 1 and 2; the insurer has no such right.

Subparagraph 3 allows the deadlines in subparagraphs 1 and 2 to be disregarded when it is clear that the assured will not recover the ship.

It goes without saying that the assured will not be able to bring a claim for total loss compensation after the ship has been released. Conversely, subparagraph 4 stipulates that the claim of the assured for total loss compensation will remain intact if the ship is released after he has brought a claim for total loss compensation. The fact that the compensation has not been paid out makes no difference. When an assured brings a claim for total loss compensation, it will often be in connection with other measures he takes to obtain a new ship. Consequently, it is proper that he acquire an irrevocable right to total loss compensation in view of his claim for total loss compensation.

Subparagraph 5 confers corresponding application on the provisions of § 11-8 and 11-9.

#### § 15-12. Blocking and trapping

The provision is new, but is based on the rule that was implicit in Wpol. § 12, subparagraph 4. That provision was on the face of it a special rule providing for an extended deductible period in the event of blocking or trapping in the Strait of Hormuz. The intention, however, was to convey that the assured was generally covered against loss of the ship due to blocking and trapping.

Subparagraph 1 gives the assured a right to total loss compensation when the ship is prevented from leaving port, etc., as a result of a war risk, and the hindrance lasts for over 12 months. The provision is aimed primarily at cases where the hindrance is of a physical nature, for example, when the ship remains trapped because the lock gates have been destroyed by bombing, or because a bridge has been blown up by sabotage and blocks the way out of port. The lines are fluid, however, between hindrances of this type and hindrances consisting of a foreign State power detaining the ship in port due to fear that it will fall into enemy hands. The detention may be reinforced by the area around the ship being mined or by other measures aimed at preventing the ship from leaving the area. Regardless of whether the authority in question implements separate physical measures, a detention of this nature will be deemed to be blocking and trapping within the meaning of the provision, and will also fall within the scope of § 15-11.

The hindrance will be manifested by the ship being unable to leave port "or a similar limited area". The comparison shows that the area must not be too large geographically and, accordingly, must

be comparable to a port. A typical example would be that the ship remains trapped in a canal, etc., because the lock gates or other structures have been destroyed. The events in Shatt-al-arab during the Iran-Iraq war and in the Suez Canal during the war between Israel and Egypt are examples of this type of situation. The provision will not apply, however, if a general cargo ship is prevented from leaving the Great Lakes because the lock gates have been bombed in the St. Lawrence Seaway. By contrast, in relation to the Strait of Hormuz, the provision must be given a wide interpretation. As mentioned earlier, blocking and trapping due to the closing of the Strait of Hormuz was covered under Wpol. and there has been no intention to restrict that cover. Accordingly, if an oil tanker is unable to get out of the Strait of Hormuz during a conflict, e.g. because the Strait has been mined, the provision will apply.

Subparagraph 2 stipulates that § 15-11, subparagraphs 3, 4 and 5 shall apply correspondingly.

#### § 15-13. Restrictions imposed by the insurer

The provision corresponds to Wpol. § 13, subparagraph 3, but has been expanded somewhat in relation to that provision.

The provision confers on the assured entitlement to total loss compensation when restrictions imposed by the insurer prevent the ship from earning income for a period of over six months. This provision is related to the loss-of-hire cover, see § 15-18. When the assured is covered for loss of time arising from orders issued by the insurer, it is reasonable for that cover at some point to be switched over to total loss cover. There is a fundamental difference between § 15-18 and this provision, however. Under § 15-18, it is sufficient that there has been a loss of time. This may very well be the case even though the ship is partially earning income, see § 16-1. For the assured to be entitled to total loss compensation, however, the ship must have been entirely deprived of income. If then, the assured has been ordered to follow another route than the usual one, for example, on a voyage between Europe and the United States, the assured will be able to claim under § 15-18, if that deviation leads to a loss of time. A claim for total loss compensation will not be possible, however, since the ship will still be earning income. This implies that the provision will be of most significance when the insurer orders the ship not to leave port or another area due to a war situation or other circumstances for which the insurer will be liable.

The deadline in § 15-13 is set at six months and not twelve as provided for in § 15-11 and § 15-12. The reason for this is that a shorter time period is reasonable when it is the insurer's measure which leads to the ship sustaining a loss. The insurer will be able to assess the overall risk and, if he comes to the conclusion that, in view of the circumstances as a whole, the only sensible thing to do is to detain the ship for as long as six months, then he should compensate the actual loss of the asset the assured thereby suffers, and not just the loss of income.

## Section 5 - Damage

### § 15-14. Relationship to chapter 12

The provision is new. Wpol. § 9, nos. 11-14 contained provisions which led to more or less the same result as is achieved through this provision.

Subparagraph 1 sets out, by way of introduction, that the rules in chapter 12 apply fully to war hull insurance as well. This concords in reality with Wpol. It is true that Wpol. § 11 contained a separate provision to the effect that war hull insurance covered "wear and tear and other deterioration in value beyond what normally results from the ship's age" in the event of seizure or requisition. The provision was unnecessary and confusing, however, since the war risk insurer covers extraordinary wear and tear regardless.

§ 15-14 does differ from chapter 12 on one important point, however. The provision is aimed at solving an underlying problem when the assured has both hull cover and loss-of-hire cover and a conflict arises between the hull insurer's wish for a reasonably-priced (but slow) repair and the loss-of-hire insurer's wish for a fast (but expensive) repair. An arrangement for "comprehensive cover" was drawn up in the loss of time conditions of 1972, see the commentary on the Special Conditions § 6 and Appendix 2, but was not implemented at the time. Since the war risk insurer does cover against both hull damage and loss-of-hire, though, it is both reasonable and logical to attempt to give the assured full cover under the war risk insurance. Accordingly, this provision, and the accompanying provision in § 15-19, the loss-of-hire section, are based entirely on the arrangement which was proposed in 1972 although, formally speaking, it has been simplified somewhat, precisely because it was desirable to only have to deal with one type of insurance and one insurer. The assured then has a repair alternative which ensures him full cover for both the repair bill and the loss of time, with the limitations which follow from the agreed-upon deductibles. The simplification lies in the fact that it is the hull insurance which is primarily "charged with" the costs of full cover, instead of these costs being entirely apportioned between the hull cover and the loss-of-hire cover, as was the situation under the 1972 conditions. When it is ultimately the same insurer who will cover the overall costs anyway, the only logical step is to place most of the burden on one insurance, the hull cover, thereby freeing the loss-of-hire cover from its proportion of these costs, see § 15-19. On this point a solution has been chosen in the war chapter different from these in chapters 12 and 16, see the commentary on § 12-12 and 16-9.

Letter (a) entails that the war hull insurance is "cleansed of" those elements of loss of time cover which are placed in chapter 12 (and § 4-11), so that that portion of war risk insurance stands apart as a pure property damage insurance.

Letter (b), subparagraph 1, first sentence, corresponds entirely to § 12-12, subparagraph 1. The second sentence states that the adjusted tenders shall be accompanied by an amount corresponding to the daily amount under the ship's loss-of-hire insurance, multiplied by the number of days the ship will be out of income-generating operations if the repair yard in question is used. "Daily amount under the loss-of-hire insurance" means the daily amount which, in the event, will be used for settlement under the loss-of-hire insurance, i.e. usually the assessed daily amount, but sometimes the actual loss of income per day, cf. § 16-3. The daily amount shall serve as a basis for calculations even though the sum insured at the time is lower. Thus reasonable account shall be taken of the uninsured portion of the shipowner's loss of time as well. The third sentence states that the sum of the adjusted tenders and loss-of-hire costs due to the choice of the repair yard in question shall constitute the total cost of repairs.

Letter (b), subparagraph 2 corresponds entirely to § 12-12, subparagraph 3.

Letter (b), subparagraph 3 is based on § 12-12, subparagraph, 2 and maintains the principle that the assured decides where the ship is to be repaired, although liability under the hull cover is limited to the amounts referred to in the preceding subparagraphs. At the purely practical level, this implies, firstly, that the insurer will compensate what is referred to as total costs under letter (b), subparagraph 1, in so far as the assured accepts the tender which leads to the lowest total costs. Secondly, it means that the insurer will not cover more than the total costs according to the lowest tender, even though the assured accepts another tender. Letter (b) imposes a limitation here, however: if the tender with the lowest total costs is submitted by a shipyard which the assured demands be disregarded, he will not be penalised as long as he accepts the next lowest offer.

### § 15-15. Deductible

The provision is new, but the principle in it is taken from Wpol. § 9, no. 5.

The provision follows § 12-18, which establishes that rules relating to the deductible should be stated in the policy. The provision defines the concept of casualty when the ship is returned following a seizure or requisition, and establishes that all damage, etc., sustained by the ship during that period is to be deemed as being caused by a single casualty. Thus, only one deductible is to be calculated in these cases.

Wpol. § 9, no. 3 assumed that certain types of damage were to be compensated without deductible. The parties remain free to set out what will apply when they determine the deductible amounts in the policy. Having such rules in the Plan is not appropriate, however.

## Section 6 - Loss of time

### § 15-16. Relationship to chapter 16

The provision is new. It is, strictly speaking, unnecessary, but it does provide an appropriate bridge between the general loss-of-hire rules in chapter 16 and the rules in section 6. The provision shows that the general rules on loss-of-hire apply to both the "actual" loss-of-hire cover and to the extensions afforded under § 15-17 and § 15-18. Thus, if a loss of time has occurred as a result of a peril covered by the war risk insurance, the rules in chapter 16 determine whether and to what extent the assured will be entitled to cover from the war risk insurer.

On one point, however, the loss-of-hire cover under the war risk insurance goes further than the loss-of-hire insurance under marine perils insurance: with respect to loss of time due to blocking and trapping. Under § 16-1, subparagraph 2, (b), for the insurer to be liable for a marine peril, the obstruction must be "physical". The loss-of-hire cover under war risk insurance also includes blocking and trapping due to intervention by a foreign State power, cf. subparagraph 2, which corresponds to § 15-12.

In addition, the insurer will cover loss of time for the assured in those situations referred to in the subsequent paragraphs, although the scope of the cover in those cases will be set according to the rules in chapter 16. The provision in § 15-19 is not really an "addition" to chapter 16; instead, it replaces one provision from that chapter with another. The reality of the circumstances should be unproblematic, however.

The rules on deductibles and number of compensation days are to be indicated in the policy, see § 16-7, and it is, therefore, not necessary to have a separate provision on these matters in this section. In so far as the general rules are not appropriate, the parties must make sure to agree separately on which deductibles and compensation days are to apply, see the commentary on § 15-17 below.

### § 15-17. Loss in connection with a call at a visitation port, a temporary stay, etc.

The provision is substantially similar to Wpol. § 12, but has been re-written and somewhat simplified, as the cover under the provision has been worked into the loss-of-hire cover.

The subparagraph 1 sets out the situations in which the assured is entitled to cover under the provision. Calls at a port for visitation (letter (a)) are usually only relevant in wartime or war-like conditions, cf. § 2-9, subparagraph 1, (a), but is also possible in other circumstances, for example, when a State power intervenes, cf. § 2-9, subparagraph 1, (b) in connection with sanctions against a given country.

Capture and temporary detention (letter (b)) are also most relevant in wartime or war-like conditions, but may happen in peacetime as well, for example, in connection with customs inspection, embargo, etc. The detention must be by a foreign State power; thus, the provision does not apply if the ship is detained by reason of a strike, etc.: see the arbitration award in GERMA LIONEL (referred to in Brækhus/Rein, *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), at pp. 73-74, and pp. 239-240. The provision does not set out which type of loss is covered, but rather assumes that the general rules in chapter 16 on the calculation of compensation for loss of time apply.

Unlike Wpol., the provision does not contain any rules on how the period for which compensation is to be paid is to be calculated. In so far as the usual rules on deductibles which are stated in the policy for loss of time are not applicable, the parties must agree separately on rules on deductible periods.

Under Wpol., the insurer compensated for "operating expenses and other costs", but not for the assured's lost earnings. The way the provision is now formulated, the general rules in chapter 16 will determine the scope of the assured's claim for compensation.

Subparagraph 2 states that, as a general rule, the assured is not entitled to compensation for loss of time in cases where he is entitled to total loss compensation under § 15-11 and § 15-12, except for the first month of the loss of time. In a case of total loss, the assured will be entitled to interest as of one month after the time of the intervention and the loss of time cover must be adapted to reflect this fact. If more loss of time compensation has already been paid out than the assured is entitled to, the excess amount will be deducted from the total loss compensation.



### § 15-18. Loss caused by orders issued by the insurer

The provision is substantially similar to Wpol. § 13, but has been expanded somewhat. The provision must be read in connection with § 15-13, which confers on the assured entitlement to total loss compensation in the event of orders which have considerable impact on the ship in terms of time and a total loss of income.

Subparagraph 1 sets out when the assured is entitled to loss of time cover under the provision. The decisive factor is whether the order from the insurer, cf. § 15-4, has caused a loss of time for the ship. The order may be of a nature which leads to a total loss of income, which will typically be the case when the order consists of requiring the ship to remain in a given port. It may also be the case when the ship is able to sail, but the operation is prevented or made more expensive due to the order; in this case as well, the assured will be entitled to compensation. A typical example of this is when the ship is ordered to deviate or take another (longer) route than it would have otherwise taken.

It follows from subparagraph 1 second sentence, that the assured is not entitled to have his loss of time covered if the insurer issues an order in connection with the outbreak of war. This is such a special situation that the insurer must be allowed to "freeze" the situation until he has obtained a proper overview of the consequences. An obligation to compensate for the assured's loss of time in such cases would easily place the insurer in a difficult situation of double pressure. The insurer must, however, be under an obligation to decide which measures he wishes to implement and which ones do not need to be maintained as soon as possible after the circumstances surrounding the outbreak of war have become clear. If these decisions are dragged out, the general rule in the first sentence will apply.

Under Wpol., the assured received compensation for operating expenses and loss of use compensation in the event of orders issue. Since § 15-18 does not contain any explicit rules on what is to be compensated, the usual rules in chapter 16 on the calculation of loss-of-hire and determination of compensation shall apply. This should not imply any major departure from the previous rules.

Subparagraph 2 states that if the assured is entitled to total loss cover under § 15-13, he will only be entitled to cover of the loss of time for the first month, cf. the commentary on § 15-17, subparagraph 2.

### § 15-19. Choice of repair yard

The provision is new and is based on the so-called alternative approach in the 1972 conditions, see the commentary on § 15-14 above. Since in war risk insurance it is usually the same insurer who covers the hull insurance portion and the loss of time portion, it has been possible to simplify the provision considerably. The alternative arrangement in the 1972 conditions also contained a separate provision on Costs incurred to expedite repairs. However, that provision is so similar to § 16-11 that a separate provision is not necessary.

The provision states that § 16-9 does not apply to war risk insurance. It follows from § 15-14 (c), subparagraph 3, and the Commentary on that provision that the hull cover ensures the assured full compensation for both repair costs and loss of time in connection with the repairs, as long as he accepts the tender from the repair yard which submits the tender with the lowest total costs, thereby eliminating the need for loss of time cover under § 16-9.

### *Section 7 - Owner's liability, etc. (P&I)*

#### § 15-20. Scope of cover

The provision corresponds to Wpol. § 17, no. 1, with some important formal modifications, see below.

Subparagraph 1 states that the assured will have P&I cover under his war risk insurance which corresponds to the P&I cover he has under his ordinary P&I insurance. Thus the only difference will be in the description of perils covered. The effect of the rule is that it does not matter where the assured actually has his P&I cover. He will in any event have war risk P&I cover which reflects the cover he has under his marine perils P&I cover.

Wpol. referred explicitly to strike insurance as a possible part of the P&I insurance. This reference has been removed, although no change in substance is intended. If the assured has strike cover under his marine perils P&I cover, it follows from the connection established in the first subparagraph that he will also have it under his war risk P&I cover. It is, moreover, difficult to see how this cover is of any significance in actual practice. The marine perils P&I cover will, in reality, cover the war risk following from a strike, cf. § 2-9 (c).

Wpol. § 10 contained rules on crew liability. With respect to points 1) to 4) (the "actual" crew liability) this meant liability which was normally covered by the ship's P&I insurance, see Assuranceforeningen Skuld's conditions §§ 8.1 and 9.2. Accordingly, it is most appropriate for this liability to simply be placed under the P&I cover. Because crew liability is part of the general P&I cover against marine perils, to which P&I cover is, of course, related, no express provision is needed on this in § 15-20. The fact that it has been moved should not make any real difference to the assured. It is true that crew liability under Wpol. § 10 was covered outside the sum insured, while it will now be part of the sum insured under the P&I cover. In terms of amounts, however, crew liability will be so minimal in relation to the sum insured under the P&I cover that it is difficult to see how it will have any appreciable impact. With respect to points 5) and 6) of Wpol., see the commentary below on § 15-23.

Subparagraph 2 maintains the approach of Wpol., which assumes that the ship has its ordinary P&I insurance with Assuranceforeningen Skuld (Oslo), if there is no such insurance. The differences between the conditions of the various P&I associations which are members of the international pool are relatively minor. It is necessary, however, to make a choice between them, as there can be small differences in nuance on some points and a clear base of measurement is needed.

§ 15-21. (deleted, cf. Section 9)

#### § 15-22. Limitations to the cover

The provision corresponds to Wpol. § 17, no. 5.

The provision establishes that the war risk insurer's cover under the P&I section is subsidiary in relation to other insurance which the assured may have effected. It follows from §§ 2-6 and 2-7 that the effect for the assured and the insurer is that the insurance is made subsidiary, and this may vary depending on whether or not the other insurance has been made subsidiary. The provision has been included to ensure that, in the event of double insurance, the war risk insurer will not be left with full liability vis-à-vis an ordinary P&I insurer who consistently uses clauses which make the insurance subsidiary to all other insurances.

Some P&I associations have their own excess cover. In so far as this is done, the provision will not apply, as the insurance cover will actually come in addition to the cover the assured otherwise might have under its insurances. However, for clauses relating to the ordinary P&I associations' usual cover which make the insurance subsidiary to all other insurances, the provision has full force and effect.

*Section 8 - Occupational injury insurance, etc.***§ 15-23. Scope of cover**

The provision corresponds to Wpol. § 10, points 5 and 6.

Subparagraph 1 states that war risk insurance will cover death and disablement of the crew, in so far as it is a consequence of the assured's obligation by law or pursuant to a collective agreement to effect insurance to cover such eventualities. For Norwegian assureds, the relevant provisions are currently found in Act no. 65 of 16 June 1989 relating to Industrial Injury Insurance (Yrkesskadeforsikringsloven), in collective agreements currently in effect with seamen's organisations and in the so-called "War Injury Agreement" (Krigsskadeoverenskomsten) which has also been entered into with the seamen's organisations.

Subparagraph 2 makes the insurance subsidiary to any other insurance the assured may have effected, provided that the insurance in question includes loss as referred to in subparagraph 1. The provision is currently of primary significance for the so-called "Security Insurance" (Trygghetsforsikringen), which is a collective insurance scheme established by collective agreement. This insurance will, to a large extent, give the members of the scheme (crew members) cover corresponding to what they obtain through the Krigsskadeoverenskomsten. From the way these types of collective agreements and the Krigsskadeoverenskomsten are formulated, it may appear as though crew members are entitled to double cover in certain situations. This has not been the intention, however, and there appears to be agreement among the parties to the collective agreements on this matter. Accordingly, the provision is based on that agreement which actually exists between the parties to the collective agreements.

## *Section 9 - Special rules for ships insured with the Norwegian Shipowners' Mutual War Risks Insurance Association*

### *1. General rules*

#### **§ 15-24. Extension of perils covered/Re. § 2-9**

This provision corresponds to earlier versions of § 2-9, subparagraph 3, and § 15-1, subparagraph 3, of the 1996 Plan.

Subparagraph 1 corresponds to earlier versions of § 2-9, subparagraph 3, of the 1996 Plan but the formulation "If the ship is insured with the Norwegian Shipowners' Mutual War Risks Insurance Association, an insurance against war perils also covers" has been deleted because it now follows from the heading of section 9 that the cover applies only to insurance with the Norwegian Shipowners' Mutual War Risks Insurance Association. Since the association only covers war risk insurance, it is not necessary to state this in the text. The provision maintains the cover for requisition by a foreign State power (i.e. a State power other than the State power in the ship's State of registration or in the State where the major ownership interests are located). Reference is made to the commentary on § 2-9, subparagraph 1 (b) as regards the meaning of this term.

Subparagraph 2 corresponds to § 15-1, subparagraph 3, of the 1996 Plan, but has been simplified in the same way.

Since all special provisions regarding cover with the Norwegian Shipowners' Mutual War Risks Insurance Association have now been collected in section 9, § 3-17, subparagraph 2, which states the same thing as § 15-24, subparagraph 2, was deleted.

#### **§ 15-25. Suspension of cover**

This provision is new in the 2007 version, and has been taken from Clause 9 of the Association's 2006 Conditions.

In these insurance conditions, the provision was designed as a warranty, i.e. the insurance terminated automatically in the situations that were specified in subparagraph 1 (a) and (b) and subparagraph 3, unless the assured had been given permission to carry out the specified acts. This rule corresponds to the reinsurance conditions. However, this approach is seldom adopted in the rest of the Plan, and it is therefore appropriate to formulate the rule as a rule on suspension of cover patterned on trade in an excluded trading area, cf. § 3-15, subparagraph 3.

Subparagraph 1 deals with breaches of United Nations trade restrictions, Security Council resolutions or public rules incorporating such restrictions or resolutions, cf. subparagraph 1 (a), and trade in areas or calls at ports without the permission of the relevant UN organisations where such permission is required, cf. subparagraph 1 (b). In these cases, cover is suspended regardless of whether the ship is sailing in ordinary or conditional trading areas.

The rules are not applicable, however, if the insurer explicitly consents to such situations as are specified in subparagraph 1 (a) and (b), cf. subparagraph 1, last sentence. This is in line with practice, where the assured normally receives permission to undertake the specified acts, possibly subject to a certain increase in premium.

If the circumstances specified in subparagraph 1 (a) and (b) cease to exist before the insurance period expires, the insurance again takes effect, cf. subparagraph 2. This corresponds to the solution set out in § 3-15, subparagraph 3, as far as excluding trading areas are concerned.

According to subparagraph 3, the rules of subparagraphs 1 and 2 apply correspondingly to the carriage of weapons, ammunition or military equipment as cargo, provided the ship is sailing in a conditional trading area, cf. § 15-9. This constitutes a certain relaxation of the conditions, but is in line with practice.

#### **§ 15-26. Termination of the insurance/Re. § 15-5 and § 15-6**

This provision corresponds to § 15-5, last part, and § 15-6, second sentence, of the 1996 Plan.

Subparagraph 1 is identical to § 15-5, last part, of the 1996 Plan, and entails that the insurance does not terminate automatically in the event of a war between the major powers if the ship is insured with the Norwegian Shipowners' Mutual War Risks Insurance Association. The cover applies to all ships that are registered in the association; it is not a condition that the ship is registered in Norway.

Subparagraph 2 is identical to § 15-6, second sentence, of the Plan, and entails that the insurance does not terminate in the event of any use of nuclear arms for war purposes if the ship is insured with the association. However, this does not apply if the ship is in an area that is excluded from the insurance or where the insurer can require an additional premium, cf. § 3-15.

## *2. Limited cover for requisition by the ship's own State and for perils covered by the Race II clause.*

### **§ 15-27. Perils covered under the limited cover**

This provision is new in the 2007 version, and has been taken from Clause 8-1 of the Association's 2006 Conditions. The provision introduces a limited additional cover in two contexts: requisition for ownership or use by a State power to which the ship has a special connection, and risks that are covered by the RACE II clause and excluded in § 2-9, subparagraph 2 (b), of the Plan.

Under letter (a), the insurance covers requisition for ownership or use by the State power in the ship's own State of registration or in the State where the major ownership interests are located. This provision comes in addition to the Association's cover for requisition by a foreign State power, cf. § 15-24 (a), but as stated earlier, unlike this cover, cover in relation to the ship's own State power is limited.

Cover for requisition by the ship's own State power was discussed during the revision of the Plan in 1996, but at the time it was impossible to obtain such cover. The term "requisition" means that public authorities take over possession of the ship for ownership or use by means of force, but in return for compensation for the loss resulting from the requisition. Requisition is therefore the same as expropriation. On the other hand, the term does not cover other forms of enforced acquisition, such as capture at sea, condemnation in prize or confiscation. The characteristic aspect of such interventions is that the State power pays no compensation; it is merely a question of the use of force or a threat to use force. The main difference between requisition and the other aforementioned interventions is therefore that requisition in principle triggers a claim for compensation against the State. This means that, through the cover specified in letter (a), the Association advances the compensation from the State. If the State refuses to pay, the Association will also cover the risk of the resulting loss.

Under letter (b), the insurance covers the perils that are excluded from cover in § 2-9, subparagraph 2 (b).

As already mentioned, the cover provided under § 15-27 is not an ordinary insurance cover, but is limited in accordance with § 15-32.

According to § 2-12, subparagraph 3, the assured has the burden of proving that the loss was not caused by RACE II perils. In insurances that exclude RACE II perils, this rule will result in the assured not receiving any cover unless he is able to document that the damage was not caused by RACE II perils. However, the provision also applies in relation to the limited cover in § 15-27. In this case, the rule has the following effect: the basic rule is that the assured has the burden of proving that he has sustained a loss that is covered by the insurance, cf. § 12-2, subparagraph 1. In order to obtain the special cover provided under § 15-27, he must therefore prove that the casualty was caused by a RACE II risk. However, a RACE II risk might conceivably combine with an ordinary war risk, for instance when a terrorist attack is carried out by means of both conventional and biological weapons. In such a situation, § 2-12 would primarily entail that if the assured had documented that the casualty was caused by an ordinary war risk, and the insurer was unable to prove that a RACE II peril was a contributory cause, the insurer would be fully liable for loss caused by the ordinary war risk, i.e. for the ordinary sum insured. In this connection, however, it follows from § 2-12, subparagraph 3, that it will be up to the assured to prove that the loss was not caused in part by a RACE II risk; if he is unable to do so, the insurer is only liable for the limited sum insured even if an ordinary war risk has been a contributory cause.

### **§ 15-28. Losses covered under the limited cover**

This provision is new in the 2007 version and was taken from Clause 7-2 of the Association's 2006 conditions.

The provision states that an insurance under § 15-27 only covers total loss, cf. letter (a), and damage, cf. letter (b). In relation to the general cover under Chapter 15 of the Plan, the cover is therefore more limited, cf. § 15-2 (c) to (g), which do not apply. The rationale for this limitation is that in the future it will be easier, according to the reinsurance market, to obtain reinsurance for an insurance that only covers total loss and damage, particularly because of the long amount of time it takes to clarify some of the losses specified in § 15-2.

This also entails that there is no separate P&I cover linked to the RACE II perils. However, limited cover for costs relating to biological and chemical, etc. weapons is offered, cf. below in section 3.

#### § 15-29. Concurrent causes of damage/Re. § 2-13

This provision is new in the 2007 version, and was taken from Clause 7-4, second sentence, of the Association's 2006 Conditions.

If a RACE II peril combines with an ordinary war peril, it follows from § 2-13, subparagraph 2, that the entire loss must be attributed to the former peril. In so far as RACE II perils are excluded, the consequence of this provision is that the assured will have no cover. However, the provision also deals with the combination of an ordinary war peril and a RACE II peril that is covered under the limited cover, cf. the commentary on § 15-27 regarding the specific rule in § 2-12, subparagraph 3. However, the provision in § 2-13, subparagraph 2, entails that in a situation of concurrent causes the assured is covered under the limited cover.

Under § 15-29, on the other hand, the provision does not apply if the damage was caused by a combination of causes covered under the limited cover and circumstances covered by Chapter 3 of the Plan, such as breaches of safety regulations. In such situations, it is more logical to apply the ordinary rule of apportionment set out in § 2-13, subparagraph 1. This means that the influence that the peril which is covered with a limited amount, has had on the occurrence and extent of the damage must be weighed against that of the assured's breach of safety regulations, which is not covered. Depending on the influence that is ascribed to the breach of the safety regulation, a reduction may therefore be made in the limited cover.

#### § 15-30. Combination of marine and war perils/Re. § 2-14

This provision is new in the 2007 version, and was taken from Clause 7-5 of the Association's 2006 Conditions. Contrary to § 15-29, cf. § 2-13, which deals with the combination of covered and uncovered perils within the scope of the limited cover, § 15-30, cf. § 2-14, concerns a combination of perils that are covered by the limited war risk insurance and marine perils. The scope of the provision is also broader than that of § 15-29 in that it is relevant not only in cases where a RACE II peril is involved, but also when requisition by the ship's own State power is involved, cf. below.

Thus the provision applies to the situation where a RACE II peril or requisition by the ship's own State power combines with a marine peril, such as an error made by a crew member or heavy weather. However, the effect of the provision differs slightly in relation to RACE II perils and requisition respectively. In the case of a combination of a RACE II peril and a marine peril, the basic rule in § 2-14 is that the entire loss must be ascribed to the cause that has had the dominant influence. If a RACE II peril is the dominant cause, the entire loss must be covered by the war risk insurance – in this case by the limited cover. If, on the other hand, the marine peril is the dominant cause, under the basic rule in § 2-14 the marine peril insurer is liable. In such case, according to § 2-13, subparagraph 2, the element of RACE II peril would result in the assured not receiving any compensation because the whole loss is ascribed to the RACE II peril. Under the provision in § 15-30, however, the whole loss is covered by the limited war risk cover in this kind of situation as well, even if this means that the cover thereby includes an element of marine peril.

In cases involving a combination of requisition and a marine peril, the result is a little different: in the event of requisition by a State power, the basic rule in § 3-17 is that the marine peril insurance and the war risk insurance terminate. The assured then has no insurance against marine perils. If the marine peril is dominant in a combination with requisition by the ship's own State, the assured receives no compensation. However, the Norwegian Shipowners' Mutual War Risks Insurance Association covers requisition by a foreign State power, and thus also assumes the cover against marine perils, cf. § 15-24. In relation to this solution, it is therefore logical that the Norwegian Shipowners' Mutual War Risks Insurance Association also cover an element of marine peril if a marine peril combines with requisition by the ship's own State power.

#### § 15-31. Limitation amount/Re. § 4-18, § 4-19, § 5-4 and § 15-3

This provision is new in the 2007 version, and was taken from Clause 7-6 of the Association's 2006 Conditions. Under subparagraph 1, first sentence, the ordinary rules regarding the sum insured as the limit of the insurer's liability, cf. § 4-18 and § 15-3, do not apply to cover under § 15-27. This also means that no separate sum insured applies to measures taken to avert or minimise loss, cf. § 4-18, subparagraph 1, second sentence. Instead, a limitation amount that is specified in the policy applies both to the insured ship per year and to the Association's total liability for all ships per year, cf. second sentence. Only one limitation amount as specified in the policy is available for both situations. The grounds for this limitation is that it is not possible at present to obtain reinsurance for these risks. The Association therefore finds it necessary to limit its liability. The reason for

stating the amount in the policy rather than in the text of the Plan is that the Association is engaged in continuous efforts to obtain reinsurance for this cover and aims to increase the limitation amount to the extent that reinsurance is obtainable. It is therefore more expedient to stipulate the amount in the policy in connection with each renewal.

According to subparagraph 2, first sentence, the limitation amount is absolute in the sense that costs that are normally covered in addition to the sum insured must in this connection be covered within the limitation amount. The limitation amount per ship per year includes the insurer's liability for costs related to the provision of security, cf. § 4-3, costs of litigation, cf. § 4-4, costs in connection with settlement of claims, cf. § 4-5, and costs of necessary measures to preserve the object insured, cf. § 5-21, first sentence. Moreover, no interest is payable on the compensation, cf. subparagraph 2, second sentence. This means that § 4-19 and § 5-4 do not apply.

Subparagraph 3 contains special rules regarding the apportionment of the aggregate limitation amount for the Association. Under the first sentence, the Association may at any time defer settlements in order to divide up the amount between the claims. This provision is necessary if the Association sees that claims may exceed the total limitation amount. Any assured who has received more than his pro rata share of the limitation amount must repay the excess amount to the Association, cf. second sentence.

The aggregate limitation amount represents the Association's total liability for all ships. If an assured who has received more than his pro rata share of the amount fails to repay the excess amount to the Association, this loss must be apportioned between the other assureds. The Association will not assume the risk of an assured's failing to repay the excess amount.

### *3. Limited cover for certain costs*

#### *§ 15-32. Perils covered by the limited cover*

This provision is new in the 2007 version, and was taken from Clause 8-1 of the Association's 2006 Conditions. Cover under § 15-32 constitutes narrow, limited cover for certain defined costs. The cover is confined to the part of the RACE II exclusion that concerns biological, chemical, biochemical or electromagnetic weapons, cf. the reference to § 2-9, subparagraph 2 (b) (5). This is the only peril that is covered under this cover.

#### *§ 15-33. Losses covered under the limited cover*

This provision is new in the 2007 version, and was taken from Clause 8-2 of the Association's 2006 Conditions.

The cover comprises only the losses specifically mentioned under subparagraph 1 (a) to (h). This means that § 15-2 does not apply. The various types of cost that are specified are in accordance with reinsurance conditions.

#### *§ 15-34. Limitation amount/Re. § 4-18 and § 15-3*

This provision is new in the 2007 version, and was taken from Clause 8-3 of the Association's 2006 Conditions.

Like the cover for RACE II perils, cover under § 15-32 and § 15-33 is limited. However, the limitation amount is organised somewhat differently than for the RACE II cover. The limitation under § 15-32 and § 15-33 comprises an amount linked to any one ship and a larger, aggregate amount for the Association.

Under subparagraph 1, the cover for any one ship per casualty is limited to the amount stated in the policy. This amount includes the costs of measures taken to avert or minimise loss and costs specified in § 4-3 to § 4-5 og § 5-21, first sentence, cf. subparagraph 2, which refers to the provision in § 15-31, subparagraph 1. It also follows from this reference that no interest is payable.

The aggregate limitation for the Association per year is also stated in the policy, cf. subparagraph 3. With regard to the grounds for stating the amount in the policy, reference is made to the commentary on § 15-31. The provision in § 15-31, subparagraph 3, applies correspondingly to settlements in accordance with § 15-33 and § 15-34, cf. subparagraph 4.

## Chapter 16 - Loss of hire insurance

### General

The loss-of-hire conditions were revised in 2003, after remaining unchanged since 1996. The new conditions are based on the 1996 version, but certain amendments have been made in § 16-1, § 16-2, § 16-4, § 16-7, § 16-9, § 16-11, § 16-12, § 16-13 and § 16-15. Although the text of § 16-16 has not been amended, substantive amendments have been made to the Commentary. The Committee has discussed fundamental amendments to several clauses, but these amendments have not been effected.

The Commentary has been completely reworked, also in respect of provisions in which no amendments have been made from the 1996 version to the 2003 version.

Like the 1996 version, the 2003 version is largely a continuation of the main elements of the earlier conditions, primarily the 1972 general CONDITIONS for loss-of-hire insurance, with amendments made in 1977 and 1993 (CEFOR Form No. 237, June 1993). The Commentary to the 1996 version contained extensive references to these earlier conditions, as well as to the so-called RANHAV judgment (ND 1967.269 NV), which was a key element in the preparation of the 1972 conditions. These references have been omitted in the 2003 version for the sake of clarity. In the introductory section of the various paragraphs, only the amendments introduced in the 2003 version are now emphasised. Persons interested in the historical evolution of the conditions are therefore referred to the Commentary to the 1996 version.

### § 16-1. Main rules regarding the insurer's liability

This provision was amended in the 2003 version.

Subparagraph 1, first sentence contains the main rules regarding the insurer's liability under the loss-of-hire insurance, which require "damage to the ship" that "is recoverable under the terms of the Plan". As a main rule, therefore, the loss-of-hire insurance does not cover loss of time arising from causes other than damage to the ship. Thus the casualty that is recoverable under the loss-of-hire insurance is basically the underlying hull damage. Furthermore, the damage must be recoverable under the conditions of the Plan as they applied at the time the loss-of-hire cover came into effect. This applies regardless of whether the ship's hull insurance has been effected on different conditions or whether the ship has no hull insurance at all. If hull insurance has been effected on conditions other than those of the Plan, such as ITCH, and the loss-of-hire insurer has given his written acceptance that the loss-of-hire cover is to be based on the said conditions, special rules nevertheless apply, cf. the second sentence and below. The reference to the Plan applies to the standard conditions, and not to the individual insurance contract. Consequently, the damage must entitle the assured to compensation in accordance with chapter 10 et seq. In this connection, the rules regarding full cover pursuant to § 10-4 will be decisive. Consequently, it is of no significance whether the ship is insured on conditions that are more or less favourable than the full conditions of the Plan. If the hull insurance has been effected on stranding terms pursuant to § 10-8, the loss-of-hire insurer is therefore liable, provided that the damage would have been recoverable pursuant to § 10-4. On the other hand, if the hull insurer has assumed extended liability for error in design and must therefore pay compensation for hull damage that would not have been recoverable under § 12-4 of the Plan, the loss-of-hire insurer is not liable for the loss of time entailed by the casualty. Nor, in relation to the liability of the loss-of-hire insurer, does it make any difference if the damage is not covered by the hull insurance because it is less than the deductible, cf. the first sentence in fine to the effect that the deductible shall be disregarded when determining whether the damage is recoverable under the hull conditions.

The term "damage" denotes the contrast to a total loss; in the event of the total loss of the ship, the question of cover under the loss-of-hire insurance does not arise, cf. below under § 16-2. On the other hand, there is no requirement that the damage must be recoverable as particular average in accordance with the rules of chapter 12. Damage to the ship which is recoverable under the hull insurance by virtue of the general average rules, cf. § 4-8, also triggers the loss-of-hire insurance. On the other hand, if the general average situation causes a delay without there being any damage, this does not fall within the scope of subparagraph 1. In such cases, however, a special cover provision has been introduced in subparagraph 2 (d).

The reference to the Plan aims at the objective criteria for cover in chapter 10 et seq. If the damage, objectively speaking, is recoverable under the Special Conditions but the assured loses his hull coverage on account of a breach of the rules of chapter 3, he does not necessarily also lose his loss-of-hire cover. Breaches of the rules of chapter 3 must be considered in direct relation to loss-



of-hire cover. This means, on the one hand, that breaches of the rules regarding safety regulations, for instance, will be breaches which normally also are relevant in relation to the loss-of-hire cover, and which the loss-of-hire insurer therefore must be able to invoke. On the other hand, the loss-of-hire insurer will not be able to argue that the assured has failed to comply with his duty of disclosure to the hull insurer as long as he himself has been given full and correct information relating to his own cover. Nor can the loss-of-hire insurer invoke breaches of special safety regulations included in the individual hull policy, cf. what has been said above concerning cover of error in design.

In practice, the loss-of-hire insurer will often follow the decisions made in respect of the hull insurance with regard to whether damage is recoverable, the apportionment fraction in the event of concurrent causes of damage, etc. However, the loss-of-hire insurance is an entirely independent insurance, and the decisions made by the hull insurer are not binding on the loss-of-hire insurer.

The damage to the ship which gives rise to the loss of time may have various causes. In such cases, the general rules of § 2-8 and § 2-9 regarding the perils insured against apply. Pursuant to § 2-10, the insurance only covers marine perils, unless otherwise agreed; under § 2-8, however, marine perils encompass "all perils to which the interest may be exposed", with the exception of the perils that are mentioned in letters (a) to (c) of the provision, including "war perils". Loss-of-hire insurance against war perils will be included in the war risk cover in chapter 15, which incorporates the present chapter. If no war risk insurance has been effected in accordance with chapter 15 of the Plan, loss-of-hire insurance against war perils in accordance with § 2-9 must, if relevant, be agreed separately. Such cover will be directly related to chapter 16, and will therefore be somewhat less comprehensive than the loss-of-hire cover provided by chapter 15, cf. § 15-16 to § 15-18, which contain a number of additions to the loss-of-hire cover pursuant to chapter 16.

The question of causation and concurrent causes of damage is basically also regulated by the general part of the Plan, cf. § 2-13. If the loss has been caused by a combination of perils that are covered by the insurance and perils that are not covered, it must be apportioned proportionately between the perils insured against and the excluded perils according to the influence each of them must be assumed to have had on the occurrence and extent of the loss. The problems relating to cause were discussed thoroughly during the 2003 revision process. The Committee agreed that while no change was to be made in the causal principles that are currently applied in loss-of-hire insurance, it was appropriate to address causal issues from a broader perspective in the Commentary.

Concurrent causes of damage in relation to loss-of-hire insurance may occur in a variety of situations, which may arise alone or in combination:

Firstly, the hull damage that causes the loss of time may be a consequence of a concurrence of perils that are covered under the hull insurance and perils that are not covered, such as a concurrence between navigational errors and breaches of safety regulations.

Secondly, several instances of hull damage may be repaired simultaneously. If one or more of these instances of damage is either not covered by the insurance or is covered under another insurance period, the loss of time will be a consequence of damage that is covered and damage that is not covered.

Thirdly, there may be a situation where causes that are not covered or causes that must be attributed to another insurance period may result in the prolongation of a loss of time or stay in a repair yard that is due to the occurrence of hull damage. Such causes may be external factors in the form, for instance, of a strike, extreme weather conditions or the detention of the ship due to its arrest and the like, or factors related to the ship itself, such as the discovery during repairs of unknown damage to the ship that is not covered by this insurance.

In the first situation, where the hull damage that causes the loss of time is a consequence partly of perils that are covered and partly of perils that are not, an apportionment will be made in relation to the hull settlement on the basis of § 2-13 of the Plan. In this case it will be natural to use the same percentage apportionment for the loss-of-hire settlement, unless the loss-of-hire insurer has special reasons for applying another ratio of apportionment, cf. above as regards the fact that the loss-of-hire insurer normally follows the decisions of the hull insurer. If, therefore, the assured himself must pay 30 per cent of the hull damage on account, for instance, of breaches of safety regulations, it is likely that he will also have to pay 30 per cent of the time lost in repairing the damage. If the damage is due to a concurrence of marine and war perils, the special rules of § 2-14 to § 2-16 apply. That portion of the loss of time that must be attributed to a war peril is not covered by a loss-of-hire insurance against marine perils, and must be covered by taking out either

loss-of-hire cover under an insurance pursuant to chapter 15 of the Plan, or an independent loss-of-hire insurance against war perils, compare above.

The second situation, in which several instances of hull damage are repaired simultaneously, is dealt with separately in § 16-12. Here the general, discretionary rule of apportionment in § 2-13 has been replaced by fixed criteria for apportionment. These rules may be applied cumulatively with the rules of § 2-13 to § 2-16; for further information see below under the commentary to § 16-2, subparagraph 1.

As to the third situation, on the other hand, we must fall back on the general rule of apportionment in § 2-13 regarding concurrent causes of damage. In this case, contrary to the first situation, there will be no apportionment settlement for the underlying hull damage, and § 2-13 must thus be applied directly to the loss-of-hire settlement.

In this situation, a casualty giving rise to a claim for compensation concurs with a new cause and prolongs an already existing loss of time. The general view as regards apportionment pursuant to § 2-13 in situations of this type where several causes are determinant on one another in a chain of cause and effect is, according to the commentary to § 2-13, that greatest weight is to be attached to the first cause to take effect, in this case the hull damage. This must also apply in relation to the prolongation of repair time under a loss-of-hire insurance. At the same time, of course, account must be taken of how likely it is that the circumstance in question will lead to prolongation, and how long such a prolongation would normally be. The decisive criterion for how apportionment is to be effected is therefore how foreseeable the event prolonging the loss of time is when the ship is sent to the repair yard. However, the criterion of foreseeability must be seen in connection with the rules regarding evaluation of tenders in § 16-9, the assured's duty to reduce the loss and general preventive considerations.

Such considerations will be particularly relevant in connection with perils that prolong the loss of time and that are so foreseeable that the assured must be expected to take account of them when considering the choice of repair yard. The tenders on which the assured's evaluation is based pursuant to § 16-9 will normally be based on the time it will take to carry out the actual repairs, and will not include an expected delay due, for instance, to an announced strike or the likelihood of poor weather or the like. In principle, therefore, foreseeable prolongations will not be included in the basis on which the assured makes his choice. On the other hand, the assured has a general duty to reduce the loss. Therefore, the assured cannot merely consider tenders when choosing a repair yard; he must also take account of expected delays in order to determine which yard will carry out the repairs most quickly, in real terms. This means, among other things, that the assured must inform the insurer if he is aware of factors that may prolong the ship's stay in a repair yard, so that the insurer can take this into account when discussing which of the tenders obtained entails the least loss of time in real terms. In the event of a grossly negligent breach of this duty, the insurer may apply § 3-30 and § 3-31 of the Plan. In less serious situations, however, preventive considerations may be used as an argument in favour of apportionment.

On the other hand: it is conceivable that a tender based on the estimated repair time at repair yard A, added to a foreseeable delay due to an announced strike or expected climatic problems, is more reasonable than alternative tenders from other repair yards. If the parties in such a situation jointly agree to choose repair yard A, the prolongation must be covered in its entirety. Reference is otherwise made to the commentary to § 2-13.

In practice, it is particularly the prolongation of stays in a repair yard due to strikes that has caused problems. The 1996 Commentary states that while, in principle, the apportionment rule in § 2-13 was to be applied, in practice a prolongation of the stay in a repair yard due to a strike among the yard workers had been covered. However, the practice referred to consisted only of accepting local strikes at the yard as "foreseeable", and in such cases paying "full" compensation, i.e. without proportionate apportionment. In the Committee's view, prolongation due to a strike must be considered in the customary manner on the basis of § 2-13, and not on the basis of whether or not the strike is local.

The problems raised by the "reference-back rule" in § 2-11, subparagraph 2, are discussed in the commentary to § 16-14.

The loss covered by loss-of-hire insurance is referred to as "loss of time". This does not mean that the time lost is covered; loss-of-hire insurance is an insurance against loss of income (loss of freight), hence "loss of hire" or "loss of earning" insurance in English. The characteristic aspect of loss-of-hire insurance is that income is lost as a direct consequence of loss of time, i.e. as a result of the fact that the ship is temporarily unable to operate.

The loss of time is specified as "loss due to the ship being wholly or partially deprived of income as a consequence of damage...". The loss of time will normally coincide with the time during which the ship is physically unable to operate. The time during which the ship is in a yard undergoing repairs, added to the time spent on surveys, obtaining tenders and rerouting the ship to the yard, will normally be lost in terms of income. If the ship cannot resume operation immediately after repairs have been completed, however, a loss of time may also occur after completion of repairs. These problems are solved by the provision in § 16-13.

It is not required that there be a total loss of income; loss of time due to the ship being "partially" out of operation is also covered. This includes both the situation where the ship can partially operate, and the situation where the ship is operating normally but has reduced earnings due to the damage, for instance because the ship can no longer carry several types of cargo. This kind of loss will be recoverable under the loss-of-hire insurance if the insured can prove that the loss is a consequence of the damage, because he would have been able to accept another type of cargo if the damage had not occurred.

The first paragraph, second sentence, was added in the 2003 revision, and regulates the situation where loss-of-hire cover pursuant to chapter 16 is effected for a ship for which hull insurance has not been effected on Plan conditions. This question gave rise to considerable discussion during the 1996 revision of the Plan. The problem was to determine which rules should be used to decide whether hull damage was recoverable, thereby providing grounds for covering the loss of time under the Plan's loss-of-hire conditions. During the 1996 revision, however, there was disagreement as to how such coordination could best be effected, and it was therefore not considered expedient to resolve this question in the Plan.

Lacking a solution to the problem in the Plan, each insurer has drawn up clauses to be applied when the hull insurance has not been effected on Plan conditions. Since these clauses are practically identical in content, it has now been agreed that the question is to be regulated in the Plan, thereby achieving a uniform solution to this problem.

If the hull insurance has been effected on the basis of conditions other than those of the Plan, and these conditions have been accepted in writing by the insurer, the second sentence establishes that the provisions in these conditions which correspond to chapters 10, 11 and 12 of the Plan are to be applied to determine whether the damage is recoverable as hull damage, thereby triggering the loss-of-hire insurance. If no hull insurance has been effected, or if hull insurance has been effected on Plan conditions but adapted to individual cases, or if other conditions have been used which have not been accepted, the rules of the Plan are to be followed, cf. above.

If the insurer has accepted in writing hull conditions that are different from the Plan's hull cover, these other conditions will be decisive for the liability of the loss-of-hire insurer. Consequently, if the exclusions specified by such conditions for damage due to wear and tear or error in design, etc., are more comprehensive than what is provided under § 12-3 and § 12-4 of the Plan, the loss-of-hire cover will be reduced correspondingly. On the other hand, if the conditions offer more extensive cover than the Plan, liability under the loss-of-hire cover pursuant to chapter 16 will be extended. Extensions or reductions of hull cover in individual cases in relation to standard cover may thus be of significance for loss-of-hire cover, provided that the insurer has accepted this in writing. This will also apply if the hull insurance is based on the Plan.

The coordination of loss-of-hire cover with hull conditions other than those of the Plan is binding provided the insurer has accepted the deviating hull conditions. Thus the assured may not choose to link his loss-of-hire cover to the Plan's conditions for hull cover once he has obtained acceptance for other hull conditions.

If the hull cover is divided up into several parts effected on different conditions, the loss-of-hire cover must be apportioned correspondingly. If, for instance, one third of the ship's hull cover has been effected on English ITCH conditions with the consent of the loss-of-hire insurer and two thirds on Plan conditions, one third of the loss of time must be covered in accordance with the ITCH rules that correspond to chapters 10-12 of the Plan, while the remainder must be covered pursuant to the Plan.

Nevertheless, only the conditions in the insurance in question that correspond to chapters 10-12 of the Plan are relevant in relation to the loss-of-hire cover. This means, on the one hand, that cover must be based on the conditions in question insofar as they state which objects are covered by hull insurance and the scope of the hull cover in the event of damage to the ship (chapters 10 and 12). Furthermore, these rules must be followed as regards the delimitation between damage and total loss that does not entitle the assured to loss-of-hire insurance, cf. chapter 11 and § 16-2.

However, no reference to chapter 13 is necessary because this chapter concerns the hull insurer's cover of collision liability.

On the other hand, this means that issues that are regulated by chapters 1-9 of the Plan and that concern the perils covered, incidence of loss, causation, breaches of the assured's duties relating to the underlying hull damage, etc. must always be decided on the basis of the rules in the general part of the Plan.

Coordination with other hull conditions is only linked to the assessment of the underlying hull damage; issues related to the loss-of-hire insurance itself, such as the rules regarding the duty of disclosure or special trading limits relating to loss-of-hire cover must always be decided in accordance with the rules of the Plan. If the ship is outside the trading area covered by the foreign hull insurance, but within the trading area covered by the Plan, the loss-of-hire insurer will therefore be liable even if no compensation is payable under the hull insurance.

Hull insurance conditions may conceivably change in the course of the insurance period covered by the loss-of-hire insurance, for instance from Plan conditions to English ITCH conditions. In such case, the hull insurance and the loss-of-hire insurance must be coordinated on the basis of the hull conditions that applied when the loss-of-hire insurance was effected, unless the assured has notified the insurer of a change to other standard conditions and received the latter's written acceptance of these. This type of solution is necessary because the loss-of-hire insurer calculates the premium in relation to the hull conditions that apply at the time the insurance is effected.

Subparagraph 2 represents an extension of the cover provided by loss-of-hire insurance in that in certain cases loss of time is covered even if there is no damage to the ship. This means that the loss-of-hire insurance's "casualty concept" has been extended: in addition to the hull damage defined in subparagraph 1, the events mentioned under letters (a) to (d) must also be deemed to be "casualties" for which compensation must be paid. Apart from the addition of a new letter (d), the provision is the same as in the 1996 Plan. The rules are structured on the basis of specific cases. Pursuant to letter (a), the insurance covers time lost because the ship "has stranded". To say that the ship "has stranded" means that the stranding must be in the nature of a casualty, even though there is no requirement that the stranding resulted in damage. If, on the other hand, the stranding is a consequence of "ordinary use", for instance foreseeable strandings during navigation on a shallow river, cf. § 10-3, the insurer is not liable for the loss of time. This extension of cover must be assumed to have little significance in practice, since a stranding that does not cause damage to the ship will normally not result in a loss of time that exceeds the deductible period.

Letter (b) corresponds to § 15-12, but is more restrictive in two respects. Firstly, contrary to § 15-12, letter (b) stipulates "physical" obstruction. The difference arises from the fact that § 15-12 also encompasses blocking due to intervention by a State power. On the other hand, such blocking is excluded from the marine perils covered, which is decisive in relation to § 16-1. Secondly, obstruction on account of ice is not included. In all other respects, reference is made to the commentary to § 15-12 as regards the scope of the provision. Loss of time that is covered pursuant to (b) must be deemed to be an independent casualty that triggers a separate deductible. However, this does not apply when the obstruction is a proximate consequence of an earlier stay in a repair yard. In such a case, the time lost during the ship's obstruction is covered pursuant to § 16-1, subparagraph 1, and no new deductible is to be calculated.

Letter (c) extends cover to include loss of time resulting from action taken to salvage or remove damaged cargo.

Letter (d) was added in the 2003 version, and extends cover to include delay resulting from a general average situation that does not lead to damage to the ship, for instance caused by cargo shifting. This corresponds for instance with the solution under English loss-of-hire conditions.

#### § 16-2. Total loss

This paragraph was amended in the 2003 version.

The provision states a fundamental principle of loss-of-hire insurance: the insurance does not cover loss of time resulting from the total loss of the ship. Such loss of time can occur in two different connections. Firstly, considerable time may elapse from the time of the casualty until it becomes clear that compensation for total loss will be paid. Secondly, time can be said to have been lost when the assured has used the lost ship for a specific purpose, such as on a liner route, and it takes time to procure a new ship to replace the old one.

Both these forms of loss of time are, however, covered by total loss insurances for the ship, i.e. ordinary hull insurance and interest insurances. Loss resulting from the interruption of operations due to the loss of the ship will to a certain extent be reflected in the ship's hull value; if this business interruption interest is particularly great, it can be covered by an interest insurance. To some extent, compensation for loss of time in connection with late settlement is also provided by the interest rule: interest is also payable on compensation for a total loss pursuant to § 5-4, i.e. from one month from the day on which notice of the casualty was sent to the insurer.

By excluding loss of time resulting from total loss from the loss-of-hire insurance, the very difficult problems posed by the calculation of such losses of time are avoided.

The basic principle in § 16-2 is that if the assured could have claimed total loss compensation pursuant to the rules of chapter 11, he is not entitled to cover under the loss-of-hire insurance. The fact that he is not actually paid such compensation is irrelevant. If the ship meets the conditions for condemnation pursuant to § 11-3 et seq. but the assured nonetheless prefers to have it repaired because of its low insurable value and rising ship prices, cf. § 12-9, this will therefore not entitle him to claim compensation under the loss-of-hire cover.

As regards whether there is a total loss pursuant to chapter 11, the loss-of-hire insurer will usually follow the decisions made in the relationship between the assured and his hull insurers. However, these decisions are naturally not binding on him, cf. what is said in the commentary to § 16-1, subparagraph 1, about a parallel issue.

The fact that the hull insurer pays the sum insured in accordance with § 4-21 cannot be equated with payment of total loss compensation in accordance with chapter 11. Should it later prove that the conditions for condemnation would have been fulfilled, § 16-2 will be applicable. The same applies if the further development of the casualty results in the ship actually becoming a total loss, for instance where it has struck a reef and later sinks while being towed off.

If the ship's hull insurance has been effected on conditions other than those of the Plan, and the insurer has accepted these conditions, the question of the right to compensation for total loss must nonetheless be decided by the conditions of the insurance concerned. This solution, which is new, is explicitly stated in § 16-2 in the 2003 version. However, only the rules in the relevant condition that correspond to chapter 11 of the Plan shall apply. The general part of the Plan shall therefore apply in the usual way in relation to this rule as well.

In earlier versions of the Plan, the rule in § 16-2 was that if the hull insurer, as a compromise, paid at least 75% of the hull value without taking over the ship and without requiring the assured to carry out repairs, this had to be regarded as equivalent to a total loss. The provision aimed at a so-called "compromised total loss" settlement. This type of settlement is appropriate when a ship is so badly damaged that it is not worth repairing, but when the ship nevertheless does not satisfy the conditions for condemnation because it has been overvalued, cf. § 11-3, subparagraph 2.

This provision was deleted in the 2003 revision. It was considered unsatisfactory because it could result in the assured falling between two stools. If the damage repairs amounted to at least 75% of the hull value, but this amount was less than 80% of the ship's value once repaired, the shipowner would not be entitled to request condemnation, cf. § 11-3, nor could he claim compensation under the interest insurances. At the same time, under the 75% rule he would not be covered under the loss-of-hire insurance, regardless of whether or not he chose to repair the ship.

The practice of undervaluation can be ascribed to the right to effect interest insurances, which gives the shipowner an incentive to supplement a low hull value with high interest insurances, giving rise to problems in the event of partial damage. As long as the system of high interest insurances is accepted, loss-of-hire cover should also be secured in the event of casualties that do not entitle the assured to compensation under the interest insurances. Insurers will not incur significant costs as a result of this amendment because this is a minor problem in practice.

If the assured chooses to repair the ship even if, objectively viewed, it is not worth repairing, he may claim compensation under the loss-of-hire insurance in accordance with the usual principles. However, repair of the ship is not a prerequisite for compensation for time lost in connection with this type of damage settlement. The shipowner is entitled to compensation for lost income during the period until it is finally determined that the ship is not to be repaired. In such situations, moreover, the shipowner also has a duty to limit the loss pursuant to § 3-30, and therefore cannot cause undue delay.

### § 16-3. The main rule regarding calculation of compensation

This provision was not amended.

The first sentence states the main rule for calculating compensation, and provides that compensation is to be determined on the basis of the time during which the ship has been out of operation and the loss of income per day.

The method of calculation indicated must be used even when the loss of income can be established more directly. This is because both the loss of time and the daily amount must be determined on account of the rules regarding days of indemnity (cf. § 16-4) and the rules fixing a maximum limit for the insurer's liability per lost day (cf. § 16-5).

"The daily amount" is the insurable value of the assured's loss of income per day. It must be distinguished from the agreed "sum insured per day". The daily amount is normally assessed and insured in full, and the assessed daily amount will thus also be the sum insured per day. However, this does not preclude partial cover; for instance, insurance can be effected for USD 5,000 per day of an assessed daily amount of USD 10,000. For further details, see the commentary to § 16-6.

A basic condition for compensation under the loss-of-hire insurance is that the ship has been deprived of income as a result of the damage. If the ship would have been unable to obtain employment even if it had not been damaged and would consequently have been laid up, there is no loss of time that entitles the assured to claim compensation, cf. *Cepheus Shipping Corporation v. Guardian Royal Exchange Assurance PLC, The Capricorn*, [1995] 1 Q.B. 622. However, in order for the loss of time to be recoverable, it is sufficient that the assured would have had a reasonable chance of obtaining employment for the ship if it had not been affected by circumstances mentioned in § 16-1. If the ship, therefore, is one of many that are waiting in the Gulf to be chartered, the condition is fulfilled. The assured cannot be required to prove that his ship would actually have obtained employment. However, the assured must prove that there was a genuine, commercially sound, chance of obtaining a charter, and that it was realistic to move the ship from the area in which it was located when the decision to make repairs was made to the area where there was potential employment. If, therefore, a drilling platform is damaged in the North Sea area, and it is evident that it would have been unable to obtain employment in Europe, but that there are employment opportunities in the Far East, the assured must prove that it would have been commercially realistic to move the platform there.

According to the second sentence, the period of time lost cannot begin to run before the casualty or the event that gives rise to a claim under the loss-of-hire cover pursuant to § 16-1 has occurred. This means that no compensation will be paid for loss of income relating to a prior period. Example: a ship sailing under a voyage charterparty suffers a casualty during the ballast leg. As a result of this casualty, the charterparty is terminated. In actual fact, the freight covers both the ballast leg and the loaded leg, and the assured could argue that the loss of income must be dated back to the start of the ballast leg. However, the provision in § 16-3, second sentence, precludes such a claim.

The provision in § 16-3 naturally does not prevent the parties from explicitly agreeing that the cover is to include loss of time irrespective of whether the assured can prove that the ship would have been employed if the damage had not occurred. However, assessment pursuant to the rules of § 16-6 cannot be perceived as such an agreement.

### § 16-4. Calculation of the loss of time

Subparagraph 2 was amended in the 2003 version, but the amendment was purely editorial and entailed no substantive changes.

This provision supplements § 16-3, and lays down further rules for calculating loss of time once the extent of the time lost has been established. Additional supplementary rules are laid down in subsequent paragraphs.

Ascertaining and calculating the loss of time will primarily raise problems of a factual nature, namely establishing how long the insured ship has been deprived of income as a result of the damage that it has sustained. However, certain questions of principle also arise. A brief account of the calculation of loss of time in certain typical cases may be found in earlier versions of the Commentary to the 1996 Plan, and is therefore not repeated here.

Subparagraph 1, first sentence, provides that the loss of time shall be stated in days, hours and minutes. The insured is therefore also entitled to compensation for loss of time that is less than one day. This method of calculation is in conformity with the usual method for calculating loss of time in off-hire and demurrage settlements.

Subparagraph 1, second sentence, states that time during which the ship has only partly been deprived of income shall always be converted into a period during which operations have halted completely. This is in accordance both with established practice in settlements and with the method of calculation used for off-hire and demurrage.

However, the provision has given rise to certain problems in practice in cases where the cause of the ship's being partly deprived of income is not reduced speed, but a fault in the ship's equipment, holds or tanks. If, in such a situation, the assured allows the ship to continue operating with the defective equipment for a period of time, and subsequently carries out repairs when this is convenient in relation to the ship's charterparties, the result is first a partial time loss linked to the ship's reduced operations, followed by a full loss of time during the period of repairs. In principle, however, the insurer should not be liable for a loss of time that is greater than what would have occurred if the ship had been repaired immediately. In connection with the 2003 revision, therefore, the Committee considered limiting the conversion provision to situations where the reason for the ship's being partly deprived of income was reduced speed, and giving more limited cover if the reduced income was due to other causes. In this respect, however, it suffices to refer to § 3-30 and § 3-31 of the Plan which state that the shipowner has a duty to limit his loss. Under § 3-30, second sentence, the assured has a duty to consult the insurer if there is an opportunity to do so. If, for commercial reasons and without consulting the insurer, the assured chooses to postpone making repairs that could have been carried out immediately, and this inflicts a loss on the loss-of-hire insurer, the latter must therefore be able to invoke these rules.

Subparagraph 2 was amended in the 2003 version, in that the Norwegian term "forsikringsperioden" has been amended to "forsikringstiden" (both terms are translated as "period of insurance"), which is the term otherwise used in the Plan, see for instance § 16-14. Pursuant to this provision, the daily amount multiplied by the maximum number of days covered per casualty or altogether during the period of insurance must be seen as a sum insured, i.e. a maximum monetary limit on the insurer's liability (per casualty and altogether during the period of insurance). The insurer is liable to pay a full daily amount for up to the stated number of days or a reduced amount for a correspondingly larger number of days. The stated number of days therefore does not impose a maximum limit on the total number of days for which the insurer may be liable.

If the insured ship suffers a more serious casualty at the beginning of the insurance period, with the result that the maximum number of days of compensation are "used up" immediately, the loss-of-hire insurance will not provide the assured with any cover for the remainder of the insurance period. In practice, the parties often agree that cover is to be automatically extended in such cases (the so-called reinstatement clause).

The rules regarding the limitation of the insurer's liability per casualty contain no provisions regarding the delimitation of the term "casualty" in the event of damage caused by heavy weather and the like. Such provisions are included, on the other hand, in § 16-7 regarding the deductible period. Should there be a need for a corresponding delimitation in relation to § 16-4, the rules of § 16-7, subparagraphs 2 and 3, must be applied by way of analogy. However, the problem is not likely to arise in practice, since a total maximum number of days equal to the maximum number of days per casualty has as a rule been agreed.

#### § 16-5. The daily amount

This paragraph was not amended.

The provision lays down rules for calculating the daily amount under open policies, i.e. policies that do not specify any assessed value for the daily amount. As mentioned in the commentary to § 16-3, the "daily amount" is the insurable value of the assured's loss of income per day. In practice, the daily amount is usually assessed, i.e. fixed by agreement. The provision in § 16-5 is therefore primarily applicable in cases where the assessment "is opened" in accordance with § 16-14, subparagraph 2.

Subparagraph 1 states that the daily amount shall be fixed at the equivalent of the calculated gross freight per day less the costs saved per day due to the ship's not being in regular operation. The gross freight per day poses no difficulty when the ship is under a time charter. In the case of a voyage charter of the whole ship, the estimated freight must be divided by the number of days that would normally be required for the voyage and any necessary prior or subsequent ballast voyages. In both cases, the freight according to the contract of affreightment in force when the loss of time occurs is decisive.

Subparagraph 2 prescribes the daily amount in cases where the ship is unchartered when the period of interrupted operations begins. This rule provides for an objective calculation of loss for practical legal purposes: it can be very difficult to decide how the ship would have been employed

if it had not been out of operation. To avoid the difficulties of deciding which course of action the assured would have chosen, the daily amount in such cases is fixed at "the average freight rates for ships of the type and size concerned" for the period during which the ship is deprived of income. The term "average freight rates" means a "weighted average"; account must be taken of how long each rate has been in effect. In practice, this can be achieved by dividing the period of interrupted operation into shorter periods during which freight rates were relatively constant and calculating the compensation for each individual period. If rates for long-term charters and voyage charters differ, compensation must be based on an average in these cases, too.

If the insured ship is employed in a liner trade, the daily amount must be calculated on the basis of the information available concerning the earnings of other ships in the same line during the period in which the ship was out of operation.

The reference to the ship being "unchartered" does not cover the situation where a charterparty lapses due to a casualty covered by the insurance. This situation must be evaluated in accordance with subparagraph 1.

#### § 16-6. The assessed daily amount

This provision has not been amended.

The provision regulates the assessed daily amount. As mentioned under § 16-5, the daily amount is usually assessed; the reason for doing so is to avoid difficulties in calculating the daily amount under an open loss-of-hire policy. Under § 2-3, assessment of the daily amount means that the insurable value is fixed "by agreement between the parties ... at a certain amount".

If it is clearly stated in the text of the policy that the daily amount is assessed, the matter is straightforward. In practice, however, policies often merely state the amount the insurer is to pay for each day of time lost. This may be an assessed daily amount, but it is also conceivable that only the sum insured per day is stated. In this connection, § 16-6 lays down an important rule of presumption: if the policy states "that the loss of income shall be compensated for by a fixed amount per day, this amount shall be regarded as an assessed daily amount unless the circumstances clearly indicate otherwise". In such case, the amount will also be the sum insured per day; in other words, the assessed value is fully insured.

Both the assured and the insurer may invoke the assessment. For the insurer, this is primarily relevant in the case of under-assessment, i.e. when the assessed daily amount is lower than the real loss of income per day. In such case, the assessment will limit the assured's claim for compensation. However, the assessment may also be relevant when the rules of § 16-11 are applied and when there is a question of seeking recourse against a third party who is responsible for the loss of time. Under § 16-11 the assessed daily amount will be decisive when calculating the savings the insurer makes as a result of the extraordinary measures taken to expedite repairs. As far as recourse is concerned, it must be proven to the insurer that the assessed daily amount represents the full loss, and that it therefore is not appropriate to apply the rule of apportionment laid down in § 5-13, subparagraph 2. Only when the insurer's loss has been recovered in full can the assured make any claim, cf. § 5-13, subparagraph 3.

In view of the consequences of under-assessment, not every amount that is mentioned in the policy should automatically be regarded as an assessed daily amount. If the amount is so much lower than the real loss per day that there can be no question of any rounding-off or rough calculation of the loss, the policy should be treated as an open policy. The provision has been worded with this in mind. If, for instance, the gross freight per day is USD 10,000, and the assured has effected a loss-of-hire policy for USD 3,500 per day, one can safely say that "the circumstances clearly indicate" that the amount is a sum insured per day, not an assessed daily amount: thus there is an open policy with under-insurance. Naturally, there is nothing to preclude combining under-insurance with assessment. In our example, for instance, it may be agreed that the policy is to cover USD 10,000 of an assessed daily amount of USD 15,000. In terms of settlement, it would be an advantage if the apportionment ratio pursuant to § 5-13, subparagraph 2, first sentence, is fixed at the ratio between the insured daily amount and assessed daily amount. It would therefore be expedient to have separate spaces on the first page of the policy for "sum insured per day" and "assessed daily amount".

The system of assessed insurable values is well established in hull insurance. Ship values change constantly, and it can often be difficult to establish what a ship is really worth at a particular point in time - there is clearly a need to fix the value in advance. In freight insurance, the situation appears to be slightly different; in this case the exact amount of freight of which the assured is deprived will often be known, and an assessment that exceeds the freight amount is likely to be perceived as excessive compensation for the assured's actual loss. Nevertheless, the system of



assessment has been maintained without exception. If it is evident that a loss of time has occurred, cf. § 16-3, and the daily amount has been assessed, the assured must be paid the amount assessed for the number of (full) days during which the ship is out of operation. The only exception from this rule is where the assured has supplied misleading information about matters that are relevant for the assessment, cf. § 2-3, subparagraph 1. The insurer must therefore ensure that the assured provides enough information concerning the ship's potential earnings to give the insurer a basis for evaluating whether the assessment is correct when the insurance contract is effected. This also applies to the question of the duration of the charterparty, so that account can be taken when fixing the assessed daily amount of the possibility of the contract of affreightment lapsing.

It follows from § 16-4, subparagraph 2, that the assessed daily amount shall not apply to time lost during repairs that are carried out after the insurance period expires, if the actual loss of income per day calculated pursuant to § 16-5 is less during this period. This provision is sometimes set aside in individual insurance contracts. As a rule, this is only done by adding the words "fixed and agreed", or if relevant, "chartered or unchartered". If the parties to the insurance contract have a common understanding that the purpose of this addition is to nullify § 16-4, subparagraph 2, it is of course binding on both parties. However, not all insurers take this view of the provision, in which case it is highly uncertain whether such an addition is sufficient to set aside § 16-4, subparagraph 2. If this is the intention, the setting aside should be formulated more clearly.

If the insured ship is sailing under a charterparty for consecutive voyages, the assessment must be based on the average gross freight per day that the ship would have earned if all the voyages had been completed in the normal way. It may then be relevant to deduct from the gross freight an amount for costs that will be saved if the ship must dock for repairs. There are numerous uncertain factors in this calculation. The uncertainty is even greater for ships in the liner and tramp trades. In general, it can be said that the greater the degree of uncertainty in the calculations, the more important it is that the daily amount be assessed in advance.

It is conceivable that, after the expiry of the contracts of affreightment on which the assessment was based, the ship is chartered on even more advantageous conditions. In such case, the assessment still has significance, since it always forms the maximum limit for the insurer's liability.

#### § 16-7. Deductible period

Subparagraph 3 was amended in the 2007 version. The paragraph is otherwise identical to the 2003 version.

Subparagraph 1 has been simplified, but the substantive content is unchanged. The first sentence of subparagraph 1 provides that a deductible period, stated in the policy, shall be established for each casualty. In accordance with the solution that follows from § 12-8 as well as from § 16-7 of the 1996 version, the provision merely provides a number of rules for calculating the deductible period. The number of days must therefore be fixed in the policy. This is linked to the fact that the number of deductible days is a key factor when fixing the premium and therefore an important element of the negotiations between the assured and the insurer. Thus the deductible period is agreed in each individual case.

The term "casualty" here means an event that gives rise to the right to claim under loss-of-hire insurance in accordance with § 16-1, i.e. also events which are mentioned in § 16-1, subparagraph 2, but which do not result in damage to the ship.

A separate deductible period is applied for each casualty; this is in accordance with the other deductible provisions in the Plan, cf. § 12-18 and § 13-4. However, if one and the same casualty leads to a number of separate delays, e.g. delay at the place where the casualty occurred, delay in connection with temporary repairs and delay during permanent repairs, then only one deductible period shall be applied for the aggregate of all the delays. As far as the wording "each casualty" is concerned, reference is made to the commentary to § 12-18 and § 4-18. In loss-of-hire insurance, the question of whether there has been one or more casualties will probably seldom be acute, because the deductible periods for several more or less contemporaneous casualties will usually coincide. An example would be where the insured ship collides with three other ships within a short space of time; the rudder is jammed by the first collision and it is impossible to stop the ship before the second and third collisions occur. For the hull insurer who covers collision liability it will be important to decide whether one or three casualties have taken place; this will determine whether his maximum liability is one or three times the sum insured, cf. § 13-3. For the loss-of-hire insurer, on the other hand, the number of casualties will seldom be important. Even if one assumes that there are several casualties, the delay and the deductible period will run parallel,

both at the site of the casualty and during subsequent repairs - thus the result will in practice be the same as if the events were regarded as a single casualty.

According to subparagraph 1, second sentence, the deductible period runs "from the commencement of the loss of time". In the 1996 version, the starting point for calculation of the deductible period was stated as "the casualty", but strictly speaking this is somewhat inaccurate. In order for the deductible period to be able to run, there must be a loss of time. The wording was therefore amended in the 2003 version. If, for instance, the ship runs aground but continues her voyage immediately at her normal speed, there is no loss of time nor does any deductible period run. If bottom damage is later discovered that necessitates a lengthy stay in a repair yard, on the other hand, a loss of time occurs. In this case, the deductible period begins to run in parallel with the loss of time.

The rule that the deductible period begins to run at the commencement of the loss of time also means that the deductible period is to be placed at the beginning of the period of lost time. This also applies where the loss of time runs during several separate periods. The deductible period is therefore not to be apportioned pro rata between the various periods. On this point, the rule in loss-of-hire insurance differs from the rule applied in hull insurance where the deductible is apportioned pro rata between the expenses to be covered by the insurer. The placement in time of the deductible period can have the following consequences for the settlement:

Firstly, it is significant in relation to the rule of apportionment in § 16-12 regarding simultaneous repairs. It will be a distinct advantage for the assured to have owner's work (i.e. repairs that are not covered by insurance) carried out during the deductible period; the assured does not receive any loss-of-hire compensation for this period in any event. On the other hand, if owner's work is carried out during a period of time that is covered by the loss-of-hire insurer, the result is that the assured may only claim 50 % of the compensation that he would have received if only repairs covered by the insurance had been carried out, see § 16-12, subparagraph 1.

Secondly, the placement in time of the deductible period may become significant where the daily amount pursuant to § 16-5, subparagraph 2, or § 16-14, subparagraph 2, is lower for the last repair period than for the first. In this case, the assured may not demand that the deductible period be placed during the last period so as to enable him to receive compensation for correspondingly more days at the highest daily amount.

Thirdly, the placement in time of the deductible period may become significant when apportioning costs of measures to avert or minimise loss and extra costs incurred to save time, cf. § 4-12, subparagraph 2, and § 16-11, subparagraph 3. Insofar as such costs are incurred in saving time during the deductible period, they must be covered by the assured, cf. further information in the commentary to § 16-11, subparagraph 3.

Finally, the placement in time of the deductible period may become significant when apportioning claims for reimbursement pursuant to § 5-13 and § 16-16.

The second sentence also states that the deductible period is to be calculated in accordance with the rule in § 16-4, subparagraph 1, second sentence. This corresponds with the 1996 version. If the ship is only partly deprived of income, the deductible period lasts until the loss of time, converted into a period of total loss of income, has reached the agreed number of days. This means that if a machinery casualty causes a ship to sail at half speed for 40 days and the deductible period has been fixed at 14 days, the deductible period lasts for 28 days, reckoned from the time of the casualty.

The same applies where the loss of time resulting from a casualty is spread over several periods, separated by periods in which the ship is in full operation. In such cases, only the days with (full) loss of time are counted. The deductible period does not expire until the fixed number of days is reached.

Subparagraph 1, third sentence, states that loss of time during the deductible period is not covered by the insurer. This is in accordance with the 1996 version.

In the 1996 version, § 16-7, subparagraph 2, contained a rule prescribing that heavy weather damage arising during the period of time while the ship navigates between two ports should be regarded as a casualty, as well as a rule of apportionment in the event that the insurance period expired during this period. Subparagraph 3 gave subparagraph 2 a corresponding application for damage resulting from the ship's passing through ice and for damage caused by grounding or contact with the seabed while the ship is navigating in shallow waters. In the 2003 version, these two subparagraphs have been combined and simplified along the lines of the corresponding provision in § 12-18. Subparagraph 2 states that damage which is due to heavy weather or the

ship's sailing through ice, and which occurred during the period of time between the ship's departure from one port and its arrival at the next, is to be regarded as one casualty. The provision is identical to § 12-18, subparagraph 2. The provision regarding damage caused by grounding or contact with the seabed in § 16-7, subparagraph 3, of the 1996 version, cf. above, has been deleted, but no change in practice as regards this point is intended.

The reason for the rule is the technical difficulties that might easily arise in connection with settlement if an attempt was made to categorise heavy weather damage, damage caused by ice, etc. sustained during one and the same voyage as separate casualties.

However, the rule is of far less importance in loss-of-hire insurance than in hull insurance. As mentioned in the commentary to subparagraph 1, instances of damage that occur during one and the same voyage will normally all be repaired at the same time. Even if the various instances of damage are ascribed to several different casualties, both the deductible period and the delay will coincide for them all; for settlement purposes, therefore, the result is the same as if all the damage had been regarded as one casualty.

The provision in subparagraph 2, second sentence, in the 1996 version stated that if the insurance should attach or expire during the period between two ports, the insurer covered the same proportion of the total loss of time resulting from all heavy weather damage occurring during the period as the number of heavy weather days during the insurance period bore to the total number of heavy weather days occurring throughout the period. This rule has been deleted to bring the provision into line with § 12-18, but no change in practice is intended on this point either.

The principle of apportionment is most easily illustrated by an example. On a voyage which lasts from 20 December 1995 to 10 January 1996, the ship sails in heavy weather for six days before and three days after the new year, resulting in a total loss of time of 60 days. The 1995 policy has a 30-day deductible and covers 180 days per casualty, while the 1996 policy has a 15-day deductible and covers 90 days per casualty. The 1995 policy thus covers 6/9 of the 60 days of lost time, i.e. 40 days, subject to a deduction of 2/3 of the deductible period of 30 days, i.e. 20 days; hence 20 days of loss of time is recoverable. The 1996 insurer covers 1/3 of the loss of time, i.e. 20 days, subject to a deduction of 1/3 of the 1996 deductible period, i.e. five days; hence 15 days are recoverable. The maximum number of recoverable days under the 1995 policy is 2/3 of 180 days, i.e. 120 days, and under the 1996 policy 1/3 of 90 days, i.e. 30 days. Thus, in our example limits would have no relevance.

Subparagraph 3 was added in the 2007 version. In practice, it is not uncommon for a separate deductible period to be agreed for damage to machinery. This has given rise to questions as to how the term "damage to machinery" should be defined in this context, and whether this deductible should be applied regardless of the cause of such damage. Subparagraph 3 therefore states that § 12-16 shall apply correspondingly, so that the term "damage to machinery" has the same meaning in relation to loss of hire insurance as in relation to machinery damage deductions under § 12-16. The provision in § 12-16, subparagraph 2, applies correspondingly, so that the damage referred to in the provision does not trigger a separate deductible period.

#### § 16-8. Survey of damage

This provision has not been amended.

The provision refers to the rules for survey of damage in § 12-10 of the Plan. The reference also applies even if the hull insurance has been effected on conditions other than those of the Plan with the written consent of the insurer. Consequently, any survey rules in the differing standard conditions shall not be used.

The statement that the survey rule applies "correspondingly" to loss-of-hire insurance means that the loss-of-hire insurer must be notified and given an opportunity to survey the damage before it is repaired, cf. § 12-10, subparagraph 1.

The primary purpose of the survey and survey reports is to secure proof of the circumstances that are decisive for the liability of the insurer and for the extent of such liability. However, the survey can also provide a necessary basis for evaluating where and when repairs should be carried out, cf. § 12-10, subparagraph 3, regarding preliminary reports.

A main condition for the loss-of-hire insurer's liability is, in most cases, that the loss of time is due to damage that is recoverable under the ordinary hull conditions, cf. § 16-1, subparagraph 1. The necessary information regarding the cause, nature and extent of the damage will normally appear in the hull survey reports. The loss-of-hire insurer can use these reports, cf. § 5-1, in which case it will not be necessary to include a detailed description of the damage in the loss-of-hire survey

reports. But in exceptional cases the situation may be different: such large deductibles may have been agreed that no compensation can be claimed for the damage under the hull policy and therefore no hull survey is carried out. However, the loss-of-hire insurer may be liable, in which case he must ensure that the necessary facts concerning the damage are established. There may conceivably also be cases where the loss-of-hire insurer is not willing to automatically accept the survey that has been conducted for the hull insurance; he is then fully entitled to require that all the relevant facts are included in the loss-of-hire survey report.

In survey reports for the loss-of-hire insurance, it is necessary to include facts that are particularly significant for the loss-of-hire settlement. It is important to include exact indications of time for when the casualty occurred, any time spent at the site of the casualty, the ship's rerouting to the shipyard, times of arrival at and departure from the shipyard in connection with temporary repairs, if any, and in connection with permanent repairs. If repairs arising from different casualties or maintenance or other owner's work are carried out on the same occasion, the amount of time that each of these would have required if carried out separately must be specified, (cf. § 16-12). If extraordinary measures have been taken to save time (cf. § 16-11), this must be stated and the cost of the measures and the amount of time saved must be specified.

#### § 16-9. Choice of repair yard

Subparagraph 3 was amended in the 2003 version.

This provision regulates the right of the assured to choose a repair yard and the consequences his choice of yard has for the extent of the loss-of-hire insurer's liability.

Subparagraphs 1 and 2 concern the invitation of tenders on which to base the choice of repair yard. Subparagraph 1 has the same wording as § 12-11, subparagraph 1. Once the insurer learns of the casualty, he must be obliged to make it clear to the assured whether or not he will require that tenders be obtained. If he fails to do so, § 16-9 will not apply, and the loss-of-hire insurer must then cover the actual loss of time. In practice, tenders will normally be obtained after consultation between the assured, the hull insurer and the loss-of-hire insurer. If necessary, however, the insurers must be entitled to take independent action, together or individually.

It is conceivable that the loss-of-hire insurer enters the settlement process at such a late stage that it is impossible to obtain tenders prior to carrying out repairs from the repair yards from which he would have been interested in receiving tenders. If this is due to the fact that the assured has not notified the insurer of the casualty pursuant to § 3-29, the insurer may invoke § 3-31. The insurer must also have the right to obtain tenders after the repairs have been carried out.

Subparagraph 2 is identical to § 12-12, subparagraph 3, see further the commentary to that provision.

Subparagraph 3, first sentence, establishes an important principle; the assured is always entitled to decide at which yard the repairs are to be carried out. However, the assured's choice may affect the relationship between his loss-of-hire cover and his hull cover. If there are several alternatives as regards repair yards, the hull insurer will in principle want the cheapest repairs, even if they take longer, while the loss-of-hire insurer will want the quickest repairs, even if they will cost more.

In principle, it should be possible to resolve this conflict by having the hull insurer be liable for the cheapest repair alternative; the additional costs of more expensive, but quicker repairs should be covered as costs incurred in order to save time under the loss-of-hire insurance. Traditionally, however, the hull insurance has also covered part of the loss-of-hire risk on this point, partly out of consideration for assured parties who do not have loss-of-hire insurance, and this solution has been maintained in the Plan, cf. § 12-7, § 12-8 and § 12-11 to § 12-13, and the commentary to these provisions, particularly § 12-7. The choice of repair yard is regulated in § 12-12, which in brief entitles the assured to charge the hull insurer for the additional costs of more expensive, quicker repairs up to an amount equal to 20 per cent p.a. per day of the hull valuation for the time saved by the assured by choosing the more expensive tender. The relationship between the other provisions in the hull cover and the loss-of-hire insurance is further explained in the commentary to § 16-11.

The issue here is how the loss-of-hire conditions should be coordinated with the rules concerning choice of repair yard that have been adopted in the hull conditions. This will depend on how the loss-of-hire and hull insurance are organised. The simplest situation is where the underlying hull insurance has been effected on Plan conditions, and both hull insurance and loss-of-hire insurance have been effected with the same insurer. This will be the case in war risk insurance effected with the Norwegian Shipowners' Mutual War Risks Insurance Association, where the insurance in accordance with § 15-2 comprises both hull insurance and loss-of-hire insurance unless otherwise

agreed. In such cases, it is possible to fully coordinate loss-of-hire cover with hull cover, so that the loss-of-hire insurance covers the entire loss of time that is not covered under the hull insurance.

If loss-of-hire insurance and hull insurance are effected with different insurers, the question of coordination is more complicated because of the underlying conflict of interest between the insurers. If the hull insurance has been effected on Plan conditions, however, the assured can be provided with full cover by linking the liability of the loss-of-hire insurer to the quickest repair alternative, thereby giving the assured full cover under the hull insurance. This solution has therefore been chosen in situations where the loss-of-hire insurance has been effected on Plan conditions, compare with the comments below on subparagraph 3, second sentence.

If, on the other hand, the hull insurance has been effected on conditions other than those of the Plan, with the insurer's written consent, this solution is less satisfactory for the loss-of-hire insurer. If the hull conditions in question have no loss-of-hire cover, the loss-of-hire insurer risks being fully liable for the loss of time resulting from the choice of the cheapest repair alternative. However, there is no reason why the loss-of-hire insurer's liability should be any higher because the hull insurance has been effected on conditions other than Plan conditions. In this situation, therefore, an intermediate solution has been chosen, see further the commentary to subparagraph 3, fourth sentence.

If the underlying hull insurance has been effected on Plan conditions, it follows from the second sentence that the loss-of-hire insurer's liability is limited to the loss of time resulting from the repair alternative that takes the shortest time among those alternatives that the hull insurer is obligated to cover in full in accordance with § 12-12. This solution is best illustrated by means of an example, in which the figures are stated in USD, 20 % p.a. of the hull valuation and the daily amount are both USD 10,000 per day and the loss of time at repair yard A is 30 days, at repair yard B 45 days and at repair yard C 75 days:

REPAIR YARD	A	B	C
Cost of repairs and removal	1.8 million	1.2 million	1.0 million
Loss of time	0.3 million	0.45 million	0.75 million
<u>Total</u>	<u>2.1 million</u>	<u>1.65 million</u>	<u>1.75 million</u>

Under § 12-12, the insurer's liability for the costs of repairs is limited to the lowest tender, with the addition of 20 % p.a. per day of the hull valuation for the time saved by the assured by not choosing this tender. In this example, the lowest tender is C = USD 1 million. If we assume that the assured chooses B, he saves 30 days, which is the difference between the loss of time resulting from the cheapest repair alternative, i.e. 75 days, and the loss of time resulting from alternative B, i.e. 45 days. He can thus claim USD 1 million (costs of repairs at C) + USD 0.3 million (30 days of time saved multiplied by USD 10,000) from the hull insurer = USD 1.3 million. This means that the hull insurer will be obligated to cover the entire costs of carrying out repairs at B (= USD 1.2 million), since this amount is within the limit of USD 1.3 million.

In this case, the loss-of-hire insurer will cover the time lost by choosing this alternative, i.e. 45 days or USD 450,000. In total, the assured thus receives USD 1.65 million, i.e. he obtains full cover when he chooses the alternative which, seen as a whole, is financially most favourable. Naturally he has no obligation to choose this alternative. He remains free to decide which repair yard to use, cf. first sentence, but the extent of his loss-of-hire cover is determined on the basis of his choice. On the other hand, if the assured chooses this alternative, it makes no difference if the tender should prove to have been based on an over-optimistic estimation of the time required for repairs. It follows from the third sentence that the assured would in such case be entitled to require that the settlement be based on the actual loss of time. If the repairs take 60 days rather than 45 days as stated in the tender, the assured would thus be entitled to compensation for 60 days of time lost or USD 600,000.

The purpose of this solution is to provide the assured with full cover by means of a cover alternative that is also the most advantageous, seen as a whole, for the hull insurer and the loss-of-hire insurer. In practice, however, this is not necessarily the case, because the hull insurer's liability is not linked to the repair alternative that is most favourable seen as a whole. The Committee has nonetheless chosen to maintain the solution because it will be difficult to find a rule

that always leads to the financially most favourable result. In this connection, it is important to emphasise that the loss-of-hire insurer and the assured cannot obtain a more favourable result by regarding the greater expense of quicker repairs as extraordinary costs in accordance with § 16-11, see further the commentary to § 16-11.

Under the 1996 version of the Plan, the loss-of-hire insurer's liability was coordinated with the hull insurer's liability regardless of whether or not the hull insurance was effected on Plan conditions. Application of the rule was therefore not contingent on the assured having hull cover that contained a component of loss-of-hire cover, as is the case in § 12-12 of the Plan. If the assured had hull insurance that only covered the cheapest repair alternative without any form of compensation for higher repair costs incurred in order to save time, the loss-of-hire insurer, pursuant to chapter 16, therefore had to cover the loss of time resulting from the longer but cheaper stay in a repair yard. In the example above, the loss-of-hire insurer would in such case be liable for 75 days. The result was then that hull insurance on such conditions provided better loss-of-hire cover than hull insurance on Plan conditions. § 16-9 could thus be perceived as an incentive for the assured to choose hull conditions other than those of the Plan, and this was considered to be unsatisfactory. During the 2003 revision, therefore, a certain reduction was made in cover where the hull insurance has not been effected on Plan conditions, cf. subparagraph 3, fourth sentence, which for such cases reintroduces the solution that generally applied under the 1972 conditions. In accordance with § 16-1, the reduction only applies if the insurer has accepted the deviating conditions in writing. The provision entitles the assured to cover of the loss of time under the tender that would have entailed the least loss of time plus half of any additional loss of time that may arise. Based on the above-mentioned example, the result is as follows: the hull insurer covers the costs of repair according to the cheapest alternative C (= USD 1.0 million). The loss-of-hire insurer covers the loss of time resulting from the quickest tender, i.e. 30 days at repair yard A, and half of any further loss of time that may arise. If the assured chooses C, the loss-of-hire insurer will be liable for  $30 \text{ days} + (1/2 \times 45) = 22.5 \text{ days}$ . In this case, the assured will receive compensation for 52.5 days from the loss-of-hire insurer. His total cover will therefore be USD 1.0 million + USD 0.525 million = USD 1.525 million. He thus has an uncovered loss of time of 75 days - 52.5 days = 22.5 days or USD 0.225 million. If the assured instead chooses repair alternative B, the loss-of-hire insurer will be liable for  $30 \text{ days} + (1/2 \times 15) \text{ days} = 37.5 \text{ days}$ . The assured's settlement will then be USD 1.0 million + USD 0.375 million = USD 1.375 million, giving the assured an uncovered loss of USD 0.2 + USD 0.075 = USD 0.275 million. This means that the assured will therefore normally choose alternative C. If the assured has effected hull insurance on conditions other than Plan conditions without the insurer's written consent, settlement must follow the lines laid down in subparagraph 3, second and third sentences.

§ 16-10. Removal to the repair yard, etc.

This provision has not been amended.

The provision regulates the insurer's liability for loss of time in connection with the ship's removal to a repair yard, carrying out surveys, obtaining tenders, etc., which is in addition to the actual period of repairs after damage has been sustained. Liability for such loss of time is conditional on the insurer being liable for the time lost pursuant to § 16-1. In other words, § 16-10 does not provide any independent legal basis for covering loss of time in connection with removal, etc.

Subparagraphs 1 and 2 regulate loss of time in connection with the removal itself, while subparagraph 3 regulates time lost in connection with surveys, tenders, tank-cleaning, waiting and the like which are necessary in order to carry out the repairs.

In accordance with subparagraph 1, loss of time during removal to a repair yard is to be allocated to the class of repairs that has "necessitated the removal". The assured would not normally send the ship to a repair yard unless this was necessary for the further operation of the ship. Therefore, if the damage sustained in a casualty is of such a nature and extent that it must immediately be repaired at a repair yard, it is the repair of this damage that has "necessitated the removal". If, on the other hand, the ship must be docked by a certain date in order to carry out a classification survey or similar operations, and the repair of the casualty damage per se could be postponed, the costs of removal must be for the owner's account, since it is the survey required for classification that makes removal necessary.

It follows from the above that if a casualty "necessitates" repairs at a repair yard, the assured has the opportunity to have owner's work carried out during this repair period without having to carry any of the removal time for his own account. On the other hand, if it is the owner's work that is necessitating the repair yard stay, all of the removal time must be for the assured's account, even if the casualty damage is repaired at the same time. It is therefore irrelevant for the allocation of

removal costs whether owner's works, carried out simultaneously, might require more extensive repairs or take more time, or which of several simultaneous repairs take the longest time.

The assessment of which class of works made the removal to a repair yard necessary must be based on the situation when the removal commenced. If the ship is on its way to a yard to carry out extensive maintenance repairs but suffers a casualty on the way which requires immediate repairs, it is the maintenance work that has necessitated the removal. Therefore, none of the removal time is to be allocated to the casualty repairs, even though the removal time has in fact also proved to be advantageous for such repairs. The same applies where unknown damage from a previous casualty is discovered while the ship is at the repair yard; none of the removal time must be allocated to this damage either.

Subparagraph 1, second sentence, of the 1996 version made the rule in the first sentence correspondingly applicable in the event of time lost after completion of repairs. This rule has now been moved to § 16-13.

Subparagraph 2 regulates the situation where removal to a repair yard "was necessitated" by more than one class of repairs. In such cases, the removal time must be apportioned according to the time each class of repairs would have required if carried out separately, cf. first sentence. The Committee considered introducing a rule for a division of the time into two equal parts along the lines of the rule that applies in the case of simultaneous repairs, cf. § 16-12, but decided not to do so. If, for instance, it takes the ship 20 days to sail to a repair yard, where casualty repairs and owner's work which separately would have required 90 and 10 days respectively are carried out, it is likely to seem unreasonable to allocate half the removal time or 10 days to the owner's work. The natural solution is to allocate the removal time on a pro rata basis according to the time each class of work would have required if they had been carried out separately. In our example, consequently, 90/100 of the removal time, i.e. 18 days, must be allocated to the casualty work and 10/100 of the owner's work, i.e. 2 days, must be attributed to owner's work.

Subparagraph 2, second sentence, establishes that removal time occurring during the deductible period is not to be apportioned. The rule only has significance in those cases where removal time is to be apportioned; if the removal time falls in its entirety on the insurer, the deductible period will run during the removal in the normal way. The reason for this provision is that it may seem unreasonable to make the assured bear a portion of the removal time that falls during the deductible period. Apportioning 50 % of the removal time to the insurer would, for instance, mean that half of the removal time would be added to the deductible period. If the removal period is 30 days and the deductible period is 15 days, the entire removal period would be converted into a deductible period, and the owner would receive no compensation for the removal time. The consequence of the provision is that the deductible period runs in the normal way, each day counting in full during the removal period, even in cases where the removal time is to be apportioned.

In other words, the principle of apportionment is not to be applied until the deductible period is over. In the above-mentioned example, the assured therefore receives compensation for  $1/2 (30 - 15) = 7 \frac{1}{2}$  days, if each class of work would have required the same amount of time if they had been carried out separately.

Subparagraph 3 specifies that loss of time in connection with carrying out surveys, obtaining tenders and cleaning tanks is to be dealt with according to the rules in subparagraphs 1 and 2. The provision is not exhaustive, cf. the phrase "or due to other similar measures". In many cases, loss of time of the kind referred to in subparagraph 3 will have been "necessitated" by one class of work; time lost in obtaining tenders must, for instance, be allocated in its entirety to the work to which the tenders apply.

#### § 16-11. Extra costs incurred in order to save time

The title and subparagraph 1 were amended in the 2003 version.

The title was changed from "Costs" to "Extra costs" in order to specify that the costs must essentially be of an extraordinary nature.

This provision regulates the liability of the loss-of-hire insurer for costs incurred in order to save time, and must be seen in connection with the provision in § 4-7 regarding compensation for the costs of measures to avert or minimise loss. Costs of this kind occur at two levels in connection with loss-of-hire insurance: firstly, there are costs which are incurred in order to avert or minimise loss under the hull insurance and which more indirectly benefit the loss-of-hire insurer. These costs are covered by the hull insurer. Secondly, there are costs incurred to avoid loss of time, i.e. to save time. To the extent that this type of cost qualifies as costs to avert or minimise loss under the loss-

of-hire insurance, they must be covered in accordance with the rules in § 4-7 et seq. of the Plan. The provision in § 16-11 may be regarded as an extension of the rules for costs incurred to avert or minimise loss, in the sense that it specifies, in relation to an area of practical importance, the costs that will be covered by the insurer.

Subparagraph 1, first sentence, establishes that the insurer is liable for "extra costs incurred in connection with temporary repairs and in connection with extraordinary measures taken in order to avert or minimise loss of time covered by the insurance". This provision corresponds to the 1996 version, apart from the fact that the wording "other extraordinary measures" has been replaced by "and in connection with extraordinary measures" in order to make it clear that temporary repairs are to be covered as extraordinary measures even if such repairs must not necessarily be regarded as an extraordinary measure. As regards other measures, on the other hand, the assured must prove that they are of an extraordinary nature in order for the insurer to be liable. The wording "taken in order to avert or minimise" loss of time is in accordance with § 4-7.

The provision entails that all extraordinary measures taken in order to save time must be covered, not just measures to expedite repairs. However, it is a condition that the costs in question are extra costs incurred to save time; the insurer will not cover extra costs incurred for some other purpose. On the other hand, it is not a condition that the measures satisfy the requirements for compensation for the costs of measures to avert or minimise loss, cf. above.

The loss-of-hire insurer's liability for costs incurred in order to save time only applies "insofar as such extra costs are not recoverable from the hull insurer". The provision must be seen in connection with § 12-7 regarding temporary repairs and § 12-8 regarding costs incurred to expedite repairs. Pursuant to these provisions, the hull insurer is liable for the entire cost of necessary temporary repairs if permanent repairs cannot be carried out at the place where the ship is currently located. For other temporary repairs of the damaged object and measures to expedite repairs, liability is limited to 20 % p.a. per day of the hull valuation for the time saved by the assured. These provisions are based on the assumption that the rest of the costs related to measures to expedite repairs will be covered by the loss-of-hire insurer, so that the assured receives compensation for that portion of the costs that are not recoverable from the hull insurer. In this respect, loss-of-hire insurance becomes a supplement and subsidiary to the hull insurance. On the other hand, the loss-of-hire insurer's liability is not extended if the costs are not covered by the hull insurance due to the deductible; the decisive criterion is whether the costs are of such a nature that they are recoverable under the hull insurance.

In the 1996 version, this was adopted as the basic solution regardless of which kind of hull insurance was used. This has been changed in accordance with the amendment to § 16-1, cf. subparagraph 1, second sentence. If the insurer has given his written approval of hull conditions that do not cover such loss-of-hire components, he is fully liable for the costs of temporary repairs and extraordinary measures that are not covered by the hull insurance up to the limitation laid down in subparagraph 2, cf. below. If, on the other hand, the assured has effected such hull insurance without written approval, the rule in the first sentence applies, i.e. compensation is to be based on the Plan's hull cover.

The costs encompassed by subparagraph 1 are costs related to "temporary repairs and in connection with extraordinary measures". This wording includes those measures which in accordance with § 12-7, subparagraph 2, and § 12-8 activate the hull insurer's limited liability for loss of time, but also embraces a wider range of measures. The provision in § 16-11 therefore encompasses any temporary repair; i.e. all measures taken to enable the ship to be removed to a repair yard, but which are not intended as permanent repairs. This includes the replacement of parts of the ship or its equipment, if relevant also the hire of such parts or equipment, e.g. a mobile generator. The fact that the ship is supplied with parts that will later be replaced is of no significance. Nor is it required, contrary to § 12-7, subparagraph 1, that the temporary repairs are "necessary".

The rules in § 16-11 only become significant when temporary repairs are made in order to save time. Occasionally, such repairs are also made in order to reduce the total costs of repair: a ship that has suffered a major casualty in America may, for instance, only carry out such repairs there as are necessary for the ship to be allowed to sail to Europe, where permanent repairs can be carried out so much more cheaply that, all in all, money is saved for the hull insurer. In these cases, the costs of the temporary repairs pose no problem; they will be covered by the hull insurer in accordance with § 12-7, subparagraph 2, first alternative, of the Plan. The problem is the increased loss of time resulting from the temporary repairs and the ship's removal to Europe. The solution to this problem must be sought in § 16-9. Temporary repairs at A + permanent repairs at B must be regarded as an alternative to permanent repairs at A. The loss-of-hire insurer's liability



is then limited to the loss of time under the alternative that would have resulted in the least loss of time of the tenders (for A and A+B) for which the assured would have been able to claim compensation under the hull insurance. The relationship between § 16-11 and § 16-9 is otherwise further explained below.

In all cases where the question of temporary repairs arises, it is important that the assured fulfils his duties pursuant to § 3-29 and § 3-30, i.e. that he immediately notifies the loss-of-hire insurer of the casualty and keeps him informed of developments. If the assured fails to do so, the insurer may demand that his liability be reduced pursuant to the rules of § 3-31.

In the event of the hire of generators and boilers, the insurance will cover the costs of hire and shipment, installation and removal on board, connection and disconnection, etc. On the other hand, it will not cover fuel, lube oil and other ordinary operating costs while the object hired is being used on board. If the change leads to higher operating costs, however, the increase in costs will also be covered. The wording "extraordinary measures" will also cover the increase in costs related to the use of overtime in connection with the damage repairs, an agreed bonus to be paid in the event the ship is returned to service earlier than stipulated in the repair contract, and the higher costs of replacement rather than repairs that entail a lengthy repair period. The extent to which the costs of a charter aircraft are to be regarded as an extraordinary measure must be assessed in each individual case, having particular regard to what is recoverable under the hull insurance according to the doctrine of "impossibility of repair". Costs that are not deemed to be extraordinary in this connection are primarily those that can be described as increased travel expenses, i.e. the extra travel costs incurred in order to keep the ship gainfully employed. The same applies to the increase in costs because the main engine or auxiliary engine requires more expensive fuel, and the operating costs if an auxiliary engine must be used in the absence of an axle-driven generator. This category also includes use of extra towboats for port calls and canal transits due to, for instance, reduced engine capacity or damage to thrusters and the like.

The wording "extraordinary measures" does not include the choice of a tender under which the repair costs pursuant to § 12-12 are not fully recoverable from the hull insurer. There may conceivably be situations where it will be financially advantageous for the loss-of-hire insurer if the assured, in order to save time, chooses a tender that is not fully recoverable pursuant to § 12-12, in return for the loss-of-hire insurer compensating the assured for the repair costs that are not recoverable. However, the choice of repair yard is exhaustively regulated in § 16-9, and cannot be supplemented by § 16-11. Questions as to what constitutes "extraordinary measures" in relation to the choice of repair yard must be regarded in relation to what appears to be the "normal alternative". The normal repair alternative is permanent repairs carried out in the manner and at the speed that must be said to be normal at the repair yard in question during the period of repair. Repair costs incurred under this alternative must always be borne by the hull insurer, even if certain savings could have been achieved if more time-consuming work methods were used. § 16-11 applies only to costs incurred in connection with extraordinary measures to expedite repairs.

In any event, the insurer's liability is limited to the amount of the reduction in compensation under the loss-of-hire insurance that results from the measures taken, cf. subparagraph 2. The liability of the loss-of-hire insurer for the costs is therefore determined in the form of an amount and not, as under the hull insurance, in the form of a percentage of the hull valuation. The relevant amount for the loss-of-hire insurer will normally be equal to the number of days saved multiplied by the amount or amounts per day that the insurer would have had to pay. If the measures taken reduce the repair time so that it does not exceed the deductible period, however, any days that may have been saved within the deductible period may not be taken into account. If the days that are saved fall within a period during which other work is also carried out, and where the rules of apportionment in § 16-12 apply, the time saved cannot exceed that which should have been covered by the insurer.

Because of the limitation in § 16-4, subparagraph 2, the costs which are to be paid by the insurer must be converted into days of indemnity by dividing the total costs by the amount that is to be compensated per day.

Subparagraph 3 states that the assured shall bear a share of the extraordinary costs that is proportionate to the time saved for his account. In reality, the solution is a departure from the solution that otherwise applies to the apportionment of costs of measures to avert or minimise loss, cf. § 4-12, subparagraph 2. As further explained in the commentary to § 4-12, the basic rule is that no apportionment is to be made in cases where the costs of measures to avert or minimise loss have also benefited the assured's uninsured interests. The principles applicable to apportionment under a loss-of-hire insurance must take account of the way in which the cover is normally structured in such insurance: the assured is liable for the agreed deductible period, after

which the insurer is liable for the number of days of indemnity stated in the policy, and should the loss of time exceed this maximum, the assured is again liable for the excess number of days. Costs must therefore be apportioned in such a way that the assured and the insurer cover the costs related to a saving of time during the periods of loss of time for which they are respectively liable. This means that the assured first bears costs related to any reduction of the number of days in excess of the policy maximum, whereafter the insurer must cover costs related to any reduction of the number of days covered by the policy, and finally the assured must cover costs related to time saved within the deductible period.

#### § 16-12. Simultaneous repairs

Subparagraph 1 (b) was amended in the 2007 version. The provision is otherwise identical to the 2003 version, in which minor amendments in subparagraphs 2 and 3 were made, former subparagraph 1 (c) was deleted, while former subparagraph 1 (b) was split up into letters (b) and (c).

The provision regulates the liability of the loss-of-hire insurer in cases where repairs that are covered by the insurance and work that is not covered by it are carried out at the same time. The latter may be relevant to a loss-of-hire insurance for an earlier or later year, or it may be work that is not covered by any insurance, e.g. work relating to classification or modifications.

When repairs relating to one or more casualties (under one or more loss-of-hire policies) are carried out at the same time as work on board for the assured's account (e.g. work in connection with periodic classification surveys), the loss of time during the stay at the repair yard will in actual fact be due to several concurrent causes of damage. In the absence of other provisions, the loss in such cases must be apportioned between the assured and the various insurers in accordance with the rule of apportionment in § 2-13. However, this type of solution is unsatisfactory from a technical legal standpoint because it will entail numerous decisions that are made largely on a discretionary basis. In order to avoid these problems, therefore, more clear-cut rules of apportionment have traditionally been applied in the loss-of-hire conditions. The rules of apportionment in § 16-12 are based on such principles, with the result that the causation rules in § 2-13 are set aside in two respects:

Firstly, by applying relatively simple criteria, § 16-12 prescribes when simultaneous repairs are to be regarded as concurrent causes of the loss of time, and when one of the repairs is to be regarded as the only cause. In this way, difficult and, to some extent, subtle questions of causation are avoided. Secondly, § 16-12 fixes the exact proportions to be used when apportioning the time lost among the various repairs; it is therefore unnecessary to use the discretionary rule of apportionment in § 2-13.

These two departures from the main rule considerably simplify the issue. The fact that the provisions may occasionally give one of the parties an unwarranted advantage is of little significance compared to the substantial advantages achieved for the settlement process.

Subparagraph 1, which was amended in the 2003 version, deals with the question of apportionment which is most important from the standpoint of the assured, i.e. the apportionment between work relating to a casualty and owner's work.

Pursuant to subparagraph 1, letters (a) to (c), an apportionment is to be made between the assured and the insurer when specified owner's work is carried out at the same time as casualty work.

Subparagraph 1 (a) establishes how loss of time is to be apportioned when casualty work is carried out at the same time as owner's work in order to fulfil a requirement issued by a classification society. In the 1996 version, it was specified that this rule applied regardless of whether the classification requirement was issued in connection with a periodic survey, and that the time limit for complying with the requirement need not have expired. This already follows from the wording "classification requirement" and thus does not need to be stated explicitly. However, it is a condition that the classification society has issued the requirement in writing; repairs which the classification society has recommended or advised making, without actually imposing a requirement, do not fall within the scope of letter (a), although they might conceivably fall within the scope of one of the other letters.

On the other hand, the term "requirement" does not cover repairs that the classification society has recommended or advised making without actually imposing a requirement.

Letter (b) was amended in the 2007 version. According to the 2003 version, an apportionment was to be made in the case of repairs that were necessary for the seaworthiness of the ship or for its

capacity to perform its contractual obligations. However, the rules regarding seaworthiness were removed from the Plan in the 2007 version in conformance with the new Norwegian Ship Safety Act. The wording "the seaworthiness of the vessel" was therefore replaced by "to enable the ship to meet technical and operational safety requirements", cf. in that respect the wording in § 3-23.

Under the 1996 version, letter (b) also included reconstruction; this has been moved to letter (c), cf. below. The wording "necessary for ... its capacity to perform its contractual obligations" covers both freight contracts and other types of assignment, such as a contract for a research project. Examples of repairs that are necessary in order to perform a contract of affreightment and the like are the replacement of hatch coamings and the application of a new coating in cargo tanks.

As mentioned above, letter (c) was taken from the former letter (b), and covers reconstruction of the ship.

Pursuant to letter (c) in the 1996 version, an apportionment should also be made in the case of work relating to "strengthening, repairs or maintenance", but with the exception of work which "would not by itself have necessitated a separate stay at a repair yard". This rule was so comprehensive that it included the majority of the situations mentioned in the then letters (a) and (b). However, the reason for making it a separate provision was that the principles of apportionment in this case favoured the assured, because he was given 30 days of grace before the apportionment could be effected: In reality, therefore, there was seldom any basis for apportionment in connection with this type of work. During the 2003 revision, it was agreed that the provision should be deleted.

In accordance with subparagraph 1, last sentence, the apportionment is to be made on the basis of an equal shares principle: the insurer shall pay compensation for half of the common repair time in excess of the deductible period. This is in accordance with the solution in the 1996 Plan. The said principle may be justified by the argument that the common repair time is assumed to be utilised equally effectively by both parties, and that it is therefore reasonable to share liability for the loss of time during this period equally; furthermore, this type of 50/50 rule is very easy to apply in practice. Two numerical examples can illustrate the rule of apportionment in relation to the deductible:

1. In the case of common repair time totalling 40 days and a deductible period of 14 days, which begins to run when the ship arrives at the repair yard, the insurer will pay compensation for:

$1/2 (40-14)$  days = 13 days of common repair time.

2. In the case of common repair time totalling 40 days and a deductible period of 30 days, 20 of which have been spent in bringing the ship to the repair yard, the insurer will pay compensation for:

$1/2 (40-10)$  days = 15 days of common repair time.

The provision is based on the assumption that a class of work that is fully covered by the insurance is carried out simultaneously with a class of work which is not covered at all. However, it is conceivable that damage and the repairs relating to it have been caused by a concurrence of several perils, only some of which are covered by the insurance. In such a case, the rules of apportionment in § 2-13 to § 2-15 will apply in addition to the rules of apportionment in § 16-12. First the loss-of-hire insurer's liability must be calculated, assuming that the damage in its entirety has been caused by one of the perils insured against, after which his liability must be reduced in accordance with the rules of apportionment pursuant to § 2-13 to § 2-15. A simple numerical example: casualty work and owner's work, which if carried out separately would have taken 80 and 60 days, respectively, are carried out simultaneously in a total of 80 days. The casualty was the result of the kind of combination of marine and war perils that makes the rule of equal apportionment in § 2-14 in fine applicable. If the deductible period under the loss-of-hire insurance against marine perils is 20 days, the insurer's liability will be as follows:

Of the common repair time in excess of the deductible, i.e. 40 days, half is recoverable pursuant to this subparagraph = 20 days

Further time to complete casualty work = 20 days

Had the damage been caused solely by marine perils, the insurer would have been liable for = 40 days

Pursuant to the rules of § 2-14 in fine, however, the insurer is only liable for half the loss = 20 days

No problems arise when repairs relating to two casualties, both of which are covered by the insurance, are carried out simultaneously, provided the deductible periods for both casualties also run in parallel; in such case the assured must only carry one deductible period, but also only receives compensation once for the loss of time in excess of the deductible period. It is conceivable, however, that the deductible period for one casualty expires before that of the other. This situation is regulated by subparagraph 2, which states that the rule of apportionment in subparagraph 1 shall in such case apply to the time that falls within the deductible period of one casualty, but not within the deductible period of the other casualty. This provision corresponds with the 1996 version, but certain adjustments have been made to its wording. This can be illustrated by the following example: the ship sustains machinery damage in February and must call at a port of refuge to carry out temporary repairs. The prolongation of the voyage and the stay at the port of refuge total 14 days, which is also the deductible period. In March of the same year, the ship suffers heavy weather damage, the extent of which is ascertained during a stay at a repair yard in June. During this stay, permanent repairs of both casualties are completed; carried out separately, it would have taken 40 days to repair the machinery damage and 20 days to repair the heavy weather damage. Thus the common repair time is 20 days. In the case of the machinery damage, the deductible period had expired when repairs were commenced; the entire period of repair is therefore recoverable. As far as the heavy weather damage is concerned, on the other hand, the first 14 days of the repair period are the deductible period, and only six days are recoverable. Pursuant to subparagraph 2, the 50/50 rule in this case must apply to the first 14 days. The rule can be justified by the need for consistency: like owner's work, work during the deductible period must normally be carried out in the assured's own time and, as mentioned above, it is unreasonable to make the insurance more expensive by giving the assured "free time" to carry out owner's work that just happens to be carried out at the same time as work covered by insurance. In accordance with this solution, the insurer is only liable for half of the time lost as long as the deductible period for the second casualty continues to run.

Subparagraph 3 regulates the apportionment of time lost in carrying out repairs of damage that is relevant to more than one loss-of-hire insurer, e.g. damage covered by the 1995 insurer and damage covered by the 1996 insurer, or damage covered by the marine perils insurer and damage covered by the war risks insurer. The first sentence states that the 50/50 rule must be applied. The second sentence provides that the same rule also applies to common repair time that falls within the deductible period of one insurance (in the example above, the 1995 policy or the war risks insurance), with the result that the assured only receives compensation for half the loss for this period of time. Another variant of the apportionment problem arises where casualty repairs covered by two different loss-of-hire insurances are carried out at the same time as owner's work of the type mentioned in § 16-12, subparagraph 1, cf. third sentence, which was simplified in the 2003 version in accordance with the simplification in subparagraph 1. In this situation, a rule of 50/50 apportionment patterned on subparagraph 1 must be applied, i.e. the assured must pay one half, after which the insurers divide the remaining loss of time equally between them, i.e. each of them covers 1/4 of the loss. The view taken in this case is that it is the dichotomy between owner's work on the one hand and casualty work on the other that is significant for the assured - the fact that two sets of insurers just happen to be liable for the time spent on casualty work should not reduce the share of the common time to be covered by the assured. In accordance with practice, the rule must be interpreted as meaning that the maximum the assured must cover is half the common repair time, and he must not have to bear a further 1/4 for the period during which the deductible period runs under one of the insurances but not the other. The insurer whose deductible period has expired must then pay compensation for half of the common repair time until the deductible period under the other insurance has expired.

The conditions do not address the conceivable, but hardly practical situation in which repairs relating to three different loss-of-hire policies are carried out simultaneously, but an analogy from the rule applicable to two insurances quite clearly leads to the conclusion that each insurer must only carry 1/3 of the common time in excess of the deductible period for the policy in question. Furthermore, if owner's work of the type mentioned in § 16-12, subparagraph 1, is carried out, the analogy would require that each of the three insurers must bear 1/6 of the loss of time, while the assured must bear 1/2.

Subparagraph 4 is identical to the 1996 version. The main rule in the first sentence can most easily be explained by an example: during a stay at a repair yard, both extensive casualty repairs and various work for owner's account are carried out. The total time spent at the yard is 98 days. The casualty repairs continue during the entire stay, while the owner's work is completed after 50 days. It would appear, therefore, that there are 50 days of common repair time, and if a deductible period of 14 days has been agreed, pursuant to the rules in the first paragraph the owner himself should have to carry the loss of time for  $14 + 1/2 (50-14)$  days = 32 days.

However, the provision requires that an important correction be made. One must ascertain how much time each class of work would have required if it had been carried out separately. In many cases, it will be found that, had this been done, the work would have been completed earlier. In our example, it may be found that the work for owner's account would only have taken 30 days if carried out separately. There may be various reasons why more time is lost when repairs are made simultaneously: a deliberate reduction of the pace of the owner's work in order to achieve a better overall utilisation of the time required for casualty repairs, or limited capacity or technical problems may result in simultaneous repairs taking more time than if each class of work had been carried out separately.

It is not reasonable that delays of this nature should be borne in full by the interest affected. On the contrary, the basic principle must be that each class of work should only be allocated the amount of time that would have been required if they had been carried out separately. The 50/50 rule in § 16-12, subparagraph 1, must also be seen as presupposing such a correction. It is only where both parties can make full use of the time without any hindrance from the other party that it can be said that they have had equal benefit and should thus each bear half of the loss of time. If the owner's work in our example would only have taken 30 days if carried out separately, while the casualty repairs would in any event have taken 98 days, the owner must bear  $14 + 1/2$  (30-14) days = 22 days of lost time.

When it has been decided that the lesser number of days that would have been required in a particular case is to be used instead of the actual time used, it is also necessary to decide how dates for this lesser number of days are to be fixed. Fixing the dates of the relevant periods is necessary both in relation to the rules concerning the deductible period and apportionment in the event of simultaneous repairs, and when establishing the daily amount and when pursuing any claim against a third party, cf. here the commentary above to § 16-7 regarding the equivalent problem of placing the deductible period in time. The natural solution is to assume that the work was performed continuously from the time it was started until the expiry of the number of days that the work would presumably have taken if carried out separately, cf. the first sentence of subparagraph 4.

However, the second sentence of subparagraph 4 contains an important supplementary rule: it is presumed that all classes of work are commenced at the same time, i.e. on the arrival of the ship at the repair yard. This presumption must prevail even for work which has been postponed in the overall plan for the progress of the work and which may not have been started at all during the initial period at the yard; this postponement is merely a practical adjustment between the various classes of work. By way of contrast, a clear example of different starting points in time would be where a ship suffers a casualty while it is in dock to carry out classification surveys; the casualty repairs cannot, of course, be assumed to have begun before the casualty occurred. The reverse situation may also arise: a ship is in a yard to repair a major casualty; after the work has been in progress for some time, the owner decides to undertake certain reconstruction work during the remaining portion of the ship's stay at the yard. Calculations must also be based on different starting points in time if an unknown casualty is discovered some time after work has begun on repairing other casualty damage. In this case, a new deductible period must be calculated from the time when the new casualty is discovered.

The third sentence regulates the situation where each class of work would have taken less time if carried out separately than the total number of days that the vessel was at the repair yard. The previous example can be adjusted slightly to illustrate this point: it is assumed that the casualty work would also have taken less time if carried out separately, e.g. 90 days instead of the 98 days actually required. Thus, two classes of work which would have required 30 and 90 days, respectively, if carried out separately, take 98 days when carried out in parallel. In other words, the repair time has been prolonged by 8 days as a result of the simultaneous repairs. It would not be fair to allocate all 8 days to a single class of work. They should be apportioned between both classes according to the number of days each would have required if carried out separately. In our example, the 8 days must thus be apportioned in the ratio of 30:90; 3/12, i.e. 2 days, are allocated to owner's work and 9/12, i.e. 6 days, to the casualty work. These shares must be allocated in their entirety to the class concerned; they are not part of the apportionment in accordance with subparagraphs 1 and 2. Thus the total loss of time to be borne by the assured will in this case be:

$14 + 1/2$  (30-14) + 2 days = 24 days,

while the following would be allocated to casualty repair work:

$1/2$  (30-14) + (90-30) + 6 days = 74 days.

### § 16-13. Loss of time after completion of repairs

Letter (d) and subparagraph 2 were added in the 2003 version.

This provision limits the insurer's liability for loss of time that occurs after repairs have been completed. According to the main rule for calculating loss of time set out in § 16-4, the insurer would have been fully liable for time lost after completion of repairs to the extent that this loss of time was a result of the casualty. The insurer therefore had to pay compensation for loss of time until the ship was again gainfully employed, as well as any loss of time resulting from the termination of the contract of affreightment. Thus § 16-13 involves a limitation on the liability that follows from § 16-4 in respect of time lost after completion of repairs. In accordance with subparagraph 1, first sentence, the insurer is only liable for such loss of time in the cases that are specifically mentioned in letters (a) to (d); in all other cases the liability of the loss-of-hire insurer ceases when the repairs have been completed.

Letter (a) deals with the situation where the ship, after completion of repairs, is to continue to sail under the contract of affreightment that was in effect at the time of the casualty; in such case, the insurer is liable for time lost until the ship has resumed its former employment. The provision applies irrespective of the type of contract of affreightment concerned. Contractual obligations that are not set out in an actual contract of affreightment must be regarded as equivalent to such a contract in this connection. If, on the other hand, the contract of affreightment is cancelled due to the ship's stay at a repair yard, the insurer is only liable for the time lost up to the completion of repairs.

Letter (b) regulates loss of time for ships that are used in a liner or similar trade. In these cases, too, loss of time is covered until the ship can resume its activity.

Letter (c) applies to ships for which a binding contract of affreightment has been entered into before the casualty occurs but which have not begun to operate under the contract, and where the contract is not cancelled as a result of the casualty. As regards the term "contract of affreightment", see the commentary to letter (a).

Letter (d) was added in the 2003 version, and applies only to passenger ships. The reason for this provision is that the other letters are not entirely appropriate for this type of ship, which sails in a regular line or follows a pattern, for instance departing once a week from the place of departure. However, this type of ship should also have cover for the time that it is obliged to spend waiting. On the other hand, cover of loss of time after completion of repairs is limited to 14 days. The term "passenger ship" also includes cruise ships.

Loss of time after completion of repairs covers both the situation where the ship remains in the repair yard for a while after repairs have been completed and while the ship sails to a place to resume its activity. However, loss of time due to the fact that the ship is unable to find employment immediately after repairs have been completed is not covered. Such loss of time may in certain cases be said to be a consequence of the repairs and hence also a consequence of the damage that was repaired. However, the most significant cause of the loss of time will be market conditions, or possibly decisions made by the assured, and it is therefore natural that the loss should not be covered.

Subparagraph 2 was added in the 2003 version and has been taken from § 16-10, subparagraph 2, second sentence, cf. the commentary to this provision.

### § 16-14. Repairs carried out after expiry of the insurance period

This provision has not been amended.

It follows from § 2-11, subparagraph 1, that the decisive criterion as regards the insurer's liability is whether the peril "strikes" during the insurance period; if so, the insurer is also liable for any loss that occurs later. If, for instance, the insured ship is subject to a collision or grounding just before the expiry of the insurance year on 31 December 1995, the 1995 insurer will be liable for the loss of time, even if most of the loss occurs in 1996. Conversely, the 1996 insurer can as a general rule disclaim liability for a loss of time that occurs in 1996, but which can be referred back to a peril that "struck" in an earlier year. If, for instance, the ship suffers an engine casualty in 1996 as a result of cracks in the engine that occurred the previous year, the 1996 insurer is not liable for the loss of time. If the assured had loss-of-hire insurance in 1995, his loss will be covered by the 1995 insurer. However, there is a significant modification in this respect in accordance with § 2-11, subparagraph 2: if the cracks were "unknown" when the 1996 policy came into effect, they must be regarded as a marine peril that struck the ship when the casualty occurred in 1996. The 1996

insurer must then cover the loss of time relating to the repair of the consequential damage; the time lost in repairing the crack itself, on the other hand, must be referred back to the 1995 insurer.

However, the loss-of-hire insurance stands in a special relationship to the rules in § 2-11 in that, where the damage does not affect the ship's seaworthiness, the assured himself may decide when the repairs are to be carried out and the loss is to occur. In the interest of the loss-of-hire insurer, a limit is set to the assured's right to postpone the repairs. The insurer should be able to demand settlement of claims for which he is liable under the policy within a reasonable period of time; however, the loss of time cannot be established until the repairs have been carried out. Subparagraph 1 therefore sets a time limit for how long the assured can wait before commencing repairs. This time limit has been fixed at two years. For the assured it would have been most convenient to have a five-year limit in order to achieve concordance between the loss-of-hire and the hull insurance; this is not possible, however, in loss-of-hire insurance, which is traditionally short-tail business. If the assured wishes to have a time limit of more than two years, this must be agreed when the insurance is effected.

The time limit is linked to the "stay at a repair yard" in order to make it clear that the assured cannot circumvent the rule by having the ship begin temporary repairs or repairs of a limited part of the damage within the two-year limit. If the repairs are split up into several separate stays in a repair yard, the rule regarding the time limit must be applied separately to each stay. The stay has "commenced" the moment the ship begins its voyage to the port of repair.

A postponement of repairs will often be chosen when the ship is trading at particularly favourable rates. Even if the loss of time is covered under a policy with a correspondingly high daily amount, interrupting operations in order to carry out repairs will mean a loss for the shipowner; among other things, he himself must carry the loss of time during the deductible period. One can never be certain how long a strong freight market will last; next year the situation may have changed - at which time the repairs can be carried out. The loss-of-hire insurer has no cause to object to such a practice. However, it will often mean that the assumption on which the daily amount was assessed no longer applies. Subparagraph 2 therefore establishes an important time limit for the validity of the assessed daily amount: if a stay at a repair yard is commenced after the insurance period expires, the assessed daily amount is only a maximum limit for the insurer's liability. Within that limit, the assured may only claim compensation pursuant to § 16-5.

#### § 16-15. Liability of the insurer when the ship is transferred to a new owner

Subparagraph 2 in the 1996 version was deleted in the 2003 version.

Subparagraph 1 has not been amended and regulates the situation where damage to the ship is repaired in connection with the ship's transfer to a new owner. In this case, the basic principle is that the normal loss-of-hire cover applies up to the time the ship is delivered. However, the insurer is not liable for the time that would in any event have been lost as a result of the transfer, cf. first sentence. The provision takes into account the fact that, in connection with a sale, the seller will often take the ship out of operation and place it in dock for a survey. If he can use part of this time to carry out repairs, he has not suffered any loss, cf. also what has been said under § 16-3 concerning the assumption that the assured has suffered a loss of time: if the ship would in any event have been lying idle in connection with the transfer, there is no loss of time for which the insurer is liable.

The deductible period must run in the ordinary manner even if the damage is being repaired in connection with a sale of the ship. The deductible period therefore begins to run at the time of the casualty, and continues until the entire deductible period is exhausted. If a survey is carried out within the deductible period, the survey will have no consequences for the cover; the assured would not in any circumstances have received compensation for the loss of time during this period.

If the assured chooses to repair the ship before the transfer of ownership, and the ship was unemployed at the time the repairs are carried out, the assured would not in principle have suffered any loss. Therefore, he has no claim against the insurer. But if the delivery must be postponed due to the repairs and as a result the purchase amount is paid later than planned, the assured will suffer a loss of interest. The assured should be covered for this loss, cf. subparagraph 1, second sentence. The interest is to be determined pursuant to the rules in § 5-4.

Subparagraph 2 in the 1996 version regulated the transfer of the ship with unrepaired damage to a new owner. The provision entitled the assured to claim compensation under the loss-of-hire policy in connection with the transfer of ownership, even if the damage had not been repaired at the time. Compensation was limited to the assured's real loss "because the ship will be out of service while repairs are being carried out by the new owner". This provision has now been deleted. In cases where the buyer accepts the ship with unrepaired damage, he will be able to postpone

repairs until such time as the ship will in any event be in dock or have to be taken out of service in order to have owner's work carried out. Such damage will therefore normally not cause the buyer to suffer loss of time.

In accordance with subparagraph 2, first sentence, compensation pursuant to subparagraph 1 is limited to the sum insured per day multiplied by the time for which delivery was delayed or the estimated time of the buyer's repairs, less the agreed deductible period. The insurer is not liable for loss of time after completion of repairs in accordance with § 16-13; when a ship is being sold, the insurer will not know how the buyer intends to use the ship, cf. subparagraph 3, second sentence.

Subparagraph 3 establishes that the claim against the loss-of-hire insurer may not be transferred in connection with a transfer of the ship to a new owner. The rule in this provision is thus different from the one that applies in hull insurance.

#### § 16-16. Relationship to other insurances and general average

This provision has not been amended. However, amendments have been made on points of substance in the commentary.

It follows directly from § 5-13 that the loss-of-hire insurer is subrogated to the assured's claim against any third party who is liable for the loss of time for which the insurer has paid compensation. If the insured ship has collided with another ship, the loss-of-hire insurer will therefore be subrogated to the assured's claim against the owner of the other ship for (full or partial) compensation for the time lost due to the collision. A claim for compensation for operating costs (board, crew's wages and bunkers) in general average must, in this connection, be regarded as a claim against a third party for (partial) compensation for the loss of time as a result of a casualty.

Pursuant to § 16-16, the loss-of-hire insurer is also subrogated to claims against the hull insurer in cases where the latter provides cover for loss of time, see letter (a). Here an explicit provision is required, since this is a case of double insurance, which in the absence of such a provision would be subject to the rules of § 2-6. The rule in letter (b) could conceivably have significance where the loss is covered by another freight insurance.

The provision is a subrogation clause and not one that makes the insurance subsidiary to other insurances. This means that the assured can always choose to claim the full amount from the loss-of-hire insurer. In practice, however, the assured will often receive compensation from the hull insurer for the loss covered by the hull policy. In this event, such amounts must naturally be deducted from the loss-of-hire settlement.

According to the commentary to the 1996 version, any amount recovered had to be apportioned between the assured and the insurer according to the procedure suggested in the commentary to § 16-11, subparagraph 3, i.e. that the apportionment should be effected according to the so-called "top down" principle. First the assured was to receive compensation for the number of days that exceeded the policy maximum, then the insurer was entitled to recover for the number of days covered by the policy, and finally the assured could claim compensation for the deductible period. However, this procedure was not followed in practice, and it was regarded as unreasonable. It was therefore decided that, under the 2003 version, the sum recovered should be apportioned according to the general pro rata principle in § 5-13. However, this already follows from the wording of the first part of the provision, and it is therefore not necessary to amend the text of the Plan in order to change the principle of apportionment. The top-down principle is no longer to be applied.

An example will illustrate how the apportionment is to be carried out: the ship is insured for 90 days per casualty. The daily amount is USD 10,000 and the deductible period is 14 days. After a collision, the ship suffers a loss of time of 180 days equivalent to USD 1,800,000. The casualty is settled as follows: the assured must carry the first 14 days, after which the insurer covers the next 90 days, paying a total of USD 900,000 in compensation, and finally the assured covers the remaining 76 days. It is assumed that there are no simultaneous repairs. Blame in the collision settlement is apportioned on a 50/50 basis, and the opposite party accepts the loss of time of 180 days as the basis for the settlement. The insured ship then recovers 50% of USD 1,800,000 = USD 900,000. The recovery must be apportioned on a pro rata basis between the parties according to the time each of them has covered. The assured receives 50 % of  $(14 + 76) = 90$  days of lost time, i.e. USD 450,000, while the insurer receives 50 % of the loss of time that he has covered (90 days), i.e. USD 450,000.

The net result of this procedure is that the insurer only pays USD 450,000 despite the fact that the sum insured is USD 900,000. At the same time, the assured will have an uncovered loss of 50 % of



the uninsured time, i.e. USD 450,000. When the loss-of-hire conditions of 1972 and 1993 were practiced, it was claimed that since the insurer's net payment did not amount to the full sum insured, he had to use his share of the recovery to "continue" to cover the assured's uncovered loss of time in excess of the deductible period. In actual fact, however, this would be reintroducing the "top-down" principle. The rule of pro rata apportionment pursuant to § 5-13 must be applied consistently in all cases. Therefore the insurer must not be obliged to use the amount he recovers to compensate for loss of time in excess of the deductible period. However, the apportionment principle in accordance with § 16-16, cf. § 5-13, only applies to recovery settlements. Other principles apply to apportionment settlements between the assured and the insurer in accordance with § 16-11, subparagraph 3, see the commentary to this provision.

## ***PART FOUR - OTHER INSURANCES***

### **Chapter 17 - Special rules for fishing vessels and small freighters, etc.**

#### General

Chapter 17 coordinates the rules relating to insurance of fishing vessels and small freighters, and contains conditions for hull insurance (sections 2 and 3), catch and equipment insurance (sections 4 and 5) and shipowners' liability insurance (section 6). A number of rules which are common to these insurances are singled out in section 1. Furthermore, all the insurances under this chapter are subject to the rules in part I of the Plan (chapters 1-9).

## *Section 1 - Common provisions*

### **§ 17-1. Scope of application**

This paragraph is new.

Chapter 17 provides a special insurance cover for small vessels and constitutes a supplement to the other rules of the Plan. The hull part of this chapter (sections 2 and 3) is an addition to the general hull part of the Plan (chapters 10-13), while the special insurance for catch and equipment (sections 4 and 5) and the liability insurance (sections 6 and 7) do not have any parallel in the Plan. However, there is no clear dividing line between ships that are insured according to chapters 10-13 of the Plan and ships that are insured according to chapter 17. Certain fishing vessels and freighters are thus insured on so-called hull conditions for ocean-going vessels (chapters 10-13). It is therefore necessary to have a rule determining the applicable cover if this is not clear. According to § 17-1 the rules in chapter 17, sections 1-7, shall only apply to the extent that this is explicitly stipulated in the policy. The provision has the greatest practical significance in relation to the hull cover because there are two sets of rules to choose between here. If hull insurance has been effected on Plan conditions without chapter 17, sections 2 and 3, being mentioned in the policy, only the rules in chapter 1-13 shall apply.

Given that the provision relating to the scope of application is contained in section 1, sections 4 to 7 must be stated in the policy in order to be applicable. As mentioned, the Plan does not contain any alternative covers for these insurances. If it is not stated that a catch and equipment insurance or an owners' liability insurance has been effected, the ship will therefore be sailing without such cover on Plan conditions.

Insurance for catch and equipment according to sections 4 and 5 and owner's liability insurance according to section 6 and 7 may, as mentioned, be tied to a hull cover on the general hull conditions of the Plan in chapters 10-13. In that event, the common rules in section 1 apply to the catch and equipment insurance and the liability insurance, but not to the hull cover. The consequence of this is that the hull cover is not automatically renewed, cf. § 1-5, subparagraph 3, and that the ordinary rules relating to trading limits, classification and safety regulations must be adhered to.

### **§ 17-2. Renewal of the insurance/Re. § 1-5**

This paragraph corresponds to CEFOR Form 220 A, C 7 and ICA section 3-6. The provision was amended in the 2002 version.

The non-mandatory rule in ICA section 3-6 concerning automatic renewal has been departed from in § 1-5, subparagraph 3, of the Plan, which establishes that the insurance is not renewed unless this has been specifically agreed. During the 1996 revision there were discussions concerning the need for a special rule for fishing vessel insurance in line with the rule which earlier existed in CEFOR Form 220 A, C 7. On the one hand, it was pointed out that many of the persons effecting insurances in this industry do not have professional offices. It may therefore be problematic for them to be required to ensure that the insurance is renewed, in particular if it expires while they are at sea. On the other hand, the reinsurance is frequently not finalised until immediately before the insurance takes effect, and insurers do not want to bear the risk if it turns out that reinsurance is not obtainable on the conditions anticipated 30 days before the renewal. The problem of reinsurance may, however, be resolved by the insurers cancelling the insurance not less than 30 days before expiry if it is not clear whether satisfactory reinsurance is obtainable. The special rule was therefore maintained in the form of a rule providing for automatic renewal if the insurance is not cancelled 30 days before the date of expiry.

In the 2002 version, the rule regarding automatic renewal has been retained, but it is specified that in such case the insurance is renewed at the same rate and on the same conditions as before, cf. subparagraph 1. If the insurer does not wish to renew the insurance, or if he is only willing to renew it on different conditions or at a different rate, he must follow the procedure set out in subparagraph 2, cf. below.

Subparagraphs 2 and 3 were added in the 2002 version. The 1999 version contained no special rules regulating the issue of renewal if the insurer wished to change the conditions. It was therefore contended that the insurer could send a renewal offer less than 30 days before the date of expiry, thereby precluding the person effecting the insurance from cancelling the insurance. Such a solution is unreasonable and unintended. The basic rule in subparagraph 1 must be that the insurance remains in force on the same conditions and at the same rate unless it is cancelled within

30 days prior to expiry of the insurance period, cf. above. If the insurer wishes to cancel the insurance or change the rate or the conditions, it now follows from subparagraph 2 that he must notify the person effecting the insurance of this within one month of expiry of the insurance period. The person effecting the insurance is thereby given a reasonable amount of time to consider alternative cover. For policies that run for several years, the decisive point in time for the insurer's duty of notification will be when the multi-year policy is about to expire. Thus the provisions do not apply to payments of due premium during the period covered by the multi-year policy.

Under subparagraph 3, the person effecting the insurance has a time limit of 14 days before expiry of the insurance period to consider the insurer's renewal offer. If he notifies the insurer, before the time limit expires, that he does not wish to accept the renewal offer, this will result in the contract lapsing from the date the insurance period expires unless the parties agree on new conditions. On the other hand, if the person effecting the insurance fails to respond within the time limit, he is bound by the renewal at the proposed rate and on the proposed conditions. Therefore, if the person effecting the insurance accepts an offer from a competing insurer, it is important that he at the same time ensures that the previous contract is cancelled within the specified time limit. Otherwise, he will be bound by two insurance contracts, in which case he must ask one of the insurers to release him from the contract.

If the insurer wishes to renew the insurance on the same conditions and at the same rate, it will not be necessary for him to send notification pursuant to subparagraph 2. If, in such a case, the person effecting the insurance should not wish to renew the insurance, possibly not on the same conditions or at the same rate, he must notify the insurer accordingly within the same time limit as stated above, i.e. 14 days prior to expiry of the insurance period. Otherwise the insurance will remain in force on the same conditions and at the same rate pursuant to subparagraph 1.

#### § 17-3. Trading limits for fishing vessels/Re. § 3-15

The paragraph corresponds to CEFOR Forms 251 B 1 to 4, and 244 B 1 to 2. The provision was amended in the 2002 version.

In the Special Conditions the rules relating to trading limits were set out in the hull conditions, in addition to which reference was made to them in the liability conditions. The consequence of the rules relating to trading limits now being placed in section 1 is that they automatically become applicable to all three types of insurance, hull, equipment and liability insurance.

§ 17-3, subparagraph 1, of the 1996 version established that the trading limits were to be stated in the policy, while subparagraph 2 laid down a special rule for fishing vessels. In the 2002 version, these two subparagraphs have been combined, and the purely geographical description of the trading limits has been moved to the Appendix to the Plan and further illustrated by three maps. Moreover, the entire provision is henceforth limited to fishing vessels, cf. the heading. For freighters, therefore, the general rules of § 3-15 of the Plan apply, unless otherwise provided by the policy, cf. below.

The basic rule for vessels insured under Chapter 17 is that the trading limits are as indicated in § 3-15 of the Plan with Appendix, unless otherwise provided by the policy or Special Conditions. In such case, the system of sanctions for conditional and excluded trading areas applies in the normal manner. For freighters, any departure from § 3-15 must be explicitly stated in the policy, cf. the fact that § 17-3 applies only to fishing vessels. The normal procedure for freighters is that the trading limits in the policy are linked to what is stated in the vessel's trading certificate. Furthermore, it is normally only a matter of ordinary and excluded trading areas, so that navigation in conditional trading areas, which are regulated in § 3-15, subparagraph 2, is not relevant.

Such a procedure may also be used for fishing vessels, cf. subparagraph 1 which states that the provision only applies unless "otherwise provided in the policy".

For fishing vessels, however, there is a need for a standard solution that is different from the one that follows from § 3-15 and the Appendix. On the one hand, parts of the fishing fleet operate close to ice-strewn waters, and therefore need an extension of the normal trading limits northwards. On the other hand, there is a considerable risk associated with small fishing vessels that operate in remote waters. A special rule regarding trading limits for fishing vessels was therefore incorporated into § 17-3, subparagraph 2, in the 1996 version. However, there proved to be a need to extend the trading limits eastwards and westwards. The trading limits were therefore redefined in the 2002 version. Furthermore, to achieve closer conformity with § 3-15 of the Plan, the geographical description was moved to the Appendix and supplemented with three maps. § 17-3, subparagraph 1, therefore now contains only a reference to the limitations pursuant to Point III of the Appendix to the Plan.

Under § 17-3, subparagraph 2, of the 1996 version, the limit to the east was defined as 50 degrees east longitude. In the 2002 version, this has been extended to 55 degrees east longitude south of Novaya Semlya and 65 degrees east longitude north of Novaya Semlya, cf. point III, second sentence, of the Appendix and maps nos. 4 and 5. To the west the limit has been extended from 65 degrees west longitude to 65 degrees west longitude north of Saint John and 75 degrees west longitude south of Saint John, cf. point III, third sentence, and maps nos. 4 and 6 compared with § 17-3, subparagraph 2, of the 1996 version. This means that the trading area has been extended to include ports on the east coast of the USA and Canada north of 40 degrees north latitude, cf. the fact that the limit to the south at 40 degrees north latitude has been retained. On the other hand, the seaward approach to the St. Lawrence River and the Hudson Bay are outside the trading area.

In § 17-3, subparagraph 2, of the 1996 version, the trading area was limited to the north to open/scattered drift ice concentration (4/10-6/10) or higher. This limit has now been extended to apply in all directions, see point III, last sentence, of the Appendix. The purpose of this limitation is to ensure that the vessel does not enter waters where there is ice. It may be difficult to achieve such a limitation by means of a fixed geographical specification because the ice limit will vary considerably. The trading area has therefore been linked to the ice charts issued by the Norwegian Meteorological Institute (DNMI). The ice charts distinguish between "ice free", "open water", "very open drift ice", "open drift ice", "close drift ice", "very close drift ice" and "fast ice". The trading limit is stated to be the limit between "very open drift ice" and "open drift ice", cf. the wording "open/scattered drift ice concentration (4/10-6/10) or higher". In this context, 4/10 indicates the lower limit for "open drift ice".

The ice limit may move during the period between the publishing of two ice charts. For the definition of trading limits, the most recent ice chart available from the Norwegian Meteorological Institute is the decisive factor. The question as to whether or not the chart is available must be subject to an objective assessment. If the assured has failed to obtain the most recent chart made available to the public, this must therefore be his risk.

If the ice limit has moved from one chart to the next, the assured has a duty to remove the vessel from waters where the concentration of ice is too high. In such a situation, however, the vessel must be given time to proceed into a permitted trading area. Consequently, the vessel cannot be deemed to have proceeded beyond the trading limits if it reacts promptly to new information about the ice limit, even if the vessel, strictly speaking, was in an excluded trading area for a brief period of time.

Within the specified trading area, rates must be determined on the basis of the operating area of each individual fishing vessel.

Subparagraph 2 has been taken from CEFOR Form 251 B 4 (a) and 244 B 2 (a), but has been adjusted somewhat in accordance with the rules relating to a vessel proceeding beyond the trading limits in § 3-15. The provision relating to trading limits in the general part of the Plan stipulates ordinary trading limits, a conditional trading area and an excluded trading area. A ship may sail within the conditional trading area, but if the insurer has not been notified of this, an additional deduction shall be made in the event of damage. For fishing vessels a slightly simpler system is used: if the assured wishes to proceed beyond the trading limits defined in the policy or in the Special Conditions, permission must be obtained in advance, possibly against payment of an additional premium. Areas beyond the trading limits specified in the policy or the Special Conditions are automatically regarded as excluded. Trading in these areas shall therefore be treated in accordance with the rules relating to excluded trading areas in § 3-15, subparagraph 3. This means that the insurance automatically ceases to be in effect when the fishing vessel enters the area, but that the insurance comes into effect again if the vessel leaves the excluded area before expiry of the insurance period. As mentioned above, a similar system can also be applied to freighters, but must in such case be agreed in the policy.

The rules in § 17-3 apply only to "fishing vessels". Consideration was given to whether there was a need to define the term "fishing vessels", but in view of the strict marking and registration rules, this was considered unnecessary. If the vessel is registered as a fishing vessel and has been given a registration number, it must be regarded as a fishing vessel under § 17-3, even if it is used for purposes other than fishing in a specific situation.

The rules in § 17-3 relating to trading areas must be viewed in conjunction with the authorities' regulation of the trading area for certain vessels, cf. the Norwegian Maritime Directorate's Regulation of 4 November 1981 No. 3793 relating to trading areas. The rules for fishing, whaling and sealing vessels are contained in chapter IV. The trading area stipulated by the authorities is normally described in a trading certificate for the vessel in question. As a rule, the trading area in the trading certificate will be more limited than the area specified in subparagraph 1. If the insurer

wants the trading area under the insurance to coincide with the trading area in the trading certificate, this must follow from the policy, cf. subparagraph 1. Normally, however, this type of official regulation is only in the nature of a special safety regulation in relation to the insurance, cf. § 17-5 (b). Under these rules, if a vessel proceeds beyond the trading limits specified in the trading certificate, this will only have consequences for the insurance coverage if the infringement can be ascribed to the assured, or someone with whom he may be identified, and if there is a causal connection between the infringement and the casualty. This means that the sanction will be somewhat less strict than it would have been pursuant to § 3-15, subparagraph 3.

If the vessel has lost its trading certificate, the rules in § 17-4 shall apply.

CEFOR Forms 251 B 1 to 4 and 244 B 1 to 2 also contained certain rules relating to the use of the vessel. These provisions have allegedly not been used for the past 20 years and have consequently been deleted. However, it may in certain cases be expedient to state the vessel's type of use in the policy. Infringements of the stated type of use must in that event be considered an alteration of the risk under § 3-8 et seq. If the vessel is used contrary to the stated purpose, the insurer is free from liability, provided that he can prove that he would not have accepted the insurance if he had known that the alteration would take place, cf. § 3-9, subparagraph 1. If he would have accepted the insurance, but on other conditions, he is free from liability if the casualty was caused by the alteration of the risk, cf. § 3-9, subparagraph 2. In addition, the insurer has the right to cancel the insurance, cf. § 3-10.

#### § 17-4. Class and ship control/Re. § 3-14

The heading and subparagraph 1 were amended in the 2007 version in connection with the amendment to § 3-14. The paragraph is otherwise identical to earlier versions of the 1996 Plan. The commentary was adjusted in the 2007 version in connection with the contents of § 3-24 being moved to § 3-22.

§ 3-14 of the Plan is based on the assumption that the ship has a class and establishes that the insurance will automatically cease to be in effect in the event of loss of class. **Change of classification society is deemed to be an alteration of the risk, cf. § 3-8, subparagraph 2, last sentence.** However, there is no reason to introduce such an assumption for vessels that are insured under chapter 17, see subparagraph 1, which merely establishes that if the vessel is classed with a classification society at the inception of the insurance, § 3-14 and § 3-8, subparagraph 2, shall apply in the normal way. The provision means that the insurance ceases to be in effect if the assured cancels the class and proceeds to sail legally under the rules of the Norwegian Ship Control.

Vessels which do not have a class will be subject to the rules of the Norwegian Ship Control. According to these rules, fishing vessels and freighters of more than 50 gross reg. tonnes will be issued a trading certificate. For vessels of less than 50 gross reg. tonnes the rules differ to a certain extent for fishing vessels and freighters respectively. Fishing vessels shall - depending on their length - have an equipment certificate/safety certificate, which is a simplified form of trading certificate, whilst the freighters shall have a simpler form of equipment certificate called a survey certificate.

During the revision it was agreed that these various certificates should have the same significance as class has for larger vessels. At the same time it is a condition for coverage on Plan conditions that these are vessels with a length of 15 meters or more. Vessels with a length of less than 15 meters are insured on separate conditions according to the mandatory rules of ICA. Under subparagraph 2, first sentence, the insurance of a vessel that does not have a class is made subject to the condition that it has a valid certificate according to the rules of the Maritime Directorate. The term "certificate" covers trading certificate, equipment certificate/safety certificate, survey certificate and any other form of certificate which the Maritime Directorate might use. The lapse of a valid certificate will for such vessels result in the lapse of the insurance, cf. second sentence, which refers to the rules relating to the loss of class. This provision may seem strict, but the reaction is necessary because normally it should take a lot more to lose a trading certificate or another certificate than it does to lose the class.

Orders from the Norwegian Ship Control are regulated in § 3-22.

#### § 17-5. Safety regulations/Re. § 3-22 and § 3-25

This paragraph corresponds to Cefor Forms 251 B 5 and 6, and 244 B 3 and 4. **The heading and commentary were adjusted in the 2007 version in accordance with the amendments to § 3-22.**

The provision provides three different safety regulations for the insurance of fishing vessels and freighters and comes in addition to § 3-22 et seq. in the general part of the Plan.

Letter (a) concerning ice-forcing is taken from the hull conditions (CEFOR Forms 251 B 5 and 244 B 3), but has been simplified without the intention of making any changes on points of substance. Due to the fact that it is incorporated in the section containing common rules, it is applicable also to equipment and liability insurance. The purpose of the provision is to avoid any deliberate fisheries, etc. under difficult ice conditions with a high risk of ice damage.

The provision constitutes “a special safety regulation laid down in the insurance contract” under § 3-25, subparagraph 2. This means that the assured must be fully identified with anyone “whose duty it is on behalf of the assured to comply with the regulation or to ensure that it is complied with”. This will normally be the duty of the master of the vessel. As a special safety regulation § 17-5 (a) also prevails over the provision relating to the situation where the owner is the master of the ship in § 3-25, subparagraph 1, second sentence. If the owner himself is the master of the vessel, he will therefore forfeit coverage if the ship sustains damage due to negligent ice-forcing.

This provision only applies to ice-forcing. Ice-forcing presupposes that the ship proceeds through ice as the result of a deliberate choice. It further follows from the rules relating to safety regulations that the damage must be a foreseeable consequence of this choice. If ice damage is sustained accidentally, e.g. by striking against drift ice in open sea, this does not constitute ice-forcing. Nor does the provision cover “ice-forcing” in order to avert major damage or total loss where a vessel has unexpectedly become ice bound; this would constitute a measure to avert or minimise loss. On the other hand, letter (a) will apply if the master has deliberately proceeded into an area where it is foreseeable that the vessel will become ice-bound.

It is further a condition that the forcing concerns “ice”. If the ship is sailing in an open lane, this does not constitute ice-forcing. This was earlier stated explicitly in the Special Conditions, but is superfluous. Furthermore, the content of the term “ice” can be difficult to define precisely. The term must be defined on the basis of discretionary criteria, such as the thickness, solidity and extent of the ice. There may also be reason to take into consideration the time of year in question and whether any ice-breaker service has been organised. A certain support may also be obtained from the ice classification requirements.

Letter (b) concerns the trading certificate, which is referred to in § 17-3. As mentioned, the trading certificate defines the trading area as determined by the authorities for the vessel in question. The provisions contained in the trading certificate automatically constitute safety regulations under § 3-22. However, the advantage of mentioning them specifically here is that the identification rule in § 3-25, subparagraph 2, second sentence, becomes applicable.

Orders from the Norwegian Ship Control are not subject to any special regulations. If the assured fails to comply with orders issued by the Ship Control, the trading certificate becomes invalid, in which case the insurance will automatically lapse according to § 17-4.

Letter (c) is taken from CEFOR Forms 251 B 6.3 and 244 B 4.3, but has been simplified. The provision concerns vessels at quay or laid up, and is consequently more extensive than § 3-26, which merely concerns vessels laid up. For fishing vessels and freighters it is more practical to stay in port than to be laid up. There is moreover a special need for safety regulations in connection with the risk of theft, because it is normally quite simple to gain access to this type of vessel. It is therefore the assured's duty to provide daily supervision of the vessel and its moorings and furthermore to secure the vessel and its equipment. The provision also contains a requirement that the equipment shall be kept in such a way that it can only be removed by the use of tools.

Cefor Forms 251 B 6 and 244 B 4 contain a number of special safety regulations concerning manning and the qualifications of the crew. These regulations were linked to public regulations and were therefore superfluous in addition to § 3-22, which makes all public regulations safety regulations.

#### § 17-6. What the assured has saved

This paragraph corresponds to § 241 of the 1964 Plan.

The provision is taken from the P&I Conditions in the 1964 Plan, but contains a general principle under insurance law and has therefore been generalised.

## *Section 2 - Hull insurance*

### **General**

Section 2 deals with the standard cover of hull insurance for fishing vessels and freighters (the Coastal Hull Insurance Conditions). The provisions in section 2 are supplementary to Part II of the Plan, chapters 10-13, relating to hull insurance. This was previously stated in the Commentary, but has now also been included in the text of the Plan, cf. § 17-7.

In addition to the provisions in section 2, this insurance is therefore subject to the common provisions in section 1 and the provisions in the general part I of the Plan (chapters 1-9) and part II relating to hull insurance (chapters 10-13).

The provisions in section 2 are based on conditions for hull insurance of coastal and fishing vessels with a length of 15 meters or longer (CEFOR Form 251, March 1995) and Conditions for Hull Insurance of Fishing Vessels With A Length Of More Than 15 Meters Or Larger, Extended Cover (CEFOR Form 244, December 1993). The system of a standard cover for fishing vessels and freighters and an extended cover for fishing vessels has been retained in that the standard cover is incorporated in section 2, while the extended cover is incorporated in section 3. With the exception of a few rules, the provisions of the normal cover are common to fishing vessels and freighters. It is therefore practical to deal with these collectively. As regards the few provisions which only concern one of the types, this will be evident from the actual provision and the Commentary.

A number of the earlier provisions in the Conditions for insurance of fishing vessels and freighters become superfluous when the insurance is incorporated in the Plan and the same solution is adopted as in the general part of the Plan. This applies to CEFOR Forms 251 A 20 and 244 A 17 relating to the sum insured as a limit to the insurer's liability, CEFOR Forms 251 A 21 and 244 A 21 relating to interest, CEFOR Forms 251 D and 244 C relating to return of premium, CEFOR Forms 251 A 5 and 244 A 3 relating to nuclear risk, CEFOR Forms 251 A 6 and 244 A 4 relating to amendment of §148 of the 1964 Plan, CEFOR Forms 251 A 7 and 244 A 6 relating to survey and estimate of damage, and CEFOR Forms 251 A 19 and 244 A 20 relating to deductible. CEFOR Forms 251 A 18 and 244 A 16 have been incorporated in chapter 13 of the Plan.

CEFOR Forms 251 A 8 and 244 A 7 contained a provision which limited the insurer's cover of costs for surveyor, cf. § 4-5 of the Plan. Here it must be sufficient to fall back on the limitations in § 4-5, subparagraph 2, to the effect that it is a condition for covering the expenses of employing the assured's own surveyor that they are "necessary" and are based on "reasonable grounds".

CEFOR Forms 251 A 22 and 244 A 22 relating to bottom painting have been deleted from the ordinary hull conditions and have therefore also been deleted here.

CEFOR Form 251 A 4 contained an objective seaworthiness clause, which was stricter than both the Plan's rules relating to unseaworthiness in § 3-22 and ICA's rules relating to safety regulations, etc. During the revision it was seen as unfortunate that vessels which were so large that they were not covered by the mandatory rules of ICA, but so small that they fell outside the scope of the ordinary hull conditions, were to be treated more strictly than both of the other two groups. This provision has therefore been deleted.

CEFOR Forms 251 C 3 and 244 A 5 contained a provision for fishing vessels concerning an insurance of objects removed from the ship. However, this provision is also relevant for fishing vessels that are insured on the ordinary hull conditions and it has therefore been moved to § 10-2.

The Special Conditions contained deduction rules in the form of a deductible, cf. CEFOR Forms 251 A 19 and 244 A 20, and machinery damage deductions, cf. CEFOR Forms 251 A 16 and 244 A 14, and furthermore referred to the rules relating to new for old deductions in the 1964 Plan §§ 191 et seq.. In accordance with the general system of the Plan, the most practical approach is for deductibles and machinery damage deductions to be agreed on an individual basis. Hence, it is sufficient here to apply the rules in § 12-16 and § 12-18. There was also agreement that the new for old deductions were cumbersome and outdated, and that they should therefore be deleted and replaced by machinery damage deductions and deductibles which took into account the age of the ship and machinery and the sum insured. However, the conditions for insurance without new for old deductions is that these deductions are compensated by the other deductions. If the assured is not willing to accept the deductible and machinery damage deductions on a sufficiently high level, the insurers must therefore be entitled to incorporate provisions concerning new for old deductions in the individual policy.



CEFOR Forms 251 and 244 finally contained a rule relating to the loss of catch in the event of a collision with another vessel. This was unusual and casuistic and has therefore been deleted.

#### § 17-7. The relationship to chapters 10-13

This paragraph is new in the 2003 version.

The provision states that for hull insurance the rules of chapters 10-13 apply to chapter 17, section 2, with such amendments as follow § 17-9 to § 17-16 inclusive. Certain amendments in the general rules of the Plan, see § 17-7 and § 17-8, also apply.

#### § 17-7 A. Amendment of the open or assessed insurance value/Re. § 2-2 to § 2-3

**The first sentence was amended in the 2007 version. The paragraph is otherwise identical to earlier versions of the 1996 Plan.** Due to the introduction of a new § 17-7, the number has temporarily been changed to § 17-7A.

According to the rules of the Plan, the parties may choose between open and assessed insurable value, cf. § 2-2 and § 2-3. An open insurable value is not assessed until the casualty has occurred, but is then fixed at the "full value of the interest at the inception of the insurance", cf. § 2-2. However, an assessed insurable value is fixed by agreement between the parties when the insurance is effected, cf. § 2-3. According to § 2-3, such an assessed insurable value is binding unless the assured has given misleading information about matters that are relevant for the assessment. There are, however, possibilities of demanding a revision of the assessed insurable value in the event of market fluctuations, cf. § 2-3, subparagraph 2.

A common denominator for open and assessed insurable value is thus the fact that in principle there is no basis for taking into account any changes in value after the contract is entered into (unless the right to a revision in § 2-3, subparagraph 2, becomes applicable). **However, the value of a fishing vessel is largely contingent on the vessel's fishing rights, and it is therefore necessary to have a provision that entitles the insurer to take account of changes in such rights.** The first sentence imposes a duty of notification on the assured in two situations. **The first situation was defined in earlier versions of the Plan as changes in concession conditions. This wording has been amended to "conditions prescribed by public authorities relating to the vessel's fishing rights". This amendment was necessitated by changes in fisheries policy, such as the introduction of perpetual fishing rights. Fishing rights now go by a variety of names, such as concessions, structural arrangements, unit quota systems, participation rights, etc., depending on the type of fishing the vessel is engaged in and the size of the vessel. The wording "concession conditions" is therefore no longer adequate to cover changes of relevance to the insurer.**

Such changes may have a direct impact on the value of a fishing vessel and create the need for a renegotiation of the assessed insurable value. Similarly, there will in connection with the determination of an open insurable value be a need to take such factors into consideration. In the second place, the assured shall notify the insurer if he has accepted an offer of a state destruction subsidy which is lower than the assessed insurable value. The state will often make an offer for a subsidy to break up the vessel in order to reduce the fishing fleet. Because it may take some time from when the offer is accepted until the vessel is taken out of service, the assured will need insurance in the interim period. If the assured has accepted an offer for such a subsidy which is lower than the assessed insurable value, it is natural that the insurer is given a right to renegotiate the assessed insurable value. Similarly, it should be possible to take this fact into account in connection with a subsequent calculation of an open insurable value.

The second sentence provides the insurer with a right to demand a reduction of special open or assessed insurable value in cases such as mentioned in the first sentence. **This provision thus gives the insurer** a possibility of renegotiating the assessed insurable value during the insurance period. If the assured has failed to give the necessary notices, the insurer must nevertheless have the right to set aside the assessed insurable value in a subsequent settlement.

**It follows from § 2-4** that the question of under-insurance must be based on the assessed insurable value, even if it is set aside under subparagraph 1.. The rule entails that if the assessed insurable value is 5, the real value 2.5, and the sum insured 4, the insurer will be liable for 4/5 of 2.5, i.e. 2.

If the assured has accepted an offer for a state subsidy to break up the vessel, and the ship is damaged before being broken up, the insurer will be liable in the normal way. In the event of a total loss, the insurer will be liable for total-loss compensation. Such compensation will be deducted from the state subsidy. The same applies if the vessel at the time of condemnation has an unrepaid damage for which the insurer is liable. Damage which has already been repaired and indemnified will, however, not have any influence on the condemnation settlement.

If the parties disagree as to whether there is any reason to reduce the assessed insurable value, or about the size of the reduction, the provisions in § 2-3, subparagraph 3, shall apply. The question will then be decided with final effect by a Norwegian average adjuster designated by the assured. The provision shall be applied by analogy if the parties disagree about the significance of the said matters for a subsequent calculation of an open insurable value.

When the parties renegotiate the assessed insurable value, they shall also negotiate the possibility of a reduction in premium.

#### § 17-8. Damage to dories, fishing gear or catch/Re. § 4-7 to § 4-12 and § 4-16

This paragraph corresponds to CEFOR Forms 251 C 1 and 244 A 18, but has been rewritten and simplified.

The dories, fishing gear and catch have in principle been lifted out of the hull insurance through the exception in § 10-1, subparagraph 2. The insurer is nevertheless in principle liable for damage to such objects if the damage occurs during a measure to avert or minimise loss. Damage to or loss of such objects should, however, be covered by the owner himself on the basis of a "knock-for-knock" line of thought. Where several fishing vessels are operating together, it is foreseeable that equipment will be damaged in various connections. Instead of involving the owner's own insurance company or that of the party causing the damage in an often difficult insurance settlement with complicated evidentiary problems, it is therefore more expedient to let the owner bear his own damage.

The provision in § 17-8 therefore explicitly excludes such damage from the cover in cases where it is connected with a measure to avert or minimise loss. The provision, which corresponds to CEFOR Forms 251 C 1 and 244 A 18, subparagraphs 1, first sentences, only applies to fishing vessels and not to freighters.

CEFOR Forms 251 C 1 and 244 A 18, subparagraphs 1, second sentences, also excluded liability under § 13-1 in the event of striking against dories, fishing gear and catch belonging to another fishing vessel. This provision now follows from § 17-15, subparagraph 1.

CEFOR Forms 251 C 1 and 244 A 18, subparagraphs 2, established that the fishing vessel's hull insurance was subsidiary to a separate insurance covering the vessel's dory. This provision has been deleted.

#### § 17-9. Hull and freight interest insurance/Re. § 10-12

This paragraph corresponds to CEFOR Form 251 E.

According to the Special Conditions, the insurance was invalid if separate insurances against total loss (hull interest and freight-interest insurances) had been effected for the vessel. However, there is no reason to have such a strict reaction in the event that an interest insurance is effected. The insurer's interests can be safeguarded by means of a right to a reduction along the lines of the rules the ordinary hull insurance. The provision has therefore been rewritten and patterned on § 10-12.

Today separate total-loss insurances for fishing vessels and freighters are not formally offered. However, the owners wish to have such an offer. It has therefore been stated explicitly that the hull insurer may consent to the effecting of an interest insurance. In that event, the reduction rule will only apply to interest insurances which are larger than what the hull insurer has consented to.

#### § 17-10. Condemnation/Re. § 11-3

This paragraph corresponds to CEFOR Forms 251 A 9 and 244 A 1-3.

The Special Conditions made the condemnation requirements stricter on several points. However, during the revision the conclusion was reached that the most important thing was the raising of the actual condemnation limit; otherwise the ordinary rules could be followed. The Special Conditions did not contain any reference to the market value (the value of the vessel in repaired condition). This was probably due to an oversight, and such reference has therefore been added to the provision in accordance with the rule in § 11-3.

The condemnation limit has been raised from 80% to 90% in relation to § 11-3. A limit of 80% is too advantageous when taking into account that the average age of the fleet is far higher today than 30-40 years ago, that the international marine insurance market relies on a condemnation limit of 100%, and that the value of the concession forms part of the insurable value of fishing vessels, at the same time as this value is retained by the assured in a condemnation settlement.

Subparagraph 1, third sentence, of the Special Conditions kept the value of fixed equipment stored ashore out of the calculation of the insurable value. However, this already follows from § 10-2 relating to insurance of objects removed from the vessel in respect of this type of equipment, and it is therefore unnecessary to repeat this here.

CEFOR Forms 251 A 9 and 244 A 1-3, subparagraph 1, also provided a right for the insurer to demand condemnation. This provision is superfluous. The insurer always has the right to be free from further liability by paying the sum insured, cf. § 4-21 and § 12-9, and can hardly be considered to need further protection.

CEFOR Forms 251 A 9 and 244 A 1-3, subparagraph 3, contained rules to the effect that only damage from the current insurance period was to be included in the calculation, and that removal expenses were to be kept outside the condemnation formula. However, here the most natural approach will be to follow the ordinary condemnation rules, and these provisions have therefore been deleted.

#### § 17-11. Hull damage to vessels not built of steel / Re. § 12-1

This paragraph corresponds to CEFOR Forms 251 A 14 and 244 A 12, and § 176 (e) of the 1964 Plan.

Letter (a) is almost identical to letter (a) of the Special Conditions, but has been reedited and simplified. This provision is first and foremost relevant to insurance of vessels deserving of preservation.

Also letter (b) has been reedited in relation to the Special Conditions. Furthermore, the exception for vessels reinforced with proper ice protection plates has been deleted as superfluous given that wood and plastic vessels, etc. "reinforced with proper ice protection plates" allegedly do not exist in Norway. The provision is not intended to cover more unforeseeable forms of striking against ice, e.g. where an ice floe has drifted out from a branch of a fjord to an open area of water where there is normally no ice.

Letter (c) excludes caulking of hull and deck and is taken from § 176 (e) of the 1964 Plan. This is typical maintenance work, and it will not be easy to decide to what extent the caulking has in reality been necessitated by the casualty. The exclusion does not cover expenses incurred in caulking those parts of hull and deck which have to be replaced as a result of the casualty. Here the caulking represents a normal cost of renewal of a part of the ship, and it must therefore be covered.

#### § 17-12. Limited cover of damage to machinery

The second part of the first sentence was amended in the 2007 version. The paragraph is otherwise identical to earlier versions of the 1996 Plan.

The heading was amended in the 2003 version from damage to machinery, electronic equipment, etc. to limited cover of damage to machinery in order to make it clear that this paragraph provides limited cover for damage to machinery. On the other hand, extended cover for damage to machinery may be effected in accordance with § 17-17.

The first part of the first sentence specifies that the insurer is "only" liable for the enumerated perils.

The second part of the first sentence states the perils covered by the insurer. In earlier versions, the insurer's liability was tied to the damage being a result of "collision, striking, an earthquake, an explosion outside the machinery or fire, or of the vessel having sunk or capsized". It was claimed that this sentence was unclear in practice because it could be interpreted as meaning that fire in the machinery was not covered. The wording has therefore been rewritten to make it clear that fire is covered regardless of where it occurs, cf. the wording "explosion outside the machinery or a fire, or of the vessel having sunk or capsized". The insurer's liability for "the vessel having sunk or capsized" also applies when the ship is moored.

The second sentence stipulates an exception to the rule in the first sentence as regards damage to electronic equipment. If such damage is caused by bad weather and the same casualty causes damage to hull or superstructure, the damage to the electronic equipment shall be covered.

#### § 17-13. Costs incurred to save time/Re. § 12-7, § 12-8, § 12-11 and § 12-12

This paragraph corresponds to CEFOR Forms 251 A 10 to 13 and 244 A 8 to 11.

The provision excludes the time-loss element in the ordinary hull conditions from the cover under the coastal hull insurance conditions. It is practically identical to the Special Conditions, but has been rewritten and simplified without any intended changes on points of substance.

Letter (a) corresponds to CEFOR Forms 251 A 10 and 244 A 8.

Letter (b) corresponds to CEFOR Forms 251 A 11 and 244 A 9.

Letter (c) corresponds to CEFOR Forms 251 A 13 and 244 A 11.

The last sentence corresponds to CEFOR Forms 251 A 12 and 244 A 10.

§ 17-14. Deductions/Re. § 12-15, § 12-16 and § 12-18

This paragraph corresponds to CEFOR Form 251 A 15 and CEFOR Form 244 A 13 and 15.

The ice damage deduction in letter (a) is taken from CEFOR Form 251 A 15 and CEFOR Form 244 A 13. The provision reflects the high damage percentage for ice damage in the stated area. It is therefore difficult to provide normal insurance coverage here; insurance without a special deduction might result in no insurance being offered at all. On the other hand, an increase in premium would affect all fishing vessels, and it is therefore preferable that those who are engaged in fishing in that area take on the problem of the ice damage through an increased deduction.

The provision represents a middle-of-the-road solution in relation to the Special Conditions, where the limit was in one case set at 74°N (CEFOR Form 251 A 15), and in another at 76°N (CEFOR Form 244 A 13). There is not much need for ice damage deduction south of 75°N.

In CEFOR Form 244 A 13 the ice damage deduction was limited to the period from 16 November until 15 May. This limitation has been deleted.

The rules relating to ice damage deduction off Greenland are taken from CEFOR Form 251 A 15. However, the rule relating to ice damage deduction for Newfoundland has been left out.

In the Special Conditions the ice damage deduction was set at 45% for all vessels. During the revision, however, it was emphasised that it was unfortunate that vessels with ice classification had the same deduction as vessels without ice classification. The deduction has therefore been differentiated somewhat according to the vessel's classification. For vessels with ice classification ICE 1 B or better, i.e. ICE 1 B or ICE 05-Sealer, the deduction is set at 25%. ICE 1 B and ICE 05-Sealer refer to the requirements from Det Norske Veritas with regard to hull structure and strength, rudder arrangement and the presence of ice fins. For vessels with ice classification ICE IC or without ice classification the Special Conditions' deduction of 45% has been retained.

According to the Special Conditions, the ice damage deduction applied to damage as well as to total loss and costs of measures to avert or minimise loss. According to the Plan, the deduction applies only to partial damage in accordance with the general system of the Plan.

Ice damage which occurs in areas that are not covered by the clause is recoverable subject to a deduction of 1/4 under § 12-15.

If the vessel has ice classification approved by the insurer, an extended cover against ice damage may be agreed against an additional premium.

Letter (b) corresponds to CEFOR Form 244 A 15. The Special Conditions stipulated different deductions for electronic equipment depending on whether or not there was a new for old deductions clause. As mentioned in the introduction to section 2, the new for old deductions have been deleted from the Plan. There was also little difference between the rules. They have therefore been combined into a joint deduction for electronic equipment. In line with the general Plan system regarding deductions, the size of the deduction has been taken out of the Plan. This will instead be the subject of individual negotiations where inter alia the age of the equipment can be taken into account. It is therefore unnecessary to make the size of the deduction dependent on the age of the equipment in the actual Plan text. The provision has thereby been considerably simplified in relation to the Special Conditions. Reference is merely made to the deduction agreed in the policy.

The term "electronic equipment" covers three main groups, viz. radio equipment, fish-finding equipment and navigation equipment.

Radio equipment includes main transmitter with short-wave and receiver, watch-receiver, telephone watch for AM-VHF, VHF transmitter and receiver, lifeboat transmitter, direction-finding beacon, emergency communication set for aircraft frequency, receiver and TV for mess rooms or cabins, walkie-talkie transmitter and receiver, intercommunication between bridge, engine room, cabins, mess rooms, and deck as well as a weather chart recorder.

Fish-finding equipment includes sonar, display screen, echo sounder, echo enlargements connected to main sounder, trawl watch, echo scope, echo sounder for trawl probe and probe receiver.

Navigation equipment includes gyrocompass, autopilot, course controller, all types of radar, electronic log for satellite navigator and display screen, radio sounders for AM VXF and WT, satellite navigator, Omega receiver and Loran C receiver.

In addition to deductions for electronic equipment, the Plan's rules relating to machinery damage deductions and deductibles, cf. § 12-16 and § 12-18 shall apply. For the sake of clarity, this is repeated in letters (c) and (d). As regards the basis for calculating the various deductions, § 12-19 applies so that all deductions shall be calculated on the basis of the full amount of compensation according to the Plan before deductions under any of the relevant provisions.

Given that the normal cover has not allowed for new for old deductions, the age of the vessel and the machinery, possibly also the sum insured, shall be taken into account when determining deductions and deductible. In the event that the agreed deductions do not compensate for the lack of new for old deductions, the insurer may have to agree on individual new for old deductions.

§ 17-15. Collision liability for fishing vessels/Re. § 13-1

This paragraph **was amended in the 2007 version.**

**Under § 17-15, subparagraph 1, of the 1996 Plan, the insurer was liable for "liability incurred by the assured for loss which the vessel with accessories, equipment and cargo, or tug used by the vessel, has caused to another vessel with fixed accessories in a collision". In relation to § 13-1, which applies to liability for "collision or striking" in general, the cover in § 17-15 was thus limited to collision (not striking) with a vessel with fixed accessories. This cover has now been extended so as basically to follow § 13-1 as regards general liability for collision and striking. The purpose of this amendment is to ensure that cover includes collision and striking with aquaculture structures, which are no longer covered under P&I insurance. However cover for collision has now been generalised. At the same time, however, this cover has been limited with regard to collision with vessels and with fishing, whaling or sealing tackle, cf. below.**

**Under letter (a), cover in the event of "collision with or striking against" another vessel is limited to damage caused to the vessel with fixed accessories. Thus the insurance does not cover floating accessories. "Fixed accessories" means equipment which is normally on board, but is not necessarily "nailed down". Catch, fishing gear and dories which are not lifeboats are examples of objects which do not constitute "fixed accessories". Loss of catch and other loss of time are also all outside the scope of cover. The provision refers to the "knock-for-knock" principle which is mentioned in the explanatory notes to § 17-8. When several vessels participate in the same fishing team, collisions between the individual vessels and fishing gear, catch and dories which are in the sea are foreseeable. It serves little purpose to use resources on a detailed distribution of liability in such cases. It is therefore assumed that each fishing vessel owner covers damage to his own equipment. A natural extension of such a "knock-for-knock" principle is to exclude such damage from the liability insurance of the person who has caused the damage.**

**Under letter (b), the insurer does not cover any liability for collision with or striking against fishing, whaling or sealing tackle in the sea. This limitation is explained by the fact that this liability is covered under P&I conditions. Letter (c) is identical to subparagraph 2 in earlier versions. The provision is a continuation of the "knock-for-knock" principle mentioned above. When several vessels participate in the same fishing time or as pair trawlers, it is expedient to have a further limitation of the cover, so that also damage to or loss of the vessel with fixed accessories is excluded from the collision liability.**

§ 17-16. Collision liability for freighters, including well boats, which carry live fish/Re. § 13-1

This paragraph corresponds to CEFOR Form 251 A 18 A.

The provision has been rewritten and furthermore amended to emphasise that the exclusion also covers damage to the actual device and shall apply irrespective of what is loaded or discharged. The provision is first and foremost aimed at floating devices which are easily damaged, such as where the vessel runs into an enclosure for fish and the fish escape. In such cases it is difficult or impossible to determine the extent of damage. The application of the provision is not subject to the condition that there is loss of or damage to live fish; the deciding factor is the nature of the device. Liability is excluded whether damage or loss occurs while the vessel is moored at the device or on arrival and departure. If there are several independent devices in the same area, however, liability to another device than the one from which loading or discharging shall take place will be covered.

*Section 3 - Hull insurance - extended cover***§ 17-17. Extended cover of damage to machinery**

This provision was amended in the 2003 version.

In the 2002 version, section 3 contained three provisions: § 17-17 The relationship to section 2, § 17-18 Damage to factory machinery and § 17-19 Costs of removal of the ship. These provisions have now been combined to form one provision with the heading "Hull insurance - extended cover for damage to machinery. The former § 17-8 and § 17-9 have thus been deleted.

Only the cover for damage to machinery in § 17-12 has been extended through section 3. Section 2 thus applies in full to the other parts of the hull insurance.

The fact that extended cover for damage to machinery has been agreed will be evident from the policy, see subparagraph 1. In such case, damage to machinery, electronic equipment, etc. will be covered in accordance with the ordinary rules of chapter 12 of the Plan, with certain minor exceptions. These follow in part directly from subparagraph 1, in part from subparagraphs 2 and 3. Subparagraph 1 refers to § 17-13 and § 17-14, which thereby apply correspondingly in the event of extended cover for damage to machinery.

Subparagraph 2 corresponds to § 17-18 of the 2002 version, but has been reworded as an exception in accordance with the amendment to subparagraph 1. For "damage to factory machinery for the preparation or processing of catch, etc.", the rule in § 17-12 (b) has been reintroduced; in such cases damage must have been caused by the listed perils in order to be covered. The insurer is liable for damage to other machinery in the usual way, on the basis of the all-risk principle set out in § 2-8. The remainder of the provision is unchanged.

Subparagraph 3 corresponds to § 17-19 of the 2002 version, and establishes that costs of removal of the vessel in connection with damage to seine winches and the like are not covered if the damage to machinery is subject to deduction pursuant to the rules of § 17-14 (c). It is illogical, in a way, that the cover of removal costs will thus be better under § 17-12 (c) than under the present subparagraph in cases where the damage to seine winches and the like is a consequence of the vessel having been subjected to a collision, striking, etc. However, the solution corresponds to the solution that was introduced in the 1997 version. A group of the insurers have not wished to make any amendments on this point now, and the committee has deemed it necessary to defer to this view.

## *Section 4 - Catch and equipment insurance - standard cover*

### General

Catch and equipment insurance corresponds to the former fishing insurance. In addition to this section, the general part of the Plan and chapter 17, section 1, shall apply. However, chapter 17, sections 2 and 3, shall not apply.

Section 4 is based on CEFOR Form 254 (from 1996) and the former conditions CEFOR Form 220 A (December 1989/October 1992). CEFOR Form 220 B relating to insurance of wages and crew's clothing, cf. § 237 of the 1964 Plan, has, however, not been included in the new Plan. The same goes for insurance of dories under CEFOR Form 220 A, separate condition 2. Such boats are excluded from the Plan according to § 10-1, subparagraph 2.

CEFOR Form 254 3 relating to the sum insured, 7.1 relating to interest and 7.3 relating to safety regulations have been deleted. Here the general part of the Plan shall apply. Paragraphs 5 and 7.2 of the Special Conditions have been moved to section 1, see § 17-3.

The sum insured for insurance of catch and equipment is determined in the policy on an annual basis or for a round voyage.

### § 17-20. Scope of the insurance

This paragraph corresponds to CEFOR Form 254 1.

The provision states the objects and interests covered by the insurance. It corresponds to CEFOR Form 254 1, but has been rewritten and simplified without any changes on points of substance being intended.

Letter (a), first sentence, concerns the catch and corresponds to paragraph 1.1, subparagraph 1, of the Special Conditions. By catch is meant the quantity taken on board the assured's own vessel. It is irrelevant whether it was caught by the relevant vessels itself or bought from others at sea. The provision also covers catch which has been processed, packaged and frozen. However, the provision is limited to the ship's operation as a fishing, whaling or sealing vessel, and does not apply if the vessel is used as a cold store whilst laid up.

The second sentence, which corresponds to paragraph 1.1, subparagraph 2, of the Special Conditions, establishes that the insurance, subject to certain specific conditions, also covers freight. This applies only where the catch has in actual fact been reported to a fish sales co-operative and the vessel directed to a specific place for unloading before the casualty occurred. It is not sufficient if the reporting, etc. takes place later. The Special Conditions contained a provision to the effect that a deduction should be made in the compensation for expenses which would have been incurred in order to earn the said freight, but which have been saved as a result of the casualty. Such deduction now follows from the general rule in § 17-6 and is therefore superfluous here.

In addition to catch and freight, the fishing insurance also covers fishing gear and accessories which are on board the vessel, cf. letter (b), which corresponds to paragraph 1.2 of the Special Conditions. It is a condition that the gear belongs to the assured. The assured can therefore not take on board seines which belong to other owners and obtain compensation for damage to these without this having been agreed in advance with the insurer. The gear must be on board the ship. Gear onshore or in the water therefore falls outside the scope of cover. The gear is deemed to be in the water from the moment setting starts and until it is back on board again. Furthermore, the requirement that the object must be on board is commented on in more detail under § 10-1.

Letters (c) and (d) correspond to paragraphs 1.3 and 1.4 of the Special Conditions, but have been rewritten in order to be in accordance with § 10-1. The Special Conditions thus covered bunkers and lubricating oil on board, which are already covered by § 10-1. Paragraph 1.3 of the Special Conditions stated explicitly that the supply of bait was covered. However, this follows from the term "equipment in connection with fishing" in letter (d), and that part of the provision has therefore been deleted. The reference to § 10-1 in letter (d) is included for the purpose of making it clear that the cover under the fishing insurance will not be extended by agreeing on a more limited scope of cover under the hull insurance.

It follows from § 2-12 that the assured has the burden of proving that he has suffered a loss which is covered by the insurance. This rule entails that the assured must prove that the catch or the equipment was in actual fact on board when it was lost or damaged. This was stated explicitly in the Special Conditions as regards the catch, but is unnecessary to repeat.

### § 17-21. Insurable value

This provision corresponds to CEFOR Form 252, Conditions for Transport Insurance of Goods of 1995, § 29.

The provision states the value of the interests covered by the insurance based on certain "objective" criteria. Subparagraph 1 regulates the insurable value of the catch, while subparagraph 2 determines the insurable value of the other objects which are insurable under an insurance of catch and equipment.

The provision does not prevent the parties to the insurance contract from agreeing on a specific insurable value. However, an assessment of the insurable value is not very common for insurance of catch, but is more widely used in insurance of fishing gear, etc.

The basis for the calculation of the insurable value of the catch is under subparagraph 1 the market price of the catch at the place of loading at the time of loading. The market price of the catch will be the value of the catch to the seller's hand, before he has incurred costs in connection with the forthcoming transport. The market price is the price at which the catch can be sold by taking into account the seller's place in the chain of distribution.

The value refers to price conditions "at the time of loading", i.e. at the time when the catch is loaded on board the vessel.

If the catch was reported to a sales cooperative and directed to a specific place for unloading, it follows from the provision that the insurable value also covers freight, "transport surcharge", see § 17-20 (a), second sentence.

Subparagraph 2 regulates the insurable value of objects covered according to § 17-20 (b), (c) and (d). Here the insurable value represents the replacement cost of the object at the inception of the insurance. The provision is in accordance with § 2-2. The "inception of the insurance" is the time when the insurer's liability takes effect. The time for calculating the insurable value under subparagraph 2 is accordingly different from that under subparagraph 1, where the value refers to the time of loading.

### § 17-22. Extraordinary handling costs

This paragraph corresponds to CEFOR Form 254 4.3. The provision was amended in the 2002 version.

Under the 1999 version, the insurer covered extraordinary costs related to the discharging of damaged catch up to an amount equivalent to 10 % of the sum insured. In the 2002 version, this cover has been extended to also include costs in connection with the removal and destruction of damaged catch. At the same time, the financial limit of the cover was increased.

This extension of cover is linked to the problems that arose in winter 1998/99 when a number of fishing vessels proved to have been infected with salmonella due to the fact that the ice used to preserve fish on board was infected with the bacteria. In addition, there is the fact that the authorities set stringent requirements for the destruction of catch in a controlled manner. There is therefore a need for cover of extraordinary costs in connection with the removal and destruction of damaged catch.

It was originally proposed that a special provision be incorporated into chapter 17, section 6, Liability insurance - scope of the insurance, in order to deal with the problems related to the removal and destruction of damaged catch. However, the Committee found it more expedient to expand the earlier provision in § 17-22 relating to extraordinary costs. In terms of substance, the rules regarding cover of extraordinary discharging costs and cover of costs related to the removal and destruction of catch are very similar. Moreover, such cover will only apply when the shipping company has effected insurance for the catch. It is therefore more appropriate to place the provision under section 4 concerning catch and equipment insurance.

In the 1999 version, cover of extraordinary discharging costs was limited to 10 % of the sum insured. Now that the cover has been extended to also include removal and destruction, this limitation makes the cover insufficient. The extent of the cover has therefore been increased, so that the insurer is liable for an amount equivalent to the sum insured. Such an extension is in accordance with the cover for costs of measures to avert or minimise loss, which is largely similar to the cover for extraordinary costs.



## § 17-23. Excluded perils/Re. § 2-8

This paragraph corresponds to CEFOR Form 254 2.11 to 2.16. Letter (d) was amended in the 2002 version.

The provision states limitations to the perils covered by the insurance, and must be seen in conjunction with the provisions in § 2-8 to § 2-10. According to § 2-8 an insurance against marine perils covers any peril to which the interest is exposed, with the exception of the perils stated in letters (a) to (d). The war peril has been taken out of the marine-perils cover through the exception in § 2-8 (a) and has been made the object of a separate war-risks insurance under § 2-9. If there is no specific statement as to what perils are covered by the insurance, the rule in § 2-10 is that the insurance covers marine perils under § 2-8.

The exclusions in § 17-23 largely reflect the general principle under insurance law that the insurance shall only cover unforeseeable losses. Losses resulting from the inherent nature of the catch, inadequate packaging, loss in weight or volume of the catch, etc. are foreseeable and should therefore fall outside the scope of cover. The provision has been somewhat simplified as compared to the Special Conditions, without any changes on points of substance being intended.

Letter (a) excludes damage due to the inherent nature or condition of the catch when the catch was taken on board, and concurs with paragraph 2.11 of the Special Conditions, even though it has been somewhat simplified. The exclusion also covers cases where the catch is unable to stand up to the foreseeable exposures on board. This provision is particularly relevant to mackerel and herring in bulk, which are unfit to stand movements on the way to port if the ship has remained for too long in the field with the fish on board.

Letter (b) regulates inadequate packaging and preservation and has been taken from paragraph 2.12 of the Special Conditions. Inadequate preservation includes cases where refrigerated or frozen catch did not have the correct temperature at the time it was refrigerated or frozen down. This was earlier stated explicitly, but has been deleted as unnecessary.

Letter (c) excludes loss as a result of ordinary loss in weight or volume and concurs with paragraph 2.13 of the Special Conditions.

Letter (d) was amended in the 2002 version. Under the 1999 version, the cover only applied to damage resulting from excessively high temperature when the ship's thermo-machinery was out of service for a continuous period of at least 48 hours due to a casualty. In the 2002 version, this time limit was deleted. The amendment is primarily related to the fact that the 48-hour limit did not provide sufficient cover in respect of the transport of fresh fish which is kept in salt water to maintain a low temperature and preserve the fish as fresh fish for a longer period. The temperature in such tanks is around 2-3 degrees. If the temperature is raised to, for instance, 8-10 degrees, the fish can be spoiled in a short time, depending on weather and temperature conditions. In such cases, therefore, the 48-hour limit is unreasonably long.

In connection with the 2002 version, it was discussed whether this problem should be resolved by setting a shorter time limit for refrigerated fish, but it was concluded that it was unnecessary to have any time limit at all. The treatment of refrigerated catch is subject to extensive EU regulation, and buyers also have stringent criteria as regards the quality of the fish. The assured will therefore normally be very careful to ensure that the water is sufficiently cooled down before the catch is taken on board. If the refrigeration plant is not functioning or has not been started up, fish will not normally be taken on board.

However, the 48-hour limit should also be removed with regard to frozen fish. Quality standards for frozen fish are so stringent that any thawing may result in loss because the fish cannot be sold at the ordinary price. As a result of the 48-hour limit, therefore, factory ships have taken out transport insurance for the catch in addition to cover under chapter 17 of the Plan.

Paragraph 2.16 of the Special Conditions excluded deterioration of catch due to sailing in heavy sea. Such deterioration will either be covered by letter (a), in that sailing in heavy sea is a normal strain, which the catch must be expected to stand, or by letter (c) concerning ordinary loss in weight or volume. The provision is therefore superfluous.

Paragraph 2.14 of the Special Conditions excluded "damage to the catch caused by delay, unless such delay causes further deterioration of a damage otherwise covered under this insurance occurring during transit to a port for unloading". This provision, too, is superfluous. If the loss in question has resulted from a delay which has no connection with a preceding casualty, it follows from § 4-2 that the insurer is not liable. It is also conceivable that loss resulting from a delay is excluded through § 17-23 (a), in that the fish has to stand a few days' delay. If, on the other hand,

the delay is a result of an earlier casualty, the insurer must be fully liable in the normal way, cf. the cover of further developments according to the Special Conditions. This follows from general rules of causation and applies independently of the cause of the delay or its duration. The fact that damage to the catch develops further during transport to the place of destination is a risk which must be covered by the insurance. However, the insurer's liability for the delay is based on the assumption that the assured could not have avoided this delay. If the assured, following a casualty, chooses instead of taking the ship directly to a port, to remain at sea in order to prevent loss of time, the loss caused by the delay is not a consequence of the casualty. If it is found that the loss is partly a result of the casualty, partly of a delay, the rule of apportionment in § 2-13 shall be used.

#### § 17-24. Deck cargo

This paragraph corresponds to CEFOR Form 254 2.2.

The provision entails that further restrictions are made in the perils covered for deck cargo. In all essentials it concords with the Special Conditions, but it has been somewhat simplified.

In letter (b) the term "dirt" first and foremost covers pollution from the ship's own machinery.

#### § 17-25. Total loss

This paragraph corresponds to CEFOR Form 254 4.1 and CEFOR Form 252, § 35.

The provision regarding total loss in CEFOR Form 254 4.1 has been replaced by the total-loss rules in the conditions relating to insurance of carriage of goods, CEFOR Form 252 § 35. The total-loss rules there are somewhat more detailed than the total-loss rules in CEFOR Form 254, but in reality there is little difference. § 17-25 concerns all objects insured under the catch and equipment insurance, i.e. both the catch and the accessories, cf. the introductory words of the provision.

Subparagraph 1 defines when a total loss has occurred, and is taken from CEFOR Form 252 § 35, subparagraph one, but in reality it concords with CEFOR Form 254 4.1. Under letter (a), the total loss has occurred if the objects insured have been destroyed. The objects have been "destroyed" where they are totally burnt up, dissolved, evaporated or have leaked out, or where they are in some other way physically totally destroyed. In principle, all objects insured, including the entire catch, must be affected in order for it to constitute a total loss. The rules relating to loss in weight, cf. § 17-26, however, make subparagraph 1 of § 17-25 similarly applicable where part of the objects insured/catch are totally lost. The condemnation rules in letters (c) and (d) do not call for a more precise definition of the term "destroyed". On the other hand, the distinction between condemnation and partial damage may be difficult to make. Reference is made to the explanatory notes to § 17-27.

Under subparagraph 1 (b) a total loss has also occurred where the objects insured (including the catch) "have been removed from the assured without any possibility of his recovering them". The objects have been "removed from" the assured if he does not have physical disposal of them. They have sunk, been washed over board, stolen, impounded or handed over to a wrongful recipient. There is, however, no requirement that the objects shall be physically damaged or impaired. The actual removal must be complete. The objects must have been removed from the assured "without any possibility of his recovering them".

If the objects have disappeared without there being any basis or information to indicate how this happened, the assured has the burden of proving that the total loss was caused by a peril covered by the insurance.

Rules relating to condemnation are contained in subparagraph 1 (c) and (d). The provision in (c) is taken from CEFOR Form 254 4.1, and sets the condemnation limit at 100% for fishing gear and accessories. For other objects, however, the condemnation limit is 90% in line with the solution in CEFOR Form 252 § 35, subparagraph 1 number 4. The reason for the difference is that catch, packaging and supplies may be considered equivalent to goods, while the insurance of fishing gear is more similar to an ordinary property insurance.

The condemnation rules apply when the objects insured are so extensively damaged that at least 100% or 90% of their value must be considered lost. When deciding whether the objects are condemnable, damage must be assessed under § 17-26 and § 17-27 and be seen in relation to the insurable value. In the assessment only loss of value resulting from damage covered by the insurance shall be taken into account. If several insured incidents occurred during the transport, it is the aggregate damage which must have resulted in a loss of value of 100% or 90% respectively.

Subparagraph 2 regulates the further content of a total-loss settlement. The provision corresponds to CEFOR Form 252 § 35, subparagraph 2. In the conditions for fishing insurance there was no such rule. The fundamental principle is that the assured is entitled to payment of the sum insured for the object insured, however, limited to its insurable value, cf. first sentence.

If the objects, before becoming a total loss, sustain damage, it follows from the second sentence that no deduction shall be made for such damage in the total-loss claim. It is, however, a condition that the damage occurred during the insurance period. For pre-existing damage prior to the inception of the insurance, deductions shall be made, given that such damage will reduce the insurable value of the object correspondingly.

#### § 17-26. Damage to or loss of catch

This paragraph is new, and is taken from CEFOR Form 252 § 37.

The provision regulates the claims settlement where catch is damaged or lost without the rules relating to total loss in § 17-25 becoming applicable. Because there is no question of any repairs in respect of a catch in the event of damage or partial loss, as would be the case for other objects covered by the insurance, the provision determines that the assured will in these cases always be entitled to compensation. As regards the size of this compensation, it shall be determined in the same way as under § 17-27, subparagraph 2, and reference is therefore made to the commentary on that provision.

#### § 17-27. Damage to other objects

This paragraph is new, and is taken from CEFOR Form 252 § 37 and § 38.

The provision regulates settlement in the event of damage to fishing gear, accessories and equipment insured according to § 17-20 (b), (c) and (d).

Subparagraph 1 is taken from CEFOR Form 252 § 37, subparagraph one, and establishes that the insurer is always entitled to demand that damage be repaired, thus ruling out any compensation to the assured for unrepaired damage. Repair means that the object is restored to its original state. Only the insurer may demand repairs. The assured will be referred to the compensation alternative in subparagraph 2. He may not against the insurer's protest carry out repairs and claim compensation for the costs incurred in that connection.

The insurer's right to demand that damage be repaired is not unconditional. Repairs must be feasible without "unreasonable" loss or inconvenience to the assured. In the evaluation of this question, the length of time such repairs will take must amongst other things be taken into account.

Presumably the costs of repairs will constitute a smaller amount than the sum insured; if not, it will be a case of condemnation under § 17-25, subparagraph 1 (c) or (d). If the insurer has demanded repairs under § 17-27, subparagraph 1, and these repairs turn out to be significantly more expensive than anticipated, he must, however, pay all costs in full. The same applies if the repairs turn out to be inadequate.

Subparagraph 2 regulates settlement when the damage is not repaired, either because the insurer is not entitled to demand it, or chooses not to do so. The provision is taken from CEFOR Form 252 § 37, subparagraph 2. In such cases a cash settlement shall be made based on the determination of a damage percentage for the object. The damage percentage shall reflect the final reduction in the value of the damaged objects, i.e. the market value of the object in undamaged condition in proportion to the value in damaged condition at the place of destination. The damage percentage shall be calculated on a discretionary basis

When the damage percentage has been determined, the insurer's liability will be the product of the damage percentage and the insurable value. However, if the sum insured does not cover the entire insurable value, such under-insurance must be taken into account by a pro-rata calculation of the insurer's liability, cf. § 2-4.

Subparagraph 3 is taken from CEFOR Form 252 § 38 and concerns damage to or loss of an object which consists of several parts. It is mainly relevant in the event of damage to fishing gear and similar equipment. Under the provision, the insurer's liability is limited to covering repairs or renewal of the part that is lost. The assured therefore never has the right to demand a new object in the event of such damage.

#### § 17-28. Survey of damage

This paragraph is new.

Insurance of catch and equipment is not subject to the rules in chapter 12. It is therefore necessary to have a reference to § 12-10 in order to have authority to carry out a survey of damage.

#### § 17-29. Deductible

This paragraph corresponds to CEFOR Form 254 4.2.

The provision is in reality identical to CEFOR Form 254 4.2, but has been rewritten in order to concord with the other deductible provisions of the Plan. The deductible shall apply both to damage, total loss and loss incurred by measures to advert or minimise loss.

### *Section 5 - Supplementary cover for nets and seines in the water*

#### General

The supplementary cover under this section cannot be effected separately, but must be effected in combination with the standard cover under section 4.

#### § 17-30. Objects insured

This paragraph corresponds to CEFOR Form 254, Special Clause 1.1.

The provision is almost identical to the Special Conditions, but the specification in the first sentence to the effect that nets and seines, etc., must be in the sea is new, without this entailing any change on points of substance. The distinction between objects which are on board the vessel and objects which are in the water is commented on in further detail in the Commentary on § 17-20 (b). The insurance does not cover other seines than ring-nets in the water.

The objects that are insured under the supplementary cover in section 5 are to a large extent the same as the objects that are insured under the normal cover in section 4, cf. § 17-20 (b). Normally a sum insured will be agreed for each cover. If a sum insured has been agreed for the objects concerned under the normal cover, but not under the supplementary cover, it must, however, be assumed that the sum insured shall be the same under both covers. This was earlier stated explicitly in CEFOR Form 254, Special Clause 1.2.

#### § 17-31. Excluded perils/Re. § 2-8

This paragraph corresponds to CEFOR Form 254, Special Clauses 1.3 and 1.5. The provision was amended in the 2002 version.

In the 1999 version, the perils covered by the insurance were positively specified as loss resulting from wreck of the vessel, heavy catch, currents and damage to the vessel that is not due to inadequate maintenance, etc. In practice, this description of the range of perils proved to be too narrow, with the result that the rules were difficult to follow when settling claims. The most common damage is that seines get caught on the sea bed. The insurers are prepared to cover such damage subject to the limitations that follow from letters (a) to (e). Such cover could actually be achieved by extending the clause defining liability, while otherwise retaining the principle of a positive specification of the perils covered. Because it is difficult to prove that "currents" and "heavy catch" are causes of damage, the Committee found it more expedient to change to a negative specification of the perils covered, even if such a transition may cause some uncertainty as regards the actual content of the cover. To safeguard the position of the insurer in connection with such a revision of the description of the perils covered, the burden of proof in respect of exclusions has been reversed in relation to § 2-12, cf. below.

The exclusions set out in letters (a) to (c) sustain solutions that were to be found in the 1999 version of § 17-31, in subparagraph 2 (a) and subparagraph 1 (d), respectively. Letter (a) entails that the insurer is only liable for loss resulting from the net or seine getting caught in an unknown wreck or unknown wreckage. Damage resulting from ordinary contact with the sea bed, for instance if the net or seine gets caught on natural obstacles that are part of the general character of the sea bed, is not covered.

The wreck is "known" when it is indicated on a chart, in the Notices to Mariners published by the Norwegian Maritime Directorate or in corresponding foreign publications. The term "unknown" is meant to be an objective criterion. The assured cannot argue that he was not aware of wreckage that has been made known to the public as stated above. On the other hand, the wreckage must be regarded as known if the assured had knowledge of it, even if it might not have been made known to the public.

Letters (d) and (e) are new. Letter (d) provides that the insurer is not liable for loss resulting from nets and seines being in contact with ice. Letter (e) is based on the same principle as § 10-3 of the Plan.

It follows from the principle in § 2-12, subparagraphs 1 and 2, of the Plan that the insurer, under an all-risks insurance, has the burden of proving that the damage was caused by an excluded peril. Under § 17-31, subparagraph 2, this rule of the burden of proof for exclusions has been reversed, thus placing the burden of proof on the assured. This has been necessary in order to give the assured the better cover inherent in a negative specification of the perils covered.

The earlier exclusions in § 17-31, subparagraph 2 (b), regarding gear used for shore- locking and the like, letter (c) regarding infringements of statutes or official regulations, and letter (d) regarding measures to avert or minimise loss have been deleted. The exclusion for shore-locking was superfluous because gear is no longer used in that way, while infringements of statutes or regulations are governed by safety regulations. The insurers are willing to cover measures to avert or minimise loss.

#### § 17-32. Deductible

This paragraph corresponds to CEFOR Form 254, Special Clause 1.4.

The deductible in the Special Clauses was set at 30% of the claims amount. This has been changed in accordance with the other deductible provisions of the Plan. The deductible shall now be agreed on an individual basis and be stated in the policy. The deductible shall also apply in the event of total loss.

#### § 17-33. Duties of the assured in the event of casualty/Re. § 3-29

This paragraph corresponds to CEFOR Form 254, Special Clause 1.6.

The provision has been simplified in relation to the Special Conditions. The purpose of the provision is to make it possible to identify lost objects if they are recovered. This provision comes in addition to the ordinary duty to notify the insurer in § 3-29. In the event of a failure to comply with this duty, § 3-31 shall apply.

## Section 6 - Liability insurance

### General

In the 1999 version, provisions for liability insurance were divided into two sections, section 6 relating to the scope of the insurance and section 7 relating to limitations of the liability insurance. In the 2001 version, these two sections were combined in section 6.

Section 6 is based on chapters 16 and 18 of the 1964 Plan and Conditions For Hull Insurance of Coastal and Fishing Vessels With a Length of 15 Metres or Larger, cf. CEFOR Form 242 A. (July 1995). Chapters 16 and 18 of the 1964 Plan provided general P&I insurance conditions for shipowners, but have not been retained in a general form in the new Plan, because P&I insurance of larger ships is no longer effected on Plan conditions. Liability insurance for coastal and fishing vessels, cf. CEFOR Form 242 A is, however, based on the 1964 Plan's P&I conditions, and it is therefore necessary to have such rules in chapter 17.

In addition to the rules in this section, the common rules in chapter 17, section 1, as well as the general part of the Plan, shall apply. It follows from § 4-17, subparagraph 1, that in the event of insurance on Plan conditions the rules in ICA section 7-6, first paragraph, relating to an injured party's right to file a direct claim against the insurer do not apply. In contrast, ICA section 7-8 is mandatory in any liability insurance.

CEFOR Form 242 A I 3 (nuclear risk) and II 8 (interest) have been deleted, because these rules now follow from the general part of the plan.

### § 17-34. Perils covered

This paragraph corresponds to § 224 of the 1964 Plan and Cefor Form 242 A I 2. **The commentary was adjusted in the 2007 version in accordance with the amendments to § 2-8 (d) and § 2-9, subparagraph 2 (d).**

Subparagraph 1, first sentence, is practically identical to § 224, subparagraph 1, first sentence, of the 1964 Plan and specifies the perils covered by the insurance as losses mentioned in § 17-35 to § 17-45. The provision reflects the basic principle that the P&I insurance only covers liability and other losses which are specifically stated. In other words, this is not a general liability insurance. On the other hand, a number of types of loss which are not in the nature of liability, viz. various forms of expenses and damage which the assured may incur, are covered. Also in respect of such expenses and damage it is a requirement that they must be specifically stated.

The provisions in § 17-35 to § 17-45 partly state the nature of the loss, partly the extent to which the loss is covered. Both sets of conditions must be satisfied in order for the insurer to be liable.

While § 17-35 to § 17-45 state the extent of liability, §§ 17-46 et seq. state limitations to the cover. The provision in § 17-34 must therefore also be seen in conjunction with these limitations.

Another fundamental principle for owner's liability insurance is that the cover only includes liability and loss which "has occurred in direct connection with the running of the vessel covered by the insurance". The claims filed must have direct connection with the running of the insured vessel. Liability and other loss which concern the shipping business in general, or which are common to several ships, are normally not covered.

Accordingly, all liability and losses in connection with the running of the assured's shore installations, social and other expenses which are not associated with any specific vessel are excluded from the cover. However, it is not a requirement that the loss occurred on board the vessel, or that it was caused by the crew.

The liability which is covered must be a legal liability for damages. The fact that the assured feels obligated from a business or moral standpoint to cover a loss is not sufficient. Legal liability normally means the personal obligation to pay for which the assured is liable to the extent of all his assets. However, also liability in rem where the assured is only liable with certain objects, typically the vessel and freight, is covered by the insurance. The country under whose law the liability occurs is also irrelevant, whether it is a contractual liability (e.g. cargo liability), or liability outside contractual relations (e.g. collision liability), and it is irrelevant on what basis the liability is founded. However, contractual liability is subject to certain limitations according to § 4-15.

The second sentence corresponds to CEFOR Form 242 A II 5 a, and entails that the cover is extended in certain situations to include liability incurred by vessels other than the insured vessel.

Subparagraph 2, first sentence, is taken from § 224, subparagraph 1, second sentence, of the 1964 Plan and establishes that the insurer covers liability according to subparagraph 1, irrespective of whether the liability is caused by marine perils or war perils. The liability insurance is therefore basically an insurance against marine perils, cf. § 2-8, as well as against war perils, cf. § 2-9. The war-risks cover is, however, somewhat limited under the second sentence. This provision corresponds to CEFOR Form 242 A I 2, second and third sentences, but has been modified to adjust to the rules in chapter 15 of the Plan relating to war-risks insurance.

§ 224, subparagraph 2 of the 1964 Plan and Cefor Form 242 A I 3 contained a limitation of the insurer's liability for nuclear risk. Such limitation is now contained in § 2-8 (d) nos. 1 - 4 and § 2-9, subparagraph 2, (b) nos. 1 - 4.

#### § 17-35. Liability for personal injury

This paragraph corresponds to § 225 of the 1964 Plan and CEFOR Form 242 A II 1, first sentence.

Subparagraph 1 is taken from § 225 of the 1964 Plan and defines the cover in the event of personal injury or loss of life. The main rule in the first sentence affords a very comprehensive cover. If the injury is "sustained in direct connection with the running of the insured vessel", the insurer covers the assured's liability regardless of where and how the injury was inflicted and regardless of whether the assured is liable as personal wrongdoer, or is liable on the basis of the rules relating to vicarious liability in section 151 of the Norwegian Maritime Code. The assured's liability to crew and passengers is nevertheless subject to certain limitations, cf. below.

Nor are any limitations stipulated as regards which items of loss shall be covered. In the event of "personal injury", liability covers expenses for treatment, expenses for artificial limbs, loss of income during the treatment and loss of future earnings as a result of full or partial disability, cf. section 3-1 of the Compensatory Damages Act. In the event of losses more in the line of consequential losses, the assured's, and hence the insurer's, liability will, however, be limited by foreseeability considerations.

The term "personal injury" also covers shock and other mental injuries, including "compensation for permanent injury" according to section 3-2 of the Compensatory Damages Act. However, the liability will normally not cover non-economic loss under section 3-5 of the Compensatory Damages Act. Such liability presupposes that the assured has personally caused the bodily injury intentionally or with gross negligence, in which event the insurer's liability will normally lapse under the rules in § 3-32 and § 3-33.

If it is a question of "loss of life", liability will cover loss of provider and funeral expenses, including expenses for shipping home the coffin or urn, cf. section 3-4 of the Compensatory Damages Act.

Liability under subparagraph 1, first sentence, also covers liability for salvage awards in the event of the saving of life. Such salvage remuneration will only be relevant where a ship or cargo has been salvaged at the same time, cf. section 441 of the Norwegian Maritime Code. As regards salvage awards for the salvaging of ships and cargo, the owner of these assets may recover the award as costs of measures to avert or minimise loss under the hull insurance and the cargo insurance respectively. In the same way, the liability insurer covers salvage awards for the saving of life under §§ 4-7 et seq., if the salvage operation is in effect a measure to avert or minimise loss. However, the provision in § 17-35 provides an independent authority for coverage of a salvage award, regardless of whether or not it qualifies as a cost of measures to avert or minimise loss. On the other hand, only salvage awards determined specially due to the saving of life are covered. It is not sufficient that the salvage award as such has probably increased due to the saving of life, without this being specified in a judgment or an agreement.

It is only the assured's liability for life-saving which is covered by the liability insurer. The assured may not claim a refund from the liability insurer for that part of the salvage award which may have been allocated to the cargo interests without liability for the assured. Nor does the liability insurer cover the liability in respect of which the assured may claim cover from the hull insurer under the relevant hull conditions, cf. § 17-46.

As regards the persons who shall be covered by the assured's liability, certain limitations are stipulated. In the first place, the cover under subparagraph 1, second sentence, does not include the assured's liability to the crew or their dependents for wages in the event of a shipwreck, death, illness or injury. The provision corresponds to § 225 of the 1964 Plan, which referred this liability to an insurance of wages and effects under § 237. This insurance is not included in the Plan, and the definition has therefore been incorporated directly in § 17-35. This liability will today normally be covered under an occupational injuries insurance. However, the insurer does cover certain social benefits to the crew under § 17-43.



The crew's personal effects are excluded under § 17-43, subparagraph 2 (c).

The delimitation applies only in relation to "the crew". In the event of injuries sustained by others who work in the service of the vessel without belonging to the crew, e.g. persons who carry out work on board or in connection with the vessel while it is in port, the insurer covers the assured's liability under subparagraph 1, first sentence.

Secondly, the assured's liability for injury sustained by or loss of passengers is only covered where this has been specifically agreed, cf. subparagraph 2. The provision corresponds to CEFOR Form 242 A II 1, first sentence, but has been amended from applying to passengers and "other persons accompanying the vessel without belonging to the crew" to merely applying to "passengers". Under Skuld's and Gard's P&I Conditions liability for passengers is included in the normal cover. According to the Plan's rules, however, it is necessary to have a separate agreement about this. The requirement for a separate agreement, however, only applies to ordinary paying passengers. Family, friends or others who accompany the ship are therefore covered in the usual way.

The cover under § 17-35 must be seen in connection with the limitations of liability in § 17-46, subparagraph 3, relating to insurance and social benefits for the crew, and the requirement for limitation of liability as regards liability to passengers in § 17-47.

#### § 17-36. Liability for property

This paragraph corresponds to § 226 of the 1964 Plan and CEFOR Form 242 A II 2 and II 6.

Subparagraph 1 is practically identical to § 226, subparagraph 1, of the 1964 Plan but a simple adjustment has been made. The provision contains the practically speaking most important cover provision in liability insurance and provides that the insurer covers the assured's liability for damage to or loss of an object which "does not belong to the assured". Loss in the event of damage to or loss of the assured's own objects does not belong under a liability insurance subject to the limitations which follow from § 4-16. The 1964 Plan tied the cover to objects which "belong to a third party". The amendment has been made in order to emphasise that the insurance also includes liability for damage to objects which are not subject to private ownership, e.g. shell fish and seaweed which are damaged by oil pollution with the result that those who exploit them for business purposes suffer a loss.

By "object" is meant objects of every type or form, real estate as well as chattels. The object may be on board the insured vessel, on board another vessel, or on shore. Certain objects which are on board are nevertheless excluded in subparagraph 2, cf. below. The term "object" furthermore comprises another vessel, a ship or other floating structure. "Damage" means any form of physical impact on the object which results in a deterioration in value: breakage, water damage, decay, infection, smell and radiation damage, etc. "Loss" covers not only cases where the object has physically been destroyed, but also cases where it has been stolen, impounded or mislaid so that the owner cannot expect to recover it within the foreseeable future.

The insurer covers liability for property damage regardless of the basis on which the liability is founded. It is irrelevant whether it is liability under contract law or non-contractual liability, and it is further irrelevant whether liability is non-statutory or is founded on statutes. The liability therefore covers cargo liability, liability to tugs, liability for property damage in the event of a collision, liability for property damage in the event of oil pollution and other liability for property damage outside contractual relations, provided liability has "occurred in direct connection with the running of the vessel covered by the insurance", cf. § 17-34. Cargo liability is subject to certain limitations, see § 17-50 and the assured is furthermore obliged to disclaim liability for damage to and loss of cargo to the extent that this is allowed under current rules of law, see § 17-47.

§ 17-36 only regulates liability for property damage. Loss resulting from incorrect description of goods in the bill of lading or from the goods being handed over to a wrong recipient does not constitute liability for property damage. However, these types of liability are in certain contexts covered under § 17-37 and § 17-38. But, if liability for property damage occurs, then not only the part of the liability which corresponds to the reduction in the value of the object will be covered, but also the part which is associated with any consequential loss, cf. the wording "liability resulting from damage to or loss of".

Subparagraph 2 (a) is identical to § 226 (a) of the 1964 Plan, while letter (b) is taken from 1964 Plan § 226 (b) and (c) and CEFOR Form 242 A II 2. CEFOR Form 242 A II 2 also contained an exclusion for damage to or loss of the vessel with accessories, equipment and stores. This provision is normally superfluous, see § 4-16, second sentence, which excludes the relevant objects if they are owned by the assured. Furthermore, the provision in § 17-46 will exclude these objects if they are insurable under the rules in part II, part III or part IV chapter 17 sections 3 to 5, of the Plan.

§ 226 (c) of the 1964 Plan also excluded "bunkers". Bunkers is now included in the hull cover, cf. § 10-1, and thereby falls outside the scope of the P&I insurance according to § 17-46.

Letter (c) is taken from § 226 (d) of the 1964 Plan.

Subparagraph 3 is taken from CEFOR Form 242 A II 6, but has been amended. According to CEFOR Form 242 A II 6 (c), the limitation also concerned damage to or loss of deck cargo. This provision has been deleted because the charterer under the rules of the Norwegian Maritime Code can no longer reject liability for such damage.

Under the rules of the Norwegian Maritime Code, it may be uncertain whether the assured has the right to reject liability for damage to or loss of live fish. However, the insurers are under no circumstances willing to accept this liability. It is therefore excluded from the cover according to letters (b) and (c), which are taken from the Special Conditions. The provision must be seen in conjunction with the limitation of liability in § 17-16, which establishes that the hull insurer does not cover liability under § 13-1 for damage to or loss of fish or device for keeping live fish in connection with calling at such an installation for loading or discharging.

CEFOR Form 242 A II 6 contained rules in letters (d) and (e) relating to damage to a loss of goods arisen prior to loading or after discharging, or while the goods were in the custody of another carrier. These rules are superfluous alongside § 17-50, and have therefore been deleted.

#### § 17-37. Liability under bills of lading

This paragraph corresponds to § 227 of the 1964 Plan.

The first sentence concurs with § 227 of the 1964 Plan and establishes that the insurer covers the assured's liability for inadequate or incorrect description of the goods or other incorrect information in the bill of lading or similar document.

In principle, the liability covers all types of liability under bills of lading. If liability is imposed under the principle of estoppel, see section 299, subparagraph 3, of the Norwegian Maritime Code, it will, however, normally be a cargo damage liability and accordingly be covered under the rules in § 17-36.

Liability is covered even if the ship's crew or the owner's employees have been grossly negligent in connection with the issue of the bill of lading. By contrast, the assured will not be covered if he has himself been grossly negligent, cf. § 17-48, subparagraph 1.

Liability under bills of lading applies to "a bill of lading or similar document". The term "bill of lading" comprises both shipped bill of lading (section 292 of the Norwegian Maritime Code), through bill of lading (section 293 of the Norwegian Maritime Code) and received-for-shipment bill of lading (section 294 of the Norwegian Maritime Code). In connection with transshipment, not only liability under bills of lading where the bill of lading is issued in connection with the loading of the insured vessel is covered, but also where the bill of lading is issued by an earlier carrier on behalf of all concerned.

By other "similar documents" is meant other documents issued as evidence of goods received for carriage. A practical example is the non-negotiable sea waybill (section 308 of the Norwegian Maritime Code). Admittedly, goods in transit will rarely be bought or paid for on the strength of the description of the goods in such a sea waybill, but it does happen. If the assured then becomes liable under general liability rules for negligent, incorrect or incomplete description of the goods, etc., this will be covered under this provision.

The last part of the provision contains a limitation of the insurer's liability. If the assured or the master of the ship knows that the description in the document of the cargo, its quantity or condition is incorrect, the insurer is not liable. This part of the provision is new in relation to the 1964 Plan, but concurs with the solution in, e.g. Gard's P&I Conditions. On the one hand, it is sufficient that the master of the ship knows that the description is incorrect. The assured is not required to know. On the other hand, the exclusion does not cover negligence. The assured or the master must have definite knowledge that the description is incorrect.

#### § 17-38. Liability for wrongful delivery of goods

This paragraph corresponds to § 228 of the 1964 Plan.

Under the 1964 Plan, the insurer covered the assured's liability for delivery of goods carried to a recipient who was not entitled to them. If the goods were delivered without the presentation of proper bills of lading or other bearer documents for value, liability was, however, only covered

where reasonable security had been provided, or it was otherwise justifiable to hand over the goods.

The Plan restricts the cover of the assured's liability for wrongful delivery significantly, a restriction patterned on inter alia Gard's P&I Conditions. The basic principle is admittedly still that the assured's liability for wrongful delivery is covered, see subparagraph 1. However, due to subparagraph 2, this principle will in reality only be relevant where the goods are carried on a sea waybill or some other non-negotiable document. In that case liability for wrongful delivery acquires an entirely different content than in the event of carriage under a bill of lading, because such non-negotiable documents do not constitute evidence of the right to the cargo. The assured's duty to hand over the goods is therefore not tied to the document in the same way as under a bill of lading, where he is obliged to hand over the goods to the third party who presents the document in the port of discharge. In the event of non-negotiable documents, the assured shall hand over the goods to the consignee stated in the document, possibly to some other consignee named by the consignor, see section 308 of the Norwegian Maritime Code. If the goods are handed over to someone else, and the assured incurs liability in that connection, such liability will be covered under subparagraph 1.

Subparagraph 2 initially establishes that liability for wrongful delivery is not covered if the goods are handed over to a person without presentation of a due bill of lading. The main rule where the relevant carriage takes place under a bill of lading will thus be that the insurer does not cover the liability for wrongful delivery incurred by the assured because the goods were handed over to someone who is not entitled to them without presentation of the bill of lading. However, the rest of subparagraph 2 stipulates a small exception to this rule. The assured's liability for wrongful delivery in such a situation is in fact covered if the goods were carried by the assured in accordance with a sea waybill or some other non-negotiable document and handed over as prescribed by this document, but he incurs liability under a bill of lading or some other negotiable document issued by or on behalf of someone else for carriage partly in the assured's ship, partly in another ship. Such a situation may arise if a non-negotiable document and a negotiable document have been issued for the same cargo, and the bearer of the negotiable document is someone other than the cargo consignee named in the non-negotiable document. An example may illustrate the situation. Carrier A issues a bill of lading for a shipment from Kristiansund to Kiel. A is in charge of the shipment from Kristiansund to Oslo, while the shipment from Oslo to Kiel shall be handled by sub-carrier B. Under the bill of lading, each carrier is liable for damage to or loss of the goods while they are on board his vessel. B has issued for his leg of the shipment a non-negotiable document with the same named consignee as stated in the bill of lading. However, the bill of lading is transferred to someone else, and this new bearer of the bill of lading demands that the goods be delivered to B. If B has already handed over the goods in accordance with the non-negotiable document, his liability to the bearer of the bill of lading will be covered under the provision.

CEFOR Form 242 A III 1 b contained a special safety regulation with regard to liability for wrongful delivery for freighters. However, this regulation is of little independent importance in view of the limitation of liability in § 17-37 and has therefore been deleted.

#### § 17-39. General average contributions

This paragraph corresponds to § 229 of the 1964 Plan.

Subparagraph 1 is taken from § 229, subparagraph 1, of the 1964 Plan and establishes that the insurer covers the assured's loss resulting from his being precluded from claiming cargo's contribution in general average by reason of a breach of the contract of affreightment. In the event of general average, the assured will normally be entitled to recover cargo's contribution from the cargo owner or his insurer. Basically this also applies where the general average is caused by the assured's breach of contract, e.g. where a fire with major fire-extinguishing damage is caused by defects in the vessel when it last left port, and where this defect was known, or ought to have been known, to the vessel's crew and made the ship unseaworthy. However, in such cases the cargo owner may have recourse against the assured for the general average contributions they are obliged to pay, cf. YAR rule D and ND 1993, p. 162 NH FASTE JARL. If it is the assured who has incurred the general average expenses and who collects the contributions, the cargo owner will exercise his recourse claim by a set-off. If the counterclaim succeeds, the cargo owner will not have to pay the general average contribution, and the assured suffers a loss. This loss is covered by the liability insurer under subparagraph 1. This cover may be seen as a continuation of the coverage of the assured's cargo liability: Formally, the assured will not be precluded from claiming a contribution, but he has to accept being held liable for the loss which the cargo owner has suffered by the imposition of the duty to pay contribution.

The provision in § 229, subparagraph 1, of the 1964 Plan also applied where the cargo's contribution was irrecoverable for reasons other than a breach of the contract of affreightment, e.g. because of the cargo owner's unwillingness or inability to pay. This provision has been deleted in line with a corresponding limitation in the ordinary P&I Conditions.

The general average contribution may also be lost or reduced for reasons other than a breach of contract or the cargo's unwillingness or inability to pay, e.g. where the assured does not comply with the time limit for filing the claim. This will in that event be the assured's risk. Nor does the cover extend to excess general average contributions from the cargo, where a loss arises for the assured because sacrifices and disbursements exceed the value of the contributions, at the same time as the cargo owner's liability is limited to the value of the cargo.

The provision applies only in relation to the cargo's contribution. This is due to the fact that the freight contribution shall normally be covered by the assured. However, in the event of sub-chartering, the contribution shall be allocated to the charterer. The failure to pay contributions which may then occur is, however, not covered by the liability insurer.

§ 229, subparagraph 2, of the 1964 Plan contained a rule to the effect that liability for irrecoverable contributions was contingent on the provision of an average bond and reasonable security, where such security must be deemed necessary and obtainable. However, in view of the fact that the insolvency risk has been removed from the liability insurance, it is not necessary to make insurance coverage contingent on an average bond. Another matter is that such an average bond must be submitted under any circumstances in connection with the general average adjustment.

Subparagraph 2 is identical to § 229, subparagraph 3 of the 1964 Plan. Expenses incurred in connection with the collection of general average contributions will often be recoverable as costs of measures to avert or minimise loss, cf. § 4-7 and §4-12. However, subparagraph 2 imposes a direct obligation on the liability insurer to cover such costs regardless of whether or not they qualify as costs of measures to avert or minimise loss. The provision is of particular importance if legal proceedings must be instituted in connection with general average, but it also covers other costs in connection with collecting cargo's contribution, e.g. costs in connection with out-of-court collection.

As regards the assured's duties to maintain and secure the claim against the cargo, § 5-16 shall apply.

#### § 17-40. Liability for removal of wrecks

This paragraph corresponds to § 230 of the 1964 Plan.

The provision provides that the insurer shall cover the assured's liability for removal of wrecks, provided such removal is ordered by the authorities. If the assured becomes liable for the removal of a wreck, it is normally because the vessel has been involved in a collision with another vessel or object, or because it has run aground. To the extent that the liability is covered by the vessel's hull cover, it falls outside the scope of the liability insurance, cf. § 17-46, subparagraph 1 (a) with the exception of excess collision liability, cf. subparagraph 2. Under the Plan, the hull insurance covers liability for the removal of the wreck of another ship with which the insured vessel has collided, cf. § 13-1, subparagraph 1, but not liability for the removal of the wreck of the vessel itself, cf. § 13-1, subparagraph 2 (i). Liability for the removal of the wreck of the insured vessel is therefore in its entirety covered under § 17-40. Excess collision liability for an oncoming vessel, i.e. liability for the removal of wreck for the oncoming vessel which exceeds the sum insured for collision liability is covered partly under § 17-40, partly under the rule of cover for the assured's ordinary liability for property damage, cf. § 17-36.

The scope of the provision is reduced in relation to the 1964 Plan in that it merely covers liability for the removal of wrecks "ordered by the authorities". This restriction entails that liability for the removal of wrecks according to contract is not covered by the insurance. Otherwise, the cover is very general. It covers any basis for liability and liability for the removal of wrecks which present an obstruction to traffic according to the port regulations of the country concerned. Cf. for Norwegian law the Ports and Waters Act of 8 June 1984 no. 51, section 18, subparagraph 3, second and third sentences, liability for removal of wrecks because the vessel has gone down at a location where the cargo may cause damage, and liability for removal of wrecks as a result of collision to the extent that this liability is not covered under the hull insurance. Both strict liability (e.g. under the Ports Act) as well as culpa liability are included. It is also irrelevant whether the costs incurred in removing the wreck concern the insured vessel or another vessel, and it is irrelevant whether the vessel becomes a wreck due to a casualty or for other reasons.

Under § 230 of the 1964 Plan, the insurance only covers liability for the removal of wrecks where the vessel was lost in consequence of other causes than war perils. This was due to the fact that the war-risks hull insurer covered liability for the removal of wrecks where the ship was lost as a result of a war peril. In the Plan, liability for the removal of war wrecks has been incorporated in the liability insurance part in chapter 15 on war-risks insurance, cf. § 15-21. It must therefore also be included in the liability insurance under chapter 17.

A vessel is a "wreck" when salvage has been abandoned because it would be unprofitable, i.e. the value of the object to be salvaged is less than the costs involved in salvaging it. It is irrelevant whether the vessel is condemnable under the Norwegian Maritime Code or under the hull conditions. In practice, it may be difficult to decide when the insurer's liability for removal of wrecks is triggered. When an owner is instructed to remove a wreck, he must without undue delay decide whether he wants to salvage the vessel so that the insurer may start the work of removing the wreck before the port authorities do it.

If the insurer pays the costs involved in removing the wreck, the proceeds will accrue to him, even if the wreck should prove to be worth more than the costs involved in removing it.

The term "liability for the removal of wrecks" also covers the costs of removing the cargo, etc. to the extent that this is necessary in order to remove the wreck. Otherwise the removal of wreckage other than the actual shipwreck will not be covered, e.g. cargo which the ship has lost, or parts of vessel or cargo which have sunk. Nor does the cover include liability for obstructions to traffic vis-à-vis owners of ports, canals, etc. It is only the actual wreck-removal expenses that are covered.

#### § 17-40A. Liability for special salvage compensation

This paragraph is new.

According to this provision the insurer is required to cover the assured's liability for special compensation to the salvor where the assured is required to pay such compensation under the rules of section 449 of the Maritime Code of 1994 or other rules of law or contract rules which are based on article 14 of the International Convention on Salvage of 1989. Article 14 of the Convention, on which section 449 of the Maritime Code of 1994 is based, arises from the amendments to the international salvage rules relating to prevention of damage to the environment. It appears from section 446 (b) of the Maritime Code, cf. article 13 paragraph 1 (b) of the Convention that the ordinary salvage reward shall be fixed taking into account "the skills and efforts of the salvors in preventing or minimising damage to the environment". The concept "damage to the environment" is defined in further detail in section 441 (d) of the Maritime Code of 1994, cf. article 1 (d) of the Convention. If therefore the result of the salvor's efforts is that the ship has been salvaged, wholly or in part, at the same time as damage to the environment has been prevented or minimised, this will be taken into consideration and the salvage reward will be increased. The total salvage reward will be apportioned in the general average adjustment which shall take place after a salvage operation, cf. Rule VI (a) subparagraph 2 of the York Antwerp Rules. The ship's general average contribution will be covered by the (hull) insurer in the normal manner according to the rules in § 4-8. If the conditions for a general average adjustment are not met, either because the ship, freight and cargo belong to the same person, or because the ship is in ballast, the (hull) insurer will nevertheless cover the ship's contribution in an assumed general average adjustment under the rules of § 4-9 and § 4-11 respectively.

If the salvor has incurred costs in connection with "salvage operations in respect of a ship which by itself or its cargo threatened a risk of damage to the environment", he is entitled to a special compensation from the owner equivalent to his expenses, see section 449, first paragraph, of the Maritime Code, cf. Article 14.1 of the Convention. If the ship has been salvaged, wholly or in part, such special compensation shall, however, be paid only to the extent that it exceeds the fixed salvage reward, see section 449, first paragraph, 2nd sentence, of the Maritime Code, cf. Article 14.1 of the Convention. However, it is not a condition for claiming special compensation that the efforts were a success in the sense that damage to the environment was prevented or minimised. But, if the efforts were successful, "the special compensation may be increased by about 30% of the expenses incurred by the salvor", and if deemed "fair and just" by "up to 100%", see section 449, 2nd paragraph, of the Maritime Code, cf. Article 14.2 of the Convention. This special compensation is not recoverable in the general average adjustment, see Rule VI (b) of the York-Antwerp Rules and, accordingly, will not be covered by the (hull) insurer as part of the ship's general average adjustment contribution.

It follows from the provision that the assured's liability for such special compensation is recoverable under insurance of fishing vessels and small freighters according to the rules in the liability section. This is subject to the condition that liability is provided for by section 449 of the

Maritime Code of 1994, or rules of law in other countries which are based on Article 14 of the International Convention on Salvage of 1989. Liability may also be provided for in contract clauses which are based on this Convention, see e.g. Lloyds' Form (LOF 1995) clause 1 (b). Given that liability for special compensation must be regarded as a special rule relating to costs of measures to avert or minimise loss, cf. § 4-12 relating to costs of particular measures taken to avert or minimise loss, liability is not recoverable within the sum insured under § 17-53, but under the separate sum insured for costs of measures to avert or minimise loss, cf. § 4-18, subparagraph 1, second and third sentences, and the Commentary to § 17-53.

#### § 17-41. Stowaways

This paragraph is practically identical to § 231 of the 1964 Plan.

The provision regulates expenses and liability relating to stowaways. The assured's liability and direct expenses resulting from the vessel having stowaways on board are covered. Such liability is first and foremost relevant in the event of deportation, etc., if the stowaways get ashore in a port where they are not wanted.

The term "direct expenses" merely covers "out-of-pocket expenses" in contrast to loss of earnings.

According to the second part of the provision, an exception is made for expenses for board and lodgings which could otherwise have been provided on board. Such maintenance expenses will normally be so low that there is no point in having the insurance cover them.

This provision applies only to "stowaways". It does not cover the situation where the vessel takes refugees on board for humanitarian reasons.

#### § 17-42. Liability for fines, etc.

This paragraph corresponds to § 232 of the 1964 Plan.

The insurer's liability for fines is limited somewhat as compared to the 1964 Plan, cf. subparagraph 2. Subparagraph 1 (c) has furthermore been amended in order to concord with the provision in § 17-34.

According to subparagraph 1 (a), the assured's liability for immigration and customs fines is covered regardless of who has committed the offence. It is sufficient that the assured becomes liable and that liability has been incurred in direct connection with the running of the vessel. This latter requirement will normally be satisfied if the assured becomes liable for the conduct of the crew or the passengers, even if the offence has no connection with the service or the vessel. The possibility of the assured becoming liable in such cases is a risk in connection with the running of the vessel.

The precondition for the cover is that it is a question of "fines", i.e. a definite penal sanction. Charges in the form of customs duties or taxes are not covered, even if they might be of a certain penal nature.

Letter (b) covers fines resulting from the conduct of the crew. Such fines are covered regardless of the nature of the fine, but the cover concerns only fines caused by the master or the crew. Fines attributable to offences committed by passengers or the assured's people ashore are not covered.

Under letter (c), expenses in connection with orders for deportation of the crew, passengers or other persons accompanying the vessel without belonging to the crew are covered. For the assured, such expenses are in effect the same as fines when he is liable for them. The provision concerns all persons who have accompanied the ship, i.e. also persons who are neither passengers nor members of the crew, e.g. an itinerant repairman. However, the deportation of stowaways is covered under § 17-41. The cover also extends to a deportation which is foreseeable, e.g. where passengers go ashore or crew is signed off in a port where they have no permit of residence and no home journey has been arranged for them.

The cover under subparagraph 1 presupposes that the assured has "liability" for the fine or the expenses, i.e. a personal liability. However, subparagraph 2 extends the cover to include such cases where payment can be enforced by detaining the ship, e.g. by a formal arrest or by denying clearance to depart, or by obtaining security in the ship, e.g. because there is a maritime lien or some other legal mortgage for the claim. A fine for which the assured is not liable and where payment furthermore cannot be enforced is, however, not covered by the liability insurer.

Subparagraph 3 makes an exception to the insurer's liability under subparagraphs 1 and 2 for a certain number of specified fines. Letter (a) excludes fines resulting from overloading of the vessel. By "overloading" is meant that the ship lies lower in the water than the allowed mark, normally due

to excess cargo, bunkers, ordinary water or ballast water. The reason for the exception is that overloading entails a significant increase in the risk of damage to ship, cargo and passengers. A similar exception is contained in letter (b) as regards the fact that the vessel has more passengers than allowed.

The exception in letter (c) concerning illegal fishing has to do with the fact that increased competition combined with reduced fish resources has resulted in an increased risk of excessive fishing. Many coastal states have strict regulations for permitted fishing zones, the use and size of equipment and prohibition against fishing certain types of fish. Fines resulting from a breach of these rules should not be covered by the liability insurance.

Letter (d) excludes fines resulting from inadequate maintenance of lifesaving or navigation equipment and is based on the increased focus on safety. Lifesaving equipment includes not only life boats and life buoys, but also equipment such as life jackets, flares and water tight lights. Maintenance of this equipment includes routine repairs and replacements. By navigation equipment is meant e.g. radar, echo sounder and charts. Most coastal states have minimum requirements regarding the lifesaving equipment which must be on board the ship. Breach of such regulations will normally result in a fine, which is thus not covered under the liability insurance.

The exclusion in letter (e) concerns the flag state's requirement that a ship shall at all times carry the mandatory certificates on board. As far as Norway is concerned, this is a certificate required by the Norwegian Maritime Directorate. According to §17-4 the insurance cover will lapse if the valid certificate lapses. In that event, the exclusion in letter (e) is superfluous. The provision is therefore only relevant where the vessel does have a valid certificate, but it is not on board.

#### § 17-43. Liability for social benefits for the crew

This paragraph corresponds to § 233 of the 1964 Plan and CEFOR Form 242 A II 3. Subparagraph 1 (d) was added in the 2002 version.

Subparagraph 1, which is identical to § 233 of the 1964 Plan, establishes that the insurance covers the assured's liability for certain specific social benefits for the crew in accordance with the law or collective wage agreements.

Under letter (a), the care and maintenance of the crew on shore in the event of illness or injury are covered. The provision reflects the fact that a seaman who has fallen ill or been injured is, under section 28, no. 1, cf. section 27, of the Norwegian Seaman's Act, entitled to nursing for the assured's account, on board or ashore, for the duration of his service. If he is ill or injured on termination of his employment, he has the same rights for up to 16 weeks. It is only the expenses for care and maintenance ashore which are covered, not on board the ship.

The insurer also covers costs in connection with the crew's travel home, including maintenance, in the event of illness or injury or following a shipwreck, cf. letter (b). A seaman who is left in a Norwegian or foreign port due to illness or injury, or who in signing off suffers from an illness which would have made signing off necessary, is, under section 28, no. 3, of the Seaman's Act, entitled to a free journey home with maintenance for the assured's account. If his service terminates as a result of a shipwreck or condemnation, the seaman is entitled to a free journey home with maintenance, cf. section 18 of the Seaman's Act.

According to letter (c), costs in connection with the funeral and sending home of the cinerary urn and the deceased's effects are covered. The assured is obliged to cover such expenses if a seaman dies whilst still in service or whilst he is entitled to nursing or whilst he is travelling for the assured's account, cf. section 31 of the Seaman's Act.

Letter (d) was added in the 2002 version, and provides for an extension of liability to include liability under collective wage agreements for costs relating to the crew's travel home, including maintenance, in the event of the illness or death of a close relative. This extension was taken from Gard's rule 27 d and Skuld's rule 7.6.1, and brings the liability insurance under chapter 17 in line with the other P&I covers as far as this point is concerned.

Subparagraph 2 is practically identical to CEFOR Form 242 A II 3, second sentence, and establishes that no deductible shall be calculated in respect of compensation under § 17-43, unless this has been specifically agreed.

CEFOR Form 242 A II 3, first sentence, limits the insurer's liability to the part of the costs which exceeded the benefits from public social security schemes. This provision has been moved to § 17-46, subparagraph 3.

## § 17-44. Travelling expenses for replacement crew

The first sentence was amended in the 2007 version. The paragraph is otherwise identical to earlier versions of the 1996 Plan.

The first sentence establishes that the insurer must cover the necessary expenses of a replacement, and is based on the fact that a number of countries have rules concerning minimum manning and refuse to let a ship leave a port unless these requirements are met. If the master or an officer of a ship dies or falls ill, it may therefore be necessary to have a replacement in order for the ship to be allowed to leave the port. The cause of death, injury or illness is irrelevant, but the illness or injury must be the primary reason for the termination of service. Only the expenses related to the outward journey are covered, but the place of departure is irrelevant. The cover includes all expenses, e.g. ticket, meals, accommodation during the journey, etc. The cover is, however, subject to the condition that the expenses are deemed "necessary". If an acceptable replacement can be found locally, therefore, the assured does not have the right to send a replacement from elsewhere at the insurer's expense.

Under earlier versions of the Plan, the insurer only covered expenses for replacements' travel abroad. However, there is just as great a need for cover for expenses related to replacements' travel in Norway, because the costs involved are often higher. The word "abroad" has therefore been deleted.

The second sentence restricts the cover further. Only expenses for travel to the first port of call following the death, or the port where the person in question signed off, even if the replacement is in actual fact sent to a port further away, are recoverable.

## § 17-45. Disinfection and quarantine expenses

This paragraph is almost identical to § 235 of the 1964 Plan.

The first sentence deals with the cover of the costs of quarantine orders and disinfection of the ship. By "quarantine orders" is meant orders from public authorities, and the expenses are "necessary" to the extent that they must be incurred in order to comply with the order. The reason for the order is irrelevant. It may be a relevant danger of infection or a general fear of infection.

The cover of necessary expenses in connection with the disinfection of ship or crew is limited to cases of infectious diseases on board and does thus not cover extermination of insects, bugs, vermin, etc. Nor does it apply to preventive measures, unless they constitute measures to avert or minimise loss.

Under the second sentence, operating expenses during the stay will not be covered. Loss of time and other consequential losses will also fall outside the scope of cover.

## § 17-46. Limitation due to other insurance, etc.

This paragraph corresponds to § 238 of the 1964 Plan, CEFOR Form 242 A II 1 and 3 and 5 (d).

Subparagraph 1 is almost identical to § 238 of the 1964 Plan, with the exception of two additions: (a) also refers to the hull insurance rules in chapter 17, and in letter (b) an addition has been incorporated concerning liability for towage of vessels which belong to the same fishing team, taken from CEFOR Form 242 A II 5 (d).

The definition in letter (a) concerns losses which according to their nature are insurable under a hull insurance according to part II of the Plan, or part IV, chapter 17, sections 1-5, or other large-ship insurance in part III of the Plan. The provision gives a strictly complementary delimitation between the liability insurance and the above mentioned insurances. It is irrelevant whether the insurance in question has in actual fact been effected or whether it is limited quantitatively so that the assured will not get full cover, cf. "according to their nature". This applies both in relation to limitations which follow from the actual standard conditions, and limitations which follow from individually agreed deductions or deductibles. However, an important exception to this rule concerns collision liability, cf. below.

Furthermore, the cover provided under Plan provisions is of decisive importance. If the assured has taken out an insurance on conditions which afford a cover inferior to that of the Plan's provisions, this will accordingly not result in any extension of the scope of cover of liability.

Overlapping between hull cover and liability cover occurs, partly where the liability insurer covers damage to or loss of the assured's effects, and partly where the hull insurance covers the assured's liability, see further Brækhus/Rein: Handbook of P&I Insurance, pp. 248 et seq. The most frequently occurring overlapping situation concerns collision liability, where the hull insurer



according to § 13-1, cf. § 17-15, covers liability in connection with a “collision” caused by the vessel with accessories, equipment and cargo, or tug used by the vessel. However, this cover is subject to a whole series of limitations, cf. § 13-1, subparagraph 2, § 17-15, subparagraph 2, and § 17-16, where the liability insurer comes in (with the exception of § 13-1, subparagraph 2 (a), cf. below). In addition, the liability insurer covers liability which is not covered by the rule in § 13-1, cf. § 17-15. Reference is here made to the Commentary on § 13-1 and § 17-15, and to Brækhus/Rein 1.c. pp. 250 et seq.

According to letter (b), first sentence, the liability insurer does not cover losses as mentioned in § 13-1, subparagraph 2 (a), i.e. liability which arises while the vessel is engaged in towage, or which is caused by the towage, unless it is a salvage operation. The reason for this exclusion clause is the increase in the collision risk which arises when the insured vessel engages in towage. The second sentence, which is taken from CEFOR Form 242 A II 5 (d), however, modifies this exclusion as regards liability incurred during towage of a vessel belonging to the same fishing team.

Letter (c) concerns losses as mentioned in § 4-16 and contains a delimitation in relation to fire insurance, cargo insurance or other general insurance. According to § 4-16, the liability insurer will in certain cases be liable for damage to the assured’s own property. However, also on this point, the liability insurer’s liability is strictly complementary to general insurance. Losses which according to their nature are insurable under the said general insurances fall outside the scope of the liability insurance. The provision means that the assured normally may not claim compensation for damage to his own cargo according to § 17-36. Such damage could have been covered by a cargo insurance.

Subparagraph 2 represents an important exception to the principle that liability insurance is complementary to hull insurance. The liability insurer covers collision liability which exceeds the amount which the assured may claim under a hull insurance with a sum insured which is equivalent to the full value of the vessel. The liability insurance here provides a complementary excess cover of the assured’s collision liability. The provision is identical to the 1964 Plan, with the exception that the word “ship” has been replaced by “vessel”.

The excess cover concerns liability in excess of “the amount which according to § 13-3 is recoverable under a hull insurance with a sum insured that covers the full value of the vessel”. The “full value” of the vessel means the value (normally the market value) at the time the casualty occurs, not the insurable value in relation to the hull insurance, which is the full value of the interest at the inception of the insurance, cf. § 2-2. However, the assessed hull value will be relevant as an element in the assessment of the real value. If the vessel is undervalued, the excess cover does not apply to the amount between the assessed hull value and the “full value” of the vessel.

Subparagraph 2, second sentence, provides a separate rule regarding collision liability for collision with the assured’s own vessel, cf. § 4-16. For excess collision liability for sister ships, a deduction will be made for amounts which could have been covered under insurances as mentioned in letters (a) and (c). On this point the cover is thus subsidiary also in relation to insurances mentioned in letter (c).

Subparagraph 3 is taken from CEFOR Form 242 A II 1, third sentence, and 3, first sentence, but has been rewritten and simplified, patterned on subparagraph 1. The provision makes the liability insurance partly subsidiary, partly complementary, in relation to benefits from the Norwegian National Insurance, pension schemes, the Occupational Injuries Insurance and other personal insurance benefits funded by the liable employer. The provision comes in addition to the protection against liability for personal injury which the assured, and hence the liability insurer, already have under Norwegian law pursuant to section 3-1, subsection 3, and section 3-7 of the Compensatory Damages Act, and which entails that a deduction shall be made in the claims settlement (on an exact amount basis or on a discretionary basis) for the relevant benefits, at the same time as the assured will normally not have any liability to the party who makes the payments. However, the delimitation in subparagraph 3 goes further than the rules of the Compensatory Damages Act.

The provision applies to any type of personal injury, regardless of who the injured party is, and therefore covers any liability for personal injury covered under § 17-35. In addition, it applies to the liability for social benefits for the crew, cf. § 17-43.

According to letter (a), the cover has been made subsidiary to national insurance benefits and benefits from employee or occupational pension schemes. The deciding factor here is the actual amount which the injured party receives from the said schemes. The provision applies only to “employee or occupational” pension schemes. Private pension insurance agreements which the injured party might have therefore fall outside the scope of cover.

As regards benefits covered by insurance agreements which are mandatory under collective wage agreements and which are funded by the liable employer, the cover of liability has, however, been made complementary, cf. letter (b). The provision is relevant where the assured becomes liable for persons of whom he is the employer, i.e. the vessel's crew and any other employees who might be injured in connection with the running of the vessel. If the assured in his capacity of employer has neglected to take out the mandatory insurance, defaulted on payments of premium, etc., and therefore does not obtain a deduction for these benefits in accordance with section 3-1, subparagraph 3, of the Compensatory Damages Act, the assured must cover this part of the liability himself.

Letter (c) makes the cover of liability complementary to the occupational injury insurance. According to section 3 of the Occupational Injury Insurance Act, an employer is obliged to take out insurance to cover industrial injuries and industrial diseases for his employees. Losses which according to their nature are covered under this insurance are removed from the liability cover. This applies both in relation to the assured's own employees, to persons whom the assured uses in the service of the vessel, but of whom the assured is not an employer, and for total outsiders, e.g. an injured party on an oncoming vessel in connection with a collision. As regards the industrial injuries insurance, the assured therefore bears the risk that other employers have in actual fact fulfilled their obligation to take out insurance. In practice, the injury will be covered by a pool arrangement if no industrial injuries insurance has been taken out. In view of the fact that the insurance companies involved have recourse against both the employer and the party causing the injury (the assured), cf. sections 7 and 8 of the Industrial Injuries Insurance Act, cover under the assured's liability insurance may give the industrial injuries insurance company a motive for a recourse claim against him. However, such injuries should remain with the employer or with the industrial injuries insurance companies jointly.

#### § 17-47. Safety regulations/Re. § 3-22 and § 3-25

This paragraph corresponds to CEFOR Form 242 A III.

CEFOR Form 242 A III 1 (a) and 2 (b) contained a detailed regulation of the exclusions of liability which the assured's contracts of affreightment and shipment documents were to contain. The provision was partly in contravention of the rules of the Norwegian Maritime Code of 1994. During the Plan revision it was decided that there would not be much point in preparing a new and detailed safety regulation adapted to these rules. Instead a simple model was chosen patterned on the limitation of liability rule in inter alia Gard's Conditions, but in the form of a safety regulation. The assured's duty to incorporate disclaimers of liability is now tied directly to his right to exclusion of liability and limitations of liability according to current rules of law.

By "current rules of law" is meant the rules in force in the State where the liability arises, as well as relevant international conventions. As far as Norway is concerned, the rules are today first and foremost contained in sections 171 ff. of the Norwegian Maritime Code.

In view of the fact that this is a special safety regulation, the loss of cover is subject to the condition that the assured or anyone who on his behalf is obliged to comply with the regulation, has been negligent, and that there is a causal connection between the negligence and the liability, cf. § 3-25, subparagraph 2.

CEFOR Form 242 A III 2 (a) contained a regulation to the effect that passenger vessels must be approved for the conveyance of persons. This provision is unnecessary, because such a requirement already follows from § 3-22, cf. § 3-25, which requires the assured to comply with public regulations.

CEFOR Form 242 A II 1 (b) contained a safety regulation relating to the delivery of goods without presentation of bill of lading. The provision is superfluous in view of the limitation of the liability for wrongful delivery under § 17-37, second sentence, and has therefore been deleted.

#### § 17-48. Assured's fault

This paragraph corresponds to § 239 of the 1964 Plan and Cefor Form 242 A II 4. **The commentary was amended in the 2007 version in accordance with the amendments to § 3-22.**

Subparagraph 1 is identical to § 239, subparagraph 1, of the 1964 Plan and regulates the event insured against caused by a negligent act or omission. The provision supplements and modifies §§ 3-32 et seq. It follows from § 3-32 that the insurer does not cover liability which the assured has intentionally caused, whereas in the event of gross negligence a reduction may be made under § 3-33. However, under § 17-48, the rules have been made stricter: the insurer is completely free from liability if the assured has brought about the loss by gross negligence, or on the basis of a

negligent understanding of rules of law or contractual terms. The reason is the very comprehensive liability cover, inter alia in view of the fact that the insurance covers the assured's contractual liability.

The deciding factor according to the first alternative, is that the loss was "brought about" by the assured "by a grossly negligent act or omission". The assessment of the negligence shall therefore be tied to the act or omission, and not to the consequent damage. The gross negligence is not required to have been deliberate.

The second alternative is a special rule relating to mistake of law in connection with the performance of a contract. In such cases the criterion gross negligence is often difficult to apply. In a business context the assured will often have to take chances, and he may not automatically be deemed to have been grossly negligent if he chooses a solution which may lead to liability. He makes his choice between the various possibilities based on an evaluation as to what will give him the best result. If he is lucky, the profit is his. If he is unlucky, he should not be entitled to transfer the loss to the liability insurer. The rule acquires special significance in relation to so-called "liberty" clauses in charterparties, i.e. deviation, ice, war or strike clauses.

Conception of law is "wrong" when it is in contravention of clear law or practice. That the understanding is "uncertain" means that it is disputed, so that one must be prepared that the courts resolve the issue in the disfavour of the assured. It is not decisive whether arguments may also be submitted in favour of the assured.

Subparagraph 2 lays down special rules for an assured who is a master of the vessel (the master owner) or a member of the crew. The provision was patterned on § 3-25, subparagraph 1, without this entailing any major changes on points of substance. Reference is furthermore made to the explanatory notes to § 3-22, subparagraph 1, second sentence, and § 3-25, subparagraph 1, second sentence.

#### § 17-49. Rights of the insurer in the event of liability

This paragraph corresponds to CEFOR Form 242 A IV.

CEFOR Form 242 A IV contained detailed provisions regarding the assured's duties in the event of liability. However, most of these rules had their parallels in other rules in the Plan and have therefore been deleted. This applied to no. 1 relating to assessment of damage to fishing gear in order to prevent the gear from being dumped and evidence removed. Such a duty follows from § 5-9, no. 2, subparagraph 1, regarding the assured's duty to notify the insurer, which follows from § 3-29 and § 5-9, no. 2, subparagraph 2, first sentence, concerning the duty to obtain information and document and limit the claim. These duties follow from § 3-30, § 5-1, § 5-9, § 5-15 and § 5-16, no. 2, subparagraph 3, which required the assured not to admit to any duty to pay compensation or to negotiate such a duty without the insurer's consent, unless it was a case that had been subjected to mediation before the Norwegian Fisheries Inspectorate and the amount was less than NOK 10,000. This is superfluous in addition to § 4-17, subparagraph 3, no. 2, subparagraph 4, to the effect that the insurer conducts the case and covers litigation costs. This is based on § 4-4 and § 5-10. No. 2, subparagraph 2, last sentence, contained a rule to the effect that the assured had a duty to seek an amicable settlement with the injured party if the insurer so requested. The provision has no direct authority in the Plan, nor is it in accordance with ICA, and it has therefore been deleted.

However, no. 2, subparagraph 5, of the Special Conditions, has been retained, cf. subparagraph 1. By the term "the liability amount" is meant the lowest of the injured party's claim, the limitation amount under the law and the insurer's maximum liability under § 17-53.

Subparagraph 2 is taken from no. 2, subparagraph 6, of the Special Conditions and refers to the mandatory provision in ICA section 7-8 of ICA. The fact that the injured party does not otherwise have a direct claim against the insurer appears from § 4-17, subparagraph 1.

#### § 17-50. Liability for loss occurring during other transport, etc.

This paragraph corresponds to §§ 242 and 243 of the 1964 Plan.

The provision has on certain points been rewritten in order to take into consideration the changes that have taken place in the mandatory carrier liability through the Norwegian Maritime Code of 1995. Letter (a) refers to sections 254 and 274 of the Maritime Code, while letter (b) refers to section 285 of the same Act. The provision must also be seen in conjunction with the basic principle in § 17-34 to the effect that the liability insurer only covers loss that occurred in direct connection with the running of the insured vessel.

Letter (a) excludes liability for cargo occurring during the period prior to loading or after discharging or during transport to and from the ship covered by the insurance when the cargo is not in the carrier's custody. If the cargo is in the carrier's custody, e.g. where it is carried out to the ship in the carrier's boats, the assured will be liable under section 274 of the Norwegian Maritime Code, and the liability must normally be deemed to have occurred in direct connection with the running of the vessel. For passengers a corresponding distinction shall apply according to letter (d).

It follows from letters (b) and (c) that the assured's liability to passengers and cargo is not covered while passengers or cargo are in transit with or in the custody of another carrier. As far as the cargo is concerned, it follows from section 285, subsection 2, of the Norwegian Maritime Code that the assured can in such cases normally disclaim liability. The same follows from section 431, subsection 3, of the Norwegian Maritime Code as regards passenger transport.

§ 243 of the 1964 Plan contained a provision relating to liability for loss occurred during storage. This has now in reality been incorporated in letters (a) and (b) and has therefore been deleted.

#### § 17-51. Limitation of liability for fishing vessels

This paragraph is identical to CEFOR Form 242 A II 5 (b).

The provision refers to the "knock-for-knock" principle which is mentioned in the Commentary on § 17-8 and § 17-15. When several vessels are fishing together in the same fishing team or as pair trawlers, damage to the assured's own and other vessels with accessories and catch is foreseeable. It is therefore more expedient for the individual owner to cover damage to his own object, possibly via his hull insurance, rather than having a claims settlement in connection with the liability insurance.

CEFOR Form 242 A II 5 (a) has been incorporated in § 17-34, subparagraph 1, second sentence.

CEFOR Form 242 A II 5 (d) has been incorporated in § 17-46, subparagraph 1 (b).

CEFOR Form 242 A II 5 (c) contained a rule to the effect that the insurer did not cover liability resulting from the vessel or the fishing team to which it belonged having breached the rules of the Act on Salt-Water Fishing, etc. of 3 June 1983 no. 40, chapter V. It was not quite clear whether the rule was to be deemed a safety regulation or an absolute limitation of liability. However, chapter V contains rules regarding operations in the fishing field, and under the Plan system it is natural to regard the provision as a safety regulation. In that case, it is superfluous. It follows from § 3-22 that any statutory provision to prevent loss constitutes a safety regulation under the Plan. The provision has therefore been deleted.

#### § 17-52. Limitation of insurer's liability for measures to avert or minimise loss

This paragraph is almost identical to § 245 of the 1964 Plan.

Basically the liability insurer covers costs of measures to avert or minimise loss according to the rules in §§ 4-7 et seq. Provided that the conditions are met, the insurer will be fully liable regardless of the nature of the loss, damage or expenses in question. As regards liability insurance, however, § 17-52 contains a number of restrictions to this principle. The provision must be regarded as a continuation of the restrictions which follow from § 4-12 concerning particular measures to avert or minimise loss. This means that it cannot be interpreted antithetically, but must be supplemented with § 4-12.

Letter (a) is based on the point of view that proper loading and stowage is an operating expense which the assured shall pay himself. This also applies if the work is initially done so inadequately that it has to be done over again. The vessel may be "too heavily loaded" without being overloaded in the ordinary sense.

Letter (b) excludes costs of measures which were or could have been taken by the vessel's crew or by the proper use of the vessel or its equipment. Typical costs here are wages and overtime of the crew and bunkers consumption. If such costs were to be covered as costs of measures to avert or minimise loss in all cases where the measures must be regarded as unforeseeable or extraordinary, cf. § 4-12, this could result in an unnecessarily complicated settlement. The distinction between operating costs and costs of measures to avert or minimise loss is often difficult to make. Certain costs shall be regarded as operating costs even if they are incurred by measures which, seen in isolation, are unforeseeable or extraordinary, e.g. a minor deviation to avoid a storm centre. It is therefore important to have an inflexible rule in order to reach a conclusion. The provision entails that costs as mentioned in letter (b) are not covered, even if the measures are of an extraordinary nature or are qualified as unforeseeable. Wages and bunkers in connection with a port of refuge

call in order to recondition the cargo shall therefore not be covered. As regards the use of the vessel, it is, however, a condition that it is "justifiable". If it is necessary to force the engine so that there is a deliberate risk of damaging it, the costs of potential damage shall not be covered. Similar considerations apply to the exclusion in letter (d).

Letter (c) entails that the liability insurer will not cover as a cost of measures to avert or minimise loss the liability the assured may incur if such a measure delays the vessel.

#### § 17-53. The sum insured as a limit to the insurer's liability

This paragraph corresponds to CEFOR Form 242 A I 4.

The provision is taken from CEFOR Form 242 A I 4, but has been amended in accordance with the other rules of the Plan, cf. § 4-18. The limitation also applies if the injured party files the claim directly against the insurer. If the assured, according to current rules of law, is entitled to limit his liability to the injured party, the insurer is obviously also entitled to invoke this limitation vis-à-vis the injured party.

The sum insured applies only to the actual liability for compensation associated with the casualty. If costs of measures to avert or minimise loss have also been incurred, special rules shall apply in accordance with § 4-18, subparagraph 1, second and third sentences.

Subparagraph 2 is new and specifies that payments under § 4-19 are made in addition to the maximum amount of the policy.

#### § 17-54. Deductible

This provision corresponds to CEFOR Form 242 A II 7.

In accordance with the other deductible provisions of the Plan, the actual amount of deductible has been removed from the provision.

## **Chapter 18 - Insurance of offshore structures**

### **General**

The chapter is new in the Plan and is based on CEFOR Rig Form No. 1, and certain Special Conditions. The references below and in section 1 to the Special Conditions concern CEFOR Rig Form No. 1. The Commentary is partly taken from the Norwegian Conditions for Hull Insurance of Drilling vessels with Commentary of 1975.

CEFOR Rig Form was written in English. It was not considered expedient to have English conditions in the Norwegian version of the Plan, and it was also natural to give the conditions a "Norwegian" form. A number of formulations in the Special Conditions have therefore been simplified or deleted altogether, either because they are seen as unnecessary repetitions or superfluous alongside the other provisions of the Plan. The fact that a formulation has been changed does not therefore necessarily mean that changes on points of substance have been made. Changes on points of substance will appear from the Commentary on the individual provisions.

A number of the Special Conditions have become superfluous after insurance of offshore structures was incorporated in the Plan. This applies to II, 1, 2 on nuclear risk, II, 2 on interventions by State Powers, II, 3 on information from classification societies, II, 5 on responsibility for measures to avert or minimise loss, II, 6, 1 on loss in connection with measures to avert or minimise loss under another insurance, II, 7 on venue, II, 10 on interest insurances, II, 14 on costs to expedite repairs, II, 15 on removal, II, 18 on foreign currency, II, 19 on interest, II, 20 on change of ownership, II, 21 on change of class, II, 22 on time-limit for repairs, II, 23 on duty of notification, II, 24 on limitation, II, 25 on fraud in connection with claims settlements, IV on trading limits, and V on return of premium.

CEFOR Rig Form II, 13 established that § 176, letter (I) of the 1964 Plan shall not apply. This provision has been deleted in the Plan and the exclusion has accordingly become superfluous.

### *Section 1 - Hull insurance*

#### § 18-1. Scope of application and applicable rules

This paragraph is new.

The first sentence establishes that it must be evident from the policy that the insurance has been effected in accordance with chapter 18. The background to the rule is the fact that there is no clear distinction between ordinary ships that are insured under the general hull insurance conditions of the Plan, chapters 10-13, and offshore structures that are insured in accordance with chapter 18, cf. what is stated about the distinction between “ship” and “vessel” in connection with § 17-1. If hull insurance has been effected without any specification that the rules in chapter 18 shall apply, the basic assumption must be that this is an ordinary hull insurance. This must apply, even if the insurance has been effected for a structure which could have been covered under chapter 18.

CEFOR Rig Form was associated with insurance of “mobile offshore units”, and defined this term in I, 1, (1) as “mobile units used in connection with the exploration or exploitation or storage of natural resources of the seabed or the subsoil thereof, or in aid of such activity”. However, this definition has no legal significance in relation to the rules in the Plan and has therefore been deleted. It will therefore be up to the parties to decide whether an offshore structure shall be insured in accordance with the rules in chapter 18.

In practice, however, chapter 18 will first and foremost be used for vessels and other mobile installations that are used for the exploration for, exploitation or storage of natural resources of the seabed, or in support of such activity. The designation of the insurance as an insurance of “offshore structures” means that it accordingly covers both various forms of vessels operating on the continental shelf and various forms of mobile installations. It is irrelevant whether the structure is designed like a ship and is a ship (e.g. a drilling vessel or production vessel), or if it falls outside the normal ship’s concept, e.g. jack-up or semi-submersible structures/installations.

According to the definition in the Special Conditions, it was a prerequisite that the structure was “mobile”. Fixed or stationary installations, e.g. platforms resting on poles rammed into the seabed, were thus not included. Nor did the rig conditions cover other types of stationary facilities, e.g. pipelines. Chapter 18 is not based on any such absolute distinction between mobile and stationary facilities or structures. The normal situation will nevertheless be that mobile installations are insured on Plan conditions, while fixed installations are insured under a more comprehensive energy insurance. By fixed installations are thus meant steel-fixed or concrete-fixed installations which are placed in the field to be used throughout the life of the field. However, there is no point in drawing a sharp line between a mobile and a fixed installation.

The second sentence states the rules applicable to insurance under chapter 18, section 1. In addition to chapter 18, the rules in the hull part of the Plan (chapters 10-13) shall apply to the extent that they are not departed from in chapter 18. The general part of the Plan (chapters 1-9) shall obviously also apply; however, it is not necessary to state this explicitly. CEFOR Rig Form I, 2 contained a provision to the effect that insurance of drilling rigs, etc. was effected on full conditions in accordance with §10-4 of the Plan. This provision is superfluous when reference is made to the ordinary hull conditions, because it appears from § 10-4 that the insurance is regarded as effected on full conditions, unless otherwise provided.

#### § 18-2. Objects insured/Re. § 10-1

This paragraph corresponds to CEFOR Rig Form I, 3.

CEFOR Rig Form I, 3 contained partly rules relating to the objects insured, partly rules relating to insurance of objects removed from the vessel. This provision is divided into two and patterned on § 10-1 and 10-2. § 18-2 regulates the objects of the insurance, while the cover of objects removed from the structure is contained in §18-3. Otherwise, the rules represent a retention of the Special Conditions, but the cover has been somewhat extended.

Letter (a) has been taken from the Special Conditions I, 3 (1), first sentence. The insurance first and foremost covers the structure stated in the policy. The type of structures which are normally covered under this chapter are described in further detail in § 18-1.

Damage to or loss of the structure will first and foremost affect the owner, and he is the primary assured. Any mortgagees are automatically co-assured under the rules in chapter 7. However, a number of other persons will be co-assured under the policy, see § 18-9, subparagraph 2, and chapter 8 of the Plan. The owner will also normally be the person effecting the insurance. However,

insurance under chapter 18 can also be effected by others, e.g. a lessee or a contractor. In those cases the owner will normally be co-assured.

As a rule, a separate insurance will be effected for each individual structure, but several structures may also be insured collectively. If the same policy is to cover several structures, an (assessed) insurable value will be stated for each structure. A natural interpretation of such assessment is that each structure shall be regarded as being insured separately. However, to avoid any misunderstanding, this should be stated explicitly in the policy. A corresponding interpretation is natural where separate insurable values are agreed for equipment, machinery, etc.

The fact that the individual structures (possibly parts of a structure) are insured separately will in the first place be of significance in the event of a total loss. It will be sufficient that the conditions for compensation for total loss (e.g. the condemnation conditions) are met for the individual entity. The same applies to § 6-3 on premium in the event of total loss. Furthermore, a deductible according to § 18-13 shall be calculated separately for each entity.

According to letter (b), which has been taken from the Special Conditions I, 3 (1) and (3), the insurance also covers machinery, equipment and spare parts for structure, machinery and equipment. The term "spare part" is new, but concords with the conception in practice that equipment included spare parts.

The first sentence of letter (b) is taken from the Special Conditions I, 3 (3), but has been rewritten in accordance with § 10-1. The provision establishes that only machinery, equipment and spare parts which belong to the assured, or which have been borrowed, leased or purchased with a sales lien or similar reservation, are covered. The provision reflects the fact that equipment used in the petroleum industry often has different owners; it may belong to the owner of the structure, the licensee for whom the structure is carrying out a contract, a charterer of the vessel or an independent contractor. Often certain parts of the equipment will belong to one party, while other parts of the equipment will belong to others.

The Special Conditions provided that the cover applied to objects which were "in the care, custody or control" of a person who was co-assured according to II, 9, viz. "owners, charterers, drilling contractors, and operators of the insured unit". It is, however, more expedient to state the association with the object by means of the same terminology as in § 10-1, and this hardly entails any change on points of substance. This solution also makes it unnecessary to refer to the co-insurer's provision in § 18-9, subparagraph 2. The term "assured" automatically includes anyone who is co-assured under the insurance. In other words, all equipment on board which is either owned by or in the care, custody or control of the co-insured persons in their capacity of borrower, lessee or purchaser under a vendor's lien, is covered by the insurance.

If the person operating the structure leases the equipment and operates the equipment himself, the owner of the equipment will normally be co-assured. By contrast, a firm or a person who or which is subcontracted by the contractor and operates his or its own equipment, e.g. a divers' firm with its own diving equipment, will normally not have the status of co-assured. If, as an exception, such a firm should have such status, the equipment will be covered under § 18-2 (b). On the other hand, equipment which belongs to the crew of the structure will always fall outside the scope of cover.

Item (2) in letter (b) has been rewritten in relation to the Special Conditions. According to these, the rule was that machinery and all equipment, with the exception of drilling equipment, were required to be on board, whereas the drilling equipment was covered also "while above water, under water or in the drilling hole". Such definition was natural as long as the cover mainly concerned drilling vessels. In view of the fact that the cover has now been extended to cover offshore structures in general, there is, however, a need to cover also other equipment while used during various operations away from the actual structure, in particular because part of this equipment is very costly. The extension of the cover to include while "above water, under water or in the drilling hole" has therefore been generalised.

Given that all equipment is covered, it goes without saying that this includes drilling equipment, even if this is not explicitly mentioned. The drill string and safety equipment against blow-outs located in the water are therefore also covered. However, the cover of the drill string is subject to important limitations, see § 18-11.

The provision will not cover suction anchors, piggybacks, auxiliary or buoyancy buoys or blow-out preventers which are either left on the seabottom when the structure leaves the place of operation, or which are launched in advance, e.g. before drilling. Anchors, anchor chains, etc. which are cast in advance are, however, covered under § 18-3, subparagraph 1 (b), and for blow-out preventers an extended cover is given in § 18-3 (c).



Letter (c) is new, but concords with § 10-1, subparagraph 1 (c), according to which the hull insurance covers bunkers and lubricating oil on board.

Subparagraph 2 contains certain limitations of the cover of accessories. The provision concords with the Special Conditions, but has been simplified. Letter (a) has been taken from the Special Conditions I, 3 (4) (b) and , in accordance with the principle in § 10-1, subparagraph 2, of the Plan certain articles of consumption from the scope of cover. The assumption is that such articles will be covered under a special equipment insurance. The Special Conditions also excluded bunkers and lubricating oil; however, in accordance with the principle in § 10-1, the cover has been extended to such objects.

The Special Conditions I, 3 (4) (a) contained a corresponding rule specifically aimed at drilling operations, and excluded pipes for casing and tubing, drilling mud, cement, chemicals and other materials or supplies intended for use in connection with such operations. However, this rule is superfluous, given the explicit exclusion of "other articles" than those listed "intended for consumption" and has therefore been deleted, without this entailing any difference on points of substance.

Letter (b) is taken from the Special Conditions I, 3 (4) (c), and excludes helicopters from the cover. Helicopters may be covered by the term "equipment on board" in subparagraph 1 (b), and in the absence of a specific exclusion, they could therefore come within the scope of cover, provided they were owned, etc. by one of the assured. However, the natural solution is for helicopters with equipment and spare parts to be covered under a separate aircraft hull insurance. In the Special Conditions the exclusion was limited to helicopters stationed on board. However, the exclusion should be general and also cover helicopters which land on the structure due to, e.g. engine problems.

Letter (c) excludes "blueprints, plans, specifications, logs, etc.". The provision is taken from the Special Conditions I, 3 (4) (d), but the exclusion for "blueprints" is new. On the other hand, the Special Conditions also covered "copies". This is now covered by the term "etc.", which has been added after "logs". The exclusion covers various documents which may be of considerable value (in particular the logs kept of drilling operations may contain very valuable information about the geological structure of the seabed and accordingly concerning the probability of finding petroleum in the area. The reason why the documents are nevertheless excluded from cover is partly difficulties in assessing their value in terms of money, partly the access which the interested parties have to running transmission of important data to shore.

Letter (d) is new and excludes mini submarines and remote controlled vehicles whilst in operation. This type of equipment is basically covered by subparagraph 1 (b), item (2), cf. "under water". However, the most expedient solution is for such equipment to be covered under a separate insurance, because practice as regards the use of the equipment varies. Submarines, etc. are therefore only covered under the structure's insurance up until the time where they may be said to be "in operation. Normally, the object is deemed to be "in operation" when rigging, lifting, etc. starts. There is in other words no requirement that the object shall be removed from the structure in order for it to be deemed to be "in operation".

#### § 18-3. Objects temporarily removed from the structure/Re. § 10-2

This paragraph corresponds to CEFOR Rig Form I, 3.

The provision supersedes the provision relating to "insurance of objects removed from the ship" in § 10-2, which does not quite fit in with offshore insurance.

Letter (a) has been taken from the Special Conditions I, 3 (2) which provides an "insurance of objects removed from the rig" in respect of machinery and equipment and corresponds to § 10-2 for hull insurance of ships. By comparison with the Special Conditions, the text has been simplified, and furthermore extended in accordance with the Special Conditions. Subparagraphs (1) and (2) are taken from the Special Conditions, while subparagraph (3) concerning permanent storage is new.

As in the case of the Special Conditions, this part of the insurance covers in the first place machinery and equipment as well as spare parts for the structure, machinery or equipment, if the objects are on board a "vessel, structure or fixed installation" which is moored to or is in the vicinity of the insured structure and has been used in connection with that structure, cf. subparagraph (1). The Special Conditions used the term "vessels". On this point there has thus been a certain extension. However, as in the case of the Special Conditions, the insurance of objects removed from the structure is limited, in terms of function as well as location: It must be a

vessel/structure/installation which is used in the operations carried out by the insured structure, and which is either moored to the insured structure or is in its vicinity.

Secondly, the insurance of objects removed from the structure covers machinery, equipment, etc., which have been temporarily removed from the structure for repairs, rebuilding, storage, etc., cf. subparagraph (2). In CEFOR Rig Form 1 3 (2) this part of the insurance was limited to temporary storage. Also on this point there has thus been a certain extension of cover. The cover includes transport to and from the structure in connection with work or storage as mentioned. However, only objects which have been on board, cf. "removed", are covered. The scope of cover consequently does not comprise new equipment in storage at the base and in transit for the first time to the structure. However, a certain cover of such objects is provided in subparagraph (3), cf. below. The insurance of objects removed from the structure further does not cover - subject to the exceptions which follow from letters (b) and (c) - equipment which is left behind when the structure has to leave the place of operation temporarily because of repairs of damage, etc.

The third element of the insurance of machinery, equipment, etc., removed from the structure covers storage which falls outside the scope of subparagraph (2). This part of the insurance is new. The cover includes storage of the object, regardless of the purpose of the storage or its duration. Nor is there any requirement that the stored object must be removed from the structure. New objects, which were purchased for the structure, but which are kept in storage before being used on board, are therefore also included. A fundamental prerequisite for cover is, however, that the object concerned "belongs to" the insured structure. If the object can be used on several structures, and it has not been clearly decided during the storage period that it is going to be used on the insured structure, it must be covered under a separate storage insurance. If an object is purchased and stored with a view to the insured structure, but is later taken on board a different structure than the one insured, the cover will cease under subparagraph (3) as soon as the decision has been made that the object is to be shipped to another structure.

The cover under subparagraph (3) is, however, subject to certain limitations. In the first place to a limitation in amount: the objects in question are covered up to 10% of the sum insured under the hull insurance. This has to do with the fact that practice regarding storage varies considerably, and the insurers need to have control of this part of the cover. If the assured wants more comprehensive cover, a separate insurance must be effected. On the other hand, the insurer is fully liable for any damage up to the stated amount, cf. the fact that § 2-4 relating to under-insurance does not apply.

Secondly, a separate deductible shall be calculated for this part of the cover. The fact that a deductible shall be calculated in the event of damage to stored objects goes without saying. However, the provision relating to a separate deductible becomes significant if one and the same incident should, in exceptional cases, occur to both the structure and the objects stored. In that event, two deductibles must be calculated in the claims settlement (unless it is a case of total loss). If only one deductible has been agreed, a deduction of twice that amount shall thus be made. If the assured wants a lower deductible for objects covered under subparagraph (3) than for the structure in general, this must be specifically agreed in the policy.

Objects covered under subparagraph (3) shall be kept out of a total-loss settlement concerning the structure. The value of these objects must therefore be deducted from the insurable value in the event of a condemnation settlement. However, objects covered under subparagraph (2) shall be included in the total-loss settlement in the normal way.

Letter (b) is new and extends the cover to "anchor, anchor chain, etc.", which are used for the structure at the operation site. In addition to the anchor, this cover includes buoyancy buoys which constitute an integral part of the mooring system. Further, both anchor chain and other types of moorings, e.g. wires or nylon lines, cf. "etc.", are covered. The cover applies both to the place where the anchor, etc., was cast before the arrival of the structure, and if the anchor is left behind after the structure has departed, e.g. in connection with repairs. Cover is, however, subject to the condition that it is an anchor or anchor chain which forms part of the insured structure's equipment. If the anchor or anchor chain is left behind in connection with a replacement of structures in order to be used by the new structure, they will no longer belong to the insured structure.

Letter (c) is also new and entails cover of blow-out preventers left on the sea bottom due to casualty or measures to avert such casualty. The provision only covers "blow-out preventers", and not any other type of valve.

Normally a blow-out preventer left behind will be located at the top of the pipes for casing and tubing, but the provision also covers the situation where the blow-out preventer is left next to these pipes. That a blow-out preventer is "left behind" means that a decision is made to leave it.

The cover only concerns the situation where the blow-out preventer is left behind due to a casualty or measures to avert or minimise such casualty. If the blow-out preventer is left behind as part of the normal operation of the structure, it is therefore not covered by the insurance.

The expenses involved in lifting a blow-out preventer left behind are recoverable as costs of measures to avert or minimise loss. Such expenses are incurred for the purpose of averting a total loss of the said preventer.

§ 18-4. Perils insured against/Re. § 2-8 and § 2-9

This paragraph corresponds to CEFOR Rig Form II, 1 (3).

The provision contains a limitation in the cover of perils and must be seen in conjunction with the rules relating to perils insured in § 2-8 to § 2-10. The Plan has two main types of perils: "marine perils", cf. § 2-8, and "war perils", cf. § 2-9. The rules in chapter 18 are applicable to insurance against marine perils (section 1), as well as to insurance against war perils (section 3). If no special agreement concerning perils insured against has been made, the insurance will according to § 2-10 only cover "marine perils". There is obviously nothing to prevent one and the same policy from covering marine perils as well as war perils.

An insurance "against marine perils" is basically an "all risk" insurance: The insurance covers all perils to which the interest is exposed, unless specific exclusions are stated. The exclusions from marine perils appear from § 2-8 (a) to (d). In connection with insurance against marine perils the provision in § 18-4 will therefore come as an addition to these exclusions.

By contrast, the perils under an insurance against war perils are "specifically defined", they only comprise the perils enumerated in § 2-9. § 18-4 will here stipulate an exclusion, to the extent that this risk could be deemed to be included in the perils enumerated.

The provision in § 18-4 must also be seen in conjunction with the limitations of the perils insured against which follow from chapters 10-13 on hull insurance, in particular the exclusion for loss due to ordinary use in § 10-3, and the exclusions for damage due to inadequate maintenance in § 12-3, and error in design, etc., in § 12-4.

The provision is a direct translation of the Special Conditions, but has been simplified in that "for the purpose of controlling or attempting to control" has been replaced by "for the purpose of controlling". Furthermore, "with another unit" has been replaced by "another structure or fixed installation". As regards the term "structure", reference is made to what is stated above in § 18-1. From a linguistic point of view, the term may comprise mobile as well as fixed structures. However, to avoid any misunderstanding, "or fixed installation" has been added.

The background to the provision is the risk of blow-outs, i.e. uncontrolled ejecting of drilling fluid through the drilling hole and into the sea or the air, followed by uncontrolled emission of oil, gas or fluid from the well and into the sea or the air caused by a pressure from the underground. Such blow-out will often be followed by a fire. This risk of blow-outs and fires can be eliminated by the drilling of a relief well. It is perfectly conceivable that an insured drilling structure may be requested to drill one or more such wells in order to assist another structure/installation, and it may, depending on the prevailing circumstances, be natural, or even necessary, for such a request to be complied with. Nautical casualties with subsequent salvage operations are a natural parallel. For the insured structure to embark on a salvage operation will very often represent a relevant alteration of the risk under the hull insurance, cf. § 3-8 and § 3-9. However, according to § 3-12, subparagraph 2, the insurer automatically covers the added risk involved in "measures taken for the purpose of saving human life or by the insured ship salvaging or attempting to salvage ships or goods during the voyage". A salvage operation which consists in the drilling of a relief well is, however, in a special position. The risk to the salvaging structure may be considerable, and it is first and foremost the licensees'/operator's interests which are at stake: the risk of the oil well being destroyed and the risk of extensive pollution liability, etc. The consideration of mutuality which may be said to be the background to § 3-12, subparagraph 2, in ordinary hull insurance is missing here. The provision therefore excludes this special "salvage risk" from the perils insured against. This obviously does not preclude the possibility of having the risk covered under a separate agreement, possibly subject to an additional premium.

The exclusion for the drilling of a relief well must apply, even if the drilling is ordered by the authorities. According to § 2-8 (b), third sentence, "measures taken by a State power for the

purpose of averting or limiting damage" are admittedly covered by the insurance, provided the risk of such damage is caused by a peril covered by the insurance against marine perils. However, the provision in § 18-4 must, as a special clause, prevail over the general provision in § 2-8. It is therefore irrelevant for the insurer's liability whether it is the operator who decides that a relief well shall be drilled, or whether the operator is acting on the instructions of the authorities.

In II, 1 (1) the Special Conditions contained an exclusion for earthquake and volcanic eruption. This has been removed from the Special Conditions and has therefore also been left out in the Plan. Particularly in the case of structures operating in the North Sea the limitation was of little practical significance. If the insurers want to reincorporate the exclusion for structures operating in other parts of the world, this will have to be done in the individual policy.

#### § 18-5. Alternation of the risk/Re. § 3-8

This paragraph corresponds to Cefor Rig Form II, 4. **The commentary was adjusted in the 2007 version in accordance with the amendments to § 2-8 (d) and § 2-9, subparagraph 2 (d).**

The provision is a direct translation of the Special Conditions. The reason is that the storage and use of the stated material is a perfectly normal occurrence during operations on the Continental Shelf and therefore constitutes a foreseeable risk which the insurer can calculate when entering into the contract.

The provision merely states that storage does not constitute an alteration of the risk. It provides no basis for the cover of damage resulting from the use of explosives or radioactive material. Whether such damage is covered must be decided by the general provisions relating to perils insured against. § 2-8 relating to marine perils contains no limitation concerning damage resulting from storage or the use of explosives. Explosion, fire and other damage resulting from such storage or use must therefore be covered in the normal way, unless the assured has breached any of the obligations in chapter 3. However, § 2-8 (d) **nos. 1 to 4** contain general exclusions **for various types of nuclear-related risks**. If the storage or use of radioactive material causes **radiation, radioactive contamination or any other nuclear-related risk as specified in these provisions**, resulting loss or damage will therefore fall outside the scope of cover. The same applies to insurance against war risks, see § 2-9, subparagraph 2 (b), nos. 1 - 4.

#### § 18-6. Safety regulations/Re. § 3-22 and § 3-25

This paragraph corresponds to CEFOR Rig Form III, 1 and 2.

The provision has been simplified in relation to the Special Conditions, and states two safety regulations which must be regarded as "a special safety regulation laid down in the insurance contract" according to § 3-25, subparagraph 2, first sentence.

Letter (a) provides that the drilling hole/well shall be equipped with blow-out preventer(s) which is safety equipment to prevent blow-outs. As mentioned in § 18-4, a blow-out may occur when reaching oil or gas which is under higher pressure than the fluid in the drilling well. The oil or gas will then be pressed up through the hole and into the sea, or even into the air below the surface, unless it is stopped by a blow-out preventer. The result may be extensive pollution damage. It has also happened that the oil or gas has ignited with extensive fire and explosion damage as a result. Some types of loss resulting from such a blow-out will, according to their nature, fall outside the scope of cover under chapter 18, inter alia liability for personal injury and liability in connection with the flowing of oil into the sea. However, also the actual structure itself may also be damaged or become a total loss as a result of a blow-out, e.g. as a result of an explosion or fire. Losses of this nature are normally covered under chapter 18, subject to the exceptions which follow from §18-7, cf. also § 18-4. It is therefore of the utmost importance for the insurers that all reasonable measures are taken in order to prevent a blow-out. Most important of all in this connection is the use of blow-out preventers.

Offshore petroleum activities are normally subject to extensive safety regulation through public regulations, cf. as far as Norway is concerned Regulation on Safety, etc. of 28 June 1985, no. 1215. These regulations also stipulate requirements that drilling and well work shall be carried out in a safe manner, and that a program shall be prepared for the work to be carried out (§§ 46 and 47). According to § 3-22, such regulations are also safety regulations in relation to the insurance contract. By incorporating the rule relating to blow-out preventers in the Special Conditions, the result is, however, that it becomes a "special regulation" in relation to § 3-25, subparagraph 2.

According to the provision it is the "drilling hole/well" which shall be equipped with blow-out preventers. This concurs with the Special Conditions, cf. the term "well and/or hole". In

accordance with the Special Conditions, the provision concerns only "blow-out preventer(s)" and not other valves, such as production valves and test valves.

CEFOR Rig Form III, 1 stated that blow-out preventers were to be in place "in all operations". This wording is slightly unfortunate. There is no point in requiring the installation of a blow-out preventer before this is in effect feasible. The deciding factor as to when the blow-out preventer shall be installed must therefore be what follows from "standard practice". The same requirement applies to the procedures for the installation, the number and the testing of the blow-out preventers. By "standard practice" is meant the procedure which the contractors are normally obligated to follow under contracts when installing blow-out preventers in the relevant area. As a rule "standard practice" will be in accordance with the decisions of the relevant authority, but if standard practice in the industry has stricter requirements regarding certain conduct than what the authorities require, standard practice shall be decisive. As regards the type of blow-out preventer, reference is made to "standard issue".

The safety regulation in letter (a) only applies to structures which are engaged in drilling. If drilling takes place on another structure in breach of the rules in letter (a) and this results in damage to the insured structure, the structure will not lose its insurance cover.

Letter (b) has been taken from the Special Conditions no. 2 but has been significantly amended on the basis of practice. The Special Conditions contained detailed rules relating to the approval of place of operation and removal and the assured's duty to act on recommendations from an institution approved by the insurers. The provision made it necessary to clear every removal with the classification society or the relevant authorities, something that was perceived as cumbersome and costly. In practice special conditions were therefore applied, which allowed removal without approval, provided it was in accordance with the operation manual of the structure, and this manual was approved by the classification society. Departure from the approved operation manual had to be approved by the classification society. However, this type of special conditions presuppose the existence of operation manuals for the structure approved by the classification society or the authorities. This is the case for operations in the North Sea. For operations in other areas, however, the insurer still needs to have control of the removal.

Against this background, it was not considered necessary to maintain the strict and detailed requirements for approval tied to the place of operation and removal. However, in order to give the insurer control of the removal risk, a requirement has been introduced for a "removal plan" patterned on the rules concerning a "lay-up plan" according to § 3-26. Prior to removal, the assured must therefore prepare a removal plan, which shall be approved by the claims leader, cf. letter (b), first sentence. If a operation manual exists which is approved by the classification society or the authorities, it may be used as a basis for the removal plan. If no such manual has been prepared, the requirement for a removal plan entitles the insurer to demand that the classification society or the authorities be brought in to evaluate the question of removal.

The removal plan shall be adhered to during the removal and act as a special safety regulation under § 3-25, subparagraph 2, cf. letter (b), second sentence.

In the Special Conditions the requirements for approval of the removal varied depending on the type of structure in question. On this point the rules have been simplified: The requirement for approval of the removal plan applies to the removal of all types of structures. The term "removal" covers removal from the coast to an area of operation and between areas of operation as well as to removal between places of operation within the same area of operation. Minor adjustments of the location of the structure within an area of operation shall, however, not be regarded as "removal".

If the removal entails a change of the area of operation, both parties may demand an adjustment of the premium according to § 18-8.

In contrast to the Special Conditions, the Plan does not contain any requirement for approval of the place of operation. However, the question of area of operation, i.e. the area within which the structure may operate without any change in premium, must be clarified with the insurer when the insurance is effected, cf. § 18-8. Normally, the places of operation within the area of operation will have been defined by the authorities in the relevant Shelf State. This regulation will in that event automatically function as a safety regulation according to § 3-22. If the insurer also wants to have control of the place of operation, this will have to be incorporated in the policy.

### § 18-7. Measures to avert a blow-out, etc./Re. § 4-7 to § 4-12

This paragraph corresponds to CEFOR Rig Form II, 6 (2).

The provision is an almost direct translation of the Special Conditions and limits the insurer's liability for costs incurred in controlling blow-out and cratering, or fire in connection with a blow-out.

As regards the term "blow-out" reference is made to the explanatory notes to §18-4. "Cratering" is an after-effect of a blow-out in that a submarine crater is formed in the subsoil around the well due to uncontrolled emission of oil, gas or fluid. If oil or gas is suddenly released in large quantities, the pressure conditions in the subsoil may change to such an extent that the area around the oil well collapses so that an underwater crater is formed. For a platform resting on the sea bottom (a totally submersible or jack-up structure) such a "cratering" may result in the foundation being pulled away with the result that the platform loses its stability.

Blow-out and cratering, possibly accompanied by fire, will first and foremost threaten the actual oil source. There will often be a risk of the loss of human life and economic assets, in addition to a major potential pollution liability. Normally, extensive measures will be initiated to get the flow of oil under control. However, this is first of all the licensees' responsibility. They are the ones who must bear the liability of any pollution damage, etc., and they are the ones to suffer the loss caused by the destruction of the oil well. Where a structure is brought into the efforts to fight a blow-out, etc., the regard for the safety of the actual structure will often merely be a side motive. If the Plan's rules were to be applied in full in such cases, this would require a discretionary allocation of the overall loss in connection with the salvage operation among the interests at stake for the owner and the licensees, cf. § 4-12, subparagraph 2. Only the portion attributed to the owner would be recoverable from the hull insurer. However, it would not be easy to carry out such an apportionment, first and foremost because the assets at stake for the licensees (including the potential oil pollution liability) are difficult to estimate. The proportion that would be attributed to the owner of the structure would normally be fairly modest. Given that § 18-7 excludes this item from cover, the owner has a strong incentive to secure an agreement with the licensees (in practice the operator) to the effect that they shall cover the costs of averting or minimising the loss in connection with a blow-out, etc., in full. This is also in concordance with the allocation of risk normally used in drilling contracts.

Only measures aimed at gaining control of a blow-out, etc., are covered by the provision. If a fire has broken out on board the structure as a result of a blow-out, the costs (possibly salvage award) incurred in connection with the fire fighting or the towing of the structure away from the area of danger, will have to be covered by the insurer under the rules in §§ 4-7 et seq. of the Plan.

CEFOR Rig Form II, 6 (1) contained a rule about the insurer's right to be subrogated to the assured's claim against another insurer if a loss was recoverable as a cost of measures to avert or minimise loss with this insurer. This provision has now been incorporated in § 2-7, subparagraph 3, of the Plan.

### § 18-8. The area of operation/Re. chapter 6

This paragraph corresponds to CEFOR Rig Form II, 8.

The provision is an almost direct translation of the Special Conditions, and regulates the insurer's right to adjust premiums in the event of a change of the area of operation.

Subparagraph 1 establishes that the area of operation shall appear in the policy. The area of operation is the area within which the structure may operate without any adjustments of premium being required. Often the description will be relatively narrow, e.g. associated with the wells to be drilled during the policy period. However, the description may also refer to the field, e.g. Ekofisk or a larger area, e.g. the North Sea or the Gulf of Mexico. If the assured changes the area of operation, this may, depending on the circumstances, represent an alteration of the risk according to §3-8. The change from one field in the North Sea to another, e.g. from Ekofisk to Statfjord, will normally not represent an alteration of the risk. If, however, the new area of operation is considerably further away, e.g. from the North Sea to the Gulf of Mexico, the result may be different, in particular if the removal must take place during a period with a high climatic risk, or where it involves a structure where towage is particularly risky. If the change of the area of operation represents an alteration of the risk the insurer is entitled to cancel the insurance, cf. § 3-10. If the assured has failed to give notice of the change, and a casualty occurs, the insurer is also free from liability provided that he can prove that he would not have accepted the insurance if he had known about the change. If, however, the insurer would have accepted the insurance even if

he had known of the change, but would have agreed different conditions, he will not be liable unless the casualty was not caused by the change, cf. § 3-9.

If the policy does not mention the area of operation, the structure may operate all over the world within the trading area, cf. § 3-15 on the trading area and the appendix to that provision. The removal of the structure from one area of operation to another will in that event not represent an alteration of the risk, as long as the structure remains within the ordinary trading area. However, it follows from § 18-6 (b), first sentence, that any removal of the structure shall be made in accordance with a removal plan approved by the claims leader. This applies irrespective of whether or not the area of operation is stated in the policy. In the event of a breach of such a safety regulation, the insurer may be free from liability according to § 3-25.

Subparagraph 2, first sentence, imposes a duty on the assured to notify the insurer if the structure is to change its area of operation in relation to what is stated in the policy. A removal between areas of operation stated in the policy does not give rise to any duty to notify the insurer, but will still require approval according to §18-6, see above. The provision does not stipulate any sanctions if the assured fails to give notice of the removal. However, the insurer will normally get to know about the removal under any circumstances, so that an increase in premium, if relevant, may be calculated afterwards.

The second sentence authorises both parties to demand an adjustment of the premium in the event of a change of the area of operation, while the third sentence establishes that in the event of an increase in premium, the insurer must notify the person effecting the insurance not later than 14 days after the insurer has received notice of the changed area of operation.

#### § 18-9. Waiver of subrogation and co-insurance of third parties/Re. § 8-1

This paragraph corresponds to CEFOR Rig Form II, 9.

An insurance effected on the basis of the Plan automatically also covers a mortgagee's interest, cf. § 7-1. However, other third parties' interests are not covered, unless specifically agreed, cf. § 8-1. In connection with the insurance of offshore structures there is, however, a need for a more extensive cover of third parties' interests than what follows from chapters 7 and 8.

CEFOR Rig Form II, 9 resolved this question by making "owners, charterers, drilling contractors and operators of the insured unit" co-assureds under the insurance, cf. subparagraph 1, first sentence. At the same time it was emphasised in the third sentence that the insurer in relation to these co-assureds waived rights of subrogation against those parties. Given that the waiver of subrogation was in this way tied to co-insurance, it was in reality superfluous. Such protection against subrogation is precisely part of the protection which a co-assured has.

To the extent that a co-insured third party has ownership interests or other economic interests in the capital value of the insured structure, machinery or equipment, a co-insurance will, in addition to protection against subrogation, also afford him insurance cover of the said economic interest. That the said persons have such ownership interests is in particular relevant in connection with various types of equipment covered under the insurance of the structure. Where the relevant third parties do not have such economic interest, it is the protection against subrogation, and not the rest of the co-insurance cover, which will be the entire purpose of the co-insurance. The background to the protection against subrogated claims is that the party in question is in such a position that he risks causing damage to the structure or the equipment. At the same time the contract between the owner of the damaged object and the person causing the damage will normally be based on a "knock-for-knock" principle, which means that it is the owner, and not the person causing the damage, who shall cover the damage. The owner has in other words waived the right to hold contractor, charterer, etc., liable for damage which they may cause to the structure or the equipment. The basis of the "knock-for-knock" principle is, however, that the insurer is not entitled to be subrogated to the assured's claim against the person causing the damage in recourse proceedings, cf. section 4-3 of the Norwegian Compensatory Damages Act and § 5-13 of the Plan. Protection against subrogation under the insurance therefore becomes an important part of the "knock-for-knock" regulation.

During the revision of the Plan it was found expedient to distinguish between those situations where there was merely a need for protection against subrogated claims, and those situations where there was a need for a more extensive co-insurance protection. This has been done by subparagraph 1 regulating the protection against subrogated claims, while subparagraph 2 regulates co-insurance.

According to subparagraph 1, the insurer waives the right of subrogation against any person causing damage who has according to contract disclaimed liability for damage to the structure and

reserved the right to protection against recourse from the insurer. The protection against subrogated claims has in other words been given those persons causing damage who have, on a contractual basis, been given an undertaking that the insurer shall not be entitled to claim against them, and is not given to any specifically named groups of persons. In this way the insurance contract comes in as an extension of the “knock-for-knock” agreements entered into concerning the use of the structure or the equipment in offshore operations. Often the protection against recourse will benefit such persons as mentioned in the Special Conditions, typically contractor, charterer, or licensees in the area of operation in question. However, the protection may also be extended to others, e.g. another contractor/supplier engaged by the licensees (the operator) to carry out certain services or work in connection with the structure.

The provision stipulates the condition that the relevant contractual regulation, where the person causing the damage disclaims liability and reserves the right to protection against recourse “is regarded as customary in the activities in which the structure is involved”. Implicit in this condition is first and foremost that protection against recourse shall only be reserved for those groups of persons who normally obtain such protection under the contractual system used in the petroleum industry. The question as to what is “customary” must be evaluated, both in relation to the type of activities in question, and in relation to the geographical area where the structure is located. In many areas petroleum activities will normally be based on a “knock-for-knock” principle with extensive and relatively clear and unambiguous rules as to who shall be covered by the regulation. However, it is also conceivable that there are areas where such regulation is not customary, in which event this must be decisive. Reference is furthermore made to the explanatory notes to § 4-15 concerning unusual or prohibited contractual conditions.

The provision does not state who must have entered into the contract with the person causing the damage. This is done deliberately. The protection against subrogated claims may appear from different contracts in the contractual pyramid which are frequently encountered in the petroleum industry, at the same time as these contracts may have been entered into by different groups of persons. The crucial point is that the person causing the damage is, through such a contract, ensured protection against any subrogated claims from the insurer, and not who is his contracting partner under this contract. The protection for the insurer lies in the fact that the protection against subrogation of the person causing the damage shall be in accordance with customary contractual regulation in the industry, see above. If the insurer wants a more narrow protection against subrogation, he will have to stipulate this in the policy.

The provision is worded as a traditional waiver-of-subrogation clause and entails, according to its wording, an absolute waiver of the insurer’s right of subrogation. However, such far-reaching exclusion of liability will not be valid. A person causing damage may not disclaim liability for his own intentional or grossly negligent acts, cf. section 36 of the Norwegian Contracts Act. In reality, it is therefore § 3-33 of the Plan which will determine the limit of the insurer’s right of subrogation.

Subparagraph 2 regulates the co-insurance question and is taken from subparagraph 1, first sentence, of the Special Conditions. However, also here it was decided to tie the insurer’s obligation directly to the persons who on a contractual basis have been given the right to co-insurance under the insurance of the structure, and not to defined groups of persons. In this way, there is a guarantee that the co-insurance satisfies contractual obligations, at the same time as this prevents the status of a co-assured being given to groups of persons who in reality have no need for, nor any expectation of, such cover.

Where a co-insurance is tied to contractual obligations, it is no condition for co-insurance that the co-assured has an economic interest in the structure or the equipment. It is conceivable that a contract presupposes co-insurance protection also of groups of persons without such economic interests, e.g. a drilling contractor who has no ownership interest in the structure or any part of the equipment. In that event, the full co-insurance protection under § 18-9, subparagraph 2, would not give the co-assured very much more than the limited protection against subrogation according to subparagraph 1. However, often the co-assureds will have such ownership interests, e.g. by owning the equipment they are going to use themselves. As mentioned in §18-2, subparagraph 1 (b), such equipment will be covered by the insurance, regardless of ownership. In that event, the co-assured has a direct insurance against damage to his own property.

The co-insurance may also acquire significance in connection with the cover of collision liability. If a structure is chartered on bare-boat conditions, a collision liability will lie with the charterer in his capacity as owner, i.e. employer of the crew of the vessel. Provided that the owner of the structure is required to co-insure the charterer, such liability will according to § 18-9 be covered under a hull insurance effected by the owner.



The normal situation will be that the owner of the structure will act as the person effecting the insurance when a structure is insured. In that event, he also has status as assured. The provision in subparagraph 2 will in such cases first and foremost be significant for the charterer, including bare-boat charterers, contractors and sub-contractors engaged by the owner, as well as the licensees, including the operator, provided that they have in contracts with the owner or others reserved the right to co-insurance under the insurance of the structure. If, in exceptional cases, the insurance is effected by a charterer, contractor/sub-contractor or licensee/operator, the owner of the structure will in the same way be co-insured, provided he has a contractual right to a status as co-assured under the insurance.

As in subparagraph 1, subparagraph 2 stipulates a prerequisite that the contractual regulation of a co-insurance must be "customary in the activities in which the structure is involved". In relation to the co-insurance protection it is, however, not sufficient to have a liability regulation based on a "knock-for-knock" principle. The contracts must in addition normally contain a requirement for co-insurance protection of the relevant group of persons. This question will first and foremost become significant where the relevant co-assured has an economic interest in objects covered by the insurance. If not, he will normally be sufficiently protected through the waiver of subrogation in subparagraph 1.

Subparagraph 2, second sentence, contains a subsidiarity clause and establishes that the co-assured's cover under the insurance of the structure is secondary to any insurance effected by the co-assured himself. Part of the purpose of the co-insurance clauses in contracts is to avoid double-insurance. If the co-assured has nevertheless taken out a separate insurance, there is no reason why the damage shall also be covered under the insurance of the structure.

Co-insurance under § 18-9 follows the rules in chapter 8.

Subparagraph 1, second sentence, of the Special Conditions contained a requirement that the insurer should be informed of the names of the co-assureds. This requirement caused problems in practice and has therefore been deleted. Subparagraph 2 of the Special Conditions contained a provision to the effect that the policy was required to state the amount of compensation which the insurer was allowed to pay without the consent of the mortgagee, cf. § 7-4, subparagraph 2, first sentence. This provision is superfluous and has been deleted.

#### § 18-10. Deleted

This paragraph was deleted in the 2007 version in accordance with the amendment to § 12-2. Under § 18-10 in the earlier versions, the assured had a general right to compensation that was more extensive than the right to compensation under § 12-2. A specific rule to this effect was therefore necessary. In the 2007 version, the right to compensation in § 12-2 has been made a general entitlement, and there is thus no need for specific rules in Chapter 18. The provision in earlier versions of § 18-10, subparagraph 2, regarding the calculation of compensation has now been included in the rules in § 12-2, subparagraph 2.

#### § 18-11. Damage to the drill string/Re. § 12-3 to § 12-5

This paragraph corresponds to CEFOR Rig Form II, 12.

The provision establishes certain limitations to the cover, which come in addition to the limitations in § 12-3 to § 12-5.

Letter (a) corresponds to the first sentence of the Special Conditions, but the insurer's liability is extended in accordance with the Separate Clauses. The provision has furthermore been given a less casuistic form without any amendments on points of substance being intended.

The provision concerns "loss of or damage to the drill string ... whilst in the subsoil or in the water". According to the Special Conditions, the insurer was in connection with such damage only liable for "fire, blow-out or cratering". In the Special Conditions this had been extended to also cover lightening, explosion above the seabed, floods, tidal waves, ice, tornado, storm, cyclone, hurricane, earthquake or collision. The reason for the extension was the underlying drilling contracts, where the risk of such causes of damage was placed with the owner of the structure/the drilling contractor, while the licenses/the operator covered other damage. During the Plan revision it was agreed that such casuistic enumeration was unnecessary. This enumeration has therefore been superseded by a reference to "external circumstances, for which the drilling contractor is liable under contractual conditions, which are regarded as customary within the area concerned".

By "external circumstances" is first and foremost meant the type of factors mentioned in the Special Conditions and the Separate Clauses, cf. above, in contrast to damage which is attributable to wear and tear, inadequate maintenance, etc., or to the fact that the drill string for other reasons

cannot take the strain to which it is subjected during the performance of the work. However, the term “external circumstances” also covers more ordinary heavy-weather damage than hurricane, storm, etc., e.g. where high seas or difficult current conditions result in damage to or loss of the drill string. The term does not, however, cover the situation where the drill string is left in the drilling well due to technical problems in retrieving it, or where the string in connection with ordinary drilling gets jammed. Nor do “external circumstances” comprise damage to the string as a result of negligence on the part of the drilling contractor, or someone for whom he is liable. However, if the direct cause of damage is a fire, etc., the insurer will not be free from liability because the fire was caused by negligence. Here the question of liability must be evaluated under the general rules in chapter 3 relating to the duties of the assured.

The cover only extends to external circumstances for which the drilling contractor is liable according to customary contractual practice within the relevant area. If, for example, it is customary for the operator to assume the risk in respect of damage caused by fire or explosion, this damage does not concern the insurer. In that event, it is irrelevant whether the drilling contractor under the relevant contract has accepted this risk if this is contrary to customary contractual practice.

The limitation applies to the drill string, as installed, including any of its component parts such as weights, stabilisers, thread connections etc.

Letter (b) is a direct translation of item (2) of the Special Conditions. That the drill string is “left in the drilling hole/well” means that a decision is made to that effect by the persons who are responsible for the drilling operations. The provision does not apply to cases where attempts to retrieve the string from the hole are abandoned due to technical difficulties which this entails. In such cases the string shall be considered lost, and the loss is, as mentioned, excluded from cover according to letter (a). The purpose of leaving the string must be that it is intended to serve as a pipeline for gas or oil produced from the hole. This means that it is no longer part of the drilling equipment, and it should for that reason no longer be covered. Effectively, this also follows from § 18-2 (b): the drill string left behind no longer constitutes part of the “equipment” of the drilling structure.

Subparagraph 3 of the Special Conditions contained a provision to the effect that the insurer did not cover “the scraping and painting of the insured unit’s bottom”. This exclusion has not been retained. Subparagraph 3 furthermore contained a provision to the effect that § 176 (j) of the 1964 Plan was not to apply. Letter (j) has, however, been deleted during the revision.

The limitations in § 12-3 to § 12-5 apply in addition to the limitations in § 18-11.

#### § 18-12. Damage/Re. § 12-5

This paragraph is new.

According to § 12-5 (a) the insurer does not cover costs of wages and maintenance of the crew during the period of repairs. However, in connection with insurance of offshore structures the insurer has in practice covered costs of wages and maintenance of the crew during repairs carried out at sea. The reason is that it is, after all, less costly to carry out the repairs on the Shelf than to bring the structure to shore. Due to the explicit exclusion in § 12-5 (a), there is, however, a need for a special authority for this liability.

In connection with damage to a structure, it is conceivable that the assured engages a supply vessel which is under contract with him and is therefore in the area, to be used during repairs. If the assured incurs additional expenses in this connection, his expenses must be covered by the insurer as part of the costs of repairs.

In practice there have been discussions whether the costs involved in getting a structure back to the place of operation are covered in a case where the structure has been brought to shore for repairs. It follows from the commentary on § 12-13 that the insurer’s liability for “removal” covers the entire deviation to and from the repair yard, which must imply that basically the insurer is liable for such removal back to the place of operation. However, this presupposes that the damage occurs after the structure has arrived at the place of operation. If the damage occurs prior to that point in time, e.g. during towage from land to the first place of operation, the insurer’s liability is limited to the removal back to the place of damage, and not to the place of operation.

Liability during removal also covers wages and maintenance of the crew, provided that the crew is “necessary”, cf. for further details § 12-13 and the commentary on that provision.

### § 18-13. Deductible/Re. § 12-18, subparagraph 2

This paragraph corresponds to CEFOR Rig Form II, 16.

CEFOR Rig Form II, 16, subparagraph 1, first sentence, established that instead of machinery damage deductions, deductible for partial damage and deductible for collision liability under the Plan, an individual deductible amount should be stipulated in the policy. This provision has been deleted. Basically, the Plan system of different deductibles to be agreed on an individual basis shall apply, see § 12-16, §12-18 and § 13-4. If the parties wish to combine these deductibles into one amount, this will have to be agreed specifically. As in chapter 12, the deductible must be calculated for each structure. In the event of damage to several structures, the same number of deductibles shall be calculated in the settlement.

CEFOR Rig Form II, 16, subparagraph 1, second sentence, contained a special rule relating to heavy-weather damage. This has been retained in a simplified form. Damage caused by bad weather arising as a result of the same atmospheric disturbance shall be regarded as one casualty. According to the Special Conditions, the rule was that every 72-hour period within the same atmospheric disturbance constituted one casualty. Now the entire atmospheric disturbance shall be regarded collectively. This provision supersedes the rule in § 12-18, subparagraph 2.

It follows from the reference to § 12-18 that no deductible shall be calculated in the event of a total loss of the insured structure.

### § 18-14. Collision liability/Re. § 13-1

This paragraph corresponds to CEFOR Rig Form II, 17.

The provision is taken from CEFOR Rig Form II, 17, 1, but has been simplified. The Special Conditions stated explicitly that the insurer covered collision liability according to the Plan. This is superfluous given that the conditions are incorporated in the Plan. The second sentence of the Special Conditions relating to a limitation of the collision liability in the event of liability for damage to or loss of a fixed installation has, however, been retained.

Compared to the rule in § 13-1, the provision means that the insurer covers collision with another floating structure, regardless of the nature of that structure, in other words, regardless of whether it is a traditional ship or a structure which is covered under chapter 18. The cover includes cases where it is a tug used by the insured structure which causes the damage. The insurer does not, however, cover collisions between the structure or its tug and a permanent installation on the Shelf. Such permanent installation may, e.g. be a production platform or a loading installation.

Under § 13-1, the insurer's liability is independent of the basis for the liability for damages, which means that liability for damages based on a contract will in principle be covered. However, the provision in § 4-15 entails a certain limitation in this respect.

The Special Conditions II, 17, 2 contained a limitation of liability caused by cargo on board the colliding structures and liability for pollution, fire or explosion caused by oil or gas. This provision is more or less parallel to § 13-1, subparagraph 2 (f), and is therefore superfluous.

*Section 2 - Separate insurances against total loss***§ 18-15. Applicable rules**

This paragraph corresponds to CEFOR Rig Form No. 2.

CEFOR Rig Form No. 2 contained rules relating to “anticipated gross earnings insurance of mobile off-shore units”. During the revision of the Plan it was agreed that any separate insurances against total loss could be effected in accordance with chapter 14 of the Plan, cf. the first sentence. Whereas the Special Conditions only concerned freight interest, the door is now opened to the effecting of both freight-interest and hull-interest insurance. The policy shall state the type of insurance against total loss that has been effected.

*Section 3 - War-risks insurance***§ 18-16. Applicable rules**

This paragraph corresponds to CEFOR Rig Forms Nos. 3 to 5.

CEFOR Rig Forms no. 3 to 5 contained detailed provisions concerning war-risks insurance of mobile offshore structures. However, also as regards the war-risks insurance, there was general agreement that cover could be effected on ordinary Plan conditions. If it has been agreed that the insurance also covers war perils, the rules in chapter 15, cf. the first sentence, shall apply. In addition, the rules in chapter 18, section 1, shall apply correspondingly, cf. the second sentence.

## Chapter 19. Builders' risks insurance

### General

The rules in this chapter are based on CEFOR Form 250, which is in turn based on Institute Clauses for Builders' Risks. The conditions have so far only been applied to the building of ships in Norway. The Commentary is partly based on the Commentary on the builders' risks conditions in the 1964 Plan.

Chapter 19 applies directly only to the building of ships and is intended to cover the yard and the buyer's needs in a building situation. In the event of repairs of a ship, the ordinary hull and loss of hire conditions shall apply. The ordinary owners' insurances also apply in connection with the reconstruction of ships. There is nevertheless nothing to prevent the taking out of an insurance according to chapter 19 also for a reconstruction of the ship if this is deemed expedient. However, the conditions are not written with this situation in mind, and they must therefore be adapted to meet the special needs in a reconstruction situation, for example in respect of the loss of hire risk for the owner.

§ 9 of CEFOR Form 250 contained a rule that the sum insured was the amount stated in the policy; such a rule applies to all types of insurance and is unnecessary. § 10 relating to interest has in the new Plan been incorporated in § 5-4. Furthermore, § 5 of CEFOR Form 250 contained a separate provision about causal connection. Here it was decided to take the general provision in § 2-11 for a basis.

§ 11, subparagraph 1 (a) of CEFOR Form 250 stated that the insurer was liable up to the sum insured for loss of or damage to the newbuilding caused by any one casualty. In principle the provision concorded with § 4-18, subparagraph one, first sentence, of the Plan and has therefore been deleted.

§ 11, subparagraph 1 (c), of CEFOR Form 250 contained a provision concerning cover of costs of measures to avert or minimise loss. The provision differed from § 4-18 in that the insurer's liability for such costs was limited to the sum insured. It was not possible, as under § 4-18, to "transfer" a sum insured that had not been used up in the claims settlement for the property damage to costs of measures to avert or minimise loss relating to the same casualty where these costs exceeded the sum insured. During the revision it was agreed that the general rule in § 4-18 of the Plan should be adhered to. The provision has therefore been deleted.

§ 11, subparagraph 2, of CEFOR Form 250 stated that the said limitation amounts comprised litigation costs and possible general average contributions, but that interest was to be added. Also here it was decided to follow the solution in the general rules of the Plan, cf. § 4-19.

Builders' risks insurance is, in addition to the provisions in chapter 19, also subject to the provisions in the general part of the Plan (chapters 1-9), and the rules in chapters 10 to 12, insofar as this transpires from chapter 19, section 2.

### *Section 1 - Common provisions*

#### **§ 19-1. Perils covered/Re. § 2-8, cf. § 2-10**

This paragraph corresponds to § 1, subparagraph 1, and § 2 of CEFOR Form 250.

CEFOR Form 250 was structured so that § 1 contained the main rule that the insurance covered all perils that were not specifically excluded, while the exclusions were stated in § 2. The provision in § 1 corresponded to the main rule about an all-risk insurance in § 2-8, and is therefore superfluous. The exclusions in § 2 corresponded to a large extent to the exclusions in § 15 and § 16 (a) and (b) of the 1964 Plan and the exclusion for nuclear risk in the Hull Conditions for Ocean-Going Vessels. However, § 2 did not contain any exclusion that corresponded to § 16 (c) of the 1964 Plan relating to riots, strikes, etc., or letter (d) on piracy and mutiny. All in all, this description of the perils included under the insurance entailed that the builders' risks insurance was an insurance against marine perils, but included certain perils which normally belong under the war-risk cover.

During the revision, there was agreement to limit the range of perils in the builders' risks insurance so that the insurance does not cover riots, sabotage, piracy and mutiny. Such risks occur today primarily during trial runs and deliveries in "exotic waters", and must in future be insured against under a separate war-risks insurance under section 6. However, the cover against strikes and lockouts has been retained in addition to the ordinary cover against marine perils, cf. § 2-8. The reason is that the separate war-risks insurance for the construction of newbuildings presupposes that the newbuilding has been launched, cf. § 19-27, subparagraph 1. The assured's need for cover against strikes and lockouts while the newbuilding is in dock must therefore be resolved through the ordinary marine peril cover.

The cover against strikes and lockouts must be seen in conjunction with the fact that the builders' risks insurance is a hull insurance, possibly a liability insurance, for the yard. The insurer will therefore only become liable if a strike or lockout results in damage to the newbuilding or components, materials etc., possibly liable for damages for the yard for damage inflicted on a third party. It is not sufficient to trigger the right to payment under the builders' risks insurance that a strike or lockout results in a delay.

§ 1, subparagraph 1 (a) to (e) of CEFOR Form 250 contained an overview of the main elements of the cover. Such an overview is misleading because it is incomplete, and it is furthermore not in accordance with the system of the Plan. It has therefore been deleted.

#### **§ 19-2. Insurance period/Re. § 1-5**

This paragraph corresponds to § 4 and § 8, subparagraph 2 of CEFOR Form 250.

§ 4, subparagraph 1, of CEFOR Form 250 contained a provision to the effect that the insurance attached from the time stated in the policy. This follows from § 1-5, subparagraph 1, first sentence, and there is accordingly no need to repeat it.

On the other hand, there is a need for special rules determining when the builders' risks insurance terminates because such insurance does not run on an annual basis.

Subparagraph 1, first sentence, states that the insurance is terminated as from the takeover date stated in the building contract. This point of departure is new in relation to CEFOR Form 250, § 4, second sentence, which stated that the insurance terminated at the time of actual takeover, or when the newbuilding was ready for delivery. However, the first sentence seen in conjunction with the second sentence entails that the insurance remains in effect until the actual takeover, provided this takes place before expiry of the time-limit of nine months under subparagraph 3. The significance of the point of departure in the first sentence is therefore first and foremost that, in the event of an extension beyond the time of delivery stipulated in the building contract, the insurer is entitled to an additional premium as established in the policy. This is new in relation to CEFOR Form 250. If delivery takes place before the stipulated date, the assured will, on the other hand, be entitled to a return of premium, cf. § 6-5.

The rule that the insurance terminated when the newbuilding was ready for delivery has not been retained. Regardless of whether it is the yard or the buyer who in such cases bears the risk for the newbuilding, there is a need for continuous insurance cover until the newbuilding is comprised by an ordinary hull insurance. To ensure ongoing insurance coverage it has therefore been taken for a basis that the insurance remains in effect until takeover, regardless of whether or not the newbuilding is ready and regardless of whether or not the delivery date under the building contract

has been met. If the original date of delivery in the agreement is postponed because of additional work, or because the yard is delayed, the builders' risks cover therefore remains in effect until the delivery in actual fact takes place, provided this happens within nine months, cf. subparagraph 3. However, as mentioned, the insurer is entitled to an additional premium.

Normally, the shipbuilding contract will contain a specification of the date of delivery, cf. for example § 2 of "Standard Form of 7 October 1981 for Contract for the Building of Ships at Norwegian shipyards" (the 1981 Contract), which is an "agreed document" between the Norwegian Shipowners' Association and the Federation of Shipyards and Offshore Yards. If no such agreement has been entered into, the delivery date will depend on the parties' actions, assessed against the background of general principles of contract law and the provisions of the building contract in general.

It is conceivable that the hull insurance under the agreed conditions comes into force before the builders' risks insurance terminates, for example in the event of late delivery. In that event, the rules relating to double insurance shall be applied, cf. § 2-6 and § 2-7.

Subparagraph 2 is taken from CEFOR Form 250, § 8, subparagraph 2, and states that the insurance is extended automatically against an additional premium as agreed in the policy if the newbuilding is not taken over by the original buyer. In the Special Conditions the rule was that a specific agreement had to be concluded for extensions. However, it is more expedient for the extension to be automatic against an additional premium agreed on in advance, cf. the comment on subparagraph 1 above. The extension lasts until the newbuilding is in actual fact taken over by another buyer. However, also here a time-limit of nine months under subparagraph 3 shall apply.

An extension under subparagraph 2 is only triggered where the newbuilding is not "taken over" by the original buyer. According to Draft Standard Form Shipbuilding Contract 1997, clause 5, Removal of Vessel the buyer is given three days from "Delivery" to remove the ship from the builder's yard. In such cases, the ship has been taken over on "Delivery". If the newbuilding remains at the yard after takeover in accordance with this provision, this consequently does not entail an extension of the builders' risks insurance under subparagraph 2. In such cases, the buyer must arrange for ordinary hull insurance.

If it is the original buyer who takes over the newbuilding after first having refused to take delivery, it is subparagraph 1 that regulates the termination of the insurance.

The Special Conditions contained a corresponding rule in the event that there was no original buyer. This rule has been deleted. If the yard builds the newbuilding for its own account, the insurance must, regardless, be adjusted to this fact. The parties must in that event also conclude a special agreement about the insurance period.

The provision in the Special Conditions to the effect that the place and manner of lay-up must be approved by the insurer is superfluous in addition to § 3-26 relating to a lay-up plan.

Subparagraph 3 is new and stipulates a maximum period for how long the supplementary cover remains in effect without separate agreement, viz. up to nine months after the takeover date in the building contract.

#### § 19-3. Co-insurance/Re. § 8-1

This paragraph corresponds to § 3 of CEFOR Form 250.

A ship will normally be built according to a building contract entered into between a building owner and a shipyard, e.g. "Standard Form of 7 October 1981 for Contracts for the building of ships at Norwegian Shipyards" (the 1981 Contract), which is an "agreed document" between the Norwegian Shipowners' Association and the National Federation of Ship and Offshore Yards. In order to safeguard the interests of both parties in the newbuilding and objects or parts to be incorporated in the newbuilding, it is therefore necessary for the insurance to be for the benefit of both the yard and the buyer. Normally, it will also follow from the shipbuilding contract that one of the parties, usually the yard, cf. e.g. § 7, item 2, first sentence, is required to take out insurance. This obligation to take out insurance comprises the buyer's deliveries and also entails that the buyer shall have a direct claim against the insurer in the event of a total loss as regards amounts paid which the yard is obliged to refund the buyer, cf. § 7 item 3 (c). Also in relation to such contractual regulation it is therefore necessary for the builders' risks conditions to cover the interests of both parties.

§ 3 of CEFOR Form 250 solved this problem by letting the insurance be partly for the benefit of the yard, partly for the benefit of the buyer. The yard's interest was covered to the extent that it bore the risk for the newbuilding and parts, etc. when a loss occurred. The buyer's interest covered



objects for the newbuilding which he supplied and which were included in his risk, plus instalments on the price paid if it was a case of total loss.

During the revision there was agreement that it would be more expedient to take for a basis the normal situation where the yard was the person effecting the insurance and the buyer was given the status of co-insured according to § 8-1, cf. first sentence. This means that both the yard and the buyer will have the status of assured and be entitled to compensation for their economic interest in the newbuilding to the extent that this follows from the Special Conditions.

It is only the yard that takes out the insurance that is secured under chapter 19. In principle, the insurance does not comprise the subcontractors, cf. the fact that the co-insurance provision in § 19-3 applies only to the buyer. If it is desirable for the insurance also to comprise the subcontractors' interests, it is therefore necessary to take out a separate co-insurance according to chapter 8. In that event it is also necessary to ensure that the place of insurance according to agreement under § 19-5, subparagraph 2, includes the subcontractor's premises.

The insurance is effected for the benefit of the yard as the person effecting the insurance to the extent that the yard bears the risk for the newbuilding and parts, etc., when a casualty occurs. According to § 7, item 1, of the 1981 Contract, the risk is transferred on delivery. Until delivery has taken place, the yard bears the risk for the newbuilding. If the newbuilding is totally destroyed with the effect that the yard's duty to deliver is terminated, the yard must therefore refund the buyer the instalments on the price which the latter has paid during the period of construction. The "total-loss risk" for the yard therefore consists in the investments in the newbuilding being lost without the price, or a proportion thereof, being recoverable from the buyer. To this must be added the risk for partial damage, which consists in the yard having to, at its own expense, repair any damage which the newbuilding sustains in connection with less extensive accidents before the risk has passed to the buyer. This concords with the solution given earlier in § 3 (a) of the Special Conditions.

The co-insurance of the buyer comprises the buyer's economic interest as defined through the building contract. If the buyer is required, for his own account, to procure certain components or materials to be incorporated in the newbuilding, the buyer's status as co-insured entails that these are included in the builders' risks insurance, provided that it is set out in the policy or transpires from conditions in general that the objects are comprised. However, the components are only comprised by the insurance from the time they are in the builder's yard in the port where the yard is situated, cf. § 19-5 concerning place of insurance. If the components are delivered directly to the newbuilding and the newbuilding is outside the place of insurance by agreement with the insurer, the position must be that the components are covered from the time they are on board the newbuilding. This concords with § 3 (b) of CEFOR Form 250. The condition is, however, that the buyer's deliveries are covered by the insurance, cf. § 19-9 (b), which concords with § 3 (b) of CEFOR Form 250, but here the rule was that the buyer's objects were only covered if the value was included in the sum insured.

In addition to the risk for own deliveries, the co-insurance comprises the buyer's interest in a refund of instalments on the price paid in the event of a total loss, cf. § 3 (c) of the previous CEFOR Form 250. Prior to delivery, the risk for the newbuilding will normally be on the yard, cf. § 7, item 1, of the 1981 Contract, so that the yard must refund instalments paid in the event of a total loss. However, it is in exclusional cases conceivable that the buyer bears the risk for loss of the object of the contract prior to delivery and, in that event, this interest will be covered. This is also the case if the insurance period is extended beyond the time of delivery so that the risk for the newbuilding has passed to the buyer. However, the buyer's position as co-insured must also give him a direct claim against the insurer in the event of a total loss, even if this is the yard's risk, cf. in this respect § 7, item 3 (c) of the 1981 Contract. This is of significance if the yard is insolvent so that the insurance compensation would in its entirety have gone to the insolvent estate, while the buyer would have had to be content with a dividend claim. The co-insurance will therefore ensure that the yard, or its bankrupt estate, will not receive any total-loss compensation without the buyer at the same time being refunded his advance payments.

As regards the buyer's right to recover paid instalments in the event of a total loss, the Special Conditions contained in letter (b) a rule to the effect that the buyer was required to have become the owner of the newbuilding as the construction progressed. This provision is less expedient because the buyer will normally get a bank guarantee instead of a title to the newbuilding under construction. The provision has therefore been deleted.

Co-insurance of the buyer for the instalments on the price paid is, on the other hand, only valid if he has made the payments himself, or they were paid by others on his behalf. Other intervention payers will not receive a corresponding automatic status as co-insured.

That the buyer is co-insured "according to § 8-1" entails that he will not acquire any better ranking right against the insurer than what the yard has. This concords with § 3, subparagraph 2, of the Special Conditions. If the buyer wants a better cover in the form of an independent co-insurance, he must take out co-insurance according to § 8-4.

As mentioned above, § 19-3 is based on the normal situation where the yard is the person effecting the insurance, cf. § 7, item 2, of the 1981 Contract to the effect that the yard is required to take out the insurance. However, it is conceivable that the buyer wants to take out the insurance himself, e.g. because he has the title to the newbuilding. Such procedure is normal in offshore insurance. In that event, a separate agreement must be concluded if the yard is to be co-insured.

The cover of mortgagees is effected in accordance with the general rules of the Plan, see chapter 7.

The second sentence states that the co-insurance does not apply to the expense coverage according to section 3. This concords with § 25, second sentence, of CEFOR Form 250, about the insurer's liability for the yard's own expenses in connection with the removal of wrecks. The buyer shall also arrange for separate insurance cover for any additional expenses incurred in connection with an unsuccessful launching or the removal of the newbuilding.

§ 3, of Form 250, cf. section 3, emphasized that the liability cover only concerned the yard's liability for damages so that the buyer was not co-insured under the liability part. However, it is more expedient for the buyer to be co-insured also as regards the liability cover. Liability which the buyer may incur by employees or management's wrongful acts in connection with the building project will not be covered under the owner's P & I insurance. The buyer must therefore have a separate liability insurance in order to cover such situations. However, in practice it is rare for such cover to be taken out, which means that the buyer will be without cover for this liability. In such cases it is therefore expedient for the buyer also to be co-insured under the liability cover.

On the other hand, liability cover under the builder's risks insurance should be subsidiary to other liability insurances, if any, taken out by the buyer, cf. subparagraph 2, which is new.

#### § 19-4. Transfer of the building contract/Re. § 3-21

This paragraph corresponds to § 8, subparagraph 1 (a) of CEFOR Form 250.

§ 8, subparagraph 1 (a) of CEFOR Form 250 entailed that the insurance would remain in effect upon a transfer of the building contract if the insurer had been advised in advance of such transfer. This applied regardless of whether it was the buyer or the yard who transferred the contract. In the Plan, a distinction is made between a transfer to a new buyer and a transfer to a new yard. If the building contract is transferred to a new yard, the insurance will terminate. If the yard is the person effecting the insurance and the owner, the solution follows from § 3-21. But the rule must apply also if the buyer is the person effecting the insurance and the owner of the newbuilding, and the yard is co-insured. Such transfer must be regarded as a change of ownership according to § 3-21. Furthermore, the termination of the insurance will normally follow from § 19-5 concerning place of insurance, because on transfer of the building contract to a new yard, the newbuilding must be removed to that yard and will thereby move outside the place of insurance. It has nevertheless been deemed expedient to have an explicit rule to that effect.

On the other hand, the solution in the Special Conditions that continued insurance in the event of a transfer to a new buyer was subject to the insurer being notified of the transfer has not been retained. It would be unfortunate if the yard were to lose its cover if the buyer transfers the building contract without notifying the insurer. In such cases it is therefore more expedient for the insurance to continue. This is also the solution in the English conditions, cf. IBR, items 15 and 16.

The rule that the insurance shall remain in effect even if the buyer transfers the building contract is subject to the condition that it is the yard, and not the buyer, who is the owner of the newbuilding. If it is the buyer who is the owner, it follows from § 3-21 that the insurance will terminate if the buyer transfers the building contract. This applies both in relation to the new buyer and in relation to the yard. If the new buyer, and possibly the yard, in such cases want the insurance to continue, this will have to be agreed with the insurer before the transfer, possibly against a payment of additional premium.

### § 19-5. Place of insurance

This paragraph corresponds to § 6, subparagraphs 1 and 2, and § 8, subparagraph 1 (b), of CEFOR Form 250.

The provision defines the geographical scope of the insurance. However, the heading has been changed from "The geographical scope of application of the insurance" to "Place of insurance".

Subparagraph 1 (a) is approximately identical to § 6, subparagraph 1, first sentence, of CEFOR Form 250, but has been rewritten to make it more comprehensible. The provision delimits the insurance to the builder's yard or other premises in the port where the yard is situated and transport between these areas. A shipyard will often have its activities spread over a number of different places, partly in the form of warehouses and factories close to the building berths, partly in the sense that it has its building berths located at different places within the same port. It is therefore practical for those parts and materials that are intended for the insured newbuilding to be covered by the insurance, regardless of where they are located within the yard's premises or areas, provided that it is in the same port. If parts of the newbuilding are to be built in a different port, however, this will fall outside the scope of the insurance, cf. the wording the builder's yard "in the port where the yard is situated". In that event, the yard will either have to extend the cover by a separate agreement under subparagraph 2, or take out a separate insurance.

Also "local" transport within the areas of the builder's yard situated in the same port is in principle covered by the insurance. If the parts or the materials are made or stored relatively close to the building berth, it would be impractical if a separate insurance had to be taken out for each individual transport to the building site. If the parts have to be sent to a department of the yard situated in another port, the transport risk should, however, be evaluated separately, cf. subparagraph 2, or be covered by a separate insurance.

However, the insurance does not cover transport of components from subcontractors to the yard. This applies regardless of whether it is the yard that has ordered the components, or they are delivered by the buyer. Components delivered to the yard are included in the insurance once they are in the builder's yard, cf. letter (a). Where the yard has ordered the main engine or other components for the ship from a subcontractor, the risk will pass to the yard when the part is "delivered" according to the law pertaining to the sale of goods. Normally, the agreement will be to the effect that the yard bears the risk during transport from the supplier's factory. Such transport must, like longer transports between the builder's yard's own departments in different ports, be assessed as a separate risk and be covered by a separate insurance.

Letter (b) is taken from § 6, subparagraph 2, of CEFOR Form 250. The rule in the Special Conditions to the effect that trial runs within an area of 250 nautical miles are covered has, however, been superseded by a rule to the effect that the insurance comprises trial runs within the area allowed by the newbuilding's provisional certificates. If the newbuilding proceeds beyond this area, the insurance cover is suspended. However, the insurance must again take effect when the newbuilding comes within the relevant area.

For newbuildings that are registered under Norwegian flag such provisional certificates are issued by the Maritime Directorate. In the past, the Maritime Directorate also issued provisional certificates for foreign newbuildings that were built in Norway, but that arrangement has now been terminated, cf. circular 12/97. Today it is therefore the flag state of the newbuilding that must draw up such certificates. In relation to this group of newbuildings it was therefore discussed whether the certificate requirement would lead to problems, and whether it would be better to retain the previous limit of 250 nautical miles. The reason why it was nevertheless decided to base the trading limits on the provisional certificates is partly that the certificate requirement is absolutely fundamental in relation to the operation of the ship, and partly that buyer and shipyard must therefore be expected to ensure that these papers are in order. To this should be added that a limit of 250 nautical miles may cause considerable problems in relation to a provisional certificate which operates with a narrower trading area, because it will then be unclear whether the insurance is suspended whenever the newbuilding proceeds beyond the limits stated in the certificate, but stays within 250 nautical miles.

§ 8, subparagraph 1 (b) of CEFOR Form 250 contained a rule to the effect that the insurance could also comprise the newbuilding when it was outside the area stipulated for the trial run in § 6, subparagraph 2, i.e. beyond a distance of 250 n.m. from the place where the construction work was completed. Cover was subject to the condition that the insurer was notified of the infringement. This provision is impractical given that the area for trial runs is now tied to the area stipulated in the newbuilding's provisional certificates.

The provision in letter (b) must be seen in conjunction with § 3-15 relating to trading limits. If the trading area indicated in the newbuilding's provisional certificates comprises areas which entail an additional premium according to § 3-15, subparagraph 2, this provision must apply to the builders' risks insurance. The insurer must in that event be notified if the ship has proceeded beyond the ordinary trading limits and is entitled to demand an additional premium or other conditions. If the assured fails to notify the insurer, subparagraph 2, second and third sentences of § 3-15 concerning an additional deductible shall apply in the event of a casualty.

Subparagraph 2 is taken from § 6, subparagraph 1, second sentence, of CEFOR Form 250, but has been rewritten. Normally the insurer will consent to such extension of the cover for the building of sections at the assured's own yards other than the main yard, but not for components manufactured and purchased by subcontractors. As long as the component is the subcontractor's risk, the yard will not have any need for such additional insurance. However, it is conceivable that the yard would be interested in postponing the collection of the relevant component from the subcontractor until the work on the newbuilding has progressed so far as to allow the fitting of the component. Under section 13, item 2, of the Sale of Goods Act, the yard will in that event bear the risk for the component while it is stored with the supplier. The yard will then need supplementary cover in the same way as for transport of the object from the supplier's factory, cf. above.

If it is necessary to move the newbuilding outside the areas indicated in § 19-5, § 19-6 regarding removal shall apply.

§ 6, subparagraph 2, of CEFOR Form 250 contained a provision regulating when deliveries from a buyer were covered. This is superfluous. The buyer is co-insured according § 19-3, and the buyer's deliveries will be covered by the insurance to the extent that they are stated in the policy, or it transpires in some other way that the deliveries are included, cf. § 19-9. However, the question as to where the deliveries must be in order to be included must, like the other objects covered by the insurance, be resolved through the provision in § 19-5 and the policy's statement of the geographical scope of application of the insurance.

§ 19-6. Removal plan/Re. § 3-22 and § 3-25

This paragraph corresponds to § 7 of CEFOR Form 250.

§ 7 of CEFOR Form 250 stated that the insurance did not comprise the removal of the newbuilding or parts thereof under its own steam or whilst towed outside the builder's yard in the port where the yard is situated, unless the insurer had given his consent. This rule has been retained as regards removal outside the place of insurance without it being necessary to state this explicitly. In such cases a specific agreement must therefore be made whether the insurance shall apply.

However, as regards removal between the area stated in § 19-6, subparagraph 1, and the areas included in a special agreement under § 19-6, subparagraph 2, the rule concerning a specific agreement has been superseded by a safety regulation concerning the drafting of a removal plan patterned on § 18-6 (b), cf. first sentence, of the Plan. The removal plan shall be submitted to the insurer for his approval. However, the intention is not that the insurer shall review the classification society's recommendations as regards procedures for the removal.

It will typically become applicable if the newbuilding is to be moved or towed from the builder's yard in the port where the yard is situated to other building berths in other ports for the building yard or a subcontractor. Such removal will normally not be included in the ordinary premium. In that event, the insurer may of course, demand an additional premium.

The fact that consent has been replaced by a safety regulation entails that the insurer can only react to a breach of the removal plan if the assured has been negligent and there is a causal connection between the breach and the casualty, cf. § 3-22. In contrast to § 18-6 (b), the safety regulation in § 19-6 is not a separate safety regulation under § 3-25, subparagraph 2, cf. second sentence, which only refers to § 3-25, subparagraph 1. This means that the extended identification rule in § 3-25, subparagraph 2, does not become applicable. The question of identification must then be decided as usual under the rules contained in § 3-36 to § 3-38.

§ 19-7. The sum insured as the limit of the liability of the insurer/Re. § 4-18 and § 4-19

This paragraph corresponds to § 11 of CEFOR Form 250.

The provision is taken from § 11, subparagraph 1 (b), of CEFOR Form 250 and essentially concords with § 4-18, subparagraphs 1 and 2. The provision entails that the insurer may become liable for up to three sums insured: One sum insured for loss of or damage to the newbuilding according to section 2, one sum insured for loss in connection with measures to prevent or minimize a casualty covered under section 2, and one sum insured for additional costs in connection with an

unsuccessful launching and costs of wreck removal (section 3), and for liability covered under section 4. According to § 4-18, subparagraph 1, third sentence, any unused sum insured to cover loss of or damage to the newbuilding may furthermore be "transferred" to cover measures to avert or minimize such loss.

#### § 19-8. Deductible

This paragraph corresponds to § 12 of CEFOR Form 250.

According to § 12 of CEFOR Form 250, the deductible was to constitute 1 per thousand of the sum insured, however, not less than NOK 75,000. However, the Plan system is that the deductible shall be decided individually and be stated in the policy, cf. e.g. § 12-18. The provision has therefore been amended in accordance therewith, cf. subparagraph 1, first sentence.

The second sentence states that only one deductible shall apply if the same casualty entitles the assured to compensation for both damage to the newbuilding, damage to the yard area, wreck-removal costs and liability to third parties. This concords with the solution in practice, but differs from the solution in the Plan in general.

According to subparagraph 2, it is emphasized that no deductible shall apply to total loss, costs in connection with the claims settlement or costs to avert or minimise a loss. This is in accordance with the General Plan system.

## *Section 2 - Loss of or damage to the newbuilding*

### **§ 19-9. Objects insured**

The paragraph corresponds to § 13 of CEFOR Form 250.

The provision comprises the economic effort made by the yard and the buyer at any given time in order to complete the ship.

Letter (a) is taken from § 13 (a) of CEFOR Form 250. By "the newbuilding" is meant whatever has at any time been built. This was stated earlier in the Special Conditions, and there is no intention of making any changes here.

If the newbuilding consists of several sections that are built at several different yards, the insurance basically only covers the part of the newbuilding that is built in the yard of the person effecting the insurance, cf. § 19-5, subparagraph 1 (a). If the parties want insurance cover which also comprises sections built elsewhere, a separate agreement must be made for an extension of the place of insurance according to § 19-5, subparagraph 2. In that event, it may also be relevant to give the subcontractor status as co-insured, cf. the comments on § 19-3.

Letter (b), first sentence, is taken from § 13 (b) and (d) of CEFOR Form 250, and concerns the economic effort that is implicit in components, equipment and materials. The term "equipment" is new without this entailing any changes on points of fact. The insurance comprises components, equipment and materials which the yard has for its own account procured or manufactured to be used for the newbuilding, as well as components, equipment and materials manufactured or procured by the buyer, cf. in this respect letters (b) and (d) of the Special Conditions.

Letter (b), second sentence, emphasizes that the buyer's components, equipment and materials are only covered to the extent that this is set out in the policy or transpires from circumstances in general. This is in accordance with § 13, subparagraph 1 (d) of CEFOR Form 250, cf. also § 3, subparagraph 1 (b), but here this was subject to the condition that the relevant objects were included in the sum insured. If the sum insured is insufficient to cover the interests of both the yard and the buyer, it will, however, be difficult to decide whether this is due to the fact that the sum insured has been calculated too low in relation to the overall values, or to the fact that the buyer's interest in materials and components delivered shall not be comprised. A clearer procedure is therefore for the policy to state to what extent the buyer's components and materials shall be covered. On the other hand, such a rule may become too rigid and lead to unreasonable results if the yard were to forget to state the buyer's deliveries in the policy despite the intention for them to be included. If the yard is in such cases obliged under the building contract to insure the buyer's deliveries, and the insurer invokes that the policy does not contain any information to this effect, the yard will incur liability for the neglect vis-à-vis the buyer. In order to avoid such an outcome, letter (b) states that the deliveries are included, also if this "transpires from conditions in general". This may for example be the case if the buyer's deliveries are included in the contract price and the contract price is identical to the sum insured. On the other hand, it may have been understood between the parties that the buyer shall take out his own insurance, for example where it is a question of comprehensive seismic equipment of great value. In such cases the buyer's deliveries will not be included.

Where the buyer's deliveries are in this way included in the insurance, it is important that the yard ensures that the sum insured is sufficient to cover both the yard's and the buyer's deliveries. If the sum insured is too low, the result will be that the yard is underinsured for its own deliveries and furthermore incurs a liability to the buyer for the latter's deliveries to the extent that the yard is obliged keep these insured.

§ 13, subparagraph 2, of CEFOR Form 250 contained a provision to the effect that "damage to or loss of objects which are not incorporated in the newbuilding" were only covered if the assured could "prove that they were labeled with the newbuilding's hull number". During the revision there was agreement that it was sufficient to have a rule to the effect that the objects were manufactured or procured for the newbuilding, cf. (b), first sentence, which is taken from § 13 (b) and (d) of CEFOR Form 250. It then follows from § 2-12 that the assured has the burden of proving that this requirement is met. The requirement for labelling has therefore been deleted.

Letter (c) is identical to § 13 (c) of CEFOR Form 250 and includes the yard's costs in connection with the drawing and other Planning of the newbuilding in the cover. The object insured is here not the specific drawings, models, etc. - these can normally be reconstructed at low cost if they are destroyed - but the general costs incurred by the yard in its own Planning department and to hire

consultants in connection with the Planning of the ship. If the building contract is terminated, these costs will normally be wasted.

If the ship forms part of a series which the yard is going to build, the costs can be distributed over all the ships in the series. If it is an established fact that the existing Plans will be used in connection with the building of subsequent ships, it will be possible to say that "the yard's costs in connection with the drawing and other Planning of the newbuilding" only comprise the proportion of the costs which come under the insured contract. However, if this is not perfectly clear, no deduction shall be made from the compensation on account of the potential value which the Plans may have for the execution of subsequent contracts.

Letter (d) corresponds to § 13 (e) of CEFOR Form 250, but has been amended in accordance with § 10-1. The Special Conditions furthermore comprised, in addition to bunkers and lubricating oil, deck and engine accessories. This cover now follows from the term "equipment" in letter (b). This entails that it is sufficient that the equipment has been "procured for the newbuilding"; it need not be on board. The Special Conditions also stipulated a prerequisite that the said objects, etc., must belong to the yard. Also bunkers and lubricating oil belonging to the buyer should, however, be covered.

The rules in subparagraph 1 must be compared with § 1-5, first sentence, as to when the insurance period starts. The yard's investments in materials etc. will only be covered as from that point in time. However, there is obviously nothing to prevent an agreement that the investments shall be insured from an earlier point in time.

#### § 19-10. Insurable value

This paragraph is new.

The provision defines the insurable value in builders' risks insurance and is taken from § 199 of the 1964 Plan and § 14, subparagraph 2, second sentence, of CEFOR Form 250.

Subparagraph 1 defines the insurable value when the newbuilding is ready for delivery. CEFOR Form 250 did not contain any actual definition of the insurable value, but apparently assumed that the insurable value at the time of delivery was "the contract sum plus additions as mentioned". This concords with the wording "the original contractual price with later agreed deductions" and "later agreed additions stated in the policy", cf. letters (a) and (b), which are taken from § 299 (a) and (b) of the 1964 Plan. The wording "later agreed deductions" concerns changes which result in a reduction in the price. Normally the insurer will be notified of such deductions for the purpose of obtaining a reduction in premium. In that event, they will also be stated in the policy. To avoid that the insurable value exceeds the assured's real loss, it is, however, necessary to take such deductions into account in the calculation of the insurable value, regardless of whether or not the insurer has been notified.

The term "later agreed additional amounts" in letter (b) refers to variation work in relation to the original contract which results in an increase in the price. The consequence of such variation work/additions not having been reported is that the relevant part of the building contracts is not insured, cf. in this respect p. 170 of the Commentary to the 1964 Plan.

It follows from subparagraph 1 letter (c) that also the value of the buyer's deliveries is included in the insurable value. It transpires from § 19-9 (b) that such deliveries are included in the insurance if this is set out in the policy or transpires from conditions in general. In that event, it is natural that also the value of these deliveries is stated in the policy and included in the insurable value.

According to letter (d) also the value of subsidies and contributions stated in the policy are included in the insurable value provided that the subsidies are mentioned in the policy or are in some other way understood to be covered. The subsidies concerned are state subsidy schemes which are basically common to all European shipyards. As at 1997 such subsidies constitute 9.89% of the contract price. The amount is paid to the yard after delivery of the newbuilding at fixed dates of payment twice a year. The subsidies are therefore an addition to the price and must be regarded as a part of the total value of the building project.

If the insurable value is based on the contract price with agreed additions, the yard's profit will be included. However, such a definition of the insurable value does not comprise the buyer's profit on the building contract given by the difference between the contract price with additions, etc., and the ship's market value. This concords with the solution in CEFOR Form 250.

Subparagraph 2 defines the insurable value before the newbuilding is ready for delivery. The provision corresponds to § 200 of the 1964 Plan and § 14, subparagraph 2, first sentence, of CEFOR Form 250, but has been rewritten. The provision is based on the fact that the insurable

value in the builders' risks insurance increases concurrently with the investments made in the ship. Consequently, deductions shall be made in the insurable value calculated according to subparagraph 1 for work that has not been carried out and components and materials which have not been procured or made for the newbuilding, cf. letters a and b. Components and materials which have been procured shall, however, be included, provided that they are within the place of insurance, cf. § 19-5. In reality, this should concord with the solution in § 14, subparagraph 2, first sentence, of CEFOR Form 250, which provided that the assured in the event of a total loss before the time of delivery was entitled to "the value of the part of the newbuilding that was completed at the time of loss plus the value of components, etc., procured or manufactured for the newbuilding". The rule entails that the yard will receive compensation for the profit element of the work that has been done.

Furthermore, a deduction shall be made for the proportional part of the subsidies which relate to the work that has not been done and the components, etc., which have not been procured, cf. letter c. This provision refers to the fact that the subsidy shall only be paid on delivery so that the assured has only earned parts of this amount in case of a total loss before the time of delivery.

However, the definition of the insurable value under subparagraph 2 does not afford cover for the yard's profit on the investments which have not yet been made. In order to obtain the full profit the contract must therefore be executed by a rebuilding of the ship. This concords with § 14, subparagraph 2, of CEFOR 250 and the point of departure of the 1964 Plan. However, under the 1964 Plan it was possible to include the full profit element in the insurance, see § 200, subparagraph 2.

#### § 19-11. Total loss in the event of condemnation

This paragraph is new.

In the Special Conditions the definition of total loss and the determination of compensation in the event of total loss were gathered together in a joint provision, § 14. In chapter 19 the rules are split into three paragraphs. § 19-11 and § 19-12 give the definition of total loss and thus correspond to § 11-1, § 11-3 and § 11-7 of the hull conditions. Compensation in case of total loss is regulated in § 19-13, which corresponds to § 4-1, but is more complicated.

The provision gives a condemnation rule and comes in addition to the total-loss rule relating to the situation where the yard's obligation to deliver is terminated. The purpose is to obtain a simpler total-loss rule by not having to decide whether extensive damage to the ship results in the termination of the obligation to deliver because of failed contractual assumptions. In case of extensive damage to the ship, the condemnation rule is now directly applicable.

The assured is entitled to compensation for total loss if the newbuilding has such extensive damage that the costs of repairs will constitute more than 100% of the sum insured. This condemnation limit differs from the corresponding rule in the hull conditions, where the condemnation limit is set at 80% of the insurable value or the value of the newbuilding in repaired condition. The reason is that § 19-11 does not contain any corrective in the event of the market value being higher than the sum insured making a higher limit necessary.

The rule that a total loss does not occur until the costs of repairs would constitute 100% of the sum insured entails that a total loss will normally not arise until at or immediately prior to the time of delivery. At earlier stages of the building project, a total loss of what has been completed will normally not constitute the entire sum insured. In the event of damage to the newbuilding in such cases, the question of a total loss must be resolved according to § 19-12. The decisive point is then whether the damage has resulted in the termination of the yard's obligation to deliver. In the event of minor damage, this will normally not be the case, unless there is also damage to the yard which makes it impossible to repair the damage.

If the newbuilding is damaged without this constituting a total loss, settlement shall be effected according to the rules relating to damage contained in §§ 19-14 et seq.

#### § 19-12. Total loss where the yard's obligation to deliver is terminated

This paragraph corresponds to § 14 and § 26 of CEFOR Form 250.

The provision ties total loss under the builders' risks insurance to the termination of the yard's obligation to deliver under the building contract due to damage to the newbuilding or the yard, and retains the solution in § 14 of CEFOR Form 250. However, due to the fact that a condemnation rule has now also been introduced, cf. § 19-11, the total-loss rule in §19-12 has become less relevant.



The provision specifies that it is only the termination of "the yard's" obligation to deliver which triggers the right to the total-loss compensation. It is not sufficient that the parties in connection with an incident of damage agree that the contract shall not be executed, or that the buyer has stipulated in the building contract a unilateral cancellation right in case of delay due to damage.

The question as to when the building contract is terminated must be decided on the basis of the building contract, cf. e.g. § 2, subparagraphs 2 and 3, of the 1981 Contract relating to cases of force majeure, supplemented with general non-statutory rules on force majeure and failed contractual assumptions. A total loss will only exist if the damage to the newbuilding or the yard is so extensive that the yard may demand to be released from the obligation to fulfil the contract on the basis of these rules. The force-majeure concept in the 1981 Contract is based on the corresponding concept in section 24 of the Sale of Goods Act of 1907, and presupposes that the damage to the newbuilding or the yard has made it impossible, or practically impossible, to fulfil the contract. This question is discussed in further detail in Knudtzon: "Den nye kontrakt for bygging av skip ved norske verksteder, Nordisk Skipsrederforenings medlemsblad 1984 A", pp. 19 et seq. ("The new contract for the building of ships at Norwegian shipyards, the Northern Shipowners' Defence Club's bulletin 1984 A").

A total loss is based on the assumption that "the obligation to deliver" is terminated "as a result of" the said circumstances. The insurer is not liable if the obligation to deliver is terminated for other reasons, e.g. where the yard has the right to cancel without any loss or damage as mentioned having occurred. Nor will the termination of the obligation to deliver due to the yard's failure to meet its obligations trigger the right to total-loss compensation. This is a strictly commercial risk which cannot be covered by insurance, cf. also the exclusion for insolvency in § 2-8 (c).

Letters (a) to (c) corresponds to § 14, subparagraph 1, of CEFOR Form 250, but have been rewritten. Three reasons are stipulated on the basis of which the yard may be released from its obligation to deliver under the building contract, viz. damage to the newbuilding itself, damage to parts of the newbuilding, or damage to the yard, cf. letters (a) and (b). The alternative, damage to or loss of "parts of", is new; furthermore, letter (a) specifies that the damage must be "to" the newbuilding. None of the amendments entail any differences on points of fact. Decisive is the fact that the actual newbuilding is so extensively damaged that the yard cannot be expected to rebuild it, or that the yard itself suffers such extensive damage that it must be released from its obligations, cf. above.

According to letter (c), which corresponds to § 14, subparagraph 1, last sentence, of CEFOR Form 250, a total loss furthermore occurs when the obligation to deliver is terminated due to similar circumstances for a subcontractor, provided that manufacturing at the premises of the relevant subcontractor is covered according to §19-5, subparagraph 2.

#### § 19-13. Compensation in the event of a total loss/Re. § 4-1

This paragraph corresponds to § 14, subparagraphs 2 and 3, and § 26, of CEFOR Form 250, and § 199, cf. § 201 of the 1964 Plan.

Subparagraph 1 corresponds to § 14, subparagraph 3, of CEFOR Form 250 and regulates the insurer's liability for damages in the event of total loss when the newbuilding is ready for delivery. The basis for the total-loss settlement may in such cases be either the condemnation rule in § 19-11, or the rule in § 19-12 concerning the termination of the obligation to deliver. In that event, the insurer covers the sum insured, however, not in excess of the insurable value. The reference to the insurable value as the maximum limit for compensation is new and follows from the introduction of a definition of insurable value in § 19-10, cf. § 4-1.

Under CEFOR Form 250 the system was such that a total loss at the time of delivery triggered partly the payment of the ordinary sum insured, partly a refund of duty and other contributions stated when the insurance was effected. Refund of duty is not relevant today, in contrast to subsidies and other state contributions. However, under the new Plan, such subsidies and contributions have not been made a separate insurance "only against total loss", but are incorporated as an element in the ordinary definition of the insurable value, cf. § 19-10 (d). If such subsidies etc. are mentioned in the policy, the assured must therefore ensure that the agreed sum insured also includes this amount. If not, it will be a case of under-insurance, cf. § 2-4 and below.

In addition to the sum insured, the insurer shall in the event of total loss cover costs and other losses as set out in § 4-19.

According to § 19-10 the insurable value is defined as the original contractual price with any deductions or additions, the value of the buyer's deliveries and any subsidies. All of these elements must therefore be included in the agreed sum insured, cf. above concerning subsidies. If a fixed

sum insured has been agreed at the inception of the insurance and notice of additional work is later given to the insurer, the assured must therefore ensure that the sum insured is increased correspondingly. If not, the sum insured will be lower than the insurable value at the time of loss and this will result in under-insurance, cf. § 2-4.

In the same way the assured must ensure that the sum insured is reduced in the event of deductions resulting from parts of the work not being carried out. If this is not done, the sum insured will be higher than the insurable value, and the compensation will be limited to the insurable value. In that event, the assured will have paid premium on a larger amount than what he can recover under the insurance.

Subparagraph 2 defines the insurer's liability for damages in the event of a total loss before the newbuilding is ready for delivery and concords with § 14, subparagraph 2, first sentence, of CEFOR Form 250. The insurer's liability for damages in this case constitutes the proportion of the sum insured which corresponds to the insurable value calculated according to § 19-10, subparagraph 2. The calculation of the insurable value in this case is commented on in more detail in § 19-10, subparagraph 2. If the total loss here only affects part of the building project, the insurer's liability must be adjusted accordingly. If the sum insured is equivalent to the insurable value, the entire insurable value under § 19-10, subparagraph 2, will be payable. However, if the sum insured is less, the assured shall only receive the proportionate share which corresponds to the proportion between the sum insured and the insurable value.

The rule that a total loss has occurred when the yard's obligation to deliver is terminated because of damage to the yard or the premises of a subcontractor may result in the insurer having to cover the value of the newbuilding and components or materials procured for the same, even if both the newbuilding and the components are relatively, or even totally, undamaged. This may be the situation if the yard or a subcontractor sustains damage, e.g. by fire or natural hazards, which does not affect the newbuilding, components or materials, and the damage is so extensive that it would be unreasonable to expect the yard to complete the building project. Subparagraph 2 in conjunction with the definition of the insurable value in § 19-10, subparagraph 2, will in that event result in the assured recovering compensation also for the part of the newbuilding and materials or components which are undamaged, cf. the fact that from the insurable value deductions shall only be made for investments which have not been made. The reason is that where the obligation to deliver is terminated due to damage to the newbuilding or damage to the yard/the subcontractor's yard, it is clear that all the investments made are in principle lost for the assured. He should therefore receive compensation for these investments, even if the newbuilding and any components/materials are wholly or partly undamaged.

On the other hand, the insurer will in connection with the total loss settlement take over the title to the newbuilding and any undamaged components or materials, cf. § 5-19, subparagraph 1. The insurer can therefore utilize the market value which the newbuilding or the components may represent after the damage. If the buyer and the yard find it expedient to rebuild the newbuilding after payment of the total-loss claim, this therefore presupposes that the insurer agrees with such a decision. If such rebuilding results in the payment of subsidies to the yard which the insurer has paid through a total-loss settlement, the insurer must have a claim for reimbursement against the yard, corresponding to the amount of subsidies he has paid.

§ 14, subparagraph 2, last sentence, of CEFOR Form 250 stated that if the sum insured was less than the insurable value, liability must be limited according to the under-insurance rule. The rule applied only to total loss before the time of delivery; total loss at the time of delivery triggered payment of the sum insured in its entirety, cf. § 14, last subparagraph, of CEFOR Form 250. The rule relating to under-insurance in the event of total loss before delivery now follows from § 19-13, subparagraph 2, in that the insurer's liability is limited to the proportion of the sum insured which corresponds to the insurable value calculated according to § 19-10, subparagraph 2. As regards total loss on delivery, however, the under-insurance principle, follows from § 2-4 on under-insurance. This represents an extension of the under-insurance principle in relation to CEFOR Form 250, which was thus limited to total loss before delivery.

In practice, the buyer will normally have paid one or several instalments on the price, and these must be reimbursed when the yard's obligation to deliver is terminated due to a total loss. According to § 19-3, the buyer shall be regarded as co-insured as far as the instalments paid are concerned and will in the event of a total loss acquire a direct claim against the insurer.

#### § 19-14. Damage/Re chapter 12

This paragraph corresponds to §§ 15, 17, 19, 21 and 22 of CEFOR Form 250.

The builders' risks conditions were structured with a number of separate rules and subsequently a number of rules that were almost identical to the corresponding rules in chapter 12 of the Plan on hull damage. However, it is more in concordance with the Plan system to take chapter 12 on damage for a basis and exclude the provisions that are not appropriate. § 19-14 aims at obtaining the same result as §§ 15, 17, 19, 21 and 22 of CEFOR Form 250.

§ 15, subparagraph 1, first sentence, of CEFOR Form 250 was almost identical to §12-1, subparagraph 1. This provision now follows directly from the reference to chapter 12, and entails that if the newbuilding (or components and materials for the newbuilding) is damaged without this constituting a total loss, the insurer shall indemnify the costs by repairing the damage or re-acquiring lost objects. The costs of repairing the damage also comprise ordinary profit for the yard from such work. The repair work must in other words be calculated in the same way as if the yard had undertaken work paid by the hour for someone else, and the insurer shall indemnify the full amount. However, § 12-1, subparagraph 2, to the effect that liability arises as and when the repair costs are incurred protects the buyer against a major compensation for damage being paid to the yard without the corresponding repair work being carried out.

It is conceivable that the damage can be repaired, but that the owner nevertheless demands new equipment rather than repairs, e.g. out of fear of delayed damage in connection with water damage to a generator. Here the insurer's liability must be tied to the yard's obligation vis-à-vis the buyer according to the building contract. If under the contract it is sufficient for the yard to carry out repairs, possibly combined with a warranty against delayed damage, the insurer's liability must be limited in the same way. If the yard out of consideration for its customers or for other reasons chooses to buy a new object rather than repairing it, this must accordingly be of no concern to the insurer.

§ 15, subparagraphs 2 - 4, of CEFOR Form 250 contained a number of provisions that were practically identical to § 12-1, subparagraphs 2 - 4. The application of these rules now follows from the reference to chapter 12.

§ 15, subparagraph 5, of CEFOR Form 250 reflected the same principle as § 12-9 relating to repairs of a condemnable newbuilding in the event that the newbuilding was repaired in spite of the fact that it was a total loss. Also this provision is superfluous in view of the point of departure chosen in § 19-14.

§ 17 of CEFOR Form 250 contained rules that were practically identical to § 12-5 (a) to (c). The other exclusions in § 12-5 are not relevant in a builders' risks insurance and have therefore been deleted. § 19 of CEFOR Form 250 concerning survey of damage was identical to § 12-10, while § 21 of CEFOR Form 250 concerning removal was practically identical to § 12-13, and § 22 of CEFOR Form 250 concerning allocation of costs was identical to § 12-14 of the Plan. These rules are now made applicable by the reference to chapter 12. However, provisions which were not originally in the builders' risks conditions have been deleted.

§ 19-15. Limitation of the insurer's liability/Re. § 12-1

This paragraph corresponds to § 15 of CEFOR Form 250.

§ 19-15 is taken from § 15, subparagraph 1, second sentence, of CEFOR Form 250, but has been rewritten patterned on § 12-4. As regards the concepts "faulty design" and "faulty material", reference is made to the Commentary on that provision. Furthermore, § 19-15 provides an exclusion for "faulty workmanship". This limitation is due to a basic reluctance to cover the yard's costs of rectifying a fault due simply to poor workmanship. Faulty "workmanship" is where the choice of materials, the dimensioning or the actual workmanship, e.g. the welding, is contrary to the designer's directions or generally recognized building standards. Damage due simply to accidents during work, e.g. fire damage resulting from negligence during welding, or hull damage arising by the newbuilding keeling over as a result of inadequate support in the building dock shall, however, not be regarded as "faulty workmanship". The dividing line between "faulty workmanship", etc., and mere accidents during work must furthermore be decided on a case-to-case basis in practice.

§ 15, subparagraph 1, second sentence, of CEFOR Form 250 also excluded damage resulting from "incorrect choice of material". However, incorrect choice of material is comprised by the term "faulty workmanship" and is therefore superfluous.

The limitations in the second sentence apply only to "costs of renewing or repairing the part or parts" which were not in a proper condition due to the stated perils. This means that the exclusion applies only to costs of repairing the defective part, i.e. the primary damage. If a case of faulty construction or faulty workmanship as regards the steering gear results in the newbuilding running

aground during the trial run, the grounding damage will thus be recoverable, but not the costs of repairing or replacing the steering gear.

#### § 19-16. Compensation for unrepaired damage/Re. § 12-2

This paragraph corresponds to § 16 of CEFOR Form 250.

Subparagraph 1 corresponds to § 16, subparagraph 1, first sentence, of CEFOR Form 250, but has been rewritten and patterned on § 18-12. According to § 16, subparagraph 1, first sentence, of CEFOR Form 250, it was only the insurer who was entitled to claim cash settlement for unrepaired damage. The reason was that the insurer felt the need to cancel the insurance on expiry of the insurance period. However, this solution is contrary to the other rules of the Plan where it is the assured who is granted the right to claim cash settlement. The right to claim cash settlement has therefore been extended so that also the assured has been given this right. Whether the yard and/or the buyer has this right will depend on who owns the damaged interests.

Subparagraph 2 corresponds to § 16, subparagraph 1, second sentence, of CEFOR Form 250 and states that the compensation shall be calculated on the basis of the estimated costs of repairs. The alternative, "the price reduction attributable to the damage", is new and is relevant if the damage results in the buyer being granted a price reduction. The provision concords with § 12-2, subparagraph 2.

§ 16, subparagraph 2, of CEFOR Form 250 contained a special rule tied to the provision concerning apportionment of loss contained in § 5 of the Special Conditions. This has been deleted, and the specific rule in the Special Conditions has therefore become superfluous.

#### § 19-17. Costs incurred in order to save time/Re. § 12-7, § 12-11, § 12-12

This paragraph corresponds to § 18 and § 20 of CEFOR Form 250.

§ 18 and § 20 of CEFOR Form 250 contained provisions concerning temporary repairs and invitations to tender which were identical to § 12-7 and § 12-11 to § 12-12, but without any limited cover for the loss of time which the assured suffered by choosing the least expensive repair alternative. The solution has been retained, but rewritten and patterned on the corresponding rules in § 17-13.

However, CEFOR Form 250 did not contain any rule relating to the cover of the yard's costs applied in order to expedite repairs. Such a rule may, however, be expedient because damage may have negative consequences both for the yard's possibility of timely performance of the building contract and for its overall capacity. The cover of such costs now follows from the reference in § 19-14 to the rules in chapter 12. This entails that if the yard in order to limit a loss of time expedites repairs of the newbuilding by extraordinary measures, the insurer will be liable for the costs incurred, limited to 20% p.a. of the insurable value of the newbuilding according to § 19-10, subparagraph 1, i.e. the insurable value at the time of delivery, for the time which the yard saves. 20% p.a. constitutes approximately 0.55 per thousand per day.

An example may illustrate the rule: If the insurable value under § 19-10 is NOK 182,500,000 and the yard is able to save 10 days by expediting repairs, the insurer will be liable for

20% of 182,500,000 = 36,500,000 for one year, which must be divided by the number of days, 365, and gives a liability of NOK 100,000 per day for 10 days, i.e. NOK 1 million.

If the yard has, in addition to the ordinary hull insurance under section 2, also taken out insurance against the yard's loss of interest and daily penalties in the event of late delivery, this additional cover will only apply where the yard's loss exceeds the insurer's liability under § 12-8. The yard's liability for loss of interest and daily penalties must thus be set off against the cover for extraordinary costs before the additional cover is triggered.

### *Section 3 Indemnification of additional costs incurred in unsuccessful launching and costs of wreck removal*

#### General

Section 3 contains partly a new rule about extra costs in the event of an unsuccessful launching, partly a retaining of § 25, second sentence, of CEFOR Form 250. This provision was contained in the liability section of the Special Conditions. It is, however, more expedient to separate this element into a separate section.

#### § 19-18. Additional costs incurred in unsuccessful launching.

This paragraph is new.

The provision is taken from the English conditions (IBR 5.2) and states that the insurer in the event of an unsuccessful launching covers the assured's additional expenses in connection with a relaunching. The insurer's liability comprises both such additional expenses relating to the unsuccessful launching and expenses in connection with a relaunching, if this is necessary because of the initial failure. It will often be necessary to classify such expenses as cost of measures to avert or minimise loss because they are costs for the purpose of averting damage to or loss of the newbuilding or other losses covered by the insurance. However, this need not be the case, e.g. where it is a question of expenses relating to a new launching after the first failure. It is therefore necessary to have a separate provision in this respect.

#### § 19-19. Costs of wreck removal

This paragraph corresponds to § 25, second sentence, of CEFOR Form 250.

The insurer's liability concerns the assured's costs of "necessary removal of wrecks". The removal is "necessary" when it is impossible for the yard to conduct its activities without removing the object. In concordance with the limitation in § 25 of CEFOR Form 250 it is furthermore only reasonable expenses in connection with the removal that are covered. If the removed wreck has any value, this shall be deducted in the claims settlement, cf. § 25, second sentence, of CEFOR Form 250, which admittedly only applied if the removal expenses were less than the value of the object removed. It is only costs of removal of the wreck from places which are owned or at the disposal of the yard which are recoverable. If the newbuilding/wreck results in obstructions to traffic in areas belonging to/at the disposal of others, e.g. in a port area owned by the public authorities, this would have to be covered as wreck removal liability under § 19-20.

### *Section 4 - Liability insurance*

#### **§ 19-20. Scope of the liability insurance**

This paragraph corresponds to § 23, §24 and §25 of CEFOR Form 250.

In CEFOR Form 250 the provisions relating to cover of the yard's liability to third parties were all included in one provision, § 23. In order to make the rule more comprehensible it is divided into two parts, so that the scope of the liability insurance is stated in § 19-20 and the limitations are defined in § 19-21.

The liability cover in § 23 of CEFOR Form 250 was limited to the yard's liability for damages. As mentioned in the Commentary to § 19-3 about co-insurance, it is however expedient for the buyer to be co-insured also under the liability cover in order to ensure cover for the buyer in the event of his not having taken out his own liability insurance which comprises liability in connection with the building project. If the yard has taken out the insurance, it therefore follows from § 19-3 that the term "assured" in § 19-20 comprises both the yard as the person effecting the insurance and assured and the buyer as co-insured. If, however, the insurance is taken out by the buyer, the yard will not be co-insured according to § 19-3 and thus not be comprised by the liability part of the builders' risks insurance either. In such cases the yard must take out its own insurance or arrange to be co-insured under the buyer's cover.

The first sentence establishes that liability comprises personal injury and loss of life and corresponds to § 23, subparagraph 1 (a), first sentence, of CEFOR Form 250. The basis for liability is irrelevant; it may be liability based on fault for the yard's management, employer's liability or non-statutory strict liability. On the other hand, there is an important limitation to the requirement that the injury must have arisen in direct connection with the performance of the building contract, cf. below.

§ 23, subparagraph 1 (a), first sentence, of CEFOR Form 250 stated that liability for personal injury included "the assured's legal liability for loss or injury suffered by guests during trial or delivery runs as well as during transport to or from the newbuilding with another vessel which is leased or owned by the assured". This provision is superfluous. Whether trial runs/delivery runs are comprised by the insurance depends on whether the area where these runs take place are included in the newbuilding's provisional certificates, cf. § 19-5, subparagraph 1 (b). If this is the case, damage caused by the yard during such runs must be regarded as damage arisen "in direct connection with the execution of the building contract." Whether there are invited guests or others who are injured is irrelevant in this connection, see, however, the exclusion in § 19-21 subparagraph 1 (a) in respect of the yard's own employees, cf. below. The same must be the case with injuries during transport to or from the newbuilding with another vessel to the extent that the yard becomes liable for such damage. Here the yard may incur transport liability if he owns or leases the vessel. If, however, the transport is handled by another carrier it will normally be that carrier, and not the assured, who will be liable.

The terms "personal injury" and "loss of life" are referred to in further detail in § 17-35. Reference is therefore made to the comments on that provision.

The second sentence corresponds to § 23 (b), first sentence, of CEFOR Form 250 and establishes the insurer's liability for property damage caused to a third party. That the object must belong to a "third party" means that damage to or loss of the yard's own objects is not covered. The term "third party" must here be read as a "third party" in relation to the yard or buyer as tort-feasor. If the yard causes damage to the buyer's property, this will in principle be comprised by the liability insurance. The same applies if the buyer causes damage to the yard's property. To the extent that such damage is covered by the hull conditions in chapter 19, sections 1, 2 or 5, the damage will, however, fall outside the scope of the liability insurance, cf. § 19-21 (c). Reference is furthermore made to the comments on § 17-36, subparagraph 1.

The third sentence corresponds to § 25, first sentence, of CEFOR Form 250, but has been amended and patterned on § 17-40 without any changes on points of fact being intended. The wreck-removal liability concords with the international liability according to IMO rules and comprises the assured's liability in connection with the raising, removal, destruction, marking or illumination of the newbuilding or parts thereof. In contrast to § 25, subparagraph 1, of CEFOR Form 250, it is emphasized that only liability imposed by the authorities, and thus not contractual liability, is covered. This also follows from § 19-21, subparagraph 1 (e). Reference is furthermore made to § 17-40 of the Commentary on coastal and fishing vessels.

Only the assured's legal liability for damages is covered. The yard must therefore be liable according to general rules of liability law determining the basis for liability, causation and loss in order to trigger payment of the insurance. If the yard out of consideration for its customers or for other reasons chooses to cover damage for which it does not have liability, this is irrelevant to the insurance.

A further condition is that the liability has arisen "in direct connection with the performance of the building contract". The provision is taken from § 23, subparagraph 1, of CEFOR Form 250, but the term "construction" has been replaced by "the performance of the building contract" in order to make the point that the damage need not arise during the actual construction work, cf. below. Like shipowner's liability insurance, liability insurance under a builders' risks cover is therefore tied directly to an individual newbuilding - i.e. in this connection a building contract. Liability for damages in connection with other building projects must be allocated to the builders' risks cover of these projects.

That liability arises "in direct connection with the performance of the building contract" means that liability is connected with the actual construction work or the handling of parts or materials intended for the relevant newbuilding. Liability in connection with the handling of materials or parts before it has been decided that these parts, etc., shall be used for the said newbuilding, accordingly falls outside the scope of cover and will have to be covered under a more general liability insurance for the yard or the buyer. The same must be the case for liability connected with the assured's general operation.

On the other hand, it is not a condition that liability arises in connection with the actual construction work. Also liability arising during storage or transport of parts for the relevant newbuilding must be covered, provided that this takes place within the place of insurance according to the policy. Similarly, liability arising during a trial run or a delivery run within the place insured must be covered.

The heading of § 23 of CEFOR Form 250 read "third party liability", and subparagraph 3 read that "third party" referred to anyone other than "the yard". This provision is superfluous. The yard cannot become liable for damages to itself. Liability for damages for the yard must therefore apply to "anyone other than the yard".

The provision in § 19-20 must be seen in connection with the general rule regarding perils in § 19-1. The insurance therefore applies to any marine peril and to war perils, strikes and lockouts. However, it does not cover the yard's liability for damages resulting from other war perils, unless a war-risk insurance has been effected under section 6.

Subparagraph 2 corresponds to § 24 of CEFOR Form 250, which stated that the insurer covered damage to objects belonging to the yard resulting from collision following an unsuccessful launching. This provision must be seen in conjunction with the general sister-ships rule in § 4-16 about the insurer's liability in the event of damage to objects belonging to the assured. If the newbuilding causes damage to objects belonging to the assured during or after launching, and this is attributable to circumstances for which the assured would have been liable if the damaged objects belonged to a third party, the insurer is liable to the assured according to § 4-16 to the same extent as he would have had to cover the assured' liability to third parties. This now follows from the reference to § 4-16 as regards damage from collision or striking following launching. The provision is worded such that the sister-ships rule shall not apply to any damage to the assured's own property other than what is specifically mentioned.

The fact that the liability cover in section 4 has been extended to include buyer's liability if it is the yard that is effecting the insurance, cf. § 19-3, entails that § 4-16 shall also apply if the newbuilding causes damage to the buyer's property. However, this is hardly a very practical situation.

On the other hand, § 4-16, in contrast to § 24 of the Special Conditions, does not cover the situation where the newbuilding causes damage to the buyer's property without the assured's conduct having given rise to liability. However, such damage should be covered by an ordinary property insurance taken out by the assured, and not under the builders' risks insurance, which concerns either damage to or loss of the newbuilding and parts, etc., or the assured's liability for damages. This part of § 24 of the Special Conditions has therefore been deleted.

#### § 19-21. Exclusions

This paragraph corresponds to § 23, subparagraph 1 (a), second sentence, and (b), second sentence, and subparagraphs 2 and 4, of CEFOR Form 250.

Letter (a) is taken from § 23, subparagraph 1 (a), second sentence, of CEFOR Form 250 and excludes liability for the yard's own employees or their surviving relatives from the cover. For Norwegian yards this liability will normally be covered by the occupational injury insurance. In that event, it follows from the delimitation in relation to other insurances in subparagraph 2 that this liability falls outside the scope of liability insurance under the builders' risks insurance. It is nevertheless necessary to have a separate rule to cover foreign shipyards that do not have the type of insurance or social benefit schemes for their employees as mentioned in subparagraph 2. A person is "employed" with the assured if the yard, in addition to wages or salary, covers the employer's social security contributions for the person in question. A consultant with a consultant's fee and without any contract of employment is, by contrast, not employed.

Letter (b) corresponds to § 23, subparagraph 1 (b), second sentence, of CEFOR Form 250, and excludes objects that belong to the yard's employees from the cover. The exclusion is in accordance with the exclusion in letter (a), and also with the provision in § 17-36, subparagraph 2.

§ 23, subparagraph 2, of CEFOR Form 250 stated that the insurer did not cover loss "which is recoverable under another insurance". The wording of the provision was general and suggested that the liability cover was subsidiary in relation to any other insurance taken out by the tort-feasor or the injured party. However, if the cover is subsidiary in relation to the injured party's insurances, the result may be that the yard will have to cover the liability for damages if the injured party chooses to recover the loss from the yard, or the injured party's insurance company claims indemnification from the tort-feasor. According to section 4-2 number 1 (b), cf. section 4-3, of the Compensatory Damages Act, such a right of recourse is allowed in any non-life insurance for commercial purposes. This would represent a significant undermining of liability insurance and would furthermore seem quite random because the yard's liability would be dependent on whether or not the injured third party had taken out non-life insurance.

On the other hand, the provision did not extend far enough in relation to damage to the buyer's property or personal injury/loss of life. In these cases there is partly a need to make the insurance complementary to certain insurance schemes, and partly there is a need to extend the subsidiarity principle to include pension and social benefits.

The relationship to other insurances is accordingly divided into three parts: subparagraph 1 (c) concerns insurance relating to the buyer's objects, subparagraph 1 (d) concern the relationship to other liability insurance effected by the yard, while subparagraph 2 concerns insurance relating to personal injury/loss of life.

Letter (c) is patterned on § 17-46, subparagraph 1 (a), but applies only to damage which according to its nature is recoverable under chapter 19, sections 1, 2 and 5. This has to do with the fact that the liability insurance under the builders' risks insurance terminates concurrently with the termination of the hull insurance under section 2 or section 5 which means that there is no question of tying this liability cover to the ordinary hull insurance or other insurances on Plan conditions.

In contrast to § 23, subparagraph 2, of CEFOR Form 250, which provided that the insurance was subsidiary to other covers, the idea is here, in accordance with chapter 17, that the insurance is made complementary. It is therefore irrelevant whether the said insurance has in actual fact been effected; decisive is whether the loss could, according to its nature, have been covered under the relevant insurance.

Only losses which, according to their nature, could have been covered under the said insurances fall outside the liability cover under the builders' risks insurance. If the buyer suffers a loss which falls outside the scope of the said insurances, e.g. consequential loss, this must be covered under the liability conditions, provided that the requirements as regards adequate causation are satisfied.

Letter (d) contains a delimitation in relation to other liability insurances which the yard has taken out. If the liability is e.g. covered by an ordinary liability insurance taken out by the yard, this will prevail over the liability cover under the builders' risks insurance. However, this applies only if such liability insurance has been effected; on this point the cover is thus subsidiary, not complementary.

According to letter (e), which is practically identical to § 23, subparagraph 5, of CEFOR Form 250, the insurer furthermore does not cover liability which is exclusively based on a contract. This exclusion concords with normal non-marine liability insurances which do not cover contract liability. However, the rule differs from ordinary shipowners' liability insurance, which does not have such an exclusion.

Subparagraph 2 corresponds to § 23, subparagraph 2, of CEFOR Form 250 as regards personal insurance, but extends further. § 23, subparagraph 2, of CEFOR Form 250 made the cover



subsidiary to other insurance. In the new Plan partly other systems than insurance have been introduced, cf. letter (a), partly the cover has been made complementary to insurance benefits which are imposed by collective agreement and financed by the liable employer (cf. letter (c)). If the type of insurance is such that it would entail a deduction in the compensation pursuant to section 3-1, subsection 3, second sentence, of the Compensatory Damages Act, is irrelevant. The solution is almost identical to § 17-46, subparagraph 2, but the relationship to the occupational injury insurance is adjusted to the fact that the insurance shall also be applicable to building projects at foreign shipyards. Reference is therefore made to § 17-46, subparagraph 2.

### *Section 5 - Supplementary covers*

#### § 19-22. Applicable rules

This paragraph corresponds to Special Clause No. 2, paragraph 1, Special Clause No. 3, paragraph 1, and Special Clause no. 4, paragraph 1, of CEFOR Form 250.

The formulation of CEFOR Form 250 allowed the effecting of various supplementary covers stated in Special Clauses Nos. 1 to 4 in addition to the principal cover. Special Clause No. 1 concerned war risk insurance and has been separated from the rest for special regulation in section 6. The other special clauses are contained in § 19-23 to § 19-25 in this section.

Common to all the supplementary covers was that they came in addition to the other provisions in the builder's risk insurance. This solution is now common to the supplementary covers in § 19-22.

#### § 19-23. Insurance of additional costs in connection with rebuilding

This paragraph corresponds to CEFOR Form 250, Special Clause No. 2.

The provision applies to insurance of additional costs in connection with "rebuilding". It is therefore only relevant in the event of a total loss that results in "rebuilding", and not in the event of repairs of damage which is recoverable under §19-14 et seq. In case of a total loss without rebuilding, such costs are not incurred. This cover is used extensively in practice, but allegedly rarely results in payments of compensation. However, because it only applies to total loss, the premium is low.

The insurer's liability is defined as the difference between what is recoverable under the builders' risks insurance and the costs of rebuilding and concords with Special Clause No. 2, paragraph 3. The difference will normally constitute the ordinary price increase of components during the rebuilding period. The Special Conditions emphasized that "the costs of rebuilding" also comprised replacement costs of components and materials for the newbuilding within the sum insured under the supplementary cover. This still applies without it being necessary to state it explicitly.

Compensation for additional costs will not be payable until the sum insured under the ordinary hull insurance has been used up. According to Special Clause No. 2, paragraph 4, first sentence, the insurer's duty to pay compensation arose as and when expenses were incurred. This now follows from § 19-22 and the reference in § 19-14 to chapter 12, cf. § 12-1, subparagraph 2.

Normally, the additional costs according to the building contract will be the yard's risk which means that it is the yard that is entitled to the compensation.

Special Clause No. 2, paragraph 2, contained a rule to the effect that the sum insured was the amount stated in the policy (open policy). This meant that the insurable value was open so that the assured would not recover more than the actually incurred additional costs up to the sum insured. This provision is superfluous. The sum insured shall always be stated in the policy. The same applies to the insurable value, cf. 2-2 and § 2-3. If only one amount is stated in the policy, it must be presumed that the insurance is effected with an open insurable value. The sum insured for additional costs is normally set at 10% of the contract price.

Special Clause No. 2, paragraph 3, subparagraph 2, stated that under-insurance under the principal cover, i.e. that the sum insured under the builders' risks insurance was less than the contract price with additions and the value of the buyer's deliveries, was similarly applicable to the supplementary cover. This provision has been deleted. Supplementary cover for extra costs incurred in connection with rebuilding is hereinafter effected on first-risk conditions.

Special Clause No. 2, paragraph 4, second sentence, contained a reference to § 20 of CEFOR Form 250 concerning invitation to tender. Such reference follows from § 19-22 and is therefore superfluous.

#### § 19-24. Insurance of the yard's liability for the buyer's interest claim for instalments paid

This paragraph corresponds to Special Clause No. 4.

The heading of Special Clause No. 4 read, "Insurance of buyer's loss of interest on instalments paid". This has been amended to "Insurance of the yard's liability for buyer's interest claim on instalments paid" in order to make it clear that it is a liability insurance effected by the yard.

The provision regulates the yard's liability for buyer's interest claim relating to instalments paid. The insurance is effected by the yard and relates to the yard's contractual obligations in relation to the buyer. In contrast to the ordinary liability cover under the builder's risks insurance in section 4, § 19-24 therefore concerns contract liability associated with the building contract.

Special Clause No. 4, subparagraph 1, referred to the applicable rules. That provision has been moved to § 19-22.

The first sentence is taken from Special Clause No. 4, subparagraph 2, but has been rewritten in line with the other provisions in this section and has also been somewhat simplified. The yard's liability for buyer's interest claim in the event of a total loss refers to the instalments that have been paid by buyer to the yard during the building period. The liability is limited to the sum insured, cf. Special Clause No. 4, subparagraph 2.

The liability is tied to "buyer's interest claim according to the building contract". It appears in § 4, subparagraph 5, of the 1981 Contract that buyer, in the event of a termination of the contract, is entitled to a refund of instalments paid plus interest according to the Act relating to Interest on Overdue Payments, etc. of 17.12.1976 from date of payment until date of refund. As security for the buyer's refund claim plus interest, the yard shall, at the latest concurrently with the payment of the instalments, provide adequate bank guarantee. Such guarantee is normally given by the bank granting the building loan against a mortgage on the newbuilding, but it does not always include the buyer's interest claim. In such cases it is therefore relevant with supplementary cover under § 19-24.

However, the supplementary cover only comprises the interest claim if "the duty to deliver is terminated due to loss or damage which is recoverable under § 19-12". If buyer cancels the building contract due to a breach of contract and in this connection is entitled to a refund of the instalments, buyer's interest claim is not covered under an insurance according to § 19-24. In the event of rebuilding. It is also based on the assumption that the loss or damage does not result in a rebuilding, cf. the references to § 19-12. In the event of rebuilding the instalments shall not be repaid. The reference to § 19-12 must be seen in conjunction with the requirement that the duty to deliver is terminated; if an incident of damage is settled under the condemnation rule in § 19-11 without the duty to deliver being terminated, there will be no interest cover.

According to the second sentence, which is taken from Special Clause No. 4, subparagraph 4, interest shall be calculated from the date of payment of the individual instalment until the time of the total loss. According to § 4, subparagraph 5, of the 1981 Contract, and Art. XI, paragraph 1, of the Contract, the yard's liability for interest, however, remains in effect until the amount is refunded to buyer, and liability is unlimited. During the revision it was discussed whether the insurance could be adjusted to the liability under the contract, but it was found that this was not possible.

In Special Clause No. 4, subparagraph 4, it was emphasized that buyer had to prove the loss of interest. This provision is superfluous. It follows from general rules of liability law that buyer has the burden of proving his loss in relation to the yard, and from § 2-12 that the yard has a corresponding burden of proof vis-à-vis the insurer.

Special Clause No. 4, subparagraph 3, contained a provision that the sum insured was the amount stated in the policy (open policy). This is unnecessary to state explicitly, cf. the comments on § 19-23.

§ 19-25. Insurance of the yard's loss of interest and daily penalties in the event of late delivery

Subparagraph 6 was added in the 2007 version. The provision is otherwise identical to earlier versions of the 1996 Plan.

The provision is comparable to a loss of hire insurance or an insurance against late delivery of a newbuilding which is accepted by the buyer. However, the provision in § 19-25 only covers the yard's loss. The supplementary cover is expensive in relation to the ordinary builder's risks insurance, but is in practice used to some extent,

Subparagraph 1 states that the insurance covers the yard's interest loss and daily penalties resulting from late delivery due to damage which is recoverable under the builders' risks insurance according to sections 1 and 2. What is covered is the amount which the yard and buyer have agreed in the contract that the yard shall pay for each day the delivery is delayed as a result of circumstances for which the yard has the risk. It is irrelevant whether this amount is designated as daily penalties or liquidated damages in the contract.

According to § 2-12 the yard has the burden of proving the loss suffered.

Normally, supplementary cover for loss of interest, etc. is effected with two sums insured, one for the loss of interest and one for the daily penalties, and the claims settlements are also made separately. Often two policies are used.

Subparagraph 2 contains rules regarding deductible. Like an ordinary loss of hire insurance, deductible is agreed in the form of a deductible period. Today a deductible period of 14 days is customary. The deductible period shall apply to any one casualty that results in delays under the builders' risks insurance.

Subparagraph 3 states the insurer's maximum liability for any one casualty. Like under loss of hire insurance the insurer's liability is defined in the form of an agreed daily amount and a certain number of days. In concordance with § 16-1, the loss of time shall be stated in days, hours and minutes.

Subparagraph 4 lays down rules regarding the length of the insurance period. If the assured and the buyer agree to postpone the delivery date due to circumstances which do not provide grounds for compensation under this supplementary cover, the insurance will automatically be extended against an additional premium. As in the event of an extension of the principal cover, cf. § 19-2, the supplementary premium shall be determined in the policy. Extensions are limited to 9 months, cf. the reference to § 19-2, subparagraph 3.

When determining whether there has been "late delivery", the basis for the calculation is the delivery date agreed between the assured and the buyer. Subparagraph 5 lays down a specific rule on loss due to a combination of causes and is in that respect in accordance with the principle in § 2-13. If the delay is the result partly of damage entitling the assured to compensation under the builders' risks insurance, partly of uncovered circumstances, the insurer covers a proportional part of loss of interest and daily penalties calculated on the basis of the loss which the two groups of delay causes would have entailed beyond the deductible period if they had arisen separately.

Subparagraph 6 was added in the 2007 version, and states that if the assured takes measures to avert or minimise the delay covered by the insurance, the insurer shall not be liable for more than the amount he should have paid if no such measures had been taken. This solution is in accordance with § 16-11, subparagraphs 2 and 3. The addition is due to the fact that the commentary on the 2003 version stated that in such cases, insurers should be fully liable for all justifiable costs. Strictly speaking, this tallies with the commentary on § 4-12, subparagraph 2, which states that if liability has been averted, no account is taken of the assured's deductible. However, the solution was contrary to the former insurance conditions on which Chapter 19 was based and which contained a rule equivalent to that in subparagraph 6, as well as to the provision in § 16-11, subparagraphs 2 and 3 as regards loss of hire insurance. In many ways, cover under § 19-25 is built up in the same way as loss of hire insurance, with a deductible period, etc., and it is therefore logical to include a corresponding rule here.

The problem can be illustrated by an example:

Just before a fishing vessel is delivered, the sonar's bottom equipment is damaged and the damage is recoverable under the builders' risk policy. The ordering, delivery and installation of new parts will delay delivery by 10 days. To avoid late delivery, alternative bottom equipment is leased and installed, and the replacement of this equipment with "correct" new equipment is postponed to a later date when it can be done without extra loss of hire.

In this way, ten days of delay are avoided by paying for the lease of alternative equipment and extra installation/dismantling costs. However, covering this amount in full without regard for the fact that the assured would not have received any compensation at all if a 14-day deductible was applied is not reasonable and contrary to the solution under § 16-11. Under § 19-25, it is therefore more logical to follow the same principles as under the loss of hire insurance.

### *Section 6 - Supplementary cover for war risks*

Section 6 corresponds to CEFOR Form 250, Special Clause No. 1.

Special Clause No. 1 provided detailed rules on Scope of the insurance, Exclusions, Insurance period, Cancellation and Automatic termination of the insurance. During the revision it was stated that the provision was hardly ever applied and that it was of little practical significance. For the assureds who wanted it, the war risks cover was normally given without additional premium

At the same time there was great similarity between Special Clause No. 1 and the war risks conditions in § 16 of the 1964 Plan and those of the war risks conditions (chapter 15) that concerned exclusions from the insurance, cancellation and automatic termination of the insurance. Given that the war risks insurance is now incorporated in the Plan, it was found expedient to tie the war risk cover for the builders' risks insurance to this insurance, which gives a more orderly set of rules at the same time as entailing few changes on points of fact.

The war risks cover is stated in three paragraphs. § 19-26 states the perils insured, § 19-27 provides rules on the insurance period, and § 19-28 states which rules from chapters 15 and 19 apply correspondingly to the war risk insurance.

#### § 19-26. Perils insured

This provision is taken from Special Clause No. 1, subparagraph 1 (a) to (c). Special Clause No. 1, subparagraph 1 (a), (b) and (c) was practically identical to § 16 (a) and (b) of the 1964 Plan, and CEFOR I.1. The rules on perils insured in § 16 (c) and (d) in the 1964 Plan were, however, included in the ordinary builders' risks insurance against marine perils, cf. § 2 of CEFOR Form 250, and above § 19-1 and the comments on that provision. In the new Plan the range of perils insured under the builders' risks cover is restricted on this point and now only comprises strikes and lockouts from the range of war perils insured. By referring to § 2-9 with exclusions for strikes and lockouts the same result is therefore achieved as under CEFOR Form 250, viz. that an insurance against marine perils and an insurance against war perils combined cover the entire range of perils stated in § 2-8 and § 2-9. At the same time the reference to § 2-9 entails that the range of war perils under the builders' risks cover has been subjected to the same amendments as other war risk insurance.

Special Clause No. 1, subparagraph 2 (a) excluded nuclear risk from the insurance. This exclusion has today been incorporated in § 2-9, subparagraph 2 (b).

#### § 19-27. Insurance period

This paragraph corresponds to Special Clause No. 1, subparagraph 3.

Subparagraph 1 corresponds to Special Clause No. 1, subparagraph 3, first sentence, and maintains the principle that the insurance does not attach until the newbuilding has been launched. While the newbuilding is in dock it thus has no war risk cover. The limitation has to do with the fact that it is not until after the newbuilding has been launched that it can be moved out of the war zone. However, the ordinary builders' risks insurance against marine perils also covers strikes and lockouts so that the newbuilding is protected against these perils whilst in dry-dock, cf. above under § 19-1.

The Committee considered extending the war risk insurance to cover the entire building period, thereby achieving a distinction between marine perils and war perils which concords with § 2-8 and § 2-9 of the Plan. However, it is difficult to carry out such a solution because the reinsurance market has so far not wanted to reinsure such cover. The condition that the newbuilding must be launched furthermore concords with the English builders' risks conditions.

Subparagraph 2 corresponds to Special Clause No. 1, subparagraph 3, second sentence. Machinery, parts and materials are not covered by the war risks insurance until the parts, etc., are on board the newbuilding.

#### § 19-28. Other applicable provisions

This paragraph corresponds to Special Clause No. 1, first sentence, subparagraphs 2 and 5.

Subparagraph 1 is taken from Special Clause No. 1, subparagraph 1, first sentence, and states that the provisions in sections 1 to 4 shall apply to the war risks insurance. The war risks insurance thus covers partly hull insurance, partly damage and costs recoverable under section 3, and partly liability insurance for the yard.

Subparagraph 2 is taken from Special Clause No. 1, subparagraphs 2 and 5. Special Clause No. 1, subparagraph 2 (b) and subparagraph 5 (b) contained partly an exclusion for damage, loss or liability caused by a war between the major powers, partly a rule to the effect that the insurance terminates automatically in the event of a war between the major powers. Reference is here instead made to § 15-5 concerning the outbreak of war between the major powers which entails the immediate termination of the insurance. When the insurance is terminated automatically, there is no need for a separate exclusion provision.

Special Clause No. 1, subparagraph 5 (a) stated that the insurance terminated automatically upon any hostile detonation of nuclear weapons. The same result is achieved by a reference to § 15-6.

The reference to § 15-8 corresponds to Special Clause No. 1, subparagraph 4. Also here the rules are in reality identical.

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