



# Commentary Part 2

*Chapters 10–13*

**The Nordic Marine Insurance Plan of 2013 - *Version 2019***

Based on the Norwegian Marine Insurance Plan of 1996, Version 2010

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Part two  
HULL INSURANCE

## Chapter 10

# General rules relating to the scope of the hull insurance

### Clause 10–1. Objects insured

In 2016 the word “supplies” in sub-clause 2(a) was replaced by “provisions”. The reason was that the word “supplies” is too wide and may unintentionally expand the scope of the exception from cover under the hull insurance.

The heading has been changed in connection with the extension of the scope of the Plan to include also bunkers and lubricating oil, cf. sub-clause 1 (c) and below.

*Sub-clause 1* states the objects covered by hull insurance. *Sub-clause 1 (a) and (b)* distinguish between “ship”, “equipment” and “spare parts”. “The ship” comprises the hull as well as the machinery. “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 encumbrances. 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 However, the concept “purchase with retention of ownership” has been superseded in Norwegian law by “purchase with a seller’s lien”.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 encumbrances” 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. Cl. 8-1. A third party's rights will in that event be determined by the provisions in Cl. 8-1 *et seq.* Chapter 7 does 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 Plan's conditions for ocean-going vessels, this provision accordingly rules out seller's 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, second sub-clause, 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.

Sub-clause 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 sub-clause 1 (c) concerns bunkers and lubricating oil. However, the assumption is that they belong to the ship's owner. Bunkers belonging to a time-charterer or another third party is not covered by the ship's hull insurance unless the person concerned is co-insured under Cl. 8-1. Such status as a co-assured party must be reflected in the insurance contract, cf. Cl. 8-1 and above concerning equipment, etc. The loss of bunkers will not be covered if the owner of the bunkers, etc. is not co-insured.

*Sub-clause 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, provisions, 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. Cl. 176 (k) of the 1964 Plan, which stated this explicitly. However, as mentioned, it follows from sub-clause 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, in concordance with the 1964 Plan, boats and whaling, sealing and fishing tackle are excluded. 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 ship’s 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 sub-clause 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. Cl. 10-2, which makes it unnecessary to cover them under the ship’s hull insurance as well.

### **Clause 10–2. Objects, etc. temporarily removed from the *vesse***

This Clause was amended in the 2019 Version to provide a broader cover for objects temporarily removed on account of being repaired. The wording in the first sentence was amended and a new second sentence was introduced setting out the scope of cover for objects being repaired.

**There is a close connection between Cl. 10-1 and Cl. 10-2. First of all Cl. 10-1 establishes as a main rule that the relevant objects have to be “on board”. Cl. 10-2 is an exception of this requirement and establishes cover for objects that are temporarily removed from the vessel. A prerequisite for cover under Cl. 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 vessel from the manufacturer is therefore not covered by the hull insurance, cf. what is stated in Cl. 10-1 concerning conditions for the inclusion of new equipment in the vessel’s hull cover. Nor does the cover extend to joint stocks of spare parts maintained by an owner for several of his vessels.**

**Secondly, insurance of objects removed from the vessel is linked to “objects referred to in Cl. 10-1, sub-clause 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 use of Cl. 10-2 might however be limited due to the value of the objects in question will often be lower than the deductible.**

**The first sentence set out as a condition that the objects are removed in connection with the operation of the vessel or due to repairs, reconstruction, etc. The most practical situation will be in connection with loading and discharging. Fork-lift trucks and other objects which accompany the vessel will therefore have to be indemnified by the hull insurer if they are damaged whilst ashore in connection with loading or discharging. The hull insurance will not cover objects which are stored ashore while the vessel is laid up, since in that situation they have no connection with the vessel’s normal operation. This provision will also cover objects removed for repair, routine maintenance or for reconstruction/modifications.**

There are no limits as to the distance the objects may be sent **or the time it takes**, provided that they are brought back on board again before the vessel’s departure.

The insurance of objects removed from the vessel is subject to the condition that the **intention is that the objects are brought on board again before the vessel’s departure from the port in question. The insurance will not terminate if the intention was to bring the object back on board again before departure but this was prevented by an unforeseen event.**

**Second sentence widens the scope of cover for objects temporarily removed on account of being repaired. In these circumstances there is no requirement that the objects are intended to be put back on board before departure.**

**Repair in this context means damage repair covered by the hull insurance and encompasses the practical situation where machinery or equipment is sent to a repair yard or a workshop.**

**The wording “on account of being repaired” implies that the object is removed and immediately sent to the repair yard or workshop for repairs. The object is covered whilst being stored a reasonable time at the facility awaiting in queue for its allocated slot before the actual repairs starts. A removal of an object for temporary storage in a local warehouse awaiting a planned repair will not be covered even if the main purpose is to repair the object.**

**After the repairs at the yard and/or the workshop is completed the object has to be put back on board again within three months. The time is counted from the time when the actual repairs are completed. This means that the time of transportation runs as part of the three months’ time period. Within the same time period the insurance also covers local storage in a warehouse before the object is put back on board.**

**The question whether a part is temporarily removed from the vessel at the inception of a new policy does not affect the cover, and the part will be insured also under the new policy provided it otherwise fall within the scope of cover under this Clause. The rules related to incidence of loss in Cl. 2-11 are also fully applicable to any parts temporarily removed from the vessel.**

### **Clause 10–3. Loss due to ordinary use**

This Clause is identical to Cl. 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 Clause 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 sustained in connection with 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 the scope of Cl. 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 Hov R.V.S. TAKIS H, concerning the corresponding Swedish provision.

#### **Clause 10–4. Insurance “on full conditions”**

This Clause is identical to Cl. 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. Cl. 12-15 to Cl. 12-19 and Cl. 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.

#### **Clause 10–5. Insurance “against total loss only” (T.L.O.)**

This Clause is identical to Cl. 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 Cl. 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 Cl. 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 Cl. 5-4, and for costs in connection with the claims settlement, cf. Cl. 4-5. Furthermore, the insurer is liable for costs of providing security and costs of litigation, cf. Cl. 4-3 and Cl. 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 Cl. 4-19.

#### **Clause 10–6. Insurance “against total loss and general average contribution only”**

This Clause is identical to Cl. 153 of the 1964 Plan.

As mentioned in the preceding clause, 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 Cl. 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 clause.

#### **Clause 10–7. Insurance “against total loss, general average contribution and collision liability only”**

This Clause is identical to Cl. 154 of the 1964 Plan.

Hull insurance under this Clause covers the same things as insurance in accordance with the preceding clause, 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.

### **Clause 10–8. Insurance “on stranding terms”**

This Clause is identical to Cl. 155 of the 1964 Plan.

This provision affords the same cover as Cl. 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.

*Sub-clause (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.

### **Clause 10–9. Duration of voyage insurance**

This clause is identical to Cl. 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.

### **Clause 10–10. Extension of the insurance**

Sub-clause 1 was amended in the 2007 version in accordance with the amendments to the rules regarding seaworthiness and safety regulations in Cl. 3-22. The Clause otherwise corresponds to earlier versions of the 1996 Plan.

Under *sub-clause 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 Norwegian Ship Safety and Security Act, use is now made instead of the wording “technical and operational safety”, cf. in that respect Cl. 3-23, sub-clause 1. The wording “to make the ship seaworthy” in sub-clause 1 has therefore been replaced by “to make the ship compliant with technical and operational safety requirements”. The reason 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 Cl. 1-5, sub-clause 4, which explicitly mentions the provisions under which a multi-year insurance contract must 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 terminate the insurance contract as soon as it is established that the conditions for applying sub-clause 1 of this provision have not been met.

Under *sub-clause 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 Cl. 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. *sub-clause 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 Cl. 11-8.

Under Cl. 6-4, the insurer may demand an additional premium when the insurance is extended under this sub-clause.

### **Clause 10–11. Liability of the insurer if the *vesse*/is salvaged by the assured**

This Clause corresponds to Cl. 159 of the 1964 Plan.

Under Section 442, second sub-clause, 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, second sub-clause, 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.

Cl. 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 Cl. 10-11 by analogy.

### **Clause 10–12. Reduction of liability in consequence of an interest insurance**

This Clause corresponds to Cl. 160 of the 1964 Plan, Cefor I.13 and PIC Cl. 5.28.

Under Cl. 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 agreed hull value. For freight-interest insurance, there was a similar provision in the Special Conditions, cf. Cefor I.13 and PIC Cl. 5.28. 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 insurance event. 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 agreed insurable hull value, at the same time as condemnation under the hull insurance triggers the interest insurance. Thus, in the event of a low agreed 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 agreed value, it shall be incorporated into the condemnation formula instead of the agreed value. Moreover, a low

agreed insurable hull value and high interest insurance may also be unfortunate, for other reasons, for the owner because there is a risk that the agreed insurable hull value is not sufficient to cover partial damage to the ship. Thus, if the ship's market value is 100, the agreed insurable 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 agreed insurable 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 agreed 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 Cl. 14-4, sub-clause 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 Cl. 10-12.

## Chapter 11

### Total loss

#### Clause 11-1. Total loss

This Clause is identical to Cl. 161 of the 1964 Plan. The Commentary was amended in the 2007 version in connection with the amendment to Cl. 12-2.

*Sub-clause 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 agreed insurable hull value. If the agreed insurable hull value is high, it is conceivable under special market conditions that it will pay for the insurer to build a new ship around the remains of the old one. However, under sub-clause 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 Cl. 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.

*Sub-clause 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 Cl. 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. Cl. 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 agreed insurable 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 Cl. 12-2, sub-clause 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. sub-clause 2 hereof, and Cl. 12-1, sub-clause 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.

## **Clause 11–2. Salvage attempts**

This Clause corresponds to Cl. 162 of the 1964 Plan.

The Clause constitutes a necessary supplement to the preceding clause 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. *sub-clause 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*.

### Clause 11–3. Condemnation

This Clause is identical to Cl. 163 of the 1964 Plan. The Commentary was adjusted in the 2010 version. In the 2007 version the Commentary was adjusted in accordance with the amendments to Cl. 3-22 and Cl. 12-2.

*Sub-clause 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 *sub-clause 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 agreed insurable value, the de facto value shall be used as the 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 agreed insurable value, and that the assured may not obtain condemnation above a low market value and subsequently be paid the higher agreed 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 Nordic condemnation conditions differed from international marine insurance practice.

The rules in *sub-clause 2, second sentence*, regulate the not very frequent situation where several hull insurances have been taken out against the same peril with different agreed insurable values, e.g. by the shipowner after an upturn in the economy increasing the agreed insurable value of the ship and taking out an additional insurance for the difference between the old and the new agreed insurable values. In that event, the higher of the two values shall be used as the basis. The situation where there are different agreed insurable values in connection with the insurances against marine perils and war perils respectively is regulated in Cl. 11-4, sub-clause 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. Only the agreed insurable hull value, not the sum of that value and the agreed insurable values for the hull-interest insurance and/or the freight-interest insurance, is to be taken into account when making a decision on the question of

condemnation, when the agreed insurable hull value is to be used in the condemnation formula because that value is higher than the market value.

According to *sub-clause 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.

*Sub-clause 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 Cl. 12-2, sub-clause 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 Cl. 12-3 or Cl. 12-4, this will also have to be taken into consideration when determining the question of condemnation.

As will appear from Cl. 11-1, sub-clause 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 agreed insurable 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 Cl. 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 Cl. 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 Cl. 12-1, sub-clause 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 sub-clause 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 Cl. 12-3, sub-clause 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 Cl. 5-5, sub-clause 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. Cl. 12-10 and Cl. 12-11. In ND 1992.172 Gulating BERGLIFT it was held that these rules could not be applied by analogy when deciding the question of condemnation.

#### **Clause 11–4. Condemnation in the event of a combination of perils**

This Clause is identical to Cl. 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. Cl. 2-13, Cl. 2-14 and Cl. 2-16. The situation may be that the assured has breached 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 Cl. 2-14, second sentence, or Cl. 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 agreed value under the insurance in question.

In practice, the insurance against war perils is often effected with a higher agreed value than the ordinary hull insurance. With a view to the combination-of-perils cases, sub-clause 2 provides that the valuation applicable to the insurance against marine perils shall be used as the basis when deciding the question of condemnation.

#### **Clause 11–5. Request for condemnation**

This Clause is identical to Cl. 165 of the 1964 Plan.

*Sub-clause 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 Cl. 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 Cl. 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 Cl. 11-1, sub-clause 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 sub-clause 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.

*Sub-clause 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.

### **Clause 11–6. Removal of the *vesse*/**

This Clause is identical to Cl. 166 of the 1964 Plan.

When the assured makes a request for condemnation, it is important that the insurer be given the opportunity to have the ship inspected 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. *sub-clause 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. *sub-clause 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. Cl. 11-9 and the Commentary on that provision. Under Cl. 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. Cl. 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. Cl. 14-3, sub-clause 4. If the other insurers wish to limit their liability for such damage, they may have to exercise the right in Cl. 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. sub-clause 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. Cl. 11-3, sub-clause 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 at that time which will be decisive for the assessment of the ship's total damage, cf. Cl. 11-3, sub-clause 4, second sentence.

### **Clause 11-7. Missing or abandoned vessel**

This Clause corresponds to Cl. 168 and Cl. 170 of the 1964 Plan.

The 1964 Plan contained rules on missing or abandoned ships in Cl. 168, on seizure, requisition and piracy in Cl. 169 and joint rules for the two groups of cases in Cl. 170. In the new Plan, rules on seizure, etc. have been moved to the Chapter on war-risk insurance, cf. Cl. 15-11. Cl. 168 and Cl. 170 of the 1964 Plan have been combined into the present Clause.

According to *sub-clause 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 *sub-clause 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 sub-clause 3. It is nevertheless considered expedient to retain sub-clauses 1 and 2 as a point of departure.

The rule in *sub-clause 3* corresponds to Cl. 170, sub-clause 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 Cl. 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.

dispatch VINCA GORTON. 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 Cl. 5-19.

Under sub-clauses 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 may not submit a claim for total-loss compensation. However, *sub-clause 4*, which is taken from Cl. 170, sub-clause 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 cannot 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 sub-clauses 1 and 2, the limitation period in Cl. 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 sub-clauses 3 and 4 have been met.

#### **Clause 11–8. Extension of the insurance when the *vesse*/is missing or abandoned**

This Clause corresponds to Cl. 171 of the 1964 Plan.

*Sub-clause 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. Cl. 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 Cl. 1-5, sub-clause 4, which explicitly mentions the provisions under which a multi-year insurance contract shall be divided up into one-year periods. The present provision is not included.

When a time-limit under Cl. 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 Cl. 6-4, sub-clause 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. *Sub-clause 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.

### **Clause 11–9. Liability of the insurer during the period of clarification**

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 Cl. 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 Cl. 11-2, sub-clause 2, to attempt to salvage it, or when it has been abandoned or reported missing but the time-limits under Cl. 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 Cl. 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. Cl. 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 Cl. 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 *sub-clause 1*. Under Cl. 6-3, sub-clause 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. *sub-clause 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 rule can be justified by the fact 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 insurance period, cf. Cl. 11-8, *sub-clause 2*. After that point, the assured must arrange for liability cover himself. The insurer may not demand any additional premium for the period for which the liability insurance is extended under this Clause, cf. Cl. 6-4, *sub-clause 1*.

## Chapter 12 Damage

### General

Chapter 12 on damage is essentially based on the provisions of the 2010 Plan. However, amendments have been made on three points: in the first place, in Cl. 12-14 Apportionment of common expenses, the word “class of work” is changed to “Category of work” to conform to changes in Chapter 16 and 18. In the second place, Cl. 12-15 Ice damage deductions has been amended to conform to the general approach used for calculation of deductibles. In the third place, in Cl. 12-16 Machinery damage deductions, *sub-clause 2 (a)* has been amended to broaden the exclusion from machinery damage deductions. Further, the Commentaries are amended in relation to Cl. 12-1, and totally rewritten for Cl. 12-4.

As regards the incorporation of practice in the Plan, reference is made to the introduction to the General Part of the Plan.

#### **Clause 12–1. Main rule concerning liability of the insurer**

The text itself has not been amended in the 2013 Plan, but some amendments have been made to the Commentary.

This Clause contains the substantive main rules concerning the extent of the insurer's liability for repair costs and supersedes the relevant Nordic Insurance Contracts Acts to the effect that the assured shall receive full compensation for his economic loss. According to *sub-clause 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, Cl. 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 meaning of 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 sub-clause 4, second sentence, of the Clause.

There will invariably also be parts of the object insured that are not subject to classification, such as bunkers and lubricating oil (which as a starting point are part of the object insured as per Cl. 10-1). There is no doubt that the same principle applies that the insurer is liable to restore such articles to the condition they were in prior to the casualty. However, in case there e.g. is a recoverable machinery damage which also involves contamination of the lubricating oil, there is no automatic right on the assured to claim for a full replacement of the contaminated lubricating oil. Firstly, the question is which condition the lubricating oil was in prior to the damage, and e.g. in case the lubricating oil was contaminated prior to the casualty due to inadequate lubricating oil separation / maintenance, the supply of new lubricating oil will be excluded pursuant to Cl. 12-3. And secondly, even if the lubricating oil was in perfect condition prior to the casualty, there is also a possibility that contamination caused by a casualty can be "repaired" e.g. by proper lubricating oil separation. If so, it will follow that the claim in respect of the contaminated lubricating oil would be limited to the costs of separation (if any). The above principles will apply for lubricating oil already in use in the engine as well as lubricating oil in a storage tank, in line with practice under the previous Norwegian Plan.

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 the judgment by the Oslo City Court of 30 January 1996, which is published on Cefor's web page: <http://www.cefor.no/Clauses/Nordic-Plan-2013/Related-documents/>. Accordingly, in such cases, there is no room for the rules in sub-clause 4.

A special question arises if the requirements of the classification society have been made stricter than the requirements in effect when the ship was built or at the time of earlier repairs. If the assured, 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 sub-clause 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. sub-clause 3.

Use of un-original parts on ships is experienced from time to time, which in certain circumstances may reflect an acceptable level of care, see further below. In situations where there is recoverable damage to un-original parts of the ship, and the assured decides to replace them with original and more expensive parts, the insurer can limit liability to the costs of un-original part. This would be sufficient in order to restore the vessel to the condition she was in prior to the occurrence of damage. On the other hand, in case there is recoverable damage to original parts of the ship, the assured can claim the full costs of replacement with corresponding new original parts, even if cheaper and otherwise "acceptable" un-original parts may be available in the market.

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.

The use of machinery parts that have not been produced by the original machinery or equipment manufacturer creates a dilemma for the shipping industry. On the one hand safety considerations require that replacement parts should in all respects be equal to the original. On the other hand, insistence on the use of original parts from the original manufacturer gives that manufacturer a monopoly position which can all too easily be exploited. “Unoriginal” parts need not necessarily be sub-standard. They could have been produced under licence or have been subjected to some form of independent quality control. It is possible, especially in the case of less complex units, that the part is perfectly adequate even though it is strictly speaking a so called “un-original part” in the sense it has been produced without the approval of the original manufacturer and without any form of independent quality control. Competition in the production of spare parts can bring ship operators and their insurers the benefit of lower prices. The obvious danger is that lower prices might result in lower quality. Insurers have identified the use of cheap sub-standard pirate parts as the cause of a number of casualties. There are a number of potential insurance issues as discussed below.

#### Class approval required

If the installation of a replacement part should have been approved by class and the Assured has deliberately or negligently failed to ensure this but has used a sub-standard pirate part, then clearly the sanctions for breach of a safety regulation will apply, Cl. 3-25. Both the cost of repairing the pirate part and perhaps more significantly any consequential damage to other parts will not be covered.

If the installation of an unoriginal part, e.g. one manufactured under licence, has been approved by class then the rule in Cl. 12-4 will apply and damage to the part arising from an error in design or faulty material will be covered.

#### Class approval not required

If class approval of a replacement part is not required the ordinary rules apply. The use of a pirate part will not amount to a breach of a safety regulation so that the insurer will only be able to avoid liability, in part or in whole, if:

- the assured has deliberately installed an inferior part in order to save money,
- the use of the part amounts to gross negligence, or
- the part is damaged as a consequence of error in design or faulty material.

In addition, when applying the exclusion for ordinary wear and tear and ordinary corrosion, Cl. 12-3, one would take into account that cheap pirate parts are likely to become worn out more quickly than original parts.

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 Cl. 12-8.

In situations where casualty repairs necessitate 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 necessitate 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 Cl. 12-10, sub-clause 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 cost 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 cost 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. In this and other cases, however, the insurer must be entitled to refuse to accept the invoice to a certain extent, 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 Cl. 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.

Supply of electricity to a ship during repairs is usually made for several purposes. Firstly, the electric power that would have been consumed in running the ship regardless of the repairs is disallowed pursuant to Cl. 12-5 (a). However, any extra electric power consumed due to repair work being effected is allowed as a common repair expense as per Cl. 12-1. It is the assured who has the burden of proving the extent of loss, cf. Cl. 2-12, sub-clause 1.

The assessment must be based on the particular circumstances in each case. In practice, it is difficult to identify exactly how much of the consumption is related directly to the repairs. Due to this fact, the common practice, though not legally binding, is to allow a proportion of 50% of the total electricity consumption as a common repair expense. If obviously unreasonable, ref. the judgment of Gulating Court of Appeal of 17 October 2014, electric consumption may be apportioned differently. Electric consumption in a time period during which no repairs are effected (e.g. waiting time or the like), is not allowed as a common repair expense. It makes no difference whether electricity is purchased from a yard or if the vessel's own auxiliary engines are run in order to produce the electric power.

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. Cl. 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. On the other hand, the loss of gas carried as a cargo is not covered.

However, as regards a number of the accessory expenses, the insurer's liability is regulated by special provisions, cf. Cl. 12-5 (a)-(c) and Cl. 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. Cl. 4-2, Cl. 4-12 and Cl. 12-5 (a).

Costs common to repairs that are recoverable and repairs that are not shall be apportioned according to Cl. 12-14. Access work is not a common expense to be apportioned under Cl. 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.

*Sub-clause 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. Cl. 12-2. The situation where the assured goes bankrupt before the invoice has been paid is referred to in the Commentary on Cl. 7-4, see also *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 326.

The provision in *sub-clause 3* is in reality superfluous in view of sub-clause 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 an order is given to replace a damaged iron propeller by a propeller made 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 sub-clause 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 sub-clause 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. Cl. 12-4.

*Sub-clause 4, first sentence* 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 Cl. 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. sub-clause 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 sub-clause 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.

## **Clause 12-2. Compensation for unrepaired damage**

This Clause was amended in the 2007 version. It was further amended in the 2010 version.

According to relevant Nordic Insurance Contracts Acts (Nordic ICAs), 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 Cl. 12-1 was that the insurer's liability did not arise until the damage had been repaired, whereas Cl. 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 Cl. 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 Cl. 18-10 of the Plan prior to the 2007 version.

Cl. 12-2, sub-clause 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 Cl. 15-11. This limited right has now been replaced by a general right to claim compensation when the insurance period expires, cf. *sub-clause 1*. As mentioned above, this approach concords with the non-mandatory rule in Nordic ICAs, and with the solution that is widely practised in Norwegian non-marine insurance. The solution also concords with the 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. Cl. 3-21. In the case of multi-year insurance contracts, 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. Cl. 1-5, sub-clause 4, to which a reference to Cl. 12-2 has been added as one of the provisions under which a multi-year insurance contract 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.

*The first sentence of sub-clause 2* states that 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 cost 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 cost 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 sub-clause 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 cost 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 basic principle must be to use 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 Cl. 12-12, sub-clause 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 insurance contracts, the expiry of each individual annual insurance period, cf. Cl. 1-5, sub-clause 4, is decisive. If the ship is sold, the insurance will terminate at the time of sale, cf. Cl. 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, Cl. 12-10, sub-clause 3, gives him authority to require that this be done. Such assessment of unrepaired damage is not binding in relation to the settlement under Cl. 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.

*The second sentence of sub-clause 2* was inserted in 2010, and states that common expenses are not recoverable, except for 50 % of dock and quay hire. This provision concords with practice, in addition to being laid down in the Commentary, but was incorporated into the text of the Plan in order to avoid discussion as to whether the authority for this approach was sufficiently clear. The background for the general rule that common expenses are not recoverable is that the magnitude of the common expenses for various repairs is often highly uncertain. One of the reasons for this is that the shipowner usually takes advantage of the stay in a repair yard to have other defects and damage repaired at the same time.

*Sub-clause 3* was 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 Cl. 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 Cl. 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 Cl. 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 sub-clause 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 sub-clause 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 Cl. 12-2, sub-clause 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 Cl. 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. Insofar as the buyer decides to claim compensation, sub-clause 2 applies in the usual manner.

### **Clause 12–3. Inadequate maintenance, etc.**

Sub-clause 2 was deleted in the 2007 version. The Clause otherwise corresponds to earlier versions of the 1996 Plan. The Commentary was also amended in the 2007 version in connection with the amendments to Cl. 3-22.

The provision regulates the extent to which the assured is entitled to compensation where wear and tear, corrosion, rot, inadequate maintenance and similar causes have resulted in one or several parts becoming defective.

*Sub-clause 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, rot 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, rot 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. It is nevertheless a condition 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. has been contaminated as a result of inadequate maintenance, resulting damage to the machinery must be recoverable under Cl. 12-3, since the exclusions in Cl. 12-3 do not apply.

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. Cl. 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 the 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 the hull or propeller to an entirely unanticipated and abnormal extent due to chemical pollution of the water, electrolytical 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. cf. below. If, on the other hand, the damage is the result of extraordinary wear and tear, 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 Cl. 3-36, sub-clause 1. Generally speaking, it may be said that inadequate maintenance presupposes that it occurs over a certain period 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 and ND 1990.442 Stavanger MARE PRIDE, 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 be checked daily. In the ND 1990.442 Stavanger MARE PRIDE judgment, 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 content 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 normally already excluded by virtue of the exclusion for inadequate maintenance. The exclusion of wear and tear will acquire independent significance where ordinary wear and tear is not caught by the prescribed maintenance routines, e.g. because they are based on wrong assumptions as to a part's durability in normal use. However, such extraordinary wear and tear will as a rule 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 Cl. 3-36, sub-clause 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 Cl. 12-3. Faulty workmanship refers 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, faulty workmanship 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 Cl. 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, cf. the principle in Cl. 12-1, sub-clause 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 Cl. 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 is fully in class without class conditions.

The rules in sub-clause 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 Cl. 3-22 *et seq.* that will decide whether and to what extent the insurer is liable. The exclusion in Cl. 12-3, sub-clause 1, is on the one hand less far-reaching than the rules regarding breaches of safety regulations under Cl. 3-22, cf. Cl. 3-25, but shall - in contrast to Cl. 3-22, cf. Cl. 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 Cl. 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 Cl. 12-3.

The limitations of liability in Cl. 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. Cl. 3-22, cf. Cl. 3-25.

Sub-clause 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.

#### **Clause 12-4. Error in design, etc.**

##### *Introduction*

The scope of cover for parts suffering from errors in design and faulty material was extended in the 1996 Plan to apply to the whole vessel and not just parts of the main engine. Additional clarifications were introduced to the Commentary to Cl. 12-4 in connection with the 2007 version of the Plan. The Commentary below has been completely re-written for the 2013 Plan.

Cl. 12-3 excludes from cover losses that are a more or less inevitable consequence of the use of the vessel over time. Closely related to Cl. 12-3 is the exclusion in Cl. 10-3 of loss that is a normal consequence of the way the vessel has been utilised. Cl. 2-8 provides that all risks other than those that are specifically excluded are covered. It is therefore the insurer who has the burden of proving that a loss has been caused by an excluded peril such as those in Cl. 12-3 and Cl. 10-3. Losses caused by errors in design, faulty material or and in all but exceptional cases, faulty workmanship, do not fall within Cl. 12-3 or Cl. 10-3 and are therefore as a starting point covered without further qualification. There is a sense in which also these losses can be seen as an inevitable consequence of the defects existing in the vessel at the time the insurance commenced.

The justification for using insurance as a mechanism for covering the risks of faulty material and errors in design is that the time and extent of the loss is unpredictable. The loss will give rise to an unexpected and unbudgeted extra expense for the shipowner and will normally have occurred without the shipowner having any prior knowledge or warning. The countervailing consideration is that by providing cover for these losses, insurers are underwriting the quality of work processes that are directly or indirectly affected by choices made by the shipowner. In the case of a vessel under construction, the shipowner determines the vessel's specifications, chooses the yard, the suppliers of major items of equipment, and the classification society. The degree of care and attention that the shipowner puts into the design and building process will strongly influence the quality of the vessel and the risk of errors in design or that it might be built with faulty material. In the case of second hand vessels the situation is different, but a buyer is nevertheless expected to exercise care in ascertaining the quality of what he is buying and the general quality of vessels produced by various yards or having a particular configuration is often known and is reflected in the price. Similar considerations apply to components and materials installed by repairers or during a rebuilding process. The owner chooses the various parties involved, and has overall responsibility for the whole process.

It is therefore important that the cover for built in defects should be kept within appropriate limits and that it should not be open to abuse. Keeping this balance is particularly important in respect of new technology and new designs. Here there will often be some element of heightened risk of operational failure. For investors this is counter-balanced by the potential rewards and equity markets are specifically designed to balance the risks and rewards of innovation. Insurance capital has a different function. Its purpose is to handle event and operational risks that affect all vessels to a greater or lesser extent. The cover provided by the Plan supports innovation to the extent that the costs of restoring the vessel to its original condition are covered but not the costs of remedying any shortcomings that the incident reveals about the design or technology itself. The rewards and therefore the costs of innovation and technological development belong firmly with the equity investors.

The first line of protection for insurers is provided by Cl. 12-4 itself, which qualifies the scope of the cover for errors in design and faulty material by requiring that the defective part has been approved by class. For well known standard types of trading vessels with a proven design with no optional class notations, this requirement will in practice not exclude many incidents but it is a way of emphasising that the cover afforded by the Plan presupposes that basic quality standards have been adhered to in relation to design and materials.

A critical problem for insurers arises in those cases where a whole series of vessels or a component from one manufacturer suffers from the same inherent defect. The danger of an accumulation of losses is obvious. It is clear that once a particular error in design or construction becomes known, shipowners must take steps to remedy it for their own account before any damage occurs. The rules in Chapter 3 concerning the assured's duty of disclosure and the duty to take care of the vessel are obviously relevant here. Also in cases involving only a single vessel, the insurers will to a certain extent be protected by the general rules concerning the duties of the assured.

However, the most important issues in applying Cl. 12-4 concern the border line between damage that is a consequence of genuine errors in design and damage resulting from wear and tear and deterioration that is the normal consequence of the materials and design chosen or of the particular way the vessel has been employed, cf. Cl. 12-3 and Cl. 10-3. All of the matters referred to above are discussed more fully below. The further Commentary on Cl. 12-4 deals with the following issues:

- The requirement that the part has been approved by class.
- What constitutes damage, the meaning of part.
- Extent of the insurer's liability.
- Error in design and faulty material.
- Interaction with other provisions in the Plan – Duties of the assured, Causation Cl. 2-13 and Incidence of loss Cl. 2-11.

The relationship between Cl. 12-4 and Cl. 10-3 is discussed as part of the analysis of the concepts of faulty material and especially error in design.

#### *Approved by class*

This requirement must be seen in relation to the nature of the classification society's supervision and control of the building or repair process. It is not necessary that the particular part in question has been the subject of a specific control and approval during the construction process. It is sufficient that it forms part of a larger unit or assembly for which accept criteria have been specified. Classification of a vessel does not include every item of equipment on board. Cranes and similar equipment which are not regarded as critical to the safety of the vessel will not normally fall within the ambit of the

classification process and will therefore as a starting point fall outside the scope of the cover provided by Cl. 12-4. However, the class may have approved the design and material under building for parts or equipment etc., even though the part or parts fall outside the ambit of the main class.

In the off-shore industry it is common for owners to choose to avail themselves of the classification process in respect of the construction and operation of equipment which is outside the scope of the main classification process for the subject matter insured in question. Irrespective of whether the involvement of class is mandatory or on a voluntary basis, the essential purpose of Cl. 12-4 is to ensure that the cover for defective parts given is only activated in cases where the design and production of the part in question is or has been subject to rigorous standards.

As regards vessels that sail under the supervision of and with a certificate from the Maritime Directorate or other similar body, there will not normally be any approval of building and repair work from a classification society. Accordingly, they will 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 supervision and certificate of the Maritime Directorate. In relation to Cl. 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 is in class.

#### *What constitutes damage, the meaning of part*

Here the controlling principles are those that apply to Cl. 12-1. The error in design or the faulty material must have led to damage to the part itself. Some identifiable physical change in the part must have occurred. The development of tiny cracks or fractures only discoverable by the use of specialist techniques, such as fluoroscopy, is sufficient. If however the sole reason for replacing the part is the realisation that it is e.g. under dimensioned or has an inappropriate design or is one of a batch suspected of suffering from defects in material, then in the absence of evidence of actual damage there will be no claim against insurers. The meaning of part is discussed in the Commentary to Cl. 12-3 and the same principles must be used for Cl. 12-4. Essentially it is a question of identifying what might be called the “natural unit of repair”. When damage is discovered in part of a composite unit the most sensible course of action in terms of total costs might be to replace the whole unit rather than to dismantle it and repair or replace the part itself. If this is the case, then the natural “unit of repair” will be the whole assembly rather than the particular part.

#### *The extent of the insurer's Liability*

It is important to keep in mind that all damage to a vessel is covered unless it was caused by an excluded peril.

Cl. 12-4 is a limited exclusion which only applies if:

- the part has suffered damage as a consequence of faulty material or error in design, and
- the part in question has not been approved by class in the sense described below.

If these conditions are satisfied then the insurer is not liable for the cost of repairing or replacing the part itself but remains of course liable for the cost of repairing all consequential damage to other parts of the vessel. Very often the cost of repairing the defective part itself is small compared to the cost of repairing the consequential damage. As a consequence of the normal rules of apportionment in such cases, most of any common expenses will be attributed to the consequential damage and the total effect for the assured will be minor.

Where the part has been approved by class the all risks principle applies and the insurer is liable for the cost of repairing or replacing the part itself. However, this also means that the principles in Cl. 12-1 apply and the insurer is not liable for any additional costs that are incurred for the purpose of rectifying the original error. The insurer's obligation under Cl. 12-1 is to pay for the cost of restoring the vessel to the same condition it had before the casualty. The extra costs of any improvements must be for the account of the assured. An obvious example would be the extra costs of strengthening a part that has proved to be too weak for its intended purpose. This follows from the main rule set out in Cl. 12-1 and the particular rule in Cl. 12-1, sub-clause 3.

Since cover for parts that are defective as a result of errors in design or faulty material is only excluded in respect of parts that are not approved by class, the cover that remains by virtue of the all risks principle is broader than that provided by other international standard clauses. It is not a requirement as it is under the Additional Perils clause used in conjunction with English or American conditions, that the defective part should also have been the cause of damage to other parts of the vessel. Nor is cover restricted to specific parts such as shafts and boilers.

#### *Error in design and faulty material*

The term "faulty material" is easier to define than "error in design". It refers to the fact that the material used in some part of the vessel suffers from some weakness or deficiency compared to applicable standards. Most typically the fault is a result of some form of malfunction during the manufacturing process, and there is something wrong with the material itself. It makes no difference for the purpose of applying Cl. 12-4 whether the faulty material was present from the time of delivery of the vessel or became part of the vessel during subsequent modifications or repairs. The term can also be used to include cases where material that is intrinsically sound is used but the material is inadequate or inappropriate for its intended use. This is strictly speaking an error in design and can raise the same kind of border line issues, as discussed below. Damage to material resulting from a casualty is of course outside the scope of Cl. 12-4 and must be covered by the insurer at the time the damage occurred.

Design in the context of Cl. 12-4 refers to the entire process of defining how the various parts of the vessel should be configured and assembled, how they should be manufactured and the exact nature and quality of the material to be used. Any defect arising as a consequence of any of these matters must be regarded as an error in design. Defects arising from a failure to correctly follow the planned design process cannot be classified as errors in design but will rather be a case of faulty material or workmanship.

An error in design can be either “subjective” – the design is defective in the light of current knowledge and established standards – or objective – the design is regarded as suitable in the light of current knowledge and standards but is subsequently shown to be inadequate for reasons that were not understood at the time the vessel was built. In considering whether any particular construction can be regarded as an error in design, a simple test is whether, if it had been discovered before the vessel could be taken in use, it should have been corrected or changed either; because it failed to comply with then applicable design criteria - subjective error, or because subsequent knowledge and insight has shown that it was inadequate in some respect - objective error. In making this evaluation, the focus is on the safety of the vessel and avoiding any breakdown in operation, these being the focus of the classification process. One cannot argue that a vessel suffers from an error in design simply because parts become worn out more quickly than anticipated. Nor is it an error in design in cases where the party responsible for ordering the vessel has deliberately chosen solutions that entail a degree of uncertainty about serviceability or useful lifetime, for example new technology that is not yet fully tested. Similarly if the party ordering the vessel has adopted design solutions on the basis of inadequate analysis or in order to save money.

Another important borderline is between damage arising from an error in design and damage that is a natural consequence of the way the vessel has been employed, cf. Cl. 10-3. It is obvious that if a vessel is employed in ice conditions for which it has not been designed, the resulting damage cannot be regarded as caused by an error in design, but not all cases are as clear cut. The use of the vessel in a particular trade may cause unexpected problems that are simply an inevitable consequence of the prevailing conditions and circumstances. Continuous employment on North Atlantic routes will expose the vessel to a much higher level of structural stress than employment in calmer waters. While specific cases of heavy weather damage are obviously covered the general deterioration of the structure due to the development of multiple small cracks may also be attributable to other causes than error in design even if it occurs much sooner than expected.

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 starting to show signs of wear and tear, this does not itself indicate error in design as a cause, and can suggest that the effect of the ship's normal use may have been underestimated or that the ship has operated in a trade that is more demanding than anticipated. But even after a number of years allowance must be made for the possibility that an error in design will manifest itself in a sudden breakdown or malfunction.

The factors that need to be evaluated when drawing the border line between damage that is a result of an error in design and therefore covered if the part in question has been approved by class and damage which must be regarded as excluded by Cl. 12-3 or Cl. 10-3 include therefore:

- Whether the error is of such a nature that steps would have been taken to correct it either in the light of current or subsequent knowledge if it had been discovered before the part in question was taken in use. In this case, the starting point is that the error constitutes an error in design.
- How much time has elapsed since the ship was delivered or the relevant part was installed. A short period provides an argument for the error to be qualified as an error in design, whereas a long period may be an argument against this result.
- Whether the damage is a result of a gradual process or has occurred suddenly. The more gradual the development of the damage is, the more likely it is that the cause is wear and tear, lack of maintenance or similar, and not an error in design.

Finally, it should be noted that cases sometimes occur where equipment is taken in use in order to have a full scale test of new technology or a new design. The risks inherent to such testing clearly fall outside the normal scope of cover of a standard H&M insurance contract and can only be covered by specific agreement with insurers.

#### *Interaction with other provisions in the Plan*

##### *Duties of the assured Chapter 3*

If the assured is aware that the vessel has defects resulting from an error in design, then he must comply with class rules in respect of giving notice and fulfilling mandatory class requirements. This follows from the rules in Cl. 3-22. Any failure to remedy a known defect irrespective of its origin is likely to amount to a breach of a safety regulation and trigger the sanction rules in Cl. 3-25.

Cl. 3-14 requires that vessel's main class is maintained. If class is lost pursuant to Cl. 3-14 the entire insurance cover is automatically terminated so that all claims arising from a peril that struck after the termination are not covered. This includes any claim under Cl. 12-4 but always subject to the rules as to incidence of loss. It is important to notice that Cl. 3-14 does not apply to changes in the status of a vessel's voluntary additional class, although other rules such as safety regulations or duty of disclosure might possibly become relevant in appropriate circumstances.

*Causation, Cl. 2-13*

It is possible that the rule in Cl. 2-13, apportionment of loss partly caused by an insured peril and partly by an excluded peril, might become applicable in some cases. A part might suffer damage partly as a consequence of error in design or faulty material, an insured peril for parts approved by class, and partly by wear and tear or ordinary corrosion. This kind of case depends always on a careful analysis of all the relevant technical details but could result in an apportionment of the repair costs. The costs of repairing any consequential damage to other sound parts, is of course covered in all cases subject only in to the provisions in Ch. 3.

*Incidence of loss, Cl. 2-11*

By their very nature, defects arising from errors in design and faulty material tend to remain undiscovered. The interest insured under a hull insurance contract, namely the risk of economic loss arising from physical damage to the vessel, has therefore already “struck” at the time the relevant part is built into the vessel since it is usually difficult if not impossible to discover the defect before damage occurs and the economic loss materialises. For practical reasons explained in the Commentary to Cl. 2-11, these cases fall within the rule in Cl. 2-11 sub-clause 2 and the loss will be allocated to the insurance contract on risk at the time the damage occurred. The issues dealt with by Cl. 2-11 can arise in respect of other defects than those attributable to error in design and faulty material, including defects due to faulty workmanship or arising from a previous casualty. In some cases the damage to the part in question can occur in a period spanning more than one insurance contract, and in others it is very difficult to establish the exact course of events so that the rules as to burden of proof must be applied. See further the Commentary to Cl. 2-11.

**Clause 12–5. Losses that are not recoverable**

Sub-clause (f) was deleted in 2016. **The Commentary was amended in the 2019 Version.**

Cl. 176 of the 1964 Plan 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 Cl. 176 (d) and relating to loss resulting from contamination of lubricating oil, etc., which replaced Cl. 176 (m). The provisions relating to bottom painting in sub-clause (d) and Cefor I.16 and PIC Cl. 5.18 are impractical 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. Sub-clause (e) contained a provision relating to the caulking of hull and deck. This provision is impractical in hull insurance for ocean-going vessels and has therefore been moved to Chapter 17 on insurance of fishing vessels and freighters, cf. Cl. 17-12 (c). The rules in sub-clauses (g) to (l) and (n) were considered unnecessary in conjunction with the general provision in Cl. 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 Cl. 4-10 is recoverable according to the rules relating to particular average, because this is more favourable for the assured.

The limitation in *sub-clause (a)* has been taken from Cl. 176 (a) of the 1964 Plan, but the term “similar direct expenses” has been replaced by “other ordinary expenses”. Ordinary operating expenses during repairs are not normally a 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 Cl. 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 must, however, 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 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 condition for cover is nonetheless that the insurer benefits from the repairs in the form of a reduction in the cost of repairs.

**Even if it is not stated explicitly, it is clear that the insurer is not liable for** the more indirect expenses incurred while the repairs are carried out, such as interest on mortgage loans, insurance premiums, general administration costs, etc.

The limitation in *sub-clause (b)* is identical to Cl. 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 *sub-clause (c)*, which concords with the corresponding provision in Cl. 176 of the 1964 Plan, is based on the same idea as sub-clause (b) as regards the passengers.

*Sub-clause (d)* is taken from Cl. 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 Cl. 10-1, sub-clause 2. However, for equipment covered in Cl. 10-1, sub-clause 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. Anchors, 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.

*Sub-clause (e)* is identical to Cl. 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.

### **Clause 12–6. Deferred repairs**

The provision corresponds to Section 177 of the 1964 Plan. 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. Cl. 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 Cl. 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 Cl. 5-24, sub-clause 1, before the five-year time-limit under Cl. 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.

Cl. 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.

### **Clause 12–7. Temporary repairs**

This Clause corresponds to Cl. 178 of the 1964 Plan, Cefor I.7 and PIC Cl. 22.

*Sub-clause 1* is identical to Cl. 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 Cl. 12-1, sub-clause 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 sub-clause 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”.

*Sub-clause 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, sub-clause 2 makes the insurer liable for the costs of the temporary repairs within the limits 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 agreed insurable 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-hire 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 1964 Plan, therefore, Cl. 12-7, sub-clause 2, *second sentence*, 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).

Cl. 178, sub-clause 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 sub-clause 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 sub-clause 2 in the event of rental of objects, e.g. mobile generators, in order to save time. These limitations have been generalised by sub-clause 2 now only applying to "temporary repairs of the damaged object". This means that, contrary to sub-clause 1, the term "temporary repairs" in sub-clause 2 only comprises repairs in a strict sense, i.e. the actual repair of the damaged part, but not the renewal of a part, nor the rental of substitute machinery. In the case of hull damage the "damaged object" must be regarded as synonymous with the "damaged part".

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. Cl. 12-17 (c).

### **Clause 12-8. Costs incurred in expediting repairs**

This Clause corresponds to Cl. 179 of the 1964 Plan, Cefor I.7 and PIC Cl. 5.22. The Commentary was amended in the 2010 version.

The Clause is based on the view of the loss-of-time problem which was discussed in the preceding sub-clause. 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 or other extraordinary measures.

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 normally also 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 Cl. 4-7.

Cl. 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 Cl. 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 concurs with prior practice. It has also been practice to indemnify new parts that are used to save time, up to the amount of what it would have cost to repair the parts. Here we are still dealing with repairs of the damaged object.

“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.

Costs that do not expedite the actual repairs are not recoverable under Cl. 12-8. For instance, a damaged crane pedestal on a rig might conceivably be left behind for repair in Singapore while the rig is shipped on a heavylift to reach its next charterparty in Scotland in time. When the crane pedestal

has been repaired, it is sent by charter plane to Scotland, to ensure that it arrives at the same time as the rig. The use of a charter plane has not expedited the repairs of the crane pedestal, and is therefore not recoverable under Cl. 12-8. The repairs would have taken the same amount of time regardless of whether or not the rig had waited. However, the assured avoids a loss of income because without the crane, the rig rate would have been reduced. If the assured has loss-of-hire cover under Chapter 16, any costs he has incurred in order to avoid loss of time may therefore be recoverable under Cl. 16-11.

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 Clause, 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 provision as under Cl. 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 clause.

### **Clause 12–9. Repairs of a *vesse*/that is condemnable**

This Clause is identical to Cl. 180 of the 1964 Plan.

The provision is intended as a defence for the insurer if the assured insists on making repairs. 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 Cl. 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 Cl. 11-5 above.

### **Clause 12–10. Survey of damage**

This Clause corresponds to Cl. 181 of the 1964 Plan. Sub-clause 4 was amended in the 2010 version.

Sub-clauses 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, *sub-clauses 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.

*Sub-clause 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 umpire. *Sub-clause 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 umpire 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 umpire, 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 umpire 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 umpire should therefore be appointed by a Nordic average adjuster, see *sub-clause 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 umpire will furthermore remain in effect until the claims settlement has been brought to its conclusion. It is therefore no condition that the umpire be given an opportunity to inspect the damage before the repairs have been completed. In earlier versions the umpire in these cases was to be designated by a Norwegian average adjuster. The reason for this amendment is the desire to promote greater Nordic collaboration on use of the Plan.

As regards cover of the expenses of the assured's representative, reference is made to Cl. 4-5.

According to *sub-clause 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. *sub-clause 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 making repairs 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. Cl. 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 Cl. 12-1.

### **Clause 12–11. Invitations to tender**

This Clause is identical to Cl. 182 of the 1964 Plan.

*Sub-clause 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 condition 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 the relevant repair yards, the invitation to tender will not in itself have caused the assured any loss.

### **Clause 12–12. Choice of repair yard**

This Clause is identical to Cl. 183 of the 1964 Plan.

According to *sub-clause 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. *sub-clause 2*. However, if the insurer has obtained a less expensive tender from another repair yard than the one chosen by the owner, he cannot 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 Cl. 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.

*Sub-clause 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.

### **Clause 12–13. Removal of the vessel**

#### **The Commentary was amended in the 2019 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. *sub-clause 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, but 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. sub-clause 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 Cl. 12-14.

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 Cl. 3-20, each 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 *sub-clause 2*, liability is transferred to the insurer who is liable for the damage to the ship, unless he has also excluded liability, cf. *sub-clause 3*. If a claims leader has been appointed under the hull insurance, he has, as mentioned in the Commentary on Cl. 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. Cl. 9-6 and Cl. 14-3, sub-clause 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 Cl. 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 until the ship is at the repair yard, but which clearly existed before the removal commenced.

#### **Clause 12–14. Apportionment of common expenses**

Cl. 12-14 was slightly amended in 2016, and the Commentary was largely rewritten to reflect current adjusting practice.

The Clause regulates the apportionment of repair expenses that are common to more than one category of work effected during a stay at a single port or place of repairs.

According to the *first sentence*, expenses that are common to recoverable and non-recoverable work shall be apportioned taking into account the cost of each category of work.

The *second sentence* makes an exception for dry dock charges and quay rental, which are to be apportioned over the length of the time of repairs.

In practice, certain principles of apportionment have developed, and the most important features are mentioned below.

The Clause refers to apportionment over various “categories” of work. Usually the relevant categories will be;

- repair work for which the insurer is liable, and
- work that is not covered by the insurance.

However, if repairs of more than one casualty are effected simultaneously, each casualty’s repairs will also be a separate *category* of work. It should also be noted that the issue of “common repair expenses” is relevant only where more than one category of work are repaired simultaneously within a single port or place of repairs. If repairs are carried out at various occasions in various ports, the expenses incurred at each port must be apportioned separately to each category of work effected at that port.

Common repair expenses to be apportioned on a cost basis are as a main rule exemplified as follows;

- Fire watch and fire lines
- Port dues
- Agency fee (general) for the repair stay
- Owners’ superintendence (see also Cl. 4-5)
- ISPS watchmen
- Tank cleaning
- Gas freeing / gas free certificates
- Removal expenses (see also Cl. 12-13)
- 50% of telephone expenses
- Electric power allocated to repairs

Regarding supply of electricity, see the Commentary to Cl. 12-1.

The basis on which the common repair expenses shall be apportioned is the total repair costs of each category of work in a particular port. As a main rule this will include the following;

- Shipyard repairs
- Any (sub)contractors’ repairs
- The value of spares supplied for repairs
- Proportion of dry dock and berth charges allocated to each category (see also below)

Dry dock charges and quay rental shall be apportioned on a “time required” basis. Dry dock charges are accordingly to be apportioned over the time required in dry dock as if each category had been effected separately. Berth hire is similarly apportioned over the time required alongside for each category of work. Whilst berth hire is usually charged as a single item in the yard’s invoice, examples of the main dry dock charges to be apportioned over the time required in dry dock are as follows;

- Dock rental
- Docking in and out

- Shifting to/from dry dock (pilots, linesmen and tugs for docking in and out)
- Ballast water for undocking
- Docking master
- Placing of dock blocks (unless effected specifically for a particular category of work)

The practice for apportioning costs on a time basis differs between various insurance conditions. The following serves as examples of the approach according to the Nordic Plan:

a) Where one casualty and owner's work require dry dock:

If owner's work required 10 days in dry dock, and casualty repairs required 15 days in dry dock, the total of all dry dock related charges shall be apportioned as follows:

The sum of 10 days for owner's work and 15 days for casualty repairs is 25, and 10/25ths of dry dock costs are allocated to owner's work and disallowed, and 15/25ths allocated to casualty repairs and thereby allowed. If charges for a total stay of 15 days in dry dock are USD 75,000, 10/25ths or USD 30,000 would be disallowed, and 15/25ths or USD 45,000 would be allowed.

b) Where there are two or more casualties together with owner's work requiring dry dock:

If owner's work required 10 days in dry dock, casualty 1 required 15 days in dry dock, and casualty 2 required 9 days in dry dock, the total of all dry dock related charges shall be apportioned in two "steps". Firstly, the total dry dock charges are apportioned between owner's work and casualties, as follows: The sum of 10 days for owner's work and the casualty requiring the longest stay in dry dock, 15 days, is 25. 10/25ths of dry dock costs are allocated to owner's work and disallowed, and 15/25ths allocated to casualties and thereby allowed. With dry dock costs as in example a) USD 30,000 is disallowed and USD 45,000 is allocated to the casualties. Secondly, the proportion allocated to casualties shall be apportioned internally between the two casualties as follows: The sum of 15 days for casualty 1 and 9 days for casualty 2 is 24 days. Hence, USD 45,000 shall be apportioned with 15/24ths or USD 28,125 allowed to casualty 1, and 9/24ths or USD 16,875 allowed to casualty 2.

The exclusion in Cl. 12-5 (a) for expenses connected with the running of the ship is closely connected to Cl. 12-14. Examples of excluded expenses are;

- cooling water supply
- galley garbage removal
- black and grey water connection/disposal
- gangway watchmen (ISPS watchmen and fire watch are however allowed, see above)
- electric power consumed in running the ship, see the Commentary to Cl. 12-1.

It should be noted that some of the above examples of "common expenses" are not necessarily related to all categories of repairs effected in which case they are often termed "accessorial expenses". They may in other words be accessorial to some, but not to all categories of work effected. As an example,

removal expenses shall not be apportioned on any damage arising during removal (see Commentary to Cl. 12-13). And “extra” tank cleaning e.g. to allow hot work may be related to repairs in a particular tank. In case certain expenses are not common to all categories of work, they shall be attributed only to the category(ies) in respect of which they incurred.

Finally, it should be noted that the above principles of apportionment apply irrespective of whether any category of work is due e.g. under Class’ requirement, or could have been postponed to a later date. Thus, there is no difference between an emergency docking and a scheduled docking. The simple question is what actually is effected at the particular port or place of repairs. However, there is a practice to disregard owner’s work if the costs represent less than 5% of the total cost of repairs.

### **Clause 12–15. Ice damage deductions**

The *second sentence* was added in 2016. For the sake of clarity, the new sentence emphasizes that the ice damage deduction comes in addition to the general deductible under Cl. 12-18, sub-clause 1.

In line with the general deductible provision in Cl. 12-18 and other clauses of similar nature, it is left to the parties in the individual contracts to agree on the deduction, if any, that shall apply to ice damage.

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. An ice damage deduction is therefore considered to have a certain deterrent effect.

If 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 must also be agreed on individually if the owner wants the ice damage deduction in the form of a fixed amount, cf. below regarding the deductible.

Unless otherwise agreed 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 areas, cf. Cl. 3-15, sub-clause 1.

The same repair costs fall outside the scope of the ice deduction as are excluded from the scope of the machinery damage deduction, cf. Cl. 12-17. As regards the basis for calculating the deduction, reference is made to Cl. 12-19 and the Commentary on that provision.

## Clause 12–16. Machinery damage deductions

The word “grounding” was added in letter (a) and a mere editorial amendment was made to letter (c) of sub-clause 2 in the 2013 Plan.

Cl. 12-16 provides for a machinery damage deduction in addition to the standard deductible which the parties can activate by agreeing on the amount to be deducted, cf. *sub-clause 1*. It is assumed that such a 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.

For the sake of clarity, it is emphasised that the machinery damage deduction comes in addition to the general deductible under Cl. 12-18, sub-clause 1, cf. *second sentence*.

*Sub-clause 2* lists three exceptions from the general rule relating to machine damage deductions.

According to *sub-clause 2 (a)*, no deduction shall be made if the ship has been involved in a “grounding, collision or striking”. The word “grounding” was added in the 2013 Plan. 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 was moving. On the other hand, if the ship strikes its own fishing tackle or its own equipment outside the ship, this will constitute “striking”.

According to *sub-clause (b)*, moreover, no deduction is awarded in situations of “the engine room having been completely or partly flooded”, cf. *sub-clause 2 (b)*. These will normally be casualties of

a more serious nature. But the exclusion also covers a situation where the crew has forgotten an open valve with the result that water pours out into the engine room and causes damage to the machinery. Damage resulting from fire or explosion shall always be subject to a machinery damage deduction if the fire broke out or the explosion occurred in the engine room, cf. *sub-clause 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 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 Clause shall be made in connection with repairs of the 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 insulation of parts falling within the scope of this Clause.

Deductions shall also be made for accessory costs of repairs, see further the Commentary on Cl. 12-7.

### **Clause 12–17. Compensation without deductions**

This Clause corresponds to Cl. 188 of the 1964 Plan.

Certain losses are covered without deductions. This applies to depreciation in value under Cl. 12-1, sub-clause 4, normal loss of time under Cl. 12-11, sub-clause 2, costs of removal under Cl. 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 Cl. 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 Cl. 12-15 and Cl. 12-16 if the general average damage to the ship is settled under Cl. 4-10; the same applies to assumed general average, cf. Cl. 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 Cl. 4-12, sub-clause 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. Cl. 12-19, sub-clause 2.

### **Clause 12–18. Deductible**

In Cl. 189, sub-clause 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 contract, cf. *sub-clause 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 due to 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. Cl. 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 Cl. 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 making repairs.

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 when 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 Cl. 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 insurance contract 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.

*Sub-clause 2* creates an exception to the rule that the deductible is to be applied to each casualty in cases where it may be particularly 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 Cl. 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, sub-clause 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.

*Sub-clause 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 Cl. 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 Cl. 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.

### **Clause 12–19. Basis for calculation of deductions according to Clauses 12–15 to 12–18 and Clause 3–15**

This Clause corresponds to Cl. 190 of the 1964 Plan.

*Sub-clause 1* is identical to the 1964 Plan, but a reference to Cl. 3-15, sub-clause 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. Insofar as 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 areas.

*Sub-clause 2* is discussed in further detail under Cl. 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, P&I insurance has gradually 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 Cl. 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 is 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 Cl. 13-1 and the Commentary on 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 agreed value, cf. Cl. 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 Cl. 13-3 and the Commentary on that provision.

### Clause 13–1. Scope of liability of the insurer

The wording was amended editorially in the 2013 Plan in order to better protect the insurer from being subject to a direct action in a non-Nordic country, cf. the corresponding amendments made to Cl. 4-17.

*Sub-clause 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 Cl. 10-1, sub-clause 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 Cl. 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 1990.8 S. “Dispasch” VINCA GORTHON. However, after total-loss compensation has been paid, the insurer is no longer liable, unless he has taken over the title to the wreck under Cl. 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 Cl. 4-15 as regards unusual or prohibited contractual terms. The Cl. 13-1 also includes the assured’s liability towards the tug if the ship collides with it. The hull insurer shall, therefore, cover all liability for collision damage which the tow may incur under a towage contract on ordinary terms. In the 1996 version of the Commentary this intention was expressed in a way that caused practitioners to be unsure whether the previous practice really was to be abolished. Hence, the matter was tried before arbitrators, cf. ND 2000.442 NV SITAKATHRINE. The arbitrators decided unanimously that the Commentary in sufficiently clear terms bindingly determined that the previous practice should no longer be followed. The wording “caused through collision or striking” means therefore that the hull insurer shall also cover the insured vessel’s 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 stipulates 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, Cl. 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. Cl. 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.

*Sub-clause 2* lists under (a) to (j) exceptions to the main rule in sub-clause 1.

*Sub-clause 2 (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 Cl. 3-12, sub-clause 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 sub-clause 2 (a) may be covered by the hull insurers by special agreement, possibly in return for an additional premium.

*Sub-clause 2 (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 *sub-clause 2 (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 4-6 of the Norwegian Ship Labour Act), and liability for loss of luggage and crew’s effects. As regards the latter case, it will also follow from *sub-clause 2 (d)* that liability falls outside the scope of the hull cover.

*Sub-clause 2 (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 Nordic 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, first sub-clause 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, second sub-clause, 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 sub-clause 2 (j) of this Clause.

*Sub-clause 2 (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 *sub-clause 2 (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 and damage to coral reefs and other environmental damage is excluded from the hull cover. This provision is new and taken from the Special Conditions, cf. Cefor I.11 and PIC Cl. 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 further 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 Cl. 2-8 (e) nos. 1 - 4.

The exclusion for “damage to coral reefs and other environmental damage” is new in the 2010 version. This exclusion is related to the fact it has become common in recent years to seek indemnification for this type of damage for environmental reasons, and there was therefore a need to provide a precise definition of hull liability in relation to such damage as well. Previously, damage to coral reefs was only excluded if it was a question of pollution damage. The amendment entails that damage to coral reefs that is not attributable to pollution, but to the fact, e.g., that the ship has been in physical contact with the coral reef is excluded. Such damage is to be regarded as environmental damage. “Other” environmental damage means damage to other types of living organism on the sea bottom or the seashore as a result of physical contact with a ship.

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 *sub-clause 2 (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 Cl. 194, sub-clause 2 (f) of the 1964 Plan. Given the new exception for contamination, etc. in sub-clause 2 (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 sub-clause 2 (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 2016, Rule C.

*Sub-clause 2 (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 Cl. 13-1, sub-clause 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 Cl. 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 sub-clause 2 (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 sub-clause 2 (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. The provision in Cl. 13-1, sub-clause 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 Cl. 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 *sub-clause 2 (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 Cl. 194, sub-clause 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 *sub-clause 2 (j)*, final refund of amounts which a third party has paid by way of compensation for loss as mentioned under sub-clause 2 (a) to (i) is excluded. This provision is identical to Cl. 194, sub-clause 2 (i) of the 1964 Plan, and is primarily aimed at indirect cargo liability under US law, see further the Commentary on sub-clause 2 (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, fourth sub-clause, of the Norwegian Maritime Code). Like direct personal injury liability, such indirect personal injury liability falls outside the hull insurance, cf. sub-clause 2 (b).

### **Clause 13–2. Limitation of liability based on tonnage or value of more than one *vesse/***

This Clause is identical to Cl. 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 US 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.

### **Clause 13–3. Maximum liability of the insurer in respect of any one casualty**

This Clause is identical to Cl. 196 of the 1964 Plan.

In addition to the Commentary on the Clause contained in the Commentary on Cl. 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.

### **Clause 13–4. Deductible**

The provision is worded in accordance with the same principles as the provision concerning deductible for hull damage, Cl. 12-18, and reference is made to the Commentary on that Clause. A provision has furthermore been added in Cl. 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.