

COMMENTARY
TO
NORWEGIAN
MARINE INSURANCE PLAN
OF 1964

Issued by
DET NORSKE VERITAS

PREFACE

to the English Translation of the Commentary to the Plan

During the last ten years or so there has been a gradual increase in the amount of international business written by Norwegian underwriters. A significant proportion of this business is subject to the terms of the Norwegian Marine Insurance Plan of 1964. While the text of the Plan itself has always been available in English, the Commentary — which is important for its interpretation — has not. This has created an unfortunate situation where non-Norwegian assurors, adjusters and co-insurers have had to rely on secondhand information as to what the Commentary says. It was felt within the Norwegian insurance market that this defect ought to be remedied. However, several years passed before the topic was put on the agenda for the regular meetings between representatives of the Central Union of Marine Underwriters and the Committee of Mutual Marine Insurance Associations. Once the matter had been put on the agenda, the two organizations had no difficulty in resolving that they should provide the necessary funds for the translation.

The difficult task of translating the often very technical content of the Commentary has been performed by the Government Authorized Translator Mrs. Gytte Borch. As back-up support she has had Mr. Nicolas Wilmot of the Vesta Insurance Company and Messrs. Johannes Woxholt and Leif Strøm-Olsen, who both are Government Authorized Average Adjusters, together with their associate Mr. Ragnar Svarstad who was appointed Authorized Average Adjuster with effect from 1 January 1989. Mr. Svarstad has taken on the major part of the work done by the adjusters in this connection.

Mr. Wilmot's and the adjusters' task has been primarily to check that the translation correctly reflects the legal and technical meaning of the Norwegian text. Finally, the text has been proof read and re-checked by Mr. John Nielsen, former Managing Director of the Central Union and member of the original drafting committee of the Plan, and by Mr. Ingmar Jansen, former Director of the Shipowners' Section of the Vesta Insurance Company.

The two organizations are greatly indebted to all these gentlemen, but in particular the translator, Mrs. Gytte Borch, deserves to be commended for her efficient and very skilful translation.

The aim of the translation has been to produce a text which reflects the exact meaning of the original as accurately as possible. In some cases this aim has conflicted with the aim of producing a text that reads naturally for a native English speaker. No poetic licence has been taken. Despite the strict emphasis on meaning rather than style, it is, of course, possible that the translation does not completely convey the full meaning of the Norwegian original in certain parts. Where this occurs, the blame should not be put on the translator or the gentlemen giving her back-up support, but rather on the Norwegian language. It must be emphasized that the Norwegian text must prevail if the translation in certain parts proves not to convey the full meaning of the Norwegian original.

Finally, the two organizations wish to express their gratitude to Det norske Veritas, which has copyright in the Plan and the Commentary, for their immediate consent to having the translation made. Det norske Veritas appear as publisher of the translation in the same way as they are publisher of the Norwegian and the English versions of the Plan together with the Norwegian Commentary.

Oslo, March 1989

Gunnar Vefling
Central Union of
Marine Underwriters

Haakon Stang Lund
Committee of Mutual Marine
Insurance Associations

PREFACE

The General Committee of Det norske Veritas, at a meeting on the 18th October, 1957, resolved to establish a Special Committee to revise the «Norwegian Marine Insurance Plan of 1930». The committee members, originally sixteen in number besides the Chairman and Secretary, were appointed in March, 1958. An additional four members were appointed later, whereby the committee was composed as follows:

Members

Mr. Lars Bakkevig, Haugesund
 Mr. Kåre Høy, Oslo
 Mr. Odd I. Loennechen, Tønsberg
 Mr. Georg Vedeler, Oslo
 Mr. Erik Ørvig jnr., Bergen
 Mr. Sverre Holt, Oslo
 Mr. Knut H. Staubo, Oslo
 Mr. Alex Rein, Oslo
 Mr. Erling Strøm-Olsen, Kristiansand
 Mr. Hans Chr. Bugge, Oslo

 Mr. John Nielsen, Oslo

 Mr. Einar Tønjum, Oslo

 Mr. Einar Fløystad, Arendal
 Mr. Annar Poulsson, Oslo
 Mr. Henrik Ameln jnr., Bergen
 Mr. Nils Holst, Oslo
 Mr. Frode Østmoe, Oslo, later succeeded
 by Mr. Asbjørn Afseth, Oslo
 Mr. Arne Bech, Oslo
 Mr. C.H. Thrapp-Meyer, Tønsberg
 Mr. Leif Strøm-Olsen jnr., Oslo

Representing

Det norske Veritas
 Det norske Veritas
 Det norske Veritas
 Det norske Veritas
 Det norske Veritas
 Norwegian Shipowners' Association
 Norwegian Shipowners' Association
 Mutual Hull Clubs Committee
 Mutual Hull Clubs Committee
 The Central Union of Maritime
 Underwriters
 The Central Union of Maritime
 Underwriters
 The Central Union of Maritime
 Underwriters
 P. & I. Clubs
 P. & I. Clubs
 Underwriters of the Fishing Fleet
 The Claims Adjusters
 Federation of Norwegian Commercial
 Associations
 Federation of Norwegian Industries
 Norwegian Shipbuilders' Association
 Association of Norwegian Average
 Adjusters

with Professor Sjur Brækhus as Chairman and Professor Knut S. Selmer as Secretary.

At its first meeting, the Committee appointed an Editorial Committee composed of Bugge, Holt, Nielsen, Rein, Leif Strøm-Olsen jnr., besides the Chairman and Secretary. The Editorial Committee made a first draft of the preparatory notes and texts which were submitted to and discussed by the full committee.

The committee decided that the new Plan should only contain rules for insurances effected by shipowners and charterers, and that all rules concerning the insurance of cargo should be set out in a separate Insurance Plan for the Carriage of Goods. The committee's first draft with commentaries was printed in March 1963 and sent to the following institutions with a request for their opinion: The P. & I. Clubs Assuranceforeningen Gard and Assuranceforeningen Skuld, the Chartering Committee, The Norwegian Bankers' Association, The Norwegian Shipowners' Mutual War Risks Insurance Association, The Maritime Law Committee of the Norwegian Bar Association, The Coasters Shipowners' Association, The Mutual Hull Clubs Committee, The Ministry of Fisheries, The Maritime Directorate, The

Norwegian Coastal Vessels Insurance Institute, The Northern Shipowners' Defence Club, The Norwegian Shipowners' Association, Norges Skibshypotek A/S (mortgaging society), The Norwegian Ship Mortgage Association, The Association of Norwegian Average Adjusters, The Norwegian Boatbuilders' Association, The Association of Norwegian Insurance Companies, The Reinsurance Institute, The Reinsurance Institute for Fishing Gear, The Shipowners' Mortgage Association, The Association of Local Shipping Lines, The Central Union of Marine Underwriters, The Norwegian Shipbuilders' Association, The Shiptechnical Society, The State War Risk Cargo-Insurance, and the Federation of Norwegian Transport Users.

Opinions were received from Assuranceforeningen Skuld, The Norwegian Bankers' Association, The Norwegian Shipowners' Mutual War Risks Insurance Association, The Mutual Hull Clubs Committee, The Norwegian Shipowners' Association, The Association of Norwegian Average Adjusters, The Central Union of Marine Underwriters, The Maritime Directorate, The Norwegian Shipbuilders' Association, The Shiptechnical Society. After the opinions had been considered by the committee, a new, final draft with supplementary commentaries were forwarded in January 1964 to Det norske Veritas for further consideration. This draft was adopted, with a few minor alterations, at an extraordinary meeting of the General Committee of Det norske Veritas on 8th February 1964.

Oslo, September 1964

Odd I. Loennechen

Chairman of the General Committee of Det norske Veritas

CONTENTS

PART ONE

PROVISIONS COMMON TO ALL TYPES OF INSURANCE

Chapter 1	Introductory provisions	1
§ 1.	Definitions	1
§ 2.	The Policy	2
§ 3.	Reference to Norwegian law	2
§ 4.	Period of insurance	3
Chapter 2	General provisions concerning the scope of the insurance	4
SUBDIVISION 1 INTEREST AND INSURABLE VALUE		4
§ 5.	Interest comprised by the insurance	4
§ 6.	Insurance not related to any interest	5
§ 7.	Insurable value	6
§ 8.	Assessed insurable value	6
§ 9.	Under-insurance	7
§ 10.	Over-insurance	8
§ 11.	Insurer's liability when the interest is also insured with another insurer	8
§ 12.	Recourse between the insurers when the interest is insured with several insurers	8
§ 13.	Reduction of the sum insured	9
§ 14.	Duty of the person effecting the insurance to notify other insurances	10
SUBDIVISION 2 PERILS INSURED AGAINST, CAUSATION AND LOSS		11
§ 15.	Perils comprised by an insurance against marine perils	11
§ 16.	Perils comprised by an insurance against war perils	15
§ 17.	Perils insured against when it is not agreed what the insurance comprises	22
§ 18.	Causation	22
§ 19.	Principal rule of the assured's burden of proof	26
§ 20.	Combination of perils	27
§ 21.	Combination of marine and war perils	30
§ 22.	Losses deemed to be caused entirely by war perils	31
§ 23.	Loss attributable either to marine or war perils	33
Chapter 3	Duties of the person effecting the insurance and of the assured	34
SUBDIVISION 1 DUTY OF DISCLOSURE BY THE PERSON EFFECTING THE INSURANCE		34
§ 24.	Scope of duty of disclosure	35
§ 25.	Fraud and dishonesty	35
§ 26.	Other neglect of the duty of disclosure	36
§ 27.	Neglect of the duty of disclosure not imputable to the person effecting the insurance	36
§ 28.	Cases where the insurer cannot plead insufficient disclosure	37
§ 29.	Insurer's duty to notify	37
§ 30.	Insurer's right to require particulars from the classification society	37
SUBDIVISION 2 ALTERATION OF THE RISK		38
§ 31.	Alteration of the risk	39
§ 32.	Alteration of the risk caused or agreed to by the assured	40
§ 33.	Insurer's right to terminate the insurance	40
§ 34.	Assured's duty to notify	41
§ 35.	Cases where the insurer cannot plead alteration of the risk	41
§ 36.	Insurer's duty to notify	42

VIII

§ 37. Ship proceeding beyond trading limits	42
§ 38. Burden of proof where the ship proceeds beyond the trading limits	44
§ 39. Notification to voyages	45
§ 40. Illegal undertakings	45
§ 41. Requisition	47
§ 42. Notification of requisition	47
§ 43. Removal of ship to avoid condemnation	47
§ 44. Removal of the ship to repair yard	48
SUBDIVISION 3 SEAWORTHINESS, SAFETY REGULATIONS	50
§ 45. Unseaworthiness	50
§ 46. Insurer's right to demand survey of the ship	52
§ 47. Ships laid up	52
§ 48. Safety regulations	53
§ 49. Violation of safety regulations	53
§ 50. The insurer's right to terminate the insurance	54
§ 51. Terms of contract	55
SUBDIVISION 4 MEASURES TO AVERT OR MINIMIZE THE LOSS ETC.	55
§ 52. Assured's duty to notify the insurer of casualties	55
§ 53. Assured's duty to avert and minimize the loss	55
§ 54. Consequences of the assured neglecting his duties	56
SUBDIVISION 5 CASUALTIES CAUSED INTENTIONALLY OR NEGLIGENTLY BY THE ASSURED	57
§ 55. Intent	57
§ 56. Gross negligence	57
§ 57. Insurer's right to terminate the insurance	57
§ 58. Circumstances precluding the application of §§ 55 to 57	57
SUBDIVISION 6 IDENTIFICATION	59
§ 59. Faults and negligence of the crew	60
§ 60. Faults and negligence by a part-owner of the ship	60
§ 61. Identification in other cases	61
Chapter 4 The insurer's liability	61
SUBDIVISION 1 GENERAL RULES CONCERNING THE INSURER'S LIABILITY	62
§ 62. Total loss	62
§ 63. General monetary loss and loss resulting from delay	62
§ 64. Costs of providing security etc.	63
§ 65. Costs of litigation	63
§ 66. Costs in connection with the settlement of claims	64
§ 67. Costs through measures relating to several interests	64
SUBDIVISION 2 LOSS THROUGH MEASURES TO AVERT OR MINIMIZE THE LOSS	64
§ 68. Particular measures to avert or minimize the loss	66
§ 69. Loss through measures relating to several interests	70
§ 70. General average	71
§ 71. General average apportionment where the interests belong to the same person	72
§ 72. Damage to and loss of the subject-matter insured	73
§ 73. Assumed general average	73
SUBDIVISION 3 INDEMNITY IN RESPECT OF ASSURED'S LIABILITY TO THIRD PARTIES	74
§ 74. Principal rule	74
§ 75. «Cross liabilities»	75

§ 76. Unusual or prohibited terms of contract	77
§ 77. Objects belonging to the assured	78
§ 78. Determination of the assured's liability	79
SUBDIVISION 4 THE SUM INSURED AS LIMIT OF INSURER'S LIABILITY	79
§ 79. Principal rule	79
§ 80. Liability in excess of the sum insured	80
§ 81. Limit of liability in the case of combination of perils	81
§ 82. Insurer's right to avoid further liability by payment of the sum insured	81
Chapter 5 Claims settlement	82
SUBDIVISION 1 CLAIMS STATEMENT, INTEREST, PAYMENTS ON ACCOUNT ETC.	82
§ 83. Assured's duty to provide particulars and documents	82
§ 84. Claims statement	83
§ 85. Rates of exchange	83
§ 86. Interest on the claim	83
§ 87. Dispute arising out of the claims statement	84
§ 88. Venue	84
§ 89. Date on which settlement falls due	84
§ 90. Insurer's duty to make payment on account	85
§ 91. Payment on account where there is a dispute as to which insurer is liable for the loss	85
SUBDIVISION 2 ASSURED'S LIABILITY TO THIRD PARTIES	86
§ 92. Assured's duties where a claim for damages covered by the insurance is made against him	86
§ 93. Insurer's right to take over the handling of the claim	86
§ 94. Decision on questions concerning legal proceedings or appeals	87
§ 95. Provision of security	88
SUBDIVISION 3 ASSURED'S CLAIM FOR DAMAGES AGAINST THIRD PARTY	89
§ 96. Insurer's right of subrogation to the assured's claim for damages against third party	89
§ 97. Waiver of claim for damages	90
§ 98. Assured's duty to assist the insurer with information and documents	91
§ 99. Assured's duty to maintain and secure the right to claim	91
§ 100. Decision on questions concerning legal proceedings or appeals	92
§ 101. Salvage remuneration which includes compensation for loss covered by the insurer	92
SUBDIVISION 4 INSURER'S RIGHT OF SUBROGATION TO THE SUBJECT-MATTER INSURED ON PAYMENT OF CLAIM	93
§ 102. Insurer's rights in case of total loss	93
§ 103. Insurer's rights in case of damage	93
§ 104. Charges on the subject-matter insured	94
§ 105. Preservation of the subject-matter insured	95
§ 106. Insurer's right to indemnification in respect of damage to the subject-matter insured	95
SUBDIVISION 5 TIME BAR OF CLAIMS	96
§ 107. Time limit for notification of casualty	96
§ 108. Limitation of action where the insurer has refused the claim	97
§ 109. Extension of time limit on account of hindrance on the part of the assured	97
§ 110. Three years' limitation	97

Chapter 6 Premium	97
§ 112. Payment of the premium	98
§ 113. Insurer's right to terminate the insurance in case of non-payment of premium	98
§ 114. The effect of premium reminder	98
§ 115. Full premium in case of fraud and dishonesty	99
§ 116. Premium in case of total loss	99
§ 117. Additional premium where the insurer's risk becomes greater than originally assumed	100
§ 118. Additional premium where the insurance is prolonged	101
§ 119. Lapse of right to premium where no risk attaches for the insurer	102
§ 120. Reduction of premium where the sum insured is higher than the value of the interest	102
§ 121. Reduction of premium where the period of insurance proves shorter than agreed or the insurance becomes inoperative	103
§ 122. Reduction of premium when the ship is in port	104
§ 123. Calculation of the time the ship is in port	104
§ 124. Removal of the ship	104
§ 125. Cases where the insurer is entitled to full premium for the time the ship is in port	105
§ 126. Claim for reduction of premium. Charge on return of premium	105
Chapter 7 Insurance of the interest of third party	105
§ 127. Scope of the rules	105
§ 128. Duty of disclosure	106
§ 129. Loss of assured's rights owing to acts or omissions of the person effecting the insurance	107
§ 130. Amendments to and termination or cancellation of the contract of insurance	107
§ 131. Settlement of claims	107
§ 132. Rights of the insurer against the person effecting the insurance	107
§ 133. Change of ownership	108
Chapter 8 Insurance also covering mortgagee's interest	108
§ 134. Mortgagee's rights against the insurer. Notice of mortgage	110
§ 135. Notices of termination and other dispositions concerning the insurance	111
§ 136. Deviation, alteration of the risk	112
§ 137. Handling of claims, claims statements etc.	112
§ 138. Payment of compensation	112
Chapter 9 Relations between the leading insurer and the co-insurers	113
§ 139. Definitions	113
§ 140. The leading insurer's right to act on behalf of the co-insurers	114
§ 141. Notification etc. in connection with casualties	115
§ 142. Salvage	115
§ 143. Repairs	115
§ 144. Provision of security	116
§ 145. Dispute with third parties	117
§ 146. Statements of claims	117
§ 147. Venue	117

PART TWO

HULL INSURANCE AND SIMILAR INSURANCE

Chapter 10 General provisions concerning the scope of the hull insurance	119
§ 148. Objects insured	119
§ 149. Objects temporarily removed from the ship	120
§ 150. Loss due to ordinary use	121
§ 151. Insurance on «full condition»	121
§ 152. Insurance «against total loss only» (T.L.O.)	121
§ 153. Insurance «against total loss and general average contribution only»	122
§ 154. Insurance «against total loss, general average contribution and collision liability only»	122
§ 155. Insurance «on stranding terms»	123
§ 156. Duration of voyage insurance	123
§ 157. Prolongation of the insurance	123
§ 158. Right of termination in the case of fluctuations in market value	124
§ 159. Insurer's liability where the ship is salvaged or assisted by another ship belonging to the assured	125
§ 160. Reduction of liability in consequence of a hull-interest insurance	125
Chapter 11 Total loss	126
§ 161. Total loss	126
§ 162. Salvage attempts	127
§ 163. Condemnation	127
§ 164. Condemnation in case of combination of perils	131
§ 165. Request for condemnation	132
§ 166. Removal of the ship	132
§ 167. War risk insurer's liability for removal of war-wreck	133
§ 168. Missing or abandoned ship	133
§ 169. Seizure, requisition, piracy	133
§ 170. General provisions regarding missing or abandoned ships, or ships whereof the assured has been deprived	134
§ 171. Prolongation of the insurance where it is uncertain whether a claim can be made in accordance with §§ 168 and 169	134
§ 172. Insurer's liability subsequent to the casualty giving rise to a claim in accordance with §§ 162, 163, 168 or 169	135
Chapter 12 Damage	136
§ 173. Principal rule concerning insurer's liability	136
§ 174. Claim for unrepaired damage	138
§ 175. Wear and tear, faulty material etc.	139
§ 176. Loss excluded from insurer's liability	147
§ 177. Deferred repairs	150
§ 178. Temporary repairs	151
§ 179. Costs incurred in expediting the repairs	152
§ 180. Repairs to a ship that is condemnable	153
§ 181. Survey of damage	153
§ 182. Invitation to tender	154
§ 183. Choice of repair yard	154
§ 184. Removal of the ship	155
§ 185. Division of expenses	155
§ 186. Ice damage deduction	156
§ 187. Machinery damage deductions	156

§ 188. Compensation without deduction	157
§ 189. Franchise	158
§ 190. Basis for the calculation of deductions in accordance with §§ 186 to 189	159
§ 191. Insurance «subject to new for old deductions»	159
§ 192. Calculation of the age	161
§ 193. Amount of the new for old deductions	161
Chapter 13 Assured's liability for collision or striking	162
§ 194. Scope of insurer's liability	163
§ 195. Limitation of liability based on tonnage or value of more than one ship	169
§ 196. Insurer's maximum liability in respect of one casualty	169
§ 197. Franchise	170
Chapter 14 Insurance of ships under construction	170
SUBDIVISION 1 INSURANCE OF SHIPS UNDER CONSTRUCTION FOR ACCOUNT OF A THIRD PARTY; BUILDER'S INTEREST	172
§ 198. Objects insured	172
§ 199. Insurable value at time of delivery	173
§ 200. Insurable value prior to delivery	175
§ 201. Sum insured	175
§ 202. Period of insurance	176
§ 203. Premium	176
§ 204. Additional premium for voyages	177
§ 205. Total loss	177
§ 206. Damage	178
§ 207. Unsuccessful launching	179
§ 208. Liability to third parties	179
§ 209. Purchaser's rights against the insurer	179
§ 210. Reference to the rules concerning hull insurance	180
SUBDIVISION 2 INSURANCE OF SHIPS UNDER CONSTRUCTION FOR ACCOUNT OF A THIRD PARTY; PURCHASER'S INTEREST	180
§ 211. Objects insured	180
§ 212. Insurable value	181
§ 213. Total loss	181
§ 214. Reference to other rules	181
SUBDIVISION 3 INSURANCE OF SHIPS UNDER CONSTRUCTION FOR BUILDER'S OWN ACCOUNT	181
§ 215. Insurable value	181
§ 216. Period of insurance	182
§ 217. Total loss	182
§ 218. Reference to other rules	182
Chapter 15 Hull-interest insurance	182
§ 219. Definition of hull-interest	183
§ 220. Insurer's liability for total loss	183
§ 221. Insurer's liability in respect of damages in collision cases	184
§ 222. Reference to the rules concerning hull insurance	184
§ 223. Restrictions on effecting hull-interest insurances	184
Chapter 24 Insurance of freight-interest	184
§ 277. Definition of freight-interest	184
§§ 278 and 279. Scope of the insurance. Reference to the rules concerning hull insurance	185

PART ONE

PROVISIONS COMMON TO ALL TYPES OF INSURANCE

Chapter 1 Introductory provisions

A number of provisions of a general nature, which are difficult to fit into the Plan's system in any other way, are compiled in this chapter.

§ 1 of the 1930 Pl. states that the provisions of the Plan «apply when an interest which is connected with either ship or goods is insured against the perils to which shipping or sea carriage is exposed». No similar provision is incorporated in this Plan. The Marine Insurance Plan is a standard contract which shall be in effect between the parties to the extent reference is made to it in the insurance contract itself. There is nothing to prevent the making of an agreement concerning marine insurance without any reference to the Plan and, on the other hand, there is in principle no reason why the Plan should not be used in connection with insurance on land. Thus, in practice reference has to a large extent been made to the 1930 Pl. in connection with insurance of carriage of goods by rail or lorry.

However, the definition of «marine insurance» in section 59 of the Insurance Contracts Act (hereinafter called «ICA») is of real legal significance. This is because some of the mandatory rules contained in ICA do not apply to marine insurance (see in particular sections 10, subsection 1, 50, subsection 3, 51, subsection 3, and 54, subsection 2). One should therefore be aware of the fact that contractual freedom is correspondingly limited if the Plan is incorporated in a contract outside the area which is «marine insurance» according to the law. However, there is no practical need to use this Plan outside actual marine insurance. The types of insurances which it governs — hull insurance and similar insurance contracts, P. & I. insurance and freight insurance — are all insurances where marine perils will constitute the entire field of perils, or at least a very essential part of that field, cf. section 59, subsection 2, of ICA.

§ 1. Definitions

This paragraph corresponds to the «Explanation of Terms» incorporated in the 1930 Pl., but it includes several more concepts.

Subparagraphs (a)—(c) are in accordance with the definitions contained in section 2 of ICA and require no comments.

ICA uses the word «damage» as a collective designation of physical damage, costs, liability for damages and any other loss which the insurer shall compensate under the terms of the contract. The same terminology was used in the 1930 Pl. The Plan has abandoned this terminology, the word «loss» being suggested as the collective designation, cf. subparagraph (d). According to general usage this is a more comprehensive concept than «damage», which tends to suggest physical damage.

What is furthermore achieved is that the word «damage» can be used about physical damage, cf. subparagraph (e). On the other hand, the word «loss» must sometimes be used in a somewhat different sense, namely as a synonym for «total destruction». Here the Plan here uses the term «loss of», cf. e.g. § 22 (c) which refers to «loss of or damage to a life-boat attributable to its having been swung out».

The distinction in subparagraph (f) between «particular average» and loss which is indemnified in general average is deeply and traditionally rooted and requires no comments.

The committee further considered defining «casualty» as «an event involving a loss which, according to its cause and nature, is covered by the insurance». However, the committee decided to drop any attempt at a definition as the word «casualty» is not used entirely unambiguously in the various provisions of the Plan. Despite the fact that the Committee in this way gave up giving the concept a clear-cut content, there is hardly any reason to believe that the use of the word will create any practical difficulties. In practice the concept has a certain established meaning, which will also provide guidance in future. Inter alia, «casualty» in hull insurance describes the contrast to general wear and tear, corrosion and other similar impairment. This is the way the word must be interpreted, inter alia in § 163 (the Condemnation Rules).

Sometimes the word «casualty» will be used where damage has arisen as the result of a peril that occurred at an earlier point in time, cf. the Hektor case, where the peril struck previously in the form of the falling bomb (ND 1950.458 NH, cf. below under § 18). A casualty without damage is also conceivable. An example would be a grounding which did not result in any damage. In such a case the grounding will mean that the assured's ordinary duties in the event of a casualty shall be performed (cf. §§ 52—54), even if it should turn out later that the vessel did not sustain any damage.

Definitions are also to be found in certain other places in the Plan, see e.g. §§ 15(b), 16(b) and 48.

§ 2. The Policy

This paragraph corresponds to § 12 of the 1930 Pl.

Under the 1930 Pl. the insurer was not obliged to hand over the policy until the premium, or at any rate the first instalment of the premium, had been paid. This rule is superfluous in shippowner's insurance, as it is never necessary to present the policy when making a claim.

§ 12, subparagraph 2, 1st sentence, of the 1930 Pl. contained a superfluous regulation concerning the contents of the policy. The 2nd sentence of the same subparagraph established that written provisions shall prevail over the printed text. This follows from general principles of interpretation and need not be stated.

§ 12, subparagraph 3, of the 1930 Pl. stipulated a 3 day-time-limit from receipt of the policy for raising objections. Such an absolute time-limit may be unreasonable for both parties, depending on the circumstances, and the Plan has therefore incorporated the general rule of contract law that any objection to the written confirmation of the agreement must be made without undue delay.

The rules contained in this paragraph will apply correspondingly to agreements concerning amendments of the original insurance contract. It follows from generally accepted business standards that amendments shall be confirmed in writing, and that the other party shall make his objections to such confirmation without undue delay.

§ 3. Reference to Norwegian law

This paragraph is new.

It is in actual fact obvious that a dispute between an assured and an insurer, who are both resident in Norway and carry on their business activities there, must be decided on the basis of Norwegian law. It is also unnecessary to state that when deciding the dispute the general principles for the application of the various sources of law must be complied with. In other words, one must first look at the actual contract entered into and the related aspects of interpretation, next the provisions

contained in the policy form, the Plan, ICA and finally, if none of these sources give any clear answer, resort to the «general doctrines of law».

However, the provision may acquire a certain significance if both parties are resident outside Norway. It is quite common that a risk is covered with a Norwegian leading insurer, while one or more of the co-insurers are foreign. The paragraph establishes that also an agreement with a foreign co-insurer is subject to Norwegian law, cf. § 147, under which legal proceedings against the co-insurers may be instituted in a Norwegian court in such cases.

It may also occur that Norwegian conditions form the basis of insurance contracts entered into with a foreign leading insurer. If the latter does not accept Norwegian venue, the assured may have to institute legal proceedings outside Norway. In such a case this paragraph will mean that the foreign court must apply Norwegian law, provided the contract does not include a contrary provision as to the background law to be applied. Whether an explicit forum clause will also involve a reference to the substantive law of the relevant country must be decided in accordance with general rules of private international law. It must, however, be stressed that the Plan is very closely bound up with Norwegian insurance law and that it will usually involve a lot of difficulties to apply a non-Scandinavian law is applied as background law.

If a foreigner concludes an insurance contract with a Norwegian insurer on the terms of the Plan, he will have to sue the insurer in Norway and Norwegian law will apply. Also here, however, it may be practical to conclude a different agreement, e.g. where the person effecting the insurance is resident in another Nordic country. It will hardly represent any special difficulties to apply e.g. Swedish or Danish law instead of Norwegian.

The Committee also considered referring to the Commentary to the Plan as a basis for the resolution of disputes, but rejected this idea. So far as the Norwegian courts are concerned it is probably of little importance whether or not reference has expressly been made to the Commentary. The Commentary will be applied in any event. The purpose would primarily be to make the Commentary «admissible evidence» in proceedings in an English court. However, this is hardly a very weighty factor, in view of the fact that cases relating to the Norwegian marine insurance terms are very rarely tried before English courts. Such a provision might furthermore make insurance and re-insurance in England difficult during the initial period after the adoption of the new terms if the Commentary were not available in a translation at the same time as the Plan.

Even if the Plan thus does not contain any explicit reference to the Commentary, it must nevertheless carry more weight in connection with an interpretation than is normal for preparatory documents of statutory Acts. The fact is that the entire commentary has been thoroughly discussed and approved by the revision committee, and it must therefore be regarded as a part of the standard contract which the Plan constitutes.

§ 4. Period of insurance

This paragraph corresponds to § 25 of the 1930 Pl. and Hull Policy A 14.

The rule contained in § 25 No. 1 of the 1930 Pl. to the effect that local time is decisive in time policies, had been amended in the Hull Policy to the effect that Central European Mean Time was to apply, cf. also § 7 of the P. & I. Rules. This rule has been incorporated in the Plan.

The rule relating to an extension of time policies contained in § 25 No. 2 of the 1930 Pl. has been deleted from the Hull Policy, and also on this point the Plan follows the Policy. As regards prolongation of the insurance when the vessel has sustained damage which must be repaired in order to maintain her seaworthiness, and when it is uncertain whether the insured is entitled to claim compensation for a total loss, reference is made to §§ 157 and 171.

According to § 25 No. 2, subparagraph 2, of the 1930 Plan the prolongation provision contained in the first paragraph applied similarly when a time or voyage insurance ceased by reason of notice of termination or certain other circumstances.

The corresponding rules of the Plan are incorporated in the relevant rules as to termination, see § 37, subparagraph 4, § 39, subparagraph 3, § 41, subparagraph 3, and § 50.

§ 26 No. 1 of the 1930 Plan gave certain rules concerning the duration of a voyage insurance. The rules were not very practical and have been deleted. As regards voyage insurance, the Plan contains only one provision, § 156, which corresponds to § 59 of the 1930 Plan.

§ 26 No. 2 of the 1930 Plan further specified the voyage concept, which was relevant only in connection with the calculation of the deductible. The Plan does not use the voyage concept in this connection (cf. § 189), and the rules have therefore been deleted. If voyage deductibles are stipulated in the insurance contract, it will also be necessary to agree on supplementary rules defining what shall be regarded as one voyage for the ship in question.

A 14, subparagraph 3, of the hull policy authorized arbitration under the rules contained in § 34 of the 1930 Plan if the vessel changed hull insurer from one contract to the next and there is doubt whether a damage shall be paid for by the earlier or the later insurers. As the Plan does not authorize arbitration in similar situations, e.g. in the event of combination of perils, arbitration has not been provided for in this case either. The question would therefore possibly have to be submitted to the courts and will normally be decided on the basis of the rules contained in § 18. However, both insurers will be obliged to make a proportionate payment on account, cf. § 91.

Chapter 2 General provisions concerning the scope of the insurance

Subdivision 1 Interest and insurable value

This subdivision corresponds to sections 35—44, 54 and 75 of the ICA, and to Chapters I, IV and V of the 1930 Plan.

§ 5. Interest comprised by the insurance

This paragraph corresponds to § 16, 2nd paragraph, of the 1930 Plan, and section 36 of the ICA.

The Plan uses the same terminology as ICA and the 1930 Plan, viz. that it is not the object itself, but the assured's financial interest in the object, which is the subject of the insurance. Used in this manner the interest terminology is an expedient means to create flexibility and a range of variation in the insurance. In particular it must be emphasized that several persons may be allowed to insure each their own interests in the object (e.g. owner and mortgagee), and it is fairly simple to list the items of loss for which the assured can make a claim under each individual insurance (the interest in the capital value of the ship is covered by hull insurance, the income interests by freight insurance).

However, one must be aware of the fact that the word «interest» is also used in a somewhat different sense in marine insurance, viz. to designate certain capital or income interests in future earnings which are not comprised by an ordinary hull or freight insurance. There is thus a «freight interest insurance» which comprises other income interests than those covered by ordinary freight insurance.

This section applies only to property insurance (e.g. hull insurance, equipment insurance). If the object is destroyed or damaged the assured may — in the absence of any other agreement — only claim compensation for items of loss which refer to the actual capital value of the object, and not for any other loss which he might sustain, e.g. loss of income or loss arising from liability to pay damages to a third party. The reservation «or follows from this Plan» refers to the liability cover afforded by the insurer by virtue of other provisions in the Plan in respect of costs of preventive measures and general average contributions (§§ 68 ff.) and — in so far as the hull insurers are concerned — collision liability (Chapter 13). See in this connection §§ 63 and 74 which repeat and elaborate the limitation of the insurer's liability.

§ 6. Insurance not related to any interest

This paragraph corresponds to § 3, subparagraph 1, 1st sentence, of the 1930 Plan, and to section 35 of ICA.

A valid insurance contract is subject to the condition that the party listed as the assured has a financial interest in the subject-matter insured. A «wager insurance», where it has been clear from the very start that there was no insurable interest is therefore invalid. Similarly, the assured will be unable to claim under the insurance for loss occurring after the interest has passed into other hands, e.g. when the ship is finally condemned or passes to a new owner. Normally also the new person who becomes owner of the ship will not acquire the position of assured under the insurance contract, cf. §§ 127, subparagraph 2, and 133.

It is difficult to stipulate the requirements which must be satisfied in order for an interest to be insurable. As a starting point it can be said that the interest can be based on any financial relationship between the assured and the ship (owner, mortgagee, charterer, user, claimant). Further, the interest must have some financial value so that the assured will suffer a financial loss if the interest is destroyed. However, one must to a certain extent allow scope for subjective assessments in connection with the valuation of the interest (cf. freight-interest insurances). For this reason the requirement specifically stipulated in the 1930 Pl. that the interest «must be computable in money» has been left out. This term suggests that the interest must have an objective value which can be determined by more or less anybody. Such a requirement can hardly be made; when assessed insurable values are used, the assured's own evaluation of the object must be of a certain importance. The necessary guarantee against abuse is implicit in the rules relating to the revision of the valuation, cf. § 8.

Under section 35 of ICA it is also a condition that the insurance shall relate to a «lawful interest». The same applied under § 2 of the 1930 Pl. What exactly is meant by this requirement is very difficult to state. It is namely clear that not any unlawful use of the object insured will deprive the assured of his right to invoke the contract of insurance. When applying the rule one must therefore take into consideration both what type of provisions are infringed, the extent of the unlawful activities and to what extent the assured is aware of the facts. The prohibition against insuring an «unlawful interest» is therefore closely bound up with the prohibition against using the ship for unlawful purposes, and the relevant rules in this respect are to be found in § 40.

Furthermore, §§ 2 and 3 of the 1930 Pl. contained a number of provisions which were considered superfluous. It is thus unnecessary to say that the insurance only covers the interest stated when the insurance was taken out and that the contract is void if the interest has been given a misleading designation (§ 2, subparagraph 2, of the 1930 Pl.). What the insurance comprises depends on an interpretation of the contract, and the other rule follows from the rules relating to the duty of disclosure, cf. chapter 3, subdivision 1. Nor is any enumeration similar to § 2, subparagraph 3, of the 1930 Pl., required. The chapters of the Plan discussing the various types of insurance contain the most important interests which are covered by marine insurance; however, there is nothing to prevent also other insurable interests from being insured on the general terms of the Plan.

§ 7. Insurable value

This paragraph corresponds to § 16, subparagraph 1, of the 1930 Pl., and section 75, subsection 1, of ICA.

During the revision proceedings it was submitted from all quarters that the basic rule that the insurable value refers to the value at the time when the insurer's liability commences should be maintained.

In builder's risk insurance an exception must be made from this basic rule. Here the insurable value must increase as the work progresses, cf. §§ 199, 200, 212 and 215.

The rules relating to the insurable value do not become applicable in trades where the insurer covers possible liability for damages (P & I insurance) or extraordinary costs (Chapters 21 and 22). In certain types of the income (freight) insurance it appears more natural to operate with an insurable value covering the anticipated daily income (see e.g. §§ 257 and 258), and to link the total limitation of the insurer's liability to a specific number of days or a specific amount.

§ 8. Assessed insurable value

This paragraph corresponds to §§ 17, subparagraph 1, 1st and 2nd sentence, and 57 No. 1, of the 1930 Plan and section 75 of ICA.

Hull insurances and hull-interest insurances are in practice always taken out with an agreed insurable value. Also in income insurance, valuation in one form or another is very often used.

During the revision work it was argued very strongly by shipowners that a valuation should be unconditionally binding on the insurer. Inter alia the extent to which the building program of an expanding shipowner is based on the vessels' current freight earnings, or — in the event of the loss of a ship — on her sum insured, was stressed. Further, the mortgagee's need to be able to rely on the hull valuation was pointed out.

The 1930 Plan also stipulated very strict conditions for revisions of the insurable value, § 57 requiring that «the party effecting the insurance has given misleading information regarding those qualities of the ship which it was of importance to the insurer to have knowledge of at the valuation». During the revision work doubt was expressed whether this rule could be maintained, the question being whether it was aviolation of the mandatory provision contained in section 75, subsection 3, cf. section 39, subsection 1, of ICA. These provisions provide that the insurer is entitled to demand any unreasonably high valuation set aside, regardless of the good or bad faith of the person effecting the insurance.

The Committee therefore considered incorporating into the Plan a rule with the same contents as section 75, subsection 3, cf. section 39, subsection 1, of ICA. However, this met with strong resistance, in particular from shipowners. It was pointed out that § 57 of the 1930 Plan had applied for 30 years without the insurers having invoked section 75, subsection 3 of ICA. After careful deliberation the Committee decided to take account of the objections. In practice it is the rule contained in § 57 No. 1 of the 1930 Plan which is applied, and in deep-water hull insurance section 75, subsection 3, cf. of ICA has been a dead letter, despite the fact that it is a rule of law which contracting parties cannot dispense with by mutual agreement. Hence, a Plan which is to serve as guidance for the assured in this field should follow the 1930 Plan, not ICA.

Formally speaking the phrasing of the paragraph is not in violation of the mandatory provisions contained in ICA, in as much as it merely establishes that the valuation is not under any circumstances binding on the insurer if misleading information has been given about the particulars of the object insured decisive for the determination of its value. However, the Committee has relied on the assumption that in practice the provision shall be interpreted antithetically, so that the valuation cannot be revised unless misleading information has been given. By using the word «the object insured» it is made clear that the provision shall also be applicable in connection with the revision of a valuation in a freight insurance.

According to the proposed wording the insurer will be able to challenge the

valuation, even if the person effecting the insurance has given his information in good faith. As regards the determination of the valuation, the insurer should have an unconditional right to receive correct information, and the risk of possible errors should rest with the person effecting the insurance.

If a valuation is set aside, the settlement must be based on the real value of the ship at the inception of the insurance. In other words, it is not enough to reduce the valuation to the highest amount which could have been agreed without violating this section compared with section 75, subsection 3, of ICA. This follows from the fact that the agreement concerning valuation is not «binding», i.e. it is necessary to resort to the general rule about the insurable value.

A question which has been raised in the theory of insurance law is whether the insurer also has the right to demand that a valuation, which is obviously too *low*, should be set aside with the effect that an under-insurance arises in the event of partial loss. Such a right could possibly be interpreted into section 75, subsection 3, of ICA, which refers to the valuation «differing so much» from the real insurable value that it must be regarded as unreasonable. However, it has been decided that it should only be possible to challenge the valuation if it is too *high* and involves an unreasonable overcompensation in the event of a total loss. More than this is not implicit in the mandatory rule contained in ICA. Section 40 of that Act, which prescribes a pro-rata reduction of the compensation for partial loss in the event of under-insurance is not mandatory. Further, it may be alleged that the insurer hardly has any justifiable right to go back on a valuation which is too low. He has received a premium (for partial losses), which was determined on the basis of the size, type and age of the vessel, in principle independently of the valuation.

It was considered whether a special rule should be introduced to cover cases where a ship is insured with several insurers against the same peril with different valuations. In that event the rule would have to provide that the highest valuation shall apply for all insurances. However, the conclusion was reached that there is no need for such a rule. It would lead to under-insurance in respect of the insurance with the lowest valuation. If that insurance had been taken out on full terms and later supplemented with a T.L.O. (Total Loss Only) insurance with a higher valuation, the assured would be partly deprived of his cover of partial loss. Nor is the situation very practical. If the ship's value rises, after the insurable value has been agreed, the owner will probably elect to add a hull-interest insurance (within the 25% limit, cf. §§ 160 and 223), or to increase the insurable value of existing insurances.

Under § 17, subparagraph 3, of the 1930 Plan a «provisional agreement» with reference to the insurable value was not to be regarded as a binding valuation. The rule is, at best, obvious, but probably directly misleading. Whether a final agreement has been concluded about a binding valuation is a question of interpretation which must be decided specifically on a case-to-case basis.

§ 9. Under-insurance

This paragraph corresponds to § 19, cf. § 17, subparagraph 1, 3rd sentence, of the 1930 Plan and section 40 of ICA.

In so far as the insurable value has been assessed, the question of under-insurance will have been determined already when the insurance was taken out. The rule is of great practical importance, it being quite common in hull insurance for several insurers to cover certain parts of the valuation.

Under § 19 of the 1930 Plan «the assured is deemed to be his own insurer» for the part of the insurable value which is not covered by the amount insured. The purpose of this wording was to make it clear that the rule covers not only the actual compensation, but also the insurer's right to participate in proceeds and claims against third parties for damages. The rule has not been amended on this point: the solution follows from §§ 96, subparagraph 2, and 102, subparagraph 1, 2nd sentence.

The rule contained in the 2nd sentence means that under-insurance, if any, will not be eliminated or reduced when the real insurable value replaces a valuation which is too high, cf. also under the comments to the preceding paragraph.

A special rule relating to under-insurance is contained in § 215, subparagraph 2.

§ 10. Over-insurance

This paragraph corresponds to § 20 of the 1930 Plan.

§ 11. Insurer's liability when the interest is also insured with another insurer

This paragraph corresponds to §§ 21 and 22, No. 1, subparagraph 2, of the 1930 Plan and section 41, cf. section 42, subsection 1, of ICA. The provision must be supplemented with the mandatory rule contained in section 43 of ICA.

The provision becomes applicable in two situations. The first is the situation arising from ordinary co-insurance. Here the total of the separate sums insured will be equivalent to the valuation and each individual insurer will be fully liable under his contract, regardless of the fact that other insurances have also been taken out (cf., however, chapter 9, where a number of aspects of the internal mutual relations among the co-insurers are regulated).

The other situation where the provision is important is in the event of a «double insurance» in the traditional sense, i.e. when several parallel insurances have been taken out, which will collectively give the assured more than compensation for the loss he has sustained. This situation is regulated in further detail in §§ 12 and 14. This section merely establishes that also in that event the insurers shall in principle be jointly and severally liable vis-à-vis the assured within the limits of the compensation to which he is entitled.

The amount of compensation to which the assured is entitled will depend on the insurance terms. It is conceivable that one of the insurers has to compensate for a certain loss by paying a higher amount than the others. In that event this is the amount to which the assured «is entitled in all». So long as he has not received that amount, he may claim compensation from any one of the insurers, provided his claim against each of them does not exceed the amount for which the insurer concerned is liable.

Under section 43 of ICA an insurer cannot validly exempt himself from liability if the interest is or will be insured elsewhere. If an individual insurer has made such a reservation, he will never theless have a subsidiary but joint liability vis-à-vis the assured; if all the insurers have done so, they are no longer jointly liable, but liable on a pro-rata basis. However, the exemption will be valid if the insurer also waives his right to the premium.

§ 12. Recourse between the insurers when the interest is insured with several insurers

This section corresponds to § 22 No. 1 of the 1930 Plan and section 42 of ICA.

The provision regulates the internal settlement among insurers in the event of «double insurance» in the traditional sense. The criterion for double insurance is that the same interest is insured against the same peril with several insurers in such a manner that the total amount of the assured's claim in connection with a specific loss exceeds the compensation to which he is entitled. As a rule, the total amount of the separate sums insured will exceed the insurable value. But there are conceivable constellations where this criterion does not apply. *Grundt* cites as an example (Textbook of Norwegian Insurance Law 1939, p. 226—227) that the shipowner first took out a hull insurance based on a valuation of NOK 500,000. After a rise in prices the ship is assessed again at NOK 750,000, and the owner takes out a new insurance with another insurer for the difference, NOK 250,000,—. In such a case there will be double insurance against partial loss, but not against total loss. § 22 No. 1, subparagraph 1, 2nd sentence, of the 1930 Plan stipulated an express reservation with a view to such cases. Such a reservation becomes unnecessary when the concept of «double insurance» is defined in such general terms as done in this section.

When the assured has received the compensation to which he is entitled the total amount shall be apportioned among the insurers in proportion to the maximum claim which could have been made against each of them. If one of the insurers is insolvent, his share shall be apportioned among the others. It must be underlined that this is exclusively an internal settlement, which does not concern the assured.

Under § 22 No. 1, subparagraph 3 i.f., of the 1930 Plan the assured was required to assist the insurer with the implementation of recourse claims against foreign insurers in accordance with the same rules as those applicable to the recovery of recourse claims against third parties. No corresponding references have been incorporated in the Plan, there being an essential difference between the two types of claims. By recovery of a recourse claim the insurer is subrogated to the full rights of the assured and takes over completely his legal position vis-à-vis third parties. However, the apportionment in the event of double insurance is based exclusively on the rules of insurance law, which are applicable in the case concerned to the relations among the insurers involved.

Under section 42, subsection 2, of ICA, cf. § 22 No. 1, subparagraph 4, of the 1930 Plan, an insurer does not have recourse against the others if he has invoked exemption from liability, as mentioned in § 11. In that event he has only subsidiary liability vis-à-vis the assured by virtue of the mandatory rule contained in section 43 of ICA, but cannot in any way be brought into the recourse proceedings by the others insurers. The reasoning is that if he is not obliged to accept recourse, it is not reasonable that he shall be entitled to claim recourse. This rule has been left out. If the assured first raises a claim against the insurer who has exempted liability in the event of double insurance, there is a chance that the latter may not invoke that right, but will settle with the assured. He will in that event acquire an unconditional right of recourse against the other insurers for every thing he has paid out.

Within each individual branch of insurance there is hardly much of a practical risk of double insurance. It would merely be by accident if the shipowner e.g. takes out a hull insurance for more more than the valuation, or covers a voyage freight twice. Such mistakes would probably also be discovered fairly quickly and the double insurance eliminated by means of the reduction rule contained in § 13, or by one of the insurances being cancelled. On the other hand, there is a greater risk of a double insurance by two different types of insurances overlapping and both providing cover against the same loss. Such overlapping is for example conceivable in the relationship between builder's risk insurance and hull insurance, if the latter takes effect before the risk for the newbuilding has been taken over by the purchaser, cf. § 202, subparagraph 2. Obviously, when drafting the rules of cover in the various branches an attempt has been made to prevent the possibility that compensation for a loss could be claimed under two insurances, but it is not possible to achieve absolute certainty on this point. In the event of such a situation arising, the rules relating to double insurance must be applied to the settlement between the insurers, unless the liability for one of the insurers has expressly been made subsidiary. An example of this is contained in § 271, subparagraph 2.

If a salvage action concerns different interests covered by different insurers, there will seemingly be a double insurance, in so far as the salvage charges are concerned. However, in such a case the rules contained in §§ 11 and 12 are not applicable; under § 69 each of the insurers shall be liable only for such proportion of the costs as may fall on the interest insured by him. In other words, there is no question of any apportionment.

§ 13. Reduction of the sum insured

This paragraph corresponds to § 22 No. 2 of the 1930 Plan.

As mentioned under § 12, it is unlikely in practice that several hull, freight or other insurances, which collectively provide a wider cover within the individual type of insurance than what the assured is entitled to, will be taken out. If this should occur, and it is not possible to solve the difficulties by agreeing to cancel the last effected insurances, the assured should have an unconditional right to an adjustment of the insurances so that he will not have to pay premiums in respect of which he is barred from claiming compensation.

The paragraph is applicable in relation to all insurers who provide the same type of insurance under the conditions of the Plan. It is in other words not the last effected insurance which shall be cancelled, wholly or in part. All insurances shall be subject

to a proportionate adjustment. Under the 1930 Plan it was a condition that the assured was unaware of the earlier insurances when effecting the insurance which resulted in the over-insurance. This is not a reasonable requirement. The decisive factor must be that the person effecting the insurance did not realize that the last insurance might result in such over-insurance. The demand for a reduction must be put forward as soon as he becomes aware of the situation, i.e. that the existing insurances in one relation or another may result in over-insurance, cf. the definition of double insurance in the preceding paragraph. Theoretically speaking, it would also be possible to effect the adjustment in some other way than by a general reduction of the sums insured under all the insurances, e.g. by a reduction of the cover against partial damage. However, it is hardly necessary to state this explicitly.

Under subparagraph 2 of the paragraph the reduction — and thereby the reduction of premium under § 120 — will only have effect for the future. Hence, it is implicit that a demand for a reduction cannot be put forward after the risk has expired.

§ 14. Duty of the person effecting the insurance to notify other insurances

This paragraph corresponds to § 22 No. 3 and § 23 of the 1930 Plan and section 44 of ICA.

For several reasons the insurer is interested in learning whether other insurances of the same kind as his own have been effected. Partly he wants to check that the interest is not overinsured — with a more or less fraudulent intent — and partly there may be a question of co-ordinating the insurers' actions in the event of casualties, breach of trading warranties, etc.

Large hull insurances will normally be covered by a number of insurers each insuring a part of the total value. If the shipowner asks whether the insurer will cover part of the insurable value, it will normally be understood that also the rest will be insured. The duty of disclosure under this paragraph must thereby be considered complied with. If the insurer wants to know more, e.g. who the leading insurer is, and who the other co-insurers are, he will have to ask. In practice these questions are resolved without any friction.

The duty of disclosure lies primarily with the person effecting the insurance. Under § 128, subparagraph 2, the assured also has the same duty of disclosure if he either knows that the insurance is being effected, or that the person effecting the insurance has by negligence omitted to notify the insurer that the assured did not know that the insurance was being effected. Depending on the circumstances, this means that a mortgagee, who becomes aware of the situation, may incur liability under subparagraph 2.

A breach of the duty of disclosure under this paragraph, will not bring the ordinary reactions for giving incorrect or insufficient information by the person effecting the insurance into effect, cf. §§ 25 ff. A reduction of liability under the causality rule is out of the question, and also the rule contained in § 26, subparagraph 1, will be difficult to apply. The adequate reaction is to make the person effecting the insurance liable for the loss which the insurer suffers as a result of the negligence, e.g. by his instituting unnecessary salvage actions or surveys, because he does not know that other insurers are already in the picture.

If the person effecting the insurance fraudulently omits to notify the insurer about any other insurances, which have been or will be effected, the insurer must be released from the contract. It makes no difference whether the fraud is perpetrated at the time the insurance was effected, or at a later stage, e.g. in connection with the claims settlement. Under § 22 No. 3 of the 1930 Plan, fraud perpetrated when the insurance was taken out, or in connection with a claims settlement, resulted in the cancellation of «all insurances» and the right to reclaim all compensation paid out. This provision obviously applied only to insurances effected with reference to the 1930 Plan. Whether any other insurance would lapse, would depend on its terms. This strict rule has not been maintained. It is thus only the insurers, vis-à-vis whom the person effecting the insurance (the assured) may be said to have acted fraudulently, who may invoke

invalidity. In this relation the principle relied on is that the Plan is an agreement between the person effecting the insurance and the individual insurer, and it is therefore outside the natural scope of the Plan to regulate the contents of other agreements which the person effecting the insurance may have entered into. Moreover it is hardly a very practical line of thought that the person effecting the insurance would loyally divulge information about all his insurances to one of the insurers, whilst at the same time attempting to establish double insurance vis-à-vis the others with fraudulent intent.

Subdivision 2 Perils insured against, causation and loss

In this subdivision are compiled provisions which were spread throughout the 1930 Plan, thus in §§ 4, 34, 42 and 43. The provisions, which related to the perils insured against in policies for marine and war-risk insurances, have also been incorporated.

This subdivision contains vital rules in marine insurance. There are five different problem complexes which are dealt with here, viz.:

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

§ 15. Perils comprised by an insurance against marine perils

This paragraph corresponds to § 4, cf. § 42, of the 1930 Plan, and the Hull Policy A 1 and 2.

Under § 4, subparagraph 1, of the 1930 Plan a marine insurance comprised «all perils of the shipping trade and sea carriage» (section 60 of ICA: «... any kind of peril to which the insured interest is exposed.») However, in practice no insurances of such a wide scope are taken out, apart from P. & I. insurance. The perils are divided into two groups, a line being drawn between the perils covered by the insurers against ordinary marine perils and the perils covered by the insurers against war perils. Although this division is formally made by means of an exclusion of perils in the insurance against general marine perils and a cover of the excluded perils through a special war-risk insurance, the marine insurance and the war-risk insurance are, as will be established later, two equal types of insurances covering each their part of a total range of perils. The perils covered by the war-risk insurance are specified, while the insurance against marine perils covers any other form of perils to which the interest is exposed.

However, the question is whether one should exclude perils, which cut across this line and which will affect both types of insurance.

One type of limitation of liability which must obviously be contained in every insurance is the one relating to faults or omissions on the part of the person effecting the insurance or the assured. However, the crucial point here is that the person the insurer has contracted with, or someone else who derives a right from the insurance contract, has violated its terms in a subjectively blameworthy way. The majority of the rules of this type are contained in Chapter 3.

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

(1) One might in the first place ask whether there is a limitation inherent in the requirement contained in § 4 of the 1930 Plan to the effect that the perils must *relate to the shipping trade and sea carriage*. This is hardly the case. This term simply means that as a rule a marine insurance is effected only for objects, which are used in connection with the shipping trade or which are carried by sea. If the marine insurance is in effect when the object insured is on land — as in connection with the shipbuilding insurance — the insurer shall nevertheless be liable for any peril which is not specifically excluded, and this applies even if it is totally inconceivable that the peril concerned might occur at sea.

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

During the revision work it was considered whether there was a need for an express exclusion of perils in the event of a «recession», but the conclusion was reached that such a provision would not bring about any greater clarity. The fact is that in many cases when an assured suffers a casualty, the particular insurance conditions will provide him with compensation for a recession loss which he would otherwise have suffered. It is particularly relevant to point out the rule that the insurable value is the value of the interest at the inception of the insurance. If ships' prices have dropped during the period of insurance, the shipowner will, in the event of a total loss, obtain compensation for a value which he could not have obtained by selling the ship. On the other hand, a recession might constitute a cause contributory to an event which does not trigger the insurer's liability, for example when a shipowner, as the result of a depression, is unable to repair the casualty damage to the ship, and the ship, as a result of this, becomes a total loss or is sold for scrapping. In both cases the solution will be reached on the basis of more special rules. A general exclusion of the «recession» risk would not contribute to greater clarity.

(3) It is further taught that marine insurance does not cover *insolvency*, neither the assured's own nor that of any third parties. — The typical loss resulting from the *assured's own insolvency* is when the interest is seized by his creditors and sold at a forced public sale. Such a loss is obviously not covered by the insurance, and as enforcement measures of this nature have a lot in common with measures against which the insurance provides cover (seizure by a foreign power, condemnation in prize) it is already for that reason necessary to phrase an express exception for the assured's insolvency, see § 15 (c). The exception must also be incorporated in the insurance conditions against war perils, it being conceivable that the war situation, e.g. credit restrictions, the breakdown of the normal channels of payment, or the like, is the very cause of the assured's failing solvency (see § 16, subparagraph 2).

The typical loss resulting from *the insolvency of a third party* is when the third party is unable to meet his obligations vis-à-vis the assured, e.g. a charterer suspending his payments, a shipowner being unable to pay interest and instalments to the mortgagee, and a sale of the ship not fetching enough to cover the mortgage debt, or a shipyard being unable to complete the building of the ship. Losses of this kind are not indemnified by the insurer. The insolvency exception should therefore be made general and should apply to the assured as well as any third parties.

It may sometimes be difficult to decide whether there is a legally relevant causal connection between the insolvency and the casualty. If the ship is arrested as security for the shipowner's debts and she is subsequently involved in a collision or is damaged during a storm, it could be argued that she would have avoided the collision or the heavy weather if she had not been delayed because of the arrest. But, there is

nevertheless no relevant causation under insurance law between the arrest and the damage. The insolvency was merely an external and perfectly accidental cause of the damage. It will be a different matter if the arrest in itself increases the chances of the ship suffering a casualty. Hence, if the ship is arrested in late autumn in a port which will normally freeze over in a short while and suffers ice damage during departure, there may in the circumstances be a relevant causal connection between the arrest and the damage. In such a case the arrest would probably also be regarded as the only cause of the damage, and the rule relating to causation contained in § 20 would not be applied.

The rules relating to seaworthiness contained in §§ 45 and 47 are exhaustive in relation to the insolvency exclusion clause and, as special rules, they override this exception. The assured will therefore not lose his cover merely because a shipyard due to a difficult financial situation has performed unsatisfactory repairs and the ship as a result thereof is unseaworthy. The insurer may only invoke the deficiencies if the assured knew or should have known of their existence.

Under § 35 No. 2 of the 1930 Plan the insurer provided a strict insolvency cover in respect of a third party's liability to pay general average contribution to cover loss of or damage to the object insured. However, this rule has become superfluous in view of the fact that such losses shall be indemnified under the rules relating to particular loss, if this gives the most advantageous result for the assured, cf. § 72. In another connection the insurer provides a cover which must to a certain extent be regarded as an insolvency cover, viz. when the cargo consignee will not or cannot pay the freight, and the cargo has been damaged in a casualty covered by the insurer so that it does not provide full cover for the freight claim. The freight insurer shall under § 251, subparagraph 2, be liable for any loss which the owner suffers as a result of the deterioration of the object on which he has a lien.

(4) English conditions contain an express exception for losses caused by *delay*, «loss through delay», see e.g. I.T.C., Freight, 8. As will appear from (3) above, it is hardly possible to establish any such general exception without getting into major difficulties every time a delay has been the external cause of a loss involving liability. Sometimes the delay will even form an integral part of the sequence of events regarded as a casualty in the type of insurance in question, see § 250 (c).

Another thing is that the insurer will not without an express agreement be liable for «loss of time», i.e. a loss exclusively connected with the delay and increasing proportionally with that delay. Thus the hull insurer will not as a basic rule be liable for the shipowner's general operating expenses relating to the ship during repairs. This rule is worded as an exception in § 63. However, it should be noted that also the hull insurance in certain relations partly covers loss of time and, to a large extent, separate insurances are taken out against loss of time (see Chapter 20).

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

Questions of this nature should preferably be subject to special regulation in each individual area where contractual clauses may influence the insurer's liability. The necessary limitations of liability are incorporated in § 76 (liability clauses), § 97 (clauses relating to the waiver of rights to claim damages from a third party), § 250 (c) (force-majeure clauses in contracts of affreightment), and in §§ 273 (c) and 276, subparagraph 2 (clauses relating to the on-carriage of passengers). As far as contracts for the repairs of casualty damage to the ship are concerned, the hull insurer will enter

the picture to such a strong degree through the rules relating to surveys, invitation to submit tenders, approval of invoices etc. that he will in this way be able to exercise the necessary control.

Also the 1930 Plan contained a number of limitation rules of this nature, but they often prescribed that the insurer was not liable unless the assured's loss arose through the application of «general rules of maritime law» (see § 78 No. 1, subparagraph 2, and No. 2, subparagraph 2, and § 113 A No. 1). This is an unfortunate criterion. Maritime law has to a very large extent developed through contractual clauses, the object of which is to provide solutions in a legal void, or to counteract a rule in the background law which has been regarded as unfortunate. In many situations it would have been very difficult, not to say impossible, to decide which rule would have become applicable if the question had not been regulated in the contract. The only rational thing to do is to tie the insurer's liability to the legal solutions on which the parties in actual fact have to rely in practical shipping. The necessary limitation lies in the requirement that the conditions must be «customary in the trade in question».

(6) The insurer will normally limit his liability if the interest insured is used to further an *illegal undertaking*. This limitation has in practice been worded in several different ways. The illegal undertaking may result in the insurance becoming void (§ 64 No. 1. of the 1930 Plan), or the insurer may be exempt from liability for the consequences of the undertaking (§ 64 No. 2 of the 1930 Plan). Importance may also be placed on the question whether the assured knew of or took part in the undertaking. A limitation is also implied in the requirement that it must be a «legal interest». As mentioned above in § 6, the insurance under the 1930 Plan was void if it was connected with an «illegal interest». Exactly what this implies is difficult to say.

In the Plan all rules relating to illegal undertakings are compiled in § 40. The first subparagraph provides that the insurer is not liable for loss that is a consequence of an illegal use of the ship of which the assured was aware and could have prevented. This limitation of liability is very moderate, requiring both causality and subjective blameworthiness of the assured himself (i.e. the shipowner's management, cf. below in chapter 3, subdivision 6). But the rule is supplemented by subparagraph 3 of the paragraph, under which the entire insurance lapses if the ship is, with the consent of the assured, essentially used for the promotion of illegal purposes.

(7) The purpose of insurance is to provide protection against unforeseen losses. *Foreseeable* loss, maintenance, regular operating expenses etc. the assured shall pay himself. However, the line between losses which are «foreseeable» and those that are «unforeseeable» is very far from being distinct and may cause doubt in all branches of marine insurance. However, the line can hardly be made clearer by an explicit provision in the general part of the Plan.

The conditions of the various types of insurances contain a number of provisions which shed light on the line between the ordinary expenses and the losses which are covered by the insurance. From hull insurance one can mention in particular §§ 150 and 175. § 150 excludes «loss which is a normal consequence of the use of the ship, her tackle and apparel». § 175 deals with damage due to wear and tear and similar causes. Costs of repairing a part which is worn or corroded are never paid by the insurer, but wear and tear is not an excluded peril as such. Casualties caused by wear and tear are therefore in the same category as other casualties. Also in other respects the provision goes far in imposing a liability on the insurer for costs which, under the conditions in effect in other countries, would be regarded as operating expenses for the shipowner's account. Further details will be discussed in chapters 10 and 12.

From freight insurance may be mentioned § 251, subparagraph 4, under which the freight insurer is not liable for losses caused by wastage in transit. Wastage constitutes — both in relation to the cargo insurer and the freight insurer — a so-called «normal transport risk», which the assured will have to make allowance for as an operating expense.

(8) One specific peril is from an insurance point of view in a special position, viz. the peril of *radioactive radiation* and other harmful properties of nuclear or radioactive products. In the current P. & I. rules this peril is exempted, in so far as it is attributable

to radioactive products or waste carried on the insured vessel, and a corresponding limitation of the range of perils has been incorporated in § 224, subparagraph 2. In hull and freight insurance the question has not yet been clarified. In an insurance against war perils the peril of the use of nuclear arms must obviously also be covered. In the insurance against marine perils there has not thus far been any exception for nuclear perils, nor does the Plan contain any such exception. Any limitation of perils on this point would therefore have to be incorporated in the policies.

In accordance with earlier law and conditions and with the limitations explained above, an insurance against marine perils thus comprises «all perils to which the interest is exposed». This paragraph stipulates three positive exceptions, however, viz.:

- (1) the perils which are covered by the war-risk insurance
- (2) «measures by the Norwegian or allied State authorities» and
- (3) «insolvency».

Exception (3) is discussed above. Exception (2) is necessary, because measures of this nature are not covered under the war-risk insurance either and therefore fall outside the scope of exception (1), cf. below in § 16 (b), where also the definition of «State authorities» if this paragraph is clarified.

§ 16. Perils comprised by an insurance against war perils

This paragraph corresponds to § 42, No. 1, subparagraph 1, and § 43, No. 1, of the 1930 Plan.

As mentioned in § 15, the total range of perils in marine insurance is divided into two. Apart from P. & I. insurance, special insurances must be taken out against perils related to war, and against general marine perils. In practice we talk about «war perils» and «marine perils», «war insurance» and «marine-risk insurance». The Plan has adopted this terminology and therefore uses the term «marine perils» to cover the «non military» perils which occur in the shipping trade.

§§ 42 and 43 of the 1930 Plan used three methods when drawing the line between the areas of liability of the war insurer and those of the marine insurer. First of all, all losses *caused by war perils* were separated from the marine-risk insurance. This causality rule had to be supplemented with the rule of apportionment contained in § 34, No. 2, subparagraph 1, of the 1930 Plan, with a view to those cases where also marine perils were a contributory cause of the loss. Secondly, *the marine-risk insurance was suspended* when the ship, because of a war, had a foreign crew placed on board, which wholly or in part deprived the master of his free command of the ship. Casualties occurring during the period of suspension were to be covered in their entirety by the war insurer, even if they arose from strictly nautical causes and had no connection with measures taken by the foreign crew. And finally, *certain types of damage were to be regarded as war damage* and be covered in full by the war insurer, regardless of whether or not marine perils had contributed to the damage. This applied to such damage «as by its nature or proximate cause is characteristic of the state of war», in particular damage which was caused directly by means of warfare and losses resulting from requisition and other measures taken by the powers at war.

Under § 43 of the 1930 Plan a war insurance comprised all perils which had been separated from the marine insurance by the war-peril exception clause, subject to the reservation, however, that a separate agreement had to be entered into if the war-risk insurer was to be liable for partial or provisional restrictions of the assured's free disposition of his vessel by a power at war or a neutral power. Accordingly there should not normally be any «holes» in the cover. However, in practice the delimitation of the liability of the war-risk insurer and that of the marine-risk insurer turned out rather differently, and in one very important field no insurance cover whatsoever was provided.

Under the A 2 Hull Policy the marine-risk insurer was not liable for «measures taken by State authorities», regardless of whether or not such measures had any connection with a war. Under A 3 he was also not liable for «civil disorder or riots, strikes, lockouts, sabotage, syndicalism or other similar causes». Finally, A 2 provided that the insurance terminated if the ship was requisitioned by a power at war. — In

§ 2, subparagraph 1, (b) and (c), of the War Hull Policy, «measures taken by State authorities» and «civil disorder» etc. had been incorporated in the war-risk insurer's liability, but subject to the limitation (in subparagraph 2 of the paragraph) that the insurance did not cover «requisition for title or use, seizure, detention or similar measures taken by Norwegian authorities or authorities in countries allied with Norway». Specific rules relating to cover in the event of requisitioning and other measures taken by the authorities appeared in § 4. If the measure lasted for more than 12 months (24 months in case of a requisition for use) the assured would be entitled to compensation for total loss. If the ship was returned before the expiry of these time-limits, he would be entitled to claim compensation for any and all damage arisen during the period of requisitioning, including wear and tear, provided no remuneration was paid for the requisitioning.

The state of law prior to this Plan may be summed up as follows: No insurance covered measures by Norwegian or allied State authorities. The marine-risk insurance terminated if the ship was requisitioned by a foreign power at war, and was suspended temporarily when it had a foreign crew placed on board who interfered with the master's command. In both these situations the war-risk insurance also took over the risk of general marine perils. Furthermore, the war-risk insurance covered in full all losses, the immediate cause of which was the use of implements of war and, under the general rules of causality, losses caused by war risk, measures taken by State authorities, civil unrest, strikes, lockouts, sabotage, syndicalism, or similar causes. Piracy on the other hand had not been expressly transferred to the war-risk insurer and therefore came under the marine-risk insurance.

By and large the Plan maintains the same distribution of perils between the war-risk and the marine risk insurances. However, for practical reasons a few minor corrections have been made. The fact that the exception for war perils in the insurance against marine perils is tied to the perils comprised by the insurance against war perils (§ 15 (a)) prevents any gaps in the cover from arising other than those following from express provisions, viz. «measures taken by Norwegian or other allied State authorities» and «insolvency».

Formally speaking, war perils represent excepted perils in the general insurance against marine perils. The marine risk insurer is liable for «all perils to which the interest is exposed», with the exception of inter alia war perils. In the war-risk insurance, however, the perils are specifically stated and comprise (as a rule) all the perils identified by the war-perils exclusion clause. This construction has previously resulted in considerable difficulties when it came to drawing the line between the areas of liability for the two groups of insurers. Such general principles of insurance law as the principle that peril exceptions should be construed restrictively, and that the insurer has the burden of proof that the loss was caused by a peril which is positively excepted from the cover, have inter alia been applied. As will appear, both these principles are to the disadvantage of the marine risk insurer.

However, one must abandon such conceptions when drawing the line between the areas of liability of the war-risk insurer and the marine-risk insurer. For the assured it will normally be of no importance which insurer is liable to cover his loss, as long as one of them pays. Hence, the problems connected with this delimitation arise only as a conflict between two insurers who, in accordance with certain rules, have divided the total range of perils between themselves. There is no reason to give one of the insurers preferential treatment, neither in terms of construing the conditions, nor in relation to the burden of proof.

The 1930 Plan took a big step towards creating equality between the war-risk insurance and marine risk insurance in these respects. The equality followed from the introduction of the system of apportionment, both when the course of events was known and — in respect of disappeared vessels — when it was unknown. However, the 1930 Plan did not contain any special rules relating to casualties with unknown causes where the ship had not disappeared, and in this area it was long uncertain whether the traditional burden-of-proof concepts should be resorted to, imposing the burden of proof on the marine risk insurers that the loss was not caused by marine

perils. The question was solved by the Supreme Court in the so-called «Banan» judgment (ND 1956.129) to the effect that no greater burden of proof should be imposed on one insurer in relation to the other, but that a rule of apportionment should be applied to all those cases where it was uncertain whether a loss was caused by war perils or by marine perils, cf. below under § 23.

The new Plan has fully followed the line adopted by the 1930 Plan and the courts. The insurances against war perils and against marine perils shall in all respects be treated on an equal footing. The war-peril exception shall not be construed restrictively to the disadvantage of the marine risk insurers and there is no difference in relation to the burden of proof.

This paragraph specifies the range of perils covered by the war-risk insurance under four subparagraphs which will be discussed separately below.

Subparagraph (a)

§ 42 No. 1 of the 1930 Plan No. 1 defined war perils as «perils due to war or arrangements or measures taken owing to a war which has broken out or is threatening to break out».

The corresponding definition in the new Plan reads as follows:

«perils attributable to war or warlike conditions, or to the use of arms or other implements of war in the course of military manoeuvres in times of peace or during armed neutrality.»

The crucial point is, of course, the perils attributable to a war which is in progress. To give an exhaustive enumeration of the events which may be relevant here is not possible. Primarily there is the use of implements of war by the powers at war (or neutral powers) — bombs, torpedoes and other conventional arms, nuclear arms, chemical or biological implements of war, and the like. When the damage is directly attributable to the use of such an implement of war used for the purpose of war, the loss is subject to the special causal rule contained in § 22 below. But also otherwise the use of implements of war may be the cause of a loss, such as for example when the ship must pass through dangerous waters in order to avoid a mine field, or in order to stay away from an area where a sea battle or an air raid is taking place, and in the process runs aground.

The 1930 Plan explicitly mentioned «arrangements or measures taken owing to a war». The term was aimed at all such measures as are regularly taken by powers at war as well as by neutral powers and which influence shipping, such as the extinguishing of lighthouses, the withdrawal of old navigation marks and putting out new ones, the organizing of convoys where the freedom to manoeuvre is more or less restricted, orders to sail without navigation lights etc. It is unnecessary to say expressly that such measures constitute war perils. For they are caused by the war, cf. the wording of the Plan.

As for condemnation in prize, capture at sea, requisitioning etc. undertaken for the purpose of war, and sabotage carried out to further the purpose of a power at war, these are perils directly attributable to the war and therefore come under the definition in subparagraph (a) of this paragraph. However, these perils are also covered by the special enumeration in subparagraph (b); between (a) and (b) there will thus be an overlapping as far as war-motivated measures are concerned. If the measure is taken by Norwegian or allied State authorities, however, the special rule contained in (b) must prevail. Such measures will therefore fall outside the cover, regardless of whether or not they are war-motivated. If, by way of exception, the war-risk insurer has not accepted liability for the perils mentioned in subparagraphs (b) and (c), it will be a matter of construction to decide whether he must nevertheless be liable under subparagraph (a) to cover war-motivated measures by a foreign power and war-motivated sabotage.

The 1930 Plan required that the war had broken out, or was threatening to break out. The new Plan uses the term «war-like conditions» to imply that the decisive point is not how great the relevant risk of an outbreak of war is, but how war-like the measures are which a State has instituted. Whether there are «war-like conditions»

may of course be difficult to decide, but in practice the term will hardly be of very great importance. As a rule the loss will have been caused either by military manoeuvres or by measures taken by State authorities, and in either case it will be covered by the war-risk insurer, even if there are no «war-like conditions».

The fact that under the Plan he is also liable for «the use of arms or other implements of war in the course of military manoeuvres in time of peace or during armed neutrality» implies an intentional extension of the war-risk insurer's liability. This extension is due to practical considerations, in view of the fact that it will normally be easier to ascertain that a loss is attributable to «the use of implements of war» rather than whether a war «is threatening to break out». However, obviously also the new delimitation may give rise to questions of doubt which have to be solved by the courts. The main problem will be to decide when there is a case which comes within the term «the use of ... other implements of war». If a ship collides with a naval vessel sailing in a perfectly ordinary manner, this will not constitute any use of implements of war. The same applies if for example a military plane crashes in a harbour due to engine trouble, or an ammunition depot blows up as a result of an ordinary «civil» fire. The «use of implements of war» presupposes that the naval vessel (the plane, the ammunition) is used in a manner typical of its function as an implement of war, e.g. that during manoeuvres the naval vessel disregards the rules as to navigation at sea, that the plane crashes during dive-bombing manoeuvres, or that the ammunition stores blow up as a result of a failure to comply with the safety regulations.

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

Under § 5, subparagraph 2, of the 1930 Plan the insurer shall «not be relieved from» liability if the damage is a result of faults and negligence committed by the master or crew in connection with their service as seamen. The provision became directly applicable to both marine insurance and war-risk insurance. If taken literally, it would imply that the fault or negligence should be disregarded in the marine risk insurance as well as in the war-risk insurance, in other words that the fault or negligence would not acquire any independent significance for the distribution of liability between the two insurers. However, this is not the way the 1930 Plan has been interpreted in practice. In the extensive legal practice during and after World War II it was from the very beginning quite clear that any faults or negligence committed by the master or crew, which related strictly to their service as seamen, should be regarded as an independent peril which falls within the marine risk insurer's area of liability. In this respect international tradition was followed.

In the Plan the rule relating to faults and negligence committed by master or crew in connection with their service as seamen (§ 59) has been given a form which corresponds to § 5, subparagraph 2, of the 1930 Plan. As regards the delimitation of marine perils and war perils, however, this provision shall not — any more than the earlier provision — be taken literally. Faults and negligence on the part of master or crew shall therefore be regarded as an independent causal factor, a peril which falls within the marine risk insurer's scope of liability. As the chances of faults and negligence being committed as a rule are a lot greater in times of war than in times of peace, because navigation is that much more difficult, this means in actual fact that also the marine risk insurer must accept a general increase in perils owing to the war situation.

However, it is conceivable that faults or negligence on the part of the crew must be covered by the war-risk insurer, viz. where such fault or negligence is very closely bound up with the war peril or consists in a misjudgement of this peril. This is how

the provision relating to faults and negligence on the part of the crew contained in the 1930 Plan has been understood. It is e.g. conceivable that the officers are exhausted after having been subject to the pressures of war for a long period of time and, as a result thereof, they make a clear navigational error, or that the crew leaves the ship under the misapprehension that there is an impending risk of war (cf. the «Solglimt» case, Rt. 1921. 424). In practice it is also conceivable that the grounds given for the judgment will be that the crew's conduct in the given circumstances must be regarded as excusable; in other words that no actual «fault or negligence» has been committed.

Moreover, on applying subparagraph (a) of this paragraph guidance will be found in the abundant legal usage relating to the part of the fleet which sailed in Norwegian and other German-controlled waters during World War II.

Subparagraph (b)

§§ 42 and 43 of the 1930 Plan only dealt with war perils in the actual sense, i.e. perils which are associated with a war which had broken out or is threatening to break out. As mentioned above, however, the policy conditions also transferred a number of other perils to the war-risk insurer's scope of cover, viz. the perils which come under the headings of «measures by State authorities» and «civil commotions».

During the revision work it was discussed whether there was any reason for maintaining this system. It was submitted inter alia, that we are here talking about perils which do not in any way carry the same stamp of disaster as war perils, and which it is therefore from a technical point of view possible for the insurers against general marine perils to accept without any difficulty. It was further pointed out that far from all persons effecting an insurance are interested in taking out an insurance against war perils in times of peace, and that it would not be reasonable to refuse these persons cover against typical peace-time risks. If this line of thought were to be followed consistently, one would also have to transfer to the ordinary marine insurance the so-called «residual war perils», i.e. the perils of drifting mines and the like in times of peace.

However, these considerations carry greater weight in relation to cargo insurance than in connection with shipowners' insurances. Shipowners will probably to a larger extent than the cargo owners be aware of insurance questions and arrange for full cover. The war hull insurance will in any event have to be maintained as an institution, also in times of peace, as part of the general alertness that is maintained against the possibility of an outbreak of war. In addition to these considerations one must take into account the difficulties in drawing a clear line between on the one hand acts of war and war-motivated measures by the authorities, and on the other hand acts of violence and measures of a «non-military» nature. In case of revolutions and local conflicts it will often be highly doubtful whether the situation should be characterized as «war» in the proper sense. A limited rebellion may gradually develop into an extensive civil war or an international war, and it may pose considerable problems to have to decide when the unrest has reached such an extent and such an intensity that it must be said to constitute a «war». There are strong reasons in support of letting the same insurer be liable for the two groups of perils, and on this point the Plan follows the earlier system.

Subparagraph (b) of this paragraph deals with both such measures as are related to an ongoing or impending war, and such as have no direct connection with war or war perils. As mentioned above, strict war measures — such as e.g. condemnation in prize — will in actual fact also be covered as manifestations of the general war perils under subparagraph (a).

The term «similar measures» indicates a limitation of the measures which are covered. The wording is aimed at excluding from the war peril cover such measures as are taken as part of the enforcement of customs and police legislation. The war risk insurance therefore does not cover losses arising from the ship being detained by the authorities because there may be doubt as to her seaworthiness, or because the crew is suspected of smuggling. Obviously, losses arising from the ship being detained or seized as part of debt-recovery proceedings against the owners are not covered either.

This already follows from the fact that «insolvency» has been excluded in subparagraph 2 of the paragraph.

This implies that losses arising from measures taken by the police authorities must be covered by the ordinary marine risk insurance to the extent these losses are recoverable. The loss will often consist in loss of time or capital loss, for which the insurer is not liable. However, assuming for example that the vessel sustains damage during an extensive customs examination, the hull insurers against marine perils must cover the damage, provided the examination was not the result of the assured's own negligence.

Insurance against war perils does not cover measures taken by Norwegian authorities or by authorities of countries allied with Norway. On the other hand, under the definition in the paragraph of the term «foreign State authorities», measures taken by persons or organizations who unlawfully *pass themselves off* as Norwegian or allied State authorities (e.g. a Quisling government), are covered by the insurance against war perils on a par with measures taken by State authorities of countries with which Norway is not allied. Insurance against public measures taken by Norway's own legal authorities is conceivable, even though it would present special problems. The decisive reason why the war-risk insurer does not want to provide cover against measures taken by Norway's own authorities, however, is that the existence of such an insurance might easily influence the assured's position vis-à-vis the authorities. Under the standard principles of expropriation law the State must pay full compensation for the requisitioned asset, or — in case of temporary requisition — cover liability and any damage or reduction in value which the asset has suffered during the period of requisition. In this way the losses caused by such measure will be apportioned on the entire society. If there has already been an apportionment of the loss through insurance, there is an obvious risk that the authorities (possibly the legislator) may attach less importance to the financial settlement with the person who is the victim of the measure. — These considerations come into play in the case of measures taken by Norwegian authorities as well as by authorities of countries with which Norway is allied. In the event of a measure taken by an enemy of Norway or of the alliance, it is less likely that adequate compensation will be given by the requisitioning authority. And even if such compensation is given, it would be reasonable that the war risk insurance covers the loss and takes over the claim against the requisitioning authority.

The concept of «State authorities» is defined in § 15 (b). It also comprises persons or organizations exercising «intergovernmental authority». This alternative will probably be of increasing interest in future. If a measure is taken by representatives of a league of States (an alliance, group, block) of which Norway is a member, it must be regarded as a measure taken by an «allied». A requisition made by NATO or a similar organization will accordingly not be covered by the insurance.

Special questions arise when a measure is taken by an ally of Norway, but in connection with actions which have no connection with the alliance. The situation may be such that the insurance against war perils must cover measures of this nature. However, it will hardly be possible to draft a provision which would solve all the various problems which may arise. The questions will have to be solved on a case-to-case basis, bearing in mind that «allied State authorities» need not necessarily be regarded as «allied» under any and all circumstances and in any and all situations. In a given conflict it must be decided whether the acts committed by the relevant State authorities can be considered to fall within the framework of the alliance.

The insurance against war perils also covers measures taken by persons and organizations who unlawfully pass themselves off as exercising public or supra-national authority, including, as mentioned above, measures by persons or organizations who pass themselves off as Norwegian or allied State authorities. In case of measures taken by groups of rebels and usurpers it may at times be doubtful whether the situation is covered by this wording, or whether it is a case of pure piracy. However, in practice this will normally not create difficulties, as this Plan — in contrast to the 1930 Plan — also refers piracy to the war-risk insurer's scope of cover, cf. subparagraph (d) of this paragraph.

As already mentioned, an authority which requisitions property for use will normally be liable for all damage sustained by the subject-matter during the period of requisition, also damage which, viewed in isolation is attributable purely to marine perils. For the reasons set out above, such damage should not also be covered by an insurance if the requisitioning authority is Norwegian or an allied State. In case of a requisition by an enemy, it should be up to the war-risk insurer to cover the damage and recover any possible compensation. Hence, § 41 provides that an insurance against marine perils becomes inoperative if the ship is requisitioned by any State authority. However, the insurance against war perils is merely suspended in the event of a requisition by Norwegian or State allied authorities. In the case of a requisition by alien State authorities, the war-risk insurance remains in force. The last subparagraph of this paragraph states that the insurance in such a case, in addition to war perils, also comprises marine perils.

Subparagraph (b) deals only with restrictions on the owner's rights in the object insured. Restrictions consisting in an infliction of physical damage fall within the scope of general war perils set forth in subparagraph (a); hence, here there is no limitation in terms of perils attributable to Norwegian or allied State authorities in the course of acts of war. Hence, if the object is destroyed by Norwegian or allied units during acts of war, the insurance against war perils will have to indemnify the loss. This must apply both where the destruction is an unintentional consequence of the acts of war, and where it is a result of military orders for the furtherance of Norwegian and allied military objectives, cf. § 58 (c), which entitles the assured to compensation for losses which he himself has caused by a patriotic act during times of war. In this connection it makes no difference whether the military authorities have themselves effected the destruction, whether they have ordered it, or whether they have even used a formal requisition. In all of these cases the assured's loss will be recoverable. Only such measures taken by Norwegian or allied State authorities as are aimed at depriving the assured temporarily or definitively of his use of the object will fall outside the scope of cover.

Subparagraph (c)

Subparagraph (c) of this paragraph is identical with the A 3 Hull Policy, apart from the fact that the alternative «syndicalism» has been left out as being superfluous alongside the other items enumerated. By «sabotage» is first and foremost meant wilful destruction, which does not form part of the conduct of war, but which is e.g. connected with labour conflicts. War sabotage is a war peril, which will also be covered by subparagraph (a). The sabotage need not be aimed at the actual object insured. A «go-slow» action among dock workers or seamen is aimed at the employers' interests in general, but if the action involves damage to the assured's property of the kind covered by the policy, the war-risk insurer will be liable for the damage under subparagraph (c). The concept of «sabotage» furthermore presupposes that the act pursues a definite goal of a political, social or similar nature. A destruction carried out by a ship's crew as an act of vengeance or a protest demonstration against the owner must be regarded as vandalism of property and is covered by the insurance against marine perils. The same applies to a pointless destruction of property carried out while of unsound mind or under the influence of alcohol.

Subparagraph (d)

Neither the 1930 Plan nor the Hull Policy excluded «piracy» from the ordinary cover against marine perils, but according to subparagraph (d) of this paragraph this peril is now covered by the war-risk insurer. The reason for this change is the practical difficulties which would arise if one had to distinguish between «piracy» and «measures taken by alien State authorities». Piracy perpetrated exclusively for the purpose of profit presumably hardly exists anymore. The measure would in the event be organized by persons laying claim to exercising governmental authority (e.g. a government in exile which captures vessels in order to attract worldwide attention, or to finance its rebellion.)

Mutiny means insurrection by the crew against the officers, cf. section 312 of the Norwegian Penal Code. This alternative will hardly be of any practical importance, but mutiny could be conceivable in connection with piracy or some other capture of the ship, viz. if there are among the crew persons who have signed on for the purpose of taking possession of the ship.

§ 17. Perils insured against when it is not agreed what the insurance comprises

This paragraph is new. It will not be of any great significance, as it will in practice always be clear between the parties whether it is an insurance against war perils or an insurance against marine perils which is effected. Cover against both groups of perils is afforded only by P. & I. insurance, cf. § 224.

§ 18. Causation

This paragraph corresponds to § 34 No. 1, subparagraph 1, of the 1930 Plan.

Under § 42 of the Marine Insurance Plans of 1881 and 1894 the insurer was «liable for all accidents befalling the object insured for the duration of the insurance». The enumeration which followed showed that the provisions were primarily aimed at establishing the wide range of perils insured against in the marine insurance. However, the requirement that an «accident» must have befallen the object insured implied that the occurrence of a specific event involving damage to the assured's interest was required.

However, § 22 of the 1907 Plan, which on this point endorsed the wording of section 248 of the Norwegian Maritime Code, stated that the insurer was liable for «the consequences of any peril to which the object insured is exposed during the period of insurance». The wording opened up a possibility that the insurer could be liable for damage which occurred after expiry of the period of insurance, but the intention was hardly to make any material amendment of the rule. There is no reference whatsoever to the rewriting in the Commentary to the 1907 Plan, whereas it is stated in the preparatory works to section 248 of the Norwegian Maritime Code (Draft Maritime Code, Christiania 1890, p. 314) that the insurer «according to the Draft is ... liable for any accidental damage occurring during the period of insurance». – Information is missing as to how the rules contained in the aforesaid Marine Insurance Plans were practiced where a damage could be traced back, wholly or in part, to perils to which the interest had been exposed during a previous insurer's period of insurance.

Grundt, who during the revision of the Plan in 1930, devoted a lot of space to causation questions, also raised the question how the insurer's liability should be limited in time. He criticised the wording in the 1907 Plan, submitting that during the period of insurance the interest may be «exposed to» perils which have in actual fact materialized before the insurance entered into force. In that event it was in his opinion clear that the insurer could not be liable for the damage. He gave two examples. If a ship is in a port dock and a fire breaks out in the warehouses by the dock on December 31 and it has become clear by midnight that the ship cannot be moved but will be consumed by the flames, it is the December insurer and not the January insurer who indemnifies the loss. In the second example the ship is ice-bound during the month of December. Even if she is undamaged at the turn of the year, it is the December insurer and not the January insurer who is liable for the subsequent ice damage, provided it was clear at the turn of the year that, in so far as it was humanly possible to foresee, the ship would be crushed by the ice before the winter was over. (The stenciled Commentary II, p. 264–265).

In *Grundt*'s opinion, an apt description of the situations in these examples would be that «the peril had struck» at the time when the fire broke out, and the ship became ice-bound, respectively. He further stated:

«The Draft Plan states, as mentioned above, that the company is liable when «the insured interest during the period of insurance is *struck by a peril*, which is comprised by the insurance». It should be noted that it is *the peril* which must

have struck. *The loss* need not have occurred. The peril has struck when the situation is so serious that according to general human experience the peril must be expected to result in damage. In the examples referred to in the preceding paragraph, the peril has struck the ship before the new insurance became operative, and this is the reason why the fire damage and the total loss are outside the scope of cover.»

The 1930 Plan thus did not ask at what point in time the ship was «struck by an accident» or when «the loss occurred». The decisive point was whether the insured interest was «struck by the peril» within the period of insurance. If this was clear, the insurer was under § 34, subparagraph 1, of the 1930 Plan liable for damage which was a result of the peril materializing and which was covered by the rules of compensation contained in the Plan or the Policy.

Grundt also gives another reason why one should in this manner look behind the accident which has occurred and consider the nature of «the peril that has struck». He points out (p. 262—63) that a marine casualty may be the result of a very complex chain of causation, where also such causal factors as war, unseaworthiness or dispositions on the part of the assured, for which the insurer does not accept the risk, have come into play. It is therefore not sufficient to ascertain, for example that the ship has run aground or been involved in a collision. In each specific case one should look behind the casualty and check the peril or perils which have caused it.

The Commentary to the 1930 Plan provided no clear solution to a situation where during a previous period of insurance a casualty has caused a latent defect, which becomes a contributory cause of a subsequent casualty. This was the situation in a case heard by the Supreme Court in 1950 (ND 1950.458 NH *Hektor*). The ship had in 1945 been the victim of a bomb explosion involving damage to rudder and stern. The visible damage was repaired, whereupon the ship was issued with a certificate of seaworthiness and put back into service. However, it turned out that there was a crack in the rudder heel, which had not been discovered during repairs. This crack, along with heavy weather to which the ship was exposed in January 1946, resulted in the rudder heel breaking and the rudder falling off during a voyage in May 1946. There was general agreement that the costs of replacing the damaged rudder heel were to be absorbed by the war-risk insurer for 1945. The question was what to do about the loss of the rudder and the other losses arising in connection with the new casualty. These losses were by the Supreme Court apportioned on the war-risk insurer for 1945 and the marine insurer for 1946 with 60% and 40% respectively.

The *Hektor* judgment gave rise to considerable discussion, cf. notably *Rein* and *Halvorsen* in AfS 3.257 and 271. It was widely held that from a technical point of view the solution was rather unfortunate. It has been submitted that the system makes it more difficult for the insurer to allocate the necessary reserves for each individual insurance year. In addition to the unrepaired damage, which he knows of and the extent of which he is able to assess, the insurer must also take into consideration that a ship may have undisclosed damage, for which he is liable and which may later contribute to considerable casualties. Deciding the question whether and to what extent the latent defect has been a contributory cause of subsequent damage is uncertain and may result in difficult legal proceedings. At the same time it has been emphasized that no major advantages are obtained by such a detailed investigation into the underlying causes of each individual casualty. What is needed are first and foremost rules which are clear and easy to implement determining which insurer shall be liable for each individual damage.

This principle has especially caused difficulties where a ship suffers a casualty relatively shortly after delivery and the casualty can be traced back to a latent defect, which was caused by an accident during the period of construction. If the *Hektor* judgment were to be adhered to in such a situation, the new insurer would have the right to exclude liability, wholly or in part, whilst it would on the other hand be doubtful whether the insurer during the building period was liable vis-à-vis the buyer. It has not been the practice to transfer the loss back to the former insurer, but it has

given rise to major difficulties to find a valid reason for holding the insurer at the time of the casualty liable.

The consensus of the committee was that in future one should seek to avoid the unfortunate consequences of the *Hektor* judgment, but there was disagreement as to how the rules should be worded. There are two possible courses.

One possibility is to establish as a basic rule that the insurer is liable for losses, which arise during the period of insurance, provided they are attributable to a peril which is covered by the insurance. This rule would have to be supplemented with a rule to the effect that the loss shall be transferred back to the former insurer if it was obvious at the inception of the insurance that the loss would materialize, cf. the two above examples from Grundt's commentary. In such an event the assured would not be able to renew his insurance, unless it was clear that the former insurer would be liable for the foreseeable losses. The other possibility is to keep the wording from 1930 (that it is sufficient that the object insured «was struck by a peril insured against» during the period of insurance), but rule out the *Hektor* solution by a separate provision. That provision must provide that even if the peril struck during the period of insurance, the insurer shall not be liable for subsequent losses if the peril has merely resulted in in a latent defect, which was not known at the time the insurance expired. The subsequent loss must in that event be covered by the insurer during whose period of insurance it arises.

In support of the first method may be argued that it will presumably fit in best with the rules practiced in other countries. That «the loss arises» is a clearer criterion than that «the peril strikes». From the insurer's point of view it is natural that the scope of his liability should be the losses sustained during the period of insurance. The losses, which have arisen, he can ascertain and take into consideration in his annual report and accounts, in contrast to the perils which may «have struck» in the course of the year. Also for the assured the most practical solution is for him to have to look to the relevant insurer at the time the loss arises. Reference back to a former insurer may easily cause problems, except for situations where it is obvious at the turn of the year that the loss will arise.

In support of the other method it may be argued that the wording in the 1930 Plan is well-known and established in practice, and that it may cause major difficulties for surveyors and for the insurers' claims-settlement departments if a new and untried wording on such a crucial point of the insurance conditions is introduced. To this must be added that the requirement that «the peril must have struck» during the period of insurance probably constitutes an adequate description of what goes on in practice. In connection with any casualty one must, as pointed out by Grundt, look behind the casualty to find out what the real cause is. It may admittedly at times be difficult to decide how strong the peril impact must be in order to regard the peril as «having struck», but on this point a practice has been established, and difficulties have not been particularly predominant while the 1930 Plan was in force.

From certain quarters it has also been argued that the choice between the two methods is of more theoretical than practical interest. The material solutions will by and large be the same, regardless of the wording chosen. It will hence be of secondary importance whether it is stipulated that the insurer is liable for losses, which arise during the period of insurance, but with a right to transfer certain losses back to a former insurer, or it is stipulated that the insurer is liable for losses attributable to the fact that the peril has struck during the period of insurance, but with a right to exclude liability for certain losses, which do not arise until after expiry of the period of insurance.

After extensive discussions by the Committee, the conclusion was reached that the second method should be adopted. The wording of § 34, subparagraph 1, of the 1930 Plan has been maintained, with an addition which aims at ruling out the consequence drawn in the *Hektor* judgment.

A very important element in connection with the defining of the rules is that the parties to the contract of insurance must not have any possibility of influencing the decision as to which one of two successive insurers shall be liable for a loss. This

applies in particular to damage which it is difficult to attribute to any definite, external event, and where the actual discovery of the damage must often be regarded as «the actual casualty». If the assured becomes aware of an incipient damage (e.g. a cracking of the propeller shaft) he must not have the possibility of shifting the liability for this damage on to a future insurer. He would then be under the obvious temptation to renew the insurance with a lower deductible or on better conditions in general. Similar considerations may be invoked for the insurer: if, during a survey towards the end of the period of insurance, he becomes aware of the fact that «the peril has struck in the sense that major engine damage is developing, he might be tempted to keep this knowledge to himself and refuse a renewal of the insurance. Hence, if either of the parties knew that «the peril had struck during the earlier period of insurance, the principle of the *Hektor* judgment must be applied. Only if the damage is totally unknown should the new insurer bear the full risk for any new casualties.

As regards the more detailed wording of the paragraph, the following should be noted: The first subparagraph contains the general basic rule according to which the insurer's liability is subject to the condition that a peril, which is covered by the insurance, must have struck the interest during the period of insurance. Very often the fact that a peril has struck will be identical with the occurrence of a casualty. However, it is also conceivable that the peril has struck even though no casualty can as yet be said to have occurred. This will inter alia be the case in the above examples from Grundt's commentary to the 1930 Plan, where the ship is admittedly «struck by a marine peril» at the turn of the year (fire, ice-bound), but where she cannot as yet be said to have suffered a casualty.

It is irrelevant as regards the damage, which arises at the moment when «the peril strikes» («the primary damage»), whether the damage is discovered immediately or at a later stage. Liability for that damage shall in any case be referred back to the insurer who had the risk when the damage arose. On this point the Plan relies on indisputable law in Norway as well as in other countries.

The basic rule contained in subparagraph 1 of this paragraph will, if it is not made subject to any reservation, lead to the relevant insurer being liable, wholly or in part, for other losses which the assured may suffer in future, and which have a causal relation with the fact that «the peril has struck» during the relevant insurer's period of insurance. In many situations this will be the right solution, thus where an event involving liability for the assured has occurred during the period of insurance, and the third party's loss does not arise until later. The same applies where the ship on expiry of the period of insurance is at sea with casualty damage which is known and which will cause new damage before the ship reaches port. In this latter situation the rule relating to a prolongation of the insurance in § 157 will prevent any dispute about the causal relation concerning the subsequent damage. However, subparagraph 2 of the paragraph is aimed at excluding the insurer's liability for any future losses arising in situations of the same type as the *Hektor* case, viz. where the peril has inflicted a latent weakness or damage on the ship which is not known.

The new underwriter shall according to the Plan bear the risk of losses attributable to a defect or damage which «is unknown» at the inception of the insurance. That the defect is «unknown» implies that neither the insurer nor the assured knows about it. As far as the assured is concerned an identification must here be made with a larger circle of persons than what is customary in marine insurance, cf. inter alia § 59. It is not sufficient that the assured does not himself know about the damage, if at the time the insurance expired it was known by one person whose duty it was to report the matter. Hence, if an incipient cracking of the shaft is known by the ship's engineers, but has not been reported to the owners, replacement costs and any consequential losses shall be covered by the former insurer and not by the insurer during whose period of insurance the replacement takes place. This solution is necessary in order to counteract the possibility of a fraudulent cooperation between the owners and the crew for the purpose of obtaining better cover before the insurer enters the picture. On the other hand, there should be no reason to make a point of the fact that a subordinate member of the crew happened to know about the damage without

realizing its importance. The term «is unknown» is chosen to make it possible in practice on this point to choose the solution which in the specific case, as well as generally speaking, furthers the purpose of the rule, viz. to counteract disloyal suppressions in the relationship between the parties to the contract of insurance.

If it is established that on expiry of the period of insurance the damage was known by the assured or by a person, with whom he must in this connection be identified, also the liability for the consequential losses shall be transferred back to the old insurer. If the assured has fraudulently failed to disclose the damage, he runs the risk that the insurer may invoke the 6-month time-limit for notification of the casualty contained in § 107. If this is the case, the insurer must have the right to refuse to cover not only the primary damage, but also the subsequent consequential losses. However, the practical cases where liability will be referred back will presumably arise where the latent damage is well known, but the ship has been given permission to sail for some time before repairs are carried out. For example, an incipient cracking of the propeller shaft or the foundation plate is discovered, and the assured is instructed to have the repairs carried out within 6 months. If a fracture arises in that part before it has been repaired, but after expiry of the period of insurance, the old insurer is liable for the replacement costs as well as the consequential loss.

If the damage is unknown to everyone at the inception of the new insurance, it is the new insurer who is liable for the consequences which the defect has by causing a new casualty. This is expressed by stating that the damage shall «be considered as a marine peril which has struck the ship when the casualty occurred . . .». This wording reflects *inter alia* the view, which is presumably realistic, that the insurer assumes the risk for the ship with whatever unknown defects, deficiencies and weaknesses it may be suffering from.

There is an important reality in the principle that the latent defect shall be regarded as a «marine peril» which strikes the ship in connection with the new casualty. Regardless of what originally caused the damage, it is the insurer against marine perils who bears the risk of it subsequently causing a new casualty. An undiscovered war damage (cf. the *Hektor* case) thus becomes a marine peril in the cover given by the new insurance. Also this conforms with the view that it is the ship itself with its unknown defects and deficiencies which constitutes the marine perils insurer's risk. A similar transformation of the damage is also conceivable in the relationship between two successive insurers against marine perils. Let us assume that in 1960 the ship stranded and sustained unknown damage. In 1961 the owners switch to cover on stranding conditions. When the damage causes a new casualty in 1961, the insurer is only liable for the consequences if the new casualty constitutes a stranding. In other words, the old damage is detached from its original cause and represents in relation to the new insurer an element of general marine peril.

A special question arises if the latent damage is for example brought about by a casualty which occurred in 1960, is discovered in 1961 and causes a new casualty in 1962. In such a case the right thing to do must be to transfer the consequential loss back to the insurer during whose period of insurance the defect was discovered. The 1962 insurer is not liable. He will be protected by the rule of subjective knowledge. Nor will the 1960 insurer be liable. If the damage has not been discovered by the time his period of insurance expires, he shall be definitively free from liability for all further losses which the damage may cause.

As regards losses in connection with salvage operations and other accessory costs, the same rules apply as to the actual damage which the ship sustains in connection with a new casualty. In so far as liability for the damage is transferred back to a former insurer, he shall also cover salvage costs, etc. incurred in connection with the casualty.

§ 19. Principal rule of the assured's burden of proof

This paragraph corresponds to § 45, subparagraph 1, of the 1930 Plan.

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

doubt shall be to the disadvantage of the party who has the burden of proof on the point in question.

The provision is based on the general principles concerning the burden of proof in contracts of insurance. It is indisputable customary law that the assured has the burden of proving that he has an interest which is insurable, that that interest has sustained a loss as a result of a peril covered by the insurance, as well as the extent of the loss.

The assured's burden of proof also comprises the fact that the peril has struck at a time when the insurer covered the risk, cf. § 18. When an older damage is discovered, there are sometimes no certain indications as to when it arose. The damage could just as well have been caused by two different casualties, which took place during different insurance years. In such cases it would not be reasonable for the burden-of-proof rule to be used against the assured by one of the insurers, unless it is clear that also the other insurer will respect the decision. If both insurances are taken out on Norwegian conditions, problems will hardly arise in this connection, cf. *inter alia* the rule relating to advance payments contained in § 91.

If the insurer wants to claim that the loss is attributable to a specific cause which is excluded in the insurance conditions, e.g. unseaworthiness, the burden of proof on this point rests with him. Also this is indisputable law. However, one must be aware of the fact that a number of the limitations of liability contained in the Plan also provide special rules relating to the burden of proof. Thus § 38, subparagraph 1, imposes on the assured the burden of proving that a casualty is not attributable to perils to which the ship has been exposed while outside the trading limits. See in this connection also § 26, subparagraph 2, § 32, subparagraph 2, § 42, subparagraph 3, § 45, subparagraph 2, 2nd sentence, § 46, subparagraph 2, § 49, subparagraph 1, § 54, and others.

The special problems which arise when it is uncertain whether a loss is attributable to a marine peril or a war peril are discussed below under § 23.

§ 20. Combination of perils

This paragraph corresponds to § 34, No. 2, subparagraph 1, of the 1930 Plan.

A general problem in insurance law is to decide to what extent the insurer shall be liable when the event, which gives rise to the loss, was caused by a combination of perils covered by the insurance, and perils which are not covered. Based on the practice followed by the Supreme Court since the turn of the century in cases where a person with an accident insurance has died partly as the result of an accident, partly as the result of illness, it has been established that Norwegian insurance law is based on the so-called «dominant-cause doctrine» (see in particular Rt. 1901.706, 1904.600, and the summary in Rt. 1933.931). This doctrine implies that it should be established which peril constitutes «the most important causal factor», «the predominant peril». The entire loss shall be attributed to the peril which is thus designated as the principal cause. For the assured this means that he will either receive full cover, or none at all, depending on how predominant the peril insured against has been.

In personal accident insurance cases there has been a clear tendency in legal usage to regard the accident as the dominant cause, provided it has contributed to a reasonable degree and has influenced the course of events. That the courts in cases of doubt will readily reach the conclusion that the insurer is liable is well known also from other types of conflict. It would therefore possibly be a better description of the «dominant-cause rule», which is applied in practice outside marine insurance, if one states that the insurer is regarded as fully liable if a peril, which is covered by the insurance, has been a necessary triggering factor and has contributed to the loss to such an extent that it would seem reasonable to let the assured benefit from the protection which the insurance was intended to provide.

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

(1) if the loss is attributable partly to perils covered by the insurance, partly to perils excluded from the cover by an objective exclusion. The most practical is a

combination of marine and war perils, but one might also mention the case (from hull insurance) where a part is damaged, partly because of faulty construction, and partly because of events in connection with a casualty.

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

(3) if the loss is attributable to the materialization of perils insured against during several insurance years. For example, the ship sustains latent damage by a casualty in 1960, and this damage, combined with heavy weather or some other peril in 1961, causes a new casualty.

The field where this problem was first noticed and an attempt was made to solve it was a case involving a combination of marine and war perils. During World War I 1914—18 a large number of casualties of this kind took place. In the fundamental judgment (The *Skotfos* judgment, ND 1916.209) the Maritime Court, with the endorsement of the Supreme Court, established that the entire loss was attributable to «the factor which is regarded as the dominant cause of the accident». During the subsequent years a series of judgments were given in conflicts between insurers against marine perils and insurers against war perils. A feature common to these decisions was that it required a very strong war peril for the courts to regard that peril as the dominant cause. If any fault of any significance had been committed by the crew, such faults were practically always regarded as the dominant cause, with the result that the casualty in its entirety fell upon the marine risk insurer.

The marine risk insurers objected to the fact that in this way an essential part of the increase of the maritime risk attributable to a war situation (darkened lighthouses, removal of navigation marks, sailing in convoys, etc.) had been imposed on them. In connection with the revision of the Plan in 1930 there was therefore an almost unanimous request for the adoption of a rule of apportionment. In the event of a combination of causes the relative strengths of the various perils were to be evaluated and the loss apportioned, taking into consideration the significance of the individual causal factors. Instead of a choice between two extreme solutions (either A or B being liable for the entire loss), this method offered a whole scale of middle-of-the-road solutions, making it possible to choose in each individual case the apportionment which would seem to fit in best with the concrete circumstances of the case. The rule was worded as follows (§ 34 No. 2, subparagraph 1 of the 1930 Plan):

If the damage is caused by a combination of several different perils, and one or more of these perils fall outside the scope of cover, the loss shall be apportioned proportionally on the various perils according to the influence each of them must be assumed to have had on the origin and extent of the loss, and the insurer is only liable for such part of the loss as is considered attributable to the perils covered by the insurance.»

It appears clearly from the preparatory works to the 1930 Plan that the conflict which it was sought to regulate by means of the rule of apportionment was the conflict between the insurers against marine and war perils respectively. However, the rule of apportionment contained in § 34 No. 2 of the 1930 Plan, was worded in very general terms and was to be applied to all cases where there was a combination of perils insured against and perils not insured against, unless otherwise provided by other provisions of the Plan. Hence, as a basic rule the rule of apportionment was to be applied everywhere where an exclusion of liability was worded as a pure causality rule. As examples of such exclusions of liability may be mentioned the rules contained in the 1930 Plan, § 62 (unseaworthiness), § 64 Nos. 2 and 3 (customs fraud on the part of the crew, transportation of contraband) § 76 No. 4 («faults, defects or deficiencies in one particular part»), § 77 IIB (c) (various causes of loss excluded in case of the loss of mooring equipment etc.) and others, besides, of course, § 42 No. 1, subparagraph 1 (the war peril exclusion).

However, the 1930 Plan also contained a series of rules where the rule of apportionment was not applicable. This applied first and foremost to the exclusions of liability relating to negligence on the part of the person effecting the insurance or the assured, and where the corresponding rules in ICA prescribe that the so-called «causality rule» shall be applied in marine insurance. The wording in the 1930 Plan was as a rule that the insurer was liable only to the extent it was established that the excluded peril (negligence) «has not had any influence on the origin or the extent of the loss». However, also other wordings were used (see e.g. § 27 A, subparagraph 3, and § 31, subparagraph 2, cf. below). Hence, if the negligence had had any causal importance and contributed to the fact that a certain loss might have arisen, the insurer would be completely exempt from liability for that loss. Such rules were inter alia contained in § 9 No. 1 of the 1930 Plan (perils which the person effecting the insurance negligently failed to disclose on taking out the insurance), § 27 A, subparagraph 2 (willfully caused or suppressed alterations of perils, cf. § 28), § 27 A, subparagraph 3 (perils which operated while the insurance was suspended during a breach of the trading warranty), § 31, subparagraph 2, cf. § 63 (infringement of safety regulations), and others. It appears from the Commentary that this limitation of the scope of the rules of apportionment was intentional.

During World War II 1940–45 the rule of apportionment was used in a very large number of cases relating to casualties which were partly attributable to war perils, partly to general marine perils. These questions are discussed thoroughly by *Bugge* in Afs 1.1 ff. As for the ships sailing in German-controlled waters the question of apportionment had to be decided by litigation in some 100 cases, in the vast majority of those cases by the arbitration tribunal, which was established in accordance with § 34 No. 2, subsection 2, of the 1930 Plan. In practice the arbitration tribunal applied the apportionment fractions $\frac{3}{4}$, $\frac{2}{3}$, $\frac{3}{5}$ and $\frac{1}{2}$ most frequently, but also to a certain extent other fractions. The total amount of loss involved in the casualties where one of the sides demanded an apportionment was approximately NOK 36.6 million, which was divided into very close to equal parts between the two groups of insurers. By way of comparison may be mentioned that the total payments from The Norwegian Shipowners' Mutual War Risks Insurance Association amounted to approximately NOK 163 million for the home fleet. There are no statements showing how the apportionment was effected for the part of the fleet which was requisitioned by Nortraship during the war.

It is difficult to have any definite opinion about the extent to which the rule of apportionment has been applied outside the war/marine situation. It has not been applied by the courts to any large extent (cf. however the *Hector* judgment, ND 1950.458 NH, where an apportionment was effected in cases where perils had materialized during different insurance years). However, there are strong indications that the rule has become part of the general conception of justice and that it is applied fairly frequently in practical insurance settlements.

During the revision work the general sentiment was in favour of maintaining the «free» rule of apportionment in the event of a combination of causes. It was pointed out that it is established in practice and is well known by insurers, surveyors and other who are involved in the claims settlements. It opens up possibilities of reaching compromise solutions in case of casualties where the question of causation might otherwise easily have come to a head. Nor should one disregard a widely held view — perhaps particularly popular in insurers' circles — that the rule of apportionment provides a «fair» solution to causal questions. This paragraph therefore contains a rule, the contents of which are identical with § 34, No. 2, subparagraph 1, of the 1930 Plan. In principle it is applicable to all cases of oncurrent causes. The practically speaking most important situation — a combination of marine perils and war perils and similar perils — are, however, subject to special regulation in § 21.

As mentioned above, the rule of apportionment in the 1930 Plan was only given a very limited application in the event of a combination of perils insured against and perils brought about by negligence on the part of the person effecting the insurance or the assured. Here the solution on a number of points was that any element of

negligence in relation to the cause resulted in full loss of rights for the assured. The grounds given for this strict rule were the preventive considerations. However, during the revision work there was general agreement that the general rule of apportionment should be given unlimited application, also in these situations. Probably the preventive considerations will be served even better in this way than during the reign of the former rule. If the judge only has the choice between granting the assured full compensation or no compensation at all, he will naturally be reluctant to attach importance to negligence, unless it has been particularly gross or constituted the predominant causal factor. The result will easily be a decision that «it has not been proved to his satisfaction» that the assured has shown negligence, or that the fault has had any influence on the casualty. It is well known that the rules relating to the insurer's sanctions against negligence contained in the general section of the 1930 Plan were only applied to a very limited extent. This may, of course, be due to the fact that the persons effecting the insurances very rarely commit acts of negligence which may be of importance under the insurance conditions, but it is not inconceivable that a contributory cause has been that the insurers have not been able to invoke the rules without at the same time depriving the assured of his entire insurance cover. In these areas the rule of apportionment will open up the possibility, via an assessment of cause, of making suitable deductions from the compensation as a reaction to acts of negligence. The objection may be raised that it is difficult for rules of this nature to work in practice without a court decision. However, this may be countered by saying that relevant acts of negligence are, in spite of everything, rare, and when they do occur, it might be useful for such cases to be tried by a court of law with all the publicity involved.

In this light all the rules in the Plan, which deal with negligence on the part of the person effecting the insurance or the assured, are worded as pure causal rules and must be supplemented by the rule of apportionment contained in this paragraph.

The third area where it may be of interest to apply the rule of apportionment is the situation where the casualty is caused by a combination of perils which have struck the interest insured during different insurance periods. This problem has been the subject of exhaustive discussions, and the solution follows from the special rules explained in § 18.

§ 21. Combination of marine and war perils

This paragraph is new.

It is an undisputed fact that it was the «free» rule of apportionment which led to the high frequency of litigation between the war-risk and the marine risk insurers during World War II. Because each individual case had to be assessed on the basis of its specific merits, it was difficult for supplementary legal rules of law to develop through legal usage. There was not — unlike during World War I — a crystallization of certain typical cases, which came within the province of one or the other insurer. Instead each case became to a certain extent a doubtful case, because it was impossible to predict the exact percentage which the court would refer to war and marine peril respectively. The fact that, from an overall point of view, a more or less equal distribution of the losses was made, has also contributed to establishing the view that a fairly similar financial result could have been achieved in a simpler and less costly manner. It was therefore agreed that for the conflict situation war/marine there ought to be a causal rule which it was easier to practice.

The solution arrived at, which is contained in this paragraph, is to the effect that in the event of a combination of war and marine perils, the dominant-cause rule shall in principle be applied. This is expressed by providing that the entire loss shall be regarded as caused by the peril group which has been the «dominant» cause. If the application of this rule gives rise to any doubt — in other words, if it is difficult to say that one of the peril groups is «dominant» — the loss shall be divided equally between the two groups.

When comparing the strength of the two perils one should bear in mind that the insurances against marine and war perils are two equal types of insurance which any

shipowner would want, or would at least have the opportunity and invitation, to take out. Hence, there is no reason to operate with such a «dominant-cause rule», which is probably practiced by the courts in personal accident insurance, cf. above under § 20. This is of particular relevance in situations where one of the insurances is for some reason missing. The decision must in other words be made regardless of whether the ship-owner may have failed to take out insurance against war perils.

It is difficult to say anything in general about the extent to which the rule of apportionment set forth in the 2nd sentence of this paragraph shall be applied. It may have greater or lesser impact, depending on the degree of predominance required in order for a peril to be deemed «dominant». The choice of this word implies a clear requirement that there must be quite a substantial predominance. It is not sufficient to reach — perhaps under doubt — the conclusion that one of the perils is somewhat stronger than the other. Seen in relation to the apportionment of settlements during the reign of the 1930 Plan, one might perhaps say that an equal distribution should be effected if a 60/40 distribution would have been chosen, but not if the result would have been 75/25, or more. In borderline cases decisions will necessarily be discretionary, but there is reason to believe that the discretionary basis indicated by the new rule will give the parties less of an incentive to submit the issues to the courts.

The rule of apportionment is also subject to another limitation in the relationship between war-risk and marine-risk insurance. In accordance with the 1930 Plan the new Plan refers certain types of losses to the war insurer's scope of cover, regardless of whether marine perils have been a contributory cause, cf. § 22. In the event of such a loss, there will be no question of either regarding the marine peril as the dominant cause, or making a 50—50 distribution of liability. Further details regarding this rule are discussed below under § 22.

When applying the special causal rules in the war/marine conflict only perils which materialized before the casualty in question and had a bearing on the physical damage to the ship shall be taken into consideration, as far as repair costs are concerned. Hence, the increase in the costs of the repair work caused by the war situation shall not be taken into consideration, regardless of whether the price increase was a fact at the time of the casualty, or did not occur until later (cf. ND 1943.417 NV Haarfagre). Otherwise the war-risk insurer might be held liable to pay 50% of the repairs of a pure marine casualty, if the price increase of repair work had been sufficiently steep.

§ 22. Losses deemed to be caused entirely by war perils

This paragraph corresponds to § 42, No. 1, 1st sentence, cf. No. 2, of the 1930 Plan.

As already mentioned, one of the methods which the 1930 Plan used when drawing the line between the scope of cover of the war-risk insurers and that of the marine insurers was for the so-called «war damage» to be covered entirely by the war-risk insurer. If damage according to its nature was «war damage», no apportionment was to be made, even if marine perils constituted a cause contributory to the loss. In § 42, No. 2, of the 1930 Plan «war damage» was defined as «damage which according to its nature or proximate cause is characteristic of the state of war and which it is therefore unnecessary to take into account in marine insurance in times of peace». This was followed by an enumeration of four items. Item a) mentioned damage caused directly by arms, item b) deliberate destruction with a pure war motivation, item c) condemnation in prize and other war-motivated confiscation, and item d) provisional war-motivated measures which cause loss of income or capital or costs. It appeared clearly from the text that the enumeration was meant only to give examples. Hence, no antithetic construction was intended.

Since the Plan is based on the dominant-cause rule in the event of a combination of marine and war perils (§ 21), the need for such rules is considerably less than under the 1930 Plan. It is inconceivable that the war peril will not be regarded as the «dominant cause» in the event of destruction or measures, as mentioned in § 42, No. 2, subparagraphs b)—d), of the 1930 Plan. On the other hand, it is definitely conceivable that damage caused by arms or other implements of war, may have such

a strong connection with marine perils that a 50—50 distribution may be arrived at, if there were no special rules. It is e.g. conceivable that the ship suffers an engine breakdown and is carried by wind and current into a minefield, with which the crew is thoroughly familiar. With this and similar cases in mind it is established in subparagraph (a) of this paragraph that the war peril shall be regarded as a dominant cause when «the ship is damaged through the use of arms or other implements of war», and such use is either motivated by war or takes place during military manoeuvres in times of peace.

The provision is only applicable when the use of the implement of war constitutes the direct and immediate cause of the damage to the ship. If e.g. a dock is damaged by an implement of war and the ship is subsequently damaged by the tide, it is conceivable that the war peril will be regarded as a dominant damage cause under § 21, but not under this paragraph.

The paragraph is similarly applicable in respect of the other insurances on the ship. If the ship, due to the damage sustained, is prevented from performing a charter-party, the war peril shall be regarded as the dominant cause of the freight loss, not only when the ship is a total loss or is condemned, but also in the event of a cancellation of the contract of affreightment, for which the insurer is liable (§ 250 (c)).

It may sometimes be doubtful what «implements of war» are, see e.g. ND 1946.225 NV Annfin (damage caused by collision with submarine in action regarded as «war damage» under § 42 No. 2 of the 1930 Plan), ND 1944.33 NV Vestra (damage caused by the paravane fastening on the warship with which the ship collided, not deemed to be «war damage»), and ND 1947.465 NV Rogaland (damage resulting from the blowing up of explosives, which were carried by another vessel to German fortifications, not deemed to be «war damage»). However, also this question will be of less practical importance after the dominant-cause rule has been adopted as a basis in the event of a combination of marine and war perils.

If the implement of war leaves latent damage, which is not discovered until during a later insurance year, the damage itself shall of course, be covered by the war-risk insurer of the year when the damage occurred. But in relation to any further losses, which the latent damage causes, it must under § 18 be deemed to be an ordinary marine peril striking the ship in connection with the casualty.

Under subparagraph (b) of this paragraph the war peril shall also be regarded as the dominant cause when the loss «is attributable to the ship, in consequence of war or warlike conditions, having an alien crew placed on board, depriving the Master, wholly or partly, of his free command of the ship». In such cases the insurance against marine perils was under the 1930 Plan suspended and the entire risk placed with the war-risk insurer (§ 42 No. 1, subparagraph 2, cf. § 43 No. 1, subparagraph 2). However, it was considered sufficient for the purposes of protecting the marine risk insurer's position to have rules based on causation by which the war-risk insurer is solely liable where the measures taken by the alien crew have at least been a contributory cause of the damage. However, if the casualty is entirely attributable to «civil» causes, e.g. heavy weather on an open stretch of sea, which the ship would have had to cross in any circumstances, the marine insurer shall be liable.

The concept of «alien crew» has been thoroughly analyzed in legal usage from World War II (see notably ND 1943.452 NV Ringar). It must in principle depend on a concrete evaluation of the aliens' instructions and conduct whether they can be said to «wholly or partly have deprived the Master of his free command». If a pilot is placed on board the ship for compulsory pilotage ordered by the relevant authorities in waters where there are war perils, this paragraph is not applicable merely because the pilot is authorized to determine the vessel's course. If the pilot commits an error with the result that the ship runs aground, the ordinary causation rules are to be applied. The «alien crew» must have been placed on board in order to exercise a control comprising more than control of the navigation of the ship. The purpose may e.g. be to ensure that the ship puts into a port of control, or prevent it from escaping to the enemy.

§ 42, No. 1, subparagraph 2, of the 1930 Plan, referred to «the free control of the

navigation or manoeuvring of the ship», whereas this Plan uses the term «the free command of the ship». This latter term comprises something more. It is e.g. conceivable that the alien crew interferes with the handling of the cargo with the consequence that the ship is damaged or suffers some other type of loss, which is covered by the insurance. The provision is applicable also to such cases.

Under § 42, No. 1, subparagraph 2, of the 1930 Plan, the alien crew referred to must have been placed on board «in consequence of a war having broken out or which is threatening to break out», whereas the new Plan uses the term «in consequence of war or warlike conditions». The actual difference is hardly a major one, but the new wording emphasizes that the decisive factor is not the risk of a new war breaking out, but how extraordinary conditions are at the location where the alien crew is placed aboard the ship. «Warlike conditions» may therefore prevail also in the event of revolutions, local insurrections, and the like.

The provision contained in subparagraph (c) of the paragraph corresponds to § 6, subparagraph 2, of the War Hull Policy, but goes somewhat further than that provision. Under § 77 II B c of the 1930 Plan loss or damage to lifeboats whilst swung out is not covered. However, the War Hull Insurance undertook to indemnify loss of or damage to lifeboats, which were swung out because of war perils. § 176 (j) affirms these rules, it being laid down that the hull insurer shall not be liable for lifeboats, which are lost or damaged whilst swung out while the ship is under way, unless this (i.e. the swinging out) is a consequence of war perils. As a rule marine perils will also contribute to the loss of such a life-boat (it is torn off or damaged in rough weather), and the resulting position might therefore easily be that the loss had to be apportioned under § 21. However, it is reasonable to attribute these losses in their entirety to the war-risk insurer in accordance with practice during World War II.

Subparagraph (c) of this paragraph comprises not only loss of or damage to the life-boat itself, but also any other damage which the lifeboat causes to the ship, e.g. to davits and deckhouse. On the other hand, the rule is not applicable to other losses which are more indirectly attributable to the fact that the lifeboat was swung out, e.g. liability for damages in connection with a collision caused wholly or partly by the fact that a lifeboat whilst swung out has reduced visibility from the bridge. Depending on the circumstances, however, such a loss may be subject to a fifty-fifty distribution in accordance with the rule in the preceding paragraph.

If a lifeboat while swung out damages a crane or a warehouse while the ship is in the process of putting alongside the quay, liability vis-à-vis third parties must normally be borne by the marine risk insurer, in view of the fact that the failure to swing the lifeboat in before the ship puts alongside constitutes an error of seamanship.

§ 23. Loss attributable either to marine or to war perils

This paragraph corresponds to § 42 No. 3, subparagraph 1, and § 43 No. 2, subparagraph 1, of the 1930 Plan.

Special problems arise if the casualty has occurred under such circumstances as to make it uncertain whether it is attributable to marine or to war perils. The above mentioned provisions in the 1930 Plan concerned ships which «disappeared under such circumstances that it is uncertain whether the loss is due to marine or war perils», and established that in such cases liability should be divided between the marine risk insurers and the war-risk insurers «due regard being had to the various contingencies which must be taken into account when considering the question of cause». According to information to hand the rule has worked satisfactorily as far as ships which disappeared are concerned. However, the criterion «disappeared» is not clear, cf. the *Strong* case (ND 1954.76 NH), where the bow of the ship was observed for a short while by passing fishermen immediately before she foundered. There are also many other situations than that of the «disappeared» ship where it is difficult or impossible to establish the cause of the casualty. In those situations it was long uncertain what rules relating to the burden of proof were applicable in the relationship between the assured and his two insurers. The *Banan* judgment (ND 1956.129 NH) established that the rule of apportionment contained in § 42 No. 3, subparagraph 1, of the 1930 Plan,

was to be applied analogously to all casualties when it is uncertain whether the loss is attributable to war perils or to marine perils.

The Plan confirms the rule on which the *Banan* judgment was based. If it is impossible to decide whether the casualty was caused by war perils or by marine perils, liability shall be divided between the two insurers. Also in this situation there is no question of anything but a 50—50 division, cf. § 21.

That the war perils, respectively the marine perils, constitute «the more probable cause» means that there is a decidedly greater probability that it is these perils which have caused the casualty rather than other perils. Under the rule of the Plan the war-risk insurer would therefore have had to be fully liable in the cases where, in accordance with the 1930 Plan, a 15% or 20% share has been apportioned to the marine risk insurer. On the other hand, the equal-distribution rule is not subject to the condition that there is total uncertainty as to the cause of the casualty. A slight preponderance of probability in one direction or the other should not result in the relevant insurer being held wholly liable.

Chapter 3

Duties of the person effecting the insurance and of the assured

This chapter regulates the effect of the failure of the person effecting the insurance or the assured to perform the duties imposed on him by the contractual relationship with the insurer. These duties are also subject to a detailed regulation in ICA. The provisions of the Act are only mandatory in marine insurance where the assured has negligently caused the loss (section 20 of ICA) or has failed to perform the duty to prevent loss (section 52 of ICA), but by and large the Plan complies with the rules of that Act, also where these are not mandatory.

An omission on the part of the assured will often come under several of the provisions of the Plan simultaneously. Thus, both the rules relating to alteration of the risk and to violation of safety regulations will become applicable if the assured fails to comply with the prescribed, periodic class survey with the result that the ship loses its class (see §§ 48 and 31, subparagraph 2). In such cases the insurer may in principle apply the rule which leads to the most favourable result for him. However, one cannot rule out that certain of the provisions in the Plan, which regulate the effect of special omissions on the part of the assured or other factors, will be regarded as exhaustive. It is not possible to issue further directives as regards construction in this respect.

Subdivision 1

Duty of disclosure by the person effecting the insurance

The rules contained in this subdivision are on all essential points in accordance with sections 4—9 of ICA. The rules relating to the duty of disclosure are admittedly not mandatory in marine insurance, cf. section 10, subsection 1, of ICA. However, the 1930 Plan provided the person effecting the insurance with the same protection which he has under the rules of the Act, and the new Plan makes no alterations in this respect.

A new rule has been added, viz. § 30, relating to the insurer's right to require particulars from the classification society.

Furthermore, the special rules contained in § 11 of the 1930 Plan relating to retrospective insurances have been deleted. The rules contained in subparagraph 1 of that paragraph must be assumed to follow from the other rules relating to the duty of

disclosure, it being obvious that the person effecting the insurance must in the event of a retrospective insurance inform the insurer about everything he knows about the development of the risk during the period of time elapsed, which the insurance is supposed to cover. Under § 11, subparagraph 2, of the 1930 Plan, the insurance did not commence until the time the agreement was made if the insurer had not been given «proper information about the time of sailing». If this means that an excusable mistake on the part of the person effecting the insurance is enough to deprive him of cover, the rule is too strict, cf. § 27. And a blameworthy omission on this point may come under the general rules.

§ 24. Scope of duty of disclosure

This paragraph corresponds to § 7 of the 1930 Plan and section 4 of ICA.

The specification of the extent of the duty of disclosure is somewhat different from the specifications in ICA and in the 1930 Plan. According to both of these the duty of disclosure is limited to circumstances with which the person effecting the insurance is familiar and, under ICA, it is even a condition that he should understand that they are of importance to the insurer. However, the extent of the duty of disclosure should be established by objective criteria. The subjective factors — whether the person effecting the insurance knew of a certain fact, or whether he should have understood that the insurer would attach importance to it — become important when it is a question of limiting the insurer's liability under §§ 25 and 26. The right to terminate the insurance under § 27, however, may be exercised by the insurer, even if no blame attaches to the person effecting the insurance, but the condition must nevertheless be that on one point or another information has been withheld from the insurer which it would have been important for him to have. It is only possible to determine this condition if the extent of the duty of disclosure is established by objective criteria, isolated from the subjective situation of the person effecting the insurance.

When deciding whether the insurer has been given incomplete information, so that he will be entitled to exercise the right to terminate the insurance contained in § 27, decisive importance cannot be attached to what the insurer in question himself alleges would have been important for him to know when entering into the agreement. For his views will easily be influenced by subsequent developments. One must ask the question what information an insurer will normally want and has the right to demand in order to accept an insurance of the kind in question. Here the need will, of course, vary from one type of insurance to the next. It is not possible to give a complete list of such information.

Subparagraph 2 of this paragraph corresponds to § 7, subparagraph 2 of the 1930 Plan. ICA contains no similar rule relating to a subsequent duty of disclosure. The rule will e.g. be applicable when the person effecting the insurance realizes that the vessel is considerably older than what was stated at the time the insurance was taken out. For coastal vessels this is a not uncommon situation.

When the person effecting the insurance later corrects his information regarding risk, the insurer may want to terminate the insurance under § 27, or demand an additional premium under § 117. If the person effecting the insurance neglects to disclose circumstances of which he later became aware, the insurer's liability will be limited under § 26, subparagraph 2, 2nd sentence.

§ 25. Fraud and dishonesty

This paragraph corresponds to § 8 of the 1930 Plan and section 5 of ICA.

The paragraph is in accordance with the general law concerning invalid contracts. Whether the conduct of the person effecting the insurance is so blameworthy as to merit the characterization dishonest must be decided on a case-to-case basis. Generally speaking, the agreement may be considered void even if the person effecting the insurance did not have positive knowledge of the actual circumstances at the conclusion of the contract, if he realized that there was reason to check, but neglected to do so. Deliberate, gross negligence may in other words be stamped as «dishonest».

Also a subsequent omission to correct the information may, depending on the circumstances, be characterized in the same way.

§ 8, subparagraph 1, 2nd sentence, of the 1930 Plan, provided that if the person effecting the insurance «has disregarded what is considered generally accepted business principles», this was tantamount to dishonesty. The provision hardly contained any reality, beyond the honesty requirement, and has therefore been deleted.

§ 26. Other neglect of the duty of disclosure

This paragraph corresponds to § 9 No. 1 of the 1930 Plan and section 7 of ICA.

The provision is applicable when the person effecting the insurance «in any other way has neglected his duty of disclosure», i.e. when he can be blamed for something, but his conduct cannot be characterized as fraudulent or dishonest. His conduct is in other words negligent. This appears from his «neglect» of the duty of disclosure, the Plan consistently using the term «neglect» about circumstances which are, objectively speaking, imputable to the person in question.

If the insurer would not have accepted the insurance if the person effecting the insurance had made such disclosures as it was his duty to make, the insurer is completely free from liability, cf. subparagraph 1 of the paragraph. It is the insurer who has the burden of proving that he would not have entered into any agreement. However, it is sufficient if he establishes that there is every probability that he would not himself have accepted any such insurance. What other insurers would presumably have done is in actual fact irrelevant.

Under subparagraph 2 the insurer's liability is limited according to the rule of causality if he would presumably have accepted the insurance, but on other conditions. The word «conditions» is aimed both at his agreement with the person effecting the insurance and at the other arrangements he would have made if he had known all the relevant circumstances. If the insurer would have taken out a higher reinsurance, he will therefore be free from liability if the casualty is attributable to a fact which was not disclosed to him. If it has been established that the person effecting the insurance has shown negligence, either when the contract was concluded or later, he has the burden of proving that the undisclosed risk factors were irrelevant to the casualty, or that it occurred before he was able to rectify his information.

If the casualty is attributable to a combination of risk factors of which the insurer was aware, and factors which the person effecting the insurance has neglected to disclose, liability must be limited under the general rule of apportionment contained in § 20. On this point the new Plan differs from the 1930 Plan, which let the insurer's liability lapse altogether as soon as an undisclosed risk factor «has had any influence on the occurrence or the extent of the loss». The right to apply the rule of apportionment in these situations will make the rules relating to the duty of disclosure more flexible and open up a possibility of making a deduction from the compensation when the negligence on the part of the person effecting the insurance has been of minor importance. There is reason to believe that the preventive effect of the rules has thereby all in all become greater. If the choice is between awarding full compensation or nothing at all, a court of law will normally be reluctant to choose the latter alternative, and prefer to reduce the demands as regards due care to be shown by the person effecting the insurance.

Even if the insurer is protected by the causality rule, it may be in his best interest to be released from the contract of insurance, among other reasons because the proof of the cause of casualty may be uncertain. Under subparagraph 3 of this paragraph he is therefore entitled to terminate the insurance on giving 7 days' notice. The notice period commences from the moment the notice has reached the assured, cf., however, section 33, subsection 3, of ICA.

§ 27. Neglect of the duty of disclosure not imputable to the person effecting the insurance

This paragraph corresponds to § 9 No. 2 of the 1930 Plan and section 6 of ICA.

If the disclosure made with regard to risk is incomplete without any blame attaching to the person effecting the insurance, the insurer is liable in accordance with the contract concluded. However, he may terminate the insurance on giving fourteen days' notice, and demand an additional premium under § 117, subparagraph 1. What is meant by incomplete disclosure is discussed above under § 24.

Under § 9 No. 2, subparagraph 2, of the 1930 Plan, the person effecting the insurance could meet a demand for an additional premium with a demand for a reduction of the sum insured to make it equivalent to the premium originally agreed on. A detailed regulation of these questions is hardly called for. The parties would, in the event, have to negotiate an amendment of the contract. Hence, according to § 117, subparagraph 4, the person effecting the insurance is entitled to terminate the contract if the insurer demands an additional premium for a future period of time.

§ 28. Cases where the insurer cannot plead insufficient disclosure

This paragraph corresponds to § 10, subparagraphs 1 and 3, of the 1930 Plan, and section 9 of ICA.

Under ICA it is only the right to terminate the contract and to react against incorrect information attributable to negligence which the insurer loses if he was aware of the true facts at the conclusion of the contract. He may nevertheless invoke fraud and dishonesty on the part of the person effecting the insurance. Under the 1930 Plan the insurer could not invoke fraud either. This rule is maintained in the new Plan. The situation here will be that at the conclusion of the contract the insurer is aware of the fact that the person effecting the insurance gives incorrect information, but he nevertheless accepts the insurance. If the insurer were then to have the right to plead fraud at a later stage, e.g. after the occurrence of a casualty, he would have the opportunity to speculate at the expense of the person effecting the insurance.

If the circumstances, about which incomplete information has been given, have ceased to be of importance to the insurer, he may nevertheless plead fraud or dishonesty on the part of the person effecting the insurance. This follows from the fact that subparagraph 2 of the paragraph refers only to §§ 26 and 27, and does not mention § 25. But it is a pre-condition that the insurer reacts within a reasonable period of time once he has become aware of the correct circumstances. Admittedly, his duty to notify under § 29 does not apply if the person effecting the insurance is guilty of fraud or dishonesty. But the insurer cannot leave this an open question to see what is the most favourable for him. This is where the principle contained in the first sentence of the paragraph comes into play.

§ 29. Insurer's duty to notify

This paragraph corresponds to § 10, subparagraph 2, of the 1930 Plan, and section 8 of ICA.

The insurer has no formal duty to notify the person effecting the insurance if he has acted fraudulently or dishonestly. However, as mentioned under § 28, this does not mean that the insurer can leave the question open indefinitely once he has become aware of the facts.

§ 30. Insurer's right to require particulars from the classification society

This provision is new.

In shipowner's insurance the information, which the relevant classification society has, will be of vital importance. This applies both in connection with the conclusion of the contract and during the term of the insurance, e.g. if the insurer considers exercising his right to terminate the insurance under § 50.

A shipowner is always entitled to receive all the particulars which the classification society is able to give about the ship. Whether the insurer has the same right will depend on the statutes of the relevant classification society. According to the statutes of Det norske Veritas an insurer, who is a member of Veritas, may demand information direct. In practice information is normally only given to the leading

insurer of the ship in question. Other insurers must prove that they have the shipowner's consent.

This paragraph imposes a duty on the person effecting the insurance to provide on demand the insurer with all information, which the classification society is from time to time able to give about the condition of the ship. In practice this duty will normally be discharged by the shipowner giving the insurer a written authority to obtain such information to the extent such authority is required by the classification society. The Plan obviously cannot order the classification society to give out information, which it would otherwise in any circumstances have been able to withhold. This is emphasized by the stipulation that the information shall be «available».

If the shipowner refuses to cooperate, thus preventing the insurer from getting the information he wants from the classification society, this will represent a major breach of the contract of insurance. Such a breach of contract would probably entitle the insurer to terminate the contract, also without any express authority, but to avoid any misunderstanding, the right to terminate the insurance is specifically regulated in subparagraph 2 of the paragraph.

It will very often be in connection with the claims settlement following a casualty that the insurer wants to obtain information from the classification society, e.g. to substantiate an allegation that inadequate information regarding risk has been given, or that the assured has been aware of a shortcoming with regard to seaworthiness. The situation will then be governed by § 83 subparagraph 2.

Subdivision 2 Alteration of the risk

This subdivision corresponds to §§ 27—30 of the 1930 Plan and sections 45—50 and 68 of ICA. These provisions contain the general rules relating to an increase of the risk, as well as the rules relating to a breach of a trading warranty and other deviation. However, the Plan has also transferred to the subdivision concerning alteration of the risk other related provisions, viz. § 40 regarding illegal undertakings, §§ 41 and 42 regarding the effect of requisition, and §§ 43 and 44 regarding removal of the ship.

The general rules contained in ICA relating to an increase of the risk are set forth in sections 45—50. The rights these rules give the insurer correspond to the rights he has when incomplete information has been given regarding the risk. Hence, the insurer is entitled to terminate the contract or demand a limitation of his liability under the causality rule, the latter, however, only if the assured has caused the increase of the risk intentionally or has neglected to notify the insurer thereof. The rules are not mandatory in marine insurance, cf. section 50, subsection 3, of ICA, but the 1930 Plan complied with the rules of the Act, and the same goes for this Plan.

During the revision work the question was raised whether the insurer should also be authorized to issue special safety regulations for the assured when an alteration of the risk occurs. However, it was decided that the reactions indicated by ICA must be sufficient protection for the insurer. In any circumstances, he will be able to get out of the insurance by giving fourteen days' notice, and in the meantime the assured will have the burden of proving that liability, if any, was not caused by the altered circumstances.

The general rules relating to the effect of alterations of the risk are contained in §§ 31 to 36. These provisions will hardly be invoked to any great extent, as the practical incidents of increased-risk cases are in practice regulated by separate provisions. Also the rules relating to seaworthiness and safety regulations contained in Chapter 3, Subdivision 3, comprise a number of cases which would otherwise have been evaluated under the general increase-of-risk rules. The same applies to the change-of-ownership rule in § 133.

The rules contained in this and the following subdivisions are aimed at the «assured» and link legal consequences to his acts or omissions. The assured is the one who owns the financial interest, which has suffered the casualty, and is accordingly the one who is entitled to the compensation, cf. section 2 of ICA. One and the same casualty may give rise to claims for compensation from several assured under one and the same contract of insurance (e.g. where the ship is owned by joint owners). As a basic principle each assured shall be evaluated separately. Negligence on the part of one will have no effect on the others, but exceptions are conceivable. It is not necessary for the assured to have acted personally in order for the rules to be applicable. To a certain extent the assured must be identified with the people who act on his behalf. These questions — to what extent there shall be an identification among several assured and between the individual assured and his people — will be discussed collectively in Chapter 3, subdivision 6.

§ 31. Alteration of the risk

This paragraph corresponds to § 27 A, subparagraph 1, of the 1930 Plan, and section 45, subsection 1, of ICA.

A contract of insurance provides that the insurer shall bear the risk of certain specific perils, to which the interest insured is exposed. If one of these perils increases in intensity, this does not represent an increase of the risk which the insurer may invoke. If the ship is overtaken by a violent storm or gets into ice-filled waters, this does not mean that the assured has a duty to notify the insurer under § 34.

It is therefore necessary to distinguish between alterations of the risk which constitute a relevant breach of an implied condition of the contract of insurance, and alterations which are not of such a nature. This paragraph stipulates two general conditions which must be satisfied: A change in the external circumstances, which are to form the basis of the insurance, must have taken place, and the peril must in consequence thereof have altered contrary the conditions on which the contract is based. In both of these respects the decisive factor will be a construction of the existing contract of insurance. The question will be whether the insurer should be obliged to maintain the cover without any additional premium in the new situation which has arisen, or whether it would be reasonable to give him the opportunity to apply the reactions outlined by ICA and the Plan. On this point it will to a large extent be necessary to resort to general doctrines of insurance law and the law of contracts. It is not possible to give any treatment of all the relevant instances.

Sections 45 ff. of ICA refers only to an «increase in the risk». In legal theory a distinction has in some places been made between an «increase in the risk» and a «total alteration of the risk». In the event of an increase in the risk the rules contained in sections 45 ff. of ICA should be applicable, whereas in the event of a total alteration of the risk the insurer should have the right to disclaim the contract of insurance entirely without going the route of terminating the contract. This distinction has no support in legal usage and has been abandoned in recent legal theory. However, the essence of the doctrine of «total alterations of the risk» is that the identity of the insured interest must be maintained. E.g., the assured cannot at will substitute the subject-matter insured with another and demand that the rules relating to an increase of the risk shall apply. If the insurance covers anticipated profits under a time-charter concluded with A, the shipowner cannot, when later cancelling the charter-party and instead concluding an agreement for consecutive voyages with B, demand cover under the existing contract of insurance, possibly with any adjustments which the rules relating to an alteration of the risk would warrant.

That the Plan talks of an «alteration of the risk» and not an «increase of the risk» therefore does not mean that the rules are intended to have a wider scope of application than the corresponding rules contained in ICA. The term was chosen with a view to situations where although it is possible to establish that the risk has altered through a change in the external circumstances, it is difficult to decide whether it has become demonstrably greater.

In the event of radical alterations of the risk the insurer will often be able to

establish that he probably would not have accepted the insurance if he had known that the alteration would take place. Under § 32, subparagraph 1, the material result would in that case be the same as according to the doctrine of a «total alteration of the risk». Hence, if we imagine that a Norwegian pleasure craft is insured, without the trading limits being specifically restricted to Norwegian or Nordic waters, it would constitute a radical alteration of the risk if the owner takes the boat to California and uses it for pleasure sailing there, and the insurer would probably be entitled to avoid liability under § 32, subparagraph 1.

In subparagraph 2 of this paragraph it is explicitly stated that it shall be regarded as an alteration of the risk if the ship loses her class or is transferred to another classification society, if at the conclusion of the contract it was an implied condition that the ship had a certain class. That the ship «loses» her class includes being degraded to a lower class. Without an explicit rule it might in such cases be doubtful whether any «alteration of the risk» in the sense of the Plan had occurred. Often such a case will also come under § 49, subparagraph 1 (the assured has e.g. violated the classification society's regulations regarding periodic surveys). The importance of also having the possibility of applying the rules relating to an alteration of the risk lies in the fact that, depending on the circumstances, the insurer may exclude liability entirely under § 32, subparagraph 1, without there being any question of looking into what caused the casualty.

It is not necessary for the assured to have stated at the conclusion of the contract that the ship has a certain class. It is sufficient that this is an implied condition when the contract is concluded. However, an unspecified implied condition that the ship is entered in a classification society should not be sufficient. It must be understood that the ship has a certain specific class. Such an implied condition will be satisfied if the insurer has filled in the policy on the basis of information from the register of the classification society in question.

If the ship has lost her class already at the conclusion of the contract, the provisions contained in §§ 24 ff. regarding the duty of disclosure will be applicable. If the assured has in good faith given incorrect information regarding the ship's class, the insurer will thus be able to apply the rule relating to termination of the contract contained in § 27.

The rules contained in Chapter 3, Subdivision 2, are all given for the protection of the insurer in situations where the risk has either become greater or at any rate different from what was anticipated at the conclusion of the contract. But it is also conceivable that the risk will obviously become less than assumed. The proper solution in such situations would in that case have to be to entitle the person effecting the insurance to a reduction of the premium. The question was considered in connection with § 119, but the conclusion was reached that it was not possible to give a satisfactory rule. The premium will always be stipulated with a view to the fact that the ship may be used for varying purposes, and normally the insurer should therefore be entitled to the agreed premium. In the very special situations where it would be reasonable to reduce the premium, the person effecting the insurance may succeed by virtue of the general rules of the law of contracts relating to the breach of implied conditions.

§ 32. Alteration of the risk caused or agreed to by the assured

This paragraph corresponds to § 27 A, subparagraphs 2 and 4, of the 1930 Plan, and section 45 of ICA.

As regards burden of proof and causation, reference is made to what is stated above under § 26.

§ 33. Insurer's right to terminate the insurance

This paragraph corresponds to § 27 A, subparagraph 5, cf. also § 27 B, of the 1930 Plan, and section 47 of ICA.

§ 34. Assured's duty to notify

This paragraph corresponds to § 28 of the 1930 Plan and section 46 of ICA.

§ 35. Cases where the insurer cannot plead alteration of the risk

This paragraph corresponds to § 30 of the 1930 Plan, section 49 of ICA and A 4 of the Hull Policy.

Subparagraph 1 of the paragraph stipulates the same rule as regards alteration of the risk as § 28, subparagraph 2, as regards the duty of disclosure. However, it is only his right under §§ 32 and 33 which the insurer loses when the situation once again returns to normal, not the right under § 34. The duty to notify the insurer of relevant alterations of the risk is from the insurer's point of view so important that an assured who has failed to comply with this duty must be prepared to receive a 3-day notice of termination, even if the risk has once again become what it should have been under the contract. This was explicitly stated in § 30, subparagraph 2, last sentence, of the 1930 Plan, but, as far as the new Plan is concerned, it follows from the wording of subparagraph 1 of this paragraph.

Under section 49, subsection 2, of ICA, the rules relating to an increase of the risk shall not be applied if the increase is caused by justifiable measures with a view to saving human life or property. This implies that the insurance shall be valid to its full extent when the insured ship is used in a salvage operation, even if there is no risk of losing human lives. § 30, subparagraph 1, of the 1930 Plan, limited the right to undertake salvage operations to situations where human life or health is in danger. During the revision at the time it was found unreasonable that the assured should have the right to engage in other salvage operations at the insurer's expense. However, the right to salvage was again extended by an addendum to Hull Policy A 4. According to that provision the insurer could not plead an increase of the risk, which was caused by the ship's participation in a salvage operation, unless she «with the assured's consent embarks on a voyage for the purpose of salvaging or assisting another vessel, or during a voyage, upon the instructions of the assured, commences such an operation».

The Plan is based on the same fundamental view as the Hull Policy, viz. that it is in the insurer's own best interest that a ship should be allowed to start salvaging material assets without this having any consequences for its insurances. However, this right should not be unlimited. If the situation is such that the shipowner is able to assess his chances of getting a salvage award against the loss of time which will arise and the damage which the ship might sustain, the shipowner will also have the possibility of taking out the necessary additional insurances to cover the increased risk during the salvage operation. What should be covered is the risk involved in the incidental salvage operation which is decided more or less spontaneously, usually by the master on his own. This limitation has been expressed by means of the requirement that the salvage action shall take place «during the voyage». This term implies that the salvage must be of such a nature as to make it natural for a commercial vessel to engage in the operation. A typical example would be that a disabled vessel is in the immediate vicinity of the insured vessel's course. However, there is also nothing to prevent the ship from leaving a port she has put into, in order to assist a disabled vessel, if the casualty has taken place close to the port, and the insured ship is the most obvious vessel to attempt the salvage operation. Drawing the borderline will often be a matter of applying discretionary criteria.

Under A 4 of the Hull Policy the rules relating to an increase of the risk were to be applied when the ship during a voyage «by order of the assured» commences a salvage operation. This limitation of the right to salvage has been deleted. It should be completely irrelevant whether or not the assured has consented to the salvage action. Otherwise it might give the master cause for doubt whether or not to report a salvage operation which he finds it natural and right to undertake. And the line between «consent» and «order» is so far from being clear that a distinction should hardly be made here. Provided the salvage operation takes place «during the voyage» it is therefore permitted.

If human life is in danger, the ship can of course be put into any type of salvage operation, without this having any consequences for the insurance.

A salvage operation will often entail the use of the insured ship for towing. This will normally have an effect on the liability cover under the hull insurance, but under § 194 (a) also this cover shall apply in full where the salvage action is allowed under subparagraph 2 of this paragraph.

If a salvage action is not allowed, the insurer may invoke §§ 32 and 33. In view of the fact that a termination of the insurance by giving 14 days' notice is hardly a practical solution in such a situation, the protection for the insurer will essentially follow from § 32: If the insurer would not have accepted the insurance, the contract shall lapse in its entirety, and otherwise he will have no liability for the consequences of the salvage attempt. However, the insurer will be liable for incidental damage, which arises quite independently of the salvage operation. It was considered whether the insurance should be suspended for the duration of the salvage operation, but it was decided that this would be too strict.

A salvage operation, which the assured decides to carry out in violation of subparagraph 2 of the paragraph, will represent an increase of the risk, of which he is obliged to notify the insurer under § 34. If he fails to do so, the insurer may use this negligence as a basis for terminating the insurance, even if the salvage operation did not result in any damage, cf. the earlier comments to subparagraph 1.

Under the Hull Policy A 4, subparagraph 1, the insurer never covered loss of or damage to hawsers sustained during a salvage operation which the insured ship has started. The same limitation follows from § 176 (f).

When determining a salvage award, regard must also be had to damage or loss suffered by the salvors, cf. section 225 No. 1 (f) of the Norwegian Maritime Code and, pursuant to section 228, subsection 2, thereof, damage shall be covered first when the salvage money is distributed. In so far as the salvage money is sufficient to cover the assured's loss, the insurer should be indemnified, cf. § 101, which makes the rules relating to claim for damages against third parties correspondingly applicable.

§ 36. Insurer's duty to notify

This paragraph corresponds to § 29 of the 1930 Plan and to section 48 of ICA.

§ 37. Ship proceeding beyond trading limits

This paragraph corresponds to § 27 A, subparagraphs 3 to 5, of the 1930 Plan, section 68 of ICA, and the Hull Policy B, subparagraph 2.

Under § 27 A, subparagraph 3, of the 1930 Plan, the insurance became inoperative when the ship proceeded beyond the trading limits defined in the contract of insurance. During the revision work it was submitted that English marine insurance allegedly contains more liberal rules relating to a situation where a ship proceeds beyond the trading limits and that similar rules should be incorporated in the Plan. Reference was made to I.T.C., Hulls, No. 5, according to which the ship is «Held covered in case of any breach of warranty as to ... trade, locality ... , provided notice be given immediately after receipt of advices and any additional premium required be agreed». However, this clause is not very clear, and it is doubtful whether it gives the assured a better position than the rules contained in § 27 of the 1930 Plan. This is because cover outside waters where it is «guaranteed» that the ship will stay is subject to the condition that the insurer is notified of the breach «immediately after receipt of advices» and that a subsequent agreement is reached as to an additional premium. If the requirement as to advice must be interpreted to mean that the assured shall give advance notice of a breach of trading warranties which he learns will take place, it is within the insurer's powers to decide whether or not the additional cover shall be given, and he will in any case have the right to dictate the premium. Hence, there is hardly any reason to copy the English system.

In recent years the trading limits have been steadily extended with the result that insured vessels can sail practically everywhere against additional premiums, which are laid down in the Hull Policy. However, it must be anticipated that also in the future

certain absolute trading limits will be fixed and, in the event of a ship proceeding beyond those limits, the rule is that the insurance becomes inoperative for the duration of the breach of the warranty. However, there is, of course, nothing to prevent the insurer in each individual contract of insurance from agreeing to hold the ship covered regardless of where she is sailing.

The rule as to a suspension of the insurance contained in subparagraph 1 of the paragraph is somewhat stricter than that in § 27 of the 1930 Plan. According to the latter provision a suspension was subject to the condition that the assured had ordered the ship to proceed beyond the stipulated limits or had consented to it. But there is also a need for a rule which makes it possible to crack down on negligence on the part of the assured. Such a rule is provided by subparagraph 1, 2nd sentence, of this paragraph. Whether «adequate instructions» have been given to the master will depend on the circumstances. There is reason to emphasize that it should not be necessary to define the trading limits again for each voyage the ship makes. General directions, which are sufficiently clear, are enough. The shipowner will have an invitation — and an obligation — to intervene with special directions if he has a concrete suspicion that the master intends to proceed beyond the trading limits.

The ship will have «proceeded beyond the trading limits laid down for the insurance» both when she proceeds beyond the geographical boundaries laid down in an agreement relating to time-insurance, and when she, under a voyage insurance, deviates significantly from the itinerary which she was assumed to follow.

The insurance will, of course, not be suspended if a breach of the warranty is necessary for the reasons set forth in § 35, subparagraph 2, cf. subparagraph 2 of this paragraph, or if the ship is forced to proceed beyond the limits because of prevailing weather or ice conditions. A suspension is also subject to the condition that the crew are aware of the fact that the ship has proceeded beyond the limits, in other words that the ship's current position is known.

If a casualty occurs after the insurance has again become operative after a deviation, the insurer's liability was under § 27A of the 1930 Plan subject to the condition that there was «no causal connection with any damage or accidents to which the ship or goods were exposed during the period the insurance was not in force». According to the new Plan one must here resort to the general causal rules contained in § 18. If it is known that the ship has sustained damage during the deviation, the insurer will not be liable for any new casualties resulting from such damage. This is because such casualties are attributable to the fact that the ship was «struck by the peril» during the period of suspension, cf. § 18, subparagraph 1, but as the damage is known, the special rule relating to unknown damage contained in subparagraph 2 of the same paragraph will not be applicable. If a separate hull insurance had been taken out during the period of deviation, any new casualties would be comprised by that insurance. On the other hand, if it was not known that the ship had sustained damage during the deviation, the new casualties would in their entirety come within the ordinary hull insurer's scope of cover.

Here, as in other cases, however, the rule of apportionment shall apply in the event of a combination of causes. If a subsequent casualty is attributable in part to some known damage, which arose during the period of suspension, and in part to risks to which the ship has later been exposed, the insurer shall be liable for a proportionate share of the loss, cf. § 20. On this point the Plan differs from the 1930 Plan.

In view of the fact that it is of decisive importance whether the damage which a ship has sustained while the insurance was suspended, was known, it is important for the insurer to be able to survey the ship to establish any damage which she may have sustained. Under § 38, subparagraph 2, the assured therefore has an obligation to have the ship surveyed in dock at his own expense immediately before and after the period during which the insurance is inoperative. Furthermore, the last sentence of the paragraph makes an amendment to the general causal rules contained in § 18 to the effect that the damage, which is established by such a survey, and which must have arisen during the deviation, shall be regarded as having been known when the insurance once again became operative. Assuming therefore that the ship sustains a

casualty after she has come back within the ordinary trading limits, but before the survey is undertaken and the survey reveals that the ship sustained some latent damage during the deviation and that the casualty must be attributable to that damage, the ordinary hull insurer will be without liability for the casualty.

In practice it will be customary for the shipowner, when he intends to send the ship out on a voyage which will be partly outside the trading limits, to take out a voyage insurance for that entire voyage. As long as the ship is within the trading limits for the time insurance, there will be double insurance. In order to avoid this, Hull Policy B, paragraph 2, subparagraph 1, provided that the time insurance shall become inoperative during the entire period of time which is covered by the voyage insurance. A corresponding rule is incorporated in subparagraph 3 of this paragraph. However, the Plan refers to a «separate insurance» instead of a «voyage insurance», in view of the fact that the relevant insurance may have been taken out on a time-basis.

Under § 27 A, subparagraph 5, of the 1930 Plan, the insurer could terminate the insurance on giving 14 days' notice in the event of a ship proceeding beyond the trading limits. Under § 25 the insurance would not become inoperative until the ship cast anchor or was moored at the first port she put into after the notice of termination, at the earliest. It did not appear clearly from the provision whether the insurer could exercise his right to terminate the insurance also after the ship had come back within the trading limits. During the deviation the insurer is sufficiently protected through the suspension rule. On the other hand, there is a genuine need to be able to terminate the insurance when the ship, because of the prevailing circumstances during the period of time she has been outside the trading limits, has become an essentially worse risk than she was before. Such a rule of termination has been incorporated in subparagraph 4 of this paragraph.

§ 38. Burden of proof where the ship proceeds beyond the trading limits

This paragraph corresponds to § 27 A, subparagraph 3, 2nd sentence, of the 1930 Plan, and the Hull Policy B, 2nd paragraph, subparagraphs 2 and 3.

Questions of evidence become very significant if the insurer excludes liability, not only for damage and other loss which verifiably arise during the deviation, but also under the general causal rules is without liability for losses which arise later and which are attributable to known damage which the ship sustained during the deviation. If the general rules of evidence were applicable, the insurer would have had the burden of proof as to the actual facts, which justify the application of the limitation of liability contained in § 37. However, both the 1930 Plan and the Hull Policy imposed a very strict burden of proof on the assured in these respects, and the Plan follows the earlier system.

Subparagraph 1 of this paragraph firstly imposes on the assured the burden of proof that the breach of warranty is not attributable to him. If the ship sustained damage while the insurance was inoperative, which was known when the insurance again became operative, the insurer shall not be liable for any subsequent casualties, in so far as they are attributable to such damage. Subparagraph 1 of the paragraph also imposes on the assured the burden of proof that the known damage has not had any bearing on subsequent casualties. The term «casualty or other similar circumstances» was chosen to imply that the assured has a very strict burden of proof on this point. Even if it may be doubtful that the ship had any verifiable damage when the deviation ceased, the insurer will not be liable if there is every probability that the ship had been exposed to risks, which constituted a cause contributory to the subsequent casualty. The «other similar circumstances», which the paragraph discusses, may e.g. consist in wear and tear or a general deterioration of the ship, which cannot be characterized as a casualty. By using the wording «whilst the insurance was inoperative», it is emphasized that the rule shall also be applied to casualties etc. occurring whilst the ship is in actual fact within the trading limits, but the original insurance is suspended because a separate insurance has been taken out, cf. § 37, subparagraph 3.

In order to avoid any doubts which may arise as regards evidence, both parties

will be interested in having established by means of surveys any damage which must be assumed to have occurred during the deviation. Subparagraph 2 of this paragraph therefore, like the Hull Policy, imposes on the assured an obligation to have the ship surveyed in dock at his own expense immediately before and after the period of deviation. However, the insurer may, of course, waive his right to a survey, and also without such explicit waiver the rule should be applied with common sense. There will not always be a drydock at hand where the ship happens to be, and the assured will not always know in advance whether the ship might be directed to proceed beyond the trading limits during the voyage.

It has been discussed whether there should be an express sanction if the assured, without the insurer's consent, fails to undertake a survey. However, the survey is essentially important with a view to securing evidence of the cause of any subsequent casualties, and if the assured fails to undertake a survey, he will have a considerably stricter burden of proof. There is hardly any need for any other type of reaction.

If the causal rules contained in § 18 were to have been applied in full, it would have been necessary to undertake the survey the moment the ship came back within the trading limits in order to ensure a completely effective protection of the insurer. This is, of course, impossible. Subparagraph 2, 2nd sentence, of the paragraph therefore modifies the general causal rule to the effect that damage, which is disclosed by a survey according to subparagraph 2, 1st sentence, of the paragraph, and which must have occurred during the period of deviation, shall be deemed to have been known when the insurance once again became operative. Furthermore, reference is made to the comments to the preceding paragraph.

§ 39. Notification of voyages

This paragraph is new.

Under § 28 of the 1930 Plan the assured was required to notify the insurer of alterations of the risk, and this duty to give notice also applied when the ship had been or was going to proceed beyond the trading limits. It seems to follow that in the event of a breach of the duty to notify, the insurer could terminate the insurance on giving 3 days' notice.

In view of the fact that the insurer is protected by the suspension rule if the ship proceeds beyond absolute trading limits, there is no great need for advance notification of such voyages. On the other hand, the insurer will, for the purpose of the calculation of premium, be interested in receiving notification of voyages outside the so-called «trading warranties», which entail an additional premium. However, this paragraph provides that the assured has a duty to give advance notification to the insurer in both cases. This duty applies also when he learns that the master has deviated without the shipowner's consent.

The provision is more of a regulation, and the reaction to a failure to give notification is therefore not very strict. But if the assured has neglected to give such notification on several occasions, this indicates such a lack of cooperation that the insurer should be given a reasonable right to get out of the contractual relationship.

If the breach of the trading warranties in a specific case represents an increase of the risk in relation to § 31, the stricter rule contained in § 34 also becomes applicable.

§ 40. Illegal undertakings

This paragraph corresponds to § 64 of the 1930 Plan, cf. also the provision contained in § 2, subparagraph 1, relating to «legal interest».

According to the 1930 Plan the insurer was entitled to apply very strict sanctions reactions when the ship was used for illegal undertakings. If the assured was or ought to have been aware of the facts, the insurance under § 64 No. 1 would automatically lapse. And even if the shipowner was in good faith, he was himself answerable according to Nos. 2 and 3 of the same paragraph, where the master or the crew had been guilty of customs fraud, infringement of import bans, carriage of contraband, or use of the ship for blockade-running. The entire insurance might also become void if the facts were so illegal as to make the interest «illegal», cf. § 2, subparagraph 1.

There is hardly any need for such strict sanctions. This paragraph provides that the insurer shall always be liable when the assured (the shipowner) is in good faith, and that liability shall otherwise normally be limited according to the causality principle. But if the ship, with the consent of the assured, is essentially used for the furthering of illegal purposes, the entire insurance shall terminate according to subparagraph 3 of the paragraph. This rule corresponds to the earlier prohibition against insuring an «illegal interest», cf. the comments under §§ 6 and 15.

Under subparagraph 1 of the paragraph the insurer is not liable for «loss that is a consequence of the ship being used for illegal purposes». The evaluation of the question of cause may here present difficulties. If the shipowner sends the ship on a voyage, the purpose of which is clearly illegal, and she runs aground during that voyage, one could say that the damage is a consequence of the illegal undertaking. However, it must be a condition that the damage is to a certain extent a foreseeable consequence of the illegal undertaking, as e.g. where the ship has to enter difficult waters in order to carry out a smuggling operation and runs aground in the process. The specific construction of the rule in this respect must be left to the courts.

It is further a condition that the assured was or should have been aware of the illegal undertaking at such a time that it would have been possible for him to intervene. That the crew, without the assured's knowledge, uses the ship for illegal purposes is a risk against which the assured should be covered, cf. § 232, which even affords the assured cover against liability for immigration and customs fines in consequence of crew's conduct. However, when the assured becomes aware of the facts, he should intervene without undue delay. If he fails to do so, the insurer is authorized under subparagraph 2 of the paragraph to terminate the insurance on giving 3 days' notice. The burden of proof of good faith rests with the assured.

A situation or an undertaking is illegal, not only when it is in contravention of Norwegian law, but also when it is illegal under the laws of the country to which the ship is subject in the situation in question. It must be decided on a case-to-case basis whether the assured had a duty to comply with prohibitions or orders issued by the authorities of another country, cf. also the comments to § 48.

Special problems arise when the assured's actions are in violation of rules of international law. Under § 64, No. 3, of the 1930 Plan, the insurer was unconditionally free from liability for the consequences of violations of international law. However, the provision was written with a view to a situation where Norway was neutral and the powers at war respected the general rules of international law relating to neutral shipping. In a future war it must be anticipated partly that Norway will become involved, partly that blockade-running and other similar actions will be clearly desirable from a national point of view. The consequences of such acts should therefore be borne by the war-risk insurance, cf. also here § 58 (c).

The consequence of a ship being used for an illegal purpose without the assured's knowledge will often be an intervention by public authorities. If the ship sustains damage in the course of a customs inspection, such damage comes within the scope of cover of the hull insurer against marine perils. The same applies if a ship is definitively seized because of the illegal activities. The fact is that damage and interventions of this nature do not come within § 16 (b) (cf. the comments to § 16), and are therefore not excluded from the marine insurer's perils. A temporary intervention, which does not result in any damage to the ship, will be no concern of the hull insurer's. Nor will any freight or loss-of-hire insurances taken out on the terms of the Plan cover losses arising from such temporary interventions.

It may at times be doubtful whether it is the insurer against marine perils or the insurer against war perils who shall pay compensation for the consequence of an illegal undertaking of which the assured was unaware. Decisive will be what is comprised by the term «other similar measures» in § 16 (b).

The rule contained in subparagraph 3 of the paragraph will be applicable, e.g. if the assured puts the ship into regular smuggling traffic. If this is the case, it should be irrelevant whether the ship also to a certain extent carries legal cargo. The decisive factor is whether the use of the ship was mainly determined by the illegal activities.

§ 41. Requisition

This paragraph corresponds to A 2, subparagraph 2, of the Hull Policy, and § 14 of the War Hull Policy.

As mentioned above under Chapter 2, Subdivision 2, the general marine risk hull insurance is suspended when the ship is requisitioned by State authorities, regardless of whether it is Norwegian, allied or alien State authorities who are effecting the requisition. The risk is transferred in its entirety to the insurer against war perils. However, for reasons which have been explained above, also the war-risk insurer is not liable for the consequences of a Norwegian or allied requisition. In the case of such requisition the war-risk insurance is therefore also suspended. These rules have been expressed in subparagraphs 1 and 2 of the paragraph. In subparagraph 3 the insurer has been given a right to terminate the insurance corresponding to the right he has under § 37, subparagraph 4.

If the ship is requisitioned for ownership, but the requisition later for some reason lapses, it must in relation to the rules relating to suspension be regarded as a requisition for use. The original insurances will therefore again become operative, provided the term of the insurance has not expired.

In connection with the requisition of other objects than the ship, e.g. insured equipment, it would be natural to apply the rules contained in this paragraph analogously.

§ 42. Notification of requisition

This paragraph is new.

When the insurance again becomes operative after a requisition, causal problems similar to those arising when the insurance has been suspended during a breach of trading warranties will arise. Also in the event of a requisition the general causal rule of the Plan, cf. § 18, shall be applied. If the ship has sustained latent and unknown damage during the period of requisition, the insurer will thus bear the risk as regards the subsequent results of such damage. Hence, it is very much in the insurer's interest to be notified of the return of the ship so that he can exercise his right to demand a survey under subparagraph 2 of the paragraph. Any latent damage disclosed by the survey shall be regarded as «known» in relation to § 18, cf. the reference to § 38, subparagraph 2, 2nd sentence. If the survey reveals that the ship is an essentially worse risk than before the requisition, the insurer will furthermore have a right to terminate the insurance under § 41, subparagraph 3.

Where the insurance has been suspended during a period of deviation the assured has the burden of proving that a subsequent casualty is not attributable to casualties or other similar circumstances which occurred during the deviation, cf. § 38, subparagraph 1, 2nd sentence. No corresponding rule is contained in this paragraph. If the ship has been requisitioned, it is therefore, according to general principles, the insurer who has the burden of proof as regards the cause, in view of the fact that he claims the casualty is attributable to a peril which is specifically excluded from the cover. However, if the shipowner fails to report the return of the ship, thus depriving the insurer of the possibility of securing the evidence, it is reasonable to impose the burden of proof on the assured. A rule to that effect is incorporated in the last subparagraph of this paragraph.

§ 43. Removal of ship to avoid condemnation

This paragraph is new.

Under the 1930 Plan the hull insurer could demand that a ship, which had been condemned by appraisal under the rules of the Plan, be removed to a different location in order for a new appraisal to be undertaken and the condemnation possibly be «lifted». For reasons explained in the commentary to § 166 below, the new rule provides that the insurer shall only have the right to demand a removal of the ship for the purpose of subjecting the damage to a proper survey.

A removal under § 166 will be in the nature of a defence measure by a hull insurer who has been presented with an allegation that the ship is fit for condemnation (i.e. a

constructive total loss). The ship will have extensive damage and the removal will normally involve a considerable risk. It is reasonable to place that risk with the insurer who has demanded the removal, cf. § 166, subparagraph 2, and the comments to that provision. As far as the other insurers are concerned, their liability will be reduced in accordance with the rules contained in this paragraph.

The provision is applicable to all insurers with whom insurances relating to the ship have been taken out. It may be invoked by the co-insurers under the hull insurance who are not behind the demand for a removal (cf. § 143, subparagraph 2, which gives each individual co-insurer an independent position during the negotiations concerning the condemnation question), and will otherwise be particularly significant for the P. & I. insurer. The additional loss, which may arise during or in consequence of the removal, first and foremost entails liability vis-à-vis a third party, as a result of a collision or in some other way. However, for a hull insurer the provision may also become relevant in a different respect: The wreck may have sustained further damage or become a total loss as a result of the removal so that proceeds will be correspondingly reduced. Also that risk shall be borne by the insurer or insurers who have demanded the removal.

The limitation of liability applies to any insurer «who has not accepted the removal», i.e. who has not explicitly or tacitly expressed that he agrees with the removal. An insurer who demands a removal under § 166 will therefore have to approach all the other insurers if he wants to establish the extent of his risk before the commencement of the removal.

An insurer who does not accept the removal does not bear any risk during the removal operation (unless the removal means that condemnation is prevented, cf. below). He is not liable for any loss which arises during the removal operation, even if the loss has no connection with the increased risk. He may also exclude liability in respect of losses which arise later, but only in so far as he establishes that the loss is attributable to the removal. In this connection a certain functional connection between removal and loss must be required. The insurer cannot exclude liability for a casualty, which strictly coincidentally happens to occur in the port to which the ship has been moved, on the grounds that the casualty would not have happened, had the ship remained where she was.

If an insurer objects to a removal, which is effected under § 166, this implies that he accepts that the conditions for condemnation are satisfied and that he is willing to settle with the assured on that basis. If the result of the removal is that the ship is *not* condemned, he will in actual fact benefit from it. However, if during or as a result of the removal a loss has arisen, which is comprised by the relevant insurer's insurance contract, it is reasonable that he shall be liable for such a loss within the limits of the net compensation he would have had to pay if the ship had not been moved. This rule is expressed in the paragraph.

§ 44. Removal of the ship to repair yard

This paragraph corresponds to § 75, No. 2 b, subparagraph 2, of the 1930 Plan.

A «removal» of the ship means that she makes a voyage under her own steam or under towage, the purpose of which is exclusively to bring her to a drydock or a repair yard. The voyage cannot be called a removal if the ship is in such good condition that she takes a new cargo to the port where the survey or repairs are to take place. On the other hand, this does not rule out the possibility that the ship keeps on board a cargo which was already there at the time of the casualty. The decisive point seems to be whether the ship is in such a condition that the shipowner might incur liability for unseaworthiness in respect of a new cargo taken on board after the casualty.

Normally a ship will not obtain the authorities' permission to sail in a state of unseaworthiness which affects the safety of the ship. However, in connection with a «removal» the authorities will regularly grant an exemption after having weighed the pros and cons in each specific case, where also any financial considerations in favour of a removal will come into play. Provided the assured puts all his cards on the table vis-à-vis the authorities, and obtains the necessary certificates, the insurer who is liable

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for the casualty cannot plead that the ship is unseaworthy during the removal. However, if the assured deliberately misleads the insurer on this point, he will lose his cover (cf. the rules relating to infringements of safety regulations) and this will apply to all insurances relating to the ship.

The Plan talks about two kinds of removals. Under § 166 an insurer may, as a countermove to a demand for condemnation, demand the ship removed to a port where she can be surveyed properly. In such a case the risk shall to a great extent be transferred to the insurer who demands the removal, cf. § 166, subparagraph 2, and § 43. An ordinary removal to a repair yard under § 184 is in a different position. Such a removal is a perfectly ordinary arrangement, which any marine insurer must be prepared to face in the course of the insurance period. In this respect there is much to be said in favour of all insurances being allowed to remain in effect without any additional premium during the removal (provided a seaworthiness certificate has been obtained).

Also an ordinary removal to a repair yard may, however, involve a considerable increase of the risk, if the assured chooses to have the ship repaired at a particularly remote repair yard, or at a place where the ship has to pass through particularly difficult waters. It is reasonable to impose the added risk involved in such a removal on the assured. From a legal point of view this is only feasible by each of the insurers being granted the right under certain circumstances to veto the removal, with the effect that the insurance in question is suspended and the assured will have to take out an insurance against the risk on his own.

This paragraph provides such a right for the insurer. It may be invoked by any insurer with whom an insurance relating to the ship has been taken out, cf. § 184, subparagraph 3, which explicitly establishes that the provision may also be applied by a hull insurer who is liable for the damage which is to be repaired.

The insurer's right to exclude liability during the removal is subject to the condition that the removal would involve «a substantial increase of the risk». Whether this is the case will have to be decided on a case-to-case basis in relation to each of the insurers who are invoking the provision. It is e.g. conceivable that a P. & I. insurer might object to (i.e. demand an additional premium during) a removal which takes place with a cargo on board, or which brings the ship into waters where there is a particular risk that no limitation of liability can be demanded. A hull insurer against marine perils might e.g. object to a particularly hazardous removal of a war-damaged ship, or to a removal which necessitates towage over open stretches of ocean.

The right of a hull insurer, who is liable for the damage to the ship, to apply the provision is subject to the condition that other and less risky possibilities of removal exist. If only one removal is possible if the ship is to be repaired, the alternative is necessarily a condemnation of the ship wherever she happens to be. If the hull insurers do not want a condemnation of the ship, they will have to accept the risk during the removal. A P. & I. insurer, on the other hand, may, depending on the circumstances, invoke this paragraph also in such a case. The same goes for a hull insurer who does not cover the casualty in question.

An insurer, who has objected to a removal, is not liable for a «loss that occurs during or in consequence of the removal». As regards the understanding of this term reference is made to the comments to the preceding paragraph. The risk, which the insurer in question excludes, is transferred to the insurer or insurers who are liable for the damage to the ship, and who have not excluded liability during the removal, cf. § 184, subparagraph 2. The assured will in that case have neither more nor less of a risk than he would have had during an ordinary voyage. Hence, if any new losses arise, he will have to bear any new for old deductions and deductibles which may have been agreed under the insurance in question. However, if also the insurer who is liable for the damage excludes liability, the assured shall bear the risk during the removal alone, and his risk may also become greater if he fails to notify the insurer of the removal, cf. below. — It follows from § 143 that the leading insurer's exclusion of liability also affects the co-insurers.

The assured must be notified of an exclusion of liability under this paragraph

before the removal is commenced, thus allowing the assured and his other insurers the opportunity to arrange for the necessary additional insurances. Subparagraph 1 of the paragraph accordingly imposes on the assured the duty to notify all his insurers of an intended removal, provided the removal can be assumed to involve an increase of the risk. The sanction against a failure to perform this duty is exclusion of liability for any loss which arises during or as a result of the removal for the insurers who have not received any notification. And here the risk is transferred to the assured, not to another insurer, cf. the wording of § 184, subparagraph 2. This may seem a strict reaction to an omission on the part of the assured. From the point of view of legal functioning, however, it is difficult to formulate any other satisfactory rule. A rule to the effect that the insurer in question would e.g. only be exempted from indemnifying «losses attributable to the additional risk during the removal» would create major difficulties in connection with the assessment of cause.

Subdivision 3 Seaworthiness. Safety regulations

§ 45. Unseaworthiness

This paragraph corresponds to § 62 Nos. 1 and 3 of the 1930 Plan and section 63 of ICA.

The seaworthiness rules are discussed by *Vislie* in «Forsikringstidende» 1937.75 ff., and by *Myrdahl* in AfS 1.27 ff.

The seaworthiness requirement plays a vital part in shipowner's insurance. The Plan makes no attempt to specify what is implied in a ship being unseaworthy. As a general guideline one might say that a ship is unseaworthy when she is not in the condition and not manned and equipped as she should be for the intended voyage according to generally accepted maritime standards. However, such standards provide little guidance in a specific case, and on this point it will, as before, be necessary to resort to legal tradition.

§ 62 No. 1, 2nd sentence, of the 1930 Plan made the seaworthiness rules «correspondingly applicable» in the event of defects or deficiencies in respect of manning, equipment, stowage etc. This is misleading. «Seaworthiness» comprises all the items listed here.

Under the Act on State Control of the Seaworthiness of Ships of 9 June 1903 No. 7, the Norwegian Ship Control shall supervise the seaworthiness of the commercial fleet. The Ship Control's Commission standpoint will, of course, be very important if there is any question of the ship being unseaworthy in relation to the insurance conditions, but it is not decisive. Hence, the insurer must be allowed in a subsequent litigation to plead that the ship was unseaworthy on departure, despite the fact that the official controlling bodies did not intervene.

A main question when drafting the rules concerning unseaworthiness rules is the importance which should be attached to the assured's subjective fault. Whereas there was earlier a tendency to regard seaworthiness as an objective condition for the validity of the contract of insurance, importance is in current marine insurance to a very great extent attached to the question whether the assured was or should have been aware of the deficiencies. Section 63 of ICA adopts a strictly subjective rule, except that the assured is in all circumstances identified with the master. Under § 62 of the 1930 Plan the master's knowledge was irrelevant, his misjudgements as regards seaworthiness being regarded as faults committed in connection with his service as a master, for which the insurer bears the risk. On the other hand, the 1930 Plan contained an objective seaworthiness rule for a ship which did not have a «class with a recognized classification society».

While the 1930 Plan was in force it was doubtful whether the objective seaworthiness rule applied also to ships, which are subject to the Norwegian Ship Control's supervision, or whether that supervision in relation to the seaworthiness

rules must be equated with the supervision conducted by Det norske Veritas and the other classification societies. The Central Union of Marine Underwriters has vis-à-vis its members consistently claimed that the objective rule should only be applied when the ship neither has any class, nor is subject to the Norwegian Ship Control (see Vislie, l.c. p. 77). The question was before the Supreme Court in 1958 (ND 1958.348 Symbol). No binding decision was made, but a minority of two judges held that the Ship Control could not be equated with a classification society when applying § 62 of the 1930 Plan. The minority's view later formed the basis of a judgment contained in ND 1962.59 Bergen Havsulen.

Under the new Plan the subjective seaworthiness rule applies to all vessels, both those that are subject to the Norwegian Ship Control's supervision, and those that are not subject to any public supervision. The intention has not been hereby to determine the form of control which provides the best guarantee for seaworthiness, but it is assumed that the risk of inadequate control on the part of classification societies or public authorities can at least be covered by insurance. It is therefore simply a question of premium whether the same seaworthiness rule shall apply to all categories of ships. There is, of course, nothing to prevent each individual contract of insurance from incorporating stricter provisions relating to seaworthiness. During the revision work it was thus intimated that this is what will happen as regards the small-craft fleet.

Like the 1930 Plan the Plan only attaches importance to the assured, disregarding any knowledge of unseaworthiness which the master may have had. As regards the position if the assured is at the same time master of the ship or a member of the crew, see under § 59 below.

§ 62 No. 1 of the 1930 Plan disregarded unseaworthiness which arose after the ship «last left port». This rule is well founded if the question arises of letting the assured pay for the master's negligence with regard to seaworthiness. After the ship has left port it is therefore reasonable to regard such negligence as nautical errors for which the insurer must accept liability, even if the errors result in the ship becoming unseaworthy for the further voyage. However, in so far as the assured himself was, or should have been, aware of the unseaworthiness, there does not seem to be any reason for drawing the line at the last departure from port. It is conceivable that messages about deficiencies, which have arisen at sea, reach the assured at such a time and under such conditions as to make it possible for him to intervene, e.g. with specific orders to the master. In this connection it may be submitted that modern means of communication and the increasingly closer contact between ship and company management, which is characteristic of contemporary shipping, makes it natural to extend the rule to encompass unseaworthiness arisen after the ship left her last port. If the assured remains passive and the unseaworthiness results in a casualty, he should not be covered. Such a rule is expressed in subparagraph 1 of the paragraph.

§ 62 No. 3 of the 1930 Plan established a presumption as regards unseaworthiness when a casualty has occurred «without the contribution of any evident extraneous cause». The situation where such a rule is needed is when a ship suddenly springs a leak. Also other casualties may occur without any «evident extraneous cause», but it would be too strict a reaction to presume unseaworthiness, e.g. in case of a fire with unknown cause, or an engine breakdown (cf. ND 1960.68 Bergen Dyrstad, where a fire with an unknown cause was per se regarded as the «external cause» of the casualty). The rule of the new Plan therefore provides that the presumption of unseaworthiness shall only apply if the ship springs a leak whilst afloat. No condition that there must be no «evident extraneous cause» is laid down. A ship will always be exposed to external risk factors, but if these factors are considerable — as e.g. when the ship encounters rough weather — it will, of course, be easy for the assured to disprove the presumption.

By a Supreme Court judgment contained in ND 1958.348 Symbol, it was held that the assured was not entitled to invoke his good faith when he was unable to disprove the presumption of unseaworthiness. This solution is unacceptable, as it will in actual fact invite the assured to plead that the ship was unseaworthy. In subparagraph 2, 2nd sentence, of the paragraph it is therefore emphasized that the presumption only covers

the situation where the ship was unseaworthy, and the unseaworthiness has had a causal effect. The assured may nevertheless invoke his good faith under subparagraph 1 of the paragraph. However, like § 62 of the 1930 Plan also this Plan places the burden of proof of good faith with the assured.

§ 239, subparagraph 2, of the Plan contains a separate rule relating to unseaworthiness in relation to P. & I. insurance. The provision is edited in accordance with the former P. & I. rules, but essentially leads to the same material results as this paragraph.

§ 46. Insurer's right to demand survey of the ship

This paragraph corresponds to § 66 of the 1930 Plan.

The rules relating to the insurer's right to check the seaworthiness of the ship by means of surveys are very rarely applied in practice, but are nevertheless necessary. However, it is assumed that the insurers will show good judgment when applying these rules. The new Plan in the main corresponds to the 1930 Plan, but the rules have been considerably simplified. Thus the provision to the effect that the insurer cannot demand that the ship be unloaded without an appraisal by court-appointed experts has been deleted. If the assured objects to a survey demanded by the insurer, he will have the burden of proof that a subsequent casualty would not have been averted by a survey.

When the insurer demands a survey, he shall always pay the costs involved in the actual survey himself. If the survey reveals defects in the ship which must be repaired, the other rules of the Plan relating to the insurer's liability during repairs will be applicable. In that case the insurer will be liable for accessory expenses according to standard rules, but not for the assured's operating expenses relating to the ship, nor any other capital loss resulting from the repairs (cf. however, § 184 relating to the ship's operating expenses during removal to repair yard). The solution will be the same whether or not the immediate cause of the survey was a casualty.

If, however, the survey does not reveal any defects which have to be repaired with a view to the seaworthiness of the ship, the question arises whether the assured should be indemnified for his loss. If a casualty or a similar event covered by the insurance has already occurred, the assured is obliged according to general principles to have the ship surveyed in order to ascertain if she has sustained any damage. He may claim the costs of such a survey from the hull insurer, but he must himself pay the operating and loss-of-time costs for the duration of the survey (unless a separate loss-of-hire insurance has been taken out, cf. Chapter 20 of the Plan). As regards the costs of discharge for the purpose of a survey after a casualty, such costs are otherwise covered in accordance with special rules, normally in general average, but also under § 68 as a cost arising «through measures taken to avert or minimize a loss covered by the insurance». On the other hand, if no event has occurred which gives the assured reason to have the ship surveyed, but the insurer demands a survey on the basis of a general suspicion of inadequate maintenance, it is reasonable to impose full liability on the insurer if the suspicion proves to be unfounded. Subparagraph 3 of the paragraph therefore lays down that in such an event the insurer shall indemnify the assured his costs, as well as the loss he suffers as a result of the survey.

§ 47. Ships laid up

This paragraph corresponds to § 62 No. 2 of the 1930 Plan.

Under the mandatory provision contained in section 20 of ICA the contracting parties cannot make an agreement to the effect that the insurer shall be wholly or partly exempt from liability for casualties, which the assured has caused by simple negligence. Under the rule relating to unseaworthiness contained in section 63 of ICA, however, also simple negligence by the assured may result in exclusion of liability if his negligence has made the ship unseaworthy, and this has again caused a casualty. It must be possible to put a liberal interpretation on this exception from the mandatory rule contained in section 20 of ICA so that it also comprises measures taken to secure the ship whilst laid up.

The question as to what constitutes proper mooring and adequate supervision must be decided on a case-to-case basis, taking the specific conditions into consideration. Hence, no general rule can be laid down as to whether or not the engines must be kept ready for operation, or whether or not watch shall be kept on board. This will depend on the prevailing circumstances at the place where the ship is laid up.

It is not necessary to stipulate any requirement to the effect that the ship's class shall be maintained whilst the ship is laid up. This is because in practice the periodical class survey will be postponed for as long as the ship is laid up. The ship will accordingly maintain her class, provided she is surveyed before being put back into service.

§ 48. Safety regulations

This paragraph corresponds to § 31, subparagraph 1, of the 1930 Plan and section 51, subsection 1, of ICA.

The reactions which the Plan outlines in §§ 49 and 50 (c) can only be applied by the insurer when the assured has infringed a regulation which comes within the definition of a safety regulation in this paragraph. Section 51 of ICA requires that a regulation, in order to be characterized as a safety regulation within the meaning of insurance law, must be incorporated in the contract of insurance. However, this provision is not mandatory in marine insurance, cf. the last subsection of the section. The Plan gives a somewhat wider definition of the concept of a safety regulation. If it was understood at the conclusion of the contract of insurance that the ship shall be classified, any regulation from the classification society aiming at furthering the safety of the ship shall be regarded as a safety regulation.

The Plan itself does not contain any direct safety regulations. And it is only § 51 which authorizes the insurer to issue such regulations with a specific content. However, each individual contract of insurance may, of course, contain certain specific regulations, just as it may authorize the insurer to impose further regulations on the assured during the period of insurance.

Under the ICA a safety regulation must per definition aim at preventing a loss for which the insurer will be liable. The same applied under the 1930 Plan. The new Plan has not adopted this criterion. A regulation will sometimes pursue several different purposes. If one of these purposes is to prevent casualties or limit their effect, an infringement may bring this paragraph into operation. If the regulation pursues completely different purposes (e.g. immigration or customs regulations), it is hardly conceivable that there will be any causal connection between the assured's infringement of the regulation and damage which the ship sustains. Such cases will have to be considered in accordance with the rule relating to illegal undertakings contained in § 40.

In order for an infringement to be relevant, the regulation must be one which is binding on the assured. In particular where the regulation is issued by public authorities it may be difficult to decide whether the assured was obliged to comply with it. Regulations issued by the authorities in the assured's, or possibly the ship's, country of origin are of course binding. But also regulations issued by foreign authorities must to a great extent be respected by the assured, such as e.g. canal regulations and rules relating to the handling of dangerous cargo. If there is a conflict between a Norwegian and a foreign regulation, the question arises whether the assured is obliged to comply with the stricter of the two. This must depend on an interpretation of the relevant regulations on a case-to-case basis. However, if the assured had reasonable grounds for believing that the stricter regulation did not apply to him, it is conceivable that the infringement cannot be invoked by the insurer because the assured has not shown the necessary culpability.

§ 49. Violation of safety regulations

This paragraph corresponds to § 31, subparagraph 2, and § 63 of the 1930 Plan, and section 51 of ICA.

The reaction against violations of safety regulations is worked out in accordance with earlier rules. The assured has the burden of proof, both that the violation did not influence the loss, and that he was not guilty of any negligence in respect of complying with the regulation.

An important question is to what extent the assured must accept identification with the persons who act on his behalf. The basic rule applicable in this respect is that it is only negligence on the part of the assured himself which is relevant, cf. § 63 of the 1930 Plan, which established this principle in respect of regulations issued by the public authorities or by the classification society. Who is to be regarded as «the assured» in this relation is discussed below under Chapter 3, Subdivision 6.

Subparagraph 1, 2nd sentence, regulates the situation where the assured acts in the capacity of master of the ship or a member of her crew. In that case it would be too strict a reaction to have any blameworthy violation of a safety regulation result in loss of cover. The rules contained in the first sentence are therefore not applicable where the assured's negligence is «of a nautical nature»; in that event it would be necessary to resort to the general rules in §§ 55 and 56 relating to the assured's causing the casualty. When applying subparagraph 1, 2nd sentence, it must be decided whether the regulation in question refers to a matter «of a nautical nature». The rule not only comprises the actual rules of the road at sea, but, depending on the circumstances, also harbour and channel regulations, regulations relating to the passage through mine belts and other obstructions, regulations relating to the use of radio equipment in emergencies, etc.

There is reason to have stricter rules in cases where the insurer at the conclusion of contracts of insurance has found it necessary to issue a special safety regulation, e.g. that the vessel may only be used in sheltered waters, or that she must carry special equipment on board for safety reasons. In such cases the insurer should have the right to invoke negligence by anyone who, on behalf of the assured, is obliged to comply with the regulation, or to ensure that it is complied with, cf. § 31 of the 1930 Plan, and sub2 of this paragraph. Any persons working in the service of the assured in a superior position will have a duty to comply with the regulation or to ensure that it is complied with. Of the crew it will in particular be the master, the deck officers and the engineers who will come within this rule. Otherwise it will to a certain extent depend on the nature of the specific regulation how far down the line one should go in terms of identification. It must be emphasized that the special rule contained in subparagraph 1 of the paragraph relating to the shipowner's nautical errors in his capacity as master is not applicable.

In order for a special safety regulation to be regarded to be «set out in the contract of insurance», it must be incorporated in the policy or in some other document which sets out the conditions of the insurance.

§ 50. The insurer's right to terminate the insurance

This paragraph corresponds to § 31 i.f. of the 1930 Plan and section 51, subsection 2 of ICA.

Under the 1930 Plan the insurer had very extensive rights to terminate the contract of insurance when the assured or his people violated safety regulations. The notice of termination was 3 days, and if the assured had himself acted intentionally or shown gross negligence, the insurance could be terminated without notice. Under the ICA the right is more restricted, termination of the contract being subject to the condition that the violation gives reason to fear similar negligence in the future. Under the statute the notice of termination is one week.

During the revision work it was not found reasonable to grant the insurer right of termination in connection with any violation of safety regulations. Subparagraph (c) of this paragraph therefore stipulates the condition that the safety regulation is «of material importance». Depending on the circumstances a contract may also be terminated where the violation was committed by one of the assured's subordinates (who is obliged to comply with the regulation or ensure that it is complied with), and this even if the regulation in question is not of the nature described in subparagraph

2 of § 49. It is explicitly specified that the insurance may only be terminated when the regulation has been violated intentionally or by showing gross negligence. The notice of termination is fixed at 7 days, however, not earlier than on the ship's arrival at the nearest port, cf. § 37, subparagraph 4.

The rules contained in subparagraphs (a) and (b) of the paragraph are new. They give the insurer the opportunity to get out of the contract when the ship can no longer be regarded as seaworthy. The rule contained in subparagraph (a) is applicable independently of any fault on the part of the assured. It is essentially applicable in connection with old and badly maintained ships when the point has been reached where the ship is no longer allowed to sail, or in connection with ships where faulty construction has been revealed which makes the ship unseaworthy.

The rule contained in subparagraph (b) imposes a duty on the shipowner to repair the ship in the sense that the insurer may terminate the insurance if the ship remains unrepaired for a prolonged period of time. It is a condition that the assured has not been lawfully prevented from carrying out the repairs. His own poor financial circumstances is no excuse in this connection. The insurer is not under any obligation to pay compensation for the unrepaired damage on terminating the insurance, cf. § 174, but, on the other hand, the termination will not exempt him from liability for damage which has already occurred. If the assured has the ship repaired later, he may claim compensation from the insurer for the repairs of such damage.

§ 51. Terms of contract

This paragraph corresponds to § 17, subparagraphs 1 and 2, of the P. & I. Rules.

The provision authorizes the insurer to issue safety regulations during the insurance period, cf. § 48. It was found during the revision work that this right should not be limited to imposing terms which are customary in the trade in question, as the provision should also be applicable in connection with the establishing of a new trade. The rule is particularly important in P. & I. insurance, but will also be important for the hull insurer's cover of collision liability, e.g. in connection with the conclusion of towage contracts or contracts regarding ships' use of privately owned quay facilities.

The sanction for violations of safety regulations determined in accordance with this paragraph is expressly regulated in § 76 (b). The effect of a violation is that the insurer shall not cover liability which the assured incurs and which he would not have had to cover if the assured had not entered into the contract in question. Full identification shall be made in the relationship between the assured and his employees, even if the relevant regulation was not stipulated already at the conclusion of the contract.

Subdivision 4

Measures to avert or minimize the loss etc.

§ 52. Assured's duty to notify the insurer of casualties

This paragraph corresponds to § 32, No. 1 and No. 2, subparagraph 1, 4th sentence, of the 1930 Plan, and section 21, subsection 1, of ICA.

Notices of a casualty may be sent to the insurer himself, or to his local agent. It follows from the fact that the duty to notify the insurer also applies to the master under subparagraph 2 that negligence by the master may be invoked under § 54.

§ 53. Assured's duty to avert and minimize the loss

This paragraph corresponds to § 32 No. 2, subparagraph 1, 1st—3rd sentences, of the 1930 Plan, and section 52, subsection 1, 1st and 3rd sentences of ICA.

Like the 1930 Plan, the paragraph grants the insurer far-reaching powers with regard to choice of measures to avert or minimize the loss. The 1930 Plan states: «If the assured receives definite instructions, he shall follow same as far as possible.» It is not quite clear how such a provision should be interpreted, but taken literally, it

implies that the assured must comply unconditionally with the insurer's directions, provided this is physically possible for him. However, on the other hand, if this is the way the rule is to be interpreted, the assured cannot be blamed for complying with directions which give an unfortunate result.

The Plan aims at giving the assured a somewhat more independent position. According to the last sentence of the paragraph it is both his right and his duty not to comply with the insurer's directions if he must «understand that they have been issued on the basis of incorrect or incomplete information concerning the real situation». If that is the position, the assured must have the right to evaluate the situation on his own and act in accordance with his own best judgement. Even if it turns out later that he misjudged the situation or made the wrong choice of measures to avert or minimize the loss, this shall not effect his cover, unless he has shown gross negligence, cf. § 54. The assured's rights and duties under this paragraph are subject to the condition that the directions are, objectively speaking, inexpedient in the situation at hand. If the directions are in actual fact expedient, despite the fact that they were obviously issued in the light of a different situation, the assured must comply with them. On the other hand, inexpediency does not constitute a sufficient condition. If the directions were issued on the basis of complete and correct information concerning the actual situation, the assured does not have either the right or the duty to disregard inexpedient directions. However, if it is a case of inexpedient directions issued on the basis of the insurer's mistake as regards the actual situation, the assured cannot unconditionally plead that he followed the insurer's advice. However, also in this respect, the assured must have shown gross negligence in order to lose any of his cover.

If it is the master who fails to comply with or consider directions issued by the insurer, this is a fault committed in connection with his service as a master, which the insurer cannot invoke.

§ 32 No. 2, subparagraph 2, of the 1930 Plan provided that the assured could not take out an insurance covering expenses invested for salvage etc. for the insurer's account if such expenses were to be indemnified as particular average. This rule is hardly of any practical importance and has been deleted.

§ 54. Consequences of the assured neglecting his duties

This paragraph corresponds to § 32 No. 3 of the 1930 Plan, and section 21, subsection 2, and section 52, subsection 2, of ICA.

If the assured neglects his duty to give notice of a casualty under § 52, or his duty to institute measures to avert casualties, or to minimize the loss under § 53, the insurer may exclude liability for losses which would not have arisen if the assured had fulfilled his duties. If it is a question of a failure to undertake a salvage operation, the mandatory provision contained in section 52, subsection 2, of ICA requires gross negligence by the assured. Hence, the provision contained in § 32 No. 3 of the 1930 Plan, which merely required simple negligence, was in contravention of mandatory law. Under section 21, subsection 2, of ICA, however, simple negligence is sufficient where the assured has neglected to notify the insurer of a casualty. The Plan prescribes that gross negligence is required in both these cases.

Subparagraph 1, 2nd sentence, is particularly aimed at losses which may arise for the insurer as a result of the assured neglecting his duty under § 52, subparagraph 1, to keep the insurer informed of further developments following a casualty. The insurer has e.g. ordered barges to bring a grounded ship afloat, and the assured has neglected to notify the insurer that the ship is already afloat with the result that the insurer does not manage to cancel the barges in time, thus incurring unnecessary expenses. In so far as expenses of this nature can be set off against the compensation which the insurer must pay in connection with the casualty, subparagraph 1, 1st sentence, of the paragraph is sufficient. The 2nd sentence of the paragraph furthermore imposes on the assured an independent duty to pay compensation to the insurer for losses he has inflicted on him by grossly negligent violations of §§ 52 and 53. Subparagraph 2 of the

paragraph was added to make it clear that it is only in the event of a violation of the duty to notify the insurer under § 52 that the master's negligence becomes relevant.

Subdivision 5

Casualties caused intentionally or negligently by the assured

§ 55. Intent

This paragraph corresponds to § 33, subparagraph 1, of the 1930 Plan, and section 18, subsection 1, of ICA.

§ 56. Gross negligence

This paragraph corresponds to § 33, subparagraph 1, of the 1930 Plan, and section 18, subsection 2, of ICA.

Whereas ICA leaves it to an evaluation on a case-to-case basis to determine the compensation the assured may claim when he has caused a loss by gross negligence, the 1930 Plan provided that he forfeited all rights in such a case. The Plan has adopted the rule contained in ICA. As pointed out under § 20 above, experience from similar spheres of law shows that a court is very reluctant to hold that gross negligence has been shown if the choice is between awarding the assured full compensation or none at all. It is likely that a rule allowing a reduction of compensation, taking into consideration the degree of blameworthiness and the specific circumstances, will be applied also in cases where the assured would in actual fact have been awarded full compensation under the 1930 Plan. It is possible that the reaction against the assured's negligence will in actual fact become more effective this way, and the deterrence aspect correspondingly better safeguarded.

If it is one of the assured's subordinates, either in the company management or on board the ship, who has caused the casualty by a fault which must be described as gross negligence, it must be decided on the basis of the rules contained in Chapter 3, subdivision 6, of the Plan whether the insurer can plead that fault *vis-à-vis* the assured. The insurer can never plead faults committed by the insured ship's master or crew in connection with their service as seamen, cf. § 59. Furthermore, the solution under § 61 will be based on «general rules of law». The commentary to «the sister ship rule» contained in § 77 discusses the situation where the fault was committed on board another one of the assured's ships than the one covered by the insurance.

If the assured has merely shown simple negligence, the insurer shall always be fully liable, cf. the mandatory rule contained in section 20 of ICA. However, this does not apply where the negligence also comes within the scope of other rules, e.g. the rules relating to unseaworthiness or violation of safety regulations.

In P. & I. insurance special rules relating to negligence apply, cf. § 239.

§ 57. Insurer's right to terminate the insurance

This paragraph corresponds to § 33, subparagraph 1, of the 1930 Plan.

In contrast to the 1930 Plan the new Plan gives the assured three days' notice where the casualty was caused by gross negligence.

§ 58. Circumstances precluding the application of §§ 55 to 57

This paragraph corresponds to § 33, subparagraph 2, 2nd sentence, and subparagraph 3, of the 1930 Plan, and section 19, subsections 1 and 2 of ICA.

The rules relating to the assured's soundness of mind contained in subparagraph (a) correspond to § 33, subparagraph 3, 1st sentence, of the 1930 Plan. The assured may plead mental disease or a reduced state of consciousness, unless the mental disorder was due to «self-inflicted intoxication». However, in another relation this Plan deals less severely with acts of intoxication than the 1930 Plan. According to the 1930 Plan the insurer was without any liability whatsoever if the assured «has caused the loss by self-inflicted intoxication» (§ 33, subparagraph 2, 2nd sentence). The new

Plan contains no such rule, and this implies that also acts of intoxication shall be governed by the general rules concerning the fault of the assured. Hence, if it is held that the assured has merely shown simple negligence — also taking into consideration that on the occasion in question he was under the influence of alcohol — he will under this Plan be given full cover.

Under the 1930 Plan the assured's right to cause a casualty for the purpose of a rescue action was limited to situations where human life or health was at stake. According to ICA the assured is also justified in sacrificing the subject-matter insured where property is in danger. In this respect this paragraph refers to § 35, subparagraph 2. This implies that the assured has an unconditional right to expose the subject-matter insured to any peril for the purpose of saving human life, and that «during the voyage» he has the right to jeopardize the subject-matter insured for the purpose of saving material assets. In the latter case one must, of course, look at the assets which the assured attempted to save when deciding whether the action was justifiable. Normally the value of the goods, which it was attempted to save, should be substantially higher. However, if the assured was excusably misguided as regards the value, this shall have no detrimental effect for him.

Hence, the assured cannot invoke subparagraph (b) of this paragraph if he sacrifices the subject-matter insured in order to save material assets if this did not take place «during the voyage». He cannot send the ship out on a particularly hazardous salvage operation under the protection of this provision, nor sacrifice her in order to save assets on shore.

Under general doctrines of law the insurer will have a recourse claim against the owner (insurer) of the assets which were the object of the salvage operation. If the ship sustains damage for the purpose of saving her own cargo, the insurer will thus have recourse against the cargo owner (cargo insurer), provided the shipowner would not have become liable for the cargo damage. In such situations, however, the action will normally be aimed at saving both the ship herself and her cargo, in which case the rules relating to general average contained in Chapter 4, subdivision 2, come into play.

In the cases where the shipowner would have become liable for the loss which it is attempted to avert, also the P. & I. insurer may come into the picture. If the assured causes damage to the ship for the purpose of saving human life, and he would have become liable for the possible loss of life or personal injuries, the sacrifice has in actual fact been made in the P. & I. insurer's own best interest. Under § 23, subparagraph 4 No. 6, of the P. & I. Rules, however, the P. & I. insurer did not cover salvage costs consisting in the repairs of damage to the ship. It was agreed to delete this limitation, cf. § 245. The position is hence that the assured may claim compensation for such hull damage pursuant to subparagraph (b) of this paragraph, and the hull insurer will in turn have recourse against the P. & I. insurer. If both insurances are taken out on the conditions of the Plan, the natural procedure will be for the assured in such a case to claim against the P. & I. insurer direct.

If damage is inflicted on the ship for the purpose of saving the cargo, the rule contained in § 35, subparagraph 2, will not be applicable, even if the action takes place «during the voyage». This provision gives the assured the opportunity in certain cases to carry out a salvage operation without this affecting the insurance cover, but the salvage of the ship's own cargo is not covered by the provision. This applies e.g. when it becomes necessary in port to cut a hole in the ship's side in order to get the cargo out. But if the measure is due to damage which the ship or cargo has sustained through a grounding, the hull insurers will be liable for the costs of repair under § 176 (n). Damage of that nature may also in other cases be covered by an insurance of extraordinary costs, cf. § 270, subparagraph 1. And if the assured would have been liable for the damage to the cargo which has been averted, his P. & I. insurer will be liable for the hull damage according to the rules relating to salvage costs, cf. the preceding paragraph.

In this connection should also be mentioned § 69, which regulates the position when a measure taken by the assured is aimed at averting or minimizing a loss concerning several of his insurers at the same time.

The rule contained in subparagraph (c) of this paragraph is new. It is only of importance in connection with insurance against war perils. The war-risk insurers would probably have covered a loss of this nature, also without due authority, but the provision was included to emphasize the assured's right to carry out such patriotic acts without fear of financial consequences.

Subdivision 6 Identification

A very difficult question in insurance law is the extent to which the assured shall bear the consequences of faults and negligence committed by persons acting on his behalf. The insurance conditions contain a number of provisions authorizing the insurer to react when the assured acts irresponsibly, e.g. brings about an increase of the risk or a casualty, fails to submit prescribed notices, neglects his duty to institute measures to avert or minimize the loss, etc. The question is whether the insurer can invoke these provisions when it is not the assured himself, but one of his subordinate who has committed the negligence.

ICA contains only sparse provisions, which resolve the identification problem within very limited areas. It is probably correct, as argued by *Grundt* (Textbook of Norwegian insurance law, 1st edition (1939) p. 437), that the sparse provisions of the said Act do not form the basis of any general doctrine of identification. The question has been left open in the Act, and when neither this Act, nor the conditions agreed on, provide any definite doctrine, it is necessary to resort to a more free assessment of the problem.

Both ICA and the Plan consistently use the terminology that there is room for three parties in the contractual relationship: the person effecting the insurance (the person who enters into the agreement), the assured (the person who owns the interest insured) and the insurer, cf. § 1 (a) -- (c). One and the same contract of insurance may furthermore comprise interests belonging to several different assured. The problem of identification may therefore occur in several different relations: in the relation between the person effecting the insurance and his assistants, between the assured and his assistants, between the assured and the person effecting the insurance, and in the mutual relations among several assured.

The Plan does not seek to give any exhaustive solution to the identification problem. This subdivision contains two general rules, one concerning the relation between the assured and his employees (§ 59), and one concerning the mutual relations among several assured (§60). However, the Plan also contains a number of special identification rules, which are discussed in the context where they belong (see e.g. § 18, subparagraph 2, § 37, subparagraph 1, § 49, subparagraph 2, § 52, subparagraph 2, § 76, chapters 7 and 8, § 229, subparagraph 2, § 245 (a), § 251, subparagraph 3, and the commentary to these provisions). Furthermore, it is emphasized in § 61 that one must resort to general rules of law when it is not possible to derive the solution to a certain identification problem from the provisions contained in the Plan or the policy.

It is not possible to give any broad presentation of these principles here. Reference is in particular made to the presentation in *Grundt* l.c., p. 419—69, where the problems are discussed in depth. It must simply be emphasized that it follows from the ICA's and the Plan's system that the assured must fully accept being identified with the person effecting the insurance in the areas where any negligence by the latter results in sanctions. This is because the nature of the negligence, which the person effecting the insurance may commit, is such that it either affects the validity of the actual contract of insurance (failure to notify insurer), or gives the insurer an unconditional right to withdraw from the contract (failure of duty to pay premium). The reactions, which the Plan gives the insurer in the event of negligence of the described nature, may be exercised vis-à-vis anyone who is insured under the contract of insurance (see however § 136).

§ 59. Faults and negligence of the crew

This paragraph corresponds to § 5, subparagraph 2, of the 1930 Plan.

Faults committed by the ship's master or crew in connection with their service as seamen represent a peril, against which the shipowner must unconditionally have cover under a marine insurance. The provision is applicable in connection with any insurance taken out on the terms of the Plan, hence also a war-risk insurance. Here it should be noted that faults committed by the crew must sometimes be evaluated as a war peril in relation to the causal rule contained in § 21, cf. above under § 16.

The term «faults and negligence . . . committed in connection with their service as seamen» marks the contrast to faults relating to the commercial duties which a master may sometimes have on behalf of the shipowner. In connection with the commercial faults it is hardly possible to say anything in general about to what extent the assured must be identified with his employees. This will depend on the nature of the faults committed and the type of insurance in question.

If the fault was committed by someone other than the master or crew of the ship, it is necessary to resort to general doctrines of law when deciding the question of identification.

In some cases the owner of the ship works as a member of the crew himself, especially in the coastal trade. § 49, subparagraph 1, 2nd sentence, contains a rule applicable to such a situation as far as violations of safety regulations are concerned. Beyond this no special rules are required for a situation where the assured is a member of the crew. If he has caused the casualty by simple negligence, he will receive full cover in accordance with the mandatory rule contained in section 20 of ICA. If he has caused the casualty intentionally, he should obviously have no claim on the insurer (cf. § 55). If he has shown gross negligence, the discretionary rule contained in § 56 will apply. It may be alleged that the assured in his function as master or crew should have full cover, also against the consequences of his gross negligence. However, such a rule would be dangerous, in view of the fact that it might be very difficult to prove an intentional sinking of a ship in situations where it has in any circumstances been established that the navigation was grossly negligent. By applying § 56 to the shipowner acting as master the courts will have the opportunity to take his special position into consideration and award him full, or almost full, compensation where there are no grounds for suspicion that the casualty was caused intentionally.

§ 60. Faults and negligence by a part-owner of the ship

This paragraph is new.

When a ship is owned by a limited company, it has been established according to general principles of company law that the shareholders are identified with those who act on behalf of the company (its bodies). However, it happens frequently that the ownership of the ship itself is divided among several natural or legal persons. Shipping partnerships under sections 9—23 of the Maritime Code occur in the coastal traffic, and recently it has to an increasing degree become common for large ships to be owned by so-called «joint ownerships», which are partnerships where the partners are jointly and severally liable. In both cases the question arises whether the individual assured shall suffer for faults committed by one of his co-owners. On this point there has been some uncertainty.

The Plan resolves the uncertainty to the effect that there shall be no identification when the co-owner (shipping partner, associate) who commits the fault is not authorized to act on behalf of the joint ownership. It is quite exceptional that a co-owner, who is not a general manager or a business manager, intervenes and makes independent decisions regarding the ship, and it would not be reasonable if his co-owners were to suffer because of any faults he might commit in such a situation. Nor would it be reasonable if the other co-owners were to lose their cover because one of them happened to know of a relevant fact, e.g. in connection with a breach of a trading warranty which the manager did not know about. In the coastal service it happens that a co-owner is a member of the crew, but also the faults he might commit in that capacity should not affect the other co-owners.

The position is different if the fault is committed by the co-owner who has been elected by the others to safeguard the interests of the joint ownership and been granted the formal authority to act on behalf of them all. In this case a full identification should be made. From a strictly formal point of view it may probably be claimed that in the event of a joint ownership each individual co-owner shall be regarded as «assured», and that it is a basic principle in damage insurance that each individual assured has a direct claim against the insurer, which is not affected by faults which other assured might commit. But it would be unreasonable if the shipping company's corporate structure was to have decisive influence on the question of identification. Those who have the real financial interest in the ship should be in the same position, whether they form a limited company, leaving the management to a manager, or they form a partnership, leaving it to one of the partners to have free disposition of the ship.

However, if the managing owner of a shipping partnership is the master of a vessel at the same time, § 59 must prevail. The faults he commits in connection with his service as a master cannot be invoked vis-à-vis the co-owners.

§ 61. Identification in other cases

This paragraph corresponds to § 5, subparagraph 1, of the 1930 Plan.

Where a question of identification has not been resolved by a positive provision in the conditions it must be «decided on the basis of general rules of law». In this connection — as expressed in § 5 of the 1930 Plan — special «consideration to be given to the nature and circumstances of the insurance». Analogies from the positive rules of this Plan must here carry considerable weight. It is not possible to make any further comments or exemplifications here.

Chapter 4 The insurer's liability

This chapter contains a number of general rules relating to various forms of losses which are indemnified by the insurer. The rules are not exhaustive and must in each type of insurance be compared with the provisions contained in the special parts of the Plan and in the relevant policy. To a certain extent the decision as to which rules were to be included in this chapter, and which rules were to be referred to the special parts of the Plan has been a matter of discretion. Normally a rule is not included in this chapter unless it is significant in more than one of the three main branches of shipowner's insurances: hull and hull-interest insurance, P. & I. insurance and freight insurance.

A question which has given rise to some doubt is whether this Plan, like the 1930 Plan, should limit the insurer's liability to losses, the compensation of which is expressly warranted. Under § 34 No. 1 of the 1930 Plan the insurer's liability was «limited to such damage as is covered by the rules of compensation in the Plan or the policy». Hence, even if a loss was caused by a peril covered by the insurance, it was not to be indemnified, unless an express authority for indemnifying losses of this nature was found in the plan or the policy. However, the 1930 Plan did not itself carry this system into effect. Thus, § 75 referred to «damage for which the insurer is liable», presupposing a non-existing rule for compensation for partial loss in the hull insurance. The Danish Marine Insurance Convention follows another system, § 50 of the said convention providing that the insurer shall indemnify «any loss caused by an accident striking the interest insured».

The question whether to choose one or the other wording is probably of more theoretical than practical importance. Regardless of which system is chosen, the Plan must contain compensation rules of a positive as well as a negative nature, which regulate all the questions which experience has shown will arise in practice. There

must e.g. be explicit rules regarding liability for costs of repair in the hull policy, both as regards the extent of this liability in general, and as regards the special limitations thereof which must be effected. In practice, the solution will therefore normally be found through an interpretation of the positive compensation rules of the Plan and of its limitations of liability.

Theoretically it is conceivable that difficulties may arise if the assured suffers a loss of an unforeseen nature, which is accordingly not covered neither by any positive compensation rule, nor any limitation rule. Hence, according to the Danish system such a loss would be recoverable, whereas it would not be recoverable according to the system of the 1930 Plan. However, it is doubtful whether such reasoning is valid. Probably a more certain basis for reaching a solution would be by an analogous or antithetic application of the special compensation rules and limitation rules contained in the Plan and the policy rather than by invoking a general principle regarding the extent of the insurer's liability.

According to § 18, subparagraph 1, the insurer is liable «for loss attributable to the interest, during the period of insurance, being struck by a peril that is comprised by the insurance». The new Plan has thereby abandoned the system of the 1930 Plan, liability not being expressly limited to the kinds of losses which the positive compensation rules mention. However, it must be emphasized that this does not mean that any loss is recoverable, providing there is a causal connection between the loss and a peril comprised by the insurance. The Plan itself contains a number of provisions regarding non-recoverable losses, and these provisions must be applicable by analogy. Hence, in cases of doubt the solution must be sought in an interpretation of the rules of the Plan relating to the extent of liability, supplemented with other sources of law, in particular the legal tradition in marine insurance law.

Subdivision 1 General rules concerning the insurer's liability

§ 62. Total loss

This paragraph corresponds to § 47, subparagraph 1, of the 1930 Plan.

The question as to what events entitle the assured to compensation for a total loss must be resolved in the conditions for the special types of insurance. In hull insurance the question also arises what is to happen if the ship, before it becomes a total loss, has sustained damage which has not been repaired. This question has been resolved in § 161, subparagraph 2, cf. also § 106.

Total losses occur only in the types of insurance where the insurance covers an asset belonging to the assured (hull insurance, freight insurance). In the event of a total loss the insurer's liability is subject to a double limitation: It can neither exceed the sum insured nor the insurable value. Where there is an insurance valuation, these amounts will normally be identical, and the insurer will thus in the event of a total loss pay the valuation. In the cases where the insurer covers the assured's future obligations (P. & I. insurance, cover of collision liability under the hull insurance, insurance of extraordinary costs) it will merely be a question of a limitation of the insurer's liability to the sum insured, and only provided a sum insured has been agreed on. In P. & I. insurance this is not the case. Here the insurer is liable without limitation for the types of liability and loss covered by the insurance.

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

§ 63. General monetary loss and loss resulting from delay

This paragraph corresponds to § 34, No. 1, 2nd sentence, of the 1930 Plan.

The provision emphasizes that the marine insurer's liability is normally limited to such losses as consist in the destruction or decrease in value of the actual interest

insured. Losses, which are more in the nature of derivative losses sustained by the assured during the casualty, are not recoverable. However, the paragraph does not indicate more than a general principle, and must in many situations be compared with the compensation rules contained in the chapters regarding the special types of insurance.

The exception for «general monetary loss» is aimed at the general loss which the assured may sustain in his trade as a result of a casualty. The casualty may lead to his being forced to restructure his business or to redirect other ships, with the result that his income is reduced or his administration and operating costs are increased. Such losses are not recoverable.

The other main group of non-recoverable losses are losses which are tied to the delay which the insured ship has had because of the casualty. The term «loss of time» is aimed at the assured's operating expenses and his loss of freight. However, also in this respect the Plan on a number of points provides a special rule for compensation, see thus §§ 182 and 184 regarding loss of time during an invitation for tenders, and operating expenses while the ship is being moved to a repair yard, §§ 178, 179 and 183, which in different contexts take into consideration the loss of time which the assured suffers as a result of the casualty, and the rules relating to the special types of insurance for covering loss of time, in particular chapters 20 and 21.

The terms «price fluctuation» and «loss of market» are primarily aimed at the fact that due to a casualty the ship will miss the opportunity to benefit from a favourable price trend and can only be put into service in a later lower freight market. Losses of this nature are never recoverable. To avoid any misunderstanding, the limitation of liability is extended to comprise also «similar loss resulting from delay».

§ 64. Costs of providing security etc.

This paragraph corresponds to § 41, No. 1, subparagraph 2, 1st sentence, of the 1930 Plan

Under § 41 No. 1, subparagraph 1, of the 1930 Plan the insurer was not obliged to provide security for claims which a third party brings against the assured and which are covered by the insurance. This rule is maintained in § 95. However, the costs, which the assured incurs himself in order to obtain such security must be indemnified as an expense incurred through the casualty. That the costs must be «reasonable» implies inter alia that the assured cannot demand a refund of the costs incurred by providing security for an amount which obviously and essentially exceeds the third party's claim.

In contrast to the 1930 Plan the new Plan entitles the assured, under certain conditions, to demand payment on account, cf. § 90. Before he provides security for third parties' claim he must therefore submit to the insurer the question whether the claim should be met by a payment on account. If he has failed to do so, the insurer will not be liable for the costs in connection with the provision of security. However, it would be reasonable if the insurer also in such a case covers the expenses up to an amount equivalent to ordinary interest on the payment on account he would have made.

§ 65. Costs of litigation

This paragraph corresponds to § 48, subparagraph 3, 3rd sentence, and § 78, No. 3, 3rd sentence, of the 1930 Plan, § 24 of the P. & I. Rules, and section 92, subsection 1, 1st sentence of ICA.

§ 78, No. 3, 1st and 2nd sentences, of the 1930 Plan, and § 32, Nos. 3 and 4, of the P. & I. Rules, provided rules as to who was to bear the litigation costs in the event of a dispute between the assured and the insurer regarding whether a case against a third party was to be submitted to the courts. In such a situation several insurers with conflicting interests will normally be interested in the question. It has been attempted to solve the difficulties, which may arise here, in § 94.

§ 66. Costs in connection with the settlement of claims

This paragraph corresponds to § 36, subparagraph 2, of the 1930 Plan.

Subparagraph 1 of the paragraph comprises all costs incurred after the casualty which are necessary in order to ascertain whether any damage has occurred and, if so, its extent, or which are necessary in order to secure any recourse against third parties. The insurer shall thus pay costs in connection with the conducting of a sea protest and a maritime inquiry, providing these measures are attributable to a casualty which resulted, or could have resulted, in recoverable losses.

Under § 36, subparagraph 2, of the 1930 Plan the insurer did not refund the assured's costs for technical or other expert assistance during the average proceedings, unless he had made an advance undertaking to pay such expenses. The way this rule was practiced meant that the insurer would refund the assured's expenses for the surveyor with the same amount which the insurer had to pay for his own man. However, sometimes a higher amount was refunded, e.g. where the insurer had a representative on the spot and the assured had reasonable grounds for sending out his own inspector. During the revision work it was considered whether a rule should be introduced to the effect that compensation is normally limited to the amount which the insurer spends for his own surveyor. The conclusion was reached that the insurer should have a duty to refund the assured's cost in full, providing the assured had reasonable grounds for using his own surveyor, and the costs do not exceed the amount considered necessary for a proper representation. His liability comprises both the surveyor's fee — possibly a share of his salary — and his travel and living expenses etc.

§ 67. Costs through measures relating to several interests

This paragraph corresponds to § 36, subparagraph 3, of the 1930 Plan.

The proportionate distribution of litigation costs and costs in connection with the claims settlement is of great practical importance. In a collision case both the hull insurer and the P. & I. insurer will often be interested on the assured's side. In that event the litigation costs shall be distributed with allowance being made for the maximum amounts which the two insurers may be held liable through the proceedings. In the same way the refund claims which the assured raises in the proceedings will partly accrue to himself and partly to his hull insurer. The costs involved in the implementation of the refund claim must then be distributed between them in proportion to their interests in the litigation.

The detailed rules relating to the distribution of costs are laid down on the basis of practice, and the the Plan does not intend to make any amendments to those rules. § 185 contains a special rule relating to the division of accessory repair costs.

Subdivision 2

Loss through measures to avert or minimize the loss

It is a general basic principle of all damage insurance that the insurer shall indemnify the assured for any expenses and any losses he incurs for the purpose of saving the subject-matter insured and thereby averting the insurer's liability. In marine insurance this principle has always been recognized, see, however, the Eidsvold judgment (ND 1952.1 NH), which was in favour of the P. & I. insurer in a case where the assured had incurred costs for the purpose of reducing a liability which was covered by the insurance.

The difficulty consists in deciding what measures the assured must take for his own account as part of his general duty to secure and preserve the subject-matter insured, and what measures are of such a nature that the insurer should pay the costs. As will appear from what is stated below, this question has by and large been solved within the framework of general-average law. But in the areas in marine-insurance law, where it has been necessary on an independent basis to draw the line between

operating costs and salvage costs, in particular in P. & I. insurance, the question has caused considerable difficulties.

Another complication, which is especially prominent in marine-insurance law, is that a sacrifice which the assured or a third party makes will very often be for the purpose of saving assets, which are owned by several persons. Thus, a measure taken for the purpose of saving a ship will normally also be to the advantage of her cargo, and it is conceivable that pending freight may be saved by the same act. Also the assured himself, or his P. & I. insurer, may come into the picture, where the action was also taken for the purpose of averting liability.

When several financial interests benefit from one and the same measure, it is reasonable to divide the expenses involved between the owners of the interests in proportion to the loss which has been averted for each of them. This principle of apportionment has been recognized in maritime law as far back as we have written sources. Before marine insurance was introduced, the salvage costs had to be apportioned among the participants in the expedition — the owners of ship and cargo respectively — in proportion to the assets salvaged for each of them. Rules relating to this apportionment, the so-called general average distribution, were found already in antiquity. When it became common in the middle ages to take out insurances on ship and cargo, the nature of the community changed. From being a community between the parties to the contract of affreightment, it changed to being a community between their respective insurers. However, the general average rules remained unchanged, and the adjustment to the new situation was made by the insurers undertaking to pay the general average contributions which the participants in the maritime transport activities might be responsible.

When measures to avert or minimize a loss have been taken in respect of a ship carrying a cargo, a settlement is therefore first made between the owners of ship, cargo and freight. Such a settlement is normally made by an average adjuster. It consists in a summation of all the relevant salvage costs, whereupon the costs will be apportioned taking into account the values of the respective interests. The apportioned contributions will be covered by the respective insurers.

The general average rules constitute a closed system and provide a complete regulation of most of the questions which crop up in connection with measures to avert or minimize the loss to ship and cargo, a loaded vessel. They thus decide both whether the general conditions for undertaking the said measures are satisfied (whether the sufficient degree of danger exists), and establish in detail what sacrifices and costs are recoverable and how to calculate the compensation.

It must be emphasized that, formally speaking, the general average rules come within freight law and are binding only on the parties to the contract of affreightment, despite the fact that they will in actual fact be of decisive importance for the extent of the insurer's liability for salvage costs. In international shipping it is accepted practically without exception that the general average settlement shall be undertaken in accordance with the so-called York-Antwerp Rules. However, deviating clauses exist, in particular in the Rhine trade. If questions arise, which are not regulated in the general average rules which the parties have agreed to apply, they will have to resort to the national law of the relevant country. Normally this means the law at the location where «the voyage ends», i.e. where the cargo is separated from the ship.

The general-average rules are only applicable when both ship and cargo have been threatened by danger. If only one interest has been threatened — e.g. the ship is sailing in ballast — or the peril is of such a nature that it only threatens one of the interests, it is the insurer who covers that party's interest who must pay the full salvage costs. In such a case the term particular salvage costs is used.

In between these two situations are the cases where although a sacrifice is aimed at saving several interests, the general average rules nonetheless do not apply. This will e.g. be the case if the ship is sailing in ballast, but a separate insurance has been taken out for her equipment, or if a liability, which would have had to be covered partly by the hull insurer and partly by the P & I insurer, is averted. The general average rules do not contain any distribution norms for such cases, but in practice an

apportionment will also here be made on the basis of the same principle of reasonableness on which a general average distribution is based.

Even if there is no apportionment to be made, the rules relating to particular costs of preventive measures must also solve most of the questions which arise in general average, viz. the degree of danger required in order for a measure to qualify as a salvage act, what sacrifices are recoverable and how to calculate the compensation. However, it would not be very practical to have a detailed regulation of these questions with a view to the particular costs of preventive measures. Hence, in the cases which are of the greatest practical importance, viz. measures taken to avert or minimize the loss of a ship in ballast, the relevant parts of the general average rules are applied. Thus, hull conditions normally provide that costs involved in measures to avert or minimize the loss of ships in ballast shall be recoverable in the same cases and to the same extent they would have been recoverable if the ship had carried a cargo and a regular general average adjustment had to be made. This also prevents the covering of costs of preventive measures from varying, depending on whether the ship is carrying a very small cargo or is sailing in complete ballast. Hence, if sacrifices have been made in order to save a ship in ballast, this may be deemed an «assumed general average», a term adopted by the Plan. In other words, the general average rules have here been made an integral part of the insurance conditions.

In P. & I. insurance the problems in connection with costs of preventive measures are of such a specific nature that they are subject to special regulation in the P. & I. Rules.

The general average rules are hence to a large extent decisive for the insurer's liability for particular costs of preventive measures. But the application of the rules also works the other way around, which means that the particular claims rules have been given a wide application in situations which should normally have been subject to a general average adjustment. Admittedly, the general average rules contain a complete regulation as to the calculation of and compensation for damage to a ship resulting from measures to avert or minimize the loss, but these rules are not up-to-date and, furthermore, experience has shown that a general average adjustment takes longer than a corresponding claims settlement under the insurance conditions would have taken. It is therefore customary to incorporate a provision in the hull conditions to the effect that the assured is entitled to demand settlement for general average damage to the ship as if it were particular damage, without having to wait for the general average adjustment. This implies that particular damage excepted from cover and new for old deductions become applicable. The insurer is subrogated to the assured's rights vis-à-vis the co-interests in the general average and will in turn receive the contribution which the assured should have received. However, certain difficulties arise due to the fact that the claims amounts may differ according to the general average rules and the particular average rules. These difficulties have now been solved in different ways.

When the insurance conditions contain a deductible clause it is also customary to stipulate that damage caused by measures to avert or minimize the loss shall not be regulated by the clause. The point of view is that the assured should institute measures to avert or minimize the loss without being restricted in his decisions by the thought that he may have to cover a substantial deductible himself. New for old deductions, however, are provided for in the general average rules and the new for old deductions agreed on for particular damage are therefore applied when a claim for general average damage is made direct to the insurer under the particular average rules contained in the insurance conditions.

The Plan is based on this traditional system. The rules have therefore inevitably become complex. They are compiled in this subdivision and have been simplified in so far as possible.

§ 68. Particular measures to avert or minimize the loss

This paragraph corresponds to § 36, subparagraph 1, first and second sentences,

of the 1930 Plan, Hull Policy A5, Nos. 1 and 3, § 23 of the P. & I. Rules, and section 53, subsection 1, cf. section 52, subsection 1, of ICA.

This paragraph indicates the general basic principle regarding the insurer's liability for particular costs of preventive measures. It is applicable in all cases where it does not depend on the general average rules whether or to what extent costs of preventive measures are recoverable. It is thus never applicable where measures to avert or minimize the loss have been instituted in order to save a ship which is in impending danger of suffering a serious and extensive casualty, regardless of whether the ship is carrying a cargo or is in ballast. As mentioned in the introduction to this paragraph, the general average rules shall always be applied in this connection. This limitation is expressed in subparagraph 2 (a) of this paragraph.

Hence, the provision is first and foremost applicable in connection with measures aimed at averting a liability which is covered by the insurance. In hull insurance the general average rules will admittedly often be applicable also in this connection in that a measure aimed at averting collision liability will as a rule also be aimed at averting a casualty which may result in the loss of ship and cargo. But if the measure is exclusively aimed at averting a liability, which the hull insurer would have had to cover, cf. Chapter 13 of the Plan, liability for costs involved in the measures to avert or minimize the loss must be decided on the basis of this paragraph.

In hull insurance the provision must also be applicable if the peril was not of such qualified force as to make the general average rules applicable, but where it is an established fact that damage has been averted for which the insurer would have been liable. An example could be the costs involved in preventing a crane on the quay from falling across the deck, or in bringing a ship afloat which has run aground in a canal, provided it is obvious that there is no danger to the safety of the ship.

In P. & I. insurance the provision conclusively decides what costs of preventive measures are recoverable, but in this connection should be noted the special limitation of recoverable losses provided in § 245.

A main problem in applying the paragraph is drawing the line between the measures which are in the nature of measures to avert or minimize the loss for which the insurer is liable, and the measures which the assured must take at his own expense as part of the general duty to secure and safeguard the subject-matter insured. The problem has been dealt with thoroughly in Bugge: «Sjøassurandørens ansvar for redningstiltak» (The Marine Insurer's Liability for Measures to Avert or Minimize the Loss) (The Norwegian Insurance Law Association's publication No. 27). The corresponding problem obviously also arises in general average, and here the solution is based partly on detailed provisions, partly on established average adjuster practice. Accordingly support for the solution will often be found in an analogy from general average law. The following presentation is not meant to be complete, but merely brings out a number of relevant elements:

(1) As costs of preventive measures, or as the Plan puts it: «loss through measures to avert or minimize» the loss, are only recoverable losses which the assured has incurred through wilful, damage-feasant acts by the assured or someone who is acting on his behalf for the purpose of safeguarding his interests. Damage caused by natural forces or by third parties are only recoverable under the general claims rules contained in the insurance conditions. However, the intent does not necessarily have to comprise the entire loss, provided the causal relation between the loss and the measure taken is fairly reasonable.

(2) In order for a loss to be covered by the rules relating to measures to avert or minimize the loss it must have been incurred for the purpose of averting or minimizing a loss which is covered by the insurance. But it is not necessary that the person causing the loss is clearly aware of the fact that he is safeguarding the insurer's interests; it is sufficient that he acts with the intention of averting the actual loss. Hence, the insurer will be liable under the rules relating to measures to avert or minimize the loss, even if the loss was caused by a third party who did not know that an insurance had been

taken out for the subject-matter he attempted to save, or by the assured himself in cases where he was not aware of the fact that he had cover against the loss he was attempting to avert.

In § 23, subparagraph 2, of the P. & I. Rules it was specifically emphasized that the insurer is not liable for «costs incurred to avert or minimize a liability or a loss which it turns out is or would have been of no concern to the Association. This limitation is in a way superfluous, as it is implicit in the requirement that the purpose of the act must be to avert a loss for which the insurer is liable. The decisive point is whether the insurer under the insurance conditions would have had to cover the loss which it was attempted to avert, not the conceptions which the assured or any third parties might have formed in this respect. However, their subjective conceptions may become important in a different way, cf. below under (5).

(3) In order to be deemed a salvage act a casualty must either have occurred or there must have been imminent danger of it occurring. The first alternative poses no problems. However, it is very difficult to indicate the degree of danger required to justify the assured taking measures to avert the danger at the insurer's expense. Normally an increase of the general maritime risk will not give the assured such a right, unless something else has occurred at the same time which can only be averted by extraordinary measures, cf. in (4) below. In general average law this principle is reflected, inter alia in the fact that the insurer is not liable for any extra consumption of bunkers or any other costs involved in heaving to or putting into a port for refuge during a violent storm, unless an accident or the like has occurred which may endanger the ship's seaworthiness during the further voyage.

(4) In addition to the impending danger it is also required that the assured or a third party has taken measures of an unforeseeable or extraordinary nature. Whether the measures are of such a nature must be decided in relation to «the ship's voyage, the nature of the cargo and the conditions existing at the commencement of the voyage», cf. § 23, subparagraph 3, of the P. & I. Rules, which has in this respect served as a model for the wording of the paragraph. A loss which arises through an ordinary and foreseeable use of the ship and her equipment is not recoverable, and the same applies to such expenses as the assured must have expected could accrue during the voyage. It is difficult to give any more detailed guidelines: the decision must in each specific case be made taking into consideration judicial tradition. As regards P. & I. insurance the limitations contained in § 245 are based on this principle.

(5) It is further required that the measures «in the circumstances existing at the time they were taken, can be considered justifiable». This limitation is more or less a safety valve for the insurer and is of very little practical importance. It is obvious that the assured must be allowed a wide margin for miscalculations when the casualty is a fact or there is imminent danger of a casualty. In this connection reference is made to § 54, according to which gross negligence is required on the part of the assured to entitle the insurer to invoke a neglect of the duty to avert or limit the loss.

Whether or not the measures were justifiable must be evaluated in the light of the situation as it appeared to the assured at the moment of danger. That the subsequent course of events proved him wrong is therefore in principle irrelevant. It is thus not a requirement that the situation in actual fact justified preventive measures; the decisive point is that the assured *believed* the situation to be so serious. However, it is obviously a condition that the assured has shown reasonable diligence. If he misjudged the situation, his conduct must be evaluated under the rules contained in Chapter 3, Subdivision 5, on casualties caused intentionally or negligently. If he has misjudged the situation by gross negligence his claim may thus be reduced or lapse altogether under § 56.

Measures to avert or minimize the loss will very often be instituted by others acting on behalf of the assured, especially the Master and other members of the crew. If they take measures, which must in the existing situation be considered unjustifiable, this

will normally be faults committed by the ship's Master or crew in connection with their service as seamen, against which the assured is covered under § 59. The insurer must also normally accept liability if the misjudgment is attributable to a third party, who on his own initiative intervenes for the purpose of safeguarding the assured's interests. As for the damage to the ship caused by the measures to avert or minimize the loss, this consideration must be absolutely decisive. If on the other hand the assured has incurred liability or some other cost through a measure which was quite obviously taken on the basis of an unjustifiable misjudgement on the part of the crew or a third party, the possibility that the limitation contained in this paragraph will acquire independent importance cannot be ruled out.

§ 23, subparagraph 2, 1st sentence, of the P. & I. Rules established explicitly that the insurer covered the loss «even if they (the measures) were unnecessary for averting or minimizing liability». This limitation is superfluous alongside the requirement that the measures to avert or minimize the loss must have been «justifiable», in view of the fact that it is clear that the justifiability shall be evaluated in the light of the situation in which the assured and his crew were when the measures were taken.

(6) It is further irrelevant whether it is the assured himself, his own employees or a third party who instituted the measures to avert or minimize the loss.

(7) It is also irrelevant whether the measures fail to bring about any result. The insurer shall in any case cover both the costs incurred in connection with the measures, and the loss, even the attempt to avert it was not successful, in vain attempted to avert. The only limitation of the insurer's liability in this relation is that the measures must be considered «justifiable», cf. above under (5).

(8) The provision that the insurer is liable for costs incurred by unsuccessful measures to avert or minimize the loss leads to another special rule, viz. that the costs are covered, even if this means that the sum insured is exceeded. The insurer is thus liable for costs incurred by preventive measures in addition to compensation for damages which consumes the entire sum insured. This rule is laid down in § 80.

(9) Finally, the special rule relating to losses resulting from preventive measures applies that in this connection the insurer is liable for all kinds of losses, not only those that are recoverable under the rules of the Plan and the various insurance conditions. The point of view is that the assured shall be held harmless for all losses he sustains through the preventive measures. Hence, the insurer is liable for any damage to the subject-matter insured or to any other objects belonging to the assured, for any cost and any liability he incurs vis-à-vis a third party. However, also here the limitation contained in § 63 applies, cf. subparagraph 2 (b) of § 68. The losses which § 63 exempts from the insurer's scope of cover are normally of such a vague nature and their extent so difficult to establish that it might lead to major practical difficulties to impose liability on the insurer for such losses where they were connected with a measure to avert or minimize the loss.

(10) Another limitation which has at times been established in practice is that the loss is not recoverable, unless «a real sacrifice» has been made. If the objects, which have been damaged or lost through the measure to avert or minimize the loss, would in any circumstances have been destroyed, it has been held that the assured had not suffered any «loss» for which he could make a claim against the insurer. This point of view was adopted in ND 1918.513 NH Vega and ND 1947.122 Bergen Justi, but rejected by the Danish Supreme Court in ND 1917.512 Ran, see also *Selmer* in AfS 4.72 ff. Current law is probably that the assured cannot claim compensation under the special rules relating to measures to avert or minimize the loss for an object which at the time it was sacrificed was exposed to a special danger, which would have resulted in it being lost, regardless of what happened to the ship.

As mentioned above, it follows from this principle that the insurer is liable for all

losses in connection with measures to avert or minimize the loss, that the losses are also covered without a deductible, cf. § 189, subparagraph 3. However, new for old deductions shall be calculated according to the Plan if the insurance is taken out «subject to new for old deductions».

As regards the extent of the losses which are recoverable under the basic rule relating to measures to avert or minimize the loss, the Plan represents a widening of the cover in relation to the previous system. Under the Hull Policy A 5 No. 3 damage resulting from sacrifices, which are neither recoverable in general average, nor were made for the purpose of saving a ship in ballast, is only recoverable if the damage in question was also recoverable as particular damage under the insurance conditions. This rule was very rarely applied in practice and could lead to unreasonable results. It has therefore been abandoned.

§ 69. Loss through measures relating to several interests

This paragraph corresponds to § 36, subparagraph 3, of the 1930 Plan.

As mentioned in the introduction to this subdivision it is conceivable that preventive measures are aimed at saving several interests without the rules relating to general average being applicable. In that event a proportionate apportionment of the loss shall be effected among all the parties who have benefited from the measures, in conformity with the general principle on which the general average is based. This rule will e.g. become applicable if the ship is in ballast and an insurance has also been taken out in respect of the supplies on board. In that event a loss occasioned by measures taken to save the ship and her equipment shall be apportioned between the hull insurer and the insurer of the equipment, taking into consideration the value of the respective interests.

However, there is not complete consistency in the apportionment of a loss under this paragraph. If the object of a measure is to save the ship, the insurer is liable for the entire loss resulting from the measure, even if the assured, in the event of the ship being lost, would also have sustained losses which are not covered by any insurance. Thus, it is not taken into consideration that the ship is valued at a lower amount than her market value (cf. below under § 70). Nor is the assured debited for that proportion of the loss which in the event of an apportionment would have fallen on his uninsured income interests. If a liability, which is covered by the insurance, has been averted, the fact that a deductible was agreed on, which would have meant that the assured would have had to pay part of the liability himself, shall not be taken into consideration. These and similar limitations in the principle of apportionment are based on the traditions of insurance law, and it is not the purpose of the Plan to make any changes in this respect.

Special problems arise in connection with preventive measures, the purpose of which is to avert partly liability which the P. & I. insurer would have had to cover, and partly liability or damage for which the hull insurer or another insurer would have been liable. The most practical example is the averting of collision liability. Such liability will under the rules contained in Chapter 13 of the Plan be covered by the hull insurer to the extent it does not exceed the sum insured and does not concern personal injury, loss of life or other types of losses which are specifically exempted in § 194. The liability which is not covered by the hull insurer (or, if appropriate, the hull-interest insurer) will be covered by the P. & I. insurer. Most important is liability for personal injury or loss of life. Where measures have been taken to avert a collision, it will often be possible with a high degree of certainty to establish that liability has been averted for the hull insurer as well as for the P. & I. insurer, but as a rule it will be very difficult to establish the extent of liability each of the insurers would have had to cover.

In order to solve the difficulties which this uncertainty creates for the apportionment of the claims, the committee considered introducing a modification of the general principle of a proportionate apportionment. The rule provided that each of the insurers was to be liable for a specific type of loss. The P. & I. insurer was liable for the loss which consists in the assured being held liable for personal injury or loss

of life, while the other insurers — first and foremost the hull insurer — covered losses to the assured's property and liability for damage to material assets. Hence, there was no question of any proportionate apportionment. However, the Committee decided that the rule was not very expedient. It would transfer a substantial part of the liability for the measures to avert or minimize the loss (in «common situations» of this nature) to the hull insurer, in as much as a measure to avert or minimize a loss would probably rarely result in personal injury or loss of life. Hence, as previously, it should be attempted to reach a solution on the basis of «the threatened interests» by an apportionment of the costs of preventive measures between the P. & I. and the hull insurers.

§ 70. General average

This paragraph corresponds to § 35, Nos. 1 and 3, of the 1930 Plan, and sections 64 and 65 of ICA.

As mentioned in the introduction to this subdivision, the insurer will very often be liable for losses incurred in measures to avert or minimize the loss in the sense that he covers the general average contribution imposed on the assured. As in connection with the particular measures to avert or minimize the loss it is a condition that the general average act is made with a view to a peril which is covered by the insurance. If the measure is taken in order to avert war perils, the war-risk insurer will thus be liable for the contribution. However, it is not required to verify whether the insurer would have been liable for every loss the preventive measures, which entitle the assured to compensation in general average, were meant to avert. The hull insurer is thus also liable for the contribution which the assured is called on to pay to cover the so-called «common-benefit» expenses, despite the fact that they are not aimed at averting any loss which is covered by the hull insurance. Hence, once a general average adjustment shall take place, it is considered as an entity in relation to the insurer. In the event of a pure T.L.O. insurance under § 152, however, it must be verified whether there was any risk of a total loss when the general average act was undertaken, and the contribution shall only be paid in so far as it covers losses in connection with measures to avert a total loss.

The contribution is recoverable on the basis of a legal average adjustment. In connection with minor casualties the insurer will often agree to an informal general average apportionment which is not drawn up by an average adjuster. Under § 35, No. 1, subparagraph 2, of the 1930 Plan the general average statement had to be drawn up in accordance with current rules of law, or the York-Antwerp Rules, if it had been agreed that the latter rules were to apply. According to the new Plan the general average statement may also be drawn up in accordance with other conditions which must be considered customary in the trade in question, cf. also section 65 of ICA.

Under § 35 No. 1, subparagraph 2, of the 1930 Plan the contribution was to be paid on the basis of the general average statement, even if the contribution value was higher than the insured value of the interest. This rule has been maintained, cf. subparagraph 1, last sentence of this paragraph.

§ 35 No. 1, subparagraph 3, of the 1930 Plan, contained rules relating to the assured's obligation to safeguard his interests during the general average adjustment. The necessary rules in this respect follow from the assured's general duty to maintain and secure the right to claim against third parties, cf. § 99. The other rules contained in the 1930 Plan relating to the revising of incorrect average adjustments etc. were not very practical and have been deleted.

Subparagraph 2 of § 70 corresponds to § 35 No. 3 of the 1930 Plan. If the assured (normally the shipowner) is liable to the other interested parties for the event which has made the general average act necessary, he cannot claim contributions from those parties. This applies e.g. if the ship must be considered unseaworthy in relation to the cargo, or if she has deviated from the route she was assumed to follow under the contract of affreightment. However, the gravity of the assured's conduct will rarely be such as to result in his forfeiting his right to compensation from the insurer under the

insurance conditions as well. This will only be the case if the unseaworthiness was of such a nature as to threaten the safety of the ship, cf. § 45, or the deviation has taken the ship outside the trading limits agreed on for the insurance. Where the assured has thus maintained his rights vis-à-vis the insurer, the traditional solution is to impose on the insurer liability for the losses which must be considered incurred in order to save the interest insured. The Plan maintains this solution. Hence, the insurer will be liable for the proportion of the loss which would have fallen on the assured in the event of a general average adjustment. The loss suffered by the assured by his right to claim general average contribution from the cargo being forfeited will normally be covered by the P. & I. insurer, cf. § 229.

According to § 35 No. 4, subparagraph 2, of the 1930 Plan, the same principle was to apply where the measures to avert or minimize the loss had resulted in damage to or loss of the actual subject-matter insured. The fact that the assured had committed a breach of a contract of affreightment in this way resulted in his obtaining only partial cover under the hull insurance of the hull damage which the ship sustained through the measure to avert or minimize the loss. Liability for the remaining part of the loss was transferred to the P. & I. insurance. This solution is not natural. Provided the assured has not disregarded the insurance contract in such a manner that his cover is reduced or forfeited, the hull insurer should provide full cover for the damage which the ship sustains, regardless of whether the damage is due to measures to avert or minimize the loss or has arisen by way of an accident. § 72 of the Plan, which gives the assured an unconditional right to claim compensation for damage to or loss of the subject-matter insured under the rules relating to particular loss, will therefore prevail over this paragraph and give the assured right to full compensation. The limitation rule contained in subparagraph 2 will first and foremost have a bearing on salvage awards, port-of-refuge expenses and «common-benefit» expenses.

Where a salvage award has been incurred for a ship carrying a cargo this amount will sometimes be apportioned twice, first during the salvage-award case and subsequently in connection with the general average adjustment. These apportionments may differ from each other, in view of the fact that the contribution values may differ from the values of ship and cargo respectively which were relied on in the salvage-award case. In the final settlement between ship and cargo the ensuing general-average apportionment will normally be decisive. During the revision work the question was raised whether a special rule should be issued stipulating a duty for the insurer to pay the proportion of the salvage award which the ship is ordered to pay in the salvage-award case. However, no such rule has been introduced in view of the possibility of resorting to the rule relating to payment on account contained in § 90.

Where the insurer is liable to the assured for a loss which is also covered by the contribution from the other interested parties, he will be subrogated to the contribution claim to a corresponding extent, cf. § 96. Whether or not any contribution claim exists will often depend on whether the owner of the cargo has accepted personal liability when the goods are delivered to him (signed average bond). § 20 No. 6 of the P. & I. Rules made the insurer's liability subject to the objective condition «that an average bond has been given», whereas § 35, No. 2, subparagraph 1, 2nd sentence, and No. 4, subparagraph 2, 1st sentence, must presumably be interpreted to mean that the insurer was only entitled to refuse to indemnify the loss if the assured (or his employees) could be blamed for the fact that no average bond had been obtained. Under the Plan the hull insurer will in this respect have to resort to § 99, whereas a special rule has been given for the P. & I. insurance in § 229, subparagraph 2.

§ 71. General average apportionment where the interests belong to the same person

This paragraph corresponds to § 35 No. 5 of the 1930 Plan.

This provision is necessary in order to implement the apportionment among the insurers with whom the assured has taken out his insurances. For the interests which are uninsured the assured shall bear his proportionate share himself.

§ 72. Damage to and loss of the subject-matter insured

This paragraph corresponds to § 35, No. 4, of the 1930 Plan, and section 66 of ICA.

As mentioned in the introduction to this subdivision, general average damage in the relationship between the insurer and the assured is often regulated as if it were particular loss. This may be desirable for the assured for two reasons: Either to avoid having to wait for a general average adjustment which takes a long time, or because the rules relating to particular loss lead to a more favourable financial result for him than the general average rules. § 35, No. 4, of the 1930 Plan therefore gave the assured a right to choose, but laid down fairly strict limitations for the exercising of this right. It was a condition that the assured had not forfeited his right to claim contributions from the other interested parties, and he was also required to notify the insurer of his decision within 30 days from his having learned about the casualty.

In view of the fact that under § 90 the assured has a right to demand payment on account from the insurer, the fact that it often takes a long time to get the average adjustment will not motivate a right to choose. On the other hand, it happens that the compensation for the general average damage to the ship differs, whether it is calculated in accordance with the general average rules or under the insurance conditions. There is reason to give the assured the advantage of the best of these settlements, and the Plan does not maintain any of the formal limitations contained in the 1930 Plan. The condition that the assured has not forfeited his right to claim contributions from the other interested parties has been deleted on the grounds indicated above under § 70. Nor is there any reason to demand that the assured must make his decision within a certain time-limit, because he should have the advantage of the settlement which proves to be the most favourable when the general average adjustment has been completed. Hence, according to the Plan the general average damage is recoverable in accordance with the rules relating to particular loss if such a settlement leads to a result which is more advantageous to him. Even if this might entail somewhat more work for the insurers as compared to earlier practice, the Committee held that this additional work was not so extensive as to outweigh the advantage it represents for the assured always to have the right to demand the most favourable settlement. In practice the easiest way of effecting the settlement is for the assured to receive a payment on account when the general average damage has been repaired, in view of the fact that the final settlement will not be made until the average adjustment has been completed. However, it is also possible after the repairs have been carried out to issue an ordinary claims statement, which may become subject to revision at a later stage.

When applying these rules the various forms of hull damage to the ship must be considered collectively to the extent they are attributable to one and the same general average act. The assured cannot demand that some damage shall be recoverable under the general average rules and other under the particular rules. In the event of a particular settlement it is therefore necessary to apply both the limitations with regard to the recoverable losses in § 176 and any new for old deductions agreed on. (As already mentioned, no deductible shall be calculated.) On the other hand it is possible that the deductible rules in general average are less advantageous to the assured than the rules concerning particular loss, but that in return a general average adjustment will give him compensation for a number of the losses excluded in § 176.

For the losses, which are not comprised by this rule — in other words salvage awards, «common benefit» expenses and other costs — an ordinary general average adjustment must take place. The insurer shall thus be liable for the portion of the costs which is covered by the assured's contribution to these costs, and furthermore the assured must claim the other interested parties for their contribution. However, also here the assured is entitled to payment on account of his own contribution in accordance with § 90.

§ 73. Assumed general average

This paragraph corresponds to the Hull Policy A 5 No. 2.

As mentioned in the introduction to this subdivision, the general average rules shall also apply when measures have been taken to save a ship in ballast. In accordance with earlier practice concerning the Hull Policy A 5 No. 2, the rules contained in this paragraph also apply to losses incurred in order to complete the ballast voyage without this qualifying as a saving of the ship, e.g. expenses accruing during the ballast voyage where the ship has put into a port for the purpose of carrying out repairs necessary for the safe completion of the voyage. The general average rules become decisive both for the question whether the degree of the peril was sufficient for the assured's sacrifices to be recoverable, and for the question as to what sacrifices are recoverable. As mentioned above, the Plan has for such a situation introduced the term «assumed general average».

When calculating the compensation the same rules shall be complied with as if the ship had carried a cargo. As far as hull damage is concerned, the assured shall receive settlement in accordance with the rules which altogether give the most favourable result for him, whereas the settlement for other losses shall be in accordance with the general average rules.

As mentioned earlier, what is achieved by applying the general average rules to measures to avert or minimize the loss for ships in ballast is that the cover will be the same regardless of whether the ship is carrying a small cargo or is sailing completely empty. However, in practice this principle is not carried into effect in full. Under the Hull Policy there were certain limitations to the assured's right to claim costs incurred in preventive measures for a ship in ballast covered under the general average rules. In general average the shipowner shall receive compensation for a proportion of the time loss during the final repairs of the damage, cf. the York-Antwerp Rules XI. Under the Hull Policy A 5 No. 2, 4th sentence, the assured was not entitled to this advantage when final repairs of damage, which the ship has sustained while in ballast, are carried out, and that rule is maintained in subparagraph 2, 1st sentence, of this paragraph. According to established practice the limitation does not comprise any waiting time before repairs are commenced, whereas waiting time arising during repairs because necessary parts are missing is comprised. Similarly, the special rules relating to commission and interest applicable in general average are made invalid, cf. the Hull Policy A 5 No. 2, 6th sentence, and subparagraph 2, 2nd sentence, of this paragraph. Furthermore, subparagraph 2, 1st sentence, explicitly provides that the insurer shall not be liable for costs in substitution of the costs which are here excluded from the cover. The fact is that in practice it used to be assumed that such substitution costs were to be paid by the insurer. The idea was that the exclusion rule relating to crew's wages and maintenance was to be construed restrictively, and consequently, the basic rule that the insurer was liable as in general average had to be applicable to the substitution expenses. The Committee found this interpretation of the Hull Policy A 5 No. 2 to be incorrect, but in view of the fact that it followed from 30 years' established practice, it was decided that an explicit provision was appropriate.

The Hull Policy also prescribed several limitations in the right to claim for damage inflicted on a ship in ballast with a view to saving her. The limitation corresponded to § 176 (l) and (m), in addition to a limitation regarding loss of bunkers etc., which is not included in the Plan's particular claims rules. These limitations have been deleted.

Subdivision 3

Indemnity in respect of assured's liability to third parties

§ 74. Principal rule

This paragraph corresponds to § 37 of the 1930 Plan. Strictly speaking, this provision is superfluous alongside § 5.

§ 75. «Cross liabilities»

The 1930 Plan does not contain any provision which corresponds to this paragraph. However, the principle laid down in this paragraph is in accordance with certain customary Norwegian marine insurance law, cf. *Brækhus* in Afs 4.468—69 with references.

The greatest practical importance of the principle is in connection with collision settlements. This is best illustrated by a somewhat stylized example:

The insured vessel A has collided with vessel B, the blame fraction is one half. A's hull damage is 300, the time loss 120, a total of 420. B's loss totals 350. The settlement between the ships under section 220, subsection 2, of the Norwegian Maritime Code can be drawn up in two ways. One could either say that the total loss is 770, that each of the parties shall bear one half, i.e. 385, and that this is achieved by the ship having sustained the smallest loss, B, pays 35 to A. Such a single-liability settlement results in a single claim. Or A could also be held liable to pay half of B's loss, i.e. 175, and B to pay half of A's loss, i.e. 210. These two claims are set off against each other with the result that B must pay the balance of 35 to A. This is the cross-liability settlement.

In the relationship between the parties the result will be the same whether one or the other principle is followed. In the ensuing settlement between the individual shipowner and his insurers the choice between the two methods of settlement will be of great importance. The reason for this is that the indemnity obtained from the other ship (B) shall often to a greater or lesser extent be credited to other persons than those who shall bear the liability for the damage to the other ship (B). The indemnity from ship B shall, in so far as loss of time is concerned, fall to the shipowner (if appropriate, the insurer against loss of time, cf. Chapter 20), whereas the indemnity for hull damage shall normally be divided proportionately between the hull insurer and the owner, cf. § 96, subparagraph 2. Ship A's liability to ship B, however, shall as a rule be covered in its entirety by the hull insurer, cf. Chapter 13 (sometimes the P. & I. insurer will also come into the picture, see below). If the settlement between the owner and the insurer is based on the cross-liability principle, it is the gross liability amounts before the set-off which shall be debited and credited respectively under these rules. If on the other hand the single-liability principle is adopted, there will be only one amount, the liability balance, to apportion. If the balance is in the oncoming ship's favour, it shall be debited to the hull insurer as liability insurer. If it is in the insured ship's favour, it shall be divided proportionately between the owner and the hull insurer. Seen in the light of the cross-liability settlement the single-liability settlement may lead to the result that a claim from A for damages against the oncoming ship (B), which ought to benefit one person, e.g. indemnity for loss of time payable to the owner of A, is used as a set-off to cover A's liability to the other ship (B) which, under the insurance conditions, ought to be wholly covered by ship A's hull insurer.

If we assume in the above example that A's hull insurer indemnifies A's hull damage with 240 and that A has to pay the outstanding 60 himself, plus the loss of time of 120, a cross-liability settlement of the collision liability between A and his hull insurer will be as shown in Table 1.

In connection with a single-liability settlement there will be only one amount, viz. the balance of 35 in A's favour, which shall be divided proportionately between A and his hull insurer. As A's total loss was 420 this means that the indemnity from B gives a refund of $35/420 = 1/12$, and we get the settlement as shown in Table 2. There can be no doubt that the cross-liability settlement is preferable; it gives the shipowner the precise refund from the other ship indicated by the blame fraction. By the single-liability settlement the refund is reduced, in our example from $1/2$ to $1/12$, despite the fact that the other ship is held liable for one half of the loss.

The collision settlement will sometimes also affect the P. & I. insurer: In the first place where the liability against the other ship exceeds the hull insurer's maximum liability, cf. § 196. Secondly, in the event of so-called indirect person and cargo liability. For personal injury caused by a collision in a both-to-blame-case both ships are jointly and severally liable, cf. section 220, subsection 3, of the Norwegian Maritime Code.

Under American law the same applies to liability for cargo damage. It is therefore conceivable that the oncoming ship B must pay indemnity for personal injury, or for damage to the cargo on board the carrying ship A, and that B in the settlement with A charges A for half of the indemnities paid. As for ship A, she may have sustained far greater damage in the collision than ship B so that a settlement of the hull damage alone would give a substantial surplus for A. However, this is wholly or partly counterbalanced by ship B's reimbursement claim in connection with the personal injury or cargo damage claims. The final balance which emerges in the external settlement must also here be broken down into claim and counterclaim in accordance with the cross-liability principle, in view of the fact that the indirect liability for personal injuries and damage to the insured ship's own cargo shall be imposed on the P. & I. insurer, cf. § 194, subparagraph 2 (b), (c) and (h) and §§ 225 and 226. See also Brækhus, l.c. pages 482—97.

Table 1	<i>A's hull insurer</i>	<i>A</i>	<i>B and/or B's insurers</i>
Hull damage	240	60	
less 1/2 refund from B	- 120	- 30	150
	120	30	
Loss of time		120	
less 1/2 refund from B		- 60	60
		60	
Liability for 1/2 of B's loss	175		- 175
Final total charge	295	90	35

Table 2	<i>A's hull insurer</i>	<i>A</i>	<i>B and/or B's insurers</i>
Hull damage	240	60	
less 1/12 refund from B	- 20	- 5	25
	220	55	
Loss of time		120	
less 1/12 refund from B		- 10	10
		110	
Liability to B	0		0
Final total charge	220	165	35

Special difficulties arise where one or both of the colliding ships limit their liability. In the relationship between the ships the limitation will according to the laws of most countries be effected on the liability balance, in other words on the basis of the single-liability principle, cf. the Limitation of Liability Convention of 1957, Art. 1 (5), and the Maritime Law Committee's draft of a new section 254, subsection 4, of the Maritime Code. In consequence hereof the calculated gross liability will not correspond with the balance which is in actual fact paid, and the normal cross-liability settlement in the relationship between the shipowner and his insurers will not be correct. In English marine insurance law, which is based on cross liability as the

principal rule, this has led to a switch to single liability as soon as one of the involved ships limits her liability, cf. I.T.C., Hulls, No. 1. However, this solution results in an unfortunate discontinuity. An insignificant increase in liability, making limitation applicable, may result in a very substantial reduction of the reimbursement of the owner's loss of time. Danish and Norwegian practice has instead adopted an adjusted cross-liability settlement in the limitation cases by reducing the largest gross amount of liability in the insurance settlement by the same amount by which the liability balance in the external settlement has been reduced as a result of the limitation, rule, see further Brækhus l.c., pages 469—82 and 497 ff. This method of settlement was also approved by the Norwegian Supreme Court in the Fernstream case, ND 1963.75. In order to prevent this question from causing dispute in the future, it is expressly stated that the settlement shall be made on a cross-liability basis, also in limitation cases. For the sake of clarity the last sentence of the paragraph specifies how the settlement shall be effected when the limitation is applied to the liability balance.

Cases causing mutual damage and liability which affect the insurance settlements do not occur only in connection with collisions between ships, even though it is probably the collision cases which are predominant. The cross-liability principle must also be applied in a case such as the following: A cargo of slimes which is carried by the insured ship becomes liquid; the ship, which does not have the necessary longitudinal bulkheads, takes a list and ends up turning over and going down. The accident was due partly to negligence on the part of the cargo owner: he has failed to say that the slimes were of a particularly difficult type, partly to negligence on the part of the ship: even when carrying ordinary slimes the ship should have had longitudinal bulkheads. In the claims settlement the cargo owner's (partial) liability for the loss of the ship will to some extent be offset by the owner's (partial) liability for the loss of the cargo. In the ensuing insurance settlement the balance must be broken down as follows: the indemnity which the cargo owner pays for the loss of the ship falls to the hull insurer, while the indemnity to the cargo owner for the loss of the cargo must be paid by the P. & I. insurer.

In the above it is assumed that both the assured's own loss and liability to third parties are covered by insurance. However, the cross-liability principle must be applied, even if it is only the assured's own loss or only the liability which is insured. The individual insurer's liability shall not depend on how the assured has covered his other interests. For this reason the application of the cross-liability principle has been specifically authorized with a view to liability insurance in this paragraph and with a view to the apportionment of claims for damages in § 96, subparagraph 1, 2nd sentence.

§ 76. Unusual or prohibited terms of contract

This paragraph corresponds to § 78 No. 1, subparagraph 2, 1st sentence, and No. 2, subparagraph 2, of the 1930 Plan, and § 26 No. 3 of the P. & I. Rules.

The extent of the liability covered by the P. & I. insurer will to a very great extent be influenced by the agreements which the assured has entered into, in particular concerning the carriage of cargo and passengers. The collision liability, which the hull insurer covers, will usually have been incurred vis-à-vis a third party with whom the assured does not have any contractual relationship. However, also here the assured's contracts may be of significance, especially in connection with liability to owners of tug boats or quays, canals and similar installations which the ship has used.

§ 78 of the 1930 Plan stipulated the absolute condition that the liability was based on «general rules of maritime law». As mentioned under § 15 this criterion is unfortunate, as it will be very difficult to describe the content of «general rules of maritime law» isolated from the contractual clauses which are normally used. Under subparagraph (a) of this paragraph the insurer shall therefore always cover liability which is based on contractual terms which must be considered customary in the trade concerned.

The limitation of liability contained in subparagraph (b) relates to § 51, which authorizes the insurer to prohibit or order certain contractual forms.

§ 77. Objects belonging to the assured

This paragraph corresponds to § 78 No. 4 of the 1930 Plan and § 20 No. 3 of the P. & I. Rules.

If two of the assured's ships collide, the ships' hull insurers will cover the damage they have sustained. If the ships had belonged to different legal entities, the ship which was at fault would also have had to cover the other ship's loss of time, new for old deductions, deductibles concerning the hull damage and other financial losses which the owner has suffered because of the collision. This liability would normally have been covered by the hull insurer of the ship at fault. No such liability can arise when both ships belong to the same person. The assured will suffer a corresponding reduction in his cover, and the hull insurer of the ship at fault will not be liable for loss of time etc. for which he would otherwise have been liable. This is not reasonable and the Plan therefore prescribes, in conformity with earlier law, that a fictitious collision settlement shall be effected between the ships. The indemnity shall be calculated as if they had belonged to different persons. This so-called «sister-ship rule» is customary in international marine insurance.

The same applies where the ship has run into other objects belonging to the assured, e.g. a quay or pier. The insurer shall here cover the liability which the assured would have incurred if the quay or pier had belonged to a third party, based on the view that the insurer's liability should not be reduced because of the coincidence that the ship has run into the assured's own property.

It is in his capacity of insurer of the ship which would have been held liable that the insurer cover the assured's loss of time, new for old deductions etc. concerning the other ship. The sister-ship rule represents a positive extension of the liability cover and obviously rules out the possibility that the insurer may have recourse against the assured as regards the losses which are recoverable by virtue of the said rule. However, the sister-ship rule cannot be invoked vis-à-vis an insurer who has only insured the «innocent» ship. He will only be liable for the ship's hull damage in accordance with the contract of insurance.

Another question is whether such an insurer will have recourse against the assured in his capacity as owner of the ship at fault. Here one must in principle apply the general rules contained in Chapter 3, subdivision 5, of the Plan relating to casualties caused intentionally or negligently by the assured. The assured's own negligence cannot deprive him of cover, cf. the mandatory rule contained in section 20 of ICA, which means he can even lose his cover as a result of simple negligence shown by one of his subordinates. If gross negligence has been shown in the manoeuvring of the ship at fault, it must be decided on the basis of the general identification rule in § 61 whether the insurer shall have the right to invoke the fault vis-à-vis the assured. Strong reasons speak in favour of applying the same rules as those in force where the fault was committed on board the insured ship, cf. § 59, whereby identification is thus excluded. If the casualty was caused by a fault in a manoeuvring by the crew on the ship (uninsured), at fault, recourse claim is therefore precluded. Recourse will only become relevant where gross negligence has been shown by the owner's management, cf. § 56.

If a fault was committed on both the colliding ships, the application of the sister-ship rule must be «on the basis of the calculated gross liabilities before set-off is effected», cf. § 75.

This paragraph also affects the P. & I. insurer's liability in respect of damage to cargo belonging to the assured himself, or collision liability in so far as it exceeds the amounts covered by the hull and the hull interest insurer. The P. & I. insurer's liability for damage to the assured's property is subject to a special limitation, see § 244.

The extended cover under this paragraph applies only to loss of or damage to other objects than the insured ship and her supplies and equipment. Damage to such objects is not recoverable under these rules, cf. § 20, No. 3, 2nd sentence, of the P. &

I. Rules. To avoid any misunderstanding this is stated expressly in the 2nd sentence of the paragraph.

A corresponding «sister-ship rule» is applied when the vessel is salvaged or receives assistance from another vessel belonging to the assured, cf. § 159.

§ 78. Determination of the assured's liability

This paragraph corresponds to § 31 of the P. & I. Rules. Subparagraph 2 of the paragraph is in accordance with the mandatory rule contained in section 94 of ICA.

The 1930 Plan did not contain any corresponding rule relating to a determination of the assured's liability vis-à-vis a third party. However, the provision may also affect the hull insurer's collision liability, cf. Chapter 13 of the Plan.

Subdivision 4

The sum insured as limit of insurer's liability

§ 79. Principal rule

This paragraph corresponds to § 39, subparagraph 1, 1st sentence, and subparagraph 2, of the 1930 Plan, and to section 74, subsection 1 of ICA.

This provision is only applied in the types of insurances where a specific sum insured is agreed on. In P. & I. insurance it is thus not applicable. Under the 1930 Plan both damage to or loss of the vessel and liability to third parties, which the hull insurer covers, had to be taken into account when determining whether the sum insured was exceeded. This system might be justifiable as long as the shipowner's liability was limited to the owner's assets at risk in the maritime venture. The sum of hull damage and third-party liability would then normally not exceed the value of the vessel in undamaged condition. However, by the Brussels Convention of 1957 the limitation of the shipowner's liability has been separated completely from the assets at risk; the owner shall be liable up to a certain amount per ton, regardless of the fate of the vessel. A collision which results in total loss of or major damage to the ship and furthermore substantial liability to a third party, will therefore now relatively easily shift part of the liability on to the P. & I. insurer. In the Plan a separate sum insured has been stipulated for collision liability along the lines of *inter alia* English law, cf. subparagraph 2 of this paragraph and § 196.

The fact that the insurer has «separate» collision liability implies that he does not cover collision liability within the actual hull insurance sum. Whatever might be left of the ordinary sum insured after the damage to the ship has been covered shall not be used to cover liability. The separate sum insured for collision liability has been fixed at an amount equal to the sum insured under the hull insurance, cf. § 196.

What constitutes «one casualty» must be decided on a case-to-case basis. Where new damage arises in connection with a casualty, it must be established how independent the new casualty is. If it is natural to regard the accident as a direct continuation of the damage which arose in connection with the first casualty, the whole event must be evaluated as «one casualty». However, if a new event causing major damage should happen, such as e.g. a grounding, collision or mine explosion while the ship is being towed to a port following a casualty, the new event will have to be regarded as a new casualty in relation to this paragraph.

The question whether one or more casualties have occurred will affect both the cover of the damage to the ship and the cover of liability to third parties. Admittedly these problems are not of any great practical importance in connection with the damage cover, in that the ship will normally be condemned long before the total repair costs reach the amount of the sum insured. In this respect the decision of the question will essentially affect the calculation of the deductible, provided one deductible per casualty has been agreed, cf. § 189. On the other hand it is conceivable that the ship collides with several other ships in quick succession, causing losses which in total exceed the sum insured for the collision liability. In connection with such a «series

of collisions» the natural thing to do will be to relate the solution to the decision which is made with regard to the owner's right to limit his liability externally. If the series of collisions is regarded as several separate damage feasant events so that the owner must pay the limitation-of-liability sum several times, the hull insurer should be liable with just as many sums insured for collision liability. However, this applies only if the decision of the question regarding limitation of liability has been made on the basis of Norwegian law, or at least by a court which relies on similar principles. Hence, the insurer does not have to comply with e.g. an American court decision which stipulates several «separate occasions» for the more or less openly stated purpose of counteracting the effect of the rules relating to limitation of liability.

§ 80. Liability in excess of the sum insured

This paragraph corresponds to § 39, subparagraph 1, 2nd sentence, of the 1930 Plan, and section 53, subparagraph 2, 1st sentence, of ICA.

This paragraph lays down the principle that the assured, in addition to the cover which the insurance affords him within the limits of the sum insured, is entitled to separate cover of a number of accessory expenses and other losses which the casualty has caused him. This applies to losses incurred by measures to avert or minimize the loss, costs in connection with providing security, filing suit against, or defending a suit filed by, a third party, costs in connection with the claims settlement and interest on the compensation.

Under § 39, subparagraph 1 a), of the 1930 Plan, the insurer was only liable for «particular average expenses» which exceeded the sum insured, not general average contributions. The reason behind this limitation is not clear. If one accepts the principle that a loss incurred in connection with measures to avert or minimize the loss is recoverable in excess of the sum insured, there is no need to consider general average contributions (or general average damage, if appropriate, which is recoverable under the particular rules in accordance with § 72) in any other way than costs incurred for the purpose of saving one separate interest. That there is a need for a rule to the effect that also general average contributions are recoverable in excess of the sum insured is shown by the High Court decision in the «Pan» case, ND 1955, 45 Eidsivating, where the limitation in the 1930 Plan was applied.

Under § 39, subparagraph 1 a), of the 1930 Plan, particular costs of preventive measures — where they exceeded the sum insured — were only recoverable «to the extent the expenses exceed the value of what has been salvaged». Also as regards that limitation the grounds are not clear. The limitation has no support in section 53 of ICA. It is undoubtedly wrong in a case where the casualty has merely caused the ship partial damage which is repaired for the account of the insurer. In that event it is not very likely that the loss attributable to the preventive measures exceeds the value of the ship after she has been salvaged, but nevertheless the full loss should be recoverable even if it, added to the repair costs, exceeds the sum insured. The rule contained in the 1930 Plan was also unfortunate where the casualty resulted in a total loss or a condemnation of the ship, and the insurer paid out total-loss compensation and kept the wreck. In such a case the loss incurred by the unsuccessful preventive measures which the assured has taken, should be recoverable in full, in addition to the sum insured. The value of the wreck which the insurer takes over is irrelevant in this connection.

The only situation where the limitation has some justification is where the insurer pays out the sum insured in order to avoid further liability (§ 40 of the 1930 Plan, cf. § 82 of the new Plan). Here the assured receives full compensation for the value of the asset and, in addition, he keeps the wreck, if any. In this connection it might therefore be said that the assured would «make a profit» if, in addition to full compensation and the wreck, the costs of preventive measures incurred for the purpose of salvaging the

wreck would also be recoverable in full. However, in this situation the insurer's liability for the costs of preventive measures was regulated positively in § 40, subparagraph 2, of the 1930 Plan, cf. § 82, subparagraph 2, of the new Plan. The costs are recoverable in full, in addition to the sum insured, provided they were incurred before the assured learned that the insurer would pay the sum insured.

§ 39 of the the 1930 Plan did not contain any special rule to the effect that interest on the claim is recoverable in excess of the sum insured. However, this has been done in practice, and the new Plan has included an express rule along these lines.

In connection with § 80 must be mentioned § 167, which deals with liability for the removal of war-wrecks. Under that paragraph the war-risk insurer covers such liability, even if the sum insured is exceeded.

§ 81. Limit of liability in the case of combination of perils

This paragraph is new.

In the *Pan* case, ND 1956.323 NH, the question arose as to how the limitation to the sum insured was to be practiced in the event of a casualty with a «mixed» causation. Liability for the damage to the ship was apportioned with 40% on the marine insurer and 60% on the war-risk insurer. The costs of repairs etc. exceeded the hull valuation, but the assured demanded full compensation, claiming that each of the insurers within his sum insured was liable for his share of the damage to the ship. The Supreme Court rejected the claim on the grounds that the assured shall not «in a case of a combination of various different perils be in a financially more advantageous position than if there had been no combination of different perils». The Plan confirms the rule laid down by the Supreme Court.

§ 82. Insurer's right to avoid further liability by payment of the sum insured

This paragraph corresponds to § 40 of the 1930 Plan and section 74, subsection 2, of ICA.

Under § 40 of the 1930 Plan the insurer had to exercise his right to pay the sum insured «within 14 days of having received adequate information regarding the loss». However, the insurer should have the right to limit his liability also at a later stage during a prolonged salvage operation, and the Plan has deleted the limitation.

Where the insurer pays the sum insured in accordance with this paragraph the further salvage operation will be for the assured's own account and risk. If the salvage operation is successful, the assured will keep the wreck, while he must on the other hand pay the full costs. However, he may claim a reimbursement of the costs he has incurred before he was informed that the insurer had decided to pay the sum insured. The measures, which the assured has instituted prior to that time are for the insurer's account, even if the costs do not accrue until later.

Normally it will be the hull insurer who pays the sum insured for the insured vessel. However, the provision is also applicable to an equipment insurer. With a view to this eventuality subparagraph 1 of the paragraph presupposes that it may also become appropriate to pay a part of the sum insured, viz. if the equipment insurer withdraws from the salvage operation after part of the equipment has been salvaged.

The principle contained in this paragraph is only applicable in property insurance. The insurer cannot invoke the provision if the assured, contrary to his wishes, wants to institute legal proceedings regarding a liability which is covered by the insurance. Here it is necessary to resort to the rules contained in § 94. If the assured in such a case is supported by the arbitrator, but a liability, which absorbs the entire sum

insured, is nevertheless imposed on the assured in the legal proceedings, the insurer shall cover the litigation costs under the general rules.

Chapter 5 Claims settlement

Subdivision 1

Claims statement, interest, payments on account etc.

§ 83. Assured's duty to provide particulars and documents

This paragraph corresponds to § 45, subparagraph 2, of the 1930 Plan, and section 22, subsection 1, of ICA.

Under the 1930 Plan it was the assured's duty to provide particulars and documents «which the insurer wishes to have in connection with the settlement of the claim». In one respect this rule was not far-reaching enough, in that it should also be the assured's duty to produce a document or a particular which has a bearing on the settlement, but of which the insurer is not aware and therefore has not requested. On the other hand, the provision went too far when entitling the insurer to demand to have any document handed over which he might want with a view to the claims settlement. The assured's duty should not comprise more than what the insurer needs from an objective point of view. Subparagraph 1 of the paragraph is worded along these guidelines.

If the assured neglects his duty under subparagraph 1, he forfeits his right to claim interest for the time lost, cf. § 86, subparagraph 2. It will not normally be reasonable to react with loss of interest until the insurer has voiced an explicit request for a specific piece of information or a specific document and the assured then fails to comply with the request.

The rule contained in subparagraph 2 of the paragraph is new. Neither the 1930 Plan nor the policies contained any rule regarding fraud on the part of the assured in connection with the claims settlement (cf. however, § 22 No. 3, subparagraph 2, of the 1930 Plan, regarding fraud in connection with double insurance). However, outside marine insurance it is customary to include a clause in the policy to the effect that the assured will forfeit any claims against the company if he commits fraud in connection with the claims settlement. Such a rule must be considered too strict. If the fraud is of only secondary importance and concerns only certain losses, it will be a severe reaction to refuse any compensation. It will also be easier to get the courts to hold that fraud has been committed if the consequence is not a loss of all rights. The provision has therefore been worded along the same lines as the rules relating to a casualty caused by gross negligence, cf. § 56.

As mentioned in § 30, the insurer will sometimes in connection with the claims settlement want particulars from the classification society, *inter alia* in order to have a basis for evaluating whether incorrect information was given when the insurance was taken out, whether the assured has violated safety regulations, whether he has been aware of a fact making the ship unseaworthy, etc. Often the situation will be that the classification society will only provide particulars if the shipowner has given his express consent. If the assured refuses to give such consent and the particulars for that reason cannot be produced, the insurer's liability should be limited in the same way as where incorrect information has intentionally been given, cf. subparagraph 2, 2nd sentence of the paragraph.

§ 84. Claims statement

This paragraph corresponds to § 46 No. 1 of the 1930 Plan.

The rules relating to time-limits for issuing the claims statement contained in subparagraph 1 of the paragraph constitute regulations which it is assumed will be of considerable practical importance, even if no direct sanction has been suggested. The time-limits commence from the point in time when the insurer has received the necessary particulars and documents. If the assured can claim for a total loss on expiry of a certain time-limit, «the necessary particulars» will not be available until the time-limit has expired, cf. however, § 170, subparagraph 1. If there is a dispute as to whether or not the loss is recoverable, the time-limit commences from the point in time when it has been finally decided that compensation shall be paid.

Subparagraph 2 of the paragraph adopts a rule from the 1930 Plan, which has been used extensively in practice. The insurer shall forward the documents to the average adjuster as soon as possible and decide whether or not to accept the adjuster's statement within one month of having received it. However, no time-limit has been stipulated for the average adjuster's performance of the assignment. The average adjuster is not himself a party to the insurance contract, and if a provision was to be introduced, it would have to be aimed at the insurer and impose on him a duty to stipulate a specific time-limit when he gives the average adjuster the assignment. However, there is hardly any need for such a rule.

§ 85. Rates of exchange

This paragraph corresponds to § 46 No. 2 of the 1930 Plan.

It is standard international practice that the conversion from one currency to another in the claims statement shall be effected according to the rate of exchange on the day the assured made his disbursements. The 1930 Plan saw the rule as a reflection of the general principle «that the assured neither suffers any loss nor profits from the exchange through the settlement». However, no such principle can be established. Any change in the rates of exchange during the period between the disbursement and the final claims settlement must necessarily result in a loss of exchange for one of the parties, and the conditions must contain positive rules as to who shall bear the exchange risk. Also the rules contained in subparagraph 1, 2nd and 3rd sentences, are in accordance with the 1930 Plan.

§ 46 No. 2 of the 1930 Plan contained a provision to the effect that the insurer was entitled to demand a revision of a general average statement if the rate of exchange applied in that statement was not the same as the rate on the day of disbursement. This rule is not included in the new Plan. It is standard international practice to convert according to the rate of exchange on the day of disbursement in general average. If, by way of exception, another exchange rate is applied, the insurer has the right to attempt to have the actual average statement changed. If the statement is confirmed by the law courts of the country concerned, the settlement should be made on the basis of the average statement.

Subparagraph 2 of the paragraph is derived from § 87, subparagraph 2, of the Danish Marine Insurance Convention. The claims statement is «issued» when the completed stenciled calculation is sent out from the insurer to the interested parties. In the rare event of the exchange rates changing during the period of time from the actual calculation is completed until it is ready to be sent out, an additional calculation must therefore be made.

§ 86. Interest on the claim

This paragraph corresponds to the Hull Policy A 13, cf. § 46 No. 4 of the 1930 Plan, and section 24, subsection 2, of ICA.

Like the Hull Policy and the mandatory rule contained in section 24 of ICA the Plan provides a duty for the insurer to pay interest as from one month after the insurer has been notified of the casualty. However, interest on the assured's disbursements only accrues as from the day such disbursements are made. If the claims settlement

also comprises costs which have not yet accrued, no interest shall thus be charged on those items.

Under §§ 168 and 169 the assured's right to claim for a total loss will in certain cases depend on a certain time-limit having expired. However, under § 170 he may claim indemnity without awaiting the expiry of the time-limit if he can prove that he will not get the ship back. In such a case interest will accrue as from one month from the time the assured proves that he has definitively lost the ship. Here the Plan is in accordance with earlier practice.

The Hull Policy stipulated, in accordance with ICA, that the rate of interest was to be the same as the rate applicable to general savings-bank deposits. However, for the reimbursement of the assured's disbursements the interest was to be 1% above the Bank of Norway rate for the first 6 months, and subsequently the savings-bank rate. To avoid any conflict with the mandatory rule contained in section 24 of ICA the new Plan has tied the interest to the savings-bank rate of interest. The current savings-bank rate of interest (saving conditions 2%) is, however, too low, and the paragraph therefore contains a minimum interest of 4%. The minimum rate of interest after the settlement is due for payment has been set at 5%, which is the customary penalty interest, cf. section 38 of the Norwegian Sale of Goods Act and section 36, subsection 1, of the Norwegian Act on Instruments of Debt.

§ 87. Dispute arising out of the claims statement

This paragraph is new.

The paragraph gives both parties the right to demand that an average adjuster give an opinion on the claims statement before the case is referred to the courts. The average adjuster shall not make an arbitration award, but merely give an opinion as to how the claims settlement should be effected in his view. This rule may possibly have the effect that some lawsuits are avoided, the fact being that the assured will often accept a claims statement if the average adjuster he has designated himself does not support his claim. Also the insurer will presumably as a rule accept the average adjuster's decision when it is not in his favour.

Even if no claims statement exists, there may be grounds for a litigation between the assured and the insurer, viz. where the latter has refused a request for condemnation, or repudiated a claim on the grounds that no recoverable casualty has taken place. Subparagraph 3 of the paragraph makes the provisions contained in subparagraphs 1 and 2 similarly applicable in such a situation.

When the average adjuster gives his opinion, he shall also decide who shall bear the costs of submitting the case to him.

If the assured and the insurer after having obtained the average adjuster's opinion cannot reach an agreement about the claims statement, the dispute must be referred to the ordinary courts. The Plan does not contain any general rule relating to arbitration, not when it comes to the application of the rule of apportionment contained in § 20 either (cf. § 34 No. 2, subparagraph 2, of the 1930 Plan).

§ 88. Venue

This paragraph corresponds to the Hull Policy A 15.

§ 89. Date on which settlement falls due

This paragraph corresponds to § 46 No. 3 of the 1930 Plan, and section 24, subsection 1, 1st sentence of ICA.

§ 46 No. 2 of the 1930 Plan provided different settlement periods for total loss and other losses. The Plan stipulates the same time-limit, viz. one month from the date the claims statement was or should have been issued. If the time-limit is exceeded this will affect the calculation of interest, cf. § 86, subparagraph 3.

§ 46 No. 5 of the 1930 Plan provided certain rules regarding the presentation and return of the policy on payment of the compensation. Such rules are irrelevant in the shipowners insurance, where the policy cannot be assigned and is no prima facie evidence as to who is entitled to receive payment.

§ 90. Insurer's duty to make payment on account

This paragraph is new.

Under § 41 No. 1 of the 1930 Plan the insurer did not have any duty to make payments on account. However, in practice payments on account were to a large extent made in respect of costs of repair, salvage money and other major disbursements which the assured had made or would have to make. The Plan relies on this practice and gives the assured a contractual right to payments on account. The duty to make payments on account applies only to «substantial» disbursements; in that event a «reasonable» payment on account shall be made. These criteria are discretionary and will also in future in practice provide a wide scope of application.

However, an unconditional legal duty to make payments on account may be inadvisable for the insurer. If he refuses to make a payment on account in a case which later on turns out to involve major recoverable damage, he may become liable for the loss which his refusal to make a payment on account may have caused the assured, e.g. by his vessel being sold by auction. In order to protect the insurer against such a risk, the paragraph provides that the duty to make payments on account shall only apply provided the insurer does not have «reasonable grounds for doubt as to his liability», cf. subparagraph 2 of the paragraph. It goes without saying that a payment on account does not decide anything with regard to the question of liability, but to avoid any misunderstanding this has been stated explicitly in subparagraph 2, 2nd sentence. The same rule was contained in § 32 No. 2, subparagraph 3, 2nd sentence, of the 1930 Plan.

Where the assured requests a payment on account concerning disbursements which he has not yet paid, it has been established that the insurer shall have the right to pay the amount direct to the third party concerned on the same lines as those applicable to liability insurance under section 95 of ICA.

The insurer may deduct outstanding premiums from the payment on account, as well as from the final claim. It is not necessary to state this explicitly.

The insurer's interest claim under the last subparagraph of the paragraph will normally be deducted from the final claim. However, if the interest exceeds the assured's outstanding claim, the insurer may claim a corresponding reimbursement. The rule contained in the last subparagraph, last sentence, of the paragraph concerning interest on payments on account of amounts recoverable in general average corresponds to the Hull Policy A 13 b.

§ 91. Payment on account where there is a dispute as to which insurer is liable for the loss

This paragraph corresponds to § 42 No. 3, subparagraph 2, and § 43 No. 2, subparagraph 2, of the 1930 Plan.

Under the 1930 Plan the marine and war-risk insurer had a duty to make a 50% payment on account each when a ship had disappeared, and the distribution of liability between them shall be decided by arbitration. The provision was in practice made similarly applicable in situations where there was a combination of marine and war perils.

This paragraph confirms the principle in a general form. A dispute as to which insurer shall be liable for a certain loss should not be to the detriment of the assured. Until it has been finally established which one of the insurers is liable for the loss the assured cannot claim any payment on account under § 90, and a special authority is therefore required to entitle him to claim a payment on account from the insurers who may conceivably be liable. That the insurers shall make a «proportionate payment on account» means that the disputed claim shall be divided equally among them. The duty to make a payment on account is only applicable in the relationship between insurers who have in actual fact accepted liability, but do not agree which of them has to pay. If one of the insurers has other objections to the claim — e.g. that the loss was caused by the assured by an act which is in conflict with the insurance conditions — none of the insurers has any obligation to make a payment on account.

Where the insurers' contingent liability for the loss does not represent the same

amount, the payment on account shall be based on the lowest liability in order to avoid the assured having to repay the proportion of the payment on account which refers to a compensation he has not been awarded.

Theoretically speaking, the provision may become applicable in a number of situations. It will apply to the relationship between the marine and war-risk insurers if it is a question of an apportionment of the loss under §§ 21 or 23. Further, the principle will be applicable if it is a question of referring the liability for damage back to a former insurer in accordance with § 18, subparagraph 2. Also conceivable is a dispute as to which of several successive casualties has caused a certain loss where the casualties occurred during the insurance periods of different insurers. In borderline cases between the hull insurance and the P. & I. insurance it may become relevant to apply the provision if there is doubt as to which of the insurers shall under the insurance conditions cover the assured's liability for a specific loss suffered by a third party. Similar conflicts may arise in the relationship between the hull insurer and an insurer who covers equipment, extraordinary costs, ships under construction, etc.

Subdivision 2 Assured's liability to third parties

§ 92. Assured's duties where a claim for damages covered by the insurance is made against him

This paragraph corresponds to § 32 of the 1930 Plan, § 32 No. 1 of the P. & I. Rules, and sections 21 and 22 of ICA.

Subparagraph 1 of the paragraph is identical with § 32 No. 1, 1st — 3rd sentences, of the P. & I. Rules. The provision first and foremost applies where the assured is held liable for a loss which he has caused a third party, but it may also become applicable where a third party makes a claim for salvage money or payment for repairs. The first sentence of the paragraph therefore uses the term «liability» and not «liability to pay damages». (Translator's note: The English translation of this sentence in the Plan is not accurate).

In the event of a dispute with third parties the assured and the insurer will normally have common interests. However, there may be cases where a certain conflict exists, first of all in the event of privity on the part of the assured. In such cases the insurer should have an unconditional right to immediately acquaint himself with all documents and other evidence, and to be represented by his own counsel.

Under § 32 No. 1, 4th sentence, of the P. & I. Rules the insurer had the right to demand that the assured incorporate his claim against him into the case against the third party, provided the rules of legal procedure in the country concerned authorized such joinder of causes of action. This rule has been deleted. Admittedly, both the assured's liability to third parties and the insurer's liability to the assured may depend on the same circumstances, but there is an imminent risk of the insurer in the dispute with the assured using arguments which are detrimental to the assured's case against a third party.

Under subparagraph 2 of this paragraph the insurer may only react to the assured's negligence if he has shown intentional or gross negligence, cf. also § 54. The duties imposed on the assured by this paragraph will often be in the nature of measures to avert or minimize the loss, whereby the mandatory rule contained in section 52, subparagraph 2, of ICA will become applicable.

§ 93. Insurer's right to take over the handling of the claim

This paragraph corresponds to § 32 No. 2, subparagraph 1, of the P. & I. Rules.

From the insurer's point of view it will always be desirable to be able to take over the handling of the assured's disputes with third parties. In this area the insurer has the widest experience, and it will therefore normally also be in the assured's own best

interest to give his consent. That the insurer takes over the case obviously does not imply the acceptance on his part of any obligation to pay the amount for which the assured may be held liable. To avoid any misunderstanding, this is stated explicitly.

§ 32 No. 2, subparagraph 2, of the P. & I. Rules gave the insurer an unconditional right to take over the handling of the claim and to carry on litigation concerning the claim in the name of the assured, provided he had made an advance statement to the effect that he would pay the amount for which the assured might be held liable. No corresponding rule has been included in the Plan. An unconditional right for the insurer to take over the case may seem unreasonable for the assured in situations where he himself has interests in the dispute which are of greater financial importance than the insurer's, e.g. in connection with his own counterclaims concerning loss of time. It is also conceivable that both the hull insurer and the P. & I. insurer want to take over the case where it is evident that they will be covering each their part of the assured's liability. In that event the most reasonable procedure will be for the assured himself to conduct the litigation on behalf of both insurers.

§ 94. Decision on questions concerning legal proceedings or appeals

This paragraph corresponds to § 78 No. 3 of the 1930 Plan and § 32 Nos. 3 and 4 of the P. & I. Rules.

Difficult questions may arise where the assured and his liability insurer disagree as to how to handle a dispute with a third party, e.g. whether to accept an offer for an out-of-court settlement, or whether to accept or appeal against a court decision. In this respect provisions are required to determine who is authorized to decide what shall be done, the question of the insurer's liability if the assured refuses to comply with his decision, and the question of liability for litigation costs in connection with the various possible outcomes which the dispute may have. § 32 Nos. 3 and 4 of the P. & I. Rules provided an isolated solution to these questions for the P. & I. insurance, whereas § 78 No. 3 of the 1930 Plan merely contained provisions regarding the costs.

The situation is made even more complex by the fact that there will often be two liability insurers behind the assured — the hull and the P. & I. insurer respectively — and the fact that their interest in the outcome of the assured's dispute with a third party may differ widely. The following example shows how the conflict may arise: The insured vessel A has collided with the vessel B, which is lost with a valuable cargo and many passengers. Also the cargo on board vessel A is damaged. The collision shall be dealt with under American law. By a judgment of a court of the first instance the fault has been attributed entirely to A, but the owner has been granted the right to limit his liability. The owner and the hull insurer want to appeal against the judgment with a view to obtaining a 50/50 apportionment of fault. Thereby the owner would obtain 50% cover of his loss of time, and the hull insurer would both achieve a reduction of the collision liability and 50% cover of the repair costs. The P. & I. insurer objects to an appeal for two reasons: partly because a 50/50 apportionment of fault will impose on him an indirect liability for half of the damage to A's own cargo, cf. above under § 75, and partly because he fears that the superior courts will not only place the entire fault with vessel A, but will furthermore hold that this is a case of privity, which will deprive the owner of the right to limit liability. An unlimited liability for damages will first and foremost affect the P. & I. insurer, the hull insurer's liability for collision damages being limited to the sum insured, cf. § 196.

Admittedly, conflicts of this nature are in practice normally solved out of court, and so they will probably continue to be. However, if one of the insurers brings the matter to a head, it is necessary to have rules to fall back on.

Under subparagraph 1 of this paragraph conflicts between the assured and the insurer about legal proceedings or appeals shall be decided with binding effect by an arbitrator designated by the Association of Norwegian Average Adjusters. Subparagraph 2 of the paragraph lays down certain principles which the arbitrator must comply with in his decision. The principal rule he must adhere to is that he shall

choose the solution which in his discretion will in all probability result in the smallest overall loss for the assured and for his insurers. A crucial point in this connection will be the risk of the assured being denied by the court of appeal the right to limit his liability. However, subparagraph 2, 2nd sentence, of the paragraph also indicates a factor which the arbitrator shall not take into account. As will appear from the above cited example, the P. & I. insurer will sometimes prefer that the sole fault for a collision is placed with the assured, in view of the fact that he will in this way avoid the so-called «indirect cargo liability». The assured will have a similar interest in relation to the hull insurer if he has not taken out a P. & I. insurance. However, it must at all events be a legitimate interest worth protecting to attempt to have the degree of fault of the insured vessel reduced through a hearing of the case before a higher court. A rule has therefore been incorporated to the effect that the arbitrator shall not take into account the advantage which the assured or his P. & I. insurer may have through an acceptance of, or an attempt to have awarded against them, a higher degree of fault than necessary in a collision case.

The arbitrator shall decide the conflict of interest between the assured and his insurers with final effect, but there are no enforcement measures vis-à-vis the assured, in whose name the legal proceedings are conducted, if he should fail to comply with the arbitrator's directions. The assured's failure to do so will affect both the liability of the insurer in whose favour the arbitrator's decision was made, and the cover of the litigation costs. Rules relating to this subject are contained in subparagraph 3 of the paragraph. If the insurer wants to accept an offer for an out-of-court settlement or a court decision and is supported on this point by the arbitrator, he will cover the liability which would have been imposed on the assured by the out-of-court settlement or the court decision, cf. subparagraph 3, 1st sentence. If the insurer wants to lodge an appeal and is supported by the arbitrator, he will cover the liability which he anticipated would be imposed on the assured by a superior court and which he has accordingly offered to cover. It is therefore important that during the arbitrator's consideration of the matter the insurer makes it clear to him exactly what he wants to achieve by lodging an appeal. As mentioned under § 82, the insurer does not in such situations have the right to pay out the sum insured for the liability and refuse any further involvement with the case.

Should it turn out that the arbitrator was wrong and the assured's choice was justified so that the insurer in actual fact has a smaller liability than that which he had declared himself prepared to accept, it is reasonable that he shall also pay his proportionate share of the litigation costs. This is explicitly stated in subparagraph 3, last sentence.

§ 95. Provision of security

This paragraph corresponds to § 41 No. 1 of the 1930 Plan, and §§ 30 and 33 of the P. & I. Rules.

Neither under the 1930 Plan nor under the P. & I. Rules did the insurer have any obligation to provide security for the assured's liability vis-à-vis third parties, and this rule has been maintained. A legal obligation for the insurer to provide security could result in liability for him vis-à-vis the assured in cases where the security is provided too late, or where no security is provided because of unforeseen difficulties. However, in practice insurers will to a very great extent provide security at the assured's request for liability covered by the insurance, and this practice will naturally continue. That a provision of security does not imply an admission of liability must be obvious, but is nevertheless stated explicitly to avoid any doubt.

Expenses involved in the provision of security constitute a cost which follows from the fact that liability has been invoked against the assured. If the insurer covers the liability, he must also cover these costs. However, if it turns out that the liability does not concern him, he will have a reimbursement claim against the assured. This is stated explicitly in subparagraph 3 of the paragraph.

The questions, which arise in the relationship between the leading insurer and the co-insurers in connection with the provision of security, are solved in § 144.

Subdivision 3 Assured's claim for damages against third party

§ 96. Insurer's right of subrogation to the assured's claim for damages against third party

This paragraph corresponds to § 48, subparagraphs 1 and 2, and § 76 No. 7, of the 1930 Plan, and section 25 of ICA.

Where the assured has a claim for damages against a third party on account of a loss, either wholly or in part, e.g. as a general average contribution or as compensation for collision damage, the insurer will automatically be subrogated to the assured's claim against a third party when he pays out compensation under the insurance contract. If the assured has already received his compensation from the third party when he receives payment from the insurer, he shall of course transfer to the insurer the amount received from the third party. However, in marine insurance it will often occur that under the insurance conditions the assured shall bear part of the loss himself in the form of new for old deductions or deductibles, or because part of the loss falls outside the scope of cover (e.g. loss of time). In that event the assured shall keep a proportion of the claim for damages against the third party equivalent to the loss he has covered himself.

The rules contained in this subdivision are based on the basic view that it is the assured's claim which is the object of a potential proportionate distribution, not the amount of compensation which may be paid. The consequence of this is that the insurer must invoke the claim in his own name. If the assured does not wish to pursue his part of the claim, he is free to drop it. If both the insurer and the assured invoke their claims, it would be natural to bring these claims in the same legal proceedings. Such proceedings would in that case have to be conducted in the names of both, unless they agree on a different arrangement.

Where it is indisputable that it is the assured's claim which shall be divided, it is superfluous to issue rules as to the apportionment of the costs involved in the recovery. Each of the parties shall bear the costs necessary for the recovery of his own claim. The norms as to apportionment of costs which have become established practice will still be applicable.

Where the insurer under subparagraph 1 of the paragraph is subrogated «to the rights of the assured against the third party», this implies that he takes over the claim for damages regardless of the basis on which it is founded. The insurer is thus subrogated to the assured's right to claim damages, general-average contributions, etc. However, this does not apply where the assured has a claim by virtue of another insurance contract. Here the special rules relating to double insurance contained in §§ 11 and 12 shall apply. (See, however, § 271, subparagraph 2, which in a very special area lets the insurer use the assured's insurance claim.)

The insurer is subrogated to the claim as is on the assured's hands. If there is a maritime lien or some other security connected with the claim, the insurer may use it, cf. *Grundt*, «Lærebook», p. 304, and ND 1939.269 NH Congo.

The insurer only takes over claims for damages which are connected with the interest insured and refer to the very losses which the insurer has covered. If the assured has suffered any other loss, which is not covered under the insurance (e.g. loss of time in connection with a collision, «common-benefit» expenses in general average), he shall himself keep the claim for damages or the claim for contribution in respect of these items. This follows from the wording of subparagraph 1, 1st sentence.

The rule contained in subparagraph 1, 2nd sentence, is mentioned in connection with § 75.

Even if the claim for damages refers to a loss, for which the insurer has paid

compensation, it is conceivable that the assured retains a proportion of the claim himself. This is firstly the case where the insurer only pays out partial compensation for the loss concerned, e.g. because of under-insurance, deductibles or new for old deductions. The rule is laid down in subparagraph 2, 1st sentence, of the paragraph. However, the claim shall also be divided where the interest, which is affected by the loss, is valued at a higher amount in the relationship between the assured and the third party than in the relationship between the assured and the insurer and the third party for some reason is only liable for a proportion of the loss, or is unable to cover the full value of the interest, cf. subparagraph 2, 2nd sentence. Hence, the claim for damages shall be divided proportionately in the event of the ship becoming a total loss in connection with a collision and her value being estimated higher than the hull valuation, whilst the third party, because of the rules relating to limitation of liability, pays a smaller amount in damages than what the insurer has paid to the assured. On the other hand, if the value of the ship in the collision case is estimated at an amount which is equivalent to or lower than the hull valuation, the insurer shall keep the entire claim for damages (unless the assured has also suffered other losses).

If the claims, which the assured and the insurer bring against the third party, are not covered in full, e.g. because the third party has limited liability, or is insolvent, the assured and the insurer are competing on an equal footing. The Plan has thus not adopted the rule, which is customary in the more social orientated types of insurance, i.e. that the assured's claim for damages takes priority over the insurer's in the event of a third party's bankruptcy.

If the value of the interest insured is set at a higher amount in the relationship between the assured and the third party than in the relationship between the assured and the insurer, and the third party is furthermore liable for the full loss and is able to pay the entire amount, the insurer's proportion of the claim will be larger than the compensation he has paid to the assured. It will not be reasonable that the insurer in this way makes a profit from the recourse, and subparagraph 3 of the paragraph therefore establishes that such a profit shall be transferred back to the assured. There will obviously be no question of any profit until the insurer has had his expenses covered in connection with the recovery of the claim, as well as the interest accrued on the compensation he has paid to the assured. The loss of interest for the period following the claims settlement with the assured must also be taken into account.

If the third party's liability is stipulated in another currency than the one set out in the insurance contract, the insurer shall bear the risk of any exchange loss during the period between the event involving liability and the enforcement of the recourse claim. But, on the other hand, the insurer shall also have the advantage of any exchange gain. Hence, the rule contained in subparagraph 3 of this paragraph shall not apply here.

A special question arises where several insurers are entitled to a proportion of the claim for damages. The problem poses no difficulties if the various insured interests are assessed separately in the claims settlement. However, if the ship is a total loss as a result of a collision, the compensation will be fixed at one specific amount, which represents the value of the ship, possibly including the value of a lost charter-party. The question is how the compensation received shall be apportioned among the hull insurer, the hull-interest insurer and the freight-interest insurer. In such a situation it is established practice that the hull insurer has a priority claim on the compensation to the extent of his claim. Subsequently the hull-interest insurer may claim his proportion, and only then, if there is still something left of the compensation, does the freight-interest insurer come into the picture. This follows from the traditional stratification of the total-loss insurances. It would not be reasonable if the hull insurer's claim for damages in the event of a total loss would be affected by the extent of the freight-interest insurance which the shipowner has taken out.

§ 97. Waiver of claim for damages

This paragraph is new.

The paragraph regulates the effect of the assured's waiver of his right to claim

damages from a third party. It is primarily applicable in connection with damages in a contractual relationship where the assured has in advance waived his right to claim damages from the other party to the contract.

As mentioned in § 76, the question whether the waiver can be considered customary in the trade in question must be evaluated on a case-to-case basis. An advance waiver of the right to claim damages may e.g. occur in contracts concerning pilotage or towage. In some cases the ship may, against a higher remuneration, be able to obtain a contract where the other contracting party undertakes a more far-reaching liability for any faults which might be committed. It is hardly possible to say anything in general terms about the assured's right to choose the less expensive alternative. It is necessary on a case-to-case basis to decide whether it would have been reasonable to demand that, against a somewhat higher expenditure, he had obtained a scheme which was more satisfactory from the insurer's point of view.

Sometimes clauses will occur according to which the party to a contractual relationship who is likely to sustain damage, waives any and all claims for damages to the extent his loss is covered by an indemnity insurance. Where such a «benefit-of-insurance» clause becomes applicable between the parties it implies that no claim for damages arises which the insurer can take advantage of. The clause will accordingly have to be evaluated under this paragraph.

If the waiver is not made until after the claim for damages has arisen, the situation will be covered both by this paragraph and by § 99. As mentioned in the preceding paragraph, the assured will always be able to waive the proportion of the claim which accrues to him. A waiver of the insurer's proportion, however, will normally give the latter the right to reduce liability correspondingly. It will rarely be «customary» in any trade to waive claims for damages of a specific type which have arisen, and such a waiver will as a rule also have to be evaluated as an intentional act under § 99.

§ 98. Assured's duty to assist the insurer with information and documents

This paragraph corresponds to § 48, subparagraph 3, 1st sentence, of the 1930 Plan.

As to the interpretation of subparagraph 1 reference is made to what is stated in § 83, subparagraph 1.

Under § 48, subparagraph 3, 2nd sentence, of the 1930 Plan the assured could not object to the insurer invoking the full claim for damages and conducting legal proceedings concerning same in the name of the assured. As mentioned in § 96, the Plan gives the assured an unconditional right to waive his proportion of the claim for damages without this affecting his insurance cover. Nor has the Plan adopted the rule to the effect that the insurer can always institute legal proceedings about the claim for damages in the assured's name. However, if the assured agrees to the arrangement, it must be considered justified, cf. the Supreme Court decision in ND 1954.56 (61) Stalheim. Nor is there anything to prevent the insurer from including the assured's proportion of the claim for damages in a litigation which he conducts in his own name, or possibly in the names of both.

§ 99. Assured's duty to maintain and secure the right to claim

This paragraph corresponds to § 32 No. 2, subparagraph 1, last sentence, § 48, subparagraph 4, of the 1930 Plan, and to section 52 of ICA. Subparagraph 2 of the paragraph is worded, taking into account the mandatory rule contained in section 52 of ICA, which in these relations requires gross negligence on the part of the assured.

Where the shipowner has the right to claim general-average contributions from the cargo, he has the right to refuse to surrender same, unless the consignee assumes personal liability for the contribution (signs an «average bond») and, possibly, provides security. § 20 No. 6 of the P. & I. Rules made it an objective condition for the insurer's liability for irrecoverable general average contributions that the consignee has signed an average bond, whereas under § 229, subparagraph 2, 2nd sentence, of the new Plan he is exempt from liability if the assured (or his people) have shown simple negligence in this respect. It may perhaps be somewhat doubtful whether these

rules would prevail over the mandatory rule contained in section 52 of ICA, but the Committee assumed that this would be the case. This is because a P. & I. insurance is different from a hull insurance in the sense that the P. & I. insurer has not, unlike the hull insurer, covered a loss which the assured has suffered, and subsequently been subrogated to the assured's potential claim against a third party who is liable for the loss. The P. & I. insurer takes over liability for irrecoverable general average contributions as an independent cover, and the situation probably falls outside the scope of the mandatory rule contained in section 52 of ICA. In hull insurance, however, this paragraph will be decisive where the assured claims compensation for a general average loss under § 72 and no general average bond has been obtained. However, provided the assured or the Master of the vessel realized that it was a case of general average, it will normally constitute gross negligence to surrender the cargo without taking care of the necessary formalities with a view to securing the right of recourse. The master's fault in this respect was not committed in connection with his service as a seaman, cf. § 59, and it must be possible to invoke such faults vis-à-vis the assured.

§ 100. Decision on questions concerning legal proceedings or appeals

This paragraph is new.

Where the assured has a claim for damages against a third party, the latter will very often have a counterclaim against the assured. Such counterclaims must often be covered by the P. & I. insurer, whereas the claims for damages will usually accrue to the hull insurer. In such situations there is accordingly the same need for an impartial decision of the litigation question as when the third party brings a claim for damages against the assured.

The provision is obviously not applicable where the disagreement between the assured and the insurer merely consists in a different assessment of the chances of getting the claim for damages upheld, taking into consideration the costs involved in enforcing it. As mentioned earlier, the assured and the insurer will in such a situation have the right to pursue or waive their proportions of the claim at their own discretion.

§ 101. Salvage remuneration which includes compensation for loss covered by the insurer

This paragraph corresponds to the Hull Policy A 4, subparagraph 1, 4th and 5th sentences, and section 69 of ICA.

Under section 225 No. 1 (f) of the Norwegian Maritime Code the material loss sustained by the salvor in connection with the salvage operation shall be taken into consideration when the salvage remuneration is determined. Under section 228, subsection 2, of the same Act, any damage to the ship or cargo caused by the salvage operation shall be paid for out of the salvage remuneration before anything is distributed among shipowner and crew. Under the Hull Policy A 4, subparagraph 1, 4th sentence, the insurer's duty to pay compensation did not apply in so far as the assured was entitled to salvage remuneration and that remuneration was sufficient to cover the damage to the ship. If the salvage remuneration was not sufficient, it was to be apportioned according to the rules relating to proceeds and claims for damages contained in § 76, subparagraph 7, of the 1930 Plan.

The Plan is based on the point of view that the insurer's liability for the damage shall not cease to be in effect, but that the salvage remuneration shall essentially be considered in the same way as an ordinary claim for damages. However, it would not be correct to say that the insurer «is subrogated to» the claim for salvage remuneration, cf. § 96. The claim for salvage remuneration is not a «claim for damages»; the assured does not have an unconditional right to receive a salvage remuneration which covers the damage which his ship has sustained in connection with the salvage operation. It must therefore be stated explicitly that the assured shall out of the salvage remuneration received reimburse the insurer whatever the latter has paid in settlement of the assured's loss. The assured's obligation to reimburse the insurer will first of all comprise the proportion of the salvage remuneration with which he is credited in advance in a settlement under section 228, subsection 2, of the

Maritime Code, to cover damage to the ship. If this part of the salvage remuneration is not sufficient, e.g. because the damage to the ship was underestimated during the salvage remuneration case, the assured must be obliged to reimburse the insurer also out of the remainder of the salvage remuneration which he has been awarded.

The reference to §§ 96—100 implies that the assured's share of the salvage remuneration must be divided between him and the insurer according to the same rules as those applicable to ordinary claims for damages. The assured is therefore entitled to retain a proportion equivalent to the new for old deductions and deductibles which he has himself borne. Furthermore, the assured shall, in relation to the insurer, be obliged not to waive the right to claim salvage remuneration to an exceptional extent, nor to neglect to recover a claim for salvage remuneration which has arisen.

Subdivision 4 Insurer's right of subrogation to the subject-matter insured on payment of claim

§ 102. Insurer's rights in case of total loss

This paragraph corresponds to § 47, subparagraph 1, of the 1930 Plan, and section 73 of ICA.

Under the 1930 Plan the Assured, when claiming for a total loss, had to transfer the subject-matter insured to the insurer. He was not entitled to stipulate time-limits or conditions for the transfer, which was even effected without any explicit declaration of transfer from him. In these circumstances it is a fiction to operate with a transfer by the assured. The insurer is subrogated to his rights in the subject-matter insured in the same way as he is subrogated to the assured's claim for damages against a third party. This is stated explicitly in subparagraph 1 of the paragraph.

In case of a total loss the sum insured becomes payable without any new for old deductions or deductibles. Hence there will normally not be any question of the assured keeping a proportion of the rights in the wreck. This will only be relevant in the event of under-insurance, cf. the reference to § 9.

The insurer takes over all subject-matters covered by the sum insured which is paid out, cf. also above under § 82. In hull insurance the insurer will thus take over the wreck with all appurtenances which were covered by the insurance at the time the total loss occurred.

The 1930 Plan stipulated the transfer to the insurer as an absolute rule, which was interpreted to mean that the insurer could not object to becoming the owner of the subject-matter insured. Under the new Plan the insurer has the right to waive such title, provided he makes an explicit statement to that effect not later than on payment of the total loss claim. The insurer is therefore able to protect himself against the burdens which may be connected with owning and disposing of what is left of the subject-matter insured. In hull insurance, where this question is of greater interest, the risk involved in taking over the wreck is admittedly not so big because under § 104, subparagraph 1, the insurer shall not bear any costs of removal which are not covered by the sale of the wreck. However, the position as owner of the wreck may entail other burdens and expose the owner to the risk of incurring liability for damages vis-à-vis third parties. The assured cannot demand that the hull insurance shall protect him against losses and risks of this nature.

§ 103. Insurer's rights in case of damage

This paragraph corresponds to § 76 No. 7 of the 1930 Plan.

The principle that the insurer takes over whatever is left of the subject-matter insured must be similarly applicable in case of compensation for damage. The greatest practical importance of the rule is in hull insurance where repair work will often result in a quantity of scrap iron becoming available, in addition to damaged parts of a

certain value. However, also in equipment insurance the rule may become relevant, viz. if the equipment is partly lost, and the remains of the equipment which has been compensated can be sold. Subparagraph 1 of the paragraph is aimed at both these situations.

In case of a total loss the entire value of the subject-matter insured will be compensated without any deductions or deductibles. Hence, in total loss cases it is only in the event of under-insurance that the assured keeps a share in the subject-matter insured. In the event of damage, however, the assured will often have to bear a proportion of the loss himself, in which case he will have to keep a corresponding proportion of the value of the parts which have been replaced or compensated. The apportionment must be effected in the same way as when the assured has a claim for damages against a third party in connection with the damage, cf. the reference to § 96 in subparagraph 2 of the paragraph.

In an agreement concerning repairs of ships it is normally stipulated that the repair yard shall become the owner of replaced parts, scrap iron and other refuse from the repair work. Such a clause is also binding on the insurer.

§ 104. Charges on the subject-matter insured

This paragraph corresponds to § 47, subparagraph 1 and 2, of the 1930 Plan.

Under the 1930 Plan the assured was to transfer the wreck without «encumbrances which do not concern the insurance». The provision was aimed at maritime liens for claims not comprised by the insurance. If the assured is personally liable for the claim it is of course his duty to cover it instead of shifting the settlement on to the insurer. The same applies to claims for the purchase price of equipment which the shipowner has bought under a hire-purchase agreement with retention of title, cf. § 148, subparagraph 1. If such equipment is salvaged, it becomes the insurer's property, but under § 131 he will as a rule be responsible for the seller (who in this relation shall be regarded as «the assured») receiving correct settlement.

Subparagraph 2 of this paragraph establishes that the assured must cover any claims for which the subject-matter insured is liable. The provision also comprises claims for which nobody is personally liable. It is also more reasonable that the assured, rather than his insurer, settles such claims.

In principle the provision applies only to charges which have arisen before the title to the subject-matter insured passed to the insurer. If the wreck, after it has become the insurer's property, causes damage for which the owner becomes liable, it is the insurer, not the assured, who must cover such liability. Nor will the insurer be entitled to claim cover under the assured's P. & I. insurance, as that insurance covers only «the assured's liability», cf. §§ 225 ff.

Subparagraph 1 of the paragraph regulates the position where the insurer is ordered to remove objects (wreck, equipment) which he has taken over. Under the Port Authorities Act of 24 June 1933 No. 8, section 55, the port authorities may remove a wreck which is detrimental to the port or impedes general traffic. The costs of removal may be covered by the wreck and, if this is not sufficient, by the owner, who will, however, normally merely have a limited liability. Similar rules apply in most countries.

The hull insurer does not cover the assured's liability in these cases, cf. § 74. However, liability for the removal of the wreck may arise after the insurer has taken over title thereto under § 102. Under § 47, subparagraph 2 of the 1930 Plan, the insurer was «under no circumstances liable for the expenses of removing wrecks or other objects that have been lost». The costs of removing wrecks were covered by the P. & I. insurer, cf. § 20 No. 7 of the Rules, unless the ship was lost as a result of war perils. In that case the liability was covered by the war-risk insurance, cf. § 9 of the war-risk hull policy. In practice these provisions are interpreted to mean that the hull insurer will not claim any reimbursement from the shipowner (the P. & I. insurer) for the part of the costs of removal covered by the value of the wreck. The hull insurer in this respect accepts that the wreck is worthless to him, but if its removal furthermore causes him additional expenses, he will claim such expenses refunded.

As the hull insurer is entitled under the Plan to waive title to the wreck, one might think that he should also be fully liable for the costs of removal in the cases where he has taken over the wreck. However, it has been decided to maintain the earlier arrangement. An order to refund the costs of removal will in practice only be relevant in case of the wreck being worthless and a liability for its removal appearing to be a trap for the hull insurer if he has not remembered to waive title to the wreck. A system was considered according to which the hull insurer was to be given 6 months to decide whether he wanted to take over the wreck and thereby also liability for any subsequently arising costs of removal, but it was held that it would be difficult to incorporate an unlimited liability of this nature in the hull insurance. The hull insurer's right to a refund of the removal costs, which exceed the value of the wreck, has therefore been confirmed. The P. & I. insurer's liability for the same costs is regulated in § 230. The war-risk hull insurer's liability for the removal of war wrecks is explicitly established in § 167.

If the wreck founders after the insurer has taken it over, but as a consequence of the same casualty which resulted in the payment of the total-loss claim, the P. & I. insurer shall pay the removal costs, if any. The liability must here be regarded to have arisen as a consequence of a casualty which occurred while the insurance was in effect. If on the other hand the wreck founders in consequence of a new casualty which occurs after it was taken over by the hull insurer, the assured will not be liable for the removal costs under subparagraph 1 of this paragraph, and the same goes for the P. & I. insurer. An insurer who takes over a wreck which is afloat should therefore consider taking out a separate P. & I. insurance. As for what constitutes a «new casualty», reference is made to the comments contained in § 79.

Under the laws of some countries the owner of the wreck has the right to abandon it to cover his liability for damages to a third party. If the shipowner is held liable after the title to the wreck has passed to the hull insurer, the shipowner must nevertheless be able to exercise his right to limit liability in the event of an abandonment. Such a rule is explicitly stated in subparagraph 3.

§ 105. Preservation of the subject-matter insured

This paragraph corresponds to § 47, subparagraph 3, of the 1930 Plan.

Under § 53 it is the assured's duty to take measures to avert or minimize the loss, and under § 68 the insurer shall cover the costs involved in such measures. However, it may be doubtful whether these rules are applicable if it has already been established that a total loss has occurred, e.g. that the ship will be condemned. The paragraph therefore establishes that it is the assured's duty to preserve the wreck for the insurer's account until the insurer gets the opportunity to safeguard his own interests, irrespective of whether or not the total-loss claim has been paid. If the assured does not perform his duties, he may, depending on the circumstances, incur liability for damages to the insurer.

If the insurer refuses to take over the wreck, he will not be liable for costs involved in measures which are subsequently taken.

§ 106. Insurer's right to indemnification in respect of damage to the subject-matter insured

This paragraph is new.

When the insurer takes over the subject-matter insured, the question arises what will happen to the claims for damages which the assured has against third parties in connection with damage to the subject-matter insured. If the claim arose from the casualty, which resulted in a total loss, the solution is obvious. The insurer will be subrogated to the claim under the general rules contained in Chapter 5 of the Plan, Subdivision 3. However, it is conceivable that the ship has some older damage for which a third party is wholly or partly liable, or new damage arises after the casualty entitling the assured to a total-loss compensation, but before the compensation has been paid. In those cases it might be doubtful whether the insurer can also be considered to have compensated the damage when he pays the total-loss claim, so that

the rules contained in Chapter 5, subdivision 3, become applicable. To avoid any misunderstanding it is therefore stated explicitly that the insurer shall also take over such claims.

However, the insurer cannot make any deductions in the total-loss claim if the assured has already in advance received compensation from a third party. The financial result may therefore differ, depending on whether or not the assured at the time of the loss has received compensation from a third party. However, no reason has been found to introduce a rule which leads to a different result. It is not very realistic to think that a hull insurer when paying a total-loss claim will demand information from the assured, e.g. about what compensations he has received in recent years from his time-charterers in connection with unrepaired stevedore damage, etc.

Another question is whether the third party-liability for the damage shall cease to be in effect because the person suffering damage (the assured) is also entitled to total-loss compensation under his insurance. This is a question of indemnity law, cf. ND 1942.449 Bergen Bjønn, where the claim for damages was not considered to have lapsed because of the subsequent total loss.

Under § 161, subparagraph 2, the hull insurer cannot make any deduction for unrepaired damage when he pays compensation for a total loss. According to standard practice he furthermore does not have recourse against the insurer who may be liable for the damage, cf. Rein in ND 1949.175, and the commentary to § 161. This rule has been confirmed, cf. the 2nd sentence of this paragraph. As regards casualties which occur after the casualty entitling the assured to total-loss compensation, the result also follows from § 172, subparagraph 1, according to which the insurers who are not liable for the total loss are not liable for new casualties occurring after the casualty that resulted in a total loss. If the ship has suffered an extensive casualty in consequence of marine perils and the insurer against marine-risks wants a war-risk cover of the value which the wreck will represent to him in case of condemnation, he will therefore have to take out a separate war-risk insurance from the moment the assured requests condemnation.

Subdivision 5 Time bar of claims

§ 107. Time limit for notification of casualty

This paragraph corresponds to § 56, subparagraph 1, of the 1930 Plan, and § 34 No. 1 of the P. & I. Rules.

The paragraph does not contain any actual time-bar rule, but a passivity rule which supplements §§ 52 and 54.

Under the mandatory rule contained in section 30, subsection 2, of ICA, an agreement may be made to the effect that the company shall be without liability «if it has not received any claim . . . by the end of 6 months counting from the day the person making the claim has been notified of the circumstances on which it is based.» An agreement about a shorter time-limit than 6 months for making the claim is invalid. According to the Plan it is the notification of the casualty which must be made within 6 months. As it will be simpler for the assured to notify the insurer of the casualty than to formulate a claim for damages, it must be assumed that the provision is not in conflict with the mandatory rule contained in section 30, subsection 2, of ICA.

Where the insurer becomes liable for the assured's liability to a third party, «the casualty» is the actual damaging event. The assured shall notify the insurer of this event within 6 months, providing he had due grounds for believing that a claim for damages would be made against him.

If the assured does not notify the insurer of a casualty, this will often be due to the fact that he has not himself been notified of the casualty by the master of the ship. Such negligence must be regarded as a fault committed by the master in connection with his service as a seaman, which cannot be invoked by the insurer.

§ 108. Limitation of action where the insurer has refused the claim

This paragraph corresponds to § 56, subparagraph 2, 2nd and 3rd sentences, of the 1930 Plan, § 34 No. 2 of the P. & I. Rules, and section 30, subsection 1, of ICA.

Section 30, subsection 1, of ICA allows a shorter time bar than the statutory 3 years, provided the insurer has reminded the assured of the time-limit in writing, its length and the consequences of it being exceeded. The time-limit must not be less than 6 months. This paragraph stipulates a one-year time-limit for instituting legal proceedings where the insurer has refused the assured's claim and takes advantage of the law's minimum time-limit of 6 months in those cases where the refusal is based on an opinion from an average adjuster in accordance with § 87. If the average adjuster's opinion is in favour of the assured, the general limitation rules contained in §§ 110 and 111 will apply, unless the insurer nevertheless makes a formal refusal under subparagraph 3 of this paragraph. In that case the one-year time-limit stipulated in subparagraph 1 shall apply.

§ 109. Extension of time limit on account of hindrance on the part of the assured

This paragraph corresponds to § 56, subparagraph 3, 1st sentence, of the 1930 Plan.

A similar rule has been incorporated in the current draft of a new Statute of Limitations, cf. section 25 of the draft. However, it is not clear when this draft will be carried into effect.

§ 110. Three years' limitation

This paragraph corresponds to § 56, subparagraph 2, 1st sentence, and subparagraph 3, 1st sentence, of the 1930 Plan, and section 29, 1st sentence, of ICA.

Where the insurer has not submitted a written notification of refusal which satisfies the formal requirements laid down in § 108, thereby making the shorter time-limits stipulated in that paragraph applicable, the assured's claim for damages will become time-barred under this provision. The commencement of the time-limit is subject to the condition that the extent of the claim has been finally determined. If the extent of the claim depends on a court decision or an average statement, the limitation will thus not take effect until from the end of the year when a final court decision or average statement has been made.

§ 111. Ten years' limitation

This paragraph corresponds to § 56, subparagraph 3, 2nd sentence, of the 1930 Plan, and section 29, 2nd sentence, of ICA.

The paragraph stipulates a final time-bar for the assured's claim for damages. The provision covers the cases where none of the shorter time-limits has expired, e.g. where the assured has not received any notification whatsoever about the claim, or where the extent of the claim is still uncertain, e.g. because the damage has still not been repaired.

That the extent of the claim has still not been established will often be due to the fact that the outcome of a litigation or a general-average settlement is still pending. For such cases subparagraph 2 of the paragraph provides a further extension of the time-limit of one year from the final judgment or average statement having been submitted.

Chapter 6 Premium

The 1930 Plan contained general rules relating to the premium in §§ 13 and 15. Furthermore it contained a number of premium rules which were connected with the substantive rules, see e.g. §§ 3 and 8, subparagraph 2, § 9 No. 2, § 10, subparagraph

3, and others. In the new Plan all premium rules, both the general rules and those which refer to other rules, are compiled in this chapter.

The 1930 Plan did not have any rules relating to return of premium in the event of ships being laid up or staying in port for a prolonged period of time. These rules were contained in the Hull Policy D.1. Some of the rules relating to return of premium are very positive and subject to frequent amendments, but there is also a nucleus of rules of a more permanent nature. These general rules relating to return of premium for laid-up ships are incorporated in this chapter.

§ 112. Payment of the premium

This paragraph corresponds to §§ 13 and 14, subparagraph 3, of the 1930 Plan, and section 12 of ICA.

According to § 13, subparagraph 2, of the 1930 Plan, the premium falls due on conclusion of the agreement. As the Hull Policy did not contain any deviating rule on this point, this rule also applied to ordinary hull insurance which was taken out on an annual basis. However, the renewals of the hull insurances normally take place during the last autumn months, and the rational procedure is then to make the premium for time insurance payable on the day the risk commences, normally January 1. Such a rule has been incorporated in subparagraph 2 of the paragraph.

In respect of premiums which fell due during the period of insurance the insurer had the right under § 14, subparagraph 2, of the 1930 Plan to send a so-called premium reminder 14 days before it fell due with the effect that the insurance was suspended if the premium was not paid at the proper time. The rule was only applicable where the premium for an insurance was payable in several instalments, cf. § 13, subparagraph 2, but not in connection with a renewal of the insurance. If the insurance is to continue with the same insurer on more or less the same conditions it is, however, practical to be able to apply the rules relating to premium reminders also for the first instalment in the new insurance year. In subparagraph 2, 2nd sentence, of this paragraph the term «subsequent premiums» is defined in such a manner that the rules relating to premium reminders contained in § 114 are also applicable in the event of renewals.

According to NL 5-13-1 there will normally be 8 «days of grace» for the performance of pecuniary obligations. If the debtor pays before expiry of the days of grace, there will be no question of a default. However, it must be assumed that the provision is not applicable where the payment is for a running future performance on the part of the other party, cf. *Augdahl*: «Den norske obligasjonsrett almindelige del» (The General Part of the Norwegian Law relating to Legal Obligations), 2nd edition (1958), p. 46. The provision is therefore not applicable to advance payment of insurance premiums.

§ 14, subparagraph 3, of the 1930 Plan entitled the insurer to 6% interest from the due date if the premium was not paid at the proper time. The new Plan has in this respect adopted a rule stipulating 5% penalty interest, cf. section 38 of the Sale of Goods Act and section 6, subsection 1, of the Act on Instruments of Debt.

§ 113. Insurer's right to terminate the insurance in case of non-payment of premium

This paragraph corresponds to § 14, subparagraph 1, of the 1930 Plan, and section 13 of ICA.

§ 114. The effect of premium reminder

This paragraph corresponds to § 14, subparagraph 2, of the 1930 Plan, and sections 14 and 15 of ICA.

In contrast to the 1930 Plan the new Plan emphasizes that the premium reminder shall be in writing and contain information about the consequences of a failure to pay the premium within the time allowed for payment. As mentioned in § 112, another difference is that the premium reminder may also be sent on renewal of the insurance.

The 1930 Plan did not contain any rule to the effect that the insurance will enter into force again if the insurer brings an action for recover the premium. Nor has the

new Plan adopted any rule in that direction. However, such a rule is contained in section ICA, and as it is mandatory, it will under any circumstances be applicable. The rule must be interpreted to mean that the insurance only enters into force again during the period of time for which the insurer claims premium. Hence, if the premium is payable in advance, the insurer must at the end of the first quarter be entitled to claim the premium for that period of time without the insurance again entering into force as a result of suit filed.

§ 115. Full premium in case of fraud and dishonesty

This paragraph corresponds to § 8, subparagraph 2, § 20, subparagraph 2, and § 22 No. 3, subparagraph 3, of the 1930 Plan.

The rule contained in subparagraph 1 of the paragraph applies to cases of fraud and dishonesty on the part of the person effecting the insurance on conclusion of the contract. Despite the fact that the contract is in its entirety invalid, the insurer is under this provision entitled to the entire agreed premium. The rule is motivated by preventive considerations. It must be based on explicit legal authority, in view of the fact that under general rules of law it is not normal that the other contracting party can claim full compensation despite the fact that he is not bound by an agreement.

The 1930 Plan did not contain any explicit rule relating to premiums where the assured loses his cover, wholly or in part, because of faults and negligence committed by himself or persons with whom he must be identified. As the insurer has in such cases borne the risk which he has undertaken under the agreement, he would probably be awarded full premium. To avoid any misunderstanding, the rule is stated explicitly in subparagraph 2 of the paragraph. If the negligence results in the insurance period becoming shorter than agreed, e.g. because the insurer terminates the insurance, § 121 becomes applicable.

§ 116. Premium in case of total loss

This paragraph corresponds to the Hull Policy D 2b.

Although neither the 1930 Plan nor the Hull Policy contained any explicit rule, it is standard practice in the shipowner's insurance that the full premium shall be paid for the entire current insurance year in the event of a total loss. In the mutual marine insurance associations, where the insurances are not taken out on an annual basis, full premiums are also charged for the calendar year during which the total loss occurs. The rule is based on the view, which is expressed in *Grundt, «Lærebok»*, p. 194—197, that the rule contained in section 16, subsection 2, relating to a proportionate deduction of the premium in connection with insurance contracts which terminate before expiry, shall not apply where the insurance contract lapses because of a loss. It could admittedly be said that the claim for a full premium will in reality be tantamount to a deduction in the total loss claim. However, on the other hand, as pointed out by Grundt, one might adopt the view that in connection with a total loss the insurer has fulfilled all the obligations he undertook under the insurance contract and should accordingly be entitled to the full premium. The Plan has adopted the current rule in compliance with a specific demand from the insurers' representatives on the Committee.

Normally shipowners' insurances are taken out on an annual basis, which means that it will be one year's premium which the insurer can claim. In mutual insurance the rule is adapted to the insurance conditions.

If the total loss was caused by a peril, which is not comprised by the insurance, the situation vis-à-vis the insurer will be that the insurance lapsed before expiry. In that event the person effecting the insurance must be entitled to a proportionate reduction of the premium. This follows both from subparagraph 2 of this paragraph, and from § 121. If the loss is attributable to a combination of marine and war perils and liability is to be divided equally between the two groups of insurers under § 21, the insurer can only claim half of the premium for the remainder of the insurance period. If the loss is partly attributable to another peril, which is specifically excluded,

and liability is divided according to the general rule of apportionment contained in § 20, the reduction of premium must be adjusted to the fraction of apportionment.

In the event of a regular total loss there will be no doubt that all insurances concerning the ship will lapse. The assured must thus pay the premium up until that time, unless either the insurer concerned is liable for the total loss, or a special provision has been included in the insurance conditions about the insurer's right to the premium. However, in the event of condemnation, abandoning and where the insurer wishes to invoke his time-limit under § 162, subparagraph 2, in an attempt to save the ship, there will be a period of uncertainty where it is not known whether the total-loss claim will be paid and where it is accordingly not known whether the other insurances will lapse or remain in effect against payment of the full premium during the period of repairs, cf. ND 1945.433 Oslo Haakon Jarl. If it turns out in such cases that the total-loss claim will be paid, the risk as far as the other insurers are concerned shall under subparagraph 2, 2nd sentence, of the paragraph, be considered to have lapsed at the time of the casualty, or -- in the abandonment cases -- at the time of the last news about the ship. Until the question regarding total loss has been finally decided it will be uncertain both whether the insurers are entitled to premium for the period following the request for condemnation, and whether they are liable for subsequent casualties, cf. § 172. It has therefore been decided that the premium shall be deposited until the question has been decided. The deposit rule is only significant for the duration of the insurance period agreed on. If the question is still open when the insurance period expires, the question of an extension of the insurance and of the insurer's right to premium must be solved on the basis of the rules contained in §§ 171 and 118.

Also a P. & I. insurance will lapse in the event of a total loss of the ship. However, here there will never be any question of a «full annual premium», while on the other hand the assured must keep the P. & I. cover during the period of uncertainty until a total loss has become clearly established. The last subparagraph of the paragraph therefore explicitly excludes P. & I. insurance.

The rules relating to a reduction of premium contained in subparagraph 2 of the paragraph is not applicable where the insurer's liability is reduced under the rule of apportionment because the casualty is partly attributable to fault or negligence on the part of the assured or a person for whom he is liable. In such cases the insurer is entitled to a full premium under § 115, subparagraph 2.

§ 117. Additional premium where the insurer's risk becomes greater than originally assumed

This paragraph corresponds to § 9 No. 2, § 10, subparagraph 3, § 27 B, 2nd sentence, and § 30, subparagraph 2, 2nd sentence of the 1930 Plan.

It presumably follows from general principles of the law of contracts that the insurer is entitled to an additional premium equivalent to the additional risk he has to bear where the risk is or becomes different from what was assumed on conclusion of the agreement. An exception has been made in subparagraph 2 of the paragraph: No additional premium can be claimed where the ship has been engaged in a salvage operation to save human life.

In subparagraph 3 of the paragraph it is specifically emphasized that the insurer must demand an additional premium without undue delay as soon as he has become aware of the situation.

§ 9 No. 2, subparagraph 2, of the 1930 Plan entitled the person effecting the insurance to demand a reduction of the sum insured so that he avoided having to pay the higher premium. The rule is not very practical, and subparagraph 4 of this paragraph instead entitles the person effecting the insurance to terminate the insurance with immediate effect. The future premium may thus become the object of negotiations. The person effecting the insurance will in any circumstances have to pay the additional premium for the time elapsed.

§ 118. Additional premium where the insurance is prolonged

This paragraph corresponds to § 60, subparagraph 1, last sentence of the 1930 Plan.

Subparagraph 1 of the paragraph will be applicable where the ship at the expiry of the insurance period has damage for which the insurer is liable and which is of such a nature as to affect the seaworthiness of the ship, cf. § 157, subparagraph 1. The provision affects both the relationship with the hull insurer, the freight-interest insurer and the equipment insurer, cf. the references to the hull rules contained in §§ 279 and 284.

If it turns out, after the ship has put into port, that she is a constructive total loss, an insurer, who is not liable for the total loss will also not be liable for any new casualties which occur after the casualty which resulted in a total loss, cf. § 172, subparagraph 1. Under § 116, subparagraph 2, such an insurer can only claim premium for the period leading up to the casualty. Hence, there can be no question of any prolongation of the insurance as far as he is concerned, cf. however, the deposit rule contained in § 116, subparagraph 2, 3rd sentence.

The insurer, who is liable for the total loss, shall under § 172, subparagraph 2, cover all collision liability which arises after the casualty, but before the compensation is paid, and which under the rules contained in Chapter 13 falls within the scope of cover of a hull insurer. However, in this case the insurance is not «prolonged in accordance with § 157», cf. subparagraph 1 of this paragraph, and the insurer cannot claim a separate premium for such cover. As soon as it has been established that the ship is ripe for condemnation it is clear that the insurer who is liable for the total loss is entitled to the full annual premium, cf. § 116, subparagraph 1. The other insurers' liability is regarded as having lapsed in consequence of the casualty.

Subparagraph 2 of the paragraph regulates the insurer's right to premium where it is uncertain at the expiry of the insurance period whether the assured will be entitled to claim for a total loss under the rules contained in § 162, subparagraph 2, §§ 168 and 169. If at the expiry of the insurance period the ship is stranded, but the insurer wants to exercise his right to attempt to save it under § 162, subparagraph 1, no premium shall be paid as long as it is uncertain whether the salvage operation will succeed. If the ship is saved before the time-limit has expired, she will normally have sustained damage which makes the prolongation rules contained in § 157 applicable. The premium will then once again take effect from the moment the assured «gained control of the ship», which in that situation means that she has come afloat and can commence shifting to a repair yard. Should it turn out, however, that the ship is ripe for condemnation, the rules set out in the preceding paragraph must be applied.

Under §§ 168 and 169 the assured can claim for a total loss on expiry of certain specific time-limits when the ship is reported missing, has been abandoned by the crew or taken from the assured. If at the expiry of the insurance period it is uncertain whether the assured will claim for a total loss according to one of these rules, all premium payments will cease. If a total claim is later paid, the premium settlement shall be effected as described above in the discussion of a condemnation case.

Even if the time-limit under one of the said paragraphs has expired, the assured can, however, keep the question of compensation open if he prefers to get the ship back instead of the total loss claim because of the state of the market. This will particularly be relevant in connection with requisitions in times of war. If the ship is found before the assured has claimed for a total loss, the insurance shall under § 171 be prolonged until the ship has reached a port, and subsequently the rules contained in § 157 shall apply. According to subparagraph 2 of this paragraph the premium will in such a case again run from the time the assured, or someone on his behalf, acquires disposal of the ship.

Under § 4 No. 2, subparagraph 3, of the War-Risk Hull Policy no premium was payable during the time the ship was requisitioned for use by a foreign power, provided the assured did not receive any remuneration for the use of the ship. In such a case the payment of premium was thus suspended already from the time of the casualty, not, as provided by the Plan, from expiry of the insurance period agreed on.

A special question is whether the insurer has the right to demand a new and full annual premium if the ship becomes a total loss after she has been found, but before the prolonged insurance has expired. According to current practice no new annual premium shall be paid in such a case, and the Plan shall be interpreted in the same way. According to § 116 the insurer is entitled to the whole «premium agreed» in case of a total loss, but in connection with a prolongation of the insurance there is no agreement about insurance for a new insurance year. Hence, in that connection only an additional premium for the period from the time the assured acquired disposal of the ship until she was lost shall be paid.

§ 119. Lapse of right to premium where no risk attaches for the insurer

This paragraph corresponds to §§ 3 and 4, subparagraph 2, of the 1930 Plan.

Under § 3, subparagraph 3, of the 1930 Plan the person effecting the insurance was to notify the insurer as soon as he realized that at the conclusion of the contract there was no insurable interest, or that the interest no longer existed. If the person effecting the insurance neglected to fulfil this duty to notify the insurer, the latter was entitled to the whole premium. The rules were not very practical and could seem unnecessarily strict vis-à-vis the person effecting the insurance. They have therefore been abandoned. However, it should be pointed out that in such situations the person effecting the insurance may incur a liability for damages to the insurer, viz. if he negligently fails to notify the insurer that no insurance will be taken out and the insurer has in the meantime taken measures and incurred expenses in that connection.

The rule contained in § 126, according to which the person effecting the insurance forfeits his claim for a reduction or return of the premium if he has not made a claim to that effect within 6 months after the expiry of the insurance year, will hardly apply to the situations discussed in this paragraph.

§ 120. Reduction of premium where the sum insured is higher than the value of the interest

This paragraph corresponds to § 17, subparagraph 2, § 20, subparagraph 1, 2nd sentence, and § 22 No. 2, 3rd sentence and No. 3, subparagraph 3, of the 1930 Plan.

Like the 1930 Plan the new Plan entitles the person effecting the insurance to a reduction of the premium when that premium is determined on the basis of a value of the interest insured which is higher than what turns out to be the case. In subparagraph 2 of the paragraph it is established that the premium shall correspond to the premium which the insurer would have charged at the conclusion of the contract if he had known the real value. In hull insurance no proportionate reduction of the premium can be indicated taking the value into consideration, in view of the fact that it is only the proportion of the premium which covers the total-loss risk which will vary in accordance with the value. The so-called «average premium» will mainly be determined on the basis of the ship's type, and age, without taking the assessed value applicable to the hull insurance into account.

The provision is not applicable in connection with each and every reduction of the assessed insurable value during the insurance period. If the shipowner and the insurer agree to reduce the assessed value applicable to the hull insurance e.g. in the event of a recession, they must also agree on the future premium. The rule contained in subparagraph 1(b) of the paragraph is therefore only applicable when the valuation, contrary to the shipowner's wish, is set aside by virtue of § 8.

For the purpose of counteracting overinsurance and overvaluation subparagraph 3 of the paragraph provides that the person effecting the insurance does not have the right to claim a reduction of the premium under (a) and (b) if at the conclusion of the contract he knew, or ought to have known, that the interest was overinsured. A corresponding subjective condition applies also to double insurance. This follows from § 13, according to which the person effecting the insurance does not have the right to demand a reduction of the sum insured if at the conclusion of the contract he knew that the interest was double insured. It is therefore unnecessary to repeat the subjective condition in this paragraph.

§ 121. Reduction of premium where the period of insurance proves shorter than agreed or the insurance becomes inoperative

This paragraph corresponds to § 15, subparagraphs 1 and 2, of the 1930 Plan, and section 16 of ICA.

Section 16 of ICA reflects 2 different principles for the calculation of the premium where the insurance contract is interrupted before expiry. Under subparagraph 1 of the paragraph the company is entitled to a so-called «short-term premium» where the insurance is terminated by the company. A «short-term premium» is the premium which the company would have charged if it had known that the period of insurance would be so short. It will normally be higher than the premium which would have resulted from a reduction of the agreed premium based on the relationship between the insurance period agreed on and the actual period of insurance. This is in particular due to the fact that the company's costs in connection with the effecting of the insurance must be covered by the premium with the same amount, regardless of whether the period of insurance is longer or shorter. If the insurance contract for some other reason ceases to be in effect, the company has the right under section 16, subsection 2, of ICA to claim the proportion of the premium which corresponds to the period during which the company has covered the liability. In other words, a strictly proportionate reduction shall be effected here. That the company has the right to charge a higher premium in the former case is due to the fact that a termination by the company will always be connected with negligence or other circumstances related to the person effecting the insurance or the assured, which the company wishes to counteract.

§ 15 of the 1930 Plan contained somewhat deviating rules. Where the insurance was terminated by the insurer, or became inoperative according to the rules relating to premium reminder, the insurer would be entitled to a short-term premium. In other cases the premium was to be calculated with a view to «the risk covered during the time of the insurance». The purpose of the latter provision was that it was not only the shortened period of insurance that should be taken into account, but also the fact that the risk may vary according to the time of the year, the waters in which the ship is sailing, etc.

During the revision work there was general agreement that it is not necessary to have such detailed rules regarding the calculation of the premium in respect of insurances which terminate before the time agreed. Therefore the rule was amended to the effect that in any circumstances a strictly pro-rata reduction shall be made, taking into account the agreed and the actual period of insurance, cf. subparagraph 1 of the paragraph. However, it was stated that in the small-craft trade there is a need for more varied premium rules in this respect, and the rules of the Plan will therefore perhaps have to be modified in each individual contract of insurance.

§ 15, subparagraph 1, of the 1930 Plan stated explicitly that the insurer was entitled to a premium for the period of time during which the insurance had been suspended in consequence of the person effecting the insurance having ignored a premium reminder. As regards other cases of suspension the 1930 Plan did not contain any explicit rule, but it must be assumed that the insurer would also in those cases be entitled to the full premium. This would be a reasonable solution where the suspension was attributable to a blameworthy conduct on the part of the person effecting the insurance or the assured, e.g. where a premium reminder is ignored or the ship proceeds beyond the trading limits with the assured's consent. However, if the ship is requisitioned by Norwegian or allied State authorities, the marine-peril insurer should not receive any premium for the requisitioning period. The same should apply where the assured charters the ship for a voyage to a port outside the trading limits and takes out a special insurance for that voyage. The suspension of the insurance during the removal of the ship to a repair yard constitutes a special position according to § 44. In such a case the insurer should not be entitled to a premium for the period of the removal, as it will otherwise not cost him anything to protest against any removal which might involve a certain increase of the risk. Otherwise the insurer should be

entitled to the whole premium in the event of a suspension of the insurance. These rules have been expressed in subparagraph 2 of the paragraph.

The paragraph applies only to a reduction of the contractually agreed remuneration for the insurance. Of course, it does not prevent the insurer from claiming compensation from the person effecting the insurance or the assured if he has suffered a financial loss through the event which caused the insurance to become inoperative, and the compensation conditions have otherwise been satisfied.

§ 122. Reduction of premium when the ship is in port

Subdivision D of the Hull Policy contained a number of rules relating to a return of premium when the ship is in port. The rules were divided into 4 groups:

- (1) general rules relating to the calculation of the time the ship is in port,
- (2) specification of the situations which do and do not warrant a return of premium,
- (3) general return-of-premium rates,
- (4) minimum premiums which the insurer shall receive, even if the other conditions for a return of premium have been satisfied.

During the revision work importance has been attached to the principle that the policies should be shortened and that consequently as large a part of the conditions as possible should be transferred from the policies to the Plan. However, as regards the rules relating to a return of premium, a special consideration comes into play that these rules are subject to relatively frequent amendments. Hence, it is only the more permanent return-of-premium rules which are incorporated in the subsequent paragraphs. Subject to certain simplifications the Plan adopts the rules in the policy which belong in category (1) above, and some of those which come under category (2). All premium-return rates, rules as to minimum length of time in port, deductions from the time in port, and minimum premiums have been deleted, as well as the rules as to what should be done when repair or maintenance work is carried out during the ship's stay in port. On all of these points supplementary provisions will still have to be incorporated in the policy.

§ 123. Calculation of the time the ship is in port

This paragraph corresponds to the Hull Policy D 1 (a), subparagraph 2, and (g).

§ 124. Removal of the ship

This paragraph corresponds to the Hull Policy D 1 (h).

The Hull Policy defined «one port» as the area which is under the control of one public port authority. This rule may seem casual and has been deleted. Whether there are one or several ports must be decided on a case-to-case basis depending on local geographical and commercial conditions.

When moving a ship to another port the Hull Policy stipulated the condition that that port must be «close» and «good». When calculating the reduction of premium 2 days always had to be deducted. In case of the removal covering long distances the question whether the stay in port should be considered to have been interrupted was to be decided by «Sjøassurandørenes Fellesutvalg» (The Joint Committee of Marine Underwriters), who were also to determine the additional premium for the removal. — It was found unnecessary to say that the new port must be «good». Nor does the Plan maintain the rules that the port must be «close», in view of the fact that the insurer will under any circumstances be entitled to the full premium for the period of time the removal takes. The Hull Policy's rule to the effect that questions of doubt shall be decided by «Sjøassurandørenes Fellesutvalg» has also been deleted, in view of the fact that the Plan should not refer questions for their final decision to representatives of one of the parties. Finally it should be mentioned that the Plan — unlike the Hull Policy — does not limit the rule relating to the removal to another port to those cases where the ship is not carrying any cargo.

§ 125. Cases where the insurer is entitled to full premium for the time the ship is in port

This paragraph corresponds to the Hull Policy D1 (e), (f) and (j).

§ 126. Claim for reduction of premium. Charge on return of premium

This paragraph corresponds to the Hull Policy D1 (i) and § 15, subparagraph 3, of the 1930 Plan.

The rules contained in this paragraph are applicable to all cases where the duty of the person effecting the insurance to pay premium has lapsed, wholly or in part, under the rules contained in Chapter 3, cf. § 116, subparagraph 2, §§ 119, 120, 121 and 122 to 125.

It has been suggested to extend the time-limit for making a claim for a return of premium from 3 months (the Hull Policy) to 6 months. According to the policy the time-limit took effect as from «expiry of the policy». According to the Plan the time-limit takes effect as from expiry of the insurance year, alternatively expiry of the period of insurance agreed. The term «insurance year» is used in order to adapt the rule to the continuous insurances. In this paragraph «the insurance year» means a period of one year from the insurance came into force. If it is a continuous insurance contract, the insurance year constitutes a period of one year from expiry of the preceding insurance year. The insurance year may coincide with the calendar year, but this is not a requirement. Under the policy the insurer was entitled to demand the production of a certified extract of the log book. This regulation is superfluous alongside section 39 of the Maritime Code.

Under the 1930 Plan the charge on return of premium was 10% of the return premium, however, not higher than NOK 500,—. According to the Hull Policy the fee was also 10%, in that the full return premium constituted 90% of the premium for the period for which the return premium was granted. However, according to the Hull Policy there was no limit to the amount of the premium which the insurer was entitled to keep. — The Plan maintains the rule of a cancellation fee of 10% on the return premium but, like the 1930 Plan, it stipulates a maximum amount.

Chapter 7

Insurance of the interest of third party

§ 127. Scope of the rules

This paragraph corresponds to § 53 of the 1930 Plan.

Under section 54, subsection 1, of ICA, a property insurance shall be deemed to be taken out for the benefit of «anyone who as owner, mortgagee or holder of some other possessory rights in the subject-matter, or because he bears the risk in respect of same, is interested in preventing it from being damaged or lost». In connection with an ordinary property insurance there may accordingly be a number of «assured», viz. all the persons who have a further qualified interest in the capital value of the subject-matter. The third party concerned is automatically co-insured and will, in the event of a loss, have an independent claim against the insurer corresponding to his financial interest in the subject-matter. Sometimes his interest will comprise the entire value of the subject-matter, as e.g. when he has bought and paid for it or has a mortgage which swallows the entire value. But he may also be a co-assured alongside the owner.

The 1930 Plan contained rules relating to the insurance of third parties' interests in §§ 49 to 53. The rules were very complicated and difficult to follow. They were also characterized by the fact that they were written with a view to being applicable to the insurance of goods. However, there is a considerable difference between problems in a shipowner's insurance and problems in an insurance of goods.

The branch of the shipowner's insurance where third parties' interests are

particularly relevant is hull insurance. In this connection there may be a number of third parties with financial interests in the ship's capital value, inter alia a purchaser who has taken over the ship, or who has entered into an agreement for the purchase of the ship at a price which is lower than the valuation, a long-term charterer who has entered into an agreement on favourable conditions, a shipyard which has a lien on the ship as security for the invoice for repairs, a maritime lienholder, or a mortgagee. If section 54, subsection 1, of ICA were to apply to hull insurance, all these categories of third parties would, depending on the circumstances, have the right to claim a share of a total-loss compensation for the ship, and their interests would also have to be safeguarded by a regulation of partial damage. This would be in contravention of traditional solutions in marine insurance and would reduce the financial security which the insurance gives the shipowner from time to time. § 53 of the 1930 Plan therefore explicitly set aside section 54, subsection 1, of ICA, stipulating that an insurance, which an owner of ship or goods had taken out, did not cover «the interests of a mortgagee or other similar interests of a third party connected with the subject-matter insured, unless there is an express agreement to the contrary». As regards the mortgagees, a separate arrangement had been made, cf. below in Chapter 8.

The Plan maintains the previous system. Subparagraph 2 of this paragraph establishes as a basic principle that the third party's interest in the subject-matter insured is not protected, unless this has been specifically agreed. As regards the mortgagees, their position is regulated in Chapter 8 of the Plan. Under § 148 the hull insurance is also for the benefit of a third party who owns or has separate security in ship's equipment covered by the insurance, and under § 209 the purchaser of a newbuilding is co-insured under the shipyard's insurance as far as instalments already paid on the building price are concerned. Otherwise the Plan does not contain any rules regarding automatic co-insurance or other protection of other third parties. Such agreements would have to be concluded separately, e.g. if the hull insurance is also to be for the benefit of the purchaser of the ship.

The rules contained in this chapter will hardly have any wide practical application. As most of the questions of importance in connection with the protection of the mortgagees and the purchasers of newbuildings are exhaustively regulated in Chapter 8, cf. § 209, subparagraph 3, the rules contained in Chapter 7 will, apart from the case mentioned in § 148, essentially be applicable when, by way of exception, a separate agreement is made to the effect that the insurance shall also be for the benefit of other third parties than the mortgagees, cf. subparagraph 1 of the paragraph.

§ 128. Duty of disclosure

This paragraph corresponds to § 52, No. 1, of the 1930 Plan.

Where a third party is co-insured, his rights will depend on the existence of a valid contract of insurance. Failure on the part of the person effecting the insurance to fulfil his duty of disclosure may invalidate the contract of insurance wholly or in part, cf. Chapter 3, Subdivision 1, of the Plan, and a co-insured third party will have to accept that the insurer invokes this objection, despite the fact that no fault attaches to the third party.

This paragraph regulates the case where a third party is in possession of information which has a bearing on the insurer's assessment of the risk. If the third party knows that the insurance is being effected, he has the same duty as the person effecting the insurance to give his information to the insurer, and his negligence will be assessed under the general rules relating to the duty of disclosure contained in the Plan, cf. subparagraph 2, 1st sentence, of this paragraph. For the insurer it will therefore be of essential importance to know whether the third party is aware of the insurance being taken out, so that he has a duty to and a possibility of passing on the information he possesses. Hence, under subparagraph 1 of the paragraph the person effecting the insurance shall, in addition to the other risk information which it is his duty to give, also state whether or not the third party knows that the insurance is taken out. If the person effecting the insurance intentionally or negligently fails to give the

insurer this information, the third party shall be considered as if he knew that the insurance was taken out and failed to give the information which he should have given, cf. subparagraph 2, 2nd sentence, of the paragraph.

§ 129. Loss of assured's rights owing to acts or omissions of the person effecting the insurance

This paragraph corresponds to § 52 No. 3 a of the 1930 Plan.

A third party, who is co-insured, has an independent position as «assured» in relation to the insurer. He may thus, wholly or in part, forfeit the cover for himself, and only for himself, by causing an increase of peril, a casualty, failing to notify the insurer of a casualty which he learns about, etc. All rules in the Plan which are aimed at the «assured» will thus be directly applicable to him.

However, under this paragraph the assured shall also to a certain extent be identified with the person effecting the insurance as regards acts of this nature, viz. when the subject-matter insured is in the custody of the person effecting the insurance or in the custody of someone who holds it on his behalf. In that event negligence on the part of the person effecting the insurance shall be assessed as if it had been shown by the assured, regardless of the fact that the person effecting the insurance no longer has any personal financial interest in the subject-matter insured.

§ 130. Amendments to and termination or cancellation of the contract of insurance

This paragraph corresponds to § 52 No. 3 b, of the 1930 Plan, and section 56, subsections 1 and 2, of ICA.

The paragraph gives the person effecting the insurance a wide authorization on behalf of a co-insured third party. However, it will hardly be of any major practical significance. In the shipowner's insurance it will be a rare thing for an insurance to be taken out for the benefit of a third party whose identity is not disclosed to the insurer (cf. the last subparagraph of the paragraph), and if it has been disclosed that the insurance is effected for the benefit of a specific third party, it will normally also follow from the relationship that the person effecting the insurance shall not have the right at his own discretion to eliminate the cover, (cf. the 1st subparagraph of the paragraph).

§ 131. Settlement of claims

This paragraph corresponds to § 52 No. 3 c and d, of the 1930 Plan, and section 57 of ICA.

Section 57, subsection 1, of ICA, explicitly establishes that it is «the person to whom the interest belongs who is entitled to the compensation. This applies even if the person effecting the insurance has not notified him of the insurance». The same applies under the Plan. However, it was not found necessary to state the rule explicitly, in view of the fact that it follows from ICA's rules and from the entire Plan system.

The paragraph gives the person effecting the insurance a certain negotiation and acknowledgement-of-receipt authority vis-à-vis the insurer. The authority is subject to the condition that the insurer does not know, nor ought he to have known, who the assured is. It is thus not sufficient to deprive the person effecting the insurance of his authority that the insurer realizes that a third party is co-insured, as long as he neither knows, nor ought to know, who that third party is.

§ 132. Rights of the insurer against the person effecting the insurance

This paragraph corresponds to § 52 Nos. 2 and 4 of the 1930 Plan.

The duty to pay premium lies with the person effecting the insurance, cf. § 112, subparagraph 1. However, in the event of a default on the payment of premium the insurer may invoke his rights against anyone who is assured under the contract of insurance, cf. subparagraph 1, 1st sentence, of the paragraph. The assured will often be interested in laying out the premium, thereby averting the effects of a default, and subparagraph 1, 2nd sentence of the paragraph therefore prescribes that he shall be

informed of any demands, notices of termination and other notices sent by the insurer to the person effecting the insurance.

Subparagraph 2 of the paragraph prescribes an identification of the person effecting the insurance with the assured if the knowledge of the person effecting the insurance when the insurance was taken out is relevant for the question whether or not a premium shall be paid.

The last subparagraph of the paragraph establishes the general basic principle that the insurer may always set off outstanding premium payments and other claims arising from the insurance concerned against the compensation, regardless of whether the compensation accrues to someone other than the person effecting the insurance. However, the insurer cannot set off claims which have no connection with the contract of insurance. The right to plead a set-off here is thus somewhat limited in relation to what would follow from general rules of law. A special rule which further limits the right to plead a set-off is incorporated in the chapter on mortgagees, see § 138 i.f.

§ 133. Change of ownership

This paragraph corresponds to § 65 of the 1930 Plan and § 10, subparagraph 2, of the P. & I. Rules.

Under section 54, subsection 2, of ICA a property insurance shall, regardless of any agreement to the contrary, be effected for the benefit of the purchaser of the property for a period of 14 days, providing the new owner does not have a claim for compensation through his own insurance. However, this mandatory rule does not apply to «marine insurance of ships», and was made inoperative by § 65 of the 1930 Plan. The new Plan confirms the previous system. In the shipowner's insurance the risk is contingent on who has the disposal of the ship to such a great extent that a change of ownership should unconditionally result in the insurance lapsing.

The provision applies not only to hull insurances which are taken out on the basis of the Plan. Also freight and P. & I. insurances will lapse in the event of a change of ownership.

The insurance will lapse only in respect of casualties which occur after the change of ownership. If the ship at the time of transfer has unrepaired damage, for which the insurer is liable, or is encumbered with a maritime lien for claims for damages which will be covered by the P. & I. insurance, the seller has a conditional claim against the insurer, which he may transfer together with the ship, cf. ND 1950,299 Bergen Byrding.

Subparagraph 2 of the paragraph gives the insurer a right of termination when more than half of the capital in the company that owns the ship passes to a new owner, and in the event of a change of management. In this connection also a co-ownership with personal liability of the owners shall be regarded as a company. The rules relating to the transfer of shares or interests is, of course, not quite satisfactory from the insurer's point of view, in view of the fact that a person or a group may acquire a controlling influence in the company through the purchase of less than 50% of the interests or the share capital. To draft a rule which would in a practical manner regulate such a situation would be very difficult.

Where the insurance lapses by virtue of this paragraph, the person effecting the insurance may demand a reduction of the premium under § 121, subparagraph 1.

Chapter 8

Insurance also covering mortgagee's interest

The trend in the direction of bigger and more costly ships has resulted in the shipowners to an increasing extent being forced to solve their financing problems by mortgaging the ships. Greater attention is being paid to the rules relating to mortgages on ships than before. This applies in particular to the aspects of insurance law in

connection with these problems: Without an effective insurance cover of the mortgagee's interests an extensive credit in ships would not be possible.

The mortgagee's interest may be covered by independent insurances, but as the shipowner would in any circumstances insure his interest in full, regardless of the mortgage, the mortgagee insurance would in reality result in double insurance. The most expedient solution must obviously be that the mortgagee in some way gets to benefit from the shipowner's insurances. Formally speaking, this may be arranged in two different ways:

In the first place the mortgagee may be given a mortgage on the shipowner's claim against the insurers. The insurers should have no objections to such an arrangement. The ship mortgagee will as a mortgagee in the insurance claim not have any priority right against the insurer over the shipowner. However, the system has certain deficiencies. When using the construction «mortgage on the insurance claim», the difficult questions of legal protection for mortgage on claims arise. Without legal protection a mortgage is not worth much, the shipowner's other creditors not having to respect the ship mortgagee's preferential rights to the insurance. In practice the legal protection has been ensured by the shipowner's insurance policies being deposited with the mortgagee, an arrangement which has been approved by the Supreme Court, see Rt. 1918.205 Kragernæs, and which the 1930 Plan assumed would be maintained, see its § 51. As the issuing of the policies normally does not take place until some time after the commencement of the insurance year, there will every year be a shorter or longer period during which the mortgagee's rights are unprotected, see further *Vislie*: «Panthaverinteresser i kaskoforsikring, Norsk Forsikringsjuridisk Forenings Publikasjoner nr. 8» (also in TfR 1939.34-52). By the Nordkyst-judgment ND 1953.383, however, the Supreme Court held that legal protection may also be established by an entry in the ships' registry. As most ship-mortgage forms contain a provision to the effect that the mortgagee shall also have a mortgage on any sums insured, and as ship mortgages must always be registered, this means that the mortgagees in most cases so to speak automatically obtain a legally protected mortgage in the shipowner's insurance claim (cf. *Langlo* in «Forsikrings-tidende» 1953.221 - 23).

When the Nordkyst judgment was rendered, however, practice had long since abandoned the system of a mortgage on the insurance claim and switched to the system of co-insurance of the mortgagee's interest under the shipowner's insurances; by co-insurance the mortgagee gets a direct claim against the insurer, not just a claim derived from the shipowner's claim, whereby the many complex legal-protection problems are averted. What rights the mortgagee shall have vis-à-vis the insurer may be determined in the insurance conditions. The rules may be worded in detail in the said conditions as indicated by the mortgagee's need for protection and the insurers' possibilities of affording cover without being bound by the limits set by the concept of mortgage on claims. The co-insurance point of view may also be applied in connection with insurances which do not concern the shipowner's interest in the ship itself, e.g. P. & I. insurance, where the concept of a mortgage on the insurance claim would hardly be fitting.

A co-insurance of the mortgagee interest may be effected in several ways. It may be an automatic side-effect of the shipowner's insurance, or be contingent on an explicit declaration from the insurer to the mortgagee. Further, it may be «dependent» or «independent». Co-insurance is «dependent» where the insurer may invoke vis-à-vis the mortgagee all the objections he may have vis-à-vis the shipowner. It is «independent» where the mortgagee's claim is more or less unaffected by the insurer's objections vis-à-vis the shipowner.

Section 54 of ICA authorizes in connection with property insurance, e.g. hull and hull-interest insurances, an automatic, independent co-insurance of the mortgagee interest. That the shipowner has e.g. caused a casualty intentionally or by gross negligence does not deprive the mortgagee of his right to compensation under this paragraph, obviously subject to the condition that the mortgagee himself is not an accomplice. From the mortgagee's point of view the paragraph provides a highly

satisfactory solution. The marine insurers, however, have not been willing to bear the increased burden which this solution involves. Section 54 of ICA, which is not a mandatory provision, was made inoperative by § 53 of the 1930 Plan. § 127, subparagraph 2, of the new Plan provides the same rule. As an addendum to the 1930 Plan a «Mortgagee's Clause» was adopted, which could be incorporated where co-insurance of mortgagee's interests was accepted. However, the said clause, which gave the mortgagee more or less the same protection as he would have got under section 54 of ICA, has not been applied to any great extent.

When it was discovered some time after the adoption of the 1930 Plan that the system of pledging the shipowner's policies was not quite satisfactory, a «Mortgagee Clause II (PHK II)» was drawn up which established a dependent co-insurance of the mortgagee interest. Under this clause the mortgagee cover did not take effect automatically, but had to be agreed on in each individual case. PHK II became universal in hull insurance, and a mortgagee cover of similar content was introduced in P. & I. insurance by the conditions of 1955, § 37. The Plan follows the same pattern. Some minor amendments have been made, *inter alia* with a view to the fact that the rules must be applicable to property insurances as well as liability insurances.

The rules contained in this chapter are not only applicable in connection with the mortgaging of ships. Under § 134, subparagraph 1, they shall apply where «the interest to which the insurance pertains» is mortgaged. Hence, they will also be applicable e.g. where the shipowner's anticipated freight income under a charter-party has been transferred to the lender as security. However, a mortgage on a ship is the most practical example, and the presentation below is aimed only at such a situation.

§ 134. Mortgagee's rights against the insurer. Notice of mortgage

According to the introduction in PHK II an explicit agreement had to be entered into between the shipowner and the insurer to the effect that the mortgagee shall be co-insured. § 37 of the P. & I Rules merely required a (unilateral) notice from the shipowner that the ship has been mortgaged and that he wants the mortgagee's interest protected. The Plan goes one step further and introduces an automatic co-insurance of the mortgagee interest, see subparagraph 1 of the paragraph. Admittedly, a notice shall normally be given because of the provision contained in subparagraph 2. However, it is possible that, due to an oversight, no notice has been given. If the ship should then be lost and the shipowner go bankrupt, the mortgagee will be protected under the Plan, whereas the result according to PHK II would be that the entire sum insured would go into the bankrupt estate so that the mortgagee would merely get a dividend. However, the principle of the Nordkyst judgment (ND 1953.383) would give the mortgagee a certain protection also in those cases.

The paragraph is applicable only where the ship is «mortgaged», it thus only deals with ordinary mortgages. Neither the maritime-lien holder, nor the creditor who has distrained upon the ship is co-insured under the shipowner's policies. It has not been made a condition that the mortgage is registered, but if the mortgagee's rights in the ship do not have legal protection, his rights as co-insured will not be protected in a conflict with the shipowner's creditors, cf. Rt. 1939.343 NH.

Subparagraph 1 i.f. expresses the basic principle for the dependent co-insurance: The mortgagee's rights against the insurer shall not exceed the rights of the owner. The same rule followed from the more casuistic provisions contained in PHK II, paragraphs a and c. During the revision work the Norwegian Bank Association made a statement where the association supported an independent mortgagee cover along the lines of section 54 of ICA. The Association could not see any weighty reasons why mortgagees in ships should have a cover which was inferior to that of other mortgagees, and indicated that the ship mortgagees would themselves have to obtain cover against the risks which are uncovered under the Plan. The premium for this special insurance would then be charged to the debtor. However, the Committee found that it had to accept the counterarguments presented by the insurers. The insurers stated that the Norwegian merchant marine today is mortgaged up to around half its value and that many ships are mortgaged to their full hull valuation. The insurers

could not undertake to keep the mortgagees insured regardless of whether the shipowner had forfeited his cover. The protection for the insurers inherent in the subjective seaworthiness rule would otherwise be essentially reduced.

The principle involves a certain degree of uncertainty for the mortgagee. If e.g. the ship, with the shipowner's knowledge, puts out to sea in an unseaworthy condition and is lost as a result of the unseaworthiness, the mortgagee risks being left without cover. For deep-water hull insurance this «subjective risk» is very small. However, in view of the large extent of mortgage credit on ships, even a small uncovered risk will be undesirable from the mortgagee's point of view. For that reason separate insurances, which cover the mortgagee against the «subjective risk», have been taken out in England and Sweden, and sometimes also in Norway. The real need for this form of insurance is, however, so insignificant, that it has not been deemed necessary to draw up more specific rules for such insurance in the Plan.

The fact that the mortgagee's rights do not rank before the rights of the owner does not mean that the owner may arbitrarily waive his, and thereby the mortgagee's, rights under the insurance. §§ 135 to 138 contain several provisions intended to protect the mortgagee against this and against the owner receiving compensation from the insurer without the mortgagee benefiting from the insurance. However, in order to obtain such protection, the mortgagee must see to it that the insurer is notified of the mortgage, see subparagraph 2 of the paragraph. The rule contained in subparagraph 3 of the paragraph describes the insurer's obligation; but the mortgagee is covered even if the insurer fails to give the prescribed notice.

If notice under subparagraph 2 is not given, but the insurer nevertheless knows, or ought to know, that the ship is mortgaged, the mortgagee cannot invoke the general rules relating to a third-party insurance, particularly §§ 130 and 131. The rule regarding notice to the insurer as a condition of protection of the mortgagee must be interpreted antithetically and must as a special rule prevail over the general principles contained in Chapter 7. However, the possibility that the courts may in such cases wish to protect the mortgagee cannot be ruled out. At any rate in connection with the payment of a total-loss claim the insurer should for that reason demand a certificate of title and encumbrances. Conflicts of this nature will hardly arise very often, in view of the fact that the mortgagees, in order to be on the safe side, will probably make sure that the insurer is notified in accordance with this paragraph.

The rule contained in § 128, subparagraph 2, which imposes a specific duty of disclosure on a co-insured third party, who knows that the insurance is being effected, will also be applicable to a mortgagee in the ship. However, the example is of little practical importance, as the mortgagee will rarely possess any relevant information about the ship which the shipowner does not have as well.

§ 135. Notices of termination and other dispositions concerning the insurance

Subparagraph 1 of this paragraph corresponds to PHK II paragraph b.

Subparagraph 2 of this paragraph corresponds to PHK II paragraph d, but the minimum notice period vis-à-vis the mortgagee has been increased from 3 to 7 days.

The provision is only applicable in the event of a notice of termination. If the insurance lapses automatically, e.g. in case of a change of ownership, cf. § 133, or is suspended without prior notice, e.g. by deviation, cf. § 37, the cover of the mortgagee's interest will also cease without notice. As regards a change of ownership a rule was proposed at an early stage of the revision work according to which the insurance was not to lapse automatically in relation to the mortgagee, in that he was under any circumstances entitled to a termination on 7 days' notice. However, the proposal was opposed by the insurers. Practice has shown no great need for such a rule, in view of the fact that the buyer always arranges for a new insurance to be effected from the take-over. On the other hand, the rule would involve inconveniences for the hull insurers, in view of the fact that it will often take a long time from the sale until they are notified of the transfer. They might thus find themselves in a situation where they would be liable vis-à-vis the mortgagees for a long time without any reasonable chance of getting any premium for that risk.

Also in connection with an ordinary renewal of the insurance the Committee found no reason to give the mortgagees any special protection. A duty to notify the mortgagees could in any circumstances only be imposed on the leading insurer, as it would entail far too great complications if notice were also to be given every time a line with a co-insurer was terminated. A duty for the leading insurer to notify the mortgagee would also mean a strain at a time when insurers notoriously have a heavy workload. Such a duty would also involve a considerable risk of liability for damages for the insurers if the duty was neglected. The Committee therefore assumed that the best practical solution to the problem would be for the mortgagees themselves to keep up to date with the insurances of the mortgaged objects and inquire with the shipowner before a renewal can be effected.

§ 136. Deviation, alteration of the risk

The rule is new in relation to PHK II. However, a corresponding provision is contained in a clause regarding an addendum to the mortgagee clause, drafted by The Central Union of Marine Underwriters and applicable to the insurance of coastal and fishing vessels.

§ 137. Handling of claims, claims statements etc.

Subparagraph 1 corresponds to PHK II e, but is somewhat more comprehensive. According to PHK II it was only the claims handling which the mortgagee could be kept out of, whereas the Plan also includes claims statements and the lodging of claims against third parties. Thus the owner may e.g. conclude an out-of-court settlement with the insurer regarding a disputed point of the claims statement without first having obtained the mortgagee's consent. Admittedly, an exception is made in subparagraph 2: in the event of a total loss the owner should not be entitled to make dispositions regarding claims, which would belong to the mortgagee, without having obtained the consent of the latter.

§ 138. Payment of compensation

This paragraph corresponds to PHK, subparagraph f.

The rule contained in subparagraph 1 does not imply anything new. As regards compensation for partial damage, however, certain simplifications are suggested, see subparagraphs 2-4. If the insurer sees to it that the claims amount is used as payment for repairs of the damage, or to meet a liability to a third party, the mortgagee's interests will normally be protected, because the value of the mortgage will as a rule be restored. A mortgagee should therefore not have the right to oppose such payment, and there is accordingly no reason why his consent should be required. PHK II contained the same rule (see paragraph f, subparagraph 2, 2nd sentence) as regards compensation to third parties, but required consent where the payment exceeded 10% of the sum insured or NOK 200,000. In the Plan such a limitation is only stipulated for cases where payment is effected without the insurer making sure that it is used to meet repair costs or third-party claims. For this reason the limit is set at 5% of the valuation, not more than NOK 200,000. — The rule contained in the last sentence of subparagraph 2 did not exist in PHK II, but had to apply where that clause was used.

The insurer's right to set off claims under subparagraph 5 is more restricted than under § 132, subparagraph 3. It is reasonable to limit this right to claims which arise from the contract of insurance for the ship in question, in as much as the mortgagee cannot be required to keep up to date on the outstanding premiums which accrue for the assured's other ships. Further, it would be reasonable to stipulate a certain time-limit. Here the Committee decided on a time-limit of 2 years. Hence, the hull insurer cannot have more than 2 years' premiums outstanding and expect to have the right to set off these in full against future compensations.

The Committee realized that it might involve certain disadvantages to tie the time-limit to the payment of the compensation. If at the time of the casualty there are two years' outstanding premiums, the insurer cannot automatically expect that these arrears can be set off against the compensation which will be paid out later. However,

it was held that the insurer must have the right to prepare a payment on account as soon as the extent of the casualty has been established, and in that payment set off two years' premiums. — It is further a condition that the right to set off premiums against claims can only be exercised once per casualty. The insurer cannot — where the claims settlement drags on — prepare successive payments on account and set off for a total of more than two years' premiums.

The limitation in the right to set off does not apply only to the payment of a total-loss claim, where the mortgagee shall be paid off, but also in connection with the payment of compensation for damage. From the mortgagee's point of view it is essential that the insurance at all times ensures that the shipowner has the necessary funds to carry out repairs so that the ship may be kept in operation.

Chapter 9

Relations between the leading insurer and the co-insurers

In practice both hull insurances, hull-interest insurances and insurances of future freight earnings are normally covered with a number of different insurers, who separately take a portion of the risk. Such partial insurance is based on an independent agreement, and each insurer issues a separate policy. However, basically the shipowner does not want to negotiate with each one of them, but confines himself to reaching an agreement concerning the conditions with one insurer, or with a few insurers. The conditions arrived at in this manner are automatically accepted by the others. Also during the period of insurance — as regards questions in connection with a casualty or salvage of the ship, and as regards claims settlements — normally one of the insurers will represent all the insurers vis-à-vis the assured.

The 1930 Plan did not contain any other provisions regarding these matters than § 21, which contained the in actual fact obvious rule that several insurers who have each covered a proportion of the risk, are liable to the assured under their own agreement, independently of the other insurances. In practice the participating insurers will usually adopt a «leading-insurer clause», according to which one of the insurers is authorized, to a greater or lesser extent, to make binding decisions on behalf of everyone vis-à-vis the assured. However, the leading-insurer clauses, which are normally used, only regulate a small proportion of the questions which may crop up. It is therefore doubtful, from different aspects, how far the leading insurer's right to bind the co-insurers goes, and whether or not he would be authorized vis-à-vis the assured if he makes decisions which are in conflict with his rights in relation to the other insurers.

There was general agreement in the Committee that some of these questions should be subject to regulation in the Plan. However, the Committee disagreed as to how exhaustive such regulation should be. Hence, the Plan merely adopts the relatively certain rules, on which the majority of the Committee have agreed. As for the questions, which have not been regulated, the solution will still vary depending on business considerations in each individual case. In case of conflicts, it will be necessary to fall back on any agreements which may have been entered into, possibly supplemented with considerations regarding «the nature of the case», «general legal doctrines», etc.

The rules contained in this chapter will, of course, only be applicable vis-à-vis co-insurers who have also given insurances on the Plan's conditions.

§ 139. Definitions

The term «leading insurer» has in practice been established as the designation of the insurer who is to have contact with the assured in case of a casualty, be in charge

of the salvage operation and effect the claims settlement. The powers which under §§ 142 to 146 are granted the leading insurer are all powers which have in practice been regarded as being within his scope of competence.

As regards the designation of the co-operating insurers, the terminology varies somewhat. § 21 of the 1930 Plan referred to part insurance. In practice the terms «co-insurance» and «co-insurers» are used.

The rules contained in this chapter are based on the assumption that all insurances cover the same perils (marine perils, war perils) and that they relate to shares of one and the same interest. The chapter therefore does not establish any community between the insurers in hull insurance and the insurers in hull-interest or freight insurance. However, as pointed out under § 160, the hull-interest insurance is a hull insurance against total loss, which is taken out in addition to the ordinary hull insurance. It would obviously be practical that the decisions made in the relationship between the assured and the hull insurers were also binding on the hull-interest insurers to a certain extent.

The same applies where the assured has the right to claim under a freight-interest insurance in case of a total loss. The Plan therefore contains provisions which establish a certain community, also among the insurers of different interests, see §§ 222 and 279.

The rules contained in this chapter are also based on the assumption that one of the insurers has explicitly been designated as the leading insurer when the insurance is taken out. The assured is free to decide whether he wants to cover all parts of the interest with independent insurers, who will in that case not be mutually dependent on each other. If he wants to have the advantages involved in the new system, he must therefore designate one of his insurers as the leading insurer, and notify the other insurers, whom he contacts, accordingly. On the other hand, it is not a condition that the leading insurer knows who the co-insurers are. However, in certain respects the rules cannot be effective unless the assured has informed the leading underwriter of who the co-insurers are, see in particular § 141 about notifications in connection with casualties.

§ 140. The leading insurer's right to act on behalf of the co-insurers

Subparagraph 1 of this paragraph establishes the general principle that the leading insurer has the right to bind the co-insurers in relation to the assured to the extent the following paragraphs confer such authority on him. The arrangement is based on an extensive relationship of trust among the insurers, and it is therefore emphasized that when acting on behalf of all of the insurers the leading insurer shall, as far as possible, take into consideration all insurer's interests. He is also required to consult the co-insurers whom he knows of, provided time permits and the matter is important. If such an approach shows that among the co-insurers, with whom he gets into contact, there is a predominant desire to solve the matter in a specific manner, the leading insurer is obliged to respect their point of view. If he acts in conflict with a distinct wish, this may result in liability for damages vis-à-vis the co-insurers.

When applying the rules regarding the leading insurer's obligation to consult the co-insurers, it is natural to rely on the practice which has developed. This applies both to what shall be considered «cases of importance» and which co-insurers the leading insurer should contact where the insurance is divided into many parts. It is not the aim of the Plan to introduce new rules in this respect.

Subparagraph 2 contains a legitimization rule of considerable importance. If the leading insurer has made a decision vis-à-vis the assured which is within his scope of authority under §§ 142 to 145, and the assured neither knew, nor ought to have known, that the leading insurer acted contrary to any agreement with the co-insurers, or in some other way disregarded their interests, the step taken by him will be binding on all co-insurers in relation to the assured.

The legitimization is only applicable within the area where the rules contained in this chapter confer authority on the leading insurer. However, there is nothing to prevent a provision in the agreement with the assured to the effect that the leading

insurer shall have a wider or a more restricted scope of authority than indicated by the Plan. The extent of this authority will depend on an ordinary interpretation of the agreement. According to the principles of the general law of contract the steps taken by the leading insurer vis-à-vis the assured will be binding, provided they come within the agreed scope of authority, and the assured has no reason to believe that the interests of those giving the authority (the co-insurers) are being disregarded.

Steps, which fall outside the scope of authority, will however never be binding on the co-insurers, regardless of what the assured might believe about the leading insurer's right to act.

If the co-insurers wish to reduce the authority, which the leading insurer has under the rules contained in this chapter, they must make an explicit reservation to that effect on the conclusion of the agreement. However, also without such reservation having been made, it is, as already mentioned, possible that the leading insurer's action will be without any effect for a co-insurer, viz. if the assured ought to have understood that the leading insurer did not pay due regard to the interests of the co-insurer concerned.

The fact that the leading insurer, or one of the other co-insurers, due to special circumstances have been prevented from reacting to negligence shown by the assured or the person effecting the insurance, obviously does not affect the legal position of the other co-insurers.

§ 141. Notification etc. in connection with casualties

It is of great practical importance for the assured, in the event of a casualty, to be able to look to just one of the co-insurers. In order to achieve this he shall according to the Plan designate one of the insurers as the leading insurer, inform him with whom the other shares of the interest are insured and request the leading insurer to pass on to them notifications concerning casualties and claims statements. The authority to receive notifications does not arise when the leading insurer becomes aware of a co-insurer in a more coincidental way. Such accidental knowledge should not allow the assured to consider that his duty to notify the insurers is reduced. Nor should it be sufficient for the assured to have informed the leading insurer who the co-insurers are, perhaps in a completely different context. The assured shall explicitly request that the notifications be passed on.

The paragraph is first and foremost aimed at notifications of casualties, cf. § 52, the lodging of claims for compensation cf. §§ 107 and 108, and demands that the claims statement shall be submitted to an average adjuster, cf. § 87. But also during the further proceedings in connection with a casualty or a claims settlement, the provision becomes important, in view of the fact that a co-insurer who is subject to this paragraph cannot invoke that the assured has forfeited a right by passivity, provided the assured vis-à-vis the leading insurer has done whatever is necessary to maintain his right.

The rule contained in subparagraph 2 is an instruction to the leading insurer. The fact that the leading insurer fails to pass on a notification has no influence on the assured's legal position. However, depending on the circumstances, the negligence may affect the relationship between the leading insurer and the co-insurer concerned.

§ 142. Salvage

The rules contained in this paragraph confirm the authority conferred on the leading insurer according to current practice in connection with salvage.

§ 143. Repairs

According to current practice the leading insurer always represents all the insurers in all questions pertaining to repairs of the ship, and this rule has been confirmed. However, the 2nd sentence of the paragraph makes an exception as regards the question whether the ship shall be repaired, or whether the assured's request for a condemnation of the ship shall be complied with. On this point the insurers may have conflicting interests, especially if the leading insurer has granted the shipowner a loan,

which may perhaps only be expected repaid in case of a total loss. It has therefore been established that a co-insurer shall have an independent right to have the question of condemnation further illuminated through a removal of the ship for a survey pursuant to § 166, or by an invitation for tenders. In that event the question whether the condemnation conditions have been satisfied must be decided separately for the relevant co-insurer.

A co-insurer, who exercises his right to demand a removal of the ship, or who causes the assured a further loss of time by inviting tenders, shall himself pay the costs of removal and loss of time under § 182, subparagraph 2, if it does not turn out that the action was to the advantage of all the insurers. A request for removal in order to avoid condemnation may also be met with a limitation of liability from the other insurers in accordance with § 43.

§ 144. Provision of security

Under § 95 the insurer is not obliged to provide security for the assured's liability to third parties. However, in practice the hull insurer will to a large extent provide security for the assured's liability for salvage remuneration and collision damages whenever required in order to avoid that the insured ship is arrested. Such security will normally be provided by the leading insurer, who in that connection obtains guarantees from the co-insurers. However, such guarantees merely impose an obligation on the co-insurers to pay their shares of the liability which is finally imposed on the insurers according to the insurance conditions. The guarantees do not prevent the fact that the leading insurer alone bears the risk involved in the providing of security. That risk materializes if it later turns out that the assured's liability is not covered by the insurance, e.g. because it arose in connection with an accident attributable to a foreseeable unseaworthiness, or a peril which is exempted from the insurance cover. Nor can the normally used guarantees be considered to involve a waiver of the right to compensate with outstanding premiums. The legal significance of the guarantee is therefore simply that the co-insurer undertakes not to settle direct with the assured as regards his liability to third party.

During the revision work the question whether to impose a more extensive liability on the co-insurers vis-à-vis a leading insurer, who provides security for the assured's liability, was the subject of in-depth discussions. There was general agreement that the right to set off the assured's arrears of premium vis-à-vis the leading insurer should be subject to a certain restriction. However, no agreement was reached to impose a real counter-guarantee liability on the co-insurers. In this respect the Plan involves no change in the current system. But there is obviously nothing to prevent the co-insurers from, on demand, explicitly undertaking on a case-to-case basis, if necessary, to pay their shares of the guarantee, even if the assured's liability should turn out to fall outside the scope of cover.

Subparagraph 1 deals with the effect of the leading insurer informing the co-insurers that he has provided security for the assured's liability for collision compensation or salvage remuneration. Such notification deprives the assured of creditor legitimation as far as his cover of the liability invoked against him is concerned. If a co-insurer, who has received such notification, pays compensation in connection with the liability direct to the assured, he risks having to pay the amount, wholly or in part, once again to the leading insurer, to the extent the latter's provision of guarantee has become effective.

Subparagraph 2 of the paragraph limits the co-insurer's right to make counter-claims where security has been provided. According to general doctrines of law an insurer may set off claims for outstanding premium and other claims arising out of the contract of insurance against the insurance claim, cf. § 132, subparagraph 3, which explicitly makes the principle applicable where the person entitled to the compensation is not the same as the person who is liable for the premium. Unless otherwise agreed, a co-insurer also has the right to plead a set-off against the leading insurer when the guarantee has become effective and the leading insurer has recourse. According to the Plan the co-insurer's right is subject to the condition that he has

reserved the right to plead a set-off prior to the provision of security. As the question of providing security is normally «a case of importance» in relation to § 140, the leading insurer will be obliged, if possible, to submit the question to the co-insurers in advance, and they will then be able to make their reservations. However, it frequently happens that the leading insurer does not have the time to submit the question to the co-insurers. A co-insurer, who wants at all times to be certain that his claims against the assured can be set off, must therefore keep the leading insurer continuously informed of the size of his claims. If, on the other hand, the leading insurer neglects to have a prior consultation, for which there was sufficient time, the co-insurers may plead a set-off to the extent they would have made a reservation.

It is only vis-à-vis the leading insurer that the right to plead a set-off may be forfeited. If the assured himself covers the liability and the guarantee is released, the co-insurer may, of course, plead a set-off. The paragraph applies to all types of claims arising out of the contract of insurance, also claims against the assured which pertain to the insurance of other vessels.

It is conceivable that the creditor directs his claim against another ship which belongs to the assured, and that the leading insurer of the ship, to which the liability pertains, provides security in order to obtain the release of the other ship. The rule contained in this paragraph is also applicable in such a situation, in view of the fact that no express condition has been stipulated to the effect that the object of providing security shall be to prevent the arrest of the insured vessel.

On the other hand, the rules only become applicable where the provision of security is effected for a claim of the type described in this paragraph, i.e. liability in consequence of collision and salvage remuneration. If the leading insurer has provided security for a claim of a different type, e.g. a repair yard's outstanding claim, the co-insurers shall have full right to compensation without making any special reservation in accordance with subparagraph 2 of the paragraph.

§ 145. Dispute with third parties

Also in the event of legal proceedings against a third party, the leading insurer should be empowered to represent all the co-insurers. The paragraph authorizes him to make the necessary decisions in connection with the proceedings and may be invoked vis-à-vis the courts as a basis for a general power-of-attorney to conduct the case. However, as the question of instituting legal proceedings or lodging appeals will always be «cases of importance», and as there will in those situations always be time for discussions among the insurers, it will always be the duty of the leading insurer to submit the questions to the co-insurers of whom he is aware, cf. § 140.

§ 146. Statements of claims

A crucial point in the leading-insurer clauses used in practice is that the co-insurers undertake to accept the leading insurer's statement of claim. This paragraph has been drawn up along the lines of a standard leading-insurer clause. To be on the safe side it has been explicitly emphasized that the statement of claim is only binding on the co-insurers if it has been prepared in accordance with the insurance conditions. This implies that the leading insurer's discretionary decisions are binding, providing the discretion has been exercised within the framework of the conditions. However, if he e.g. includes as recoverable a loss which, according to a correct interpretation of the Plan and the policy, must be considered to be excluded, the co-insurers will not be bound. A co-insurer must also be entitled to disagree with a discretionary decision, if the discretion has been exercised in such a manner that it must in reality be regarded as a departure from the conditions in favour of the assured. There is some case law relating to the line drawn between discretionary questions and decisions which must be regarded as being in contravention of the conditions, cf. ND 1914.285 Oslo Ipu, 1928.202 NH Fagerheim and 1934.58 NV Sarita.

§ 147. Venue

This rule is a necessary consequence of the fact that the risk may be spread over

a large number of insurance contracts. It will especially be of importance for the assured where the leading insurer is Norwegian and one or more of the co-insurers are foreign. In the relationship between Norwegian insurers section 33 of the Norwegian Civil Procedure Act regarding joint debtors' venue would be sufficient. The provision does not only refer to the leading insurer's general venue. It must be possible to sue the co-insurers in all the courts of the venue where the leading insurer by law or contract is obliged to accept legal actions.

PART TWO

HULL INSURANCE AND SIMILAR INSURANCE

Chapter 10

General provisions concerning the scope of the hull insurance

§ 148. Objects insured

This paragraph corresponds to § 58 of the 1930 Plan.

The rules of the Plan as to what objects are comprised by the hull insurance correspond in all essentials to the earlier rules, but it has been attempted to clarify them, and in a few respects the cover has been extended to a certain extent.

The 1930 Plan explicitly stated that the insurance covered the ship's hull, her main engines and all auxiliary machinery, fixtures and fittings and spare parts. The new Plan distinguishes between «ship», «equipment» and «spare parts». The «ship» comprises hull as well as machinery. «Equipment» is a collective term for such loose objects as follows the ship when in service, but which cannot be regarded as parts of the ship, e.g. radio and radar equipment, search lights, loose shifting beams, furniture and other fixtures and fittings. The 1930 Plan exempted factory machines used for the processing and refining of catch, etc. This exemption has not been maintained. Further, the 1930 Plan limited the cover of spare parts to objects intended for the renewal of parts of hull or machinery, and other spare parts required by the classification society or the Norwegian Ship Control. Under the new Plan there is no limitation in the cover of spare parts.

In practice there has been doubt whether the hull insurance comprises equipment, which the shipowner has bought on a hire-purchase agreement and of which the seller has retained ownership. Contracts of sale of this nature are common for radio and radar installations, search lights with generators etc. Under the Plan such objects shall also be comprised by the hull insurance. Thereby they will always be covered by an existing insurance. If also the seller has taken out an insurance, it will be necessary to resort to the rules relating to double insurance. The Hull insurance also comprises objects which the shipowner has borrowed or hired, and of which he is thus not supposed to be the owner.

Like the 1930 Plan the new Plan excludes boats and outfit intended for use in connection with whaling, sealing or fishing. However, even if a boat is used in the described connection, it will be covered by the insurance if it was under any circumstances required to be onboard as a lifeboat.

It is important to draw a rational line between the objects which are covered by the hull insurance and those who should be covered by an equipment insurance. The 1930 Plan described the equipment as «provisions, fuel, engine stores, paint and the

like, intended for consumption, and ... loose articles which are used for dunnage or for shoring, supporting or securing the cargo, such as dunnage, lashings, netting, loose rail stanchions and shifting bulkheads.» In this respect the new Plan follows the same line as the 1930 Plan. Excluded from the cover are under subparagraph 2 of the paragraph «provisions, bunkers, engine and deck stores and other articles intended for consumption», including of course also paint. However, the hull insurance does comprise all objects which are permanently attached to the ship, even if they are of such a nature that they must be replaced fairly often. Fixed ceilings in the holds, insulation and other permanent installations connected with the ship's carriage of cargo, are thus covered by the insurance.

However, the ship will also at all times carry on board a great deal of loose objects, and excepted from the hull insurance should also be such loose objects as are subject to particularly severe wear and tear and which therefore have a short life and will in practice often be sold after one or a couple of voyages. It will be very difficult to value such objects after a casualty where they have been damaged or lost. The Plan therefore refers to the equipment insurance «loose objects exclusively intended for securing or protecting the cargo». The decisive criterion is thus whether the objects are merely necessary in order for the cargo to arrive in as good a condition as possible; in that event they form part of the equipment. However, if the objects are also intended for the protection and safety of the ship, they are covered by the hull insurance. As equipment, which falls outside the scope of the hull insurance must thus be regarded loose ceiling, which protects 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. However, hull insurance will cover objects such as hatches, tarpaulins and loose bulkheads which are used when carrying bulk cargoes. Similarly, hull insurance will also cover objects which must be regarded as means to rationalize the transport operation, rather than as a protection of the cargo, such as forklifts used in the holds, and containers. Such objects are insured when they are on board the ship, even if they are on other occasions also used in other ships.

§ 149. Objects temporarily removed from the ship

This paragraph is new.

A question which caused considerable doubt while the 1930 Plan was in force was to what extent the hull insurance covered objects which had temporarily been brought ashore. This problem arises in many connections: in connection with loading and discharging, during routine overhauling of special equipment, when sending machinery or equipment to special repair yards, on sending equipment from the manufacturer to the ship, etc. The paragraph establishes a far-reaching cover in such situations.

It is a condition that the object is «removed from the ship». It must thus have been on board, at least for a short period of time. New equipment in transit to the ship from the manufacturer is therefore not covered by the hull insurance. On the other hand, it is not required that the object in question is exclusively connected with one particular ship. As mentioned under § 148, also containers and other special equipment for carrying cargo will be comprised by the insurance, even if they may be and are also used in other ships. However, joint stocks of spare parts which the shipowner keeps for several of his ships will not be covered. In this respect the necessary connection to the insured ship is missing, in view of the fact that the condition that the objects must be brought back on board again before sailing will not have been satisfied.

It is a condition that the objects are removed in connection with the running of the ship or because of repairs, rebuilding, or the like. Forklifts and containers, which are carried on board the ship will therefore have to be covered by the hull insurer if they are damaged while ashore in connection with loading or discharging. On the other hand, the hull insurance will not include objects stored ashore while the ship is laid up, as this will have no connection with the running of the ship.

There are no limits as to how far the objects may be sent, provided they are

brought back on board again before departure. An object, which is sent to a special repair yard will therefore be covered by the hull insurance, during transport as well as while it is at the repair yard.

It is an absolute condition that the objects are brought on board again prior to the ship's departure from the port in question. By «departure» is meant that after having completed repairs, the ship commences a voyage. If the ship, as part of the repair work, is towed or sails under her own steam to a repair yard in another port, the insurance will not cease to be in effect for the objects which are ashore. However, the hull insurance does not cover linen or spare parts which have been removed from the ship to be washed or repaired while the ship is making a round-trip.

§ 150. Loss due to ordinary use

This paragraph is new. However, the rule contained therein reflects a vital principle of insurance law, which also had to be applied in connection with the 1930 Plan.

The paragraph excludes from the insurance cover certain losses, which are regarded as regular operating expenses, and which must therefore be borne by the shipowner. What constitutes a «normal consequence of the use of the ship and her equipment» is to a large extent a question of discretion, and the provision must be interpreted in the light of traditional solutions. It is a fact that there are certain types of damage which the hull insurers have thus far refused to indemnify and also refuse to take over in future. This applies e.g. to damage to ship's sides and hatch coamings during loading of logs, and similar foreseeable stevedore damage. Such type of damage, as is linked with and is a foreseeable consequence of the trade in which the assured uses the ship, is not covered by the insurance. On the other hand, the damage will be recoverable if e.g. the ship has sustained extensive and extraordinary corrosion damage during the carriage of one particular sulphur cargo.

§ 151. Insurance «on full conditions»

This paragraph is new.

That the insurance is «on full conditions» means that the assured has the full normal cover which follows from the rules of the Plan relating to hull insurance. Any limitations to this cover must be agreed on specifically. On the other hand, «full conditions» does not imply that the insurer shall indemnify each and every damage in full, in view of the fact that the normal cover includes rules which in some cases provide for substantial deductions, cf. §§ 186—190 and § 197. However, no new for old deductions shall be made, unless by specific agreement, cf. § 191, subparagraph 1. On this point the Plan involves a departure from the earlier arrangement, in that the new for old deductions under the 1930 Plan applied automatically, unless otherwise agreed. On the other hand a «machinery damage deduction» of one fourth has been introduced for machinery damage of a technical nature (cf. § 187), and a deductible which is aimed at eliminating settlements for minor casualties (cf. § 189). The specific grounds for these amendments are given in the commentary to § 191.

The lenders often demand that the ship shall be insured «on full conditions». The shipowners must realize that under the new Plan this will mean an insurance without new for old deductions and perhaps raise the question as to how extensive a cover the lender concerned wants.

§ 152. Insurance «against total loss only» (T.L.O.)

This paragraph corresponds to § 80 of the 1930 Plan.

Where the insurance is taken out «against total loss only», the insurer is only liable for total loss in accordance with the rules contained in Chapter 11, i.e. for total loss, condemnation, etc. Under the 1930 Plan the insurer was furthermore liable for the removal costs which, added to the repair costs, would have made the ship condemnable. In view of the fact that under § 163, subparagraph 3, removal costs shall also be taken into consideration when deciding the question whether the ship is condemnable, there is no need for a corresponding rule in the Plan.

Where the ship is only insured against total loss the logical rule about loss in connection with measures to avert or minimize the loss is that the insurer is only liable for such loss where it is attributable to measures taken to avert a relevant risk of total loss. This principle was followed in the 1930 Plan, which established that the insurer is only liable for general average contributions and other costs of preventive measures «when there was an imminent risk of a total loss occurring when the sacrifices took place». The same principle forms the basis of this paragraph. However, the principle follows from the rules contained in Chapter 4, Subdivision 2, of the new Plan, according to which the insurer is only liable for losses in connection with measures taken to avert losses covered by the insurance.

When 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 it refers to measures taken to avert or minimize the danger of a total loss. Contributions to so-called «common-benefit» expenses are never recoverable. More doubtful would perhaps be costs in connection with putting into a port of refuge where the ship has suffered minor engine damage.

Where 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 is under § 72 recoverable in accordance with the rules relating to particular loss, if this results in a more favourable settlement for the assured. This rule cannot be applied to a T.L.O. insurance, in view of the fact that no compensation rules of any kind relating to damage have been agreed on. Compensation will therefore always have to be calculated on the basis of the general average rules.

Furthermore, the rules contained in the general part of the Plan relating to accessory expenses shall apply. Hence, the insurer is liable for interest on the claim according to § 86, and for costs in connection with the claims settlement, cf. § 66. The insurer is liable for costs in connection with the providing of security and litigation, cf. §§ 64 and 65, where the providing of security or the litigation is connected with events which 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 § 80.

§ 153. Insurance «against total loss and general average contribution only»

This paragraph is new.

As mentioned in the preceding paragraph, it is necessary under a «pure» total-loss insurance to split up each general average statement and only cover the contribution to the extent it concerns sacrifices, which have been made in connection with a relevant danger of total loss. Similarly, it is necessary in connection with an «assumed general average» to verify whether there was danger of a total loss when the measure to avert or minimize the loss was taken. This complicates the claims settlements, and the assessment of the degree of danger may cause considerable uncertainty.

These difficulties are avoided by an insurance in accordance with this paragraph. The insurer shall here indemnify losses incurred by measures to avert or minimize the loss to the extent he would have done, had the insurance been effected «on full conditions». Hence, the insurer is liable for every general average contribution apportioned on the ship, and every sacrifice made while the ship is in ballast, regardless of whether the measures were aimed at averting a total loss.

Furthermore, reference is made to the comments in the preceding paragraph.

§ 154. Insurance «against total loss, general average contribution and collision liability only»

This paragraph is new.

A hull insurance under this paragraph covers the same as an insurance in accordance with the preceding paragraph, plus collision liability vis-à-vis third parties, cf. Chapter 13 of the Plan. The insurer's liability for loss in connection with measures to avert or minimize the loss, litigation costs etc. will then be extended correspondingly, and he shall be liable for losses resulting from measures taken to

avert a collision, which would have resulted in liability vis-à-vis a third party, or to limit such damage.

§ 155. Insurance «on stranding terms»

This paragraph corresponds to § 81 of the 1930 Plan.

This provision will hardly be of any great significance in connection with ordinary hull insurance, but according to information obtained, barges and dorries are to a considerable extent insured on stranding terms.

This paragraph affords the same cover as the preceding paragraph, plus a limited cover against damage, and against loss in connection with measures taken to avert such damage.

The definition of a «stranding» contained in subparagraph (d) re-relates to the rules contained in § 81 of the 1930 Plan, but has been clarified and simplified in a number of respects. Under the 1930 Plan it was a condition that the damage had occurred «during a case of stranding», whereas under the new Plan it is sufficient that the damage is a consequence of such a casualty. In case of grounding it is a condition under the Plan that the ship «cannot get off by her own means», whereas the 1930 Plan required «exceptional measures». In case of capsizing it is still a condition that the ship has heeled over to such a degree that her masts are in the water. The insurance therefore does not cover damage to the ship if she 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 it is an established fact that the stability limit was exceeded and that the ship would have overturned completely if there had been nothing to support her. Finally, the 1930 Plan stipulated as a condition for fire and explosion damage that «a fire has occurred on board or an explosion outside the machinery». This implied that fire damage to hull as well as engine was recoverable regardless of where the fire had broken out, whereas explosion damage was recoverable in full if the explosion had occurred outside the engine, but not at all if the explosion had occurred in the engine. As the purpose of an insurance on stranding terms is to afford a cheap cover, the relatively frequent and very extensive damage arising from fire and explosions in the engine room have been excluded. However, in so far as such damage also affects the ship in general, it should be recoverable. The draft therefore excludes «damage caused in the engine room by fire or explosion originating there».

§ 156. Duration of voyage insurance

This paragraph corresponds to § 59 of the 1930 Plan.

As a hull insurance is normally effected for a specific period of time, this provision will not be of any great practical significance. The only change from the 1930 Plan is that the time-limits of 28 and 7 days laid down by the 1930 Plan for the discharging of cargo and ballast have been deleted.

When deciding whether the discharging «is proceeding with reasonable speed», it must also be taken into consideration 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. 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 force. On the other hand, the assured cannot let the ship assume the function of becoming a more permanent warehouse.

§ 157. Prolongation of the insurance

This paragraph corresponds to § 60 of the 1930 Plan.

Where the ship, on expiry of the period of insurance, has damage which makes her unseaworthy, and for which the insurer is liable, the old insurance should be prolonged and the new one temporarily suspended. Otherwise difficult causal questions might arise if new casualties occurred before the situation had again become «normalized». One might also say that proceedings in connection with the earlier casualties — salvage, removal, repairs, etc. — involve an additional risk, which should

in its entirety rest with the insurer who is liable for the casualties. This paragraph therefore provides, like the 1930 Plan, that the insurance is prolonged if the ship, on expiry of the period of insurance, has recoverable damage which affects her seaworthiness. At the same time the commencement of a new insurance is deferred accordingly.

The paragraph is applicable to most insurances which concern the ship, with the exception of the P. & I. insurance (see the references contained in §§ 222, 279 and 284). The P. & I. insurance will as a rule be based on a continuous membership with a mutual association. If, by way of exception, it was taken out on an annual basis, the question of prolongation must be solved by agreement.

Under the 1930 Plan the insurance was to be prolonged until final repairs had been carried out. However, the assured had the right to terminate the contract of insurance at an earlier point in time, unless the ship on expiry of the insurance was at sea and in a helpless position. In that event the insurer had an unconditional right to demand that the insurance be prolonged until the ship had reached a port. — According to the new Plan the insurance is prolonged automatically until the ship has reached port, and further until the damage has been repaired, provided the repairs are carried out at the first place where this is possible. If the ship is instead moved to another port for repairs, the question of insurance must be solved prior to the removal.

It is, of course, a condition of a prolongation that the ship is in actual fact repaired. If she is laid up with unrepaired damage, both parties shall have the right to terminate the contract of insurance as soon as it is established that the conditions for applying subparagraph 1 of this paragraph have not been satisfied.

Subparagraph 2 is new. According to § 4 the old insurance was to remain in force until 2400 hrs. of the day the repairs were completed and the new insurance come into force at the same time. However, if the ship leaves the port of repairs earlier in the day, it would be reasonable to let the new insurance take effect from the time of departure.

The question of a prolongation of the insurance also becomes relevant where the ship, at the expiry of the period of insurance, is reported missing, has been abandoned, requisitioned, etc., and is later recovered without the conditions for claiming for a total loss being satisfied. This question is regulated in § 171.

According to § 118 the insurer may demand an additional premium when the insurance is prolonged under this paragraph.

§ 158. Right of termination in the case of fluctuations in market value

This paragraph corresponds to § 61 of the 1930 Plan.

The right to terminate the insurance where the value of the ship has changed substantially due to fluctuations of the market, is a departure from the principle that the valuation is binding throughout the agreed insurance period, cf. §§ 7 and 8. However, in practice this rule is applied very infrequently. For the shipowner there may be a need to have the valuation reduced during the period of insurance in order to save premium. As far as the insurer is concerned, the only situation where it may be relevant for him to exercise the right of termination would presumably be where he has reason to believe that an extraordinarily high valuation involves a concrete risk of abuse on the part of the shipowner. However, the right of termination may be exercised in the event of a revaluation or devaluation of the currency in which the valuation is stipulated.

Under the 1930 Plan the other party could avert the termination by offering that «the altered value» was to form the basis of the insurance for the remainder of the period of insurance. It must obviously be difficult to apply this rule in practice, as there are no objective standards by which to assess the value of the ship. The Plan therefore refers the parties to negotiate the question after the termination of the contract.

If the insurance is terminated, the shipowner may demand a proportionate reduction of the premium in accordance with § 121, subparagraph 1.

§ 159. Insurer's liability where the ship is salvaged or assisted by another ship belonging to the assured

This paragraph is new.

Under section 224, subsection 3, of the Norwegian Maritime Act salvage remuneration may be claimed even if the salvaging ship and the salvaged ship belong to the same owner. The rule implies that the crew may claim their share of the salvage remuneration under section 228, subsection 2, of the Maritime Act, but it probably also implies that the owner may claim salvage remuneration from his insurer. However, there is every reason to state the rule explicitly in the Plan.

The rule contained in the Maritime Act, as well as the rule contained in the Plan apply only where the salvage operation is performed by a vessel. Hence, the assured does not have any right to claim salvage remuneration if he salvages his own vessel in some other way, e.g. by using a crane on shore. On the other hand, his loss and costs incurred in this connection will of course be recoverable under the ordinary rules relating to loss caused by measures to avert or minimize the loss.

§ 160. Reduction of liability in consequence of a hull-interest insurance

This paragraph corresponds to the Hull Policy E.

A hull-interest insurance is in reality a hull insurance against total loss, which is taken out with a special assessed value on top of the ordinary hull insurance. There are several reasons why the hull insurers want to limit the right to take out hull-interest insurances. This is due partly to the fact that they want to obtain an adequate premium under the hull insurance, and partly to the moral risk involved in an excessively high sum insured. A contributory factor is also that when deciding whether the ship is condemnable, only the assessed value under the hull insurance shall be taken into consideration. If a large part of the cover is transferred to the hull-interest insurance, the condemnation limit will in reality be lowered correspondingly.

Under the Hull Policy it was «allowed» to take out an interest insurance for a total amount of up to 25% of the assessed value applicable to the hull insurance, but the Hull Policy did not give the insurer any right to react when the shipowner took out higher interest insurances than what was allowed. On the other hand, under the Hull-Interest Policy E the entire insurance became void if interest insurances had been taken out for the shipowner's account for amounts which altogether exceeded 25% of the assessed value applicable to the hull insurance.

An adequate enforcement of the prohibition against taking out interest insurances for more than 25% of the assessed value applicable to the hull insurance must be to cancel the excess of the hull-interest insurance and reduce the insurer's liability proportionately, if several interest insurances have been taken out, which collectively exceed the limit. This rule is expressed in § 223. However, it is possible that interest insurances are not taken out on the conditions of the Plan and are consequently not subject to this reduction rule. In such situations also the hull insurer needs a reaction to a violation of the prohibition, viz. a right to reduce liability to the extent the assured receives payments under his interest insurances which exceed 25% of the assessed value applicable to the hull insurance.

The prohibition contained in the Hull Policy E applied to insurances on «hull-interest, freight-interest and similar interests». According to the Plan the subject-matter of a freight-interest insurance is defined in such a manner that the insurance can only be effected if the assured has financial interests in the operation of the ship, which will not be covered by a hull and hull-interest insurance, cf. § 277. Once these conditions have been fulfilled, the provisions of the Plan will not prevent the assured from taking out a corresponding freight-interest insurance, regardless of the amounts of the assessed values under the hull and the hull-interest insurances respectively.

On the other hand, the rule contained in this paragraph must be similarly

applicable if the assured, without applying the conditions of the Plan (e.g. abroad), has taken out an interest insurance, which is not called a hull-interest insurance, but which is not based on any such anticipation of future profit as defined in § 277.

Chapter 11 Total loss

§ 161. Total loss

This paragraph corresponds to § 70 A and B No. 1 of the 1930 Plan.

The provision comprises both the actual total loss and the so-called «unrepairability». It is obvious that there will be a gradual transition from the absolute loss (the ship has foundered in such deep waters that she cannot be reached) to cases where it is a question of financial assessment whether or not to undertake salvage and repair work. Such evaluation will be based on a comparison between the probable salvage and repair costs and the assessed value applicable to the hull insurance. If the assessed value applicable to the hull insurance is high, it is conceivable that under special conditions of the market a new ship can practically be built around the remains of the old one without this being unprofitable for the insurer. Under this paragraph, however, the strictly financial evaluation of the repair question shall also be supplemented with a technical assessment. That the ship is «unrepairable» 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 § 173, i.e. repairs which restore the ship to the state she was in prior to the damage, and a state which is expected to last.

Under the 1930 Plan the question whether it is technically possible to «repair» the ship was to be decided by a special survey in the same way as the question whether the ship is condemnable. For reasons which will be set forth in § 163, the Plan has abolished special surveys in both these situations. The question whether it is possible to repair the ship from a technical point of view is therefore an ordinary question of evidence, which will in the end have to be submitted to the courts.

In case of a total loss the assured may under § 62 claim payment of the sum insured, however, not in excess of the insurable value. As that has been defined as «the full value of the interest at the inception of the insurance», cf. § 7, it will not be affected by damage sustained by the ship during the period of insurance, and the assured will consequently be entitled to the entire assessed value applicable to the hull insurance, regardless of any unrepaired damage which the ship may have sustained in connection with previous casualties. That the assured does not also have the right to claim separate compensation for such damage is quite obvious; otherwise he would obtain an unjustified gain at the insurer's expense. As far as the unrepaired damage is concerned, however, the question arises whether the insurer, who has paid the total loss claim, has recourse to the insurer who would have been liable for the repair costs if the repairs had been carried out. This question was not clearly resolved in the 1930 Plan. However, a practice developed which may be characterized by the key words «total loss absorbs partial damage», cf. *Reim* in ND 1949.175 ff. Thus an agreement was entered into in 1943 between the hull insurers against marine perils and war perils respectively to the effect that the insurer who had paid compensation for a total loss would not have recourse for unrepaired damage attributable to the other set of perils. The same principle has been followed where the ship at the time of the total loss has unrepaired damage sustained during an earlier insurance year. The Plan affirms this practice, cf. subparagraph 2 of this paragraph and § 173, subparagraph 2, according to which the insurer's liability for repair costs normally does not arise until the repairs have been carried out.

The principle that «total loss absorbs partial damage» may seem to involve an unanticipated advantage for the former insurer who was liable for the unrepaired

damage, possibly for the assured if the damage was not covered by insurance. However, in the relationship between the insurers it is in actual fact simply a question of a mutual apportionment, which in the long run will result in neither profit nor loss for the individual insurer. There are also strong practical considerations in favour of this system. It will often be very difficult to establish the exact extent of the damage after the ship is lost. A rule to the effect that part of the liability, corresponding to the previous damage, should be referred back to a former insurer, might therefore easily cause a dispute between the insurers. In favour of the proposed rule is also the fact that it has been accepted by the insurers as a necessary consequence of the rules contained in the 1930 Plan, without it having been discussed whether the solution is reasonable.

If the assured has claims for damages against third parties in connection with the unrepaired damage, such claims are transferred to the insurer who pays the total loss claim.

§ 162. Salvage attempts

This paragraph corresponds to § 67 of the 1930 Plan, cf. the Hull Policy A 6.

The paragraph constitutes a necessary supplement to the preceding paragraph and regulates the situation where the ship is lost under such circumstances as to make it uncertain whether she can be salvaged. The Plan corresponds in all essentials to the rules contained in the 1930 Plan. However, the requirement that the salvage operation shall commence within a reasonable period of time has been deleted, as this time-limit has no independent significance alongside the time-limits of 6 and 12 months respectively for the completion of the salvage operation. The extension of the time-limit «if the ship should be in rivers or lakes where the low water level hampers the salvage operations» has been deleted as unpractical. Instead of a general extension of the time-limit where the ship is abandoned «in arctic or antarctic waters», the Plan provides that the time-limit shall be extended by the time lost due to ice conditions, however, not by more than 6 months.

The Hull Policy A 6 contained certain modifications of the time-limit, taking into consideration the provisions of the policy regarding trading limits and supplementary trading premium. Any detailed provisions of this nature must also in future be incorporated in the policy.

§ 163. Condemnation

This paragraph corresponds to § 70 B—E of the 1930 Plan.

The rules relating to condemnation have been amended on several points. They are contained in §§ 163 to 166 of the Plan. The former rules were briefly as follows:

Conditions for claiming a constructive total loss were under § 70 B No. 2 of the 1930 Plan:

(a) that the value of the wreck + gross repair costs exceeded the value of the ship when repaired, and

(b) that the gross repair costs constituted not less than 75% of the value of the ship when repaired.

In other words, it was required both that repairs would be an unprofitable investment, and that the ship was at least 3/4 damaged. If the assessed value applicable to the hull insurance exceeded the value of the ship after repairs, the assessed value was to be applied instead of the value. This in order to prevent the owner from obtaining a condemnation on the basis of a low ship's value and subsequently receiving payment of a higher assessed value.

Only «damage which is a result of the perils covered by the insurance» should be taken into consideration. The scope of this provision was unclear in several respects. It was an established fact that damage which was not covered by the insurance should not be taken into account, e.g. because it was caused by corrosion or wear and tear. But it was not clear whether the entire damage had to be attributable to the same casualty, or whether the assured had the possibility of «accumulating» damage from several casualties and use them all as a basis for condemnation. If the casualty, which

gave rise to a claim for condemnation, was due to a combination of war and marine perils, the rules contained in the 1930 Plan were also rather unsatisfactory. According to their wording, the assured had to bring separate condemnation claims against the war-risk and the marine-risk insurers respectively, and was only entitled to invoke the part of the damage which the relevant insurer should have covered. However, in practice the 1930 Plan was not taken literally, and the question of condemnation was decided on the basis of the overall damage.

The repair costs, which were to be included, were only the costs of the actual repair work. The costs involved in the removal of the ship to a repair yard were not taken into account, nor was any salvage remuneration which might accrue before the ship became accessible. The fact that the costs of removal were not to be taken into account in the condemnation formula implied, *inter alia*, that a special liability had to be imposed on the T.L.O. insurer for these costs which, added to the relevant repair costs, would have made the ship condemnable.

The rules of legal procedure were based on the view that condemnation should be effected on the basis of a legal or private survey, which «declared» the ship a constructive total loss. However, the legal force of such surveys was in reality illusory. The fact was that, even after the ship had been declared a constructive total loss by a legal survey, the insurer could invite tenders for repair costs and have the value of the wreck established by putting it up to auction.

The Plan departs from the previous system in a number of respects and involves to a certain extent an approximation to the English rules. The essence of the Plan is that the formal condemnation survey has been replaced by a free evaluation of evidence, the question of condemnation shall be decided on the basis of an evaluation of all damage which the ship has sustained, regard must be had to all expenses which are anticipated to accrue in connection with the removal and repairs of the ship after the assured has requested a condemnation (however, not salvage remuneration), the value of the wreck is deleted from the condemnation formula, and the condemnation limit has been raised to 80% of the assessed value. grounds for these rules will be given in connection with each individual paragraph.

This paragraph contains the basic rules relating to the conditions for condemnation. They provide that the ship shall be regarded as a constructive total loss and that the assured may claim total loss when the costs of repairing the ship will constitute at least 80% of the insurable value. If the ship is undervalued, so that her real value after repairs is higher than the assessed value, the real value shall be taken as a basis. What is achieved by using the higher of the two values is partly that it will not be easier for the assured to obtain a condemnation by fixing a particularly low valuation, and partly that the assured cannot obtain a condemnation on the basis of a low market value and subsequently receive payment of the higher assessed value. A condemnation limit of 80% of the valuation is also included in the Swedish Marine Insurance Plan, whereas the limit according to English law is 100%. The increase from 75% under the 1930 Plan hardly involves any real tightening of the conditions, in view of the fact that under the Plan the costs of removal shall also be taken into consideration.

Under the 1930 Plan two calculations were to be made: whether the value of wreck + the repair costs exceeded the value of the ship after repairs (if relevant, the assessed value) and whether the repair costs exceeded 75% of the value when repaired (if relevant, the assessed value). In the Plan the calculation which includes the value of the wreck is deleted. The value of the wreck is an uncertain factor and will depend on the purpose for which the wreck is intended. With a view to scrapping it should be possible to determine the value relatively accurately on the basis of the scrap-iron price, but if there is a possibility of repairing the ship, the wreck value will to a very large extent be affected by the value of the repaired ship and the foreseeable repair costs. In this respect the Plan is in accordance with English law, cf. I.T.C. Hulls, No. 17, subparagraph 1.

The rules contained in subparagraph 2, 2nd sentence, of the paragraph regulate the not very frequently occurring situation where several hull insurances have been taken

out against the same peril with different assessed values, e.g. by the shipowner after an upturn in the economy increasing the assessed value of the ship and taking out an additional insurance for the difference between the old and the new valuation. In that event the higher of the two valuations shall be taken as a basis. The situation where there are different valuations in connection with the insurances against marine perils and war perils respectively is regulated in § 164, subparagraph 2.

Where the ship is declared a constructive total loss, not only the hull insurance, but also the hull-interest insurance, fall due for payment. As mentioned in § 160, the hull-interest insurance must also be regarded as a hull insurance against a total loss, which is taken out on top of the regular hull insurance. It was discussed whether the sum of the assessed values in the two insurances should be taken into consideration when the question of condemnation is decided, but neither shipowners nor insurers were interested in any change in this respect.

Under the 1930 Plan it was not clear whether only the damage, which was caused by the latest casualty, should be taken into account, or whether also earlier, unrepaired damage to the ship should be taken into consideration. In the latter case, there are several possibilities: that casualty damage sustained during the current year and for which the insurer is liable is taken into consideration, that also earlier casualty damage is taken into account, provided it is covered by the same or some other insurance or, finally, that all casualty damage which the ship has sustained is taken into account, regardless of whether or not it is covered by an insurance. The Committee considered following the latter alternative, that all casualty damage, which the ship has at the time when the request for a condemnation is made, is taken into consideration. In this manner the decision would be based on a realistic assessment of the possibility of restoring the ship to a seaworthy condition on a sound, financial basis, and the assured and his insurers would not be forced to make unprofitable investments in a ship, which should economically have been declared a constructive total loss. The assured will not normally be entitled to full compensation for the damage if he sells the ship to be broken up (cf. § 174, subparagraph 2), and he will therefore have to have the ship repaired if he wants to benefit from the insurance. However, the Committee had misgivings about the idea of having to take into consideration old dents etc. which the ship has sustained through a long life when deciding the question of condemnation. The Committee ended up introducing a 3-year time-limit, so that casualty damage, which has not been reported to the relevant insurer and surveyed by him in the course of the last three years preceding the casualty which caused the condemnation request, shall not be taken into consideration. That the survey requirement does not apply to any casualties, which the ship may have sustained during her last voyage, goes without saying. However, the question arises what should be done if, by way of exception, compensation has been paid for such unrepaired damage. That a former owner has received compensation for such damage in accordance with § 174 (b) should not exclude the possibility of the damage being taken into consideration.

On the other hand, obviously it is only the ship's actual casualty damage which shall be taken into account, and not damage consisting in rust, corrosion or faulty construction. The assured shall not by ignoring the upkeep of the ship be able to obtain a constructive total loss. But if the damage is of such a nature as to make the insurer liable under § 175, subparagraph 2, it will also have to be taken into consideration when determining the question of condemnation.

As will appear from § 161, subparagraph 2, the Plan is based on the principle that «total loss absorbs partial damage». 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 she was lost. A departure from this principle is conceivable where a ship is declared a constructive total loss, *inter alia* because in that connection there is a possibility of undertaking an exact assessment of the costs involved in repairing the earlier damage. The rule would in that event have to be to that the older damage should be included when deciding the question of condemnation, but that a deduction should be made in the total-loss claim equivalent to the gross repair costs for that damage. If it was covered by an insurance, the assured

must have a claim on the relevant insurer, despite the fact that repairs had not been effected. If it was not covered by insurance he would have to cover the unrepaired damage himself.

However, such a rule would result in very complex settlements, it being necessary to calculate liability separately for each individual co-insurer. A co-insurer, who did not insure the ship prior to the insurance year during which the total loss occurred, would be entitled to claim a deduction in the total-loss compensation for his proportionate share of the assessed repair costs relating to damage from earlier years, and the assured would be entitled to claim that the same part of the damage be covered by the insurer or insurers who had a share of the insurance when the damage occurred, but who had since ceased to be a party to the contract of insurance. Where it was necessary when deciding the question of condemnation to take into consideration damage which dated from several insurance years, the costs of repairs of each year's damage had to be assessed separately.

The Committee has reached the conclusion that it cannot be necessary to make the settlements in connection with a condemnation of the ship so complicated. Hence, the basic rule contained in § 161, subparagraph 2, shall also be applicable here, and the assessed value applicable to the hull insurance be payable in full by the insurer who is liable for the casualty which triggers the condemnation.

The condemnation is based on a discretionary assessment of the future expenses which 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 she is at the moment when the assured makes his request for a condemnation. Thus, costs which have already been invested, e.g. in connection with temporary repairs, shall not be taken into consideration, whereas on the other hand all foreseeable costs which it must be assumed will accrue before the ship has been completely repaired, shall be taken into account. However, salvage remuneration shall not be taken into consideration, cf. below.

Costs of «removal and repairs» comprise in the first place all costs for which the insurer would be liable if repairs were effected.

But also such expenses as the assured must cover himself in connection with the repairs shall be taken into consideration, e.g. in the form of new for old deductions or deductibles, or because the damage in question is specifically excluded from the cover, e.g. in accordance with § 176 (b) and (d) — (n). On the other hand, costs, which 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, cf. § 176 (a) shall not be considered, nor the expenses mentioned in subparagraph (c) of the same paragraph. The calculation of the probable costs shall be based on the prices at the time the request for a condemnation was made. If it is appropriate to take into account the market value of the ship after repairs, it is also the general market values at this time which will be decisive, cf. subparagraph 3, 1st sentence, of the paragraph.

The rule that removal costs shall be taken into consideration represents an innovation in relation to the 1930 Plan. Thereby the decision of the question of condemnation will rest on a more realistic basis than before when solely the damage to the ship was decisive, regardless of where she was. It is obvious that the condemnation question, realistically speaking, would be considerably different for a damaged ship which is in a port, e.g. in Iceland, than for a ship with similar damage in a port with good possibilities for repairs.

If this line of thought was to be followed all the way, the salvage remuneration, which would foreseeably accrue before the ship could be moved to a repair yard, would also have to be taken into account. But it will always be very difficult to estimate in advance the salvage remuneration, and this would introduce a serious element of uncertainty into the condemnation formula. To this should be added that it is difficult to get the damage surveyed in a proper manner as long as the ship has not been salvaged. According to the Plan a salvage remuneration, which will accrue before a removal and repairs, shall therefore not be taken into consideration. The

distinction between «salvage remuneration» and such expenses as shall be included, especially removal costs, must be deducted on the basis of general maritime law criteria. In connection with salvage a «no cure — no pay» agreement will often be made, and the size of the remuneration will as a rule be held open. However, this cannot be decisive. Depending on the circumstances, «salvage remuneration» may exist within the meaning of this rule, even if the remuneration has been finally determined in advance, or shall be payable according to account rendered, and even if the salvor does not bear the risk of the ship being lost during the operation. The decisive point must be the situation in which the ship was when the salvor got the assignment.

The fact that the salvage remuneration is not included in the condemnation formula obviously does not rule out that the insurer must in actual fact also take the salvage remuneration into consideration if the assured claims for a total loss (constructive total loss, if relevant) before the ship is salvaged. If the insurer in such an event wants to save the ship, he must proceed according to § 162. The significance of the condemnation request being made already while the ship is at the place of stranding lies in the fact that this is the point in time which will be decisive for the assessment of the costs and the market value.

Where the ship is insured against «Total Loss Only» it was conceivable under the 1930 Plan that the assured's costs in connection with the repairs exceeded the condemnation limit, but that the ship was nevertheless not condemnable. This is due to the fact that costs incurred in connection with the removal of the vessel to a repair yard was not included in the condemnation formula, § 70 C b of the 1930 Plan therefore provided that the insurer by TLO insurances was to pay removal costs to the extent they exceeded the condemnation limit. No corresponding rule is necessary in the new Plan.

According to § 173, subparagraph 4, the insurer has the right, subject to certain conditions, to refuse to cover in full the costs of repairs which restore a ship to its former state. However, instead he must pay special compensation for the decrease in value due to the fact that the ship is not fully repaired. If the damage to the ship is of a such a nature as to entitle the insurer to exercise this right, the question is whether the compensation for the decrease in value, which the insurer would have had to pay, shall be taken into consideration when deciding the question of condemnation. However, the conclusion was reached that such a rule might have an unfortunate effect. It might inter alia lead to the result that a compensation for damaged works of art or decorations based on a discretionary assessment would constitute the decisive amount which brought the repair costs above the condemnation limit. It may also be argued that where the damage in question does not affect the seaworthiness and therefore need not be repaired at all, it would be less reasonable to let it count when deciding on a realistic basis whether the ship is «worth repairing» from a financial point of view. This view is reflected in subparagraph 4, last sentence, of this paragraph.

The question whether the ship is condemnable is a factual question which has to be decided in accordance with standard rules of evidence. The Plan does not authorize any specific procedure for reaching a decision. If the question cannot be solved by means of negotiations, it will have to be submitted to the courts, cf. also § 87, subparagraph 3.

§ 164. Condemnation in case of combination of perils

This paragraph regulates the position where the casualty which gives rise to the condemnation is partly due to perils not covered by the insurance, cf. §§ 20, 21 and 23. The situation may be that the assured has violated safety regulations or sent the ship out to sea in an unseaworthy condition and that the insurer for that reason is only partly liable for the casualty, or that the casualty is attributable to a combination of marine and war perils under such circumstances as to make the rule of equal distribution contained in § 21, 2nd sentence, or § 23, applicable. In such cases the insurer is only liable for a proportionate share of the total loss claim. If the liability

is to be divided between the insurer against war perils and the insurer against marine perils, each of them shall pay half of the assessed value under the insurance in question.

In practice the insurance against war perils is often effected with a higher valuation than the ordinary hull insurance. With a view to the combination-of-perils cases, subparagraph 2 of the paragraph provides that the valuation of the insurance against marine perils shall be taken for a basis when deciding the condemnation question.

§ 165. Request for condemnation

According to § 70 E of the 1930 Plan the insurer could not request that the ship be condemned. Hence, he was unable during an upward tendency of the market to speculate in paying out the sum insured and take over a damaged ship with a view to repairs and sale. The rule has been maintained in the Plan, cf. subparagraph 1 of this paragraph, which must be interpreted antithetically.

On the other hand, the insurer must be protected against the assured demanding that the ship be repaired, despite the fact that in actual fact she is condemnable. Under § 180 the insurer's liability for repair costs is in such a case limited to the amount he would have had to pay if the ship had been condemned, in other words the sum insured, less the value of the wreck.

If the assured wants a condemnation of the ship he must, under the Plan, make a request without undue delay after the ship has been salvaged and he has had an opportunity to inspect the damage. He cannot keep the question open and see how market conditions develop. If he does not make a decision, he will only be entitled to indemnity under the rules relating to damage, cf. here *inter alia* the insurer's right to limit his liability for repair costs under § 180. However, this does not apply if the ship is in actual fact so severely damaged as to be regarded as a total loss, cf. the comments to § 161, subparagraph 1. In such a case the assured's right to claim for a total loss is not subject to any time-limit (apart from the standard limitation rules).

On the other hand, however, the request for a condemnation is not a binding offer to the insurer, which he may invoke. Under subparagraph 1 of the paragraph the request may therefore 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 request will be made. It would be most unfortunate if the assured during this period of time were to take a passive attitude to the salvage operation out of fear that an active attitude would be interpreted as a waiver of his right to demand a condemnation. Subparagraph 2 of the paragraph therefore establishes that it shall not be regarded as an approval or a waiver of the right to condemnation that one of the parties salvages or fails to salvage the ship.

§ 166. Removal of the ship

Under § 70 C a of the 1930 Plan the insurer could «endeavour to have the condemnation cancelled by moving the ship to another place». The idea was that repair costs and ships' prices might be more favourable at the new location so that a new condemnation assessment would be to the advantage of the insurer.

A rule of this kind would not fit into the system of the Plan. Nor would it be of any essential help to the insurer, as it is today possible to invite tenders for repair costs from repair yards all over the world, regardless of where the ship is lying. However, a condition for being able to rely on the tenders is that the ship's damage has been surveyed in a proper manner, e.g. in dock. The insurer should therefore have an unconditional right to demand the ship moved to wherever he wants a proper survey conducted. Such a demand must be made promptly. The insurer should not at a later stage of the negotiations with the assured be able to procrastinate by demanding a removal for a further survey. The insurer must therefore inspect the ship as soon as she has been salvaged, and decide what type of survey he wants carried out.

A removal for the purpose of a survey under this paragraph is undertaken as a defensive measure by an insurer who has been presented with a total-loss claim. If the ship is condemned, despite the new survey, the insurer will bear the risk in respect of all losses which arise after the casualty, cf. § 172 and the commentary to that provision. And even if the condemnation is averted through the removal, it would not be reasonable to impose on the other insurers an unconditional obligation to bear the risk in connection with such a risky enterprise. Hence, under § 43 an insurer, who has not accepted the removal, may limit his liability in so far as losses which occur in the process are concerned. And under subparagraph 2 of this paragraph the insurer, who causes the removal, shall not only bear the costs, but also the risk in respect of any loss which arises during or in consequence of the removal, and which is not covered by other insurers.

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 unlimited liability to third parties). In relation to the assured he also bears the risk in respect of losses which would normally have been uninsured. In practice this means that the insurer must take out the necessary additional insurances during the removal. If the risk is of such a nature as to be uncoverable, this is in itself an indication that the removal should not be carried out.

The costs incurred during the removal and the survey must be taken into account when deciding the condemnation question, in view of the fact that they were incurred after the condemnation request was made, cf. § 163, subparagraph 4. However, any liability to third parties arising during the removal shall not be taken into consideration. If the ship is damaged, such damage shall be taken into account if the assured makes a new formal condemnation request after the damage occurred. It will then be the repair prices at that time which will be decisive for the assessment of all the ship's damage, cf. § 163, subparagraph 4, 2nd sentence.

§ 167. War risk insurer's liability for removal of war-wreck

This paragraph corresponds to § 9 of the War Hull Policy.

Where the ship is lost in consequence of war perils, it is the insurer against war perils, and not the P. & I. insurer, who covers the assured's liability for the removal of the wreck, cf. § 230. This paragraph implies an exception from the reimbursement rule contained in § 104, subparagraph 1. Where liability for the loss is apportioned under § 21, any liability for the removal of the wreck must also be divided between the P. & I. insurer and the insurer against war perils.

§ 168. Missing or abandoned ship

This paragraph corresponds to § 71 Nos. 1 and 2 of the 1930 Plan, cf. the Hull Policy A 6, and section 71, subsection 1, of ICA.

The Plan by and large corresponds to the 1930 Plan, but the rules have been somewhat simplified. With the present means of communication at sea the provision in the first subparagraph will not be of any great practical importance, in view of the fact that the assured will as a rule be entitled to claim payment of the total loss compensation at an earlier stage under § 170.

§ 169. Seizure, requisition, piracy

This paragraph corresponds to § 72 Nos. 1 and 2 of the 1930 Plan, § 4 of the War Hull Policy and section 72 of ICA.

The Plan corresponds to the 1930 Plan, but the time-limit under subparagraphs 1 and 2 has been extended from 4 to 6 months. Under § 4 No. 1 of the War Hull Policy the time-limit was 12 months if the ship has been taken from the owner by measures on the part of State authorities. If this time-limit is to be maintained in the war-risk insurance, a specific provision must be made to that effect in the policy.

§ 72 No. 1, subparagraph 2, of the 1930 Plan explicitly stated that the rules are not applicable if the ship is detained as security for the assured's debt. According to the

Plan this follows from § 15 (c) and § 16, subparagraph 2, which excludes «insolvency» from the perils.

The term «similar unlawful measures» contained in subparagraph 2 of the paragraph, is aimed at theft. Under § 16, subparagraph 1 (d) the risk of piracy is covered by the war-risk insurer. The risk of theft, however, will normally be covered by the insurer against marine perils, cf. however ND 1945.53 NV Igland, where the vessel had been taken by boys who wanted to go to England during the occupation. In view of the motive for the measure, liability was imposed on the war-risk insurer.

The last subparagraph is derived from § 4 No. 2, 1st sentence, of the War Hull Policy.

It is only the assured who may claim for a total loss. The insurer cannot on expiry of the time-limit demand that the ship be regarded as a total loss. In times of war with steeply increasing ship prices it may be in the assured's best interest to keep the question open and hope for the ship to be returned or repossessed. Under § 171 the insurance shall in such cases be extended for up to 2 years from expiry of the insurance period, however, without premium as long as the assured does not have control of the ship, cf. § 118, subparagraph 2.

§ 170. General provisions regarding missing or abandoned ships, or ships whereof the assured has been deprived

This paragraph corresponds to § 71 No. 3, and § 72 No. 1, subparagraph 1, 2nd sentence, and No. 3, of the 1930 Plan.

The rule contained in subparagraph 1 of the paragraph will be of considerable practical significance, e.g. if the ship is missing and wreckage is found from the ship before expiry of the time-limit, or she has been requisitioned by alien State authorities and the requisitioning is confirmed by a final prize-court finding.

Under § 71 No. 3 and § 72 No. 3 of the 1930 Plan claims for a total loss could not be made after the ship has been found or released. It is not required to state this explicitly. It goes without saying that the ship must be «missing», «abandoned .. without her further fate being known», or «the assured has been deprived of the ship by measures taken by alien State authorities» at the time when the claim for a total loss was made, and this will not be the case if the ship has already been recovered or released. However, a rule is needed for the case where the conditions have been satisfied and a claim for a total loss has been made, but where the ship is subsequently recovered or released before the claim has been paid. Under subparagraph 2 of the paragraph the insurer cannot in such a case refuse the claim on the grounds that the ship has been recovered or released. That the assured presents the claim will often be bound up with the fact that he takes other measures with a view to acquiring a new ship. Hence, he should in view of the claim presented, have acquired an irrevocable right to a total-loss compensation.

§ 171. Prolongation of the insurance where it is uncertain whether a claim can be made in accordance with §§ 168 and 169

This paragraph is new.

If at the expiry of the period of insurance the ship is missing, has been abandoned or requisitioned, and is subsequently recovered without the assured being entitled to claim for a total loss, it would be reasonable to prolong all insurances which concern the ship in accordance with similar rules as where the ship has sustained serious damage, cf. § 157. The most practical procedure will obviously be to let the insurers of the insurance year which expires cover the damage which the ship turns out to have when she has been recovered. Otherwise it would be necessary to establish the exact time when this damage was sustained, something which may be difficult or impossible. Moreover, the assured will rarely have taken out any new insurances in such a case.

However, one should here be aware of the rules contained in § 41, subparagraphs 1 and 2, and § 16, subparagraph 3, according to which the insurance against marine perils is suspended if the ship is requisitioned by alien State authorities, and the

war-risk insurer will take over the full risk during the requisitioning. In the event of a requisition it is therefore only the war-risk insurance which is prolonged according to the rules contained in this paragraph.

When an abandoning time-limit expires, the assured obtains a right, but not an obligation, to claim for a total loss. According to the Plan he may keep the question open for as long as he wants, until he recovers the ship or, if relevant, it is later established that the ship is definitively lost to him. Under § 118, subparagraph 2, he shall not pay premium for the period of time from expiry of the agreed period of insurance until he again gains control of the ship. However, it has been established that the old insurance shall not be prolonged beyond 2 years from expiry of the period of insurance, cf. subparagraph 2 of this paragraph. If the assured recovers the ship at a later stage, he will therefore not be entitled to claim compensation for her damage without proving that such damage was sustained less than two years after expiry of the original insurance. And he must take out a new insurance in order to be covered while the ship is brought into port and the damage repaired.

Under § 169, subparagraph 3, which is based on § 4 No. 2 of the War Risk Hull Policy, the abandonment time-limit is 2 years in case of the ship being seized or requisitioned for use by alien State authorities. If the requisitioning takes place at the end of the insurance year, a prolongation according to this paragraph will not extend much further than the abandonment time-limit. If the assured wants to keep the question of a total loss open for a certain period of time, he will therefore have to arrange for a new insurance with a view to the possibility of the ship being returned.

If a further prolongation of the original insurance is necessary in this case is a question which may have to be evaluated in connection with the drafting of the war-risk-insurance conditions.

This paragraph is applicable to all insurances which concern the ship, with the exception of P. & I. insurance (see the references contained in §§ 222 and 279 and the commentary to § 157).

§ 172. Insurer's liability subsequent to the casualty giving rise to a claim in accordance with §§ 162, 163, 168 or 169

This paragraph is new.

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 where it is not known whether or not the condemnation conditions have been satisfied. The same applies where the ship is stranded, and the insurer wishes to use the time to which he is entitled under § 162, subparagraph 2, to attempt to save her, or where she has been abandoned, reported missing or requisitioned, but the time-limits provided in §§ 168 and 169 have not yet expired. If the end result is that the ship is not considered a total loss — her damage is not sufficiently extensive, or she is recovered before expiry of the abandonment time-limit, 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 force throughout the period of uncertainty (regarding an extension of the insurance where the period of uncertainty extends beyond the agreed period of insurance, see § 171).

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. § 102. If the value of the wreck has been further reduced as a result of new events during the period of uncertainty, such risk shall be borne by the insurer concerned. Under § 106 he is also barred from exercise any right the assured might have under an insurance contract as regards such subsequent events. The insurer, who is liable for the total loss, will therefore in actual fact bear the risk in respect of everything that happens to the wreck from and including the casualty which gave rise to the total loss, whereas conversely, the other insurers will from that same moment not bear any risk. This is explicitly established in subparagraph 1 of the paragraph. Under § 116, subparagraph 2, the other insurers are also barred from claiming premium for the period during which they were not bearing the risk.

However, during the period of uncertainty there is a risk, not only of the value of the ship being further reduced, but also of the assured incurring a liability for damages which is covered by the insurance. Such liability may, depending on the nature of the liability, fall outside the scope of cover of the insurer who is liable for the total loss. It is e.g. conceivable that the ship has sustained extensive bombing damage, which later proves to have made her 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. The Committee assumes that liability of this nature should be covered by the insurer who is liable for the total loss, cf. subparagraph 2 of the paragraph. He should in such cases be regarded as having assumed the risk as regards the wreck in every respect after the casualty which gave rise to the total loss. The rule is logical, because there will normally be a certain connection between the damage to the ship and the event involving liability. Thereby the difficult causal questions which might otherwise arise are averted. The rule is in harmony with the one proposed for the liability during a removal demanded by the insurer in order to avert a claim for condemnation, cf. § 166. See also § 41, according to which the insurance against marine perils is suspended during a requisitioning, which may result in a total-loss situation in relation to the war-risk insurance.

This paragraph is not applicable in P. & I. insurance. The latter will therefore normally remain in effect until the moment the total-loss claim is paid and the ship in consequence thereof becomes the property of the hull insurers. As P. & I. insurance comprises marine perils as well as war perils, cf. § 224, the assured will during the period of uncertainty have cover for exceeding collision liability and any other liability which is excluded from the hull cover, regardless of which hull insurer bears the risk for the ship.

That the period of insurance has expired when it is established that a total-loss claim may be lodged is irrelevant for the liability of the insurer covering collision liability. However, it has been established that liability shall not remain in force for more than two years from expiry of the original period of insurance, cf. § 171, subparagraph 2. Thereafter the assured must himself arrange for a liability cover. The insurer cannot demand any additional premium for the period for which the liability insurance is prolonged under this paragraph, cf. § 118, subparagraph 1.

Chapter 12 Damage

§ 173. Principal rule concerning insurer's liability

This paragraph corresponds to § 75 No.3, subparagraphs 1 and 2, 1st sentence, No. 4 and No. 5 of the 1930 Plan.

The paragraph contains the material principal rules concerning the scope of the insurer's liability for the costs of repairs. The rules are applicable where the ship has sustained damage for which the insurer is liable without the rules relating to total loss «being applicable». In order for the rules concerning total loss to be applicable the conditions for a total loss must be satisfied and the rules must be invoked. Therefore, if the ship is ripe for condemnation, but the assured has her repaired nonetheless, the insurer's liability shall in principle be governed by the rules contained in this chapter, cf. however, § 180 which in this case limits the insurer's liability in respect of the cost of repairs.

The principal rule provides that the ship shall be «restored to her condition prior to the occurrence of the damage». It goes without saying that the repair work must satisfy the requirements stipulated by the classification society. However, the term implies something more. If the damaged parts were made from special materials, or if they were processed in a special manner, the assured is entitled to have the repairs

carried out in accordance therewith, unless the insurer can limit his liability under subparagraph 4, 2nd sentence, of this paragraph.

According to § 75 No. 3, subparagraph 2, last sentence, of the 1930 Plan, the insurer was entitled to limit his liability in respect of the costs of repairs to the cost assessed for the repairs in advance. This rule has not been complied with in recent years, the insurer having paid the cost of repairs in full. According to the Plan an estimate shall only be given if one of the parties so demands, see § 181, subparagraph 3, and such estimate will be of importance to the insurer's liability only in the event that the repairs are not carried out. If the ship is repaired, the insurer shall indemnify the assured for the actual cost of repairs, unless one of the special rules of limitation is applicable.

Foreign insurance terms and YAR limit the liability to «reasonable costs of repairs». The Plan does not stipulate any such limitation for the reason that this might adversely affect the assured to an unreasonable degree. If the assured has no option but to have the ship repaired at a repair yard, which enjoys a monopoly in the location concerned, the invoice may, objectively speaking, be unreasonably high in relation to the work carried out. The insurer should nonetheless in such cases cover the full cost of the repairs. The insurer must, however, to a certain extent be entitled to refuse to accept the bill, e.g. if the yard has charged more for work relating to the damage, the costs of which are recoverable under the insurance, than for maintenance work, which are not recoverable, or if the calculation of prices is in conflict with public price regulations in the country concerned. The assured must in that case take up the matter with the repair yard, possibly through litigation. If it is still not possible to achieve a reduction of the invoiced amount, the insurer must cover it in full, but in such cases it is important to be aware of the insurer's right to safeguard his interests during the legal proceedings, see §§ 92 and 93.

A question which tends to crop up from time to time is whether the repairs can be effected by using old parts, or whether a complete renewal of parts is required. This question must be resolved through negotiations between the parties. It is not possible to formulate a general rule in this respect.

The insurer's liability does not merely comprise the actual invoice from the repair yard, but also additional expenses necessary to carry out the repairs. Hence, the insurer is liable for the bunkers needed for the testing of the machinery, the trial voyage, etc. As regards a number of the additional expenses, the insurer's liability is governed by special provisions, see § 176 (a)–(c), §§ 182 and 184. Concerning the apportionment of expenses common to repairs which are recoverable and repairs which are not recoverable, see § 185.

It is a basic principle in hull insurance that the insurer is not liable for damage unless the damage has been repaired. This principle was laid down in § 75 No. 3, subparagraph 2, first sentence of the 1930 Plan, and is affirmed in subparagraph 2 of this paragraph. Certain exceptions follow from § 174.

Subparagraph 3 of this paragraph corresponds to § 75 No. 5 of the 1930 Plan. This provision is not very practical. If in connection with the repairs the assured himself takes the initiative to have the ship reinforced or her equipment improved, it is obvious that he must personally cover the extra costs involved. The same must apply where the classification society issues the general recommendation that reinforcement work shall be carried out on a specific type of vessel concurrently with repair work. However, this provision will also become applicable in cases where it is recommended that repairs be performed in a particular manner, which would result in a better ship, e.g. where it is required that a damaged iron propeller be replaced by a bronze propeller. A deduction is subject to the condition that the reinforcement or improvement has resulted in an increase in the cost of repairs.

Subparagraph 4 of this paragraph corresponds to § 75 No. 4 of the 1930 Plan. If it should prove impossible to repair the ship completely, e.g. by reason of the materials needed to carry out the repairs being unobtainable, the insurer should always be liable for the depreciation in value in addition to the cost of repairs. This is specified in subparagraph 4, first sentence, of this paragraph. In this respect the Plan entails an

extension of the insurer's liability compared with the practice followed during World War II. It was quite common at the time that materials, which had been used to build the ship originally were unobtainable, and the insurer never paid compensation for the decrease in value when the ship was repaired with inferior materials. If this problem should recur in times of war, it could be solved by inserting a special clause in the policy.

Where repairs are possible, but only at an unreasonable cost, the insurer should be entitled to limit his liability to the cost of the less extensive repairs, to which shall be added the depreciation in value, see subparagraph 4, 2nd sentence, of this paragraph. This is in accordance with § 75 No. 4 of the 1930 Plan. Typical situations where the insurer will be able to apply this provision are where the ship has sustained a dent in her keel and where artistic decorations put in by the shipowner have been damaged. Less obvious is the case where 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.

Under the 1930 Plan it was only the insurer who could invoke this rule, see ND 1940.321 Oslo Tropic Sea. However, the question is whether also the assured should have a similar right. If complete repairs of the damage will result in a considerable loss of time for him, it may be in his interest to make do with less extensive repairs, especially if he is granted the right to claim compensation for the purchase defect which the unrepaired damage represents. The Committee realized that situations might arise where it would seem less reasonable that the assured must himself cover the loss arising from the purchase defect if he, because of the loss of time involved, refrains from having the damage fully repaired. On the other hand, however, there is a danger that claims for damages arising from purchase defects will be lodged very frequently if the assured is granted such a right, and such claims would be difficult to assess and might lead to the insurer being subjected to a great deal of pressure. It was therefore decided that the current rule should be maintained.

Under the 1930 Plan compensation for a decrease in value was to be determined by public or private assessment. According to the Plan this issue will ultimately, like other issues in connection with the application of the conditions, have to be decided by a court of law.

The fact that the assured at his own expense has the ship restored to her prior condition, of course, does not mean that he is not entitled to claim separate compensation for the decrease in value.

§ 174. Claim for unrepaired damage

This paragraph corresponds to § 75 No. 3, subparagraph 3, of the 1930 Plan.

According to § 75 No. 3, subparagraph 3, of the 1930 Plan the assured was entitled to claim damages based on the estimated cost of repairing the damage if the ship passes from his ownership «by forced sale or other compulsion measures» before repairs have been effected. The rule included sale by auction and requisition by public authorities. The reasoning was that the assured has no reasonable claim for unrepaired damage when he sells the ship voluntarily, as he may then transfer the claim against the insurer together with the ship. However, in practice the insurer covered unrepaired damage also when the ship had been sold to a foreign purchaser, and also to a certain extent when the ship had been sold for scrapping.

The Committee discussed the question whether the assured should have an unconditional right to a certain share of the compensation for unrepaired damage, e.g. 50%. However, it was decided to maintain the rule that in principle a claim for compensation should continue to be conditional upon repairs having been effected, but the exceptions to this rule have been somewhat extended compared with the 1930 Plan.

In principle § 174 gives the assured the right to claim for unrepaired damage in the event of a forced public sale, requisition etc., and sale to a foreign buyer, and where the ship is sold for scrapping. In the former group of cases the assumption will be that as a result of the damage the assured has obtained a lower price than if the ship

had not been damaged. However, it is conceivable that the damage is of such a nature as to be irrelevant for the purpose for which the buyer or distrainor is to use the ship (particularly if the ship is to be used as a floating warehouse) and this provision gives the insurer the right to exclude liability for the unrepaired damage if he can prove that this is the case. In any event, the insurer's liability for the unrepaired damage is limited to the actual reduction in the price attributable to the damage.

§ 174 (b) does not apply to a sale resulting from bankruptcy in general, but to a forced public sale. In actual fact there may be good reason for applying the rule contained in subparagraph (b), not only in the event of a forced public sale, but also in connection with other types of sales which might take place where bankruptcy proceedings have been instituted against the assured. However, it seems very difficult to give any clear delimitation of the rule if the criterion «forced public sale» is abandoned, i.e. a forced public sale by auction at the request of a creditor with a mortgage on the ship, or at the request of a shipowner's bankrupt estate (see section 127 of the Bankruptcy Act). It will hardly be possible to achieve a materially satisfactory solution for all the situations which might arise in this connection, and a wording which contains a square but clear rule was therefore decided on. Subparagraph (b) stipulates that the assured cannot claim for unrepaired damage in cases where he is also entitled to compensation for total loss in the event of a requisition.

If the ship is sold for scrapping this will be due to the fact that the assured finds it unprofitable to have the ship repaired because of her type, age or condition, regard being had to the freight market. However, also in this case it is conceivable that the price is reduced in consequence of the damage, especially if the damage has resulted in the loss of iron and steel. In such cases § 174 gives the assured the right to claim compensation, but the compensation shall be limited to the reduction of the price attributable to the damage. The burden of proof that a loss of this nature has been suffered rests with the assured.

Under § 181, subparagraph 3, both parties are entitled to demand a valuation of the cost of repairs in connection with the survey of the damage. Such valuation of the unrepaired damage, which is recoverable under § 174, is not binding, but it will be a very important piece of evidence when it comes to assessing the extent of the damage. However, the compensation must be based on the repair prices at the time of the sale. If no valuation has been undertaken, the damage must be assessed in some other way, first and foremost on the basis of the survey reports. Furthermore, where the ship is sold for scrapping, the limitation of liability in respect of the reduction in the price attributable to the damage will, as a rule, make an assessment of the damage with a view to repairs superfluous.

§ 175. Wear and tear, faulty material etc.

This paragraph corresponds to § 76 No. 4 of the 1930 Plan, cf. Hull Policy A 8.

One of the questions which has proved most difficult during the revision of the Plan is the extent of the hull insurer's liability for damage attributable to faulty construction, faulty material or similar of damage causes. Below will first be given a survey of the rules applicable under the 1930 Plan and the Hull Policy. This will be followed by a discussion of the considerations which have been invoked in favour of a wider or narrower cover respectively, and finally by a commentary to the new rules. Reference is also made to an article by *Rein* in Afs 3.257 ff., with a subsequent written contribution to the discussion by the same author and by *Frøystein Halvorsen*, p. 271 ff.

Legislative history

The 1930 Plan (§ 76 No. 4) chose as its starting point the fact that the consequences of certain specific causes shall be excluded from the cover provided by the hull insurer. Such causes were «insufficient upkeep, wear and tear, corrosion, rotteness, worms, rats or mice or other similar causes». To this is added «Faults, defects or weaknesses in a particular part of the hull, in a part of the machinery, or in an

accessory». However, not all consequences of such causes were exempted; the exemptions were only «costs of repairing or renewing that part . . . which was not in a proper condition». This damage — i.e. the cost of renewal of the defective part — may be called the «primary damage». A fracture in a defective part will, however, often lead to damage to other parts of the ship, and furthermore to salvage costs and other costs in connection with the casualty. Such loss, which may be called «the consequential loss» is always recoverable, providing the rules regarding unseaworthiness are not applicable. As shown below, the consequential loss is in practice the most important from a financial point of view, and the excluded primary damage will normally not involve any significant financial burden for the assured. However, in connection with the renewal of certain larger parts of the machinery the exemption was of very great importance.

The rule stating that the primary damage was not recoverable did not apply unconditionally. The insurer was also liable for the repairs or renewal of parts which had «latent defects . . . provided the damage can be traced to an extraneous cause an external cause, for the consequences of which the insurer is liable». The insurer's liability was further subject to the condition that the ship was classified with a recognized classification society, that the society had approved the part in question and that the assured neither knew nor ought to have known that the part was not in a proper condition. The latter criteria are all fairly easy to ascertain; concepts such as «latent defect» and «extraneous cause» present larger problems. The former concept has no clear technical meaning; in technical terminology designations such as «faulty material», «material fatigue», «faulty construction» etc. are more usual. The problem of interpreting the term «external cause» lies in deciding the extent of external stress to which the part has been exposed. A ship will always be exposed to external stress; the question is whether to accept the stress to which a ship is exposed during normal trading conditions or whether to require a definite occurrence of the same nature as a casualty.

In the period following World War II these problems were especially emphasized in connection with major damage to the machinery. Cracks or fractures occurred, particularly in propeller shafts and crank shafts in certain new types of engines which had an increased number of revolutions and performance compared with previous current types. The rules contained in § 76, No. 4 of the 1930 Plan did not give a satisfactory solution to these problems. Following negotiations between shipowners and insurers the following clause was inserted in Hull Policy A 8 with effect from 1 January 1958, which is to a certain degree modelled on the English «Liner Negligence Clause.»

«Irrespective of the provision contained in § 76 No. 4, costs involved in repairing or renewing a broken shaft or a cracked boiler are recoverable. However, this is subject to the condition that the damage is not attributable to insufficient maintenance, that the ship is classified with a recognized classification society and that the part in question had been approved by the classification society.»

Hence, under this clause primary damage was recoverable irrespective of whether or not the damage was attributable to a «latent defect» or an «extraneous cause». It is sufficient that a fracture or a crack is not attributable to insufficient maintenance. The requirement in respect of inspection and approval by the classification society was also explicitly repeated from § 76 No. 4 of the 1930 Plan. The clause applied to damage to two kinds of objects only, namely shafts and boilers. But, as mentioned above, it was this kind of damage which had occurred most frequently in practice.

This policy clause has also caused certain problems of construction. The condition for indemnifying the assured for a shaft, which had to be replaced, was that the shaft was «broken». In practice, however, the shaft was not required to be broken into two separate parts. It was sufficient for an examination to reveal marked cracks, which made a replacement necessary. There was also a certain amount of doubt as to whether the clause comprised all shafts on board or just the main shafts in the main engine.

Under § 76 No. 4 of the 1930 Plan and Hull Policy A 8 the shipowner would thus sometimes have to cover costs in connection with the replacement of a «part» which was worn, corroded or suffered from other defects. In practice it proved difficult to draw up clear guidelines for determining what constitutes «a part». The printed Commentary provided some guiding examples: sails and running rigging were not recoverable if they went overboard together with a mast that was rotten, whereas a lifeboat broken by the mast as it fell was recoverable. If the anchor chain broke as a result of a worn link, the assured was to bear the loss of the whole chain, whereas the anchor would be recoverable. However, these examples were not particularly helpful, especially not when it came to damage to the machinery where most of the problems occurred. Regarding this point the Commentary only states that «a rivet falls out and is lodged so unfortunately that it damages independently operating parts of the machinery». In such an event the damage, but not the rivet, is recoverable. However, the criterion «independently operating parts of the machinery» is very difficult to apply, as the question of the size of the units into which the machinery should be divided will always be a matter of discretion. The criterion may be applied reasonably safely as long as it relates to accessories to the machinery (oil pumps, feedwater pumps, regulators etc.), but is totally inapplicable in respect of parts which are connected mechanically and which produce and transfer the motive power, such as cylinders, pistons, connecting rods and crank shaft bearings. It is a well known fact that practice varied considerably when it came to the interpretation of the concept of «part», and the solutions applied have not always been beyond reproach. On the whole it may be said that the tendency was towards making the «part» fairly small, so as to make the financial significance of the deduction relatively modest.

Deductions which, in accordance with § 77 of the 1930 Plan were to be made, unless otherwise explicitly agreed, are also part of the picture of legislative history. According to subparagraph II B a No. 2 of that paragraph, a deduction was to be made in respect of the machinery increasing from 1/4 when the ship was under 5 years old to 1/2 when the ship was over 10 years old, if the damage was attributable to causes other than stranding, collision etc., in other words in the event of a typical technical engine breakdowns.

Terminology

One fact, which has made discussions concerning questions of terminology difficult, is the lack of unambiguous technical terms. The processes in question, particularly corrosion and material fatigue resulting in fractures, are the subject of intensive research, and science can hardly be said to have definite answers to all the questions which arise after a fracture has occurred. To this should be added the difficulty in concretely ascertaining the actual direct cause of the fracture. Discussions have therefore to some extent had to be based on a terminology worked out by the Committee members themselves with a view to placing in legally relevant categories the main types of phenomena which must be taken into account.

In addition to the terms that were also used in the 1930 Plan — wear and tear, corrosion, rot, insufficient maintenance — the following terms have been used in the discussions:

«*Faulty material*». This term implies that parts of the ship (hull or machinery) are of a quality inferior to what was understood. Such a quality deficiency may e.g. be the result of a fault in the casting or some other defect in the structure of the material, which occurred during processing, or be due to the supplier of the material having delivered a quality which does not correspond with the specifications (such as the steel supplied being too brittle). «*Faulty material*» defined in this way will have been present all along when the ship was delivered from the shipyard or from the repair yard, if the part was incorporated in the ship at a later date.

Further, the fault in the material will normally be concealed, in the sense that it cannot be detected by a superficial examination. It will normally require the use of more complex methods, such as fluoroscopy, load tests, etc. However, faulty material

may also be attributable to an «external influence». It is e.g. conceivable that the part falls to the floor during processing at the building yard and sustains a flaw.

«*Faulty construction*». By this term is meant that the construction of a part of the ship turns out to be unfortunate, or that the degree of strength proves to be inadequate. Sometimes what could be termed a «subjective» faulty construction will have been made, i.e. the construction of the part in question is weaker than it ought to have been, given the knowledge available at the time of construction regarding material strengths, production methods, and the stress factors to which the part might be exposed. However, the term «fault» does not have to be viewed subjectively. «Objective» faulty construction may also occur, i.e. in cases where the construction is as sturdy as it was reasonable to make it based on experience at the time of construction, but where the part in question later proves not to stand up to the loads, which in the circumstances must be deemed to be within the limits of the foreseeable for such a part. Faults of this nature may occur rather frequently in new types of ships and engines.

The term «construction» implies not only the drawing of the part in question and specifying the types and dimensions of materials, but also a specification of the manufacturing process and specifying the types and dimensions of material, but also a specification of the manufacturing process. If the «constructor» — i.e. everybody involved in the designing of the ship at the «constructional level» — has given incorrect specifications regarding the manufacturing process, the resulting weaknesses must be considered to constitute faulty construction. On the other hand, defects attributable to a performing link in the manufacturing chain having failed to comply with the specifications given cannot be classified as faulty construction. In this area, however, the borderline in respect of the term is by no means clearly defined.

«*Material fatigue*». By this term is meant invisible structural changes in the material resulting from the loads to which it is exposed during the use of the ship. Material fatigue may cause the part in question to crack during exposure to a normal load. It will usually be possible to establish the cause of the fracture after the occurrence of a casualty. As far as certain specific parts are concerned, material fatigue must be regarded as a foreseeable form of wear and tear. Connecting rod bolts in certain types of engines should therefore be replaced regularly, regardless of whether or not they show external signs of wear and tear, due to the fact that material fatigue is to be expected. However, as a rule material fatigue happens unexpectedly. It will then normally be caused by one of two different factors: either the material has been stretched beyond its elastic limit in connection with one single intense occurrence, first and foremost a casualty, or the material has become «tired» due to normal exposure over a long period of time during the normal use of the ship. In the first instance material fatigue must be regarded as latent damage sustained by the ship in connection with the casualty. In the second instance it is due to the fact that the part in question has been incorrectly constructed considering the tests which it would have to stand up to during the normal use of the ship. Material fatigue must in other words be considered to be a consequence either of the casualty or of a faulty construction, apart from the instances where it must be regarded as foreseeable wear and tear. The Committee therefore agreed that the term material fatigue should not be used as a separate legal category.

How wide should the insurance cover be?

The natural starting point would be for the shipowner himself to cover the costs in connection with ordinary maintenance, as well as replacements and improvements which are necessary in order to modernize the ship or to improve her operational state. This applies irrespective of whether the initiative for the undertaking of such measures comes from the shipowner himself, or whether the measures are carried out in compliance with the recommendations issued by the classification society. If, for example, it has been established that a particular type of ship suffers from a structural defect which should be remedied, the shipowner will have to cover the costs involved in the strengthening of the ship as prescribed by the classification society.

It was further agreed that there are grounds for including in the hull cover the replacement of parts which suffer from faulty material to the same extent as it does today. Faulty material in the sense defined above will normally be covered by the term «latent defect» as mentioned in § 76 No. 4 of the 1930 Plan, and the conditions for covering the replacement costs were consequently that the ship was classed, that the classification society had approved the part in question and that the damage was attributable to an «extraneous cause». Damage to shafts and boilers should no longer be required to be attributable to an «extraneous cause», cf. the above quoted clause in the Hull Policy. Faulty material will be attributable to negligence or to an accident during the manufacturing process. Very often the defect will only be detected after expiry of the period of guarantee given by the supplier or the repair yard. If the part in question cracks as a result of the faulty material a straight forward casualty will have occurred, but a situation arising from a latent defect in the material being detected during an inspection of the ship will also have a lot in common with a casualty from the shipowner's point of view: due to external unverifiable causes a part of the ship is defective and has to be replaced. It was therefore agreed that faulty material constitutes an insurance risk which should, as far as possible, be covered by the liability of the hull insurer. It was further agreed that the requirement in respect of «extraneous cause» should be omitted, not only in respect of the parts specified in the quoted clause in the Hull Policy, but altogether.

The disagreement was first and foremost concerned with such causes of damage as are described above as «faulty construction». Shipowners submitted the following argument: The same need for insurance cover exists in respect of faulty construction as in respect of faulty material. The replacement of parts because of faulty construction can be extremely costly and will, from the point of view of the shipowner, be fully equivalent to a casualty. The shipowners use the best constructors and technical consultants available, all their newbuildings and repair work are subject to a thorough check by the classification society. All possible measures available in practice aimed at safeguarding the shipowner against technical shortcomings have therefore been taken. The clause incorporated in the Hull Policy of 1.1.1958 was a step in the right direction and solved the most urgent problems. But the time has now come to take one step further and introduce a general cover in respect of faulty construction. If this proves impossible due to a mere technicality, or for other reasons, it must in any case be possible to extend the cover to include all major replacements which might be needed as a result of faulty construction relating to the machinery, and not only, as at present, to cover the replacement of shafts and the repairs of cracked boilers. The need for an extension of the insurance cover applies in particular to bedframes and support frames in the main engine, which in the case of certain types of engines have had a tendency to crack due to insufficient mastery of production techniques. The shipowners declared their willingness to accept, if necessary, special deductions in the compensation for work of this nature.

In response to this argument the insurers claimed that at present it is not possible to provide a general cover for faulty construction. The fact that new structures are not up to standard is a typical risk run by a company, which it must accept and take into account in its development programme. If a company wishes to carry out technical experiments, it will have to do so at its own expense and not at the expense of all those companies which choose to stick to safe and accepted methods of construction. It was further argued that the consideration for foreign business connections suggests that the extension of the insurance cover should not be carried too far. Norwegian hull insurance is dependent on co-and resinsurance abroad, and there is a chance that a general cover of faulty construction will not be accepted in other countries.

Difficulties relating to insurance technicalities

The Committee also considered the difficulties which might arise in connection with insurance technicalities. In the first place there are problems involved in establishing the real meaning of the term «casualty», when faulty construction is accepted as a cause of damage covered by the insurance. Previously it was necessary

for the casualty to manifest itself in the form of a fracture or a crack which occurred more or less spontaneously and which made it inadvisable to use the ship until the defect in question had been rectified. If this requirement is maintained in respect of faulty construction as well, it may be tempting for the shipowner to neglect to notify the insurer when it has been discovered that a part of the hull or machinery is underdimensioned, and instead try to keep things going until the part in question cracks or breaks sufficiently to justify it being scrapped. Insurance cover of faulty construction should therefore also include any replacement which is effected in compliance with a recommendation by the classification society, when it has been established that the part in question suffers from faulty construction and consequently represents a potential danger of future fractures. However, this will in turn entail that the cover will in actual fact not provide full financial security for the shipowner: When a certain type of damage starts occurring in a certain type of ship, which gives rise to suspicion that the construction might be faulty, the hull insurers must consider increasing their premiums for ships which have still not suffered such damage. Hence the assured will in actual fact not obtain full insurance cover of the faulty construction, but will have to cover part of the replacement himself in advance. An efficient solution to the problem can only be arrived at by creating what might be called a «life insurance» for the ship, i.e. an insurance for newbuildings which the shipowner could maintain in effect for as long as he liked against a fixed annual premium, and which covered the risk of the ship proving in any respect to suffer from faulty construction. Technically speaking such a solution is possible, but it is highly unlikely that it will be carried out in practice at the present time.

Another difficulty lies in the application of the concept of «part». As long as only expenses in connection with the replacement or repairs of the «part» which is worn, corroded, has faulty construction, etc. are excluded from the insurance cover, it will have to be decided what constitutes expenses in connection with the replacement of the «part» (the primary damage) and what constitutes damage to other parts (consequential damage). However, it is very difficult, if not impossible, to draw up tenable criteria for the dividing of the main engine into separate parts. A possible solution, which was considered during the discussions, would be to include in the insurance cover all costs in connection with the repairs of both primary and indirect damage and in return introduce standard deductions, which would constitute the equivalent of the deductions which should otherwise have been made in respect of the defective parts. However, such a solution would represent a distinct departure from customary conceptions, as the insurance cover would in that case in principle also have to comprise the replacement of parts, which are worn or corroded. As far as such expenses are concerned, the insurance cover would be significantly extended. On the other hand, the cover would be less extensive in respect of damage, which is obviously not attributable to wear and tear or faulty construction. It was therefore decided that the insurance conditions should continue to operate with causes of damage which are covered by, or exempted from, the insurance. The conditions should therefore maintain the concept of «part» with the difficulties which are created by its application in practice. Some guidelines regarding the application of the above concept are indicated below.

Comments to the Plan

§ 175 of the Plan represents a compromise between the view of the shipowners and that of the insurers, as the Committee also, as far as possible, took into account the difficulties concerning insurance technicalities. The Plan is mainly based on the previous insurance cover as it was worded in § 76 No. 4 of the 1930 Plan and Hull Policy A 8. Instead of extending the insurance cover for shafts and boilers, as done before, subparagraph 2 of this paragraph contains a «breakage clause» which, subject to certain conditions, applies to all damage caused by fractures or cracks in the ship's boilers as well as in her main engines.

Subparagraph 1 of this paragraph contains the basic rule concerning the costs of repair which the assured must cover himself because they are attributable to

insufficient maintenance and similar causes. As this paragraph is contained in Chapter 12, which deals with damage to the ship, it will not be applicable in the event of a total loss. The insurer will therefore be liable for a total loss attributable to one of the causes of damage exempted in subparagraph 1 of this paragraph, unless the rules relating to unseaworthiness are applicable. This is also a consequence of the fact that it is only expenses in connection with the replacement of a defective «part», which are excluded from the insurance cover.

The rule contained in subparagraph 1 is further applied irrespective of whether the expenses in question are part of the repairs resulting from an ordinary casualty, or whether the replacement is effected in compliance with the recommendation of the classification society. The expenses which are exempted are, apart from costs in connection with the purchase or manufacture of a new «part» to replace a defective one, expenditure in connection with access work and installation of «the part», as well as a reasonable portion of the general expenses involved in the repairs, cf. § 185.

As regards what should be considered a «part», it will not be possible to give any exhaustive explanation. Nor will it be possible to single out any one particular viewpoint which is applicable to all situations where the problem may arise. In practice, it will therefore still be necessary to resort to a traditional assessment. The following examples may, however, give some guidance as to the assessment:

As separate «parts» of the main engine must be counted the propeller, the propeller shaft and the crank shaft. If the crank shaft is made up of several sections with flanges in between, each such section must be considered to be a «part». Separate «parts» are further a piston with piston rod, a cylinder block, a cylinder lining and a cylinder head cover. In the event of a defect in a crank shaft bearing, the whole bearing (upper and lower part) must be regarded as one «part». In the case of smaller auxiliary units for the machinery (oil pump, boiler feed pump) the whole unit in question must be regarded as one «part». If a lubricating oil groove is blocked by impurities transported by the oil, no individual «part» can be characterized as defective, unless the blockage is caused by an incorrect design of the groove itself.

In the event of weaknesses in the ship's hull, her tackle and equipment, it is not a decisive factor whether the «part» in question is welded or only loosely connected to the hull. A plate is thus a «part», and so is a frame, a knee or a deck beam. Rudder and rudder stock, or anchor and anchor chain must be considered separately.

The terms «faulty construction» and «faulty material» are used in the sense defined above. By «corrosion» is meant the formation of rust and any other attack to which the material is exposed during chemical processes, whether or not dampness has been a contributory factor in the process. Science has not yet found the complete answer to these questions, but as far as external corrosion is concerned, it is believed that the attachment of anodes to the hull affords a certain amount of protection.

However, occasionally when giving an immediate description of the damage, the word «corrosion» is used in cases where the damage must in actual fact be attributed to another factor, which is in the nature of a casualty. If hull or machinery has been exposed to intense heat during a fire, the steel will be very vulnerable to attacks of rust. Corrosion of this nature must be seen as a consequence of the fire and is therefore covered under the insurance. The same applies where 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, which results in the penetration of seawater, which corrodes shaft or bearings. In this context the corrosion must be seen as a result of the casualty or of unsatisfactory work by the repair yard, respectively.

Some incidents of corrosion also occur spontaneously and therefore cannot be attributed to any known casualty or similar causes, but which it may nevertheless occasionally be reasonable to cover. A ship may e.g. while in port or laid up, remain for a considerable period of time at a place where her hull or propeller is exposed to corrosion of a completely unexpected and abnormal extent. Such corrosion may be attributable to chemical pollution of the water or to electrolytical attack. Depending on the circumstances, such corrosion may in itself be in the nature of a «casualty» and the insurer will then be liable for the costs of repairs.

The delimitation of the concept of «insufficient upkeep» poses certain problems. The association made in connection with the concept of insufficient maintenance is first and foremost a lack of attention on the part of the crew over a long period of time, which leads to corrosion or wear and tear which could have been avoided. It is irrelevant that the assured himself cannot be blamed for the insufficient maintenance. In such a situation the assured would thus suffer because of faults committed by his subordinates in connection with their service as seamen. Applied in the manner exemption is of little practical importance compared with the exemptions for «corrosion» and «wear and tear».

On the other hand, it is firm practice that the insurer compensates the assured for a part which is destroyed because of a failure by a member of the crew to perform one individual necessary act of maintenance. If a member of the crew forgets to drain the cooling water from an engine which is exposed to frost resulting in the engine freezing and bursting, the insurer will thus be liable for the cost of repairs. The same applies even if the fault results in abnormal wear and tear, as in cases where such damage is caused by a failure to activate the greasing or cooling systems before starting an engine. The difficulties occur where the damage is obviously attributable to the fact that the same mistake has been made on two or more occasions at fairly short intervals. It would be difficult to set up a general norm for such cases, and the problem will have to be solved on a case-to-case basis.

The term «or similar causes» is aimed at some causes of damage which were explicitly mentioned in the 1930 Plan, but which will hardly be of any great relevance today, such as rats, mice, woodworm and wet and dry rot.

The exemption for «insufficient upkeep» etc. is formulated as a rule of causation. This implies that the general rule concerning apportionment in the event of a combination of several different perils contained in § 20 must be applicable. The question may therefore arise of imposing partial liability for the replacement of a defective part where the defect is attributable partly to insufficient maintenance or another exempted cause of damage, and partly to damage to the part in connection with a casualty.

The exemption in subparagraph 1 of this paragraph is less extensive than the exemption for unseaworthiness mentioned in § 45, subparagraph 1, but on the other hand, it is applicable irrespective of the subjective circumstances of the assured. If the defect was of such a nature that it might have posed a threat to the safety of the ship, and the assured knew, or ought to have known, about it at such a time that it would have been possible for him to intervene, the insurer may exclude liability, not only for the replacement of the defective part, but also for the further consequential damage and loss. The application of the rules relating to seaworthiness is, however, subject to the condition that the assured know, or ought to have known, about the concrete defect which caused the casualty. If he can only be blamed for a general failure as regards instructions and supervision regarding maintenance, the situation must be assessed according to this paragraph.

Subparagraph 2 of this paragraph contains, as mentioned above, a «breakage clause» for boilers and main engines. It supersedes § 76 No. 4, subparagraph 1, 2nd sentence, of the 1930 Plan and Hull Policy A 8.

The requirement that the ship shall be classed, and that the part in question shall be approved by the classification society has been adopted from the previous rules. The fact that the ship is classed also means that her class is valid at the time of a casualty. The fact that the part in question has been approved by the classification society does not mean that any special approval of the part in question has been given, over and above the approval implicit in the general supervision of the construction or repair work. The part in question must in other words be included in the supervision carried out by the classification society in connection with construction or repairs, and the part must not at a later time at the owner's expense have been replaced or repaired in disregard of the inspection regulations of the class.

The rule concerning insurance cover contained in subparagraph 2 (a) of this paragraph probably corresponds to § 76 No. 4 of the 1930 Plan, apart from the fact

that the requirement as to «extraneous cause» has been deleted. The concept «faulty material» is discussed above. If the defect is caused by a casualty, it is not «faulty material», but latent casualty damage, and the repairs must be covered by the insurer who was liable at the time when the damage occurred. Any further losses, which such damage may cause, must be assessed in accordance with the general causal rules contained in § 18.

Subparagraph 2 (b) of the paragraph reproduces in a somewhat extended form the additional cover provided by the Hull Policy A 8. Whereas the Hull Policy's clause merely covered shafts and boilers, the supplementary cover under the current provision comprises the entire main engine, including propeller shaft and propeller, as well as all boilers, whether or not they form part of the main engine.

A condition for the costs of replacement or repairs being recoverable is that the part in question is «fractured» or «cracked». In other words, a demonstrable physical defect must have occurred which requires replacement or repairs. However, it is not necessary that the defect arose from a casualty or was discovered in connection with a survey conducted after a casualty. Also a replacement effected in compliance with a recommendation from the classification society must therefore be recoverable, where the defect is discovered in connection with a routine control. The requirement that a concrete, physical defect must have arisen is absolute. The replacement is not recoverable if the background to the recommendation is a strong suspicion that the part in question is under-dimensioned.

Otherwise, no minimum requirements are set up as regards the physical defect which makes a replacement necessary. Also the initial signs of cracks, which it is only possible to ascertain by means of fluoroscopy or other similar methods, will be sufficient.

Nor is it necessary to look into the causal factors, beyond the negative ascertainment that the defect is not due to corrosion, wear and tear or inadequate maintenance. As regards corrosion damage, reference is made to what is stated above. Under quite extraordinary circumstances the replacement of a corroded part will thus also be recoverable if the corrosion is caused by an unforeseeable chemical or electrolytic influence from seawater, or is attributable to a casualty which the ship has suffered. The exception for «wear and tear» and «insufficient upkeep» rules out compensation for any fracture damage which must be regarded as a normal and foreseeable consequence of the use of the engine. Hence, if the manufacturer of the engine has given instructions to the effect that certain parts must be replaced after a certain period of operation, or after a certain wear, the insurer will not cover a replacement effected after the parts in question have been used during the prescribed period.

Also when subparagraph 2 of the paragraph is applied, the rule of apportionment contained in § 20 may become applicable. By way of example a fracture in an engine part may be attributable partly to it being underdimensioned, partly to a failure to perform the prescribed care and maintenance. In such a case a partial compensation of the replacement costs may be conceivable.

A special rule relating to the replacement of parts suffering from faulty construction or faulty manufacture is contained in § 206, subparagraph 1, 2nd sentence. The rule is only applicable in connection with the insurance of the shipyard's interest in ships under construction.

§ 176. Loss excluded from insurer's liability

This paragraph corresponds to § 77 II B c of the 1930 Plan and the Hull Policy A 11.

The paragraph contains a number of limitations of the hull insurer's liability for damage to the ship. The limitations apply first and foremost to compensation for particular damage. However, where general average damage under § 72 is recoverable according to the rules relating to particular damage, because such settlement is the most favourable to the assured, the limitations contained in this paragraph also become applicable.

The limitation contained in subparagraph (a) is traditionally applicable in Norwegian hull insurance. Even if the direct operating costs pertaining to the ship, as well as her general loss of time during repairs, must be regarded as foreseeable consequences of the casualty, these losses will not be covered by the hull insurer. This also follows from §§ 5 and 63, according to which the hull insurance merely comprises the capital value of the ship. The actual loss of time is only recoverable under an insurance in accordance with the rules contained in Chapter 20 of the Plan, whereas wages and maintenance for the crew and similar direct operating expenses are recoverable during the time it takes to move the ship to the repair yard in accordance with § 184.

It is only the operating expenses, which are incurred independently of the repair work, which fall outside the insurer's scope of cover. Expenses in connection with the repairs, however, are recoverable, such as bunkers consumption during testing of the engine and during a trial run, meals and accommodation for a repair squad staying on board, and expenses for special watch-keeping required because of the damage to the ship. The same applies to expenses for meals and accommodation ashore for the crew when the damage to the ship makes it impossible for them to stay on board.

Nor does the insurer cover the more indirect expenses incurred while the repairs are carried out, such as interest on mortgage loans, insurance premiums, general administration costs etc. It has not been deemed necessary to state this explicitly.

The limitation contained in subparagraph (b) is based on the fundamental view that the hull insurer's liability shall in principle not be influenced by whether or not the ship is carrying a cargo. Admittedly, this principle is not adhered to where the ship is damaged as a result of dangerous properties in the cargo; such damage is recoverable by the insurer. However, expenses for discharging, warehousing etc. of cargo necessitated by the repair work are not recoverable. This applies regardless of whether the work in connection with the cargo has become more expensive because of the damage to the ship, and regardless of whether the cargo has sustained damage making special measures necessary to remove it. If a shipowner wants to be covered against such expenditure, a special insurance regarding extraordinary costs must be taken out according to the rules contained in Chapter 22 of the Plan. As regards damage sustained by the ship in connection with discharging, see below under subparagraph (n).

The exception in subparagraph (c) reflects the same way of thinking as regards the passengers. However, the expenditure involved in providing accommodation for the passengers is recoverable under the insurance of passage money in accordance with the rules contained in Chapter 23 of the Plan.

According to § 76 No. 1, subparagraph 3, of the 1930 Plan, also «bunker coal, fuel oil and lubricating oil lost during shifting and storing» were not recoverable. This limitation has been deleted. Admittedly the hull insurer is not liable for the equipment lost during the actual casualty, but if the loss is due to measures taken to repair the damage sustained by the ship, it seems reasonable to impose liability on the insurer.

Under § 77 I b, subparagraph 1, of the 1930 Plan, painting of bottom was recoverable with a deduction of 1/6 for each month which has elapsed since the bottom was last painted. Under subparagraph (d) of this paragraph painting of bottom is recoverable in full if less than 6 months have elapsed since the last time the bottom was painted, otherwise no compensation is payable. If compensation is paid for painting of bottom, such compensation is not subject to the new for old deductions, which are applicable to the repair work in general, the ship's age being irrelevant in this connection, cf. § 193 No. 4. The rule is based on the view that painting of the bottom will normally be an operating expense, but if the ship suffers a casualty and must dock less than 6 months after the bottom was last painted, the previous painting must in all essentials be deemed lost for the shipowner. The 6-month time-limit is, according to current practice, calculated from the day the bottom was last painted until the day it has to be painted again.

Under § 77 II A No. 2 b of the 1930 Plan caulking of hull and deck was recoverable with a deduction of 1/3 if the caulking was between one and three years

old, whereas no compensation was paid if it was more than three years old. According to subparagraph (e) of this paragraph, costs for caulking are never recoverable. This is typical maintenance work, and it will not be easy to decide to what extent the caulking is really necessitated by the casualty. The exception does not comprise expenses for caulking the parts of hull and deck which have to be replaced in consequence of the casualty. Here the caulking represents a regular cost for replacement of a part of the ship and is therefore recoverable.

The limitation contained in subparagraph (f) corresponds to § 77 II B c, subparagraph 1, of the 1930 Plan. According to that provision, however, the said objects were also recoverable when they had «fouled the propeller». According to the Plan, such losses are excluded from the cover. Mooring and towing equipment, which is lost as a result of measures to save the insured vessel, or in order to in some other way avert liability arising for the insurer, must obviously be recoverable under the rules relating to loss in connection with measures to avert or minimize the loss. If the equipment is lost in connection with efforts to salvage another ship, it will depend on the rules contained in § 58 (b), cf. § 35, subparagraph 2, whether the insurer is liable for the loss of the equipment. If material assets are salvaged, the assured will also have a refund claim, which, under § 101, will be for the benefit of the insurer.

The limitation contained in subparagraph (g) corresponds to § 77 II B c, subparagraph 2, of the 1930 Plan. The term «sails and awnings» is meant to cover devices made of textiles or other materials comparable to textiles. Whether the awnings are permanently installed, or are taken down from time to time, is irrelevant. However, more permanent sun roofs are recoverable. The term «wind or sea» has been changed to «weather and sea» to mark that also damage by rain showers is excluded from the cover.

The limitation in subparagraph (h) corresponds to § 77 B c, subparagraph 4, of the 1930 Plan. As regards the term «weather or sea», cf. above.

The limitation contained in subparagraph (i) corresponds to the Hull Policy A 11 e. The text uses the term «under way» to make it perfectly clear that the loss is recoverable if a boat is damaged or lost while being towed to a repair yard in port.

The limitation contained in subparagraph (j) corresponds to § 77 II B c, subparagraph 3, of the 1930 Plan. The limitation is based on the view that in times of peace it represents an abnormal and unnecessary danger to leave the boats swung out in the davits. If they are damaged or lost whilst swung out, the loss should consequently not be recoverable, regardless of what the cause of the damage is. The limitation of liability thus becomes applicable, even if the damage is not connected with the fact that the boat is swung out, but is e.g. caused by fire. The provision shall apply when a boat is «swung out while the ship is under way», i.e. being to a certain extent permanently swung out while the ship is under way. If, however, the boat is damaged or lost while being swung out in connection with a boat drill, the loss will be recoverable. In times of war it is very often a necessary safety measure to sail with the lifeboats swung out. Under § 6, subparagraph 2, of the War Hull Policy the war-risk insurer was liable for damage to or loss of lifeboats which were swung out. The limitation contained in this provision presupposes such a solution, in view of the fact that it does not apply when the boat is swung out due to war perils. A loss, which is directly connected with the fact that the boat was left swung out because of war perils, is covered by the war-risk insurer. Under § 22 (c) such a loss shall in its entirety be deemed to have been caused by war perils. The rule of apportionment contained in § 21 is therefore not applicable, even if the loss must also be attributed to marine perils, e.g. rough weather. If, on the other hand, the boat is lost or damaged from causes which are not connected with the fact that it was left swung out, the marine insurer must cover the loss, e.g. where the boat is damaged during a fire, which broke out on board and which was not attributable to war perils.

The limitation contained in subparagraph (k) corresponds to the Hull Policy A 11 d. In practice anodes are often used for protection against corrosion. These anodes are also comprised by the limitation.

The limitation contained in subparagraph (l) corresponds to the Hull Policy A 11

b, subparagraph 2. It has been stated that in practice the Hull Policy A 11 b, subparagraph 2, was apparently interpreted to mean that also costs in connection with the removal and replacing of a cracked liner were recoverable. Such practice is not assumed to be followed in future. Only costs in connection with a liner are recoverable. In such a case the full costs are recoverable (as a rule with machinery damage deductions under § 187), in other words both costs in connection with the purchase of a new liner, with removing the defective liner and with fitting the new one.

The limitation contained in subparagraph (m) corresponds to the Hull Policy A 11 c. In the policy it was explicitly stated that also costs in connection with cleaning were comprised by the rule. The cleaning, which is necessary in connection with the repair work, will, however, always form part of the damage and must be subject to the same rules as the damage with regard to new for old deductions, deductibles, etc. If this paragraph specifically underscored the expenses for cleaning as part of the loss, doubt might be created as to what shall apply in all the other cases where cleaning is not specifically mentioned.

Subparagraph (n) excludes from the hull cover damage which is wilfully inflicted on the vessel during discharging and removal of cargo, unless the damage is necessitated by a stranding. If e.g. the heating coils of the ship fail and it becomes necessary to open the tanks in order to get out an asphalt cargo, which has solidified, the hull insurer is not liable for the costs incurred in restoring the ship to her original state. Losses of this nature will have to be covered by an insurance under Chapter 22 of the Plan. However, if we imagine a situation where a ship carrying a cargo of cement has stranded and the cargo as a result has become wet and has solidified in the holds, the hull insurer will be liable for the damage, which it is necessary to inflict on the ship in order to get the cargo out.

This subparagraph only comprises damage wilfully inflicted on the ship by extraordinary measures, which are necessary because of the state of the ship or the cargo. If a regular accident happens during the discharging operation — e.g. cargo falls down and damages the ship — the hull insurer is liable for such damage according to the general rules.

The Hull Policy A 11, subparagraphs a and b, excluded from the cover certain damage to boilers, funnels and exhaust pipes, provided the damaged parts were more than 10 or 15 years old. The motive for the exclusions is that the hull insurer shall not answer for the maintenance of parts, which experience has shown must be replaced or repaired after a certain period of time. However, it has been pointed out by insurers that these limitations sometimes lead to unreasonable results, and that they are no longer necessary alongside the general exemption for «wear and tear» contained in § 175. The limitations have therefore been deleted.

§ 177. Deferred repairs

This paragraph is new.

The 1930 Plan did not stipulate any time-limit for the performance of the repair work, and in practice the ship will often sail for a long period of time with minor unrepaired damage. As mentioned under § 173, the repair costs were, despite the rule contained in § 75 No. 3, subparagraph 2, last sentence, of the 1930 Plan, covered on the basis of the actual repair costs, and the insurer therefore bore the risk of a price increase for repair work during the time from the casualty occurred until the repairs were completed. On the other hand it is obvious that the assured must have a wide scope when it comes to choosing a time for the performance of the repairs which fits in with the employment of the ship. This paragraph implies a certain limitation of the insurer's risk of a price increase, in as much as he is not liable for the increase in the cost of the work which occurs after 5 years have elapsed since the damage was discovered. In view of the fact that in practice no valuation of the work will be carried out on expiry of the 5-year time-limit, the deduction would have to be calculated on the basis of the general index for repair costs.

§ 178. Temporary repairs

This paragraph corresponds to § 76 No. 2 of the 1930 Plan.

It will sometimes be in the best interest of the assured as well as the insurer that temporary repairs of the damage are carried out, viz. where final 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 the insurer will consent to temporary repairs, which are necessary to enable the ship to sail to a repair yard, and will cover the full costs involved in such repairs. In the event that the insurer does not give his explicit consent, subparagraph 1 of this paragraph establishes that the assured may have the temporary repairs carried out for the insurer's account if final repairs cannot be effected at the place where the ship is lying. That repairs «cannot be effected» means that it is not possible to effect repairs which satisfy the requirements contained in § 173, subparagraph 1.

However, it happens frequently that the assured is interested in a postponement of the final repairs and is content with temporary measures, whereas the insurer prefers that the ship's damage is repaired immediately. This will first and foremost be the case where the more extensive work in connection with final repairs cannot be carried out without waiting time, whereas temporary repairs can be effected immediately. However, it is also conceivable that, due to the general operating schedule of the ship, the assured is interested in postponing prolonged and final 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. This is just one aspect of a problem which 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 to be performed as promptly as possible and at a time where it does not interfere with the running of the ship. He may therefore be interested in choosing the tender which offers the shortest time for repairs, even if it is not the cheapest. He wants to use methods which speed up repairs, such as overtime, air transport of spare parts etc., and he will be interested in temporary repairs of the damage if this makes it possible to postpone the final repairs to a more convenient time. As for the hull insurer, he is not liable for the loss of time and therefore wants the cost of repairs to be as low as possible, provided the quality is up to standard. Nor will he be interested in paying for temporary repairs which are effected only to allow the final repairs to be carried out at a time which suits the shipowner better.

The 1930 Plan solved these problems entirely to the advantage of the insurer, in as much as it did not on any point require him to consider the assured's interest in averting a loss of time (see e.g. § 75 No. 3, subparagraph 2, and § 76 No. 2). However, this system was modified to a certain extent in the Hull Policy. A special clause, to which the Hull Policy A 7 referred, entitled the assured to a specific compensation during the time which is lost when, at the insurer's request, a tender is accepted which entails a longer period for repairs than the average time for the tenders received. The compensation was set at 0.6 per mille of the hull valuation for each full 24 hours the repairs took in excess of the average time, or in excess of the repair time according to the tender which the assured had wanted to accept, if the latter exceeded the average time.

During the revision work there was general agreement that the insurer should be required to show a certain consideration for the assured's interest in averting a loss of time in most of the situations where this might occur. The rules are worded somewhat differently for the different situations. A common denominator for these rules is that the loss of time suffered by the assured, or which he avoids through special measures, is assessed at 20% p.a. of the hull valuation, which is equivalent to 0.55 per mille per 24 hours. As mentioned, compensation under the earlier clause was 0.6 per mille per 24 hours, whereas according to English conditions it is 30% p.a. of the hull valuation (I.T.C. Hulls No. 19, which incidentally only makes the principle applicable during the time which is lost while inviting tenders).

This paragraph makes the principle applicable in general where the assured

prefers to have the damage temporarily repaired. Here the costs of the temporary repairs will usually be wasted from the insurer's point of view. However, it could also be that the repair work is to the insurer's advantage, either because part of it is of permanent value, or because it makes it possible to effect final repairs at a cheaper yard or after a general drop in the repair prices. In that case the insurer is liable under subparagraph 2 for the costs of the temporary repairs within the limits of the savings he has obtained. But even if the temporary repairs are without, or of only little, financial interest for the insurer, he shall in any circumstances cover the costs within the limits of the «normal loss of time» which the assured averts by choosing such a procedure. When looking into the time saved, one must on the one hand look at the time the temporary, and later the final, repairs took, and on the other hand the time it would have taken if the ship were to have effected the final repairs immediately.

However, the application of the rule is subject to one condition, viz. that from an overall point of view, the assured has saved time. It will therefore first and foremost be applicable where the ship would have had to lie and wait for repairs if final repairs were to be effected. If a repair yard could in actual fact have taken the ship immediately, but the assured prefers 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.

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 against the general average according to the normal rules. It is not necessary to state this explicitly.

To the extent the temporary repairs are recoverable, this will be without ice damage or machinery damage deductions, cf. § 188 (c), if relevant, also without new for old deductions, cf. § 191, subparagraph 2.

§ 179. Costs incurred in expediting the repairs

This paragraph corresponds to § 76 No. 3 of the 1930 Plan.

The paragraph is based on the view of the time-loss problem explained in the preceding paragraph. Where the assured takes extraordinary measures to save time during the repairs, the insurer should be liable for the additional costs the assured thereby incurs within the limits of the normal time loss which he has averted. In actual fact it is theoretically possible that the rule may lead to the assured being prompted to incur additional costs, even if the ship's possibilities of making a profit are very slight. However, in practice it is not conceivable that the daily profit is essentially lower than the normal profit recoverable under this paragraph making it uneconomical to incur overtime based on an overall evaluation. The normal profit, with which the Plan calculates — 20% p.a. of the hull valuation, or around 0.55 per mille of the hull valuation per 24 hours — will normally not exceed the operating expenses for the ship.

The provision reflects an assumption that there are certain measures with a view to expediting the repair work which are «ordinary», and certain which are «extraordinary». The line between the «ordinary» and the «extraordinary» measures, however, is far from sharp. New and time-saving methods, which represented an extraordinary increase in cost when they were introduced, will often after a short time be so generally used as to be regarded as representing the «ordinary». Hence, the provision does to a very large extent leave scope for discretionary evaluations, and the concrete solutions must vary according to the technical development.

In today's situation it must presumably be considered «ordinary» for small spare parts to be sent by air in order to save time. On the other hand, it is presumably still «extraordinary» to charter a plane for the transport of larger parts, or to have the work performed while the ship is on a voyage. Overtime pay to the repair yard will also normally be «extraordinary».

Often several repair jobs will be performed concurrently, each of which could be expedited by separate measures. According to the 2nd sentence of the paragraph the total repair time which the assured saves by having the work carried out in this manner

must in such cases be checked, and the total additional costs within the limits of the normal time-loss 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 time-loss for 10 days.

As regards general average, the same applies in connection with this paragraph as with § 178. If the assured has received compensation for the additional costs as a «substituting expense» in general average, the insurer will be subrogated to his rights against the general average to the extent compensation has been paid for the same costs under this paragraph.

§ 180. Repairs to a ship that is condemnable

This paragraph corresponds to § 70 E, 2nd sentence, of the 1930 Plan. It is commented on in further detail in § 165 above.

§ 181. Survey of damage

This paragraph corresponds to § 75 No. 1 of the 1930 Plan.

As mentioned under § 173, the rule contained in § 75 No. 3, subparagraph 2, last sentence, of the 1930 Plan, to the effect that the insurer's liability for the repair costs is limited to the amount estimated in advance for the repairs, was not applied. In practice the trend was that the final survey report was submitted after the repairs had been completed and it was possible to give the actual repair costs. Nor would any joint statement normally be made by the parties' representatives, as each of them reported to their respective principals.

The Plan has taken the consequence of this development. This paragraph is based on the condition that the survey reports may be submitted after the repairs have been completed.

However, it may be in the assured's own interest to receive a more detailed description of the damage before the repairs commence, especially if he is in doubt whether it will pay to repair the ship. Subparagraph 3 of this paragraph therefore gives both parties the right to demand that preliminary reports be submitted with approximate estimates of the repair costs. Each of the parties may of course always instruct his own representative to submit such a preliminary report. The significance of the provision therefore lies in the fact that also the other party's representative must do the same.

According to the 1930 Plan a judicial survey was to be conducted, unless the parties in each specific case agreed on a private survey. The Plan stipulates a private survey as the normal procedure. A public survey of the damage may only be conducted where mandatory rules of law make this necessary, cf. subparagraph 5 of the paragraph.

The conclusions drawn in the survey reports are not decisive in the claims settlement, but they will obviously be of great significance. The surveyors' opinion as to when and how each item of damage occurred may therefore be decisive for the question of compensation. If the assured's and the insurer's representatives cannot reach an agreement regarding these questions, they shall according to subparagraph 4 of the paragraph appoint «an arbitrator who shall give a reasoned opinion on the questions submitted to him». Like the parties' representatives the arbitrator shall not make any binding decision regarding the questions, but his opinion will of course carry great weight as evidence in the event of a subsequent litigation. If the parties fail to reach an agreement as to the appointment of an arbitrator, he shall in Norway be appointed by the Notary Public. In other countries the appointment shall be made by the Norwegian consul, unless mandatory rules of law make it necessary for a local authority to make the appointment.

According to the 1930 Plan the right to claim compensation was to be regarded as waived if the assured had the damage repaired without a previous survey. Further, the assured was required to ensure that the causal questions were evaluated in connection with the survey. If he failed to do so, the burden of proof that the damage

was not attributable to wear and tear or similar causes was imposed on him, cf. § 75, No. 1, subparagraph 4, of the 1930 Plan. According to subparagraph 6 of this paragraph, the fact that the assured has the ship repaired without first conducting a survey where the insurer has had the opportunity to attend will only affect the assured's burden of proof. In that event the assured has the burden of proof that the damage is not attributable to causes which are excluded from the cover by separate provisions. Of particular importance is the provision contained in § 175 relating to wear and tear etc. However, it is also conceivable that the insurer's claim that the damage arose during an earlier insurance year, or that it was caused by ice and is therefore subject to ice damage deductions, cf. § 186, must be upheld.

§ 182. Invitation to tender

This paragraph corresponds to § 75 No. 3, subparagraph 2, 2nd and 3rd sentences, of the 1930 Plan.

That tenders are invited for the repairs from several repair yards will primarily be in the insurer's interest. In the light of what is set forth under § 178 above, the insurer should not be allowed to inflict any further loss of time on the assured by inviting tenders without being liable for the normal loss of time during the time lost. In view of the fact that a normal and proper procedure for repairs of a case of major damage will under any circumstances be based on the assumption that some tenders are invited, it has been established that the insurer's liability for loss of time does not take effect until after 10 days. It is further assumed that the loss of time is exclusively a consequence of the fact that tenders shall be invited. If there is waiting time at all the relevant repair yards, the invitation of tenders will not in itself have inflicted any loss on the assured.

§ 183. Choice of repair yard

This paragraph corresponds to § 75 No. 2, subparagraph 1, and No. 3, subparagraph 2, 4th and 5th sentences, of the 1930 Plan.

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. However, if the insurer has obtained a less expensive tender from another yard than the one chosen by the shipowner, the insurer's liability for the repair costs was under the 1930 Plan limited to what the repairs would have cost at the repair yard which submitted the lower tender, in other words the tender amount plus removal costs.

As emphasized under § 178 above there was general agreement during the revision work that the insurer should to a certain extent be required to take into consideration the assured's interest in having the ship repaired at a repair yard, which is expensive, but works fast, thereby reducing the loss of time. When it has been established which tender is in actual fact the lowest — by adding to the tenders received the costs of removal to the respective repair yards — the insurer should, according to earlier law and conditions, be able to calculate the compensation on the basis of that tender. However, pursuant to subparagraph 2 of the paragraph, he is liable for the assured's additional costs incurred by choosing a faster repair yard within the limits of the «normal loss of time» which the assured thereby averts. The additional liability will obviously be contingent on equivalent additional costs having accrued. In other words, the insurer shall never pay a strict loss-of-time compensation in addition to the invoice for repairs, but possibly a share of the assured's increased repair costs when he wants to use a quicker repair yard.

The assured may from time to time claim that under no circumstances is he willing to have the ship repaired at a particular repair yard. This may be due to the bad reputation of that yard for the particular type of repair work in question, or it may be due to business factors of a more special nature. According to subparagraph 3 the tender from a yard, where the assured, because of special circumstances has justifiable reason for objecting to the repairs being carried out, shall be disregarded.

§ 184. Removal of the ship

This paragraph corresponds to § 75 No. 2 of the 1930 Plan.

The removal of the ship to the repair yard is part of the repairs, and the costs in connection with the removal must therefore be covered by the insurer. The costs of removal first and foremost comprise costs for bunkers, towage if the ship has to be towed, canal and port expenses, etc. Traditionally, however, the assured also has a limited cover of his loss of time during the time the removal takes, in that the insurer is liable for the crew's maintenance and wages during the time involved, cf. § 75 No. 2 a, 1st sentence, of the 1930 Plan. This rule is maintained. For the sake of clarity it is stated that, in addition to maintenance and wages, the insurer is also liable for «bunkers and similar direct expenses of running the ship», i.e. supplies and similar out of pocket expenses. As a removal expenditure must also be regarded the premium for the additional liability insurance which might be necessary in relation to the tug which the ship is to use, also where the assured shall be liable for any damage which the tug may sustain whilst sailing to the place where the ship is. Liability for removal costs does not, however, cover interest on debt, general insurance premiums, or any share of the shipowner's general administration costs.

The «removal» comprises the entire deviation to and from the repair yard. However, the expenses which the assured saves by the removal placing a chartered ship in a more favourable position, cf. subparagraph 1, 2nd sentence, of the paragraph, should be taken into consideration. Other advantages shall not be deducted, thus not that 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 her normal docking schedule. Here the assured does not have to accept a deduction in the removal expenses for an amount equivalent to the costs saved on the owners' work. Nor shall any advantage which the assured obtains by an unemployed ship getting into a more favourable position for chartering be taken into consideration.

The removal costs must of course be regarded as accessory repair costs, which shall be apportioned between work covered by insurance and owners' work under § 186. Here, as elsewhere, the Plan is based on the rules of apportionment which have been established in practice.

According to § 75 No. 2 of the 1930 Plan the insurer had the right, when the assured removed the ship to a repair yard «which the insurer has not approved», to limit his liability for the removal costs to the amount it would have cost to remove the ship to the yard where the insurer wanted the repairs carried out. Furthermore, under § 75 No. 3 of the 1930 Plan the insurer had the right to limit his liability for the actual repair costs to the tender which he wished to accept. According to the Plan the insurer's liability for the total repair costs, including the removal, shall be limited according to the rules contained in § 183. Hence, there will be no room for any special limitation of liability for the removal costs.

During a removal to a repair yard normally all insurances concerning the ship will be in effect on the conditions agreed on. Under § 44, however, any of the insurers may exclude liability for any loss, which arises during or as a result of the removal, if such removal involves an essential increase of the risk. Liability is transferred to the insurer who is liable for the damage to the ship, unless he has also excluded liability, cf. subparagraph 3 of this paragraph. Further, reference is made to the comments to § 44.

§ 185. Division of expenses

This paragraph corresponds to § 75 No. 6 of the 1930 Plan.

According to the 1930 Plan the common expenses were to be apportioned «according to a fair estimate, consideration being given to the cost of the work and the time it has taken». Apportionment based on the time the work has taken was only applicable for such expenses as those which increase proportionally with the time, e.g. dock rental and port fees during repairs. In practice the rule as far as the dock rental was concerned was applied by checking how many days each class of work would have taken if it had been carried out by itself, and a proportional share of the dock

rental was apportioned to it. However, it is more realistic to consider the recoverable and the non-recoverable work separately, and divide the costs on the basis of the time each of the two classes of work would have taken if the two classes of work had been carried out separately. Hence, in this respect the Plan departs from earlier practice.

§ 186. Ice damage deduction

This paragraph corresponds to § 77 I d. of the 1930 Plan.

Ice damage deduction is based on the view that the assured may by his dispositions with regard to the ship influence the risk of her suffering ice damage. A general ice damage deduction must therefore be considered to have a certain preventive significance.

Excepted from ice damage deduction are the same repair costs as those excepted from machinery damage deductions, cf. § 188. As regards the bases for calculating deductions, reference is made to § 190 and the comments to that provision.

§ 187. Machinery damage deductions

§ 77 II B of the 1930 Plan stipulated two sets of rules regarding new for old deductions for machinery damage. If the damage was a consequence of striking, collision or was attributable to other «nautical» causes, the deductions were moderate, but they were substantially larger in the event of machinery damage of a more technical nature and in case of certain other damage causes.

As mentioned in the comments to § 191 it was agreed during the revision work to delete the new for old deductions as a standard arrangement. However, «machinery damage deductions» along more or less the same lines as the stricter new for old deductions for machinery under the 1930 Plan were maintained. The deductions partly formed part of the compromise adopted concerning the cover of faulty construction; partly it was assumed that such deductions would have a certain preventive effect. The deductions are not graded according to the age of the ship, but shall always constitute one fourth of the the gross recoverable repair costs (cf. § 190, subparagraph 1).

This paragraph in principle comprises «machinery and accessories». However, as experience has shown that it is difficult to classify pipelines and electrical circuits in relation to the deduction rules, they have expressly been classified with the machinery.

The indication of nautical damage has been somewhat modified in relation to the 1930 Plan. Instead of requiring that the ship «has foundered», it is under the new Plan sufficient that «the engine room has been completely or partially flooded». This will only be the case in the event of casualties of a more serious nature. If the crew forgets a tap and leaves it open with the result that water flows into the engine room and causes damage to the machinery, such damage will normally be recoverable subject to machinery damage deductions. It has further been established — in contrast to the 1930 Plan — that damages in consequence of a fire shall always be subject to machinery damage deductions, if the fire broke out in the engine room.

Under the 1930 Plan deductions were to be made in accordance with the stricter rules when the damage was caused by the fact that «the propeller struck against loose and floating objects». This paragraph does not contain any equivalent rule. If the ship has been involved in «collision or striking», no deductions shall be made. A «striking» will undoubtedly have occurred if the propeller strikes driftwood or drift ice. On the other hand, deductions must be made if damage from overheating or vibrations occurs in consequence of prolonged sailing through ice. However, doubtful borderline cases may arise in connection with damage caused by sailing through ice.

In the event of casualties of a technical nature, such as fractures, overheating, etc., the assured may often allege that in actual fact the casualty was attributable to damage to the machinery in connection with a grounding where the propeller has struck floating objects, or the like. If that is an established fact, repairs will of course be recoverable without deductions. In order to, to a certain degree, preclude any difficult questions of proof which may arise in this connection, subparagraph 3 of the paragraph provides a short time-limit for the discovery and notifying of such damage. The time-limit does not take effect until the ship has been put into service. Damage

attributable to the casualty which is discovered during repairs which last over 3 months after the casualty will therefore always be recoverable without deductions. If such damage is discovered (logged) within 3 months after the ship has been put into service, it will also be recoverable without deductions, even if it is not demonstrated vis-à-vis the insurer until after the time-limit has expired, provided this is done without undue delay after the damage was discovered.

Deductions under this paragraph shall be made in connections with repairs of: main engine with shafting, bearings and propeller, auxiliary engines, starting air tanks, exhaust pipes for main and auxiliary engines, electric motors (however, with the exception of household appliances, nautical instruments etc.), generators, converters, steam boilers with flue outlet and internal chimney, condensers, coolers, preheaters, refrigeration machinery, steering gear, pumps, anchor windlass, winches, deck cranes, pipelines with valves and cocks, electrical panels and wires, furthermore paint and insulation of parts which come within the scope of this paragraph (cf. the comments to § 193).

§ 188. Compensation without deduction

Under § 76 No. 1 of the 1930 Plan certain accessory costs in connection with repairs were recoverable without new for old deductions, whereas other such costs were subject to deductions. Costs of removal were recoverable without deductions. The Plan maintains the latter rule (cf. subparagraph (a) of the paragraph), but otherwise introduces a change to the effect that all accessory costs of repair shall be subject to deductions. However, one must be aware of the fact that normally it will merely concern ice and machinery damage deductions, new for old deductions only being applicable when this has been specifically agreed. In that event this paragraph will also apply to the new for old deductions, cf. § 191, subparagraph 2.

Only costs, which are directly connected with the carrying out of repairs, are subject to deductions. Costs, which are recoverable in accordance with the general part of the Plan, are recoverable in full. Hence, the assured's and the insurer's costs for survey, litigation costs etc. shall not be subject to machinery damage deduction in the event of a dispute between the assured and the insurer as to whether or not a case of damage is recoverable. The same applies to costs involved in the prosecution of a claim for damages against a third party who is liable for the damage, and any costs involved in having the claims statement prepared (cf. § 84, subparagraph 2).

Costs of preventive measures, such as salvage remuneration for a ship in ballast, and general average contributions, do not refer to any specific damage to the ship and are therefore recoverable without deductions. If, during the rescue operation the ship sustains damage which is recoverable in general average, deductions will be made in accordance with YAR's rules, and a corresponding proportion of the repairs will thereby be charged to the assured himself. Further, it follows from § 72 of the Plan that general average damage to the ship «is recoverable in accordance with the rules concerning particular loss if this gives a more favourable result for the assured». In that event deductions shall be made in accordance with §§ 186 and 187. The same applies in connection with assumed general average, cf. § 73. The aim of this provision is that compensation for a certain type of damage to the ship shall be approximately the same, regardless of the cause of damage.

However, it might be doubtful whether a deduction should be made where damage to the ship is recoverable under the general rule relating to particular measures to avert or minimize the loss contained in § 68, subparagraph 1, e.g. where damage is inflicted on the ship exclusively for the purpose of averting liability, or a minor casualty which does not endanger the safety of the ship. However, the same rule should apply here as in the other cases where damage to the ship is recoverable in accordance with the rules relating to loss in connection with measures to avert or minimize the loss. Hence, § 190, subparagraph 2, establishes that deductions shall also be made in such a case.

Also recoverable without deductions is the normal loss of time for which the insurer is liable under § 182, subparagraph 2, and the depreciation in value where the insurer is liable for such depreciation under § 173, subparagraph 4.

Subparagraphs (b) and (c) correspond to § 77 II C and § 76 No. 2, subparagraph 1, 2nd sentence, of the 1930 Plan.

§ 189. Franchise

This paragraph corresponds to § 76 No. 6 of the 1930 Plan, and Hull Policy A 9.

When drafting the deductible rules two main questions arise. The first question is how often a deductible shall be calculated, and the second is whether the size of the deductible shall depend on the value of the ship or her tonnage.

If a deductible is calculated for each individual casualty, it will be possible to achieve a perfectly clearcut limit for the size of the recoverable casualty. Thereby the claims settlements for the minor casualties will be effectively eliminated. The disadvantage of the method is that it may be difficult to establish what constitutes an individual casualty, especially in connection with continuous rough-weather damage. A large casualty deductible may also create financial difficulties for a shipowner if the ship sustains several casualties in one voyage. Neither the 1930 Plan nor the other Nordic insurance conditions contained any casualty deductible, but the Hull Policy A 9 had a combined voyage and casualty deductible, the view being that due regard should be had to the number of casualties which had occurred between the commencement and termination of the voyage.

A deductible may also be calculated for each «voyage» in the most restricted sense, viz. for the period of time between the departure from one port and the arrival at the next one. Such a rule was in force under § 76 No. 6 of the 1930 Plan and is in effect under § 79 (c) of the Swedish Marine Insurance Plan, and § 157 of the Danish Marine Insurance Convention. The advantage of the method is that you obtain a clearly defined delimitation of the entity to which the deductible refers, but the disadvantage is that the deductible will have a far more onerous effect in respect of short voyages as compared to long voyages.

The deductible could also be tied to the «voyage» in a commercial sense, a «voyage» meaning the time interval which constitutes a natural commercial entity, e.g. an in- and outbound voyage for a liner vessel. Under the Hull Policy A 9 the deductible was to be calculated on such a basis. However, the rule had been modified by the provision that several deductibles must be calculated, depending on the number of casualties which had occurred and the number of ports the ship had called at during the «voyage». The disadvantage of this method is first and foremost the legal difficulty of defining the voyage concept, but also that the freight voyages may vary considerable in terms of duration, and that in consequence the deductible may have an irregular effect depending on the employment of the ship. As already mentioned, the Hull Policy attempted to moderate this effect by letting the deductible vary according to the number of ports of call, but also this may have an arbitrary effect, the method giving general cargo vessels larger deductibles than bulkcarriers.

Finally it was considered calculating one deductible for casualties which occur within a specifically delimited period of time, e.g. a month. The disadvantages of this method is that it will not be possible to single out the minor casualties as effectively as by means of a casualty deductible, and that the assured may feel tempted to attempt to have a casualty attributed to a period which is favourable in terms of the deductible.

Within the Committee there were conflicting views, some of the members preferring a voyage deductible, possibly modified in the manner effected in the Hull Policy, while others preferred a casualty deductible. If a majority of the Committee was in favour of casualty deductibles, this was first and foremost due to the desire to eliminate the claims settlements for the minor casualties. Importance was also attached to the fact that the voyage deductibles will vary according the trade in which the ship is used, and the legal difficulties of defining the voyage concept.

The other main question is whether the deductible shall be calculated in percentage of the assessed value applicable to the hull insurance, or whether it shall be put in relation to the ship's tonnage. The 1930 Plan chose the latter solution. Indications in favour of such a rule are that the costs involved in repairing damage of a certain kind will first and foremost depend on the size of the ship, and not on her

age and value. However, in favour of relying on the assessed value applicable to the hull insurance is the fact that this would give a better picture of the ship's earning capacity and actual value than the tonnage does. The deductible should be in reasonable proportion to the ship's operating budget, and there will be a marked connection between the assessed value applicable to the hull insurance and the operating expenses, in particular insurance premiums and interest on debt, if any. The majority of the Committee was therefore in favour of the deductible being calculated on the basis of the assessed value applicable to the hull insurance.

The basic rule relating to deductibles follows from subparagraph 1 of this paragraph. One deductible shall be calculated for each casualty which the ship has suffered, and the deductible shall constitute one per mille of the sum insured (the assessed value applicable to the hull insurance), however not less than NOK 1,000 and not more than NOK 10,000. In order to avoid difficulties in deciding what constitutes «one casualty» where the ship has during a voyage encountered rough weather and suffered damage in the process, a provision has been added to subparagraph 2 of the paragraph to the effect that damage caused by rough weather, which was sustained during the period of time from departure from one port until arrival at the next, shall be regarded as one casualty. The nature of the calls is irrelevant. Rough weather damage sustained between a port of loading and a port of refuge will thus be subject to one deductible.

Also in other connections it may be doubtful whether it is a question of one or several casualties, e.g. where further damage occurs during repairs. In this respect reference is made to the comments to § 79. The question may also arise when one and the same case of damage is repaired on several occasions. If the damage was fully repaired the first time, but reoccurs because of inadequate workmanship on the part of the repair yard, this must normally be regarded as a new casualty which is subject to a new deductible.

The deductible rules contained in § 76 No. 6 of the 1930 Plan applied only «to particular average damage». It was thus clear that general average contributions and other losses caused by measures to avert or minimize the loss were recoverable, regardless of the size of the amount and without any deductibles (see, however, Hull Policy A 5 No. 3, a—c). Under § 76 No. 6, subparagraph 4, the same applied also to expenses in connection with «ascertaining the damage and preparing the claims statement». These rules have been maintained in subparagraph 3 of this paragraph. 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 in any circumstances receive compensation for the losses he suffers through measures to avert or minimize the loss. Similarly, the insurer should cover in full the expenses incurred after a casualty for the purpose of ascertaining the extent of the damage.

§ 190. Basis for the calculation of deductions in accordance with §§ 186 to 189

Under § 77 I d of the 1930 Plan the ice damage deductions were to be made «from the amount payable by the insurer in accordance with the rules contained in this paragraph or in § 76». This meant that the deduction had to be calculated on the basis of the net amount after the ordinary new for old deductions had been made. In this respect the Plan introduces an amendment, the ice damage deductions under subparagraph 1 of this paragraph having to be made from the gross costs in connection with repairs of the ice damage before machinery damage deduction, if any, is made. The same applies if new for old deductions have been agreed on. In that event each deduction shall be calculated on the basis of gross repair costs, cf. § 191, subparagraph 2.

Subparagraph 2 of this paragraph is discussed in further detail under § 188.

§ 191. Insurance «subject to new for old deductions»

The object of new for old deductions was originally to compensate the advantage which the assured obtains by old and presumably worn parts being replaced by new ones. As it would be very difficult to assess this advantage in each individual case,

standard deductions have been introduced, which increase in accordance with the ship's age, and from time to time also in accordance with the age of the replaced parts.

However, the new for old deductions can no longer be justified in this way in modern insurance. From time to time it will no doubt be obvious that the assured, by means of the repairs, has managed to replace a part which he would have had to renew or repair sooner or later for his own account. However, frequently the nature of the part in question will be such that it is expected to serve for as long as the ship is sailing, only with necessary maintenance in the form of painting, lubricating etc. This applies unconditionally to frames, deck beams and plates in the hull, the outer deckhouses, trestles and cylinder blocks in the main engine, etc. The new for old deductions have therefore more or less turned into a form of deductible. However, in contrast to ordinary deductibles, the size of the deductions will vary depending on the nature of the work performed and the age of the ship.

In practice the new for old deductions have to a considerable extent been abandoned and a more rational form of cover is being used instead. During the revision work it was stated that about half of the Norwegian merchant navy was insured without new for old deductions. On the other hand, agreements are often made for substantial deductibles, e.g. on a round-trip basis.

In connection with the revision of the Plan the aim was to abandon the new for old deductions as part of the normal cover. Originally the idea was to introduce a right to agree on an «own risk», i.e. a clause to the effect that the assured was himself to bear a certain fraction of any damage which the ship might sustain. «Own risk» and «new for old deductions» were thus to represent alternative, optional arrangements. If no specific agreement had been made, only a deductible, which was to eliminate the claims settlement following minor casualties, would be applicable.

The revision work was based on the assumption that there would be no general adjustment of the premium level, and this assumption caused certain difficulties when it came to solving these questions. The Committee obtained figures from a number of mutual associations and companies and attempted to compare the new for old deductions and deductibles applicable according to the former conditions with the deductibles which might become relevant. However, the Committee reached the conclusion that such a comparison would not provide much guidance when it came to determining the deductible. This was not due to the considerable uncertainty which will necessarily characterize all calculations of this kind, but to the concept of averages. The new for old deduction rules obviously result in far larger deductions for older ships than for younger. If ships of both categories were to become subject to an average deductible, it would accordingly involve an increased burden on the younger ships and a reduced burden on the older. In other words, the younger ships would by means of their premiums have to subsidize the cover of the older ships. Such an arrangement would probably not have been accepted in practice.

In order to overcome these difficulties it was necessary on one point to depart from the assumption of an unchanged premium basis. For shipowners, who had previously insured subject to new for old deductions under the 1930 Plan, but who wanted to switch to the Plan's normal cover, individual negotiations about the premium were to be conducted, taking into consideration the age of the ships. Otherwise the system of new for old deductions was maintained, but as an optional arrangement, which has to be expressly agreed in the policy. This type of cover will be of interest for shipowners who prior to 1965 had insurance cover subject to new for old deductions and who prefer to continue with this under the new Plan instead of having their premiums increased. It was an assumption that new for old deductions with the appropriate deductible under the Plan were to be regarded as equivalent to the corresponding deductions under the 1930 Plan and the Hull Policy, so that there would be no general increase of premium as far as these shipowners were concerned.

Subparagraph 1 of this paragraph establishes the principle that new for old deductions shall only be made by virtue of an explicit agreement. If new for old deductions have been agreed on, the deductions shall be calculated in accordance with the paragraphs below. Ice and machinery damage deductions shall be added. Here the

new for old deductions for machinery under § 193 No. 2 are adjusted so as to jointly with the machinery damage deduction correspond more or less to the deductions under the 1930 Plan.

Subparagraph 2 of the paragraph refers to the general rules relating to the calculation of ice and machinery damage deductions contained in §§ 188 and 190. The reference to § 189 implies that a deductible shall apply even if new for old deductions have been agreed. However, in such a case the deductible is only half of what is normal.

§ 192. Calculation of the age

This paragraph corresponds to § 77 I a of the 1930 Plan.

The rules relating to the calculation of age correspond entirely to the rules contained in the 1930 Plan. When a ship has undergone an extensive reconstruction, it may be reasonable for the age to be calculated as from the reconstruction, but this must be agreed specifically. According to § 77 I a, subparagraph 2, 2nd sentence, of the 1930 Plan, the age was to be calculated up to the day the repairs could have been commenced where the assured may claim for unrepaired damage (cf. § 174). It has been considered superfluous to state this rule explicitly.

If a renewal of the main diesel engine entails that also the shafting and propeller are renewed, these parts will follow the age of the new machinery. Otherwise the parts follows the age of the ship. All other parts than the above mentioned follow the age of the ship.

If a renewal of the main turbines entail that gear, shafting and propeller are renewed, these parts will follow the age of the new turbines, otherwise the age of the ship. All other parts than the above mentioned follow the age of the ship. It is in any circumstances assumed that the turbines are renewed completely, and not e.g. only the high-pressure or the low-pressure turbine.

In the event of a renewal of the main boilers the new age will be linked exclusively to the boiler itself with the permanently fitted equipment which accompanies the new delivery.

§ 193. Amount of the new for old deductions

This paragraph corresponds to § 77 II A and C of the 1930 Plan.

The new for old deductions under this paragraph largely correspond to the deductions to be made under the 1930 Plan. However, the rules have been somewhat simplified in relation to the former rules. For example, all casuistics have been deleted from the text. On the other hand this paragraph and §§ 187 and 192, with the assistance of the technical department of the Central Union of Marine Underwriters, provide an illustration by examples of the concepts used in the Plan. The idea is that these examples shall provide a basis for analogous deductions with regard to parts which are not explicitly mentioned.

Subparagraph 1 of the paragraph corresponds to § 77 II A of the 1930 Plan. The distinction between iron and steel ships and other ships has been maintained, and the same goes largely for the age classification of the ships and the amounts of the deductions. The distinction between the various types of repair work, however, has not been maintained. Hence, for a steel ship which is between 15 and 25 years old 1/6 shall be deducted for work regarding wood as well as from expenses in connection with straightening bent iron and steel and labour costs incurred in removing and putting it back in place.

As regards caulking of hull and deck which, under § 77 II A No.2 b of the 1930 Plan, was subject to special deductions reference is made to § 176 (e). According to that provision caulking is not recoverable in any way, unless it forms part of the replacement of damaged parts of the hull or deck. In that event the caulking is subject to the same deductions as the other replacement work.

According to § 77 I e of the 1930 Plan the new for old deduction was to take into account the amount which the insurer saves by second-hand articles being used for the repairs instead of new ones. It has been proposed to delete this rule. The assured

must always consent to such a procedure, and it should in that event be subject to negotiations to what extent the new for old deductions (and, if applicable, the deductible) should be reduced.

Deductions under subparagraph 1 of this paragraph shall be made in connection with repairs of: the hull itself with superstructure, external funnel, rudder and rudder stock, masts, derricks, standing rigging, davits, railing, portholes, windows, bollards, hawseholes, sternpipes, chain pipes, hawse pipe, hatches with covers or shutters, catwalks, foundations, fixed ladders or stairways, panelings, intermediate ceilings, permanent floor covering, wooden decks, close ceilings. Furthermore painting and insulation of such parts.

Subparagraph 2 of the paragraph corresponds to § 77 II B of the 1930 Plan. However, the latter provision had deduction rules common to machinery and accessories. Subparagraph 2 applies only to «machinery and accessories», other accessories being subject to deductions according to subparagraph 3. Furthermore, «machinery» here means the same as in § 187, and reference is made to the comments to that provision.

Subparagraph 3 of the paragraph comprises only the accessories which are not comprised by subparagraphs 1 and 2. In subparagraph 4 it is established that painting of bottom is recoverable without deduction, in so far as this is recoverable under § 176 (d).

Chapter 13

Assured's liability for collision or striking

Hull insurance is first and foremost an insurance of property. However, from former times the hull insurer has also accepted a certain cover of liability, viz. the assured's collision liability. This arrangement was obviously expedient as long as the shipowners were without a general liability insurance. After P. & I. insurance has, at least for the larger tonnage, become just as common as hull insurance, it would seem natural to ask whether the collision liability risk should not be transferred to the P. & I. insurer, which would result in a fundamentally clear line between the hull insurer as property insurer and the P. & I. insurer as liability insurer.

From a practical point of view a negative reply comes automatically: The rule to the effect that the hull insurer also covers the assured's collision liability is so deeply rooted in the marine insurance tradition that a change on an international level is inconceivable. And an isolated Norwegian reform is out of the question.

Even if a reform had been feasible from a practical point of view, it is not even certain that the traditional system should be abandoned. Collisions will normally cause mutual damage. If there is fault on both sides — a possibility which the insurer must always take into consideration — the insured ship's owner 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 will be subrogated to the claim against the oncoming ship in accordance with the principle set forth in § 96. The hull insurer will for that reason alone be interested in the collision settlement. If there is a litigation with the oncoming ship, the hull insurer will often be the one to have the biggest claim. By transferring also the collision liability vis-à-vis the oncoming ship to the hull cover the major practical advantage is obtained that it will normally be one and the same insurer (group of insurers) who is interested on the «active» and «passive» sides in the collision proceedings. If the 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.

However, we cannot do completely without the P. & I. insurer in this connection. The principle that the hull insurer's liability is maximized to the sum insured also

applies to the cover of collision liability. A possible liability in excess of the sum insured, so-called «excess collision liability», is covered under the P. & I. insurance (cf. §§ 226 and 238), where a limitation of the cover up to an agreed sum insured does not exist. In consequence of the Plan's new rule regarding the sum insured in connection with cover of collision liability, however, it will less frequently than before be necessary to impose excess collision liability on the P. & I. insurer, see § 196 and the commentary to that paragraph.

More difficult and from a practical point of view more important is the other line which must be drawn between the hull insurer and the P. & I. insurer's scopes of cover, viz. the line between the collision liability, which the hull insurer shall cover, and liability of a related nature, which shall be covered by the P. & I. insurer. In the Plan this line has largely been drawn in accordance with established practice. However, on a few points adjustments have been made, see further § 194 and the commentary to that provision.

The leading point of view has been that it should be attempted to make the line as clear and as easily implementable as possible. Whether certain types of liability shall come within the hull cover or the P. & I. cover is often of far less importance than having a clear regulation.

§ 194. Scope of insurer's liability

This paragraph corresponds to § 78 of the 1930 Plan.

The first subparagraph of the paragraph contains a positive indication of the liability to be covered by the hull insurer.

(1) The insured ship (including accessories, etc.) must have caused a loss *by collision or striking*. Strictly speaking the word «collision», i.e. striking against another ship, is superfluous alongside the more comprehensive term «striking». However, the term «collision or striking», which is taken from § 78 of the 1930 Plan, is established in practice.

«Striking» also comprises pressure against or the touching of another object. Liability for damage caused by the ship by bumping or pressing against a quay will thus come within the scope of cover. In ND 1919.248 NH *Ida Knutsen* it was held that damage due to pulling does not constitute striking. The hull insurer was therefore exempted from covering liability for the capsizing of a tug used by the insured ship as a result of a sudden tightening of the towing hawser. From a strictly logical point of view it seems difficult to operate with such a line between «striking» and «pulling». The solution in the *Ida Knutsen* case will, however, be maintained under the Plan, see subparagraph 2 (g) of this paragraph. — Damage caused by waves or backwash cannot, according to normal usage, 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 water, 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». § 78 of the 1930 Plan stipulated the condition that the object must «belong to a third party». Hence, the cover would not be valid if the insured ship struck an object which belongs to the assured or is ownerless. As regards damage to the actual object against which the ship strikes, the limitation was superfluous: the assured will not be liable to himself or for damage to an ownerless object (furthermore, damage to the assured's own property is covered by the hull insurer as if the object had belonged to a third party, see § 78 No. 4, cf. also § 77, of the 1930 Plan). The limitation was only significant where the striking was transmitted via the assured's object or an ownerless object to an object which belongs to a third party, damaging this object, e.g. where the insured ship strikes against an ice floe, which in turn bumps against a quay, which is damaged. There is hardly any reason for excluding liability for such damage from the hull cover, cf. the comments under (5) below, and the limitation has therefore been left out in the Plan.

(3) It is *the insured ship «including equipment and cargo»* which must have struck against another object. In this wording is implicit that the hull insurer is only liable for striking damage caused by the equipment and cargo in connection with the ship herself, where it is thus the ship's movements which are transmitted via equipment and

cargo. Striking damage, which equipment and cargo cause by independent movements, must be covered by the P. & I. insurer. If e.g. 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, liability will be comprised by the hull cover. If, however, a crate or bale or the like slips out of the heave during discharging and hits a car on the quay, or a wire snaps with the consequence that a derrick falls down on top of and damages a crane, liability must be covered under the P. & I. insurance.

(4) The hull insurer must further cover the liability imposed on the insured's ship's owner by *the tug, which the ship uses, causing damage* by collision or striking. Such liability may be imposed on the shipowner by virtue of the general liability rules under maritime law, or by virtue of more far-reaching liability provisions in the towage contract. Under § 78 No. 1, subparagraph 2, of the 1930 Plan, the hull insurer was only liable in the former case. In practice this provision caused difficulties. If it is clear that the shipowner is liable for the tug's collision by virtue of the provisions of the towage contract, you will not normally get any decision as to whether the liability could also have been based on general maritime law rules. In the Plan the limitation has been deleted. It should hardly cause any misgivings worth mentioning to transfer the contractual liability for tug collisions from the P. & I. cover to the hull cover. The insurers are in any case protected by the limitation contained in § 76 as regards unusual or prohibited contractual conditions.

(5) The insurer must (within the limits of the sum insured) cover the assured's liability for *the loss which is caused by the striking*. The cover comprises not only liability for damage to objects which directly or indirectly are affected by the striking, and damage which affects interests connected with these objects, but also liability for more consequential results, e.g. damage caused to installations on shore by oil which has leaked out from the oncoming ship in consequence of the collision. The insurer is of course protected by the limitations applicable to the shipowner's liability, including the foreseeability limitation. The question is whether there is reason to stipulate further limitations in favour of the insurer.

§ 78 No. 2, subparagraph 3, of the 1930 Plan stipulated such a limitation in that it exempted the hull insurer from covering liability for damage which, even though «there may be a causal connection between the damage and a collision or striking», has nevertheless been «caused otherwise than by striking or grounding». This provision was applied in ND 1956.318 NH *Bandeirante*, where the ship had run into the lock wall of a dry-dock with the result that the dock gate could not be closed. This resulted in low water in the dock, which in turn resulted in a quay collapsing and a plant having to suspend operations because there was no water for the coolin water pumps. The Supreme Court held that this consequential damage had not been caused by striking or grounding in relation to the 1930 Plan, and that the liability therefore must be covered by the P. & I. insurer. The Supreme Court did not discuss how the line between the two insurers' scopes of cover should be drawn in general terms, holding that the decision «in borderline cases must be based on a case-to-case evaluation». The legal position following the *Bandeirante* judgment was not very clear. It was not only in borderline cases that doubt arose; not even the principle for a delimitation of the scopes of cover was clear. Cf. the discussion between *Rein* and *Vogt* in AfS 2.693—701. An attempt to indicate such a principle was made in ND 1961.21 NV *Askvin*. It is possible that a practical delimitation could have been found on the basis of that decision.

However, one cannot say that any need exists for limiting the hull insurer's liability along such lines. On the contrary, the limitation must be described as not very rational in view of the fact that it results in one and the same liability case being split up more or less arbitrarily and covered under two different insurances without this being necessary or desirable for technical reasons. The Plan has therefore not adopted the «*Bandeirante* limitation».

(6) The insurer covers only the liability which may be imposed on the assured under the laws of the country under which the collision is tried. It is irrelevant whether

it is a liability based on fault or a strict liability. Also liability based on an agreement, e.g. liability for collision damage inflicted on a tug must be covered by the insurer, cf., however, § 76, regarding unusual or prohibited contractual conditions. The assured must exercise a possible right to claim limitation of liability.

Liability need not necessarily be determined by a final judgment or award. See § 78.

(7) § 78 No. 1, subparagraph 3, of the 1930 Plan required the hull insurer to cover liability caused by striking, which is a result of measures taken for the purpose of averting another liability for striking. The provision was aimed at the «assumed ships' collision», cf. section 223 a of the Norwegian Maritime Code: The insured ship has e.g. manoeuvred incorrectly in narrow waters; in order to avoid a collision which may involve a risk of the loss of many lives, an oncoming ship makes for the beach where she runs into and damages a pier. It is clear that the insured ship's liability to the owner of the pier had to be covered by the hull insurer. However, this would also have followed from the general rules contained in § 36 of the 1930 Plan regarding the insurer's liability for costs of preventive measures. The question was therefore: Was the provision contained in § 78 No. 1, subparagraph 3, a casuistic and superfluous repetition of the principle contained in § 36? Or was it to be regarded as an exhaustive regulation of the cover of liability incurred by measures taken to avert some other liability? In the latter case the «averting liability» would only be covered when caused by «collision or striking». The question is discussed by *Strøm-Olsen* in Afs 2.647—52. He assumes that § 78 No. 1, subparagraph 3, must be supplemented with § 36.

In order to avoid creating a similar uncertainty the rules relating to «assumed collision liability» has been deleted in the Plan. It will then be clear that the rules relating to loss incurred by measures to avert or minimize the loss contained in Chapter 4, Subdivision 2, of the Plan will be fully applicable also to liability incurred for the purpose of averting collision liability.

Subparagraph 2 of the paragraph stipulates under (a) to (h) exceptions from the basic rule contained in subparagraph 1.

(a) Liability arising while the ship is engaged in towing

The towing of other vessels, of a dry-dock, a raft etc., entails a reduction of the towing vessel's freedom of movement and a corresponding increase of the collision risk.

§ 78 of the 1930 Plan did not exempt the hull insurer from covering liability for collisions occurring while the insured ship is engaged in towing. However, it is possible that the insurer could invoke the rules regarding increase of risk. The Hull Policy's A 12, which exempted the hull insurer from liability for damage to the towed vessel or towed objects, but which concluded by saying that the provision does not entail any right for the assured to use the ship for towing without the insurer's permission, pointed in that direction. On the other hand, an indication against regarding the towing as an increase of the risk was contained in § 78 No. 1, subparagraph 2, of the 1930 Plan, which provided that the insurer also had to cover liability for striking damage caused by the towed vessel, if the assured is subject to such liability according to general maritime law rules, and provided it was stated in connection with the taking out of the insurance that the ship was to be used for towing.

Under the Plan the hull insurer's cover of collision liability is suspended entirely for the duration of the towage. The assured cannot claim cover of the liability, even where it has been ascertained that the towage has had no influence on the course of events. The evidence of a lack of causal connection will be difficult to adduce. From a legal point of view it means a simplification that through the suspension rule a dispute on this point is ruled out.

Even where the collision occurs before the towage has commenced, i.e. before the towage connection has been established, or after completion of the towage, the insurer is exempted from covering the liability if it is proved that the collision was caused by

the towage. E.g. the ship collides with the ship which is to be towed during an attempt to establish the towing connection.

The limitation of the cover of liability does not apply where liability arises in connection with a salvage, or a salvage attempt, undertaken by the insured ship, provided the salvage or salvage attempt is «permitted» under § 35, subparagraph 2. The insurers' interest in encouraging salvage operations suggests that they automatically give the assured normal liability cover in such cases.

The collision liability which falls outside the scope of the hull insurance is, as mentioned above, normally covered by the P. & I. insurer. However, this does not apply to the liability comprised by this subparagraph (a), see § 238, subparagraph 1 (b). The intention is that liability shall, as hitherto, be covered by the hull insurers, but only by special agreement, possibly against an additional premium.

(b) Liability for personal injury

Liability for personal injury has always been excluded from the hull cover, regardless of whether the injured persons were on board the insured ship, the oncoming ship or ashore, cf. § 78 No. 2, subparagraph 1, of the 1930 Plan. The liability is covered by the P. & I. insurer, cf. § 225.

(c) Liability for «other loss caused to the insured ship's passengers and crew»

By way of example of such liability is mentioned 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 41 of the Seamen's Act), and liability for loss of luggage and crew's effects. As regards the latter case, it will also follow from subparagraph (d) that liability falls outside the scope of the hull cover.

(d) Liability for damage to or loss of cargo or other objects on board the insured ship

Liability for damage to the insured ship's own cargo is a typical P. & I. risk. It is therefore natural that the P. & I. insurer also assumes such liability in cases where it has arisen as a result of collision or striking. § 78 No. 2, subparagraph 1, of the 1930 Plan also contained this rule.

Collision liability in respect of own cargo will be a fairly infrequent occurrence. If the collision is judged under Scandinavian law or in accordance with 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. Any recourse claim from the oncoming against the transporting ship is out of the question. And in the relationship between the cargo owners and the transporting ship the Hague Rules will normally exclude liability. The fault committed by the assured is normally an error «in navigation or in the handling of the ship», and the assured will then be protected against liability cf. section 4 No. 2 a of the Bill of Lading Act and section 122 of the Maritime Code. However, the possibility of liability arising is not entirely out of the question. The collision may be attributable to a deficiency as regards seaworthiness which existed at the commencement of the voyage and of which the Master of the ship was aware. In such cases liability follows from section 4 No. 1 of the Bill of Lading Act. Liability for damage to own cargo may further arise in connection with collisions which are judged under American law. The U.S.A. have not ratified the Collision Convention of 1910 and do not have the Convention's rule to the effect that the colliding ships are only liable on a pro-rata basis 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 charged with half of the amount paid by the oncoming ship. That such «indirect» cargo liability shall be regarded as a liability vis-à-vis own cargo in relation to the rules regarding the hull insurer's cover of collision liability is assumed in 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* in AFS 4.488—494. It has therefore been explicitly maintained in (i) of this subparagraph.

(e) Liability to charterers or others who have an interest in the insured ship

The provision corresponds to § 78 No. 2, subparagraph 2, of the 1930 Plan.

A collision may lead to a longer or shorter suspension of operations of the ship and hence to a loss for cargo owners who have to wait for the cargo, 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 also for loss as the one mentioned. Such liability is a typical contractual liability, and it would not be natural to bring it under the hull cover. In practice the assured will furthermore in the vast majority of cases be covered by exclusion-of-liability clauses in the contract of affreightment.

(f) Liability for loss caused by cargo or bunkers after a grounding or striking against ice

In connection with a collision or striking the ship's tanks will often be damaged with the result that liquid cargo — oil, petrol etc. — and bunkers will spill out and cause damage, e.g. by pollution or by a fire breaking out. Also other cargo which is washed overboard may cause damage by pollution, by obstructing traffic, etc.

In the event of a collision with another ship, striking against a quay, etc., liability for damage caused by the cargo should be borne by the hull insurer. The fact is that the hull insurer enters the picture here as regards the actual striking damage and it would therefore be inexpedient to split up the insurance cover. In certain cases a splitting up would be practically impossible to implement, e.g. where two tankers collide and a fire breaks out in the cargo.

The position will be different where cargo or bunkers cause damage after a grounding or striking against ice. In such a case no liability will normally arise for striking damage caused to a third party. The entire liability situation is remote from ordinary collision cases and belong naturally to the P. & I. cover.

However, also in this respect the rules relating to liability for measures to avert or minimize the loss will prevail over the special rules of cover. If oil is pumped out of the ship in order to make it lighter after a grounding, the assured may claim that the hull insurer covers liability for damage caused by the oil under the rules contained in Chapter 4, Subdivision 2, of the Plan.

(g) Liability for loss caused by the ship's use of anchor, mooring lines, etc.

If the anchor, mooring lines etc. cause damage by independent movements, liability for the damage will fall outside the hull insurer's scope of cover by virtue of the rule contained in subparagraph 1 of this paragraph to the effect that it must be «the ship including equipment and cargo» which has caused damage by striking, cf. item (3) in the commentary to that subparagraph. Now it will often be difficult to draw the line between such cases of damage and cases where the damage is caused by the ship's movement being transmitted via the anchor chain, mooring line, etc. If the anchor causes damage via its own weight, or via the anchor while being weighed hooking on to a cable, the limitation contained in subparagraph 1 becomes applicable. If, on the other hand, it picks up a cable while dragging, it is the ship's movements which are decisive. If a gangway is handled carelessly when being brought into position with the result that it falls down on top of and damages cargo on the quay, the liability is no concern of the hull insurer's according to the rule contained in subparagraph 1, whereas the solution will be the opposite if the same accident happens as a result of the ship making a sudden movement the moment the gangway is being made fast. Subtle delimitations of this nature are unfortunate from a practical point of view. Liability for various damage caused by the use of the anchor etc. should be regarded as an entity and be referred to one or the other group of insurers.

§ 78 No. 1, subparagraph 1, 2nd sentence, of the 1930 Plan required the hull

insurer to cover liability for «damage caused through striking of objects which are on board the ship, including deck cargo and lifeboats swung out in the davits» and, on an equal footing with this, «damage caused by anchor and anchor chain». Anchor and anchor chain are thus regarded as objects which «are not on board the ship». Immediately after the rule regarding anchor and anchor chain § 78 provided that the insurer was not liable in other cases «when the damage was caused by the ship's equipment». From this may be deduced that mooring or towing lines, loading and discharging pipes, etc. were to be regarded as accessories which are not on board, and that liability for damage caused by such objects was no concern of the hull insurer's.

The Plan maintains the solution in the 1930 Plan as far as damage caused by mooring lines etc. is concerned. However, the special rule regarding anchor and anchor chain has been deleted. All liability for damage caused by external accessories should be covered by the same insurers. And, in view of the fact that such liability will rarely arise in connection with the actual collisions and is in actual fact rather remote from the ordinary collision liability, it seems natural to place it within the scope of the P. & I. cover.

It is only liability for damage caused by the ship's use of the anchor etc. which is exempted from the hull cover. In connection with a collision an anchor, or a gangway hoisted up and fastened to the ship's side, may cause damage by striking against the oncoming ship. However, this does not constitute damage caused by the use of the said objects.

It is not the intention that any damage inflicted during the use of anchor, mooring lines, etc. and to a greater or lesser extent caused by such use, shall be regarded as «caused by the ship's use» of the objects. The damage is only caused by the use when the striking or the pulling was caused by or transmitted via the anchor or 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 during manoeuvring away from the quay before the mooring line has 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 the striking would have been averted if the ship's freedom of movement had not been hampered by the towing or mooring line.

Item (g) also excludes from the hull cover liability for damage to or loss of anchor, mooring lines, loading and discharging pipes, gangways etc. which the ship uses. Such liability will only arise where the object concerned belongs to a third party, e.g. where the insured ship by a jerk or a pull causes a loading line which belongs to the cargo consignee to snap. However, in consequence of the rule contained in § 77, the limitation will also be applicable where the damage afflicts objects which belong to the assured. Liability (and damage) of this nature is rather remote from the typical striking liability and should be covered under the P. & I. insurance. If, however, the ship runs into a vessel at anchor, which as a result loses anchor and anchor chain, such liability shall obviously be covered by the hull insurer.

(h) Liability for the removal of the wreck of the insured ship

This provision states expressly, to avoid any misunderstanding, that the hull insurer does not cover liability for the removal of the wreck of the insured ship. This is in accordance with the 1930 Plan, cf. § 47, subparagraph 2, and § 78 No. 2, subparagraph 3. Liability for the removal of the wreck must here, as otherwise, be covered by the P. & I. insurer, cf. § 230 and § 104, subparagraph 1. (Translator's note: See, however, § 167.)

(i) Reimbursement of amounts which a third party has paid as compensation for loss as mentioned under (a) to (h)

This provision is primarily aimed at the indirect cargo liability under American

law, see further the commentary to (d). However, the provision may also be applicable in other cases where the assured is jointly liable with someone who pays compensation to the injured party and subsequently claims recourse against the assured. By way of example may be mentioned liability to passengers who are injured in a collision where the fault lies with both ships. The two shipowners are here jointly and severally liable for the personal injuries. If the owner of the oncoming ship pays compensation for such injuries, he may make a claim for a share of the amount paid equivalent to the insured ship's degree of fault, reimbursed by the said ship's owner. (In this connection possible exclusions of liability are disregarded, cf. section 220, subsection 4, of the Maritime Code). Such indirect personal injury liability is no more covered under the hull insurance than a direct personal injury liability, cf. (b).

§ 195. Limitation of liability based on tonnage or value of more than one ship

When 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 to the extent of several of the involved vessels, in so far as the limit of liability is calculated on the basis of several vessels' value or tonnage. See further *Brækhus* in ND 1949.633- 51. If the vessels are insured with different insurers, it will be necessary to have a rule regulating the apportionment of the total insurer liability on the various vessels. Two possible solutions have been proposed: Apportionment on a discretionary basis according to fault shown by each individual vessel, and apportionment in relation to each individual vessel's tonnage or value (depending on whether the limitation is based on tonnage or value respectively). The Plan has, in accordance with ND 1959.370 *NV Bamse*, taken the latter solution for a basis. As shown in the ratio decidendi of the *Bamse* judgment, this solution is the simplest to practice and the one that fits in best with the entire system of rules.

When the limitation of liability is based on the value of the vessels, freight is also taken into consideration (e.g. under American and German law), or an additional amount is calculated which is to represent freight (in accordance with the Brussels Convention of 1924 thus 10% of the ship's value prior to the collision). When applying this paragraph, the increase of the individual ship's liability limit, which the freight or the equivalent additional amount represents, shall be disregarded.

§ 196. Insurer's maximum liability in respect of one casualty

This paragraph is new.

In addition to the comments to the paragraph given in the commentary to § 79, the following should be mentioned:

Based on the principle that the P. & I. insurer should, in so far as possible, only participate in the collision settlement in case of privity, the rational thing to do would be to apply the insured ship's limitation amount as a limit for the hull insurer's liability for collision compensation. However, on the part of the hull insurers it was submitted that their maximum liability would in any circumstances have to be fixed at a specific amount, in particular with a view to reinsurance. The Committee therefore considered introducing a rule to the effect that the hull insurer is liable for collision compensation up to the ship's limitation amount, however, not in excess of an amount equivalent to the sum insured by the hull insurance. Such a rule would probably in most cases lead to the desired result, in view of the fact that the limitation amount will in most cases be lower than the sum insured under hull insurance. Against the proposal it was in particular submitted that the ship's limitation amount will often be uncertain, especially under American law. It would then be difficult to delimit the hull insurer's liability where it was not necessary in other relations to establish the ship's limitation amount. This was a situation which would *inter alia* arise in case of privity on the part of the shipowner and where in a both-to-blame settlement the other ship would make a limitation in respect of the single liability amount. To this should be added that it may sometimes be doubtful what country's laws shall be decisive for the right to limit liability.

The Committee therefore reached the conclusion that the hull insurer's liability for collision compensation shall be subject to only one limitation, which shall be equivalent to the sum insured under the hull insurance.

§ 197. Franchise

This paragraph supersedes § 78 No. 1, subparagraph 4, of the 1930 Plan. It is worded in accordance with the same principles as the provision concerning deductible for hull damage, § 189, and reference is made to the comments to that paragraph. In this paragraph a provision has furthermore been added 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 damages made against the insured exceeds the deductible.

Chapter 14 Insurance of ships under construction

The 1930 Plan did not contain any rules regarding insurance of ships under construction. The Central Union of Marine Insurers had prepared a «Building Clause» consisting of 13 items, which were applied in connection with the Hull Policy when insuring ships under construction. Otherwise Norwegian shipowners have to a large extent taken out their building insurances on English conditions, Institute Builders' Risk Clause». The Swedish Marine Insurance Plan contains rules as to building insurance in §§ 126—131, and the Danish Marine Insurance Convention in §§ 172—175.

The Plan is to a certain extent based on the former Norwegian Building Clause. However, the Committee has used the existing sources relatively freely and attempted to draw up complete and rational conditions for the insurances which it may be relevant to take out for a ship under construction. A certain regard has been had to the standard contract of 6 March 1962 regarding the building of ships at Norwegian shipyards, prepared by a committee set up by the Norwegian Shipowners' Association and the Norwegian Shipbuilders' Association (hereinafter called the Standard Contract).

A ship will normally be built in accordance with a building contract entered into between a shipowner and a shipyard. Such a contract is subject to the general rules of the law of contracts regarding labour contract. Unless otherwise provided, the risk for the newbuilding will pass to the buyer on «delivery», cf. section 17, subsection 1, of the Sale of Goods Act. Until delivery has taken place the shipyard bears the risk of the accidental loss of the ship. If the ship is totally destroyed with the effect that the shipyard's obligation to deliver ceases, the yard must accordingly refund the buyer the instalments on the building price which he has paid during the period of construction. The «total-loss risk» for the yard therefore consists in losing the investments which it has made in the newbuilding without being entitled to claim the building price, or a share of the building price, from the buyer. To this must be added the risk for partial damage, consisting in the yard having to repair for its own account any damage to the newbuilding caused by minor accidents before the risk has passed to the buyer.

As a rule the building sum agreed on will exceed the calculated building costs. The difference, which constitutes the yard's profit on the building contract, will be lost if an event occurs which results in the project being abandoned. If such an event is due to a risk comprised by the insurance, the yard should be entitled to get compensation for its anticipated profit on the building contract.

Also the buyer runs a risk during the period of construction which it should be possible to cover by insurance. In the first place the building contract will often provide that the buyer shall for his own account procure certain parts or material, which shall be incorporated in the ship. If such parts are lost or damaged while they

are at the shipyard — before or after their incorporation in the ship — this will be the owner's, i.e. the buyer's, risk, and not the yard's. Further, the buyer will have an interest in the newbuilding being delivered at the building price agreed on. If the value of the completed ship will exceed the building price, he will suffer a corresponding loss if no delivery is effected. The buyer should therefore, in the same way as the shipyard, have a right to insure his anticipated profit on the building contract.

The building contract will normally provide that the buyer shall become the owner of the newbuilding and of the parts and material which the shipyard has procured for the newbuilding by stages in accordance with his payments of the instalments on the building price, cf. the Standard Contract, § 6, subparagraph 2. However, this provision is only aimed at giving the buyer legal protection vis-à-vis the shipyard's creditors and does not imply that the risk regarding newbuilding or materials is transferred to the buyer. It will therefore not have any direct bearing on the wording of the insurance conditions. However, if the shipyard's solvency fails, at the same time as the newbuilding is destroyed and the contract ceases to be in effect — a situation which is not inconceivable — the buyer will need the same protection as regards the paid instalments as the protection a mortgagee needs as regards his claim under the mortgage. The conditions must therefore ensure that the shipyard, or its bankrupt estate, will not receive a total-loss compensation without the buyer at the same time getting his advance payments refunded.

From time to time a shipyard may also build a ship for its own account, e.g. in order to fill a vacant berth or to keep its workers employed. In that event the yard has interests, both as builder and as buyer, and must accordingly be entitled to take out an insurance which meets both needs.

Chapter 14 of the Plan contains special subdivisions dealing with insurance of the shipyard's interest by insurance of ships under construction for account of a third party (Subdivision 1), with insurance of purchaser's interest in ships under construction for account of a third party (Subdivision 2), and with insurance of the shipyard's interest when building a ship for its own account (Subdivision 3).

The Plan is only aimed at insurance in connection with contracts regarding the building of *ships* in the proper sense. The Committee realized that similar insurance needs may also exist for yards which have specialized in the building of certain components, in particular main engines. However, it was stated that such a yard may insure its current production under a general annual policy.

It is only necessary to take out separate insurances for the ships which the yard is building. On the other hand, there will be nothing to prevent the application of the rules contained in this chapter in connection with the insurance of a contract for the building of an engine, or some other part of a ship.

An indication of the relevant perils causes problems in the building insurance. As will follow from the above, the insurance covers, *inter alia*, against any physical damage to the newbuilding during the period from the laying of the keel until delivery. In this respect the insurance will — like other maritime insurance — comprise «all perils to which the interest may be exposed», cf. § 15. Actual «marine perils» will not be relevant until the ship has been launched and is in the water. While the ship is on the slip perils will first and foremost consist in fire, explosion and other accidents of a technical nature, catastrophes of nature, acts of war (in connection with war-risk insurance) and the like.

The insurance comprises both damage to the newbuilding resulting from these or other perils, and the fact that the actual building contract ceases to be in effect in consequence of physical damage to the newbuilding or the shipyard. In this respect it will be necessary to resort to the general maxims of the law of contracts regarding breach of implied conditions. A total loss will only exist if the damage to a ship or a building yard is so extensive that one or both parties may demand to be released from the duty to perform. With a view to this eventuality the purchaser as well as the yard may insure their anticipated profit on the contract. However, not any event, which results in the ship not being completed, will entitle the assured to claim for a total loss. If the contract is cancelled because one of the parties defaults on his obligations,

this is a strictly commercial risk, which cannot be covered by insurance, cf. the exception for insolvency contained in §§ 15 and 16. Nor will defaults of a different nature trigger a loss, e.g. an error on the part of the building yard which is so serious as to entitle the purchaser to cancel the contract. In this connection should also be mentioned § 206, subparagraph 1, 2nd sentence, which explicitly excludes error from the perils covered as far as the repair of partial damage is concerned.

Under the Plan an insurance against war perils also does not cover any termination of the contract in consequence of the insured perils. Requisition is exempted, cf. § 205, which provides that the contract must have terminated «in consequence of damage to or loss of the ship or damage to the building yard». Requisition by Norwegian or allied State authorities will be exempted by virtue of the general provisions contained in § 16 (b) alone. However, the Committee assumed that nor would the requisition undertaken by foreign State authorities, e.g. by an occupying power, be suitable for cover under an insurance of ship under construction.

By an insurance of the building yard's interest the yard is the «assured» in relation to the provisions contained in the general part of the Plan. In particular should be noted that § 45 relating to unseaworthiness is applicable. If the ship capsizes during launching or during a trial run the cover will therefore cease to be in effect if the yard's management has shown negligence. With which persons the building yard must accept identification must be decided on the basis of the rules contained in §§ 59 and 61.

Subdivision 1 Insurance of ships under construction for account of a third party; builder's interest

§ 198. Objects insured

This paragraph corresponds to Article 1 of the Building Clause.

The enumeration in subparagraph 1, (a) - (c) comprises the financial effort made by the building yard from time to time in order to build the completed ship. The efforts do not merely consist in the actual newbuilding as it stands on the slip (here called «the ship»), but also in parts and materials which the yard has made or procured for its own account to be used in the ship. Admittedly, the building contract will normally provide that a shipowner who pays the prescribed rates acquires «ownership» of the newbuilding and of parts and materials marked with the ship's hull No. However, as mentioned above, this provision is only aimed at the legal protection against the yard's creditors, whereas the financial risk of damage to or loss of ship and materials will still lie with the building yard. It was discussed whether there was reason to make the cover of parts and materials subject to the condition that they are marked with the ship's hull No. or the like, but the conclusion was reached that such a formal requirement might appear unreasonable in certain specific cases. However, the builder will obviously have the burden of proof that the part, which has not yet been installed in the ship, is in actual fact meant for the ship.

Under subparagraph 1 (c) the insurance covers also the building yard's expenses in connection with the planning of the ship. The subject-matter insured in this connection is not the concrete drawings, models etc. — they will normally be replaceable at little expense if they are damaged — but the general costs which the builder has had in his own planning department and for consultants retained in connection with the planning of the ship. If the building contract becomes void, such expenses will normally be wasted. Admittedly, it may be objected that if the ship is part of a series which the shipyard is to build, the costs can be distributed among all the ships of the series. If it is quite clear that the existing plans will be used in connection with the building of subsequent ships, it may be said that «the assured's expenses for drawings and other plans concerning the ship» only comprise the portion of the expenses which is covered by the assured's contract. But if this is not perfectly

clear, no deduction shall be made from the compensation on the basis of the possible value which the plans may have in connection with the performance of subsequent contracts.

The rules contained in subparagraph 1 must also be compared with § 202. Unless otherwise agreed, the insurance will not take effect until from the laying of the keel, and the building yard's investments in planning and materials would not be covered until from that point in time. But there is, of course, nothing to prevent agreements to the effect that the investments shall be insured from an earlier point in time.

At the time of delivery the insurable value will be equivalent to the contractual building price (possibly with certain increases, cf. § 199). If the ship is lost immediately before delivery is to take place, the building yard will receive the building price as a total-loss compensation, thereby getting full cover of its profit on the contract. If damage, which is so extensive as to make the builder's duty to deliver lapse, occurs at an earlier stage, the insurable value and thereby the total-loss compensation under § 200 shall constitute a portion of the contractual building price equivalent to the investments which the yard has made at that time. The building yard will therefore in such a case only obtain compensation for a corresponding share of his anticipated profit under the contract. Subparagraph 2 of this paragraph is aimed at giving the building yard a stronger position, entitling it to make it a condition that the insurance shall at all times comprise the full profit which the building yard expects to make on the building contract. If the building yard has stated the amount of this anticipated profit at the time the insurance was taken out, that amount shall be regarded as the assessed insurable value, cf. § 200, subparagraph 3. The effect of such an agreement will therefore be that the building yard, in addition to the investments it has made up to the time when the newbuilding was damaged, will also obtain compensation for its anticipated profit to the full extent of the amount.

The place of insurance is specified in subparagraph 3 of the paragraph. A shipyard will often have its activities spread over a number of places, partly in the form of warehouses and factories close to the slips, partly by having its slips located in several different ports. Under subparagraph 3 of this paragraph the parts and materials intended for the insured newbuilding shall be comprised by the insurance, regardless of on what premises or within what areas of the shipyard they may be. If the parts or materials are made or stored relatively close to the slip, it would be impractical to have to take out a separate insurance for each individual transport to the building site. The rule is therefore to the effect that also the transport risk shall be comprised by the insurance, provided the transport can be regarded as «local», i.e. is carried on between premises or areas within the same town or port area. If the parts have to be sent a branch of the building yard which is in another port, the transport risk should be evaluated separately and be covered by a separate insurance. On the other hand, the insurance will be in effect during a towage of the completed hull, but an additional premium will be charged, cf. § 204 (a).

Where the building yard has ordered the main engine or other parts for the ship from subcontractors, the risk will pass to the building yard when the part is «delivered» in the sense provided by the law of sales. As a rule the agreement will be to the effect that the building yard bears the risk during transport from the supplier's works. Such transport must, like long transports between the building yard's own branches, be evaluated as a separate risk and be covered by a separate insurance. However, a building yard will quite often be interested in postponing the picking up of the part in question from the supplier until the work on the newbuilding has progressed so far that the part can be installed. Under section 17, subsection 2, of the Sale of Goods Act, the building yard will in such cases bear the risk in respect of the part while it is stored at the supplier's, and subparagraph 3 extends the construction insurance to comprise such parts as well for as long as the transport has not commenced.

§ 199. Insurable value at time of delivery

This paragraph corresponds to Articles 2 and 3 of the Building Clause.

The calculation of the insurable value causes special problems in the building insurance. According to the general rule the insurable value is the full value of the interest at the inception of the insurance, cf. § 7. This rule obviously cannot be applied in the building insurance. When insuring the builder's interest the insurable value at the inception of the insurance will correspond to the investments and planning, which he has made at that time with a view to the newbuilding, and subsequently increase through the insurance period until at the end of the insurance period — delivery of the completed ship — it will be equivalent to the contractual building price. As regards the purchaser's interest, the insurable value will partly increase gradually as and when he by himself acquires materials and parts which are to be incorporated in the ship, and partly it will constitute a constant amount equivalent to the profit he expects to obtain by having the newbuilding delivered at the agreed price. Special rules relating to the insurable value have therefore been drawn up, partly with a view to insuring the building yard's risk and partly with a view to insuring the purchaser's risk.

If the newbuilding is damaged immediately before delivery was to have taken place and the building yard's obligation to deliver lapses in consequence thereof the building yard's loss will be equivalent to the entire payment it should have received from the purchaser. The amount will be determined partly by the original building price which was stipulated in the building contract, partly by the modifications or increases which the parties may later have agreed on, and finally by the sliding-scale increases which may have been incurred if it is part of the agreement that the building price shall increase as wages and prices of material go up. The rules relating to the assessed insurable value must be worded so that the shipyard will, to the greatest extent possible, obtain cover in respect of the entire payment, while on the other hand the insurer has a possibility of assessing the extent of his risk.

When taking out the insurance the shipyard must of course state the building price which has been agreed upon and which forms the basis of the entire insurance. Supplements to the contract, which involve an increase in the building price, are in principle only covered by the insurance if the insurer has been notified thereof. Minor amendments may, however, be effected without the insurer being notified, provided they do not collectively increase the building price essentially.

As regards the major increases, the rule is contained in subparagraph (b) of the paragraph. The effect of such an increase not being declared for insurance is that the work, with which the increase is concerned, and the corresponding part of the payment are not covered by the insurance. If such work sustains partial damage, the repair costs shall not be covered, whereas on the other hand the costs of repairing damage, which affects work forming part of the original contract, are fully recoverable. Hence, here the general rules as to under-insurance, which would have resulted in a pro-rata reduction of the compensation for each and every damage, shall not be applied.

However, it would be unreasonable to demand that the building yard shall notify the insurer of each and every change of plans which it has agreed on with the buyer and which involves a minor increase in the building price. Under subparagraph (d) of the paragraph minor changes shall therefore automatically be comprised by the insurance, provided they do not altogether exceed 2% of the original building price. When the declarations of increases have been brought up to date and the latest increases declared for insurance, the parties will have a margin of a further 2% of the original building price. The work to which such minor increases relate will be covered by the insurance in the event of it being damaged, cf. § 206, subparagraph 2.

An agreement about sliding scale in the event of a price increase may result in a very considerable increase of the originally agreed building price. As building contracts are often entered into long before the work is commenced, a substantial part of the sliding-scale increases may have accrued already before the work has commenced and the insurance been taken out. It is possible to calculate the amounts of these increases with a fairly high degree of accuracy. The subsequent building time will rarely exceed one year, and the price increase during that period of time may be slight compared with the increase that occurred during the waiting period. Subparagraph (c) therefore

establishes that the insurer is liable for the full sliding-scale increases, provided the insurer was informed when the insurance was taken out that a sliding scale had been agreed upon, and that he has furthermore been informed of the amount of the increase which at that time must be assumed to have accrued. If too low an amount is stated, the insurer shall be entitled to limit his liability to the amount stated plus the sliding-scale increases accrued during the insurance period. On the other hand there will be no risk involved in giving too high an amount of accrued sliding-scale increases, as the sum insured and the premium will in any event be adjusted after expiry of the insurance period.

§ 200. Insurable value prior to delivery

As mentioned in the introduction to the chapter, the insurable value in the building insurance will increase throughout the insurance period as and when investments are made in the ship. At the inception of the insurance the insurable value will be the investments in planning and material which the building yard has made at that time, and at the end of the insurance period it will be equivalent to the payment for the ship calculated according to the rules contained in the preceding paragraph.

This paragraph gives two principles for the calculation of the insurable value at a time prior to the time of delivery. If the building yard has not effected a separate insurance in respect of its anticipated profit on the building contract, the insurable value shall constitute a proportion of the insurable value at the time of delivery equivalent to the amount of investments made by the building yard. Let us e.g. assume that the newbuilding is destroyed and the yard's duty to deliver ceases to be in effect at a time when an amount of NOK 9 million has been invested. The yard's estimates show that it would have cost NOK 18 million to complete the ship, while the payment, calculated on the basis of the rules contained in § 199, must be assumed to have constituted NOK 20 million. The insurable value is hence $9/18$ of NOK 20 million, or NOK 10 million.

As will be apparent, such a calculation will only afford the yard cover in respect of a proportionate share of the anticipated profit on the building contract. In the example given only NOK 1 million will be recoverable of an anticipated profit of NOK 2 million for the yard. However, under § 198, subparagraph 2, the building yard may take out a separate insurance for its anticipated profit on the contract. If a specific amount of anticipated profit has been stated, such an amount shall under subparagraph 3 be regarded as the assessed insurable value. Under subparagraph 2 the anticipated profit shall be included in full in the insurable value at any time, whereas the calculation of the rest of the insurable value shall take into account the investments made. If the building yard's profit in the above example is assessed at NOK 2 million, the insurable value will thus on cancellation of the contract be NOK 11 million.

§ 201. Sum insured

In the building insurance the sum insured must be adjusted on expiry of the period of insurance when it is clear how large the total building price covered by the insurance is. The sum insured therefore cannot, like in other lines of business, be stipulated on conclusion of the agreement as a binding maximum for the insurer's liability. Underinsurance is conceivable if the building yard has intentionally wanted to keep part of the building price uninsured. The sum insured will form the basis on which the premium is calculated, cf. § 203.

According to this paragraph the sum insured is the amount which is declared for insurance, plus the amounts which under § 199 (c) and (d) shall automatically be co-insured. The term «that proportion of the building price» is meant to make the paragraph directly applicable when the insurance is apportioned among several co-insurers. «Declared for insurance» are both the original contractual building price and the increases declared under § 199 (b). To this shall be added the sliding-scale increases which have accrued during the period of insurance and the agreed increases,

which do not collectively exceed 2% of the original building price. It is accordingly not possible to finally determine the sum insured until the financial settlement between the buyer and the building yard is clarified.

At the beginning of the insurance period the sum insured will be considerably larger than the financial risk which the insurer takes, in view of the fact that the sum insured will also comprise investments which have not yet been made. If the ship should at that time sustain extensive damage without the yard's obligation to deliver ceasing, the sum insured will provide ample cover for the rebuilding costs. If on the other hand the newbuilding sustains greater damage towards the end of the insurance period, and the building yard is liable to repair the damage, the sum insured, such as it is defined under subparagraph 1, may not be sufficient to cover the rebuilding. This will especially be the case if there has been a sharp increase in prices during the building period. Hence, under subparagraph 2 the yard may take out a special additional insurance against this risk. An insurance of this nature is also assumed in § 7, subparagraph 3, of the Standard Contract. However, the contract does not distinguish clearly between insurance of the yard's risk and insurance of the newbuilding's added value for the purchaser, cf. § 7, subparagraph 6, 2nd sentence, of the Contract.

The rule contained in subparagraph 3 is a regulation which is necessary to enable the insurer to make the definitive adjustment of the premium.

§ 202. Period of insurance

This paragraph corresponds to article 4 of the Building Clause.

Work on the building slip will often start by a prefabricated section being put down, and the processing of parts and sections for the ship may already have been going on for a long time. In practice the yard will therefore normally take out the insurance from a specific date. In case the date of commencement is not indicated, the Plan maintains the earlier rule to the effect that the insurance is operative from the laying of the keel, i.e. from the time work on the building slip commences.

The insurance terminates when the risk in respect of the ship passes to the purchaser, i.e. when the ship is «delivered» for the purpose of the law of sales. § 7, subparagraph 7, of the Standard Contract contains a further specification of what shall be regarded as the time of delivery. If no such agreement has been made, the time will depend on the parties' actual acts, assessed in the light of general principles under the law of contracts and the provisions of the building contract in general.

It is conceivable that the hull insurance under the terms agreed on comes into force despite the fact that the building contract does not lapse. In such an event the rules relating to double insurance may have to be applied to the relationship between the two insurers.

If the ship is ready for delivery, but is not delivered for reasons attributable to the purchaser, the risk will under section 17, subsection 2, of the Sale of Goods Act, pass to the purchaser when the ship according to the agreement can be taken over and the yard is ready to deliver. In such situations it is highly conceivable that the purchaser has failed to arrange for a separate hull insurance. The building insurance should therefore continue to be operative to allow time to resolve the insurance question. Under subparagraph 3 both the yard and the insurer may terminate the building insurance subject to 7 days' notice. Depending on the circumstances, the building yard will be entitled to claim the premium refunded from the purchaser for the period after the time when the purchaser according to the agreement should have taken over the ship.

§ 203. Premium

Under § 201 the amount of the sum insured will not be finally determined until at the expiry of the insurance period. At that time a subsequent adjustment of the premium must accordingly also be made.

Article 13 of the Building Clause provided that no return of premium is granted in building insurance. No similar provision is adopted in the Plan. Most of the Plan's

rules relating to return of premium will be of no practical significance in the building insurance, but in the event of e.g. a total loss attributable to a combination of marine and war perils, the return-of-premium rule contained in § 116, subparagraph 2, 1st sentence, must be applicable.

§ 204. Additional premium for voyages

This paragraph corresponds to Article 7 of the Building Clause.

According to the earlier rules the insurer was entitled to an additional premium if the ship made more than two trial runs, or during the trial run travelled more than 50 nautical miles from the place where it was built. If the ship was moved away from the building yard for any purposes other than a trial run, the insurer was not liable for any damage which occurred during the removal.

However, a removal of the ship will often form part of the construction work, e.g. when the ship is towed to another yard, which belongs to the same group, in order to have the engines installed. It has therefore been suggested that the cover shall remain in force regardless of any removals which might be made. However, as regards the special risk connected with the removal the insurer should have an additional premium, and the same applies if the trial run turns out to be longer than what is normally anticipated. Because of the bigger ships, the limit has been increased to 250 nautical miles, which is also in accordance with the English terms.

The provision contained in the last subparagraph to the effect that the building yard shall notify the insurer in advance of any voyages requiring an additional premium, is a regulation without any legal sanction. However, by giving such notice the yard will obtain the advantage that the additional premium can be negotiated in advance.

§ 205. Total loss

As mentioned in the introduction to this chapter, a total loss under the building insurance consists in the building contract lapsing in consequence of a peril which is covered by the insurance. A total loss will therefore arise if an event occurs for which the insurer is liable and which results in the building yard being released from its obligation to deliver under the building contract. This may be due either to the fact that the actual newbuilding is so badly damaged that the yard cannot be expected to rebuild it, or that the yard itself sustains such extensive damage that it must be released from its obligations.

The Committee was informed that during the negotiations preceding the drawing up of the Standard Contract the question was brought up whether that contract ought to contain provisions stipulating when the building yard would be entitled to be released from its obligation to deliver due to unforeseen circumstances. However, it proved impossible to frame satisfactory provisions, and it is therefore necessary in this respect to resort to general rules under the law of contracts relating to breach of implied conditions.

The obligation to deliver must lapse «in consequence of damage to or loss of the ship or damage to the building yard». If the building yard is seriously damaged, e.g. by a fire or catastrophe of nature, the obligation to deliver may lapse, depending on the circumstances, despite the fact that the commenced newbuilding is relatively undamaged. Only physical damage to the ship or the building yard can trigger a total loss. The insurer is never liable where the contract is cancelled for other reasons, e.g. breach of contract by one of the parties, or in the event of the ship or building yard being requisitioned by foreign State authorities.

In case of a total loss the insurer shall pay the insurance value calculated in accordance with the rules contained in § 200 as per the moment the total loss occurs. § 80 shall apply so that, in addition to the insurance value, the insurer will be liable for costs and any other loss, as mentioned in this paragraph. On the other hand, the yard cannot claim any additional amount for extra costs resulting from a price increase which may have been agreed on under § 201, subparagraph 2.

In practice the purchaser will always have paid up one or more instalments of the building price, and they shall be repaid when the building yard's obligation to deliver lapses. Under § 209, subparagraph 1, the purchaser shall be deemed to be co-insured as far as the instalments already paid are concerned, and in the event of a total loss he will have a direct claim against the insurer, cf. also § 7, subparagraph 6, 1st sentence, of the Standard Contract.

§ 206. Damage

If the ship (or parts and material for the ship) is damaged without the building yard's obligation to deliver lapsing, the insurer shall be liable for the costs of repairing the damage or replacing lost objects. The costs are recoverable without ice damage deductions, new for old deductions or deductibles, cf. § 210. «Costs of repairing the damage» also comprise the building yard's ordinary profit on such work. The repair work must in other words be calculated in the same way as if the building yard had undertaken a job on an hourly rated basis for someone else, and the insurer shall compensate the full amount.

§ 209, subparagraph 2, protects the purchaser against a major compensation for damage being paid out to the building yard without the corresponding repairs being carried out.

Under subparagraph 1, 2nd sentence, the insurer is not liable for «costs incurred exclusively to remedy defects in workmanship, construction or materials». The limitation is due to a fundamental reluctance to give the building yard compensation for costs of remedying something which is strictly defects in workmanship. Should, however, the defect result in further losses — e.g. by a faulty installation causing a fire on board — the consequential damage shall be recoverable, unless the general rules contained in Chapter 3 concerning the effect of the assured's own fault shall be applicable. The dividing line between «defects in workmanship» etc. and strictly work accidents is not precise. It must presumably be a case of «defects in workmanship» where a workman makes such mistakes when manufacturing a part that it has to be scrapped. On the other hand, it must be a recoverable accident if the workman is careless in his handling of the part with the result that it falls down and is damaged. The exact line in this respect must be drawn on a case-to-case basis. However, the provision implies that the extended cover under § 175, subparagraph 2, will not be applicable in the building insurance.

The question as to whether the general rules relating to underinsurance shall apply when the insurer has not been notified of additional agreements is dealt with above under § 199.

The insurer's liability for the costs of rebuilding the ship will be limited to the building price declared for insurance, plus the increases which are comprised by the insurance, possibly with a separate additional amount for increased costs in the event of a rise in prices, cf. § 201, subparagraph 2. As the sum insured in consequence of the automatic increases does not remain constant throughout the period of insurance, the determination of the sum insured might give rise to doubt if the general rule contained in § 79 to the effect that the insurer's liability is limited to one sum insured per casualty is applicable. Subparagraph 3 of this paragraph therefore establishes that when applying the said provision only the sliding-scale increases which have accrued at the time of the casualty shall be included in the sum insured.

Subparagraph 4 of the paragraph reflects the same principle as § 180 regarding repairs of a condemnable ship. There is nothing to prevent the parties from agreeing that the work on the newbuilding shall continue despite the fact that the ship or the building yard has suffered extensive damage. However, if the building yard could be demanded to be released from the obligation to deliver because of the damage, the insurer's liability will be limited to what he would have paid in the way of compensation for a total loss, i.e. the insurable value at the time the damage occurred, plus additional amounts under § 80.

§ 207. Unsuccessful launching

This paragraph corresponds to article 5, paragraph 2, and article 6, of the Building Clause.

The provision maintains the earlier system. Without the limitation contained in paragraph 2 of the article certain practical problems would arise, as it would presumably be necessary to determine an insurable value of the building slip, or at least a separate maximum amount for the repair costs. To this should be added that the launching material is exposed to such strain that it must to a great extent be expected to suffer damage or be destroyed during the launching.

§ 208. Liability to third parties

This paragraph corresponds to article 5 of the Building Clause.

As long as the ship is on the building slip the special maritime rules of liability law are not applicable. Liability arising before the launching will be recoverable under the building yard's general liability insurance.

Upon the launching of the newbuilding it becomes a «ship» in the legal sense, and the building yard shall be regarded as «owner». As regards liability arising during or after the launching it is therefore natural to apply the general rules of the hull insurance regarding liability to third parties. However, there is no reason to give the building yard the advantage of the extended liability cover as regards damage to the yard's own objects, cf. § 77.

If it is appropriate to invoke the sum insured as the limit for the insurer's cover of liability to third parties, the sum insured shall in that event, as well as in respect of a limitation of liability for the costs of repairing damage to the ship, be calculated on the basis of the sliding-scale increases which have accrued at the time of the casualty, cf. subparagraph 3 of this paragraph.

§ 209. Purchaser's rights against the insurer

As mentioned in the introduction to this chapter, in case of a total loss the purchaser needs the same protection under the building insurance in respect of his claim for a reimbursement of the instalments already paid as a mortgagee with a registered mortgage on the ship. The protection under this paragraph is made subject to the condition that the purchaser «becomes the owner of the ship to the extent that it is constructed», in other words that he would have had a preferential right to the newbuilding in the event of the building yard's bankruptcy. Under § 6, subparagraph 2, of the Standard Contract the purchaser will, provided he has paid the first instalment of the contractual price, acquire «ownership of material, parts, machinery, boilers and equipment as and when this is bought or made available for the ship. The same applies to the ownership of the hull and the rest of the ship as the building work progresses». It must be assumed that under Norwegian law this clause will give the purchaser a secured creditor's position in the building yard's bankruptcy.

The purchaser should have protection for the entire amount he has paid on the building price. If his refund claim is limited by a special clause in the building contract, his position will be more or less like that of an owner of goods who has paid a final freight advance. In both cases the insurance should provide cover against the risk of the contractual object being destroyed and the advance paid being lost under the contract. However, it should be noted that the advances, in particular at the beginning of the insurance period, may exceed the insurable value of the ship calculated according to § 200, and that the purchaser will be without cover in this respect.

Also in the event of damage to the ship, the purchaser will be interested in the compensation not being paid to the building yard without the relevant repair work being performed at the same time. Under § 7, subparagraph 4, of the Standard Contract the purchaser may in his relationship with the building yard demand that compensations of NOK 500,000 or more shall not be paid to the building yard without the purchaser's consent. This clause in the building contract is in actual fact not binding in the relationship with the insurer, but subparagraph 2 of this paragraph

makes it explicitly applicable. To prevent the purchaser from getting an unreasonably weak position in connection with the building of small vessels, where NOK 500,000 may constitute a major part of the total building price, the building yard's right under the Plan is limited to a maximum of 5% of the building price.

Furthermore, under subparagraph 3 the rules relating to the mortgagee contained in Chapter 8 will apply correspondingly to the purchaser. Thus, the building yard cannot unilaterally let the insurance expire, and the purchaser has a right to not less than 7 days' notice in the event of termination by the insurer.

§ 210. Reference to the rules concerning hull insurance

This paragraph corresponds to article 8—10 of the Building Clause.

In the main the general rules relating to the extent of the hull insurance and the rules relating to repair of damage shall apply to the building insurance. The rules relating to a total loss, however, are inapplicable, as the subject-matter of the insurance is the contract and not the insured ship itself.

The exemption for § 176 (e)—(g) corresponds to article 8, paragraph 2, of the Building Clause. § 180 regarding repairs of a condemnable ship is inapplicable alongside § 206, subparagraph 4. The rules relating to the invitation of tenders, choice of repair yard etc. are inapplicable, as the building yard will always carry out the repairs itself. Finally, there is agreement that damage under the building insurance is recoverable without ice damage deductions, new for old deductions or deductibles.

An exemption has also been made as regards the rule relating to change of ownership contained in § 133, as the purchaser should be entitled to transfer his right under the building contract without the insurance thereby lapsing. Another matter is that the right of transfer may be limited in the actual building contract. A rule in this direction is contained in § 15 of the Standard Contract. Nor should a transfer of the yard to a new owner result in a lapse of the insurance.

Subdivision 2

Insurance of ships under construction for account of a third party; purchaser's interest

In practice an insurance covering the interests of the building yard and the purchaser is effected by one and the same policy. Such an arrangement is *inter alia* presumed in § 7, subparagraph 3, of the Standard Contract, according to which the building insurance «according to further agreement between the parties (may) be extended to cover the rebuilding value from time to time», and in subparagraph 6, 2nd sentence, of the same paragraph, according to which such an increased sum insured will in the event of a total loss be paid direct to the purchaser. However, the rules regarding insurance value etc. would be very complicated if both parties' interests are to be dealt with in one and the same paragraph. For practical reasons the Plan therefore deals with the two types of insurance separately, but there is obviously nothing to prevent both insurances from being covered in a common policy also in the future with reference to subdivisions 1 and 2 of this chapter.

§ 211. Objects insured

This paragraph indicates the purchaser's insurance interests in the newbuilding. Parts and materials for the ship which have been supplied by the assured are only insured to the same extent as the building yard's own parts and materials, cf. the reference to § 198, subparagraph 3. Where the owner has himself ordered a part from a special building yard, the latter shall not be regarded as a «subcontractor» in relation to this provision. Cover will therefore not become operative until from the moment the part comes within the building yard area.

Subparagraph 2 must be compared with § 212, subparagraph 2, according to which the excess value of the completed ship shall, in the absence of an agreement to the contrary, be deemed the assessed insurable value.

The sum insured for the assumed excess value of the completed ship cannot be used to repair partial damage which comes within the building yard's risk.

§ 212. Insurable value

In subparagraph 1 it is underscored that the insurable value of the parts and materials which the purchaser has supplied is their replacement value, calculated on the basis of the price at the time when the objects were delivered to the building yard. In this respect the rule complies with the general rule contained in § 7, according to which the insurable value is the value at the inception of the insurance. However, it is allowed to assess the insurable value of the individual parts (e.g. main engine), which may be practical if you wish to guard against an anticipated price increase.

§ 213. Total loss

A total loss will also here consist in the lapse of the building yard's obligation to deliver in consequence of the newbuilding or the building yard being destroyed or damaged as a result of a peril covered by the insurance. The excess value of the completed ship will only be recoverable in such an event. Any proceeds shall fall to the insurer under the general rules contained in Chapter 5, Subdivision 4, of the Plan. This applies also to undamaged parts which the purchaser has supplied to the building yard.

§ 214. Reference to other rules

The rules relating to period of insurance and premium in connection with insurance of the building yard's interest is correspondingly applicable to the purchaser's insurance. For each individual part covered by the insurance the cover is operative, as mentioned under § 211, from the moment the part is within the area of the building yard. However, as regards the excess value, the insurance will, provided nothing else has been agreed, be operative from the laying of the keel.

The reference to § 206, subparagraph 1, implies that also under the purchaser's insurance the insurer is not liable for repairs of «defects in workmanship, construction or materials», regardless of whether the defect was caused by the supplier of a part, or by the building yard. Admittedly, the purchaser might need an insurance cover against a loss incurred because a part has to be scrapped or repaired. However, he will normally have the right to demand redelivery, price reduction or compensation by the supplier of the part, and it would not be very natural to transfer such contractual settlements to the insurer.

Subdivision 3 Insurance of ships under construction for builder's own account

§ 215. Insurable value

When the building yard builds the ship for its own account there is no contractual building price to which the rules relating to the insurable value can be tied. The basic rule must therefore be that the insurable value is the value of the investments which the building yard has made in the ship at any given time. Through the reference in § 218 to § 198, subparagraphs 1 and 3, it is clear that the insurance comprises the same objects and is subject to the same geographical limitation as when the ship is built for the account of third parties.

The insurance is equivalent to «the value at any time» of the investments made and is therefore not required to correspond to the investments in terms of amount. If a rise or drop in prices has occurred during the building period, it must therefore be

established what the calculations of the repairs of the recoverable loss and damage would have amounted to at the time of the casualty.

On effecting the insurance the building yard must thus stipulate a sum insured comprising not only the actual costs which the construction is assumed to involve, but covering the reconstruction value of the ship in the event of it being destroyed towards the end of the insurance period. If the building yard has not taken a price increase into consideration when determining the sum insured, the insurer should be entitled to invoke the rules relating to under-insurance. This involves a pro-rata assessment of the compensation, not only in the event of partial damage, but in actual fact also in case of a total loss, provided the total loss occurs before the ship has been completed.

The building yard should, in the same way as a purchaser, have the opportunity to take out an assessed insurance of the value which the completed ship must be assumed to have. If this has been done, the insurable value must increase in relation to the investments made with the result that at the end of the insurance period it will have reached the assessed value of the completed ship.

§ 216. Period of insurance

The insurance is operative from the laying of keel, unless some other time of commencement has been agreed on, cf. the references to § 202 in § 218. If the ship is delivered to a buyer immediately upon completion, the insurance will terminate on delivery. If the building yard puts the ship into service for its own account, it must from that time take out an ordinary hull insurance. If on the other hand, the ship is not put into service, but is laid up pending a sale or the like, both parties should have an opportunity to reassess the risk. With that eventuality in mind, the paragraph gives the parties the right to terminate the insurance on giving 7 days' notice.

§ 217. Total loss

After the ship has been launched, it has become a regular «ship», which is owned by the assured. This means that the total-loss rules contained in Chapter 11 of the Plan are automatically applicable. Before the launching, however, when deciding whether a total loss has occurred it will be necessary to resort to a hypothetical evaluation of what would have happened if the ship had been built for the account of a third party. Hence, the building yard cannot arbitrarily give up the construction and claim for a total loss. It must establish that there has been such extensive damage to the ship or the building yard as to entitle it to demand vis-à-vis a purchaser to be released from the contract.

§ 218. Reference to other rules

Subject to the limitations which follow from the preceding paragraphs and from the nature of the situation, the insurance will be subject to the same rules as an insurance of a ship built for the account of a third party.

Chapter 15 **Hull-interest insurance**

As mentioned under § 160, a hull-interest insurance is a total-loss insurance with an assessed insurable value which is effected on top of the ordinary hull insurance. In practice a hull-interest insurance can only be effected when the hull insurance is assessed. If the hull insurance were effected with an open insurable value, that value would correspond to the ship's «full value at the inception of the insurance», cf. § 7, and this would leave no room for any hull-interest insurance.

In order to prevent that a major part of the hull cover is shifted to an interest policy, the insurers practice a limitation of the right to take out hull-interest insurance. Rule to that effect were contained in § 57 No. 2 of the 1930 Plan, which was, however,

superseded by the Hull Policy and the Hull-Interest Policy E. These limitations have been maintained, cf. § 160 and § 223 below. The rules are dealt with in further detail under § 160. The definition of hull-interest incorporated in § 219 will only be significant if these limitations become applicable.

Apart from giving the shipowner a total-loss cover with an amount stipulated in advance, an ordinary hull-interest insurance also comprises an additional cover against general average contributions and collision liability vis-à-vis third parties which is not covered by the hull insurance because the sum insured is exceeded. The conditions for this additional cover are contained in the so-called «Excess Clause» drawn up by the Central Union of Marine Underwriters. As far as general average contributions are concerned, this additional cover has become superfluous under the Plan, in view of the fact that under § 80 the insurer is liable in excess of the sum insured for all losses resulting from measures to avert or minimize the loss, whereas § 39 of the 1930 Plan did not mention general average contributions in this context. However, in the event of collision liability vis-à-vis third parties there may still be a need for additional cover over and beyond the hull insurance. Rules regulating this question are incorporated in § 221.

§ 219. Definition of hull-interest

The definition must delimit the hull-interest both in relation to the interest covered by the ordinary hull insurance and the interest which may be covered by an insurance of freight interest under Chapter 24 of the Plan. The hull-interest is the owners' «in their capacity as owners of the insured ship» and is therefore tied to the capital value of the ship. This capital value is normally covered by a hull insurance, but where the assessed value in the hull insurance is set lower than the ship's assumed capital value, there will be a residual value which can be covered by a hull-interest insurance.

On the other hand, the hull interest must be delimited in relation to the interests which the owner has in terms of anticipated earnings and which are covered by an insurance of freight interest under Chapter 24. The existence of such a freight interest is subject to the condition that it relates «to a particular contract of affreightment, firmly established liner trade or the like». If such an interest exists, the owner may insure it by a separately assessed insurance in addition to a possible hull-interest insurance.

As mentioned in the introduction to this chapter, the definition will only be of legal significance if a limitation of the owner's right to take out a hull-interest insurance becomes applicable.

To avoid any misunderstanding, it is stated explicitly in subparagraph 2 of the paragraph that the insurer is only liable in the event of a total loss and for excess collision liability in accordance with the following paragraphs. Furthermore subparagraph 2 states that the cover does not comprise losses resulting from measures to avert or minimize the loss. It is an established custom that the hull insurer covers both general average contributions and particular costs of preventive measures concerning the ship and does not draw the hull-interest insurer into a proportionate settlement under § 69.

§ 220. Insurer's liability for total loss

This paragraph corresponds to the Hull-Interest Policy A 1.

Any casualty which gives rise to a total-loss claim under the hull insurance will at the same time constitute a total loss under the hull-interest insurance. According to the Hull-Interest Policy A 7 the insurer's liability was made conditional upon the assured having transferred the ship to the hull insurer. However, it must be sufficient that the assured is entitled to make a total-loss claim. If the hull insurer refuses to take over the wreck, the assured must nevertheless be entitled to payment of the hull-interest insurance.

In one specific situation it should not even be a requirement that the assured has claimed for a total loss, viz. where he wants to attempt to save the ship, but the hull insurer pays the sum insured under § 82. If the salvage operation later fails, the

assured must also be entitled to the hull-interest insurance. However, in that event the hull-interest insurer should be entitled to take over the wreck under the rules contained in Chapter 5, Subdivision 4, of the Plan.

§ 221. Insurer's liability in respect of damages in collision cases

This paragraph corresponds to subparagraphs 2 and 3 of the Excess Clause.

As mentioned in the introduction to this chapter, there is no need for excess cover of contributions in general average, as these losses are covered in full, in addition to the sum insured under § 80. On the other hand there may still be a need for cover of excess collision liability. However, there is less need for such cover than before, in view of the fact that according to the Plan the hull insurer covers the collision liability with a separate sum insured in addition to the ordinary sum insured for hull.

It follows from this paragraph that the hull-interest insurer, like the hull insurer, has a separate liability as regards collision liability. In the event of a total loss, any liability shall therefore be added to the sum insured. Deductibles are out of the question as far as the hull-interest insurer is concerned. If a hull-interest insurance has been effected, there will thus be no transfer of collision liability to the P. & I. insurer under § 226, cf. § 238, subparagraph 2, until the separate sums insured under the hull insurance as well as the hull-interest insurances have been used to cover the liability.

If several hull-interest insurances have been effected, each of the insurers shall under subparagraph 2 only be liable for excess collision liability in relation to the proportion which his insurance constitutes of the total hull-interest insurances. If any of the insurances has been effected on foreign terms without cover of excess liability, a corresponding proportion of that liability will therefore be uninsured. This rule corresponds to subparagraph 3 of the Excess Clause.

§ 222. Reference to the rules concerning hull insurance

The general rules relating to hull insurance must be made correspondingly applicable to a hull-interest insurance, to the extent that they are appropriate. This paragraph also makes a few of the rules relating to the leading insurer's competence and authorization applicable to the relationship between a hull-interest insurer and the leading hull insurer. This applies to the rules relating to notice of a casualty, legal action against third parties regarding the assured's liability or claim for damages, and the venue rule. On the other hand, the hull-interest insurer will, like a co-hull-insurer, not be bound by the leading insurer's decision of the question of condemnation, and in this connection he may on his own invite tenders and have the ship moved for surveying. However, nor is the hull-interest insurer under the Plan bound by a decision made by the leading insurer under § 142 to abandon the salvage operation. The hull-interest insurer's liability is only applicable in the event of a total loss, and he should therefore have an opportunity to try to save the ship on his own. If he succeeds in salvaging the ship without it being condemnable, the costs of salvage shall be covered by the hull insurers, unless they have applied the rule contained in § 82. In that event the hull-interest insurer shall pay for the salvage, but «the wreck» will fall to the assured.

§ 223. Restrictions on effecting hull-interest insurances

This paragraph corresponds to The Hull Policy and the Hull-Interest Policy E. The rule is discussed in further detail under § 160.

Chapter 24 Insurance of freight-interest

§ 277. Definition of freight-interest

As mentioned in the introductory remarks to Subdivision 4 of the Plan, an

insurance of anticipated, future freight earnings under the Plan must be effected as an insurance of freight-interest. Such insurance may be effected separately or in combination with one of the other freight insurances indicated in the Plan.

This paragraph confines itself to describing freight-interest as «interest that the assured has in anticipated profit from the running of the insured ship». It is furthermore specified — which should in actual fact be self-evident — that anticipated earnings, which it must be assumed are already covered by some other insurance of ship or freight, cannot be covered as freight-interest. The Plan has refrained from giving any further rules regarding the evaluation of the freight-interest, e.g. the length of the period of income to be taken into consideration, the expenses which shall be taken into account, whether a deduction shall be made for the interest advantage obtained by receiving immediate payment of future freight income, etc. It is in actual fact up to each individual insurer to decide how much importance shall be attached to these and other factors when determining the assessed value of the freight-interest insurance.

§§ 278 and 279. Scope of the insurance. Reference to the rules concerning hull insurance

§ 278 corresponds to § 119, subparagraph 3, of the 1930 Plan.

A freight-interest insurance shall only be paid out in the event of an actual or constructive total loss. The assured therefore cannot claim compensation if he loses the charter-party which forms the basis of the insurance, but the ship is not regarded as a total loss in relation to the hull insurer.

Otherwise the same rules must apply to freight-interest insurance as the rules applicable to hull-interest insurance. These paragraphs therefore correspond completely to § 219, last sentence, § 220 and § 222, and reference is made to the commentary to these rules. In § 278, last sentence, it is stated explicitly that the hull-interest insurer's right to the wreck ranks before that of the freight-interest insurer in the cases where the hull insurer has paid out a total-loss claim under § 82.