

Commentary

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

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

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Part one
RULES COMMON TO ALL TYPES OF INSURANCE

Chapter 1
Introductory provisions

General

A number of provisions of a general nature, which are difficult to fit into the Plan's system in any other way, are compiled in this Chapter. While the solutions in the 1964 Plan have essentially been maintained in the Chapter, Cl. 1-3 regarding contracts entered into through a broker is new, and Cl. 1-4**A** regarding jurisdiction and choice of law has been expanded. **In the 2019 Version an arbitration clause was added as Cl. 1-4B.**

Clause 1-1. Definitions

This Clause was amended in 2016. The definitions of "loss" and "particular loss" in previous versions were deleted and a new definition of "broker" was added in sub-clause (d).

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

The definition of "the assured" in *sub-clause (c)* corresponds to the definition in Nordic Insurance Contracts Acts (Nordic ICAs). The decisive criterion for having status as an "assured" under the insurance is that the person in question is in a position where he may have a right to compensation under the insurance contract, not that he in actual fact has such a right under the contract in question. Hence, the shipowner will have status as an assured, even if, for example, the ship's mortgage loans exceed the ship's insurable value, and the mortgagee will be entitled to the entire sum insured in the event of an insurance settlement. This is primarily significant in relation to the rules in the Plan which impose duties on the assured, cf. in particular the rules relating to the duty of care in Chapter 3 of the Plan.

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

Sub-clause (d) defines "broker" as the entity that is instructed by the person effecting the insurance to act as an intermediary between the person effecting the insurance and the insurer. The broker is engaged by the person effecting the insurance and is acting on his behalf, cf. Cl. 1-3, sub-clause 1. In general, the broker safeguards the interests of the person effecting the insurance.

Clause 1-2. Policy

Sub-clause 1, first sentence, was editorially amended in 2016 replacing the term "require" with "demand".

Sub-clause 1, first sentence, states that the person effecting the insurance may demand that a policy be issued. A "policy" according to the Plan is the insurer´s written confirmation of the insurance contract. The term "policy" in the Plan corresponds to an "insurance certificate" under Nordic ICAs. However, the term "policy" is so firmly established in marine insurance that it was deemed expedient to retain it. In contrast to the provisions contained in Nordic ICAs, the insurer has no obligation to issue a policy unless the person effecting the insurance demands him to do so. Frequently, other documents will have been issued which replace the policy, cf. below under Cl. 1-3, in which event a policy would be superfluous.

In previous Plan versions, policy was used as a term both to describe the insurer´s written confirmation of the insurance contract as stated in Cl. 1-2 and as a reference to the insurance contract with the inclusion of the individual policy, the conditions and other documents. This was somewhat confusing, in particular because in today's insurance marked a policy is not always issued. The 2016 Version makes a distinction between the policy as defined in Cl. 1-2 and the term "insurance contract", which refers to the individual agreement between the person effecting the insurance and the insurer in general, thereby including both the policy - if issued - and the conditions. The distinction entails no substantive amendment. The purpose is to avoid using the term policy as a reference to the insurance contract in general. A formal policy is today in less demand due to data processed insurance documentation sufficiently evidencing the content of the insurance contract without necessitating a subsequent written confirmation issued by the insurer.

Thus, in 2016 the term "policy" was replaced with the term "insurance contract" in the Plan and its Commentaries where the term was referring to the all documents included as part of the insurance contract and not only the individual confirmation. This amendment is made in the following clauses: 4-8, 5-3, 8-2, 12-15, 12-16, 12-18, 13-4, 14-1, 14-2, 15-3, 15-15, 16-4, 16-6, 16-7, 16-12, 17-1, 17-3, 17-15, 17-18, 17-28, 17-31, 17-34, 17-55, 18-1, 18-32, 18-33, 18-38, 18-39, 18-40, 18-46, 18-48, 18-49, 18-54, 19-2, 19-5, 19-8, 19-9, 19-10, 19-25 and 19-26. It should be noted that the concept "insurance contract" also includes the conditions in the Plan as part of the contract, cf. the discussion under Cl. 3-22, sub-clause 1.

The concept of a "policy" as defined in Cl. 1-2 must be distinguished from the concept of the document in which the broker confirms details of the insurance placement (in practice called "Cover Note", "Evidence of Cover" or similar). An appointed broker issues confirmation of cover containing all relevant insurance conditions, either as a complete text or by way of reference, which is sent to the person effecting the insurance. The confirmation shall mirror the terms of the insurance agreement entered into with the insurer.

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

Nordic ICAs lay down detailed requirements concerning the conditions that must be incorporated in the policy. These requirements are not sufficiently flexible for marine insurance. *Paragraph 2* corresponds to § 2, second paragraph, of the 1964 Plan, but has been somewhat rewritten.

Sections in the Nordic ICAs also contain a number of rules relating to the insurer's duty of disclosure. This type of rule is not required in marine insurance.

Clause 1-3. Contracts entered into through a broker

This Clause was amended in 2016. Sub-clause 1 was rewritten based on the new definition of "broker" in Cl. 1-1 (d). The new sub-clause 1 replaced both sub-clauses 1 and 2 in earlier versions of the Plan. In sub-clause 2 (former sub-clause 3), first sentence, the word "requires" was replaced with "demands" and new sub-clauses 3 and 4 was added.

Sub-clause 1 emphasizes that the broker acts on behalf of the person effecting the insurance in all cases except those were the insurer has given written authority to the broker to perform a specific function on behalf of the insurer. This provision conforms with general principles of contract law.

*Sub-clause **2*** must be seen in conjunction with Cl. 1-2 concerning the policy. The *first sentence* imposes a duty on the broker to assist in obtaining a policy if the contract was entered into through a

broker. If the broker acts on behalf of the insurers, he can to the extent that he has the necessary authority issue a common policy so that it will not be necessary for the person effecting the insurance to obtain a policy from each insurer. In that event, it should be clearly evident from the policy that it is issued by authority and on whose behalf the broker is signing, cf. *second sentence*.

If the broker fails to state these facts, he risks becoming directly liable under the insurance contract. If the broker issues the policy on behalf of the insurer, he is acting as the representative of the insurer, and not of the person effecting the insurance. Any errors on the part of the broker in connection with the issuance of the policy will therefore be the insurer's risk.

If a policy is issued, the duty to raise objections set forth in Cl. 1-2, sub-clause 2, shall apply. This means that the person effecting the insurance must check the policy against any underlying agreement to see if the policy is correct. If the policy differs from the underlying agreement, and the person effecting the insurance fails to object, he risks that the policy takes precedence over the agreement.

Sub-clause 3 gives the broker authority to receive premium returns or claims settlements. The purpose of the new clause is to simplify the documentation procedures for the parties. The insurer does not need to obtain confirmation of the broker's authority every time any payment shall be made, provided always that the loss payee provision in the insurance contract is followed. It also follows that any payment by the insurer is binding also on the person effecting the insurance and/or the assured. Second sentence of sub-clause 4 makes it clear that the person effecting the insurance and/or the assured at any time may change or withdraw the power of attorney. In this event, the insurer must pay directly to the person effecting the insurance or the assured as appropriate. Return of premium will normally be made to the person effecting the insurance as the party responsible for payment of the premium, cf. Cl. 6-1. Settlements of claims will normally go to the assured, being the party entitled to compensation of claims, cf. Cl. 1-1 (c). Any change or withdrawal of the broker's authority to receive payments from the insurer will only take effect upon his receipt of the notice. The notice may be sent through the broker, but will not take effect until the broker conveys the notice to the insurer. Therefore, if it is a matter of urgency it is advisable to send the notice directly to the insurer.

Sub-clause 4 applies to premium payments. The person effecting the insurance will normally wish to pay the premium via his broker and leave it to the broker to distribute the premium to the participating insurers. As reiterated in sub-clause 5, according to sub-clause 1 the broker shall be deemed to act on behalf of the person effecting the insurance. In this context, payment of premium to the broker does not satisfy the duty of the person effecting the insurance to pay the premium to the insurer. If the broker for some reason does not forward the premium to the insurer, this is the risk of the person effecting the insurance. Interest on overdue premium according to Cl. 6-1, sub-clause 2, may accrue, and in a worst-case scenario the person effecting the insurance may have to pay the premium once again to the insurer if e.g. the broker should be declared bankrupt.

Clause 1-4A. Jurisdiction and choice of law

This Clause was amended in the 2013 Plan to adapt the Plan to its future application in Denmark, Finland and Sweden. The word "Nordic" in Cl. 1-4**A** embraces only Denmark (including Greenland and the Faroe Islands), Finland (including Åland), Norway and Sweden. Iceland is a non-Nordic country in the context of Cl. 1-4**A**. **In the 2019 Version of the Plan, sub-clause 2 was amended and a new Cl. 1-4B on arbitration inserted, see below on this Clause.**

The solution set out as standard in this Clause is that any dispute arising out of the contract can be settled by commencing proceedings against the claims leader. Chapter 9 defines the powers of the claims leader. These do not extend to all matters concerning the insurance, and the Commentary to Cl. 9-1 mentions that in practice it is sometimes necessary to make a distinction between the "rating leader" and the "claims leader". The former has the power to bind following insurers in such matters as premium adjustments due to changes in vessel values, additional premiums for breach of trading warranties, rating of additional vessels and similar matters. It is not always the case that the same insurer is both rating and claims leader and in some cases there may be separate rating leaders for different geographical markets. It is not possible in a standard contract such as the Plan to provide solutions for all the various arrangements that assureds and their brokers might find most suitable for their requirements.

Sub-clause 1 regulates jurisdiction and background law for any conflict associated with an insurance contract effected on Plan conditions and with a Nordic claims leader. There are similarities between the laws of the four Nordic countries, mainly as a consequence of co-operation in certain areas of private law including insurance, but each country has its own completely independent legislature and court system. Cl. 1-4**A** uses the term "law and venue of the claims leader". If the claims leader is Norwegian then Norwegian law will govern the insurance contract, and any dispute will be subject to the jurisdiction of the court where the claims leader has its head office. Correspondingly, if the claims leader is Danish with its head office in Copenhagen, the insurance contract is governed by Danish law and disputes must be referred to the court which according to Danish law is the competent court. The rules in sub-clause 1 and 3 are in accordance with the provisions contained in Article 9 (1) (a) and (c) of the Lugano Convention, which provides that both the claims leader and the co-insurer may be sued in the claims leader's State of domicile. On the other hand, the assured is precluded from invoking against the Nordic claims leader the other venue rules contained in Article 9 of the Lugano Convention, as well as the other venue rules contained in Section 3. This departure from the Convention is valid as it concerns insurance related to ocean-going ships or offshore structures, cf. Article 13 (5) cf. Article 14 of the Lugano Convention.

The Insurance Contract Act of the relevant Nordic country becomes applicable as background law. However, there are very few rules in the ICAs of the Nordic countries that are mandatory for this type

of marine insurance. The relevant ICA must be subordinate to the wording of the insurance contract and Plan conditions including solutions that follow by necessary implication. Nor is it necessary to state that the individual insurance contract takes precedence over the provisions of the Plan. Background law includes the rules governing sources of law and methodology of the relevant Nordic country. These will thus determine any issue concerning precedence between the various sources of law.

The provisions also apply where a non-Nordic assured enters into an agreement with a Nordic claims leader on Plan conditions. In such cases, the assured may wish to have the right to institute proceedings in his home country. There is nothing preventing the parties from entering into such agreement provided it is in writing; a verbal agreement is not sufficient, cf. sub-clause 4 and below. If no agreement in writing has been made, sub-clause 1 prevails and the venue where the claims leader's head office is located must be used. Nor is there anything to prevent the parties from agreeing in writing on the background law of another country. However, it must be emphasized that the Plan is very closely bound up with the law and practice of the Nordic countries, especially Norway. Applying any other law as background law will normally give rise to considerable difficulties. *Sub-clause 4* states that the provisions in sub-clause 1 may only be departed from if the insurer gives his written consent. The provision applies both to choice of law and jurisdiction. Under Finnish and Swedish law any marine insurance dispute must be placed before the local official adjuster before the dispute can be brought before the domestic courts. Cl. 1-4**A** will of course be subordinated to applicable local mandatory statutes. See further Cl. 5-5 and the Commentary to this Clause.

Sub-clause 2 **was amended in the 2019 Version. The previous clause stated that the default choice of law was Norwegian, but had no regulation of jurisdiction. The amended clause states that disputes in such cases are referred to arbitration according to Cl. 1-4B, where place of arbitration and background law for the non-Nordic claims leader is regulated in sub-clause 4. The reason for the amendment is given in the Commentary to this clause. In relation to background law, the reference to Norwegian law is retained for arbitration in non-Nordic countries.**

Sub-clause 3 allows an assured to sue the co-insurers in the claims leader's venue. In contrast to sub-clause 1, this is an option (cf. the words "may **be sued**"). The assured may instead institute proceedings where the various co-insurers are domiciled or any other available jurisdiction. The provision does not apply only to the claims leader's general venue (home venue). It is also possible to sue the co-insurers in all the venues where the claims leader, according to law or contract, is obliged to accept lawsuits. **However, this option presumes that Cl. 1-4A applies. If the parties have agreed arbitration according to Cl. 1-4B, obviously sub-clause 3 does not apply. Further, according to Cl. 1-4A, sub-clause 2, arbitration is the default rule for a non-Nordic claims leader. This means**

that sub-clause 3 only applies if the insurance is effected with a non-Nordic claims leader and the parties have agreed ordinary court proceedings with a specific jurisdiction.

The Plan does not contain any explicit reference to the Commentary and its significance as a basis for resolving disputes. This is in keeping with the approach of the Norwegian 1996 Plan. Nevertheless the Commentary shall still carry more weight as a legal source than is normally the case with the Traveau Preparatoire of statutes. The Commentary as a whole has been thoroughly discussed and approved by the Nordic Revision Committee, and it must therefore be regarded as an integral component of the standard contract which the Plan constitutes. However, in case of any obvious conflict between the Plan text and the Commentary, the text shall prevail as the primary legal source over the Commentary.

Clause 1-4B. Arbitration Clause

Cl. 1-4B was new in the 2019 Version.

There are two main reasons to insert an arbitration clause as an alternative to ordinary court proceedings. The first reason is that several insurers today refer to arbitration as their main dispute resolution solution, and it is therefore convenient to have a standard clause in the Plan that the parties can include.

The second reason concerns uncertainty of the regulation on court jurisdiction and recognition and enforcement of judgments after Brexit. The EU legislation on court jurisdiction and recognition and enforcement of judgments in civil and commercial law is based on the revised Brussel I Directive of 2012, which is applicable also for Norway and Denmark through the Lugano Convention of 2007. The UK is however not a signatory party to the Lugano Convention, and this creates uncertainty about recognition and enforcement of EU/EFTA court decisions in the UK and UK court decisions in the EU/EFTA states. This is primarily a problem when the insurance is effected with non-Nordic claims leaders where jurisdiction in the UK often is a natural choice. The committee is therefore of the view that it is more convenient to refer disputes with non-Nordic claims leaders to arbitration, where recognition and enforcement is based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), cf. Cl. 1-4A, sub-clause 2. It should however be noted that this may also be a problem for Nordic claims leaders in cases where there are co-insurers domiciled in the UK, and the question will be enforcement of Nordic judgments against such co-insurers. Even so, the default rule for this situation is ordinary court proceedings, cf. below.

Sub-clause 1 **states that "If the parties have agreed in writing that disputes shall be solved by arbitration, the following applies instead of Cl. 1-4A". This means that the ordinary jurisdiction and background law Clause applies if the parties have not made a specific agreement to the**

contrary. The reason for keeping this solution as the default rule is that it is uncertain to what extent the Nordic shipowners in fact want to refer all disputes to arbitration. As mentioned above under Cl. 1-4A, sub-clause 1, with reference to sub-clause 4, there are rules in Finnish and Swedish law stating that any marine insurance dispute must be placed before the local official adjuster before the dispute can be brought before the domestic courts. A reference to arbitration would depart from this system and this may not be a preferable choice.

Sub-clause 2 **is the Nordic Offshore and Maritime Arbitration Association's (Nordic Arbitration) arbitration clause sub-clause 1 and 3. The Nordic Maritime and Offshore Arbitration Association was established in 2017, and has developed arbitration regulation and best practice guidelines to fit Nordic legal tradition and culture. It is therefore convenient to refer arbitration to this system.**

Sub-clause 3 **regulates the place of arbitration and background law for an insurance effected with a Nordic claims leader, and conforms to the regulation in Cl. 1-4A, sub-clause 2.**

Sub-clause 4 **regulates the place of arbitration and background law for an insurance effected with a non-Nordic claims leader. It follows from Cl. 1-4A, sub-clause 3, that this rule applies as a default rule if the parties have not made a specific agreement on jurisdiction, forum and choice of law. If jurisdiction is not agreed, the case is referred to arbitration in Oslo, cf. first sentence. In this case, it follows from the second sentence that Norwegian background law applies. However, if the parties have agreed to arbitration in another Nordic country it is more natural to apply the law of this country. This solution also conforms to the provision for Nordic claims leaders in sub-clause 3. If the parties have agreed on arbitration in a non-Nordic country, however, the background law is again Norwegian. The Plan is mainly based on Nordic and Norwegian law and practice, and it is not convenient to combine the Plan with another legal system, cf. above on the Commentary to Cl.1-4A, sub-clause 1. If the parties have agreed on ordinary court proceedings and jurisdiction but not agreed on background legislation, Cl. 1-4B, sub-clause 4, on Norwegian background law should be applied by analogy.**

According to *sub-clause 5*, any changes in the terms of the agreement set out in sub-clauses 2, 3 and 4 must be in writing. This conforms to Cl. 1-4A, sub-clause 4.

Clause 1-5. Insurance period

This provision corresponds to Cl. 4 of the 1964 Plan and relevant sections of the Nordic Insurance Contracts Acts (Nordic ICAs). Sub-clause 4 was added in the 2003 Version of the 1996 Plan. Sub-clause 4 was further amended in the 2007 version in connection with the amendment to Cl. 12-2.

Changes were also made in the Commentary. The specification of the time in sub-clause 2 was changed in the 2010 version, at which time changes were also made in the Commentary on sub-clause 3.

The rule contained in *sub-clause 1* is new and corresponds to relevant Nordic ICAs, relating to term of liability. The Nordic ICAs contain more detailed rules than Cl. 4 of the 1964 Plan relating to the inception of the insurance. These do not fit in very well with marine insurance. This applies in particular to rules which governs the insurer's liability in those cases where it is clear that the request for insurance will be granted by the insurer.

Sub-clause 2 corresponds to Cl. 4 of the 1964 Plan, but the wording is derived from relevant Nordic ICAs. However, the time is tied to Coordinated Universal Time (UTC). The time specified for cessation of liability in sub-clause 2, *second sentence*, was changed in the 2010 version from 24:00 hours to 23:59:59 hours because the time 24:00 hours does not exist. This provision shall only apply if nothing else is agreed by the parties. If an insurance is transferred upon termination from one insurer to another, it is important that the parties take into account any differences in times in the insurance conditions in order to avoid creating periods of time with no cover.

Relevant Nordic ICAs provide that the insurer cannot reserve the right to amend the conditions during the insurance period. However, this is not a mandatory rule for marine insurance. If the insurer wants to make such a reservation, this will accordingly take precedence over the rule contained in Nordic ICAs.

The rule contained in *sub-clause 3* is new, and relates to relevant Nordic ICAs, which set out the rule concerning the insurer's duty to give notice if he does not wish to renew the insurance. Failure to give notice results in the insurance contract being renewed for one year. In marine insurance the insurer should, however, be free to decide whether or not to renew the insurance, see the *first sentence*, which introduces a point of departure that is opposite to that applied in relevant Nordic ICAs: the insurance is terminated unless otherwise agreed. The reference to Cl. 1-2 entails that the rules relating to documentation and the duty to raise objections are correspondingly applicable in the event of a renewal.

The question of an extension of the insurance when the ship has sustained damage which must be repaired for the purpose of making it compliant with technical and operational safety requirements and it is uncertain whether the assured is entitled to claim for a total loss is governed by Cl. 10-10 and Cl.11-8.

Rules relating to extension where the insurance terminates because of notice of termination or certain other circumstances are included in the relevant rules on termination, see Cl. 3-14, sub-clause 2,

Cl. 3-17, sub-clause 1, third sentence, and Cl. 3-27. The duration of a voyage insurance is regulated in Cl. 10-9.

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

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

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

If the insurance period has been fixed in full years, the provision poses no problem. Starting from the date on which the insurer's liability attaches, the total period is then divided into two or more one-year periods, In practice, however, one finds examples of insurance periods consisting of one or more full years with additional months, e.g. 1 ½ years, or 3 years and 3 months. In these cases, too, each full year or 12-month period is calculated individually from the date on which the insurance was effected; the "extra" time that does not constitute a full year then becomes a separate insurance period consisting of the relevant number of months.

On the other hand, the entire term of the insurance contract must be regarded as the basic insurance period in relation to Cl. 6-4 and Cl. 6-5 of the Plan regarding the increase/reduction of premium, and Cl. 10-10 and Cl. 11-8 regarding extension of the insurance. The same applies with regard to the question of renewal, cf. Cl. 1-5, sub-clause 3, and Cl. 17-2. Under the 2003 version, this also applied to Cl. 18-10 regarding the right to compensation for damage to offshore structures. However, the

provision in Cl. 18-10 was deleted in the 2007 version because it was rendered superfluous by the general rule regarding the right to compensation that was added in Cl. 12-2 of the 2007 version. In relation to Cl. 12-2, it has been decided that the "end of the insurance period" means the end of a one-year period, cf. the Commentary on this provision.

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

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

Chapter 2
General rules relating to the scope of the insurance

Section 1
Insurable interest and insurable value

General

This Section corresponds to Chapter 2, Section 1, of the 1964 Plan.

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

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

Clause 2-1. Insurance unrelated to any interest

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

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

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

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

The provision contained in Cl. 2-1 does not solve the question whether the interest is "legal", cf. former Section 35 of the ICA, currently NL 5-1-2. This question is essentially solved in the Plan through Cl. 3-16 relating to illegal activities. If the legality of the assured's interest is at issue in relation to matters other than the use of the vessel for illegal purposes, the question must be decided on the basis of the criteria that apply generally in insurance law, cf. NL 5-1-2. In the application of the

rule, due regard must be had to the nature of the provisions that are breached, the extent of the illegal activities, the extent to which the assured is aware of the facts, the connection between the illegal situation and the interest insured, and whether there is causation between the illegal situation and the damage.

Clause 2-2. Insurable value

Sub-clause 1, second sentence, and sub-clause 2 were added in 2016.

Sub-clause 1, first sentence, states that the insurable value is the full value of the interest at the inception of the insurance. This provision differs from general insurance law, where the insurable value is determined at the time of loss, cf. relevant Nordic Insurance Contracts Acts. The reason for the special rule in marine insurance was that it might be difficult to determine the value at the time of loss if the ship was far away. With today's communications systems, there is every possibility of determining the value at the time of the loss, regardless of where the ship might be. Nevertheless, the traditional solution in marine insurance has been maintained on this point.

Further rules governing the time for the "inception of the insurance" are contained in Cl. 1-5 of the Plan. The time poses no problems for ordinary insurance contracts with a term of one year. If it has been agreed that the insurance is to attach for a period of more than one year, it follows from Cl. 1-5, sub-clause 4, which was added in the 2003 version, that the insurance period is to be deemed to be one year in relation to Cl. 2-2. Further details regarding the calculation of the various insurance periods are set out in the Commentary on Cl. 1-5.

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

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

If the parties do not agree to fix the insurable value, the insurable value is called "open". According to sub-clause 1, second sentence, the parties may by agreement fix the insurable value at a certain amount to avoid discussion on the market value at any given time. For ocean-going vessels, agreement on the insurable value is rather common. A fixed insurable value is called agreed insurable value, cf. Cl. 2-3, and corresponds to a "valued policy" or "agreed value" in the English market.

Sub-clause 2 states that the sum or sums insured in the insurance contract shall be deemed to constitute agreed insurable value(s) unless the circumstances clearly indicate otherwise.

The term "circumstances" is taken from Cl. 16-6, and refers to matters or arguments that are relevant for the interpretation of the insurance contract. Examples are information from the negotiation between the parties, indicating that the intention of the parties was to keep the value open. The term circumstances in this respect does not include circumstances occurring after the contract is entered into, which may subsequently lead to a change in the value of the vessel.

In such case, the value must be renegotiated by the parties or amended in accordance with Cl. 2-3.

Clause 2-3. Agreed insurable value

The word "assessed" was replaced with "agreed" throughout the Plan and the Commentary in 2016. **Sub-clause 2 was amended in the 2019 Version.**

Cl. 2-3 regulates the extent to which an agreed insurable value is binding on the insurer. For the shipowners, it is important that a valuation is unconditionally binding on the insurer: an expanding shipowner's building programme is based on the ships' current freight income or, if a ship is lost, on its insured value, and the mortgagees as well need to know that they can rely on the hull valuation.

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

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

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

In relevant Nordic ICAs, reference is made to the rules relating to the duty of disclosure in the event that the person effecting the insurance has given incorrect information of importance for the valuation. In marine insurance, however, the rules relating to the duty of disclosure in Cl. 3-1 *et seq*. are not

applicable to misleading information which is only of importance for the determination of the valuation. The consequences of the misleading information in such cases are exhaustively regulated in Cl. 2-3; there is no need for further sanctions in the form of exemption from liability or cancellation of contract as allowed by the rules relating to the duty of disclosure. However, in the event of fraud, it follows from general rules of contract law that the agreement is void. And if information has been given which is misleading in relation to the valuation as well as significant for the actual effecting of the insurance, the insurer will obviously, in addition to a reduction of the valuation, have the right to invoke Cl. 3-1 *et seq*. concerning exemption from liability for damage and, possibly, cancellation of the insurance.

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

Sub-clause 2 **was amended in the 2019 Version and** establishes **a right for** both parties **to demand an adjustment of the agreed insurable value** in the event of a **significant** change in the value of the **interest** insured resulting from **change in fundamental expectations upon which the insurance contract was based**. **There must have been a change that is unrelated to the acts or influence of either of the parties and the change must be of a kind that affects the express or clearly implied assumptions that were the basis for the parties‘ agreement about the insured vessel’s value. If the agreed insurable value is based on the current market value of the vessel and there is a significant change of the market value after the insurance contract was entered into, both parties may require a change of value. If on the other side the basis for the insurable value was mainly based on the contractual arrangements for the vessel, market fluctuation might not be relevant. The same must apply if the insurable value was agreed on the basis of outstanding loan arrangements with a bank.** It is only the valuation which can be changed in this manner; the insurance contract remains in force.

If the parties do not agree as to whether or not the conditions for an adjustment of the valuation are met, or about a new valuation amount, *sub-clause 3* provides that the decision shall be made by a Nordic average adjuster appointed by the assured.

Clause 2-4. Under-insurance

This Clause is identical to Cl. 9 of the 1964 Plan and corresponds to relevant Nordic Insurance Contracts Acts (Nordic ICAs).

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

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

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

In relation to co-insurance, the rule applies only to co-insurance in the form of several parallel insurances where each individual insurer becomes liable for that proportion of the sum insured for which he is liable in relation to the aggregate insurable value. If the co-insurance is effected in the form of insurances in several layers, each layer must be regarded as an independent interest. It is therefore necessary to calculate a separate insurance value for each layer and look at the sum insured within the relevant layer in relation to the insurable value for that particular layer. The rules relating to under-insurance are applicable to co-insurers within the same layer, but not to the relationship between several co-insurers who are each liable for their own layer.

The provision contained in Cl. 2-4 does not regulate the question of the co-insurers' liability in the event of collision damage, in view of the fact that there is no insurable value for such liability. However, it is generally assumed that the distribution of liability among the co-insurers must be based on the hull value.

Clause 2-5. Over-insurance

This provision is identical to the provision in Cl. 10 of the 1964 Plan. The same result follows indirectly from relevant Nordic Insurance Contracts Acts (Nordic ICAs).

Sub-clause 1 is identical to the earlier provision and requires no comments. *Sub-clause 2* relating to fraud is not found in Nordic ICAs, but is in accordance with non-marine insurance conditions.

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

The provision corresponds to Cl. 11 of the 1964 Plan and relevant Nordic Insurance Contracts Acts (Nordic ICAs).

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

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

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

The third situation where there is double insurance is when a loss is covered partly under the primary cover of an insurance, partly as costs to avert or minimise the loss under another insurance.

In principle, this loss should be covered under the insurance which covers costs to avert or minimise the loss, cf. below under Cl. 2-7. But also here the assured must initially be entitled to claim damages from both insurers according to Cl. 2-6.

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

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

Sub-clause 2 is new and regulates the settlement if one insurance has been made subsidiary. The rule here is that the insurer who has subsidiary liability is only liable for the amount for which the assured does not have cover with other insurers. It should be superfluous to say this in the Plan text; the solution follows from the actual subsidiarity principle and does not give rise to any particular problems. However, because of the special rule contained in sub-clause 3, see below, an explicit provision was found to be the most expedient.

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

Cl. 14 of the 1964 Plan contained a provision relating to the duty of the person effecting the insurance to disclose any other insurances he might have. The provision corresponded to Section 44 of the Norwegian ICA 1930, which was deleted in the revision of the Norwegian ICA in 1989, *inter alia* on the grounds that the general provision relating to the duty of disclosure of the person effecting the

insurance was sufficient to regulate the situation. The same will apply in marine insurance; furthermore, Cl. 2-5, sub-clause 2, relating to fraudulent over-insurance applies. The provision has, therefore, been deleted. If the insurer in a recourse settlement after the insurance event has occurred, should need to know about other insurances, he can ask the person effecting the insurance.

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

This Clause corresponds to Cl. 12 of the 1964 Plan and relevant Nordic Insurance Contracts Acts (Nordic ICAs).

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

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

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

If a salvage operation concerns different interests covered by different insurers, there will seemingly be double insurance as regards costs of measures to avert or minimise the loss. However, here the

rules in Cl. 2-6 and Cl. 2-7 are not applied; according to Cl. 4-12, sub-clause 2, each of the insurers is only liable for that part of the costs which is attributed on a proportional basis to the interest which he insures; in other words, there is no question of any apportionment under the rules of double insurance.

Cl.12, sub-clause 1, second sentence, of the 1964 Plan contained a rule to the effect that if an insurer was unable to "pay his share of the compensations, it is to be apportioned over the others according to the above rules, but each insurer is never obliged to pay more than the amount for which he was liable to the assured". A similar provision in Section 42, first sub-clause, last sentence, of the Norwegian ICA 1930 was deleted, because it was regarded as unnecessary to encumber the statutory text with such detailed rules. The provision in the 1964 Plan is not referred to in the Commentary, and it has apparently not given rise to any problems in practice. It has therefore been deleted, also because the solution of a primarily pro-rata, in the alternative joint and several, liability follows from Section 2, second and third sub-clauses, of the Norwegian Act no. 1 of 17 February 1939 relating to instruments of debt (*gjeldsbrevsloven*) anyway, and must be considered to be the main rule relating to recourse liability in Norwegian property law.

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

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

Section 2
Perils insured against, causation and loss

General

This Section comprises five topics of vital importance in marine insurance:

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

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

The Commentary was amended in 2016 to remove some history and reference to the special cover provided by the Norwegian Shipowner's Mutual War Risks Insurance Association in Chapter 15. **Letter (b) was amended in the 2019 Version and split into two letters (b) and (c) whereas the other letters (c) and (d) were renumbered. Letter (c) – now (d) – on insolvency was also amended in the 2019 Version**.

An insurance against marine perils covers "all perils to which the interest may be exposed", cf. *sub-clause 1, first sentence*. **There are five** positive exceptions from this point of departure, *viz.*:

(1) perils covered by war **risks** insurance **as listed in Cl. 2-9, sub-clause 1**,
(2) "intervention by **own** State power" **as defined in letter (b)**,
(3) requisition by State power, cf. letter (c),
(**4**) insolvency**/lack of liquidity and operation of ordinary legal process, cf. letter (d),** and
(**5**) perils covered by the RACE II Clause**, cf. letter (e)**.

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

range of perils covered by the insurance against marine perils is negatively defined, covering any other form of perils to which the interest is exposed.

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

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

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

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

Fourthly, injurious acts by third parties will basically be perils that are covered by an insurance against marine perils. These may be collisions, explosions, fire or the like, which arise outside the insured ship, etc. It is irrelevant whether or not the person causing the damage is blameworthy; damage caused intentionally will also be covered. One important type of injurious act by a third party will nevertheless be excluded from the cover against marine perils, *viz.* interventions etc. by a State power; such acts will instead to a large extent be covered by the war-risk insurance, see Cl. 2-9, sub-clause 1 (b).

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

Sub-clause (a) excludes from the range of perils covered by an insurance against marine perils "perils covered by an insurance against war perils under Cl. 2-9". The perils thus excluded appear from Cl. 2-9 and the relevant part of the Commentary on that provision. It is, however, clear that whether the ship has war-risk cover in one form or the other under Cl. 2-9 will not affect the insurance against

marine perils. The insurance against marine perils will thus not be extended if the ship does not have the maximum cover against war perils under Cl. 2-9.

It has not been unusual for a ship to have hull insurance on **Plan** conditions against marine perils and on English conditions against war perils, and vice versa. Such combinations entail a risk that the person effecting the insurance may have double insurance on the one hand and gaps in the cover on the other. Also, as it appears from Cl. 2-8 and Cl. 2-9, there are admittedly certain gaps in the system of cover, but these are gaps that are normally uninsurable. Furthermore, the entire purpose of Cl. 2-8 and Cl. 2-9 has been to devise a co-ordinated system without double insurance or gaps.

It would probably be safe to say that overlapping insurances are less dangerous to the person effecting the insurance than insurances with gaps in the cover. In the event of overlapping insurances, one "merely" risks having to pay additional premiums for the overlapping factor, whereas gaps in cover may entail the risk that the assured is left wholly or partially without cover. A few examples will show the gaps in the cover that may be the result of an injudicious combination of the Plan and English conditions. It follows from Cl. 2-8 (a), cf. Cl. 2-9, sub-clause 1 (d), that piracy is regarded as a war peril and is consequently covered by insurances against war perils according to the Plan. Under English conditions piracy is - after some indecisiveness over the years - regarded as a marine peril, which means that a person with Nordic insurance against marine perils and an English insurance against war perils will not be covered against piracy. Similarly, the Plan is based on a modified "dominant-cause" rule in the event of a combination of marine perils and war perils, see Cl. 2-14, while English law in such a combination-of-perils situation would rely on a strictly "dominant-cause" criterion. If the person effecting the insurance has Nordic insurance against marine perils and English insurance against war perils, he runs the risk that English courts will say that the marine peril must be regarded as "dominant", and that the English war-risk insurer must consequently be free from liability, while Nordic courts would perhaps reach the conclusion that both groups of perils must be deemed to have exerted equal influence on the occurrence and extent of the loss and, in keeping with Cl. 2-14, second sentence, find the Nordic insurer against marine perils liable for only 50% of the loss.

Sub-clause (b) **deals with interventions of own State power. The provision was amended in the 2019 Version partly to extend the cover for such interventions, partly to clarify contradictions in the Commentary on the marine insurer's liability for such interventions.**

Until the 2019 Version, the exclusion in letter (b) applied to "intervention by a State power" without any further limitations. The concept of "State power" included "individuals or organisations exercising supranational authority". The provision was closely linked to the provision in Cl. 2-9, sub-clause 1 (b,) stating that the war risks insurance covered "capture at sea, confiscation and other similar interventions by foreign State power". An important aspect of the war risks cover was that the concept of "other similar interventions" was limited to

interventions that were undertaken for the purpose of an overriding political objective, and that interventions made as part of the enforcement of customs and police legislation were not covered. Based on this and the wording of the two provisions one should think that any intervention by State power regardless of the type and motive was excluded in Cl. 2-8 (b), whereas the more qualified interventions by foreign State power were covered by Cl. 2-9, sub-clause 1 (b). The result should then be that all interventions by national State power and less qualified interventions by foreign State power were excluded. However, the Commentary to Cl. 2-8 (b) implied that the wording was too wide by inter alia stating that "Interventions made as part of the enforcement of customs and police legislation will thus, as a main rule, be covered by the insurance against marine perils to the extent the losses are recoverable in the first place." This comment was contrary to the wording of the Clause and created uncertainty as to the extent of the exclusion in Cl. 2-8 (b). The confusion was further strengthened by remarks in the Commentary to other relevant provisions. Under the 2019 revision, it was therefore deemed necessary to clarify the cover on this issue. In addition, there has been a trend where vessels have been captured at sea and/or detained in port by foreign State power and where it has been doubtful whether the State power enforced ordinary police or customs legislation or there was some overriding political objective involved. Examples are the detainments of the vessels B Atlantic in Venezuela, Sira in Nigeria, and Poavosa Ace in Algeria. Such cases often include some fraudulent or criminal behaviour by a third party, for instance by the charterer or the receiver of the goods. These situations raise questions both as to the extent of the war risks insurer's liability according to Cl. 2-9, sub-clause 1 (b), and whether the marine insurer could be liable and if so the extent of such liability. The interpretation of Cl. 2-9, sub clause 1 (b), was clarified in the Sira arbitration case by Hans Jacob Bull, which is outlined in further detail below and under Cl. 2-9, sub-clause 1 (b).

The main results of the amendments based on the Sira case and recent developments are that:

1. **Requisition by any State is not covered either by marine risk or by war risks insurance,**
2. **the marine risk insurance excludes certain qualified interventions by own State power provided these have been made for the furtherance of overriding national political goals,**
3. **the war risks insurance does cover such interventions by foreign State power or a supranational power,**
4. **the marine risk insurance covers interventions by own and foreign State power and supranational powers that are not either excluded in Cl. 2-8 (b) or (c) or covered by Cl. 2-9 (b), but only to the extent that the losses concerned are of the kind covered by the relevant insurance.**

Under Cl. 2-8 these amendments have made it necessary to divide letter (b) in two so that letter (b) deals with "capture at sea, confiscation, expropriation and other similar interventions by own State power provided any such intervention is made for the furtherance of an overriding national political objective", whereas letter (c) deals with requisition.

Letter (b), first sentence, now excludes "capture at sea, confiscation, expropriation and other similar interventions by own State power". The interventions are the same as defined in Cl. 2-9, sub-clause 1 (b). This means that as far as the description of the interventions are concerned, the two provisions are identical. However, since such interventions most often are made by a foreign State power, it is natural that further definitions and explanations in the Commentary are made under Cl. 2-9 (b) on war risks insurance.

It is important to emphasize that the exclusion in Cl. 2-8 (b) and the cover in Cl. 2-9, sub-clause 1 (b), must be seen in the context of the all risks principle in Cl. 2-8. Interventions by own or foreign State power that are not excluded in Cl. 2-8 (b) or covered by Cl. 2-9, sub-clause 1 (b), are covered by the all risks principle unless the exclusion in Cl. 2-8 (c) applies. Generally therefore, interventions by State power other than those mentioned will be covered by the marine insurer unless the intervention is either part of the "operation of ordinary legal process …" etc. under Cl. 2-8 (d), or is excluded by other rules in the Plan, for instance Cl. 3-16 on illegal undertakings. The result is that interventions such as capture, arrest or detainment in port or the like - due to for instance suspicion or investigation of breach of regulations concerning fishery, customs, pollution, safety or navigation, will be covered. However, if the breach means that the vessel is being used for "illegal purposes" and the assured knew or should have known about this, the loss will be excluded according to Cl. 3-16. If the assured was in good faith and the breach is the result of a fraudulent or criminal act or omission from a third party, for instance the master or crew, the charterer or the receiver of the goods, cover remains in place. This widening of the cover compared to the previous wording of Cl. 2-8 (b) is a response to situations where vessels are captured and/or detained in foreign ports for a longer period of time due to some criminal behaviour by for instance a third party or the charterer or the master and crew. The amendment is also intended to bring the exclusion into alignment with the terms of Cl. 3-16 on illegal undertakings.

Further, the exclusion in Cl. 2-8 (d) only applies to "ordinary legal process". In cases where the intervention is due to abuse of power or corruption, this is covered by the all risks principle. In some countries cases which commence as a regular administrative, police or judicial process can easily degenerate in excessive delays or attempts at extortion. If the intervention in such case turns out to be for the purpose of an overriding national political objective, the intervention will be covered by the war risks insurer according to Cl. 2-9, sub-clause 1 (b). However, there may be cases where no such national political motive can be detected, but the interventions are

clearly outside the scope of normal due process. Examples would be the Chemical Ruby and Sira arbitration cases referred in Wilhelmsen/Bull, Handbook on hull insurance, 2017, pp. 94-99, where there were excessive delays but no clear overriding political objective. Such cases will then be covered by Cl. 2-8 according to the all-risks principle. Both accidental and deliberate but unjustified damage to the vessel during the exercise of State powers of the kind that falls within this category is covered by the insurers against marine perils. This also means an extension of the cover under the insurance against marine risk compared to the previous wording of Cl. 2-8 (b). When a vessel is captured at sea and/or detained in port, it may be difficult to ascertain whether this is due to misuse of power or corruption or if the intervention has an overriding national political objective. An intervention by a foreign State power with an overriding political motive is covered by Cl. 2-9, sub clause 1 (b), and is thus outside the scope of Cl. 2-8, see letter (a). If there is doubt as to which policy applies, Cl. 2-16 on division between the two perils may be applied. The assured may also require payment on account according to Cl. 5-8.

The new provision in Cl. 2-8 (b) only regulates the peril that is insured. There are no changes in the regulation of losses that are covered by the marine insurer. The traditional difference between losses covered under a marine policy and that covered under a war risks policy is therefore upheld. The insurances regulated within the Plan framework are essentially standard products. Standard Plan marine policies do not cover loss of time/income unless it has arisen as a consequence of physical damage to the vessel or one of the other limited circumstances defined in Cl. 16-1. Delays and loss of time due to State interventions of the kind that remain covered under Cl. 2-8 will therefore not give rise to a claim under a loss of hire policy governed by the Plan Ch. 16. Similarly, a marine insurance policy for hull and machinery only covers total loss of a vessel if the assured "has been deprived of the vessel without any prospect of recovery", ref. Cl. 11-1. This is a much higher threshold than the 6 months' time limit that applies in the case of war risks under Ch. 15. The standard cover provided by the Plan is not intended to provide the kind of "political risk" cover that would more fully protect owners of vessels trading to countries that have a more or less dysfunctional political system. Solutions for such vessels are available in the market and it is a matter for the assured to decide what level of more specific cover they deem appropriate. It is not natural to spread this risk over all assureds that do not trade in these areas.

Sub-clause 1 (b), second sentence, **defines the concept of "own State power" to mean the State power in the ship's State of registration or in the State where the major ownership interests are located. The term "State of registration" is not without its ambiguities in the event of so-called double registration in connection with bareboat chartering. However, in the event of double registration in both the owner State and the bareboat-charterer State, both States must be regarded as "the State of registration" for the purpose of this provision. As regards the term**

"controlling ownership interests", the vital question will normally be in what country the largest proportion of the ownership interests are located. However, the term opens the door to a discretionary assessment, where other elements such as limitations on voting rights, the composition of the ownership interests, co-operation arrangements etc. may lead to the conclusion that the controlling ownership interests are located in another country.

According to *sub-clause 1 (b), third sentence*, the concept of "own State power " does not include individuals or organisations exercising supranational authority. This conforms to the previous definition of own State power. Supranational authority is included in the concept of foreign State power in Cl. 2-9, sub-clause 1 (b). This means that interventions by such power will be covered by war risks insurance within the framework of this provision. Interventions outside this cover will be covered under the all risks principle in Cl. 2-8 except for requisition, which are excluded in Cl. 2-8 letter (c), cf. below.

Since the exclusion for intervention of State power has been limited by the revised wording of Cl. 2-8 (b), it is no longer necessary to have specific wording to achieve the purpose of the so called "pollution hazard clause" that was incorporated as an exception to the exclusion in the previous wording of Cl. 2-8 (b). It is now clear that subject to the exception in Cl. 2-9, sub-clause 1 (e), any measure taken by a State, own or foreign, for the purpose of averting or limiting any loss or damage whether pollution or any other kind of loss or damage will not be excluded by Cl. 2-8 (b), but will remain covered under an insurance against marine risks by virtue of the all risks principle. The exception in Cl. 2-9, sub-clause 1 (e), is the case of any measure taken by a foreign State power to avert or limit loss or damage where the cause of the original casualty or threat of a casualty is a war peril as defined in Cl. 2-9, sub-clause 1 (a)–(d). In this case it is of course the war risks insurer who is liable for any loss or damage that might arise as a consequence of the measures to prevent loss.

***Sub-clause 1 (c)* excludes " requisition by State power". In the previous 2016 Version, this exclusion would follow from the broad exclusion for "intervention by State power" in (b). With the more narrow provision in the new letter (b), it is necessary to make a separate clause for requisition to emphasize that requisition by State power is excluded regardless of the motive for the requisition. An identical exclusion is made in Cl. 2-9, sub-clause 2 (c). This exclusion was previously placed in Cl. 2-9, sub-clause 1 (b), but it was expressly stated that it applied to requisition "for ownership or use". The expression "for ownership or use" is deleted both in Cl. 2-8 (c) and Cl. 2-9, sub-clause 2 (c) to simplify the wording, but no material change is intended. Requisition is excluded regardless of whether a State takes over the ownership functions of the vessel or the measure is limited to the use of the vessel. Further, the exclusion for requisition applies to both own and foreign State power even if requisition typically is done by own State power, cf. below. The concept of requisition was not defined in the previous 2016**

version of the Commentary, but it was stated that "Requisition as an intervention typically occurs in times of war or in times of war-like conditions, or during a political crisis. A general criterion for defining requisition as a war peril is therefore that the intervention is politically motivated. If the State expropriates the ship for other reasons, for instance pursuant to quarantine provisions to prevent the spread of a virus, this does not constitute "requisition" in accordance with this provision." This implied that requisition was the same as politically motivated expropriation, but it was not clear how expropriation as an intervention was to be treated. Further, the reason to exclude requisition was that "According to ordinary principles of expropriation law, the requisitioner must pay full compensation for the subject-matter requisitioned or - in the case of requisition for use - cover liability and any damage and reduction in value which the subject-matter of the requisition has suffered during the period of requisition." This may be true for requisition and also for expropriation by own State power, but it is not always true for expropriation by foreign State power. The Committee means that requisition and expropriation today are not identical concepts, and that expropriation should be treated similar to confiscation, i.e. excluded in Cl. 2-8 (b) and covered in Cl. 2-9 (b). The concept of expropriation is therefore defined under Cl. 2-9, sub-clause 1 (b).

There is no court decision that provides a definition of the concept of requisition, and the concept is not clear either in Nordic or in English marine insurance. "Requisition" in the Plan means that the State "requisite" the vessel for ownership or use according to legislation and in national interest. The relevant legislation will normally provide a formal procedure to be followed. Requisition is typically limited in time and the purpose is that the vessel shall be redelivered to the owner after a certain period. Normally, but not necessarily, the authority to requisite vessels will be limited to vessels under the State's own flag. The rule is also that the State compensate for the use of the vessel and pay for any damages during the period of use, but this is not a requirement for the exclusion to apply. Expropriation, on the other hand, means that the owner is permanently deprived of the ownership to the vessel. This is thus a different concept from requisition, although the concepts may overlap if the period of requisition is uncertain and/or compensation is paid for the expropriation.

The exclusion for requisition in the sense described above is upheld. If the vessel is registered in one of the Nordic countries it must be expected that the State will pay compensation if they take over the vessel for ownership or use regardless of the motive for the requisition, and it is not natural to cover this under the insurance. Requisition of the vessel for instance to use it as a hospital vessel will according to this exclusion not be covered. An identical provision is found in Cl. 2-9, sub-clause 2, letter (c).

*Sub-clause (**d**)* **was revised in 2019 and the Commentary was re-written. The exclusion now applies to "insolvency or lack of liquidity of the assured or the operation of ordinary legal**

process to enforce payment of any fine, penalty, debt or right to security unrelated to a claim or liability covered by the insurance", whereas the previous exclusion was for insolvency only. The term "insolvency" has been used in the English text of the Plan as a translation of the Norwegian term "manglende betalingsevne" literally "lacking the ability to pay". Consequently, insolvency in Cl. 2-8 and Cl. 2-9 means inability to pay regardless of the cause of the insolvency or whether it is temporary or permanent. There is no requirement for the insolvency exception to apply that the economic situation for the assured is so grave that the assured has been or may be declared bankrupt, enters into composition agreement with his creditors or seeks protection from creditors, under any applicable legislation such as e.g. Chapter 11 proceedings under U.S. law. In order to avoid any doubt, the phrase "or lack of liquidity" has been added so as to better reflect the original Norwegian text. The term does not apply to cases where a person has the ability to pay but refuses to do so, perhaps because the claim is disputed or for some other reason. Of course, it is possible that a refusal by the assured to pay a third party demand might affect the amount or indeed the validity of an insurance claim, but this would be for reasons unrelated to a lack of liquidity or insolvency.

It can be argued that even without any specific exclusion the assured would be unable to claim for losses that can be attributable to his own insolvency or lack of funds. Lack of funds is no excuse for a failure to perform one's contractual obligations such as the duty to maintain the vessel in a proper condition. The same applies under a loss of hire insurance policy if repairs are delayed by the assured's inability to pay for the necessary spare parts. It is even doubtful whether a repossession of the vessel by a mortgagee for non-payment of a loan could ever be claimed even under an all risks policy, but sub-clause (d) removes any possible doubt on this point.

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

Previously the exclusion for insolvency also applied to the insolvency of any party other than the assured. It is difficult to see the need for such an exclusion although there are cases where a

specific exclusion avoids the need to use more complex reasoning from basic principles of contract law. On the other hand, it is obvious that there are cases where a simple exclusion for insolvency of a third party is inappropriate. Clearly, insurers must carry the risk of third party insolvency when exercising rights of subrogation against third parties who are responsible for damage that is covered by an insurance. If the owner of a vessel that has collided with the insured ship or a bunker supplier who has supplied off-spec bunkers is bankrupt, that is the insurers' problem and not the assured's. The revised wording of sub-clause (d) discussed below replaces the very unclear exclusion for insolvency of persons other than the assured with more specific wording that makes it clear without further discussion that certain obvious limitations in the scope of the insurance apply.

The scope of the exclusion for intervention by State power in Cl. 2-8 was restricted in 2019, ref. the Commentary to Cl. 2-8 (b). As a consequence the words "or the operation of ordinary legal process to enforce payment of any fine, penalty, debt or right to security unrelated to any claim or liability covered by the insurance" were added in (d). Since cover under Cl. 2-8 is based on the all risks principle, losses of the kind covered by any Plan insurance arising from interventions by State powers or even the ordinary exercise of a State's judicial or administrative powers will be covered unless they are excluded. After the changes to Cl. 2-8 (b) and Cl. 2-9, sub-clause 1 (b), the situation is that interventions by a foreign State power that satisfy the criteria in Cl. 2-9, sub-clause 1 (b), are covered by an insurance against war perils and therefore excluded from cover under Cl. 2-8 (a), while interventions by the vessel's flag state or the State where the major ownership interests are located are now specifically excluded by Cl. 2-8 (b). This would mean that interventions that does not have an overriding political goal will be covered by the all risks principle, hereunder interventions based on ordinary legal process. It is unlikely that the operation of ordinary legal processes will be the direct cause of physical damage to a vessel or lead to the owner being deprived of the vessel without any prospect of recovery but the possibility cannot be entirely discounted. In addition, it is not natural for any form of insurance to cover the cost of delays or legal costs of ordinary legal process to enforce the payment of debts or other legal rights against the assured or the vessel that are unrelated to a valid claim. It is true that the basis for legal proceedings involving the vessel might be unreasonable or ill founded. However, there is a well-established set of rules in most jurisdictions concerning arrest of vessels and protection against wrongful arrest. In many cases the vessel's P&I club will provide security to lift the arrest and so called Defence cover will cover the costs of negotiating and providing security in other cases. Where the legal proceedings relate to a valid insurance claim such as a demand for security for salvage services or in connection with a collision, the appropriate insurer will provide security and cover any costs involved. The exclusion will therefore only be relevant in very exceptional cases. It is true that the new exclusion like the exclusion for "insolvency" can apply irrespective of whether the legal proceedings relate to a claim against the assured or a third party such as a charterer but for the

reasons explained above the new wording is much less likely to lead to confusion or unintended consequences. It should be noted that the exclusion only applies to legal proceedings to enforce a debt or obtain security for a debt. It does not apply to e.g. proceedings related to public law matters such as the enforcement of customs or trading regulations. Such cases are governed by the rules in Cl. 3-16.

*Sub-clause (**e**)* was introduced in 2007 as a result of the attitude of the reinsurance market as regards terrorism risk after the terrorist attack in New York on 11 September 2001. At that time the reinsurance market included the following Clause in all reinsurance contracts (RACE II):

INSTITUTE EXTENDED RADIOACTIVE CONTAMINATION EXCLUSION CLAUSE

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

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

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

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

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

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

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

The term “release of nuclear energy” will also include radioactive radiation (released from an unstable atom). In a broad sense, the term also includes the toxicity and contamination of substances that are formed during and after such a “release”.

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

Sub-clause (**e**) (5) was also taken from the RACE II Clause, which includes "biological, chemical, biochemical and electromagnetic weapons". According to the English insurance market, the purpose of the wording "biological, chemical, biochemical" is to exclude nerve agents and viruses such as "sarin", mustard gas, smallpox, etc. The formulation does not include explosives, or methods for detonating or attaching explosives. Nor does it cover use of the ship or its cargo for harmful purposes, unless the cargo itself constitutes a chemical or biological weapon that is covered by the Clause.
The term "electromagnetic weapon" refers to sophisticated mechanisms designed to destroy computer software, and not to methods for detonating or attaching explosives.

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

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

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

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

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

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

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

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

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

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

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

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

(5) The purpose of insurance is to provide protection against unforeseen losses. *The foreseeable loss* in the form of maintenance, regular operating expenses, etc. must be covered by the assured himself. The dividing line between which losses are "foreseeable" and which are "unforeseeable" is far from clear and may cause doubt in all branches of marine insurance. This question can hardly be solved by an explicit provision in the general part of the Plan, however.

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

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

The Commentary was amended in 2016 to remove some history and references to the special cover provided by the Norwegian Shipowner's Mutual War Risks Insurance Association in Chapter 15. **In addition, the Commentary was substantially amended in the 2019 Version in connection with the amendments to Cl. 2-8 (b), (c) and (d) and Cl. 2-9, sub-clause 1, letter (b) and sub-clause 2, letters (a) and (c).**

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

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

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

Sub-clause 1 of Cl. 2-9 states the range of perils in war-risk insurance in (a) - (e).

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

An implement of war may be the cause of damage also after the war in which the implement was used has ceased, e.g. where a ship runs into a mine. Such damage shall also be regarded as "a peril attributable to war", regardless of whether or not the mine explodes. If the impact does not result in an explosion it may, however, be difficult to prove whether the impact is attributable to the implement of

war or a common marine peril, e.g. a log. In that event the rule of apportionment in Cl. 2-16 may have to be applied.

Generally, all such measures that are regularly taken by powers at war as well as by neutral powers and which affect shipping, such as the extinguishing of lighthouses, the withdrawal of old navigation marks and the putting out of new ones, the organising of convoys where the freedom to manoeuvre is more or less restricted, orders to sail without navigation lights, etc., will constitute war perils, due to the fact that they are attributable to the war, cf. the wording of the Plan.

As for capture at sea, requisition and the like undertaken for the purpose of war, and sabotage carried out to further the purpose of a power at war, these are perils directly attributable to the war and therefore come under the definition in Cl. 2-9 sub-clause 1 (a). However, these perils are also covered by the special enumeration in sub-clause 1 (b); between (a) and (b) there will thus be an overlapping as far as war-motivated measures are concerned. However, if the measure is taken by the ship's own (not "foreign") State power, the special rule contained in sub-clause 1 (b) must prevail. Such measures will therefore fall outside the cover, regardless of whether or not they are war-motivated. If, in exceptional cases, the war-risk insurer has not accepted liability for the perils mentioned in sub-clause 1 (b) and (c), it will be a matter of construction to decide whether he must nevertheless be liable under sub-clause 1 (a) for war-motivated measures by a foreign State power and war-motivated sabotage.

The term "war-like conditions" is used to imply that the decisive point is not whether war has broken out or threatens to break out, but how war-like the measures are which a State has instituted. Whether there are "war-like conditions" may, of course, be difficult to decide, but in practice the term will hardly be of any great significance. As a rule, the loss will have been caused either by military manoeuvres or by measures taken by State power, and in either case it will be covered by the war-risk insurer, even if there are no "war-like conditions". If a ship which is in international waters or within the territorial borders of a foreign **S**tate, becomes the subject of a simulated or real air raid by the relevant foreign **S**tate, this must normally be regarded as a war peril. Exceptions are nevertheless conceivable where the action must be viewed as part of the enforcement of the relevant **S**tate's police or customs legislation, see below under sub-clause 1 (b).

A **"**civil war**"** will normally constitute a "war-like condition", and the addition is therefore more in the nature of a specification than an amendment. An example of losses that are covered under this alternative is where aircraft from rebel forces in a civil war drop bombs that hit neutral ships, cf. the situation during the Spanish civil war, when bombs dropped in the summer of 1936 struck the Norwegian ship D/S Frank.

The war-risk insurer is also liable for "the use of arms or other implements of war in the course of military manoeuvres in peacetime or in guarding against infringements of neutrality". The main

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

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

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

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

Moreover, when applying Cl. 2-9 sub-clause 1 (a), guidance will be found in the abundant case law relating to those ships that sailed in Norwegian and other German-controlled waters during World War II.

Sub-clause 1 (b) of Cl. 2-9 deals with **certain interventions by foreign States. The provision was amended in the 2019 Version and the commentaries to this provision rewritten. The amendment is closely tied to the amendment of Cl. 2-8 in relation to interventions by own State power. Similar to the revision of Cl. 2-8 (b), Cl. 2-9, sub-clause 1 (b), is divided so that requisition is addressed in a separate sub-clause, cf. sub-clause 2 (c) and below.**

The purpose of the amendment is to clarify the distinction between the marine risk insurance and the war risks insurance for such interventions, to clarify several of the concepts used in letter (b), and also to adjust the war risks cover to the criteria established in the Sira case. The main amendment is to emphasize that the war risks cover only includes the interventions that are listed "provided any such intervention is made for the furtherance of an overriding national and supranational political objective". In the previous Plan version, this was not stated in the provision, but it was emphasized in the Commentary that a political motive was necessary for "other similar measures" to be covered. It was however uncertain whether such motive was required for capture at sea and confiscation. This is now clarified by the new wording. At the same time, the wording of Cl. 2-8 (b) has been revised to make it clear that such interventions by a foreign State will be covered by the marine insurance if they are not covered under the war risks insurance. This means that losses arising from measures taken by the police authorities must be covered by the ordinary marine-risk insurance to the extent that the losses are of the kind that are recoverable under the insurance in question, cf. the comments above on Cl. 2-8 (b). The loss will often consist of loss of time or general capital loss, for which the insurer is not liable. However, assuming, for example, that the vessel sustains damage during an extensive customs examination, the hull insurers against marine perils must cover the damage, subject only to the normal exclusions such as e.g. Cl. 3-16.

The interventions mentioned in Cl. 2-9, sub-clause 1 (b), may constitute a strict war measure related to a war in progress or an impending war which as a starting point would also be covered under letter (a) above. However, as a special provision, sub-clause 1 (b) will prevail.

The provision provides cover for "capture at sea, confiscation, expropriation and other similar interventions ". The cover for "expropriation" is new, cf. further above under Cl 2-8 (c).

The term "capture at sea" means that the vessel is intercepted, seized or arrested by a foreign State power at sea. This covers the situation where the insured vessel is stopped at sea by a war ship or military ship using power or threatening to do so. It is not capture "at sea" if the vessel is

arrested and detained in port without a foregoing capture. On the other hand, when the vessel is captured at sea, it will normally be escorted by power into port for further control. As long as the detainment in port is due to the same cause as the capture, the stay in port must be regarded as part of the capture. If the vessel sails into port without any threats from the foreign State, this is outside the concept of "capture at sea". This is true even if the State could have forced the vessel to enter the port.

The term "confiscation" means that the vessel is appropriated by State power without compensation. The term comprises "condemnation in prize", where a warring power will invoke international or domestic condemnation in prize rules.

The term "expropriation" means that the State takes over the vessel for a purpose deemed to be in the public interest. Expropriation is similar to confiscation in that the owner permanently loses ownership to the vessel. Contrary to confiscation, however, the assured may be compensated for his loss. Any such compensation must be deducted from the liability of the insurer. However, if such compensation is not paid, or the compensation is less than the assessed insurable value of the vessel, there is a clear need for cover. It should be noted that expropriation refers to a permanent loss of ownership. In case of a time limited transfer of ownership, this will normally constitute "requisition", which is excluded, cf. sub-clause 2 (c).

The term "other similar interventions" indicates that the enumeration in sub-clause 1 (b) is not exhaustive, and that other types of interventions by a State power may be included. The term "similar" means that the intervention must have similar consequences for the assured as "capture at sea", "confiscation" and "expropriation". Typical for these interventions is that the shipowner is being divested of the right to dispose of the vessel. This is therefore a necessary condition for an intervention to be covered under this group. An intervention satisfying these criteria can of course take place while the vessel is in port. Requisition by State power is however excluded from cover in Cl. 2-9, sub-clause 2 (c). For further comments on the distinction between requisition and expropriation, see the comments to Cl. 2-8 (c).

A common requirement for all four groups of interventions is that they must be carried out for the furtherance of an overriding national or supranational political objective. It is therefore clear that interventions in accordance with applicable law for the purpose of enforcing customs-, police-, safety- or navigation-regulations or any private law rights against the insured vessel are outside the scope of the war risks insurance cover. If the vessel is arrested/captured at sea by the Coast Guard or representations of the police or customs authorities to hinder or investigate illegal fishery, import or export or breach of trade regulations, this will not be covered. The same is true if the vessel is arrested or detained in port because of doubt as to whether the vessel is compliant with the rules regarding technical and operational safety, or because the crew is

suspected of smuggling. Obviously, losses arising from the vessel being detained or seized as part of debt-recovery proceedings against the owners are not covered, either; this follows in any event from the exclusion in sub-clause 2 (a).

It does not matter whether such police or customs intervention is caused by illegal acts performed by a third party, for instance the charterer or the master or crew. Further, it is not decisive whether the State intervention is based on the legislation of the country or may be seen as abuse of power or corruption, if the intervention does not have an overriding national or supranational political objective. However, if an overriding national or supranational political objective is detected, it does not matter if the State power formally justifies the interventions with for instance police or customs regulations, or if the intervention has the character of abuse of power or corruption.

The expression "overriding national … political objective" is based on four arbitration cases in regard to the war risks cover for interventions by foreign State power in the 1964-Plan and the 2013 Plan Version 2016, namely unpublished award of 11 June 1985 relating to the Germa Lionel, ND 1988.275 NV Chemical Ruby, The Wildrake case, which was settled, and the unpublished award "MT Sira" of 27 October 2016, but the word "national" is added to emphasize that a public State is involved. The cases are discussed in detail in Wilhelmsen/Bull, Handbook on hull insurance, Oslo 2017 pp. 94-99. The three first cases are summarized in the Sira-case, which states that interventions for the "furtherance of overriding political goals" are interventions that are typical for war or times of international crisis, and often can be explained by foreign policy considerations. The justification for the intervention may be a warranted or unwarranted suspicion that the vessel has breached rules for the protection of the security of the State. It is not decisive that the general political situation in the State has contributed to the intervention. It follows from this that abuse of power is neither a necessary nor a sufficient condition for war risks cover. If an overriding national political goal is detected, there is no need to establish misuse of power. On the other hand, misuse of power need not be explained by such overriding political motives. Misuse of power may be a reflection of a dysfunctional State and indicate another motive, but misuse of power is not in itself a necessary condition for cover.

Overriding national political objectives will typically be outlined by the president, the parliament, the government at large, or a particular ministry. Authorities at a lower level will not have the power or authority to make this type of political evaluation, as their mandate will be limited to exercising given authority in a specific and limited area.

The term "supranational" is added to emphasize that the concept of "foreign State power" includes both public and supranational power, cf. below.

According to letter (b) ***second sentence*****, the term "foreign State power" means "any State power other than own State power as defined in Cl. 2-8 (b), second sentence, as well as organisations and individuals exercising supranational authority or who unlawfully purport to exercise public or supranational authority. The term therefore comprises all** persons or organizations exercising **public or** supranational authority**, except for own State power**. Hence, if an intervention is implemented by representatives of a league of States (alliance, group, block), it must be regarded as an intervention by a **foreign** State power. A **confiscation or expropriation** by NATO or a similar organization will accordingly be covered by **letter** (b). **However, requisition by NATO is not covered, see sub-clause 2 (c) and below.**

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

Sub-clause 1 (b) deals only with restrictions on the owner's rights in the object insured. Actions leading to an infliction of physical damage fall within the scope of general war perils set forth in sub-clause 1 (a); there is accordingly no limitation applicable to actions by authorities of the State of registration or the State of ownership. If the object is destroyed by entities from these States during acts of war, the insurance against war perils will have to indemnify the loss. This must apply both where the destruction is an unintentional consequence of the acts of war, and where it is a result of military orders for the furtherance of military objectives of the State of registration or the State where the controlling ownership interests are located. In this connection, it makes no difference whether the military authorities have themselves effected the destruction, have ordered it, or have even used a formal requisition. In all of those cases, the assured's loss will be recoverable. Only interventions aimed at divesting the assured temporarily or definitively of his use of the object are irrecoverable. However, what the authorities are going to use the ship for is irrelevant.

Sub-clause 2 (c)**, excludes "requisition by State power". Requisition was previously regulated in sub-clause 1 (b), last sentence, which stated that such requisition was not regarded as an intervention in relation to Cl. 2-9, sub-clause 1 (b). However, this expression was problematic in relation to Cl. 2-8 (b), which excluded interventions from State power because it could be argued that requisition was not included in this exclusion. This was obviously not the meaning, and the wording is changed to make it clear that requisition is not covered. To further clarify this rule, it is moved from sub-clause 1 (b) to sub-clause 2 (c). As mentioned, a similar division is made in Cl. 2-8 (b) and (c). The concept of requisition is further defined under Cl. 2-8 (c). It follows from these rules that requisition is not covered by any insurance. As mentioned above under Cl. 2-8**

(c), it must be expected that a Nordic State will pay compensation if it requisite the vessel for temporary ownership or use. There is no guarantee that a foreign State power will adhere to these principles, but there is limited availability of reinsurance for this kind of purely political risk.

Sub-clause 1 (c) covers riots, sabotage, acts of terrorism and other social, religious or politically motivated use of violence or threat of the use of violence, strikes or lockouts.

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

By “sabotage” is primarily meant wilful destruction which does not form part of the conduct of war, but which is connected with, for example, labour conflicts. War sabotage is a war peril which will also be covered under sub-clause 1 (a). The sabotage need not be aimed at the actual object insured. A “go slow” action among dock workers or seamen is aimed at the employers’ interests in general, but if the action involves recoverable damage to the assured’s property, the war-risk insurer will be liable for the damage under sub-clause 1 (c). Destruction carried out by a ship’s crew as an act of vengeance or a protest demonstration against the owner must be regarded as vandalism of property and is covered by the insurance against marine perils. The same applies to wanton destruction of property carried out by someone of unsound mind or under the influence of alcohol. The term “sabotage” presupposes that the action pursues a specific political, social or similar goal, see ND 1990.140 NV PETER WESSEL, where the court based its decision on the assumption that the costs of interrupting the ship’s voyage etc. in connection with a bomb threat must be covered by the hull insurer against marine perils as costs of measures to avert or minimise the loss. The external circumstances of the threat clearly indicated that this was an act that had no background in political, social or similar circumstances.

The term "acts of terrorism" refers to the situation in which one or more representatives of a resistance group or the like carry out or threaten to carry out acts that are intended to exert influence on a government or another political body or to frighten all or parts of the population in a country.

The purpose is to promote a political, religious or ideological cause. The act of terrorism may directly affect an opponent's persons and/or interests, such as when bombs are placed in vehicles or on board ships, when aircraft are set on fire, when oil pipelines are cut, etc. However, there is nothing to prevent nor, moreover, is it uncommon for a terrorist act to be directed against a third party; in such case the purpose is usually to draw attention to the cause for which the terrorists are fighting.

Acts of terrorism are often characterised by the fact that they endanger the lives of many people, or cause extensive material damage. We have seen a number of examples of terrorist groups in recent years. An example is the terrorist attack against the United States of America on 11 September 2001.

As is the case for sabotage, acts of terrorism will under certain circumstances fall within the scope of the term "war or war-like conditions". This will primarily be the case when acts of terrorism occur in connection with a war between several States. One example may be acts committed by resistance groups in an occupied country with a view to hurting or weakening the enemy, for instance through acts of terrorism against ordinary merchant ships. "War-related terrorism" will therefore - like war-related sabotage - constitute a war peril that is covered by both sub-clause 1 (a) and (c). It is probably necessary to go one step further: acts of terrorism carried out in peacetime by resistance groups may also be so extensive that a "war-like condition" must be said to exist, see *Brækhus/Rein, Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 78. However, whether the act in question is regarded as an act of terrorism or as part of the conduct of war or a war-like act has no significance in practice for the cover.

As in the case of "sabotage", however, it is necessary to maintain that an act of terrorism must have or purport to have its basis in a more comprehensive struggle of a political or social nature. Thus a distinction must be drawn between such acts and ordinary criminal acts, including blackmail, using bomb threats, etc., purely for the purpose of gain, cf. for instance ND 1990.140 NV PETER WESSEL.

The wording ”other social, religious or politically motivated use of violence or threat of the use of violence” include acts that bear clear similarities to sabotage and acts of terrorism in that they entail the use of violence or threat of the use of violence that is not for the purpose of personal gain. The criteria as regards to motivation are the same as those that apply to riots, sabotage and acts of terrorism and will normally involve several persons. However, the addition will also cover individuals who use violence for the aforementioned motives without this qualifying for description as sabotage.

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

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

Sub-clause 1 (d) covers piracy and mutiny. The text of the Plan is unchanged, but the Commentary to the term “piracy” was amended in the 2010 Version.

In earlier versions of the Plan, the term “piracy” was defined as illegal use of force by private individuals in open sea against a ship with crew, passengers and cargo. The wording “open sea” was

the English translation of the Norwegian wording "det åpne hav", which corresponds to the wording used in the Norwegian translation of the wording "high seas" in Article 101 of the United Nations Convention on the Law of the Sea, where piracy consists only of acts committed on the high seas, and not within the territorial limit of any coastal state. The provision must be seen in conjunction with Article 105, which allows States to prosecute this type of crime outside the States' normal jurisdiction. It has therefore been asserted that the term "piracy" in the Plan only covers illegal use of force outside the jurisdiction of the coastal state, and in any event outside the territorial limit of 12 nautical miles. However, the wording "det åpne hav" or "open sea" (in the Norwegian text) was taken from the construction of the corresponding provision in the 1964 Plan in Brækhus/Rein: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), and in 1964 there were no corresponding clear international rules on the jurisdiction of coastal states. It was therefore uncertain whether the geographical delimitation should be linked to the issue of jurisdiction. However, there was also doubt as to how the term "det åpne hav" or "open sea" should be construed if it is not linked to international rules of jurisdiction. The state of the law on this point was therefore very uncertain.

In the current situation where piracy has again become a significant risk factor, it is unsatisfactory that there is an unclear geographical line between ordinary crime, which is a marine peril, and piracy, which is a war peril. The parties have pointed out that as a result of the increase in the illegal use of force, there is a need for war risk insurers to assume cover against this peril closer to land than the limit of the territorial waters or "the high seas", as the case may be. The purpose of regulating piracy in the Law of the Sea Convention is, as mentioned above, to give States the possibility of prosecuting such crime outside their ordinary jurisdiction, and it is not necessarily the case that this delimitation is suitable for regulating piracy in the context of insurance law. The illegal use of force does not change in nature depending on whether the attack is outside or inside the economic zone or territorial limit. War risk insurers may change the trading area with immediate effect as the war peril changes, pursuant to the insurance conditions and according to practice, cf. Cl. 15-9. War risk insurers may also charge an additional premium as a condition for sailing in conditional trading areas. Marine risk insurers have neither a tradition nor the legal authority for making such changes.

The Committee therefore agrees that the geographical limitation linking piracy to "the high seas" is inappropriate, and that the term "piracy" in the Plan must be uncoupled from both the term "open sea" and the international legal definition in Article 101 of the Law of the Sea Convention.

This means that in relation to war risk insurance "piracy" may also take place within the territorial limit of a coastal state. How close to land the limit lies and which other delimitation criteria apply have been topics of discussion. The consideration of what it is natural to consider a war risk as opposed to "ordinary crime" which naturally belongs in the range of marine perils must be weighed against the consideration of establishing a simple, practicable limit. Moreover, when establishing a more specific delimitation, a distinction must be made between merchant vessels that derive their

freight revenues from transporting goods and/or passengers from one port to another, and offshore installations that generate earnings by means of stationary operations in a field.

In the case of merchant ships, the Committee agrees that illegal use of force constitutes "piracy" as long as the ship is en route between two ports. Insofar as the ship is on its way from one port to another, therefore, it makes no difference whether the ship is inside or outside the territorial limit, or in "the high seas". Under this approach, even illegal use of force on lakes with a waterway connection to a sea and rivers constitutes "piracy". The Committee has discussed whether the limit for piracy should be drawn as far in as the ship's anchorage in the port, but concluded that the limit must be drawn at the port limit. Therefore, the illegal use of force within the port limit is not "piracy". This applies regardless of whether the ship is sailing in the port area or is anchored or moored, and regardless of whether the ship is lying at anchor at an ordinary anchorage for this port. The same applies to attacks while the ship is loading or discharging at a terminal. A key element in the concept of "piracy" in relation to merchant ships is that the use of force takes place at sea, making it difficult for the port State authorities to provide assistance. If the use of force takes place while the ship is within the port area, it is more natural to compare this with ordinary crime that is dealt with by the port State authorities.

The basic principle above is that the ship must be underway for an act to be piracy. However, there may be a need for war risk insurance even when the ship is temporarily anchored. Based on the considerations relating to the port limit above, the Committee has concluded that the illegal use of force against a ship that is temporarily anchored outside the port limit also constitutes piracy, even if the ship is anchored at an ordinary anchorage for the port in question. It is also piracy if the ship is attacked while it is at rest in the process of dynamic positioning or is loading from or discharging to a loading buoy outside the port area. When the ship is outside the port limit, it is more difficult for the port authorities to intervene in the event of an attack. Such an approach also concords with English law.

If the port limit has not been defined, the limit must be drawn on a discretionary basis depending on whether the use of force is in the nature of a civil peril risk or a war peril. On the one hand, the war risk insurance must obviously not cover anything that must be considered an ordinary crime of gain that is naturally dealt with by the port State authorities. On the other hand, it is important to cover the use of force by private individuals in an organised manner and the use of weapons that is more in the nature of a war peril. In countries with limited infrastructure where ports are poorly organised, there may, depending on the circumstances, be reason to let "piracy" cover attacks on ships that are temporarily anchored relatively close to land. The decisive factor must be that the way in which the use of force is organised and the use of weapons are in the nature of a war peril and not that of ordinary crime that can be dealt with by the port State authorities.

The shipowners have pointed out that the criterion "underway" is not suitable either for offshore units, dynamically positioned ships and other types of ship designed for stationary operation in a field, and which therefore are not "underway". Consequently, in the case of such units, the Committee has decided that "piracy" is to include illegal attacks on the unit while it is operating in the field, regardless of whether the field is located in "open sea" or the high seas. This kind of situation is in the nature of a war risk in the sense that the use of force necessitates a certain amount of organisation, in addition to which it takes place at some distance from land and the control of the authorities. Since the Committee has now decided that the illegal use of force against merchant ships will constitute piracy all the way to the port limit, it makes no difference how far from land the unit is operating. Since it has been decided that "the high seas" is no longer to apply as a criterion, piracy may also comprise e.g. the illegal use of force in a river delta.

The rule that attacks on units while they are laid up or under repair at or near a shipyard are to be regarded as a marine peril also applies to offshore units. Ordinarily, offshore units will not lie at or near a shipyard in the same way as a merchant ship. If the unit has been taken out of operation and moved from the field in order to make repairs, the stay at the place where the repairs are made must be regarded as a repair period. Attacks while the unit is being moved from the field to or from the place in which it is to be laid up or repaired shall be covered by the war risk insurance provided the moving process takes place outside the port limit.

The use of force may take place by means of another ship, but the pirates may also have come aboard as members of the crew or passengers on the ship which they subsequently plunder. The purpose will normally be economic profit, but an action that merely results in property damage or personal injury may also constitute piracy. Piracy will often be organized by people who purport to exercise government authority (e.g., an exile government that captures vessels to call global attention to their cause or in order to finance their revolt). The practical difficulties that would arise if a distinction had to be made between "piracy" and "measures by a foreign State power" are avoided by piracy being covered by the war-risks insurance, cf. sub-clause 1 (d).

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

Sub-clause 2 (a) is identical to Cl. 2-8 (**d**) and reference is made to the comments above.

The exceptions in Cl. 2-9, sub-clause 2 (b), are identical to the exceptions in Cl. 2-8 (**e**), except for cover of the use of radioactive isotopes for peaceful purposes, which is not relevant in a war-risks insurance. Reference is otherwise made to the Commentary on Cl. 2-8 (**e**) (1)–(5).

Sub-clause 2 (c) excludes requisition by State power, cf. above. The provision is identical to Cl. 2-8 (c) and reference is made to the comments to this provision.

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

This Clause is identical to Cl. 17 of the 1964 Plan.

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

Clause 2-11. Causation. Incidence of loss

The Commentary was amended in the 2019 Version.

Introduction

Cl. 2-11 regulates the issues of causation and incidence of loss. The provision firstly states the general requirement that there should be a causal connection between the insured peril and the loss suffered by the assured, the insured interest. It does not specify the nature of the causal connection that is required. Secondly, it contains rules for deciding incidence of loss issues. Since marine insurance contracts only provide cover for a defined period of time it is necessary to have rules that determine when a loss must be deemed to have occurred so that it can be allocated to the appropriate insurance period. This issue is often referred to as one of determining the "incidence of loss" – "periodisering" in Norwegian.

The main rule in Cl. 2-11 sub-clause 1 has remained unchanged since 1930. The so-called "anti-Hektor" rule now contained in Cl. 2-11 sub-clause 2 and sub-clause 3 has been simplified in an attempt to achieve greater clarity. However, the special rule applicable to losses arising from known defects or damage which was unique to the Plan has been changed.

In explaining the effect of the various provisions in Cl. 2-11 it is important to make three points at the outset. Firstly, other major systems do not contain specific written rules on this subject, which is normally dealt with by case law and practice. Since Cl. 2-11 is in the general part of the Plan, it applies to all Plan insurances including the various liability insurances contained in Chapters 13, 14, 15, 17 and 19. This helps to explain why the main rule in Cl. 2-11 sub-clause 1 is so general in scope. Secondly, the factual situations that can arise are extremely varied and complex, especially in relation to hidden processes, and there are a number of often conflicting considerations that must be taken into account, see below in the Commentary to Cl. 2-11 sub-clause 2 and sub-clause 3. It is not possible or even desirable to formulate rules that regulate every imaginable situation. What is needed are clear

principles that are determinative of the most common cases at the same time as they provide a consistent framework for evaluating how to decide the more complex cases.

Thirdly, it is also important to keep in mind that these issues arise in respect of recoverable claims. The right of the assured to claim is not at issue. It is true that the assured's claim can be affected by differences in deductibles, insurance contract limits or specific exclusions that can vary in different insurance contract periods but the sole purpose of the rules in 2-11 is to clarify which insurer is liable.

Cl. 2-11 sub-clause 1 The main rule

The wording of the main rule in Cl. 2-11 sub-clause 1 refers to the *insured interest* being struck by an insured peril. It does not refer to the insured object, which is usually a vessel, being struck. In the case of hull and hull related insurances, this means that actual damage to the vessel need not occur during the insurance period. It is sufficient that the operation of the peril has advanced to a stage which makes future loss of the kind covered by the relevant insurance contract almost inevitable unless extraordinary preventive measures are taken. There are many practical examples where this can occur. A vessel may run aground or be stuck in ice without being damaged in one insurance period, but may suffer damage as a consequence in the next. If a vessel is captured by pirates, it might not suffer actual physical damage until long after the date of capture during a new insurance period. Or a vessel might be blocked in a harbour by war perils and become a total loss as provided for in Cl. 15-12 after 12 months has elapsed by which time the insurance contract on risk at the time the blocking commenced will have expired. In all of these cases it is obvious that the peril has struck at the time the insured peril has materialized to the extent of creating the critical situation, and all losses flowing from that situation must be covered by the insurance contract on risk at that time.

The examples illustrate that the word "strike" presumes some kind of activity from the peril. This means that the general risk that a peril represents must have produced some concrete and specific result. A natural point of reference and the earliest point at which a peril can be said to have struck in the kind of open cases that fall within the main rule, is provided by the rules in Cl. 3-30 and Cl. 4-7. The assured's duty to do what is reasonably possible to minimise or prevent loss arises when "….a casualty threatens to occur or has occurred", Cl. 3-30. Similarly Cl. 4-7, which imposes upon the insurer an obligation to pay the costs of extraordinary measures taken to minimise or prevent loss in accordance with Clauses 4-8 to 4-12, applies when "a casualty has occurred or threatens to occur". The extent of the threat, that is the degree of danger required, is similar to that necessary to justify a general average act or salvage operation. There must be an imminent danger that loss covered by the insurance in question will arise, and the situation must be so acute that loss can only be avoided by extraordinary measures.

Once such a situation has arisen, then clearly an insured peril per definition must have struck since the insurer on risk at the time is obliged to pay for the costs of the reasonable measures taken even though no actual physical damage occurs. Any subsequent loss which can be regarded as part of the same casualty will also of course be referred back to the same point in time. The rule in Cl. 4-7 is consistent with what has already been said about the need for the peril to have had specific and concrete consequences. A general increase in the level of risk is not enough. If for instance a vessel leaves port without adequate navigation equipment and as a result runs aground at a later stage of the voyage one cannot say that the risk or peril of sailing without proper equipment has struck at the time the vessel leaves port. It is only when the vessel comes out of course and runs aground or is in imminent danger of running aground that the risk becomes so concrete and specific that the peril can be said to have struck. The very large range of possible outcomes that existed at the time the vessel left port has been narrowed down to a very few specific possibilities of which the most likely is that the vessel will suffer loss of the kind covered by the insurance contract.

Damage to a vessel can of course occur without there being an opportunity to take preventive measures. Events may move very rapidly as in the case of fire or explosion or a collision or a part of the vessel may be damaged because of some unknown defect. Clearly in the case of hull and hull related insurances, if a peril has not struck by creating a critical situation that would fall within Cl. 3-30 and Cl. 4-7 it must at the very latest have struck once damage commences.

The peril struck rule also functions satisfactorily in the case of liability insurance. The assured's liability arises from some tortious act, and the "liability interest" is therefore struck at the time the act was committed. Examples would be negligent navigation leading up to a collision or the negligent act of wrongly operating a valve so that bunkers are leaked into a harbour. In the second case the actual pollution damage and consequent economic loss to third party interests will arise some time after the tortious act, but the peril clearly struck at the time of the negligent operation of the valve.

All systems of marine insurance have rules equivalent to Cl. 3-30 and Cl. 4-7. All the examples mentioned so far would lead to the same result in other systems in those cases where the actual damage occurs in a later insurance period, although the result might sometimes be explained or justified in a different way. It can be concluded that the results are necessary and natural for the following reasons:

- The assured would be put in an impossible position if losses occurring after the expiry of the insurance period arising from e.g. grounding or seizure by pirates during the insurance period were not covered. Arranging new insurance for a vessel that is already aground or which has been seized by pirates, is not a practical proposition.

- The peril struck rule allocates losses as between successive insurers in a way that seems intuitively fair and reasonable. The allocation will be consistent from year to year so that in the long run all insurers are likely to end up being equally affected.
- The peril struck rule is consistent with rules concerning the duty of the assured to prevent loss and the liability of the insurer to cover the reasonable costs involved.
  It is in accordance with the way incidence of loss issues are handled in liability insurance, and is in harmony with the way causation and one casualty issues are dealt with.

Alternatives to the peril struck principle allocate losses to the time that damage occurs or to the time at which damage manifests itself or is discovered. Under the Plan, a version of the damage occurs principle is used in the cases regulated by Cl. 2-11 sub-clause 2 and sub-clause 3, and the burden of proof rules as explained in the Commentary to Cl. 2-12 operate with a presumption in favour of the time of discovery. In this way each principle is used in its most appropriate context.

Cl. 2-11 sub-clause 2 and sub-clause 3 Loss arising from an unknown defect or damage
In all the cases mentioned in connection with the main rule in Cl. 2-11 sub-clause 1, the chain of events is open and transparent. Events unfold continuously, usually over a relatively limited period of time and it is assumed that all the relevant facts and their timing are known. Difficulties in relation to incidence of loss arise for one of two reasons or a combination of them. A pre-existing unknown defect or damage which has its origin in one insurance period gives rise to new damage during a later insurance period. The progress of events remains hidden until either damage is discovered or there is a sudden breakdown of part of the vessel often resulting in new damage to other parts. In extreme cases the vessel may become a total loss or be put in imminent danger and require salvage services. Secondly, because of the hidden nature of the original defect or damage and the time that elapses prior to discovery or breakdown, it is often difficult to establish a clear picture of all the relevant facts and their exact timing. The first type of situation is regulated by Cl. 2-11 sub-clause 2 and sub-clause 3, and the second by the rules as to burden of proof, see the Commentary to Cl. 2-12.

The problems that arise in the first type of case came into focus by the Hektor case, ND 1950 458 NH, which in turn led to the introduction into the 1964 Plan of the rule known as the “anti-Hektor” Clause, now found in Cl. 2-11 sub-clause 2 of the 1996 Plan in a modified version.

In the original Hektor case, the vessel suffered damage as a result of a bomb attack in 1945 while it was in dock. The damage was repaired, but later in a new insurance period the rudder fell off during a bout of severe heavy weather. It was assumed that the rudder heel must have been weakened or damaged by the bomb blast, that it was not possible to discover this, and that the effect of normal use culminating in the bout of severe heavy weather caused the rudder heel to break and the rudder to fall off.

In the case itself it was decided that the cost of repairing the rudder heel must be covered by the original war insurer as part of the bomb damage. The cost of replacing the rudder was apportioned 60/40 between the 1945 war insurer and the marine insurer on risk at the time it was lost, 1946. Although the result is not entirely illogical it was regarded as unsatisfactory from a practical point of view. Firstly applying the rules as they were then understood required considerable expenditure on technical investigations. Secondly, the conclusion could only be reached on the basis of a difficult evaluation of contributing causes, and thirdly, the conclusion made it necessary to carry part of the loss back to an earlier insurance contract. A clarifying rule was therefore introduced into the 1964 Plan to the effect that unknown damage or weakness should always be regarded as a marine peril that strikes at the time the new damage and any associated losses occur.

The rules now contained in Cl. 2-11 sub-clause 2 and sub-clause 3 maintain this solution, making it clear that any unknown defect or damage, irrespective of its origins, must be regarded as creating a marine risk. Consistent with what has been said about the main rule in the Commentary to Cl. 2-11 sub-clause 1, this risk or peril accompanies the vessel until such time as it materializes in some specific further consequence. It cannot be said to have struck until it either causes (further) damage or creates a situation of imminent danger of damage as required by Cl. 4-7. Today the result of the Hektor case would be that the loss of the rudder would be allocated to the marine insurance on risk at the time of its loss. The costs of repairing the weakened or damaged rudder heel would still be covered by the war insurance on risk when the bomb blast occurred. Under other international systems loss would also be allocated to an insurance contract on risk at the time of the loss, but it is quite possible that it would be allocated to the war insurance on the basis that the original war damage was the dominant cause. The Plan rule has the practical advantage of removing the need for any evaluation as to the cause of the defect or weakness.

Cl. 2-11 sub-clause 2 of the 1996 Plan has been simplified by disentangling its three interwoven strands. Reference to known damage has been removed and dealt with separately in Cl. 2-11 sub-clause 4 and although the damage occurred principle is applicable in both cases, the rule in respect of unknown damage has been separated from the rule for unknown defects.

There are three main variants of the “damage occurred” rule. It can mean that damage should be allocated:

- only to the insurance contract on risk at the time the damage first commenced, or
- over all insurance contracts on risk at the time that damage in fact occurs so that where damage occurs progressively over time in different insurance periods, liability must be apportioned over all the insurance contracts concerned, or

- to the insurance contract on risk at the time the damage manifests itself or is discovered. This alternative is closely related to the second alternative.

There are advantages and disadvantages to each of these three variants and in some cases they could all give the same result. The key design considerations in establishing a set of functional rules for incidence of loss cases are of particular relevance in this area and can be formulated as follows:

- Insurers should not be liable for damage existing at the time the risk commenced, but they do accept the risks of new losses that arise from unknown defects assuming of course that there has not been any breach of the duty of disclosure.
- While a "fair" allocation as between successive insurance contracts has a value this does not have to be done down to the last dollar and cent. A fairly rough but consistent approach is sufficient.
- The rules as to incidence of loss must operate independently of rules that determine the validity and quantum of the assured's claim.
- It is practically inconvenient for both insurers and assureds to have liability allocated backwards in time. The further into the past liability is placed the greater the inconvenience and the greater the chance that an underwriter of the insurance contract in question might no longer be in business.
- There should not be opportunities to manipulate the decision as to which insurance contract is liable.
- The rules should be as simple as possible to facilitate their application in everyday practical claims handling.

As already mentioned the unknown defects or damage are always regarded as a marine peril irrespective of their origin. They are assumed to have struck the interest insured (this expression is used for the sake of consistency with the wording of Cl. 2-11 sub-clause 1) at a single point in time – when the damage to the defective part itself or the extension of damage to other parts starts to develop. This means that the first of the three possible variants mentioned above has been chosen, considerably reducing the scope for apportionment over several insurance contracts. It is obviously simpler to claim against one insurance contract than to apportion over a series of contracts. It is true that the chosen solution places all the loss on the earliest insurance contract, but if apportionment is adopted then that insurance contract will have to be involved in the settlement in any event. For the insurers involved, the end result over time for any portfolio of claims will almost certainly be the same.

The third possible variant is obviously impractical if it is understood in the broad sense that all damage is to be allocated to the insurance contract on risk at the time it is discovered, even if it is quite clear that the damage must already have been present prior to the inception of the insurance contract.

The opportunities for manipulation and fraud create a moral hazard unacceptable to insurers. No other system contains a general rule to this effect.

The term defect in Cl. 2-11 sub-clause 2 refers to some aspect of the vessel as such that needs to be rectified once it has been discovered. It can have arisen during construction or repair and be the result of error in design, the use of faulty or inappropriate material, faulty workmanship or mis-assembly. However, the original Norwegian text uses the word “svakhet”, literally “weakness” and a vessel may have sub-optimal features which it would be impracticable to remedy. These are usually known both to Owners and insurers but should a hitherto unknown weakness give rise to damage then it must be regarded as a defect and the case would fall within Cl. 2-11 sub-clause 2 if the claim is not excluded by Cl. 12-3.

Contaminated bunkers, lube oil or boiler feed water sometimes referred to as “system faults” are not defects within the meaning of 2-11.2. Loss arising from these causes is regulated by the main peril struck rule. In practice loss would be allocated to the time when the contaminated bunkers etc. are taken in use this also being the time when damage would normally commence.

Cl. 2-11 sub-clause 3 refers to “damage in one part of the vessel” resulting in “damage to other parts of the vessel”. As already mentioned liability for the original damage must be allocated to the appropriate point in time when the relevant peril struck, usually in a previous insurance period. It is only the incidence of consequential damage that is regulated in Cl. 2-11 sub-clause 3. The provision raises the issue of what is meant by “part”. This question also arises in connection with Cl. 12-3 and Cl. 12-4. The main practical application of this paragraph is in respect of machinery damage, a context in which it is reasonably easy to identify the various parts and components, see further the Commentary to Cl. 12-4. Practical common sense is especially necessary in some cases of hull damage. This is illustrated by example 2 below.

As example 3 shows it is quite possible to have a situation governed by Cl. 2-11 sub-clause 2 followed by one that falls within Cl. 2-11 sub-clause 3. A defective part starts to develop damage and then subsequently breaks down causing damage to other parts. If the damage to the defective part occurs in one insurance period and the damage to other parts in a later period then both the relevant insurance contracts will be involved, the first by operation of Cl. 2-11 sub-clause 2 and the second by virtue of Cl. 2-11 sub-clause 3.

Loss of Hire insurance is triggered by damage to the vessel which is recoverable under a hull insurance as specified in Cl. 16-1, sub-clause 1. This is the main peril or risk insured against under such an insurance contract. The events listed in Cl. 16-1 sub-clause 2 are unlikely to give rise to incidence of loss problems. The logical starting point is that a **loss of hire insurance** claim based on Cl. 16-1 sub-clause 1 should be allocated to the same point in time that has been identified for the

purposes of determining which hull insurance is liable for the relevant damage. **However, in case the hull insurance is subject to non-Plan conditions, there is a potential for divergence as to incidence of loss. Cl. 2-11 will obviously not be applicable for a hull insurance based on non-Plan conditions, whilst Part One of the Plan which includes Cl 2-11 is applicable for the loss of hire insurance**.

Example 1

A natural starting point in a review of examples of how Cl. 2-11 sub-clause 2 and 3 function is the case where the pre-existing defect or damage is discovered and creates a critical situation before any consequential damage occurs. We assume that the vessel is at sea and it becomes apparent that previously unknown cracks in the main engine bedplate have developed to a point where there is an acute danger of damage to the main engine if it continues to operate. It is therefore necessary to stop the main engine and seek assistance. The costs involved must be covered by the insurer benefitted, namely the insurer on risk at the time the critical Cl. 4-7 situation arose. This is the insurer who in accordance with Cl. 2-11 sub-clause 3 would have been liable if consequential loss or damage had not been mitigated or prevented. If despite the efforts made the vessel should e.g. run aground, then the losses incurred will as is normal all fall upon the insurer on risk at the time the critical situation occurred. This solution gives effect to the words “has occurred or threatens to occur” in Cl. 4-7 and assumes that these words must be read into Cl. 2-11 sub-clause 2 and sub-clause 3. The cost of repairing or replacing the bed plate will fall upon the insurer on risk at the time the cracks first began to develop since the bedplate is a single part. We are assuming that recovery is possible under Cl. 12-4. There may well be uncertainty about when damage commenced but this issue is taken care of by the burden of proof rules.

Example 2

A vessel runs aground but the Master takes the view after a divers’ inspection that the damage is not serious and decides that further inspection and repairs can be postponed until the next dry docking. At the dry docking two years later it becomes clear that the grounding damage was more serious than had been realized, and that the failure to repair had led to further damage in the surrounding areas of the hull bottom. The natural solution here is to allow all damage to be covered by the insurance contract on risk at the time of the grounding under the main peril struck rule. It could be argued that the various shell plates and internal structures should be regarded as different parts so that the case could come within Cl. 2-11, sub-clause 3. Consistent with the practice used in applying Cl. 12-3 one could regard at least the major components in the hull structure as separate parts. One might therefore conclude that as a starting point one should apply Cl. 2-12, sub-clause 3, and try and place damage to separate parts on separate insurance contracts. Common sense would however dictate otherwise. It will be difficult to distinguish the cost of repairing the original from the later damage and therefore it would make sense for the claims leader to allocate all damage to the original grounding.

On the other hand if the unrepaired grounding damage had at a later stage caused the vessel to take in water, perhaps entering the machine room, creating a salvage situation or even ultimately causing a total loss, then clearly Cl. 2-11 sub-clause 3 must be applied to achieve the obviously necessary result that damage to the machinery and any salvage costs or a total loss would be allocated to the insurance contract on risk at the time damage to other parts started to develop as the vessel started to take in water.

Example 3

A slightly modified version of a recent case is as follows: A vessel is delivered in Y1 (year 1) with an unknown defect in the form of a casting defect in the main engine crankshaft. At some stage this defect leads to small fractures. The evidence is clear that this must have occurred at the latest by Y5. The fractures continue to develop and towards the end of Y8 there is a main engine breakdown while the vessel is close to shore. The vessel runs aground, suffers grounding damage and is finally salvaged and repaired early in Y9. Cl. 2-11, sub-clause 2, requires that the entire cost of replacing the crankshaft should be allocated to Y5. There does not seem to be any compelling reason to apportion over the years Y5 to Y8 since one has to go back to the Y5 insurance contract anyway and in all probability the crankshaft would have had to be replaced or undergo a very expensive repair if the damage had been discovered in Y5. In accordance with Cl. 2-11, sub-clause 3, all consequential losses to other parts of the main engine and all other losses associated with the grounding and salvage would have to be covered by the Y8 insurance contract. In Y8 the crankshaft had unknown damage that resulted in damage to other parts. The pre-existing damage is therefore to be seen as a marine peril that struck at the time the consequential damaged commenced. This embraces all losses arising as a consequence of the breakdown i.e. not only the damage to other parts of the main engine but also the grounding damage and the cost of salvage. All the losses starting with the damage to the crankshaft would be regarded as belonging to the same casualty for the purpose of applying the agreed deductibles under the hull insurance contracts for Y5 and Y8. Any difference in these deductibles would be resolved by applying them proportionately relative to the amounts recoverable under each of the two insurance contracts.

Example 4

Norwegian practice has not favoured apportionment over successive insurance contracts where a part has been damaged by a slow process of fatigue and the rule in Cl. 2-11 sub-clause 2 and sub-clause 3 deliberately continues this tradition by allocating all liability for the damaged part to the first insurance contract. However, it is possible to think of cases where damage spreads from one part to the next in one year and then to other parts the year after. We assume the following facts: A crack in a main engine bed plate develops in a position that affects a main bearing so that it wears excessively. After a period stretching into a new insurance period the bearing fails damaging the crankshaft which has to be replaced. If we assume that the timing of the damage can be clearly established so that there are no burden of proof issues, then the effect of Cl. 2-11 sub-clause 3 will be to allocate liability for each part

to each of three appropriate insurance contracts that is the insurance contract on risk at the time the damage to each part started to develop. This is not strictly an apportionment since it is the cost of repairing or replacing each part that falls on the respective insurance contracts and obviously the costs can vary considerably. The costs are not spread evenly over the three insurance contracts. Very often in such cases the exact timing of the damage to each part cannot be established with certainty. Where the exact timing is unclear, the burden of proof rules make it possible to find a pragmatic solution which could conceivably involve a form of apportionment over two or more insurance contracts of some of the losses. In the above example the cost of replacing the crankshaft will probably be the major item and there will be no doubt that this must be allocated to the insurance contract on risk at the time of the bearing failure. However, it might be a sensible compromise to use some form of apportionment in respect of the other losses if there is no clear evidence as to their timing, but this is something that must be left to the skill and experience of the claims leader and adjuster in dialogue with the parties concerned.

Known defects or damage

It is not uncommon to postpone repairs or replacement of parts of the vessel that are known to be damaged or suffer from some form of defect. There will often be sound practical and operational reasons for the decision which is usually taken in consultation with class. Where repairs are postponed or partial or temporary repairs are carried out, the development of further damage to the damaged part or parts unrelated to any new event must obviously be covered by the original insurer. However, incidence of loss issues can arise if the decision to postpone remedial action turns out to be a misjudgement and damage or new damage to other parts arises as a consequence of the original defect or damage. In other words essentially the same issues arise as dealt with by Cl. 2-11 sub-clause 2 and sub-clause 3 except that the defect or existing damage is known. The starting point is that the decision to continue operating the vessel and postpone remedial action despite the existence of the defect or damage, however justified, represents a risk or peril. Any subsequent damage or casualty will be governed by the main rule in Cl. 2-11 sub-clause 1 and the resulting losses must be covered by the insurance contract on risk at the time damage commences or when the need for extraordinary measures to prevent loss arises. As explained, it is at this point that the risk or peril strikes the interest insured.

Three types of situation can be distinguished.

- The existence of the defect or damage is reported to the insurer at the time it is discovered and to subsequent insurers at each renewal. Equivalent to this situation is also that where the insurer on risk at the time (new) damage occurs has been informed at the time of renewal.
- The defect or damage is reported to the insurer when it is discovered but is not disclosed to new insurers at some subsequent renewal.
- The existence of the defect or damage is not disclosed to any insurer.

The first situation will normally be the most common and since the matter in question will often fall within the scope of the duty of disclosure the assured would run the risk of losing cover in the second and third situations if insurers are not kept informed. It is however possible that the matter falls outside the scope of the duty of disclosure because available expertise believes that there is no danger of any future damage or that the assured's failure cannot be regarded either as wilful or negligent so that the insurer's only remedy is to cancel the insurance by giving 14 days notice, see Cl. 3-4, liability for losses that have already occurred remaining unaffected.

The assured has a duty to take action if he knows or has reasonable grounds for suspecting that the insured vessel suffers from some type of defect, e.g. if an error in design or construction is discovered in a series of sister vessels. The cost of remedying the defect is not covered by insurance and there can be a real temptation to wait until the defect leads to damage in order to be able to have the cost of repairs covered by insurance. This issue of moral hazard was strongly in focus during the drafting of the 1964 Plan and led to the introduction of the "known defect or damage" rule in the then paragraph 18 which was maintained in Cl. 2-11 sub-clause 2 of the 1996 Plan which states that where unknown defects or damage results in a new casualty, the defect or damage shall be regarded as a marine peril that strikes the ship at the time the casualty or damage occurs "*or at such earlier time as the defect or the first damage became known.*" Taken literally this wording applies to all three of the situations listed above, including the first where insurers have been kept fully informed so that there can be no question of any manipulation by the assured. While it is easy to see the potential for manipulation in situations two and three above, it is difficult to see why the insurer on risk at the time the damage or defect became known should remain liable for events occurring after the expiry of his insurance period. Difficult questions can also arise as to the degree of knowledge required and as to whose knowledge is relevant.

In cases where insurers have been kept informed, each insurer is able to negotiate the terms and price that they think appropriate on the basis of the information available to them. The decision to continue operating the vessel and postpone remedial action despite the existence of the defect or damage however justified, means that the inherent risk created by the defect or damage retains whatever potential it might have to create new losses. Each insurer must then live with the terms and conditions they have agreed and must cover the losses that might occur during the insurance period. This is also in conformity with the general principle that while each successive insurer should not be liable for damage that has occurred prior to the commencement of the risk, each successive insurer does, subject to proper disclosure, accept the risk of any future losses that arise from the known or unknown state of the vessel at that time.

After discussion and review it was decided that the special rule in the 1996 Plan was also inappropriate for the second and third cases mentioned above. This means that assuming that there has not been any breach of the duty of disclosure that would allow the insurer to avoid liability, one returns to the normal starting point in Cl. 2-11 sub-clause 1. This also gives results that fully conform with those that would follow in other systems.

Cl. 2-11 sub-clause 4 Limitation of the insurer's liability in respect of losses arising from defects or damage that were known by the assured but not by the insurer

The special rule in respect of "known" defects or damage introduced in 1964 has been deleted. The new rule in Cl. 2-11 sub-clause 4 now addresses the issue of moral hazard in situations where the assured knows of a defect or damage but the insurer does not. It is very difficult for the insurer to avoid liability on the basis of Cl. 3-2 or Cl. 3-3 or possibly Cl. 3-33 so that there is a need for a more clear cut rule unrelated to the assured's state of mind. The key difference between the old and the new rule is that, consistent with the main rule in Cl. 2-11 sub-clause 1 the new rule does not transfer liability back to an earlier insurance contract but places liability for consequential damage on the insurer on risk at the time the risk created by the known defect or damage materializes in the form of damage or the creation of a critical situation. The question of whether and when the assured acquired the degree of knowledge required to trigger Cl. 2-11 sub-clause 4 must be decided in accordance with the normal rules as to identification in Clauses 3-36 to 3-38.

The rule in Cl. 2-11 sub-clause 4 comes in addition to any rights the insurer might have under the disclosure rules.

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

The wording of Cl. 2-12 has not been amended, but the Commentary has been rewritten for the 2013 Plan.

Burden of proof rules identify which party in a legal dispute carries the risk that doubt exists in relation to facts that are essential for a party's case. In insurance cases as in other private law areas the general rule is that facts need only be established on a balance of probabilities. It must be more likely than not that an essential fact has occurred or is true. As a starting point this is the standard of proof to be applied under the Plan.

Reflecting general insurance law, sub-clause 1 states the matters that must be established in order to make a claim under a Plan insurance; namely that the assured has suffered a loss of the kind covered by the insurance and its extent. Properly understood, this requirement in fact involves four specific items namely proof that:

- the assured has an insurable interest in the sense that he has suffered actual economic loss of the kind that is covered by the insurance in question,
- the assured's economic loss has arisen from events (perils) of the kind specified in the relevant insurance,
- that the loss occurred during the insurance period, and
- the extent or quantum of the loss.

In relation to the second point above, this means that once the assured has proved that an insured event has occurred, e.g. in the case of hull insurance damage to the vessel, then as sub-clause 2 provides the burden of proving that the damage was caused by an excluded peril falls upon the insurer unless other provisions of the Plan provide otherwise. This means that subject to any specific contrary rule, the assured must establish the three other bullet points listed above.

There are a number of specific exceptions to the rule in sub-clause 2 in addition to those in sub-clause 3. These issues are dealt with in greater detail below and thereafter the special case of the burden of proof in relation to Cl. 2-11, incidence of loss is discussed.

Further comments on Cl. 2-12, sub-clause 2, and various exceptions including those in sub-clause 3.

In practice the most frequently occurring critical issues arise when the insurer alleges that a loss has been caused by a breach of one of the assured's duties so that recovery is excluded in whole or in part. The most important exceptions to the rule in sub-clause 2 relate to this kind of case. Cases where the burden of proof rules can determine whether the assured has a valid claim or not can be distinguished from those where it is clear that the assured has a valid claim but the facts in issue will determine which insurance contract is liable, e.g. cases of damage to a vessel which must have been caused by either marine or war perils. This is specifically regulated in Cl. 2-16 which has its own Commentary. Another example would be cases where there is doubt as to when damage occurred so that the question is which of several successive insurance contracts should respond, as discussed below. These cases are less critical for both assured and insurers, and the rule in Cl. 5-8 requiring insurers to make a payment on account is designed to prevent practical inconvenience to the assured during the time needed to achieve a final decision.

Obviously the burden of proving that the assured has committed a breach of duty rests upon the insurer, but depending on the circumstances it may be reasonable to transfer the burden of proof back to the assured once the insurer has done enough to establish a prima facie case.

Cl. 3-3, sub-clause 2, and Cl. 3-9, sub-clause 2, apply to a negligent breach of the duty of disclosure and alteration of risk respectively, and provide that if the insurer has first established that he would

only have accepted the insurance but subject to different conditions, then the assured has the burden of proving that the loss was not caused by matters that should have been disclosed or which amount to an alteration of risk.

In Cl. 3-25 the insurer has the burden of proving that the assured has committed a breach of a safety regulation. Once this has been done the burden of proving that the loss was not caused by the breach or that the breach cannot be attributed to the fault of the assured falls upon the assured.

Similar examples of cases where the burden of proof is returned to the assured once the insurer has established certain facts can be found in Clause 3-18, sub-clause 3, and Cl. 3-23.

Cl. 2-12, sub-clause 3, places upon the assured the burden of proving that loss has not been caused by any of the perils listed in the so called RACE Clause – Radioactive Contamination Exclusion Clause, see Cl. 2-8 (**e**) and Cl. 2-9, sub-clause 2 (b). This Clause, which is universal both in direct and re-insurance marine insurance contracts, has its obvious justification in the danger of a massive accumulation of losses. Clearly the assured's burden of proof will in practice not be activated in every case but only in those rare cases where there is at least some evidence that one of the perils named might be involved.

Burden of proof in relation to Cl. 2-11, incidence of loss
In principle, the assured's burden of proof includes the need to prove the time at which the peril struck Cl. 2-11, sub-clause 1, or in the case of Cl. 2-11, sub-clauses 2 and 3, the time at which the damage started to develop. In practice, difficulties most commonly arise in connection with the application of sub-clauses 2 and 3. Obviously once it has been established that a loss covered by the insurance in question has occurred, the assured cannot be deprived of cover simply because it is not possible to prove that the loss probably occurred in one or another particular insurance period. If a loss is covered and it is equally likely that it occurred in one of several possible insurance periods, then it is necessary to have a mechanism for deciding which of the possible insurance contracts should respond. In some systems the solution is to apportion over the most relevant insurance contracts. As noted in the Commentary to Cl. 2-11 Norwegian practice does not favour apportionment over several insurance contracts, and this also applies to cases where it is unclear when loss actually occurred. In Norwegian practice one has sought to place the loss on one insurance contract using a presumption in favour of the insurance contract on risk at the time of discovery.

This approach can be described as follows:

Assume a series of insurance contracts starting with insurance period 0, the contract on risk at the time the damage is discovered. Number the successive previous contract periods as -1, -2, -3 etc.
The party alleging that the loss occurred in -1 rather than 0 must produce evidence that the loss

occurred in that period rather than in the current insurance period 0. Very often because of e.g. marine growth or rust or because period 0 has been on risk for only a short time, it will be quite clear that the loss could not have occurred in period 0. The next step is to look at period -1 and repeat the process. If it can be established that on the evidence the damage occurred in period -1, then the loss falls in that period for its entirety. If not, one proceeds to consider period -2. It can, of course easily happen that the facts make it clear that the loss must have occurred in a period spanning more than one contractual periods but it is impossible to narrow down the time of loss within that overall period. In such a case, the loss will fall upon the most recent of the contractual periods concerned. Thus, if it is clear to the required degree of certainty that the loss did not occur in period 0 and that it must have occurred after the expiry of period -3 but it is equally likely to have occurred in -1 or -2, then the loss will fall on -1 as being the most recent of the two possible contractual periods. Effectively this means that the burden of proving that the damage occurred in an earlier period rests on the party making the allegation. In some cases this may be the assured, the earlier insurance contract may have lower deductibles or higher limits. In others it might be an insurer who subscribes to the latest contractual period but not to the older one.

The crucial question that remains is the degree of proof required. What is required to rebut the presumption that loss occurred in the same period in which it was discovered? In principle, the general rule requiring proof on the balance of probabilities should apply, but in practice there has often seemed to be tendency to require something more. This also seems implicit to the rule in the Swedish Plan. As mentioned above, there will be many cases where it will be obvious from the technical evidence that damage could not have occurred in period 0. It is important for the long term credibility of the system that parties are not forced to allocate losses to a point in time that is clearly contrary to the available evidence. As pointed out in the Commentary to Cl. 2-11 an important design consideration is that insurers should not be made liable for damage that existed prior to the inception of the insurance contract. On the other hand, administrative efficiency favours a rule that allocates losses to period 0. The crucial issue boils down to how heavy the burden of proof should be on the party that wishes to place loss in an earlier contractual period. The natural conclusion from the practice referred to above is that something more than the balance of probabilities is required. At the same time it would be wrong to require the same degree of certainty that is required in criminal cases; namely beyond all reasonable doubt. The best way of expressing this burden is to say that the party wishing to establish that loss occurred in an earlier contractual period must do so on a clear preponderance of probabilities. Any statement as to the degree of certainty required in respect of the burden of proof will inevitably be prone to discussions and different evaluations of any given set of facts. However, requiring proof to a clear preponderance of probabilities – “klar overvekt av sannsynlighet” in Norwegian - should not be any more difficult than the alternatives and has the benefit of favouring practical solutions.

Clause 2-13. Combination of perils

Sub-clause 2 was amended in the 2007 version. The Clause is otherwise identical to earlier versions of the 1996 Plan.

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

The question of the insurer's liability in the event of a combination of causes is a general problem. General Norwegian insurance law is based on what is known as the "dominant-cause doctrine". The dominant-cause doctrine is established through case law from the early 1900s and onwards, partly in connection with cases where an assured who has an accident insurance has died as a result of an accident as well as an illness (see in particular *Rt.* 1901.706, 1904.600 and the overview in *Rt.* 1933.931) and partly in cases concerning a combination of war perils and marine perils in marine insurance, cf. below. The causation principle entails establishing which peril constitutes "the dominant-cause factor" or "the dominant peril". The entire loss shall be allocated to the peril which is thus designated as the dominant cause. For the assured this means that he will either receive full cover or none at all, depending on which peril insured against is regarded as dominant.

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

In marine insurance the problem of the combination of causes arises in three situations, *viz.*:
(1) if the loss is attributable partly to perils covered by the insurance and partly to perils excluded from cover by an objective exclusion. The most common situation in practice is a combination of marine and war perils, but one might also mention the case (from hull insurance) where a part is damaged partly because of inadequate maintenance and partly because of the impact caused by a casualty;

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

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

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

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

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

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

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

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

The conclusion was nevertheless that the most expedient approach would be to keep the rule of apportionment. The advantage of this solution is that the premium is in “correct” proportion to coverage in that the insurer is not held liable for the effect of causal factors that fall outside the scope of cover of the insurance. Considerations of fairness also favour such a solution: the assured has paid a premium to be covered against certain risk factors and has no reasonable claim to be covered against other perils.

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

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

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

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

On the basis of case-law concerning the rule of apportionment from 1930 up until today, legal theory has deduced a number of criteria for the application of this rule, see *Brækhus/Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), pp. 262 *et seq.* These criteria are still relevant. This means, in the first place, that it is necessary to distinguish between relevant and non-relevant causes. The prerequisite for applying the rule of apportionment is that the loss has been "caused" by a combination of several perils. The fact that an effect of a peril has been a necessary condition for the loss is not sufficient to justify apportionment. If the effect of a peril has been rather insignificant, it should be assigned a weight of 0; in other words, Cl. 2-13 also opens the door for an apportionment where one effect of a peril is assigned a weight of 0 and the other a weight of 100. This applies both when there is a combination of two perils which cause a casualty, cf. for example ND 1942.360 VKS

KARMØY II, and where there is a combination of the casualty and a new peril which results in further losses, cf. ND 1977.38 NH VESTFOLD I. The lower limit required for an effect of a peril having a bearing on the apportionment may on a discretionary basis be set at 10-15%.

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

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

In both of the combination situations referred to above, the loss may also have occurred through a combination of objective perils covered by the insurance and subjective negligence. As mentioned, the rule of apportionment may, in such cases, have a function similar to that of the reduction system in the event of subjective negligence under ICA. The objective of deterrence will be better served if it is possible to make some deduction from the compensation instead of having more rigid rules according to which the assured loses the entire cover in the event of any negligence on his part. In connection with minor acts of negligence, it would otherwise be tempting for the judge to reach the conclusion that "it has not been proved to his satisfaction" that the assured has shown negligence if the alternative is a loss of the entire cover. Here it would also be natural to base the apportionment on an evaluation of probability, and attach weight to the subjective negligence depending on the degree of probability that it would result in a loss. This will normally be concordant with an evaluation of the degree of fault: the higher the probability of a given action leading to a loss, the more serious the fault will normally be deemed to be. ND 1981.347 NV VALL SUN gives an example of a combination of dereliction of duty and other causal factors.

Sub-clause 2 was amended in the 2007 version, and must be seen in the context of the new exclusions in Cl. 2-8 (**e**) and Cl. 2-9, sub-clause 2 (b), cf. also the amendment to Cl. 2-12, sub-clause 3. The provision is concordant with the rules that formerly applied to the exclusion for nuclear perils, and prescribes that if an excluded peril related to nuclear risk and biological, etc. weapons has contributed to the loss, the entire loss shall be attributed to this peril. Thus there is no question of partial cover in accordance with the basic principle in sub-clause 1. This solution is in accordance with

the introduction to the RACE II Clause, which provides that any contribution by the excluded perils shall have the effect of exempting the insurer from liability.

Clause 2-14. Combination of marine and war perils

This Clause is identical to Cl. 21 of the 1964 Plan.

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

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

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

cause, an exception is furthermore made from the rule as regards an increase in costs of repairs, cf. below.

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

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

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

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

The rule of apportionment is also subject to another limitation in the relationship between war-risk and marine-risk insurance. As under the 1964 Plan, certain types of losses are allocated to the scope of

liability of the war-risk insurer, regardless of whether marine peril has been a contributory cause, cf. Cl. 2-15. In such cases, the marine peril will never be regarded as the dominant cause, nor will there ever be any question of an equal distribution. For further details, see below under Cl. 2-15.

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

This Clause is identical to Cl. 22 of the 1964 Plan.

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

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

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

The provision shall only apply if the use of the implement of war is the direct and immediate cause of the damage to the ship. In situations where the use of the implement of war takes place at an earlier stage of the course of events, while the direct cause is a marine peril, the question of liability must be resolved under Cl. 2-14. Another matter is that the use of implements of war may be deemed to be the dominant cause, even if it does not constitute the direct cause of the damage, for example, where the implement of war, an aircraft bomb, damages a dock gate so that the lock is emptied, something that in turn results in the assured ship running into another ship in the dock.

There may sometimes be some doubt as to what constitutes an "implement of war", see, for example, ND 1946.225 NV ANNFIN (damage by collision with a submarine in action deemed to be "war damage" pursuant to the corresponding provision in Cl. 42 (2) of the 1930 Plan), ND 1944.33 NV

VESTRA (damage caused by the paravane on the warship with which the ship collided, not deemed to be "war damage") and ND 1947.465 NV ROGALAND (damage resulting from the blowing up of explosives which another vessel was carrying to German fortifications, not deemed to be "war damage"). However, this question is of less significance today than under the 1930 Plan, because the dominant-cause rule is now the point of departure in case of a combination of marine and war perils.

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

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

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

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

Sub-clause (c) covers "loss of or damage to a life-boat caused by it having been swung out due to war perils". Under the 1964 Plan, loss of or damage to life-boats while swung out was not compensated, unless this was caused by a war peril, cf. Clause 176 (j). This exception has been deleted because it is

not very practical for ships to sail with life-boats swung out in cases other than during a war situation. However, in such cases the marine peril will also normally contribute to the loss of the life-boat (it will be torn loose or damaged in heavy weather), and the situation might easily arise that the loss would have to be divided under Cl. 2-14. However, it would be reasonable to attribute these losses in their entirety to the war-risk insurer, in accordance with practice during World War II.

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

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

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

This Clause is identical to Cl. 23 of the 1964 Plan.

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

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

Clause 2-17. Sanction limitation and exclusion

The Clause was new in 2016, corresponding to the Cefor Sanction Limitation and Exclusion Clause of 2014 that was already widely used in the market. Similar clauses are used in the international marine insurance and reinsurance market, cf. Lloyd's LMA 3100.

The purpose of this Clause is to protect the insurer by ensuring that he is not contractually required to perform activities that will expose him to sanctions. Where asset freezing restrictions apply, the insurer may not be able to, directly or indirectly, make payments to or for the benefit of, or receive payments from, the individual or entity designated under the sanction. Furthermore, under certain sanction regimes, including the EU sanctions applicable to Iranian and Syrian persons as defined under EU Council Regulations 267/2012 and 36/2012 and certain US sanction programmes, the provision of coverage itself is prohibited. In these situations, both providing cover and a payment from the insurer may expose the insurer to sanctions.

Sub-clause 1 regulates to what extent the insurer is exempt from liability due to sanctions.
The liability exemption does not only apply to payment of claims, but includes exemption from payment of any benefit under the insurance, for instance return of premium. The condition is that payment may expose that insurer or his reinsurers "to any sanction whether primary or secondary, prohibition or restriction". By "primary sanction" is meant a sanction addressed to the companies and citizens in the State that impose the sanction to prevent them from doing business with a rogue regime, terrorist group or other international pariah. A "Secondary" sanction is a sanction that imposes additional economic restrictions designed to inhibit companies or citizens in another State from doing business with a target of a primary sanction. A secondary sanction therefore means that a Nordic insurer may be sanctioned by a foreign State in case of breach of such sanction.

The main categories of sanctions are asset freezing and trade sanctions. If the insured is subject to asset freezing restrictions, the cover as such may be valid, but transactions must not be carried out under the contract that would result in funds being made available to any insured or beneficiary. Where trade sanctions (including arms embargos) apply, the provision of insurance coverage may be prohibited unless an appropriate licence is available or is obtained prior to the underwriting in question.

The limitation of liability does not apply to sanctions in general, but are limited to those "under United Nations resolutions or the trade or economic sanctions, laws or regulations of the European Union, the United Kingdom, the United States of America, France, the Russian Federation, the People's Republic of China or any State where the insurer has its registered office or permanent place of business". Sanctions imposed by other institutions or states not mentioned are not regulated by this sub-clause.

Sub-clause 2 gives the insurer a right to terminate the insurance if the subject-matter insured has engaged in activity that may expose the insurer to any sanction as regulated in sub-clause 1. This clause applies for instance if the insured vessel has carried cargo subject to export or import prohibitions, or if a MOU has provided services in prohibited areas, for instance Russia, cf. EU Council Regulation 960/2014.

Chapter 3
Duties of the person effecting the insurance and of the assured

General remarks

This Chapter deals with the effects of a breach by the person effecting the insurance or the assured of the duties imposed on them by the contract relation. These matters are also subject to detailed regulation in the relevant Nordic Insurance Contracts Acts (Nordic ICAs). The provisions of the Nordic ICAs have been amended substantially in relation to the previous Norwegian ICA dating from 1930, which formed the basis for the 1964 Plan. The amendments concern the criteria for the threshold for invoking/triggering sanctions and the criteria for the type of sanctions triggered/invoked. Generally it can be said that the amendments give greater protection to the person effecting the insurance and the assured in the event of breach of the duty of disclosure or the duty of care. The most important change is probably the one concerning the type of sanction, entailing a change from no liability at all to rules for discretionary reductions in a variety of situations.

The statutory provisions are not, however, mandatory for ships subject to registration which are used in commerce, cf. the relevant Nordic ICAs. One is, therefore, free to choose whether the Plan should be adapted to follow the provisions of the Nordic ICAs or not.

In principle, the approach during the revision has been that the Plan should follow the provisions of the relevant Nordic ICAs as far as possible. This is, however, not very satisfactory as regards the duty of disclosure and the duty of care. Even though they apply generally, the Nordic ICAs' provisions are aimed primarily at protecting consumers. In marine insurance, on the other hand, the person effecting the insurance is often a business enterprise; additionally, Norwegian shipowners have traditionally possessed considerable expertise in insurance matters. There is therefore not the same need for the type of extensive protection aimed at by the Nordic ICAs. Nor is the sanction structure in the Nordic ICAs, with its considerable emphasis on discretionary decision-making, entirely appropriate for a field like marine insurance. Given the considerable sums involved in marine insurance, allowing discretion to play such a large part could easily lead to significant growth in the number of lawsuits.

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

Section 1
Duty of disclosure of the person effecting the insurance

Clause 3-1. Scope of the duty of disclosure

The provision corresponds to Cl. 24 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs). The Commentary was amended in the 2010 version.

Sub-clause 1 imposes on the assured a duty to disclose all information which is material to the insurer. Accordingly, the person effecting the insurance has an independent duty to take active steps to provide information; it is not enough for the person effecting the insurance to simply answer the questions asked by the insurer. The relevant Nordic ICAs, by contrast, have introduced a mere duty to respond as the basic rule and an active duty to provide information as the exception. In marine insurance, however, it is most appropriate to retain the Plan's approach with the active duty to disclose information. The person effecting the insurance is usually a professional and will, accordingly, have knowledge about what kind of information the insurer requires.

The approach of the 1964 Plan, namely that the scope of the duty of disclosure in Cl. 24 is to be determined using objective criteria, that is, irrespective of whether the person effecting the insurance knew of a certain fact or whether the person effecting the insurance ought to have realised that such fact would be of relevance to the insurer, has also been retained. Subjective knowledge is thus of no direct significance to the scope of the duty of disclosure, but is relevant to the nature of the sanction that the insurer may invoke in the event of breach of the duty of disclosure. The provisions of Cl. 3-2 and Cl. 3-3 which allow the insurer to limit his liability in the event of breach thus assume that the person effecting the insurance is in some way to blame for the breach of the duty of disclosure. The significance of having a duty of disclosure that is ascertained by objective criteria becomes evident in relation to the rules regarding the insurer's right to cancel the insurance contract, cf. Cl. 3-4. If the insurer has not received information material to him, the insurer is entitled to cancel the contract, even though the person effecting the insurance cannot be blamed for the fact that the information is incomplete. The Plan follows the relevant Nordic ICAs on this point. In practice, there has also been

discussion regarding the question of the duty of disclosure in relation to building contracts entered into by the shipowner if the contract contains an unusual waiver of claim for damages. The problem is related to Cl. 5-14 regarding the assured's waiver of a claim for damages against a third party. However, it is uncertain whether this provision applies to an unusual waiver of the right to file a claim in accordance with the guarantee in a building contract, cf. the wording "in the trade in question". On the other hand, it is clear that if the person effecting the insurance enters into or takes over a building contract containing such an unusual waiver of liability, he has a duty to inform the insurer about this under Cl. 3-1.

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

If the insurance contract is entered into through a broker, it becomes the broker's task, as the agent of the person effecting the insurance, to diligently pass on all the information given by the person effecting the insurance. A mistake made by the broker which results in the insurer receiving erroneous or incomplete information would be the risk/at the peril of the person effecting the insurance. Similarly, if the person effecting the insurance is in good faith, but the broker knows that the information from the person effecting the insurance is incomplete or incorrect, a failure by the broker to correct the information would be the risk/at the peril of the person effecting the insurance. This means that the broker has an independent duty *vis-à-vis* the insurer to correct or supplement the information given by the person effecting the insurance. If the broker negligently breaches this duty, the insurer may invoke Cl. 3-3 against the person effecting the insurance.

The duty of disclosure applies "at the time the contract is concluded". Subsequent changes must be assessed according to the rules concerning alteration of risk, cf. Cl. 3-8 *et seq.* The difference is illustrated in the case ND 1978.31 Sandefjord ORMLUND, where a Norwegian second engineer with a dispensation to sail as a chief engineer was, after the insurance contract was entered into, replaced by another Norwegian who did not have a valid certificate or any type of dispensation. The court treated the change as an issue of breach of the duty of disclosure; the correct approach must, however, be to

treat it as an alteration of the risk: see *Bull*: *Sjøforsikringsrett* (Marine Insurance Law), pp. 103-104, and *Brækhus/Rein*: *Håndbok i Kaskoforsikring* (Handbook of Hull Insurance), pp. 120-121.

On the other hand, the person effecting the insurance will also have a duty of disclosure when the contract is being renewed. The insurer can, however, be expected to retain the information given earlier, so there can be no new duty of disclosure as regards information that was previously conveyed. On the other hand, the person effecting the insurance must give information relating to any new matters, e.g. changes in the nationality of the crew or in the ship's trading areas.

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

Sub-clause 2 corresponds to the relevant Nordic ICAs, and has been somewhat reformulated from the previous wording to concord with the Nordic ICAs. The rule will apply in situations where, e.g., the person effecting the insurance becomes aware, during the insurance period, that the vessel is considerably older than what was stated at the time the insurance contract was concluded. The duty to correct information will, however, only apply to circumstances which existed at the time the contract was entered into. Circumstances arising later must be assessed according to the rules on alteration of the risk.

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

Clause 3-2. Fraudulent misrepresentation

This Clause corresponds to Cl. 25 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

The provision governs fraudulent misrepresentation. The corresponding rule in Cl. 25 of the 1964 Plan applied to both fraudulent and negligent misrepresentation. The relevant Nordic ICAs apply only to

fraudulent misrepresentation, while negligent misrepresentation is covered by that part of the same provision which pertains to negligent breach of the duty of disclosure. The Plan follows the Nordic ICAs approach on this point. In keeping with the relevant Nordic ICAs, however, a rule on cancellation in the event of fraudulent misrepresentation has been introduced which is more onerous on the person effecting the insurance than the current rule.

The consequence of fraudulent misrepresentation on the part of the person effecting the insurance is that the contract is not binding. This is in accordance with general principles concerning voidable contracts. At the same time, it is important that the insurer reacts in such a way that the person effecting the insurance is informed unequivocally that there is no insurance coverage. The insurer's duty to give notice pursuant to Cl. 3-6 of the Plan has therefore been expanded and, in the event of his failure to give notice, cover will continue, cf. below. The relevant Nordic ICAs have opted for a somewhat different wording, but the result is, in practice, largely the same.

It does not matter, for the purposes of Cl. 3-2 of the Plan, what significance the information in question would have had for the insurer's acceptance of the risk. The issue of whether it is reasonable that incomplete or incorrect information about a factor of lesser importance should void the contract was considered, see *Brækhus/Rein*: *Håndbok i Kaskoforsikring* (Handbook of Hull Insurance), p. 125. The relevant Nordic ICAs, for their part, do not take into account what the fraudulent misrepresentation was about. Since the contract does not become void in the event of negligent misrepresentation, the need for a differentiated sanction structure is reduced, and the absolute sanction has therefore been maintained.

Sub-clause 2 is new, and gives the insurer the right, where there has been fraudulent misrepresentation, to cancel other contracts with the person effecting the insurance on giving 14 days' notice. The provision corresponds to the relevant Nordic ICAs, except that under the Nordic ICAs the insurer may cancel with immediate effect. The Committee found it appropriate to follow the Nordic ICAs in allowing the insurer to cut all ties with a client who has acted fraudulently. The period of notice in the Nordic ICAs is, however, too short for marine insurance relations, and so has been set at 14 days, in keeping with other notice periods in the Plan.

Clause 3-3. Other failure to fulfil the duty of disclosure

This Clause corresponds to Cl. 26 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

Both the threshold for invoking/triggering sanctions and the criteria for the type of sanctions triggered/invoked in the Nordic ICAs differ from the Plan's provision regarding other breaches of the duty of disclosure; the sanction threshold is higher in the Nordic ICAs and the sanction structure is

more differentiated. There is no reason, however, to raise the sanction threshold to "more than just a little blame attaching" in marine insurance. Moreover, in marine insurance, the basic principle for the sanction threshold in the event of misleading information should be that the insurer be put in the same position as he would have been in had he been given correct information. A discretionary reduction in compensation of the kind found in the Nordic ICAs is therefore not recommendable in marine insurance.

Sub-clause 1 applies when the person effecting the insurance has "in any other way failed to fulfil his duty of disclosure", i.e. there has been culpable conduct which cannot be characterised as fraudulent. Under the amendment to Cl. 3-2, the provision will encompass any case of negligent breach of the duty of disclosure, viz. from situations of ordinary negligence to situations of gross negligence qualifying as unfair conduct.

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

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

If the insurer would have accepted the risk, but on different terms, then *sub-clause 2* allows the insurer to avoid liability where there is a causal connection between the casualty and the matter that should have been disclosed. The word "terms" refers to both the contract with the person effecting the insurance and any other arrangements the insurer would have made with full knowledge of the facts. If the insurer would have taken out higher reinsurance, for example, the insurer will not be liable if the casualty is due to a circumstance about which he was not informed. If it is clear that the person effecting the insurance has acted negligently, either at the time the contract was concluded or

subsequently, the person effecting the insurance will have the burden of proving that the undisclosed risk factor was not material to the casualty, or that it occurred before he was in a position to correct the information supplied.

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

If the casualty is due to a combination of risk factors about which the insurer knew, and factors about which the person effecting the insurance has failed to give information, liability must be limited according to the general rule on apportionment in Cl. 2-13. The apportionment rule opens the door to attaining results close to those which would have been obtained under the rule regarding discretionary reduction of compensation in the relevant Nordic ICAs, whereby the indemnity is reduced depending on how much the undisclosed factors have influenced the course of events.

Even though the insurer is protected by the principle of causation, he may have an interest in being released from the insurance relationship, among other things, because the evidence for the cause of a casualty may be unclear. Under *sub-clause 3*, the insurer may therefore cancel the insurance contract by giving 14 days' notice. As elsewhere in the Plan, "notice" here refers to the period of notice for cancellation. Also as elsewhere, the notice period referred to here starts to run from the time the person effecting the insurance has received the notice.

Clause 3-4. Innocent breach of the duty of disclosure

This Clause is identical to Cl. 27 of the 1964 Plan and corresponds to the relevant Nordic Insurance Contracts Acts.

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

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

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

This Clause corresponds to Cl. 28 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

The *first sentence* states that the insurer loses the right to invoke incorrect or incomplete information if he knew or ought to have known the true facts at the time the contract was entered into. The wording "ought to have known" is new, and is taken from the Norwegian ICA Section 4-4, first sentence. This approach also fits in well with the rules of the Plan: when Cl. 3-1 imposes a strict duty of disclosure on the person effecting the insurance, it is natural that Cl. 3-5 should impose on the insurer a duty to show due diligence with respect to the information he has received. Therefore, if the person effecting the insurance gives certain information about which the insurer might wish to have greater detail, then he must request it.

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

As regards the point in time that is relevant when considering the insurer's knowledge, there are minor differences in the rules: the relevant point in time in Nordic ICAs is when the insurer receives the erroneous information, while the Plan refers to the time when the information should have been given. The Plan thus allows the person effecting the insurance to invoke the knowledge of the insurer right up to the time when the person effecting the insurance should have corrected the information pursuant to Cl. 3-1, sub-clause 2.

Under the *second sentence*, the insurer may not invoke incomplete information about facts which are no longer material to him, unless there has been fraudulent misrepresentation. This is in accordance with the approach of the 1964 Plan, while the Norwegian ICA Section 4-4 does not allow the insurer to invoke this type of fact, even in the event of fraudulent misrepresentation. However, once the insurer has become aware of such fraudulent misrepresentation on the part of the person effecting the insurance, he should react within a reasonable time, so that the person effecting the insurance may take out new insurance. A different approach might also give the insurer the possibility of keeping the question open so as to see what is most advantageous to him, cf. the comments on the first sentence of the Clause.

Clause 3-6. Duty of the insurer to give notice

This Clause corresponds to Cl. 29 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

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

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

Clause 3-7. Right of the insurer to obtain particulars from the *vessel's* classification society, etc.

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

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

Sub-clause 1 imposes on the person effecting the insurance a duty to obtain for the insurer all information which the classification society may at any time have regarding the condition of the ship. The duty to obtain information assumes that the insurer has requested it. In practice, this duty will usually be fulfilled by the shipowner giving the insurer written permission to obtain the information, to the extent that the classification society requires such prior permission. The Plan cannot, of course, require the classification society to release information which it otherwise could withhold; this is indicated by the requirement that the particulars must be "available".

Refusal by the shipowner to assist the insurer in obtaining the particulars he wants from the classification society will constitute a material breach of the insurance contract. Such breach would presumably allow the insurer to cancel the contract even without an express provision, but to avoid any uncertainty in that respect the right to cancel the contract has been explicitly set out in *sub-clause 2*. The notice period is 14 days, but the insurance does not in any event lapse until the ship has reached the closest safe port according to the insurer's instructions. "Port" is understood to mean the closest geographical place of call, not the destination of the ship. If the assured does not agree with the insurer's

instructions regarding a safe port, it must be decided, based on an objective assessment, whether the port is safe for the ship in question.

If the insurer wishes to obtain information from the classification society in connection with settlement of a claim following a casualty, in order, e.g., to support an assertion that that he had not received complete information concerning the risk or that the assured knew the ship was not seaworthy, Cl. 5-1, sub-clause 2, will apply.

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

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

Section 2
Alteration of the risk

The Commentary was amended in the 2010 version. This Section corresponds to Clauses 31-44 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs). The provisions of the Nordic ICAs only deal with the general rules relating to change of risk while this Section deals with general rules as well as special rules concerning change of class, breach of trading areas and rules of a similar nature such as Cl. 3-16 on illegal activities, Cl. 3-17 and Cl. 3-18 concerning the effect of requisition, Cl. 3-20 on removal of a damaged vessel and Cl. 3-21 on change of ownership. Cl. 43 of the 1964 Plan also contained rules which gave the insurer the right to limit his liability in the event of the ship being moved to a different location to avoid condemnation. This rule is superfluous now that the claims leader has been given authority to decide the issue of moving the ship on behalf of the whole group of insurers, cf. Cl. 9-4.

The relevant Nordic ICAs provisions on alteration of the risk give the insurer the right to limit liability in the event of alteration of the risk or changes in circumstances which are material to the calculation of the premium. The relevant sanctions are total or partial exemption from liability, or a proportionate reduction in liability. For the insurer to be able to invoke these sanctions, however, the requirements of

fault and causation must be met. These provisions from the Nordic ICAs are not, however, all suited for application to marine insurance, however. Accordingly, the relevant rules from the 1964 Plan have been for the most part retained.

The general rules on the effect of alteration of the risk are found in Cl. 3-8 to Cl. 3-13. Presumably these rules will not frequently be invoked as the practical instances of alteration of the risk are dealt with by specific provisions. Moreover, the rules on safety regulations in Chapter 3, Section 3 encompass a number of cases which otherwise would have been decided according to the general rules on alteration of the risk.

The rules in this and succeeding sections are aimed at the assured and link legal consequences to his actions or omissions. The assured is the party who is entitled to an indemnity or the amount insured, cf. Cl. 1-1 (c) of the Plan, i.e. the party who owns the financial interest which has been affected by the casualty. A single casualty can give rise to indemnity claims from several assureds under a single insurance contract, e.g., where the ship is co-owned. The main principle in such situations is that each assured shall be judged separately. Fault on the part of one will not affect the others, although exceptions can be envisaged. On the other hand, it is not necessary for the assured to have personally been at fault for the rules to apply, however. To some extent the assured must be held vicariously liable for the acts or omissions of those persons acting on his behalf. This type of issue, such as whether the act or omission of an assured may affect the legal position of another, or whether the assured may be held vicariously liable for the acts or omissions of his employees, servants or agents, are dealt with under one heading in Chapter 3, Section 6.

Clause 3-8. Alteration of the risk

Sub-clause 2, second sentence, was added in the 2007 version. Sub-clause 2 was amended in the 2003 version. The provision is otherwise identical to earlier versions of the 1996 Plan and corresponds to Cl. 31 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

The general rules on alteration of the risk correspond to the relevant Nordic ICAs, but the definitions of alteration of the risk, the threshold/criteria for triggering sanctions and the sanction structure are all different. As mentioned earlier, the issue of harmonisation with Nordic ICAs provisions has been examined, but it was decided that it was most suitable to retain the rules of the Plan.

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

Accordingly, it is necessary to distinguish between alterations of the risk having the effect of terminating the insurance contract by frustration of the contract, and alterations which are not of such character. *Sub-clause 1* sets out two general conditions which must be met: there must have been a change of a fortuitous nature, and the change must amount to frustration of the fundamental expectations upon which the contract was based. For both aspects, the decisive factor will be the construction of the insurance contract in question. The issue becomes one of whether the insurer should be bound to maintain the cover without an additional premium in the new situation which has arisen, or whether it would be reasonable to give the insurer the opportunity to apply the sanctions provided in the Plan. On this point it largely becomes necessary to fall back on basic principles of insurance and contract law; exhaustive exemplification is not possible.

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

Cl. 31, sub-clause 2 of the 1964 Plan contained a rule on loss of class as an alteration of the risk. On the other hand, the additional insurance conditions dealt with loss of class and change of class under separate rules, cf. Cefor I.23, and PIC Cl. 5.5. During the revision, the view was taken that the general rules on alteration of the risk did not provide a suitable regulatory framework for dealing with classification problems. Accordingly, the issue was made subject to specific regulation in Cl. 3-14 of the 1996 Plan. In the 2007 revision, however, change of class was removed from the specific regulation in Cl. 3-14 and moved back to the rules regarding alteration of the risk, cf. below.

Sub-clause 2 provides that a change of the State of registration, the manager of the ship or the company which is responsible for the technical/maritime operation of the ship shall be deemed to be an alteration of the risk as defined by sub-clause 1. This provision was amended in 2003 through the addition of "a change of the State of registration". The addition corresponds with the English ITCH rules, as well as with a number of continental conditions. The remainder of the provision tallies with the 2002 version and has been taken from the additional insurance conditions, cf. Cefor I.22 and PIC Cl. 5.13, which dealt with change of operating company as well as change of ownership and transfer of shares. However, the special rules regarding changes in the ownership structure of the company have been deleted as they were considered unnecessary. A transfer of shares in the owner company will not in itself be significant for the insurers – the decisive factor is whether there is a change in the company or companies responsible for operating the ship. On the other hand, the rule regarding change of operating company has been retained here, while the rule regarding change of ownership has been moved to Cl. 3-21 and is further commented on under that Clause.

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

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

Sub-clause 2, *second sentence,* was new in the 2007 version. According to Cl. 3-14, sub-clause 2, of the 1996 Plan, the rule was that the insurance terminated in the event of a change of classification society unless the insurer explicitly consented to a continuation of the insurance. As a result of this rule, the shipowner’s simply forgetting to give notification of such a change could result in the termination of the insurance, even if the insurer might well have approved continuation of the insurance had he been notified of the change of classification society. It is therefore more suitable to

apply the general rules governing alteration of the risk in respect of this point. As a result of the amendment, the rules stating that insurance cover does not terminate until the ship has reached its next port no longer applies in relation to a change of classification society. Thus, if the insurer would not have approved the change, he is not liable for casualties that occur after the change took place, cf. Cl. 3-19, sub-clause 1.

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

This Clause is identical to Cl. 32 of the 1964 Plan.

Reference is made to the Commentary on Cl. 3-3 with respect to the burden of proof and combination of causes.

Clause 3-10. Right of the insurer to cancel the insurance

This Clause is identical to Cl. 33 of the 1964 Plan.

The rule corresponds to the relevant Nordic Insurance Contracts Acts (Nordic ICAs), although the Nordic ICASs contains the additional requirement that the cancellation be reasonable. the Nordic ICAs also contains rules on how the cancellation is to be carried out. These rules are superfluous in marine insurance.

Clause 3-11. Duty of the assured to give notice

This Clause corresponds to Cl. 34 of the 1964 Plan.

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

The relevant Nordic ICAs contain a rule to the effect that the rules on alteration of the risk may not be invoked if the assured has taken reasonable steps to notify the insurer as soon as the assured knew about the change. This provision is not entirely suitable within the Plan system.

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

This Clause is identical to Cl. 35 of the 1964 Plan.

Sub-clause 1 sets out the same rule for alteration of the risk as that in Cl. 3-5, second sentence, regarding the duty of disclosure. However, it is only the rights referred to in Cl. 3-9 and Cl. 3-10

which are lost by the insurer once circumstances have returned to normal, and not the right under Cl. 3-11. The duty to give notice of relevant alterations of the risk is so important from the insurer's standpoint that an assured who has neglected this duty must be prepared to face cancellation on 14 days' notice, even if the contractual level of risk has been restored.

Sub-clause 2 prohibits the insurer from invoking an alteration of the risk caused by measures taken to save human life. This provision corresponds to the similar provision in the relevant Nordic Insurance Contracts Acts (Nordic ICAs). However, the rules are somewhat different when there is an alteration of the risk due to measures taken to salvage goods of material value: under the Plan, the insurer must accept an alteration of the risk occurring for the purpose of saving a ship or goods "during the voyage", while the rule in Nordic ICAs applies generally without any similar restriction to salvaging of goods. Unrestricted allowance of the ship to be used in salvage operations at the expense of the insurer is not appropriate in marine insurance. Coverage of the alteration of the risk in salvage operations to save goods must be limited to the occasional salvage operation decided upon more or less spontaneously, and which it is natural for a commercial vessel to undertake. This limitation is expressed in the requirement that the salvage operation must take place "during the voyage".
The salvage operation takes place "during the voyage" when the vessel in distress is located in the immediate vicinity of the sailing route. However, the formulation also encompasses the situation where the ship departs from a port of call in order to assist a vessel in distress, if the casualty has occurred in the proximity of the port and the insured ship is the closest vessel available to assist the vessel in distress, cf. ND 1966.200 Lyngen NINNI.

It does not matter, for the purposes of insurance cover, whether the assured has consented to the salvage operation or not. A requirement of consent on the part of the assured might make the master hesitate to report a salvage operation which he finds appropriate and correct to carry out. Therefore, as long as the salvage operation takes place "during the voyage", it is permitted.

Salvage operations will often involve the insured ship being used for towing. This would normally affect the liability coverage under the hull insurance contract but, under Cl. 13-1, sub-clause 2, sub-sub-clause (a), the coverage will remain in force when the salvage operation is permitted pursuant to Cl. 3-12, sub-clause 2.

If the salvage operation is not permitted, the insurer may invoke Cl. 3-9 and Cl. 3-10. Cancellation by giving 14 days' notice is, however, not very practical in this kind of situation. Consequently, the insurer's main protection will come from Cl. 3-9: if the insurer would not have accepted the risk, the entire contract ceases, besides which the insurer is free from all liability arising from the salvage attempt. On the other hand, accidental damage occurring completely independently of the salvage operation will still be covered. The alternative would have been to suspend the insurance cover while the salvage operation was being carried out, but this would have been too stringent.

A salvage operation which the assured opts to carry out contrary to Cl. 3-12, sub-clause 2, will constitute an alteration of the risk which he will have a duty to notify Cl. 3-11. If the assured neglects this duty, the insurer may use that neglect as a basis for cancelling the insurance contract, even though the salvage operation is completed without damage to the ship, cf. the comments above on sub-clause 1.

In determining the salvage reward, consideration shall also be given to damage and loss sustained by the salvor, cf. Norwegian Maritime Code (*Sjøloven*) Section 442, no. 1 (f), and under Section 446, first sub-clause, damage sustained by the salvor shall receive first priority when the salvage reward is distributed. Insofar as the salvage reward is sufficient to cover the assured's loss, the insurer should be indemnified, cf. Cl. 5-18 which applies *mutatis mutandis* to the rules on claims against third parties.

Clause 3-13. Duty of the insurer to give notice

This Clause corresponds to Cl. 36 of the 1964 Plan and has a parallel in the relevant Nordic Insurance Contracts Acts.

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

Clause 3-14. Loss of the main class

In the 2013 Plan it has been expressly stated what previously was implied in the text and the Commentary that Cl. 3-14 only apply to loss of the main class. The provision is otherwise identical to earlier versions of the 1996 Plan.

In addition to the main class the vessel with its equipment may be given optional additional class notations according to the individual classification society's rules. Unless the insurer expressly has made Cl. 3-14 applicable also for any such additional class notations, loss of same will not result in an automatic termination of the insurance cover.

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

In earlier versions of the 1996 Plan, the rule under sub-clause 1 was that both loss of class and change of classification society led to automatic termination of the insurance. In the 2007 version, this was amended to the effect that only loss of class causes the insurance to terminate, sub-clause *2, first sentence*. A change of classification society was made an alteration of the risk, cf. Cl. 3-8, sub-clause 2. The rule that the insurance cover will not terminate if the insurer expressly consents to continuation of the insurance therefore only applies in relation to loss of main class. The provision ensures that the

assured may not argue that he has informed the insurer, who has then given tacit acceptance. Furthermore, cover is maintained in any event until the ship reaches the nearest port, sub-clause 2, *second sentence*. In keeping with the formulation of Cl. 3-7, sub-clause 2, the closest safe port as instructed by the insurer is specified, cf. also the Commentary on Cl. 3-7. *Sub-clause 3* sets out what is to be deemed a loss of the main class. Because some classification societies cancel the ship's main class when a casualty has occurred, it is explicitly stated that suspension or loss of main class resulting from a "casualty which has occurred" is not to be deemed a loss of main class. In this situation the assured should not be deprived of cover. It does not matter in this connection whether the casualty is recoverable under the insurance or not. The insurance remains intact, even if the main class is suspended following a casualty which is not recoverable, e.g., because the ship was not complying with the required technical standard. The insurer may, of course, invoke any of the defences pursuant to Chapter 3 if applicable.

There is no requirement for cessation of the insurance that the loss of main class results from a formal decision by the classification society. The trend among classification societies is to introduce rules on automatic suspension of class when the assured has failed to carry out one of the three periodic surveys: Renewal Survey (every five years), Intermediate Survey (every second or third year) and the Annual Survey. The main class can thus be suspended without a formal decision on the part of the administration in the classification society.

Clause 3-15. Trading areas

The Clause was amended in 2016, due to a disagreement that had arisen on the effect of the requirement for compliance with ice class rules introduced in 2007. Hence, Cl. 3-22, sub-clause 3, was deleted in 2016.

The rules are still based on a tripartite division: ordinary trading areas, excluded trading areas (areas where there is no cover unless express prior approval has been given), and conditional trading areas (areas where the shipowner may trade but on certain conditions such as e.g. additional premium). *Sub-clause 1, first sentence* defines the ordinary trading areas, as comprising all waters except those which are defined as excluded or conditional areas. The excluded or conditional trading area**s** are defined in the Appendix to the Plan. *Sub-clause 1, second sentence*, provides that the person effecting the insurance has a duty to notify the insurer in advance whenever the ship sails outside of the ordinary trading area. Cl. 3-15 is intended to be exhaustive as regards the consequences of sailing outside the trading areas, in the sense that the general rules regarding alteration of the risk in Clauses 3-8 to 3-13 do not apply to this particular type of alteration of the risk. But other general rules may apply as explained further below.

Sub-clause 2 provides that the insurer may as before give his consent to trade outside the ordinary trading area subject to payment of an additional premium and other conditions. The insurer may e.g. provide cover subject to an increased deductible for any damage occurring outside the ordinary trading area. If the insurer should make his consent subject to compliance with other conditions aiming to prevent a loss, such conditions shall constitute safety regulations, cf. Cl. 3-22 and Cl. 3-25, sub-clause 1. The insurer may make such safety regulations special safety regulations, cf. Cl. 3-22 and Cl. 3-25, sub-clause 2. If the assured has failed to notify the insurer pursuant to sub-clause 1 of trade outside the trading area, the insurer cannot retroactively impose a safety regulation unless such safety regulation is in conformity with the insurer's normal practice for the trade in question.

The classification societies that are members of the International Association of Classification Societies (IACS) have not agreed on any common ice class notations, and ice class is not a part of the main class. Ice class is currently a voluntary additional class notation, documenting that the vessel is designed to operate in certain ice conditions. The higher the ice class, the thicker ice the vessel is designed to operate in. The classification societies' rules as such do not regulate the way in which a vessel may be operated in ice-infested waters. The vessel's class will not be lost or suspended if the vessel operates in ice conditions that it is not designed for. Even so, information about whether the vessel has any ice class, and if so which one, is of importance for the insurer's risk assessment. If the insurer has consented to trade in a conditional trading area subject to a certain ice class, the requirement of ice class will constitute a special safety regulation that shall apply in addition to any safety regulation that might apply by virtue of Cl. 3-22, sub-clause 1.

Local authorities may issue their own rules, recommendations or guidelines for operation in ice-infested waters within their area of jurisdiction. Examples of these are rules similar to the classification societies' rules on ice class, requirements to follow ice breakers and other regulations issued by the local ice navigation surveillance authorities. Whether such rules, recommendations or guidelines will satisfy the definition of a safety regulation in Cl. 3-22 will depend on whether such rules, recommendations or guidelines are binding on the assured, see further the Commentary to Cl. 3-22. In the Baltic, Finnish and Swedish ice surveillance authorities issue such recommendations. However, vessels are reportedly free to operate without complying with them. The only sanction will be that non-complying vessels will not get assistance from state owned icebreakers if stuck in the ice. Hence, the Finnish and Swedish ice surveillance authorities' recommendations cannot be deemed binding on the assured and therefore do not constitute a safety regulation according to Cl. 3-22. However, if authorities issue binding rules for navigation in ice-infested areas within their jurisdiction, then breach of these rules will also be a breach of safety regulations as governed by Cl. 3-25, sub-clause 1.

Sub-clause 3, deals with navigation in conditional trading areas. It is expressly provided that the vessel is held covered for trade in the conditional trading areas, but the insurer may charge an additional

premium and impose other conditions, cf. *sub-clause 2*. Entitlement to additional premium and to stipulate other conditions requires a genuine increase in the risk. If the ice in the Baltic Sea in a mild winter has formed later than the date stipulated in the appendix to the Plan, the requirements for imposing an additional premium are not met during the ice-free period. If the person effecting the insurance is not willing to accept the additional premium or any special conditions, he may request suspension of cover while the ship is in that area.

If the insurer has not been given prior notice as required by sub-clause 1, second sentence, the additional premium and any conditions must be set when the insurer is informed that the ship has sailed in a conditional area. In these cases, the person effecting the insurance must simply accept any additional premium and conditions the insurer might impose. Failure to notify will not have any other consequences for the person effecting the insurance unless damage occurs, cf. *sub-clause 3, first sentence*. If the ship sails in a conditional area with the consent of the assured and without notification having been given, the claim is recoverable subject to a deduction of 1/4, maximum USD 200,000. The word "claim" applies to any type of claim. It is not only the claim for repair of ice damage under the hull insurance that is subject to the deduction, but any claim for repair of any type of damage and any claim under a loss of hire insurance. One such deduction will apply to each individual insurance. The rationale is that the assured would have nothing to lose if there was no sanction for a failure to give notice. The deduction does not apply to total loss. It is also a requirement for application of the deduction that the assured has consented to vessel's entry into a conditional area. If the ship enters into the conditional trading area without the consent of the assured, e.g., due to a mistake by the master or crew, or due to ice, any damage occurring will not trigger the extra deduction. The insurer will, however, always be entitled to charge an extra premium or impose other conditions pursuant to sub-clause 2 regardless of whether a deduction of ¼ (max. USD 200,000) is to be applied.

The deduction pursuant to sub-clause 3 is applicable in addition to the ordinary deductions prescribed in Cl. 12-15, 12-16 and 12-18. When calculating the deduction, the provision in Cl. 12-19 shall apply correspondingly, cf. *second sentence.*

Sub-clause 3, third sentence was new in 2016 and imposes a further reduction of the claim if the damage is a result of the assured's failure to exercise due care and diligence by neglecting to notify the insurer that the vessel has entered a conditional trading area in accordance with sub-clause 1, second sentence. The further reduction of the claim shall be based on the degree of the assured's fault and the circumstances generally, cf. Cl. 3-33. As opposed to Cl. 3-33, ordinary negligence of the assured is sufficient to entitle the insurer to a further reduction of the claim. Delay due to non-service from e.g. state owned ice breakers because the assured has neglected to follow the local authorities recommendations, may not be recoverable under the loss of hire insurance. Likewise, additional costs incurred for the same reason such as e.g. hiring, if available, non-state owned ice breakers may also be deemed unrecoverable.

Examples of relevant criteria for deciding whether the assured has exercised due care and diligence will be

- the experience of the master and/or duty officer in navigating in ice and the use of an ice pilot when appropriate.
- that the master and crew have received timely and appropriate information and instructions concerning the construction and capabilities of the insured ship in relation to the conditions prevailing.
- that requirements, recommendations and regulations of local authorities in respect of navigating in ice are complied with.

If the vessel has no ice class, it may be deemed negligent to operate it in ice-infested waters. The same applies if the vessel operates in ice conditions without having the appropriate ice class. Breach of local requirements etc. may amount to breach of safety regulations under Cl. 3-22 if the local regulations are binding on the assured. If so, the consequence of a breach is governed by Cl. 3-25. The ordinary rules on identification will apply, cf. Cl. 3-36 to Cl. 3-38.

Sub-clause 4 is new and spells out that the insurance remains in full force and effect if the assured has given notice in accordance with sub-clause 1, and provided that the assured complies with the conditions, if any, as stipulated by the insurer.

If the damage is deemed to be caused by gross negligence of the assured, cf. Cl. 3-33, then the claim may be forfeited. The ordinary rules on identification will apply, cf. Cl. 3-36 to Cl. 3-38, unless otherwise is agreed.

Sub-clause 5 sets out the rules for navigation in excluded trading areas. It follows from the *first sentence* that the assured is allowed to sail in excluded trading areas provided he has obtained advance approval from the insurer, subject to agreed terms. If no agreement has been reached, the cover will be suspended from the moment the ship enters the excluded area. For the insurance to be suspended, however, the master must have acted intentionally in exceeding the trading limit. Suspension pursuant to sub-clause 5 will apply only as long as the ship is inside the excluded area, cf. *second sentence*.

Cover will not be suspended if the ship enters into an excluded area as part of measures being taken to save human life or to salvage ship or goods, cf. the reference to Cl. 3-12, sub-clause 2, in the *third sentence*. In relation to Cl. 3-15, sub-clause 5 the insurance will not be suspended if the ship enters into an excluded area to seek a port of refuge or similar measures to save herself and/or her cargo.

If a casualty has occurred after insurance cover has resumed following a deviation, the general rules on causation in Cl. 2-11 apply. If it is clear that the ship sustained damage during the deviation, the

insurer will not be liable for new casualties occurring as a result of that damage. The reason is that these casualties must be attributed to the ship having been "struck by a peril" during the suspension period, cf. Cl. 2-11, sub-clause 1, but since the damage is known, the special rules on unknown damage in sub-clause 2 of the same Clause would not apply. If separate hull cover was taken out during the deviation, new casualties will be recoverable under that insurance contract. If, however, the damage sustained by the ship during the deviation is unknown, the new casualties will fall entirely under the ordinary hull insurer's liability.

Here, as elsewhere, the rules on apportionment in the event of a combination of causes must be applied. If a subsequent casualty is partly due to known damage which occurred during the suspension period and partly due to impact during subsequent exposure, the insurer will only be liable for a proportionate share of the loss, cf. Cl. 2-13.

The rules on trading areas under an insurance contract are separate from the issue of where a ship is allowed to sail under its trading certificate. A trading certificate is a certificate used instead of class approval for smaller vessels governing the area where it is permitted to trade, and loss of the trading certificate is dealt with specifically in Cl. 17-4, sub-clause 2. On the other hand, sailing outside the areas permitted by the trading certificate would be a breach of a safety regulation, and is governed by Cl. 3-22, or in the case of fishing vessels and smaller coasters, Cl. 17-5 (b).

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

Clause 3-16. Illegal undertakings

This Clause corresponds to Cl. 40 of the 1964 Plan. The provision has no direct parallel in the relevant Nordic Insurance Contracts Acts.

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

Under sub-clause 1 the insurer is free from liability for "loss that is a consequence of the ship being used for illegal purposes". Judging the causation issue may give rise to difficulty. It is not sufficient that the ship runs aground on a voyage with an illegal purpose about which the assured knew. The damage must, to a certain extent, be a foreseeable consequence of the illegal undertaking, e.g., where

the vessel must venture into hazardous waters in connection with a smuggling operation and runs aground. The more detailed application of this rule is a matter which must be left to the courts.

It is also a requirement that the assured "knew or ought to have known" of the illegal nature of the undertaking at a time when it would have been possible for the assured to intervene. If the crew uses the ship for illegal purposes without the knowledge of the assured, this is a risk against which the assured should be protected. Once the assured learns of the matter, however, the assured must intervene promptly, failing which the insurer may cancel the insurance contract on 14 days' notice, pursuant to *sub-clause 2.* The period of notice was three days under the 1964 Plan, but this has now been amended to conform with the other notice periods. The burden of proving good faith lies with the assured.

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

When the ship is being used for illegal purposes without the knowledge of the assured, the consequence will often be that government authorities intervene. If the ship sustains damage as a result of a customs search, this will have to be indemnified by the marine hull insurer. The same applies if the ship is definitively seized because of the illegal undertaking. Damage and intervention of this nature do not fall under Cl. 2-9, sub-clause 1 (b), cf. the Commentary to that provision, and are therefore not excluded from the perils covered by the marine insurer.

There may sometimes be some doubt as to whether it is the marine perils insurer or the war risks insurer which must pay for a loss that is the consequence of an illegal activity undertaken without the knowledge of the assured. The deciding factor will be what falls under the expression "other similar intervention" in Cl. 2-9, sub-clause 1 (b).

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

Clause 3-17. Suspension of insurance in the event of requisition

Sub-clause 2 was moved to Cl. 15-24 (b) in the 2007 version. The sub-clause is otherwise identical to earlier versions of the 1996 Plan.

Sub-clause 1, first sentence sets out the principal rule, i.e. that in the event of requisition by a State power, all of the ship's insurances are suspended. This applies regardless of whether the insurance is against marine perils, cf. Cl. 2-8, or war risks, cf. Cl. 2-9, and regardless of whether the requisition is carried out by the ship's "own" State power or a "foreign" one. It does not matter, for the purposes of the provision, whether it is the ownership or merely the use of the vessel which is requisitioned, although Cl. 3-21 does provide that the insurance cover terminates if the ship changes owner. It is often difficult to determine whether a requisition is intended to be temporary or of a permanent nature, and for this reason it is most appropriate that cover be suspended and not definitively terminated. This provision is thus a specific rule in relation to Cl. 3-21. If the requisition ceases before the insurance period expires, the insurance will again come into effect, cf. *second sentence.* The *second sentence* regulates the right of the insurer to cancel the insurance. In the 2007 version, sub-clause *2 w*as moved to Cl. 15-24 (b) in connection with the fact that all the specific rules for insurance with the Norwegian Shipowners' Mutual War Risk Insurance Association were collected in a new Section 9 in Chapter 15. The move entails no change in points of substance.

Clause 3-18. Notification of requisition

This Clause corresponds to Cl. 42 of the 1964 Plan.

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

If the ship sustains a casualty after it is returned, and the insurer wishes to plead that the casualty is due to a casualty or circumstance which occurred while cover was suspended, the burden of proof will be on the insurer, cf. Cl. 2-12, sub-clause 2. If the shipowner fails to report the return of the vessel, thereby depriving the insurer of the opportunity to obtain evidence, it is reasonable to then place the burden of proof on the assured. Sub-clause 3 of the clause contains a rule to this effect.

Clause 3-19. Suspension of insurance while the *vessel* is temporarily seized

This Clause corresponds in part to Cl. 16 of the 1964 Plan, sub-clause 3.

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

Clause 3-20. Removal of the *vessel* to a repair yard

The Commentary was amended in the 2010 version. This Clause corresponds to Cl. 44 of the 1964 Plan.

Sub-clause 1 imposes on the assured an obligation to notify the insurer if a removal of the ship to a repair yard entails an increase in the risk. The provision is identical to Cl. 44, sub-clause 1 of the 1964 Plan with the addition that the risk must have increased as a result of damage. Notice is necessary to give the insurer the opportunity to assess whether to object to the removal, cf. below. It is sufficient to give notice to the claims leader, cf. Cl. 9-6.

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

A ship will not usually be given permission by the relevant authorities to sail when there is a breach of the rules regarding technical or operational safety. For "removal", however, the authorities will usually grant dispensation based on an assessment of the situation, in which the economic aspects of a removal will play a certain role. As long as the assured takes up the matter with the authorities and obtains the necessary permits, the insurer who is liable for the casualty may not invoke a breach of technical or operational safety regulations during the removal. However, if the assured deceives the insurer on this aspect, all cover relating to the ship will be lost (cf. rules on breach of safety regulations).

Sub-clause 2, first sentence gives the insurer the right to object to a removal to a repair yard which creates a substantial increase of the risk. This provision must be read in conjunction with the Plan's

other provisions relating to removal. Under Cl. 11-6, the insurer may, in response to a request for condemnation, request that the ship be moved to a port where it may be properly surveyed. The risk thereof shall be transferred to the insurer who requests that the removal be carried out, cf. Cl. 11-6, sub-clause 2; it is not possible to object to the removal in this situation. It will not normally be possible to object to an ordinary removal to a repair yard under Cl. 12-13, either. A removal of this nature is an entirely ordinary use of the vessel which any marine insurer must be prepared to expect during the period of insurance. Consequently, the removal should be able to take place without any extra premium being charged during the move (provided there is no breach of technical or operational safety regulations).

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

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

In practice, a claims leader will ordinarily be appointed for the hull insurance. In such case, the claims leader decides the issue of removal on behalf of the co-insurers, cf. Cl. 9-6, and the insurers for the separate insurances against total loss, cf. Cl. 14-3, sub-clause 4. If the claims leader has accepted the removal of the ship, the individual co-insurer or total loss insurer may not invoke the provision in Cl. 3-20.

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

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

Sub-clause 2, second sentence, provides that an insurer who has objected to a removal will not be liable for "loss that occurs during or as a consequence of the removal". If the claims leader under the hull insurance has objected to the removal, the co-insurers and interest insurers will also be free from liability in this connection, cf. above. The insurer(s) freed of liability will not be liable for any loss which occurs while the removal is under way, even though the loss may be unconnected to the increase of the risk. Likewise, the insurer may disclaim liability for loss arising later on, although only to the extent that he proves that the loss is due to the removal. The question of the insurer's liability must thus be determined on the basis of the general rules of causation. The insurer may not disclaim liability for a casualty which occurs purely by chance at the port to which the ship has been removed, on the grounds that the casualty would not have occurred had the ship remained where it was.

To the extent that it is the claims leader under the hull insurance who has objected to the removal, the assured will not be covered under this insurance or under the separate total loss insurances for damage or loss occurring during the removal, unless he takes out a special hull insurance for the removal period. If, in exceptional cases, no claims leader has been appointed, one or more of the co-insurers under the hull insurance may accept the removal. In such case, these insurers will accept the risk for which the other co-insurers have disclaimed liability by objecting to the removal, cf. Section 12-13, sub-clause 2.

The assured must be notified of a disclaimer of liability under sub-clause 2, first sentence, before the removal is commenced, so that the assured and any other insurers he may have may arrange necessary additional insurance. If the assured has failed to notify the insurer pursuant to sub-clause 1, the insurer has no opportunity to object to the removal, and thus will not be liable for any loss arising during or as a consequence of the removal, cf. sub-clause 2, second sentence. The risk is, in that case, transferred to the assured and not to another insurer. This may seem a rather stringent sanction for negligence on the part of the assured, but it is difficult, from a legal standpoint, to come up with any other satisfactory rule. A rule freeing the insurer in question from indemnification of loss resulting from the extra risk during the removal, for example, would create major difficulties in evaluating causation.

Clause 3-21. Change of ownership

The Commentary was amended in the 2019 Version.

The provision **sets out that** the insurance cover **will** automatically **lapse if the ownership of the vessel changes**. In reality, the issue of cover in the event of a change of ownership is usually one of cover of a third party's (the purchaser's) interests in the ship. The Plan's approach in this connection differs from the relevant Nordic Insurance Contracts Acts (Nordic ICAs), which gives the purchaser, as a starting premise, automatic co-insurance cover. Cover is even mandatory for the first 14 days after the transfer for insurance subject to the Nordic ICAs' compulsory rules. In marine insurance, however,

the risk is usually so closely related to who is controlling the vessel **and with that the** management and other matters, that a change of ownership should unconditionally result in termination of insurance cover.

The provision only applies in the event of a transfer to a "new owner". **First of all**, if a transfer is simply part of an intra-company re-organisation which does not entail a change in the actual ownership interests, the insurance will remain in effect in the usual manner. Nor will a change in the shareholder structure of a shipowning company be covered by the rules. **The same applies if a shipowning company is merged with another company or is subject to a demerger. Merger and demerger are based on a principle of continuity meaning that the old company continues within the merged or demerged company.**

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

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

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

Section 3
Safety regulations

Cl. 3-22 was amended in 2016. Further, the Commentary to Cl. 3-22 and Cl. 3-25 and this introduction to Section 3 were amended.

Historically, this Section of the Plan contained both provisions concerning safety regulations and provisions concerning seaworthiness. In the 2007 Version, however, the rule regarding unseaworthiness was revoked in its entirety.

The reason for this amendment was the entry into force of the Norwegian Ship Safety and Security Act of 2006 on 1 January 2007. The Ship Safety and Security Act replaced *inter alia* the Norwegian Seaworthiness Act of 1903, in which the concept of seaworthiness played a prominent role, cf. first and foremost Section 2. It was therefore logical, and in keeping with general traditions in marine insurance law, that the previous marine insurance Plans made seaworthiness a key factor. At the same time, subsequent developments, particularly the growing significance of safety regulations issued by

the public authorities or by classification societies, showed that there was a declining need for a separate rule on seaworthiness, and that the overlapping of such a rule with the system of safety regulations could, on the contrary, have unfortunate consequences.

The concept of seaworthiness could, in principle, impose more stringent requirements on the assured than the requirements laid down by the provision regarding breaches of safety regulations if the ship had defects which were relevant to the ship's safety, but which might not have been covered by the safety regulations in force. One aim of doing away with the concept of seaworthiness in the 2007 version was thus to make it clear that the duties of the assured in this respect were limited to complying with safety regulations as they are defined in Cl. 3-22. In this way, insurers were deprived of the possibility of asserting that even though the ship satisfied the relevant safety regulations, it was nevertheless unseaworthy on account of a defect. This also creates a greater degree of predictability for the assured because the concept of unseaworthiness is not a clearly defined term, but a legal standard that creates uncertainty as regards the content of the concept.

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

In relation to the regulation of safety regulations in the Plan, the requirements in Chapters 3 to 6 of the Norwegian Ship Safety and Security Act with accompanying regulations, which incorporate the specific rules found in international conventions such as SOLAS, MARPOL etc., may be characterized as traditional safety regulations. The regulations provide for specific and detailed duties that the shipowner has to comply with. Of particular relevance to the Plan is Chapter 3 on Technical and operational safety. These rules are based on the same legislative technique as the Plan and causes no specific problems The principle of safety management, on the other hand, raises more difficult questions with regard both to the concept of safety regulation, the question of causation and the burden of proof. These questions are addressed below in the Commentaries to Cl. 3-22 and Cl. 3-25.

The background for phasing out the rules on seaworthiness is, as aforesaid, the Norwegian Ship Safety and Security Act. This Act is only applicable to ships under the Norwegian flag. For ships under the flag of another country, the safety rules of the flag state will be decisive. If the flag state applies the seaworthiness concept, as is the case in the Nordic countries other than Norway, this will be relevant in the form of compliance with the safety requirements set by the legislature and the classification society as a condition for seaworthiness. The Committee has assumed that this will normally not cause any problems because under the current international rules unseaworthiness normally presupposes a breach of a rule that qualifies as a safety regulation, but reference is made to the reason for the abolishment of the concept in the 2007 Version of the Plan above.

Clause 3-22. Safety regulations

Sub-clause 3 was deleted in 2016, see further the amended Cl. 3-15 with its Commentary, and a new sub-clause 3 was provided. The Commentaries were also amended in 2016.

Sub-clause 1 defines safety regulations as "rules concerning measures for the prevention of loss". A fundamental requirement in order for a rule to have the status of safety regulation is that it is intended to prevent loss. A requirement may sometimes pursue several purposes. If one of them is to prevent casualties or mitigate their effect, then a breach may be relevant under the Plan's rule. Thus, a class-related requirement will always have the status of safety regulation, as will requirements primarily aimed at preventing oil spills; e.g. marine pollution rules. However, if the requirement is linked to an entirely different purpose (e.g. immigration or customs regulations), it is difficult to envisage a relevant causal connection between a breach of a rule committed by the assured and damage sustained by the ship. Cases like this must come under the rule against illegal undertakings in Cl. 3-16.

The text states that safety regulations can be expressed in four different ways. The first alternative is that the rule is issued by "public authorities". The term "public authorities" means public authorities in all states providing the rule is binding for the assured and consequently a duty the assured must adhere to. The natural starting point is the regulatory regime of the Flag State. For instance in Norway, the relevant act is the Norwegian Ship Safety and Security Act and requirements laid down by its regulations. In addition to the rules of the Flag State, a shipowner must also comply with requirements that follow from rules and regulations of the company's country of domicile as well as those that become applicable by reason of the vessel's location, e.g. while in coastal waters, or a port or while passing through a canal. If a conflict arises between the requirements of a Flag State and requirements originating in another applicable regime, the most stringent will apply with the presumption that this will be binding for the assured. However, it has to be recognised that good faith misunderstandings of which requirements take precedence could arise.

Regulations prescribed by public authorities become binding when they come into force for the insured ship, even if this is after the risk attaches. It can be assumed that adequate advance notice will have been given to the shipowners.

International conventions such as the SOLAS Convention of 1 November 1974 and subsequent amendments are not directly binding for the shipowner, but will become applicable as a safety regulation once adopted into the laws of individual countries. How a rule issued by a public authority has come into existence is in itself not significant. In the case of ND 1973.450 NH RAMFLØY, it was held that a rule set out directly in a statute was a safety regulation under the Plan.

Traditionally, safety regulations provided by public authorities are specific and concrete and provide for described actions to be taken by the shipowners to promote safety. Such provisions may be technical requirements related to design, construction and maintenance, cf. for example in Norway the Ship Safety and Security Act Chapter 3 with accompanying regulations, which incorporate the specific rules found in international conventions like SOLAS, MARPOL, etc. However, in the last 40 years the focus in international and national safety regulation has shifted from such direct requirements to the establishment of safety management systems. The most important step in this development was the introduction of the International Safety Management (ISM) Code into SOLAS by the 1988 Protocol. The ISM Code can be found in SOLAS Chapter IX, and is included in the national legislation of most flag States, cf. for example for Norway Chapter 2 and the Ship and Security Safety Act.

The approach to safety that underlies the ISM Code emphasises the role of management in establishing procedures and instructions for the safe operation of the vessel. It also recognises that the extent and content of such procedures and instructions must be relative to the operation of the vessel. However, according to 1.4 of the Code there are certain functional requirements that must be addressed:

"Every Company should develop, implement and maintain a safety management system which includes the following functional requirements:

1. *a safety and environmental-protection policy;*
2. *instructions and procedures to ensure safe operation of ships and protection of the environment in compliance with relevant international and flag State legislation;*
3. *defined levels of authority and lines of communication between, and amongst, shore and shipboard personnel;*
4. *procedures for reporting accidents and non-conformities with the provisions of this Code;*
5. *procedures to prepare for and respond to emergency situations; and*
6. *procedures for internal audits and management reviews."*

A central part of the ISM Code is a requirement for the operating company to obtain a Document of Compliance issued by an appropriate authority. This document must be kept on board each ship and each ship must also obtain a Safety Management Certificate. It is the task of the vetting authority to evaluate whether the specific procedures and instructions adopted are suitable in the context of the shipowners' or managers' operations. The vetting authority is the Flag State, or a classification society or other bodies that have been delegated such authority by the Flag State.

The status of the ISM Code with regard to the concept of safety regulation in Cl. 3-22 has caused uncertainty in practice. The previous Commentary stated that it "is the establishment of the safety management system *per se* that constitutes the safety regulation and not the individual provision." This implies that the individual policies, instructions and procedures contained in the Safety Management System (SMS) for the ship does not constitute a safety regulation according to Cl. 3-22. Hence, the insurer may not invoke breach of such procedures etc. This view was followed in ND 2010.164 Oslo FRIENDSHIPGAS. Under the 2016 amendment of the Plan it was discussed whether individual provisions must be seen as part of the ISM regulation and therefore each provision in the system constitutes a safety regulation. However, as the Safety Management System will contain individual policies, instructions and procedures that may vary substantially between different shipowners, this would put a prudent shipowner with a more detailed system in a worse position with regard to the insurance cover than a shipowner who has chosen a less detailed system. It would be contrary to the goal of the ISM regulation if shipowners were induced to establish a less rigid system in order to prevent the risk of losing their insurance cover due to the breach of a safety regulation. It was consequently agreed that the individual instructions and procedures in the SMS do not constitute a safety regulation according to Cl. 3-22.

On the other hand, the duty according to the ISM Code is to "*develop, implement and maintain"* the Safety Management System. A mere establishment is therefore not enough if the system is not prudently maintained. Further, a repeated breach of the individual instructions or procedures may indicate that the Safety Management System is in reality not implemented or maintained by the management, or that they have failed to supervise the system, cf. further under Cl. 3-25 below. Seen in this perspective, the judgement in ND 2010.164 Oslo "FRIENDSHIPGAS" is too categorical when it states that a breach of the shipowner's individual manuals neither directly nor indirectly constitutes a breach of a safety regulation according to the Plan. To the extent an individual manual repeatedly is breached by the management, depending on the circumstances in each case such breach may also be considered breach of a safety regulation.

The second alternative in Cl. 3-22, sub-clause 1, is rules "stipulated in the insurance contract". These words have caused a discussion on whether they include the safety regulations stipulated in the Plan itself, i.e. whether the safety regulations stated in the Plan is considered to be "in the insurance contract". Such clauses are today for instance found in Cl. 3-22, sub-clauses 2 and 3, Cl. 3-26 and

Cl. 18-1 (e). When the insurance contract is based on the Plan, the Plan is a part of the insurance contract and the mentioned safety regulations are thus "stipulated in the insurance contract". A narrow interpretation of these words would exclude the safety regulations in the Plan from the definition of safety regulations in Cl. 3-22. Traditionally, the Plan did not contain any clauses that were intended to function as safety regulations, but this has changed over the years, cf. the clauses mentioned above. Hence, there is no doubt that these Plan clauses both by their wordings and intent shall be treated as safety regulations according to Cl. 3-22, sub-clause 1. However, to get the status of a safety regulation, it must follow from the wording of the clause and/or a reference to Cl. 3-22 and/or Cl. 3-25 that this is the intent.

In addition, the individual insurance contract can itself contain provisions concerning measures to be taken to ensure the technical and operational safety of the vessel. If these are clear and specific, they will fall within Cl. 3-22.

The third alternative is rules "prescribed by the insurer pursuant to the insurance contract." Cl. 3-15, sub-clause 2, second sentence, as amended in Version 2016 gives the insurer authority to prescribe safety regulations. Authority for an extremely limited exercise of this power is also found in Cl. 3-28. If the insurer wishes to include powers beyond what is provided by the Plan in order to also have the authority to issue new safety regulations during the insurance period, a specific provision to that effect must be inserted into the individual insurance contract.

In practice, this means that the contract must contain written authority and set out clear parameters for subsequent safety regulations. If such parameters or authority is not included in the contract, the insurer must resort to the rules on alteration of the risk. Under these rules, the insurer may only impose new requirements if a situation has arisen that constitutes an alteration of the risk in accordance with Cl. 3-8. If this is the case, the insurer may exercise his right to cancel the contract, and establish a new contractual relationship with new requirements.

The fourth alternative is rules issued "by the classification society". Cl. 3-14 makes it clear that the insured ship's class status must be maintained in order for cover to remain in force. However, failure to comply with class requirements does not automatically lead to loss of class. Including class requirements as safety regulations further emphasises the importance of compliance. It also provides insurers with a possible sanction if failure to comply with a class requirement should be the cause of a casualty. Similar to government regulation, orders from classification societies receive the status of safety regulation from the time they are adopted or issued.

The provision in *sub-clause 2* emphasises that the requirement of periodic surveys imposed by public authorities or the classification society constitutes a safety regulation under sub-clause *1.* The provision is basically superfluous requirements issued by the classification society, including orders to

carry out a Continuous Machinery Survey, will automatically constitute a safety regulation under Cl. 3-22, sub-clause 1. However, it is necessary to be able to extend the scope of identification in such cases for breaches of this duty, like the one that applies to "a special safety regulation, laid down in the insurance contract", cf. Cl.3-25, sub-clause 2. As a safety regulation prescribed in the Plan as mentioned above constitutes a safety regulation "laid down in the insurance contract", the extended identification rule in Cl. 3-25, sub-clause 2, second sentence, will apply unless the safety regulation itself only refers to Cl. 3-25, sub-clause 1, cf. for instance Cl. 3-26 second sentence and Cl. 18-1 (e) last sub-paragraph. In such case, the safety regulation in the Plan has status as "safety regulation" according to Cl. 3-22, sub-clause 1, but not a "special safety regulation" according to Cl. 3-25, sub-clause 2.

Sub-clause 2, second sentence, imposes a duty on the assured to carry out the survey by the stipulated deadline. A breach of this safety regulation will arise as soon as the deadline is exceeded; no reaction is required on the part of the classification society in the form of a reminder or even withdrawal of class, cf. the above Commentary regarding Cl. 3-14.

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

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

Cl. 3-22, *sub-clause 3,* was amended in 2016. The previous rule concerning the effect of ice class was abolished, see the Commentary to Cl. 3-15. However, a new rule replaces the previous exclusion in Cl. 12-5 (f) for liability for loss due to lubricating oil, cooling water or feed water becoming contaminated. This former exclusion also extended the circle of persons with whom the assured could be identified with to include the master and chief engineer. Sub-clause 3 imposes instead a duty for the assured to ensure that the Safety Management System "includes instructions and procedures for the use and monitoring of lubricating oil, cooling water and boiler feed water.*"*

The duty under this safety regulation is «to ensure» that the system includes the mentioned instructions and procedures. If the vetting authorities accept these instructions as part of the Safety Management System, the assured has satisfied his duties under the new sub-clause 3. The concept of safety regulation is the same as according to Cl. 3-22, sub-clause 1. This means that the individual instructions and procedures will not constitute a safety regulation as such, but repeated breaches of

such instructions and procedures may imply a failure on the part of the management to supervise compliance with the system. Whether the insurer can invoke such failure will depend on whether there was a causative connection between the breach and the loss or damage, and whether the assured had acted negligent, see further under the Commentary to Cl. 3-25.

It can be argued that establishing appropriate instructions and procedures for the matters named in sub-clause 3 is regardless a natural part of any functional SMS. However, the ISM Code is, as noted above, deliberately designed to give shipowners flexibility to develop and tailor a safety system to their specific operation. Experience has shown that losses related to lubricating oil, cooling water and boiler feed water very often arise from the erosion of sound practice at the operational level. These matters are important in preventing not just costly damage to machinery, but also loss of propulsion and the dangers that inevitably follow from it. The deleted provision in Cl. 12-5 (f) addressed this fact by a very concrete rule including a somewhat arbitrary three month time limit. Contrary to this rather stringent approach, the new provision in sub-clause 3 underlines the undisputed fact that ensuring consistency at the operational level is a management function with the SMS being the main tool management has to achieve this. It follows that the person with the overall responsibility for a company's SMS will be regarded as part of that company's management, acting on behalf of the assured irrespective of their formal title and place in the organisational hierarchy.

Sub-clause 3 refers to Cl. 3-25, sub-clause 1, and not to sub-clause 2. This means that the extended identification rule in Cl. 3-25, sub-clause 2, does not apply.

Clause 3-23. Right of the insurer to demand a survey of the *vessel*

Sub-clause 1 gives the insurer authority to demand a survey of the ship at any time during the insurance period for the purposes of ascertaining that the ship meets the technical and operational safety regulations that are prescribed by public authorities or by the classification society.

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

If no damage is found which must be repaired for the purposes of the ship's technical and operational safety, the issue arises as to whether the assured should be indemnified for his loss. If a casualty or other similar circumstance covered by the insurance has occurred previously, the assured has, under

general principles, the obligation to allow the ship to be inspected for the purpose of ascertaining whether there is damage. The expenses of the inspection may be claimed from the hull insurer, but the assured must bear the operating costs and loss-of-hire for the time during which the inspection is carried out. The expenses of unloading for a survey following a casualty are indemnified under special rules, usually general average, but also under Cl. 4-12 regarding particular measures taken to avert or minimise the loss. If no event has occurred which requires the assured to allow the ship to be inspected, but the insurer requests the survey due to a general suspicion of poor maintenance, it is reasonable to have the insurer bear the full liability if the suspicion turns out to be unfounded. Accordingly, *sub-clause 3* of the Clause provides that the insurer shall, in such cases, indemnify the assured for costs as well as loss resulting from the survey.

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

Clause 3-24. (open)

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

Clause 3-25. Breach of safety regulations

The Commentary was amended in 2016.

Under *sub-clause 1, first sentence*, the assured will lose insurance cover if he can be blamed for breaching the safety regulation and there is a causal connection between the breach and the loss. The sanctions may be applied to all forms of negligence. In ocean hull insurance, the fault of the assured will often manifest itself by the assured failing to supervise his staff's compliance with applicable rules. In relation to the ISM Code, there may be fault with regard to implementation or maintenance of the safety management system, but due to the vetting system this is less practical. However, the assured may be guilty of a failure to supervise that the system is followed. The extent of

the assured's duty of supervision must be determined on a case by case basis, cf. ND 1980.91 Hålogaland TOTSHOLM. If the assured has delegated supervision duties to the captain or officers on board, or to certain persons on shore (cf. the "designated person" that shall be appointed according to the ISM Code), he may be identified with them within the meaning of
Cl. 3-36, sub-clause 2.

The requirement of a causal connection between the breach of the safety regulation and the loss will normally not be difficult if the safety regulation contains a specific duty for the assured to comply with, cf. the duties specified for example in the Norwegian Ship Safety and Security Act Chapter 3 with accompanying regulations. It is more difficult to establish causation in the case of regulations like the ISM Code, which requires the shipowner to ensure the establishment, implementation and maintenance of a safety management system that can be documented and verified in the shipowner's own organisation and on individual ships**.** Breaches of these formal requirements will less frequently be the cause of the casualty in question. However, if the management fails to supervise that the system is complied with and this leads to repeated breaches of procedures for **e**.g. lookout, this may result in a collision and thus causation between breach of the ISM Code and the casualty.

The provision in Cl. 2-13 on concurrent causes will, in some situations, lead to a reduction of the insurer's liability. A typical example of this is when a breach of a safety regulation has combined with an error committed by a member of the crew in his service as a seafarer, cf. Cl. 3-36, sub-clause 1, to cause the loss. Breaches of safety regulations such as the ISM Code and similar rules prescribed by national authorities in accordance with the SOLAS convention, etc., are probably good examples of situations where there can be a question of a combination of causes, assuming of course that there is a causal connection between the infringement of the duties related to the safety management system and the loss sustained.

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

If, however, the insurer has found it necessary to impose a special safety regulation at the time the contract is entered into, e.g., that the vessel must only be used in sheltered waters, or that there must be special equipment on board for safety reasons, then there is reason to have more stringent rules. In those cases, the insurer must be able to invoke negligence committed by anyone who is under a

duty on behalf of the assured to comply with the regulation or ensure that it be complied with, cf. *sub-clause 2, first sentence*. Generally speaking, people who work in a senior position in the service of the assured will have a duty to comply with the regulation or ensure that it is complied with. The shipmaster, mates and engineers in particular are crew members who will be covered by the rule. In addition, the nature of the regulation in question will, to a certain extent, determine how far down in the ranks identification will take place.

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

The provision in *sub-clause 2, second sentence*, stated that the extended rule of identification also applied to the safety regulation on periodic service in Cl. 3-22, sub-clause 2. This was deleted in 2016 as it is clarified that a safety regulation in the Plan constitutes a "safety regulation laid down in the insurance contract". This means that such safety regulation also constitutes a "special safety regulation" according to Cl. 3-25, sub-clause 2, unless it is expressly provided that the extended identification shall not apply. This is achieved if the safety regulation in the Plan only refers to Cl. 3-25, sub-clause 1, see as an example Cl. 18-1 (e).

Sub-clause 3 regulates burden of proof. According to the first sentence, the insurer has the burden of proving that a safety regulation is breached. This means that the insurer must establish the existence of a safety regulation, which of course is an easy burden when it comes to applicable SOLAS rules or incorporation of the SOLAS rules in the relevant flag states legislation. Equally easy is the burden if there is a breach of the rules of the relevant classification society. When it comes to special safety regulations stipulated in the insurance contracts or prescribed by the insurer pursuant to the insurance contract, the insurer must satisfy that such rules has in fact been given and have the required basis in the insurance contract.

If the insurer alleges that the assured has committed a breach of his obligation to design, implement (establish) and maintain a suitable SMS system, the insurer must specify in which way the assured is at fault in relation to this general obligation.

Approval by the vetting authority is strong prima facie evidence that an appropriate system is established. Consequently, the insurer must produce evidence if alleging that the system itself is either

inadequate, lacking some essential element or that it has not been properly established within the organisation or on board. More commonly, the issue is whether the system has been followed, monitored and maintained for instance through prudent reporting and evaluation systems.

It is not a breach of the ISM Code that the established management system could be improved. One of the reasons why the ISM Code is based on general functional requirements rather than prescriptive rules is that the system shall be able to develop and adapt in light of experience. The discovery of weaknesses that can be improved is evidence of a functioning system. It is important not to compromise this process by fear of the consequences. Loss of insurance cover is such a serious matter that it can only be justified when an evaluation of all the evidence shows that the system as such failed either because it was quite inadequate, had not been implemented or had not been followed up at the relevant management level.

When it comes to special safety regulations stipulated in the insurance contracts or prescribed by the insurer pursuant to the insurance contract, the insurer must satisfy that such rules has in fact been given and have the required basis in the insurance contract.

If the ship springs a leak whilst afloat, the burden of proof is reversed, and the assured must then prove that no safety regulation has been breached. The word "afloat" implies that the ship is floating on its own buoyancy. The rule implies a presumption that safety regulations have been breached if the vessel springs a leak whilst afloat. The presumption will only apply, however, to casualties in the form of leaks; for other types of casualties, e.g. fire or engine casualty of unknown cause, the insurer carries the burden of proof that a safety regulation has been breached. Nor can the provision be interpreted by analogy to encompass capsizing, cf. ND 1969.436 Gulating HEIMNES. The application of this provision has also been dealt with in ND 1972.71 NH ROSA, ND 1982.194 NH FRANK ERIK, and ND 1986.258 Agder LECH WALESA, and, as regards ships laid up, ND 1991.214 NH MIDNATSOL and ND 1991.156 Hålogaland SOPEN. These judgements were considering the corresponding provision in Cl. 45 of the Norwegian 1964 Plan and were deemed equally relevant to the previous Cl. 3-22 of the Norwegian 1996 Plan and the current sub-clause 3.

The presumption applies only to the question of whether safety regulations have been breached, not the question of whether or not the assured caused the breach through negligence. If the assured does not succeed in refuting the assumption of breach of safety regulations when the vessel springs a leak whilst afloat, the assured may all the same invoke the defence that he did not cause the breach through negligence. Here, the burden of proving that he has not been negligent rests with the assured, cf. sub-clause 3, *second sentence*.

The burden of proof rule is not relevant to any doubts on interpretation or application of a safety regulation. If there is any doubt or disagreement on interpretation or application of the safety

regulation, this doubt or disagreement must in the last instance be decided by the competent court (or arbitrators if arbitration has been agreed) in accordance with the ordinary principles on interpretation and application of statutes and statutory instruments applying the relevant sources of law available.

Once it is established that a safety regulation has been breached, the assured has the burden of proving that neither he nor anyone he may be identified with in accordance to Cl. 3-36 to Cl. 3-38 has been acting negligently. An isolated breach of the SMS at ship or shore level will not in itself be sufficient to establish that the assured has acted negligently, unless it is the result of a negligent failure to supervise the maintenance of and compliance with the system at the management level with which the company will be identified according to Cl. 3-36 to Cl. 3-38. The assured will also carry the burden of proof that there is no causative connection between the breach of safety regulation and the casualty.

Clause 3-26. *Vessels* laid up

The Commentary was amended in 2016.

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

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

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

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

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

If the assured has prepared a lay-up plan and forwarded it to the insurer, and the insurer does not respond with any objections, this will usually be taken as tacit acceptance of the plan by the insurer. The insurer may not then invoke Cl. 3-23 if the assured follows the plan during the lay-up period.

The *second sentence* prescribes the sanctions that apply if the assured fails to prepare a lay-up plan or to have it approved by the insurer, or fails to follow the lay-up plan while the ship is laid up. In such case, Cl. 3-25, sub-clause 1, will apply correspondingly. In practice, this means that unless the assured can prove that he cannot be blamed for negligence and that the casualty that occurred would have happened even if a lay-up plan had been prepared or even if the lay-up plan had been followed, the insurer is not liable for the loss sustained. As the clause only refers to Cl. 3-25, sub-clause 1, the extended identification clause in Cl. 3-25, sub-clause 2, does not apply.

Clause 3-27. Right of the insurer to cancel the insurance

This Clause was amended in the 2007 version, in connection with the revocation of the former Cl. 3-22 on unseaworthiness. The provision corresponds to relevant Nordic Insurance Contracts Acts, but contains no explicit requirement that the cancellation must be reasonable in order for the cancellation to be valid.

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

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

Sub-clause (b) corresponds in full to the former sub-clause (c). Cancellation under this provision is conditional on it being a question of an intentional or grossly negligent breach of a safety regulation, and on this regulation being of material significance. It makes no difference what kind of safety

regulation it is. The insurance may also be cancelled if the breach has been committed by a subordinate of the assured, provided that it is the duty of the person in question to comply with the regulation or to ensure that it is complied with. In this connection, the regulation concerned does not necessarily have to be of the type referred to in Cl. 3-25, sub-clause 2.

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

Clause 3-28. Terms of contract

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

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

Section 4
Measures to avert or minimise loss, etc.

Clause 3-29. Duty of the assured to notify the insurer of a casualty

This Clause is identical to Cl. 52 of the 1964 Plan and corresponds to relevant Nordic Insurance Contracts Acts (Nordic ICAs).

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

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

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

This Clause corresponds to Cl. 53 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

The *first sentence* imposes on the assured a duty to avert or minimise the loss, while the *second sentence* requires the assured to consult with the insurer. The provision corresponds to Nordic ICAs, although the provisions do not contain any duty to consult with the insurer. It is somewhat superfluous to impose a duty on the assured to consult with the insurer, since it is already part of the duty to notify and the duty to keep the insurer informed of further developments under Cl. 3-29. The provision serves as a good signal, however, and has, accordingly, been maintained.

In the 1964 Plan, the duty of the assured to act was formulated as encompassing "what he can" do to avert and minimise the loss. In accordance with Nordic ICAs, this wording has been replaced with "what may reasonably be expected of the assured".

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

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

A situation can be envisaged where the insurer needs to give separate instructions, e.g., in connection with salvaging the ship. Special rules are not needed for this; it is implicit in the requirement that the assured listen to the recommendations of the insurer. If the assured chooses to take other action which

later turns out to be less expedient, there is the risk that he will be judged to have acted with gross negligence pursuant to Cl. 3-31.

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

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

Clause 3-31. Consequences of the insured neglecting his duties

This Clause corresponds to Cl. 54 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

If the assured neglects his duty to report a casualty under Cl. 3-29 or implement measures to avert or minimise the loss under Cl. 3-30, the insurer shall be free from liability for loss which would not have occurred if the assured had fulfilled his obligations, cf. *sub-clause 1*. The sanction threshold is the same as in the Nordic ICAs, although the sanction is different. The Nordic ICAs use a sliding scale, while the Plan starts with the principle that the insurer shall not cover loss resulting from the negligence. Even though the basic approach during the Plan revision has been not to switch to sliding scale rules patterned on the Nordic ICAs, consideration was given to whether it would lead to greater consistency in the Plan rules generally if a system similar to that in Nordic ICAs was to be adopted, cf. Cl. 3-33. The conclusion was that the existing system should be maintained.

Under Cl. 54, sub-clause 1, last sentence, of the 1964 Plan the assured had a duty to compensate loss sustained by the insurer as a result of the negligence. the Nordic ICAs contain no such rule, and it has therefore been deleted. This means that the insurer may only set off his expenses against the assured's claim for indemnity, and not claim compensation from the assured.

Sub-clause 2 makes it clear that it is only in the event of breach of the duty to notify under Cl. 3-29 that negligence by the master has any significance.

Section 5
Casualties caused intentionally or negligently by the assured

The rules in this Section deal with cases where a casualty has been caused by an intentional or negligent act of the assured. The rules are virtually identical to the provisions in the 1964 Plan: intentional acts of the assured are dealt with in Cl. 3-32, while Cl. 3-33 deals with gross negligence. There is no rule that deals in general terms with cases where the insured event is caused by ordinary negligence on the part of the assured. The insurer thus remains entirely liable for the loss. This concords with the relevant Nordic Insurance Contracts Acts.

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

Clause 3-32. Intent

This Clause is identical to Cl. 55 of the 1964 Plan and corresponds to the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

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

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

Clause 3-33. Gross negligence

This Clause is identical to Cl. 56 of the 1964 Plan and corresponds to the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

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

Both the Plan and the Nordic ICAs apply a progressive reduction of the insurance cover when the casualty has been caused by gross negligence. The Norwegian ICA Section 4-9, second paragraph, sets out a number of factors which are to be specifically taken into account in assessing the reduction: the degree of fault, the course of events relating to the damage, whether the assured was in a state of self-induced intoxication, and circumstances generally. Cl. 3-33 of the Plan refers simply to "the degree of fault and circumstances generally". "Circumstances generally" is such a wide-ranging expression that it includes the other factors listed in the relevant Nordic ICAs. In deep-water hull insurance, it will be especially the "course of events relating to the damage" which will be of significance for the reduction of the insurer’s liability. The factor of "self-induced intoxication" is more relevant to coastal hull insurance, but can also become relevant for deep-water hull cover, especially if there has been a delegation of the ship owning functions which entails that the assured must be identified with the ship's captain or officers, cf. Cl. 3-36. "Intoxication" means that intoxicating substances have influenced the user in such a way that he or she acts in a way other than would have been the case had he or she not consumed the intoxicating substances. It is not possible to link the definition of "intoxication" to a set alcohol percentage in the blood, as is done, for example, in Section 22 of the Norwegian Road Traffic Act (*veitrafikkloven*). A review must be made in each case of the effect of the intoxicating substance on the individual to determine whether the assured acted while intoxicated. It is thus possible to be "under the influence" within the meaning of the Road Traffic Act without being "intoxicated" within the meaning of the Plan.

If one of the subordinates of the assured, be it someone in the shipowner's management staff or one of the people on board, has caused the casualty through an error which must be deemed gross negligence, a decision must be made using the rules in Chapter 3, Section 6 of the Plan as to whether the insurer may invoke the error against the assured. Errors committed by the master or crew in their service as seamen on the insured ship can never be invoked by the insurer, cf. Cl. 3-36, sub-clause 1. Moreover, the result will depend on whether decision-making authority has been delegated in areas which are of

material significance for the insurance, cf. Cl. 3-36, second sub-clause. Cases where the error has been committed on board another of the assured's ships than the one covered by the insurance, are dealt with under the "sister ship rule" in Cl. 4-16.

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

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

Clause 3-34. Right of the insurer to cancel the insurance

This Clause corresponds to Cl. 57 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

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

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

Clause 3-35. Circumstances precluding the application of Clauses 3-32 to 3-34

This Clause corresponds to Cl. 58 of the 1964 Plan And the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

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

Sub-clause (a) applies when the assured has a mental disorder or is otherwise incapable of judging his own actions. The provision corresponds to the Norwegian ICA Section 4-9, fifth sub-clause, although the formulation is somewhat different.

An exception from sub-clause (a) will nonetheless apply if the abnormal state of mind is due to "self-induced intoxication". This type of rule is necessary to make it clear that self-induced intoxication is never an excuse. In addition, as mentioned under the Commentary on Cl. 3-33, self-induced intoxication can have consequences for the assessment of whether there has been gross negligence, and for the discretionary reduction of liability.

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

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

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

Section 6
Identification

General remarks

The rules on the duty of disclosure and duty of care are aimed directly at the person effecting the insurance and the assured, respectively. However, there will often be other persons who act on behalf of the person effecting the insurance or the assured. The person effecting the insurance and the assured will often be different people or companies, and there may also be several assureds covered under one insurance contract. The difficult question which then arises is to what extent the insurer may invoke against the person effecting the insurance or the assured, errors or negligence committed by someone else, i.e. to what extent are the assured and the person effecting the insurance to be identified with their helpers, employees etc.

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

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

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

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

Identification between the person effecting the insurance and his servants is not regulated in the relevant Nordic Insurance Contracts Acts (Nordic ICAs), either, although the Commentary states that general principles of contract law are to apply.

During the revision, there was agreement that the issue of identification between the person effecting the insurance and his servants was not to be regulated specifically in the Plan. In marine insurance, this problem will arise particularly when the insurance contract is entered into through a broker, and then primarily in the area of the duty to disclose, cf. Cl. 3-1; for further details, see the Commentary on that provision. The main rule is that the person effecting the insurance must simply accept that he

will identified with the broker; if the broker makes a mistake during the conclusion of the contract, for example, by not forwarding information from the person effecting the insurance to the insurer, then the person effecting the insurance will have to bear any consequences that follow.

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

2. Identification between the assured and his servants

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

The relevant Nordic Insurance Contracts Acts contain a complete regulation of these matters, applies to commercial insurance, and opens up the possibility of identification with specified persons or groups, provided they are stated specifically in the contract. This means that in marine insurance of merchant ships, one is free to regulate the issue of identity in the insurance conditions. The Nordic ICAs assume, however, that no identification may take place beyond what is stated in the contract. Consequently, there can be some doubt in marine insurance as to how far identification can be taken if it is not specifically regulated in the insurance conditions.

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

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

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

In the Norwegian Insurance Contracts Acts (ICA) the starting premise is the opposite: there is to be no identification between the assured and the person effecting the insurance. Exceptions are possible, however.

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

4. Identification of assureds *inter se*

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

The relevant Nordic Insurance Contracts Acts (Nordic ICAs) have solved the identification problem by taking as a starting point that co-assureds are not to be identified with each other, although some exceptions are also possible here.

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

Clause 3-36. Identification of the assured with his servants

This Clause corresponds to Cl. 59 and Cl. 61 of the 1964 Plan. The Commentary on the first sub-clause was amended in the 2010 version.

Sub-clause 1 sets out the important principle that there shall be no identification with the master or crew in respect of faults or negligence committed "in their service as seamen". The provision corresponds to Cl. 59 of the 1964 Plan. The background for the provision is that faults or negligence committed by the master and crew are one of the risks for which the shipowner should have unconditional marine insurance cover. The wording "faults or negligence ... in connection with their service as seamen" indicate the contrast with errors touching on the commercial functions which the ship's master may sometimes carry out on behalf of the shipowner. Identification issues with respect to commercial errors must be resolved using the general rule in sub-clause 2. The crucial factor will then be whether the master or crew have been given decision-making authority in matters of material significance for the insurance. However, insofar as the error is committed "in connection with their service as seamen", it is of no import whether it is the master or the crew who have been entrusted with the authority. For example, if, pursuant to Section 19 of the Norwegian Ship Safety and Security Act, a number of duties have been imposed on the master with regard to ship safety, he shall, among other things, ensure that the ship is loaded and ballasted in a safe and proper manner, that the ship has safe and proper watchkeeping arrangements and that the navigation of the ship and the keeping of ship' books are done in accordance with statutory and regulatory requirements. Negligence relating to such duties is regarded as a "fault committed in connection with service as a seaman", which means that there will not be identification with the master and the crew. The same will apply if authority has been delegated to the master in relation to implementation of safety regulations, unless the specific identification rule in Cl. 3-25, sub-clause 2 applies. Faults and negligence relating to delivery of cargo in a general average situation are discussed in greater detail in the Commentary on Cl. 5-16.

Technological advances have brought a steady improvement in possibilities for communication between the shipowner's organisation on land and personnel on board. As long as the master or crew have acted according to instructions from the organisation on land or with its consent, any error or negligence must be assessed as though it was committed by the organisation on land itself. If the insurer does not manage to provide the proof to the contrary, it must be assumed that the error or negligence has been committed by the people on board.

The provision applies to any insurance taken out under Plan conditions, and thus also includes war risks insurance. Errors on the part of the crew will normally be judged to be a marine risk, making the issue of identification under a war risks insurance less relevant. However, if an error on the part of the crew must be judged as an element of war risk because the error is very closely associated with the

war risk or consists in a misjudgement of this risk, cf. above under Cl. 2-9, the question of identification in relation to the war risk insurer as well will arise.

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

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

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

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

The criterion for identification in sub-clause 2 is based on the view that the shipowner must be free to organise ship operations as he sees fit, but that the assured must bear the consequences of the management model chosen. If the assured chooses to delegate a large portion of the management to others, the assured must also accept responsibility for faults or negligence committed by the organisations or persons in question within the area of authority they have been given. The determining factor in relation to identification then becomes who has real authority in areas which are of significance for the insurance. "Functions of material significance for the insurance" refers to all types of management function regardless of whether they are grouped together or exist separately. If the operations are organised through a separate management company or similar entity which has the overall responsibility for the ship's technical/nautical and commercial operation, then of course the assured must be identified with the manager. Likewise, if the management function is divided into technical, nautical and commercial operations, there must be identification in relation to the person who has been given responsibility for the different functions, insofar as these functions are of material significance for the insurance. The same will be true for the person or company who is responsible for crewing.

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

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

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

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

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

Moreover, identification will only arise in the relationship between the assured who has responsibility for the operation of the ship and the party to whom the assured hands over decision-making authority. The provision does not resolve the issue of identity between a mortgagee or other co-insured third parties and the assured who is responsible for the operation of the ship. In other words, identification applies only downwards in the organisational hierarchy linked to the operation of the ship, and not laterally among several parties because of their status as assureds under the insurance contract. Identity between assureds is regulated in Cl. 3-37. On the other hand it follows from the provision that delegation of the kind referred to in Cl. 3-36 also has effect in relation to other assureds, cf. below.

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

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

This Clause corresponds to Cl. 60, Cl. 129 and Cl. 134, sub-clause 2 of the 1964 Plan.

The provision regulates faults and negligence committed by the assured or co-owners of the insured ship and, to a certain extent, brings together and expands on Cl. 60, Cl. 129 and Cl. 134, sub-clause 2 of the 1964 Plan. It also has its counterpart in relevant Nordic Insurance Contracts Acts (Nordic ICAs).

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

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

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

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

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

The criterion for identification is that the assured or co-owner has "decision-making authority for the operation of the ship". The criterion is taken from Cl. 60 of the 1964 Plan, but there the requirement was that the co-owner be a "manager". The wording "decision-making authority for the operation of the ship" means the ultimate decision-making authority for the ship. Unlike Cl. 129 of the 1964 Plan, there is no requirement that the error be committed by someone who has the ship in his or her "custody". The relevant authority will often be with the owner, cf. the rule in Cl. 134, sub-clause 2 of the 1964 Plan, but this is not necessarily the case. The crucial factor will be who has the ultimate authority to decide how the operation is to be organised and resources allocated. When persons or organisations with that authority commit a fault it is natural that there be identification in relation to all assureds: the assured or co-owner responsible has been charged with taking care of the interests of the group and has been entrusted with the formal competence to act on behalf of all. As regards the co-owner, this type of approach is also necessary to avoid a situation where the organisational form of the shipowner is the determining factor in the identification issue. Parties having status as assureds should all be in the same position, regardless of whether the shipowner is organised as a limited liability company and leaves the management to a manager, or there is a holding company in which one of the partners is responsible for the operation of the ship.

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

The identification provision in Cl. 3-37 must be read in light of Cl. 3-36. If an assured who has the overall decision-making authority for the operation of the ship delegates authority to other organisations or persons, that assured must accept being identified with them provided that the conditions under Cl. 3-36, sub-clause 2, are met. At the same time, each of the other assureds must accept being identified with the assured who has decision-making authority pursuant to Cl. 3-37. There must also be identification pursuant to Cl. 3-37 when the fault was not committed by the person exercising the authority himself, but by a party with whom he must be identified pursuant to Cl. 3-36. This means that there will be identification with all assureds in all cases where errors are committed by persons or organisations who have authority in relation to functions of importance for the insurance and the conditions for identification under Cl. 3-36, sub-clause 2 are fulfilled.

The connection between Cl. 3-36, sub-clause 2 and Cl. 3-37 relates *prima facie* only to assureds and not to co-owners, since the provision in Cl. 3-36 only regulates identification between the assured and his servants. If, however, a situation were to arise where the co-owner had decision-making authority for the operation of the ship, including authority to delegate authority to others, then it would be natural to apply Cl. 3-36, sub-clause 2, by analogy so that the owner in question is identified with his servants/helpers who have committed the fault. Any other approach would give rise to a fortuitous advantage for the other assureds.

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

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

As mentioned earlier, the 1964 Plan contained no rules on identification between the person effecting the insurance and the assured. However, the system of the Plan did provide that there was to be full identification between the person effecting the insurance and the assured, an approach that has been retained in the new Plan. Negligence that might be committed by the person effecting the insurance would relate primarily to the duty to give correct information and to pay the premium. Negligence relating to these matters may be invoked against anyone insured under the contract. The same will

apply if the negligence is committed by a servant of the person effecting the insurance, for example, an agent charged with the task of entering into the agreement with the insurer on behalf of the person effecting the insurance. This is not stated explicitly, but follows from general rules of contract law.

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

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

Chapter 4
Liability of the insurer

General

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

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

Section 1
General rules relating to the liability of the insurer

Clause 4-1. Total loss

This Clause is identical to Cl. 62 of the 1964 Plan.

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

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

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

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

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

Clause 4-2. General financial loss and loss resulting from delay

This Clause is identical to Cl. 63 of the1964 Plan.

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

The provision reflects the fact that the marine insurer's liability is normally limited to losses consisting of destruction or reduction in value of the actual interest insured. Consequential losses sustained by the assured as a result of the casualty are not recoverable. However, the Clause merely indicates a general principle, and must in many situations be read in conjunction with the liability rules in the chapters relating to the particular types of insurance.

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

The other main group of non-recoverable losses are losses arising from the delay of the insured ship caused by the casualty. The term "loss of time" is aimed at the assured's operating expenses and his loss of freight. However, the Plan provides a special rule for compensation on a number of points in this respect as well, see Cl. 12-11 and Cl. 12-13 relating to loss of time in connection with the invitation to submit tenders and operating expenses during removal of the ship to a repair yard, Cl. 12-7, Cl. 12-8 and Cl. 12-12 which, in different contexts, take into consideration the loss of time which the assured suffers as a result of the casualty, and the rules relating to the special types of insurance aimed at covering loss of time, in particular Chapter 16.

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

Clause 4-3. Costs of providing security, etc.

This Clause is identical to Cl. 64 of the 1964 Plan.

Under Cl. 5-12, the insurer is not obliged to provide security for claims brought by a third party against the assured, which are covered by the insurance. However, if the assured incurs expenses in order to obtain such security, these must, according to the first sentence, be recoverable as expenses incurred due to the casualty. That the expenses must be "reasonable" implies *inter alia* that the assured cannot claim compensation of the costs incurred by providing security for amounts which clearly and considerably exceed the third party's claim. Cl. 5-7 allows the assured, under certain conditions, the right to demand payment on account. Thus, before providing security for a third party's claim, he must submit to the insurer the question of whether the claim should be met by a payment on account. If he has failed to do so, the insurer will not be liable for the costs in connection with the provision of security, *cf. second sentence.*

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

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

Clause 4-4. Costs of litigation

This Clause is identical to Cl. 65 of the 1964 Plan.

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

Clause 4-5. Costs in connection with a claim

This Clause **was amended in the 2019 Version**.

Sub-clause 1 covers all **costs** incurred after the casualty which are necessary in order to establish whether any **recoverable loss** has occurred and, if so, its extent, or which are necessary in order to secure any recourse against third parties. Thus the insurer shall pay costs in connection with **the necessary factual investigation and damage surveys. The same applies to costs in connection with** the conduct of a vessel's protest and maritime accident inquiry, provided that these measures are attributable to a casualty which resulted, or could have resulted, in recoverable losses. **The provision does not distinguish between costs incurred by the insurer or the assured. The assured's surveyor is, however, covered by sub-clause 2.**

A requirement for cover of costs is that there has been a casualty which may result in a claim under a particular insurance cover. If for example the object insured does not function as intended, the hull insurer will not cover cost of technical investigations if the conclusion is that there is no damage and that the malfunction or errors were caused by some inherent defects, or simply not fit for purpose. The same must apply even if there has been an external event with an increased risk of damage but no damage has occurred. Say that the insured object has been exposed to heavy weather and it is decided to check whether the object has suffered any damage, such investigations must be considered as part of the normal operation of the object and the cost have to be covered by the assured if no damage is found. If technical inspections are carried out on various individual and independent parts of the object, and one or more of these parts are found damaged, the costs should be apportioned as per Cl. 4-6. An external event may constitute a "casualty" where inspection costs might be covered in full even if no damage is found. The typical example is a grounding incident where the insurer will cover a dive survey even if no damage is found.

There might be situations where costs incurred shall be considered as repair costs even if considered in isolation they have the character of determining the extent of damage. That is the situation if in parallel with repairs adjacent areas or connected interdependent parts are dismantled and checked for damages. E.g., if it is likely that there might be consequential damages to the gear following a damage to a propeller blade of a thruster, costs of dismantling the thruster for investigation should be considered as repair costs even if no other damage is found. The same solution applies if the class due to the characteristics of a grounding incident require that the vessel should be docked.

Even if the extent of damage has been ascertained it might be necessary to conduct further technical investigation regarding the cause of damage. If the cause, however, is sufficiently

established to conclude that the loss is recoverable under the insurance, further investigations into the root cause will as a starting point be for owner's account. Such further investigations might be required by third parties or be necessary to upgrade the insured object to avoid this kind of damage in the future. If further investigations into the root cause are necessary for the purpose of recourse against a third party, such costs may still be covered by the insurance as recovery costs.

This provision will also covers cost**s** of obtaining expert opinions in order to clarify technical or legal questions, for example, an opinion to document **the cause of a** corrosion damage **or expert assistance on a specific legal question. Costs incurred by the assured by engaging legal or technical consultants in a dispute with the insurer will not be covered. However, if the dispute ends up in litigation, the applicable procedural law will regulate recovery of legal costs.**

Sub-clause 2 **covers the assured's surveyor. This provision has according to long-standing and uniform practice been subject to a relatively strict interpretation.**

Costs connected with the assured's surveyor/technical consultant are only recoverable if the insurer has been given the opportunity to participate in the survey, and the insurer's liability is normally limited to the costs of one surveyor/technical consultant engaged by or from the shipowner's company. However, in complex or large cases with extensive workload for the assured's surveyor/technical consultant, the costs of more than one surveyor/technical consultant is recoverable. The insurer's liability for costs of the surveyor/technical consultant is furthermore limited to the time the repairs take plus travel and maintenance expenses in connection with travelling to and from the place of repairs. The costs will be covered even if repairs are carried out at the home town of the owners' surveyor/technical consultant, but the costs will of course be limited to the time attending the vessel for repairs. Costs in connection with the settlement of the repair invoice are also recoverable, but planning of repairs before the vessel's arrival and administration costs are not.

As regards other costs, the insurer does not cover internal costs or the costs of hiring someone to draw up the statement of claim or retaining legal or expert assistance to draft the claim submission to the insurer. Internal costs and costs for external assistance that should have been obtained internally should not be recoverable.

Nevertheless, the recovery of costs in connection with the claims settlement is subject to the condition either that it is clear in advance that the claim exceeds the deductible, or at least that there is reasonable doubt whether the claim will exceed the deductible.

Sub-clause 3 **introduces no material changes. In previous versions the basis for cover of costs relating to handling and adjusting the claim was encompassed by the wording "costs of establishing the loss and calculating the compensation". The provision establishes that the insurance covers costs of handling the claim as well as drawing up the adjustment. The provision does not distinguish between work contracted to a third party or carried out with the claims leader's internal resources. It might also be that the management and handling of the claim is carried out by the insurer and the adjusting is outsourced to a third party or vice versa.**

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

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

This Clause is identical to Cl. 67 of the 1964 Plan.

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

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

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

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

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

Section 2
Costs of measures to avert or minimise the loss, including salvage awards and general average

General

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

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

shall recover his costs of measures to avert or minimise loss in such situations. At the same time, the general average rules serve to apportion the relevant costs among the insurers involved.

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

The main source for general average settlements is the York-Antwerp Rules (YAR). The latest rules are from **2016**. In international shipping, it is very rare for alternative settlement rules to be agreed, even though alternative clauses do exist. Market agreements may also have been entered into between several insurers' associations **regulating** an apportionment, cf. e.g., **the SCOPIC Clause incorporated into** Lloyd's Open Form, which is referred to in further detail below under Cl. 4-8 and Cl. 4-12**, where certain measures taken to protect against environmental risks fall into the owners' P&I cover**. To the extent that the insurers have acceded to such agreements, these will obviously take precedence over YAR in the event of a conflict of rules.

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

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

The new Plan retains the solutions from the 1964 Plan, based on the traditional system in marine insurance. However, the heading has been changed so that it is clearly evident that the section in

reality also comprises salvage awards, even though this is only reflected indirectly in the individual provisions. The sequence and content of the provisions have furthermore been adjusted in order to achieve a certain simplification. In an introductory provision, Cl. 4-7, the general criteria for covering loss arising from measures to avert or minimise loss are established. The scope of the insurer's liability for general average contributions etc. appears from Cl. 4-8 to 4-11, while the scope of liability for costs of particular measures to avert or minimise loss is placed in a new provision, Cl. 4-12, at the end of the Section.

Clause 4-7. Compensation of the costs of measures to avert or minimise loss

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

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

The last part of the provision corresponds to the wording of Cl. 68 of the 1964 Plan, but is somewhat simplified in accordance with the corresponding wording in the Norwegian Insurance Contracts Act, Section 6-4.

A main problem in applying the rules relating to costs of measures to avert or minimise loss is distinguishing between the measures which are in the nature of measures to avert or minimise a loss

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

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

(2) In addition to the imminent danger mentioned above under (1), a further requirement is that the assured or a third party has initiated measures of an extraordinary nature. Whether the measures are of such a nature must be decided on a case-to-case basis. On this point, Cl. 68 of the 1964 Plan contained an explicit enumeration of a number of elements, in relation to which the question of the extraordinary nature or foreseeability of the measure was to be evaluated, *viz.* "the ship's voyage, the nature of the cargo and the circumstances prevailing when the voyage was commenced". These elements were included primarily with a view to P&I insurance. Given the fact that the Plan no longer applies to P&I, there is less need for such an enumeration. This part of the provision has therefore been deleted, but the elements may, of course, still carry weight in the case-by-case evaluation of the type of measures that are deemed to be extraordinary. Losses arising through an ordinary and foreseeable use of the ship and its equipment do not entail entitlement to compensation under the rules relating to measures to avert or minimise loss, and the same applies to costs the assured had to expect might arise in the course of the voyage. It is hardly possible to give any further guidance; the decision must be made on a case-to-case basis.

In practice, the distinction between ordinary and extraordinary measures has particularly caused problems in connection with what has traditionally been described as "increased ordinary voyage

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

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

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

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

(6) A further requirement is that the measures "must be regarded as reasonable". The text has been somewhat simplified on this point as well. In the 1964 Plan, the requirement of reasonableness was

linked to ”the prevailing circumstances at the time they were implemented”. This simplification is not intended to change any points of substance either. The requirement must be regarded as a sort of safety valve for the insurer and plays a very minor role in practice. It is obvious that the assured must have a wide margin for misjudgements once the casualty is a fact or the risk of a casualty is imminent. In this connection reference is made to Cl. 3-31, where gross negligence on the part of the assured is required in order for the insurer to be entitled to plead that the insured has neglected his duty to avert and minimise the loss.

Whether or not the measures taken were justifiable must be judged in the light of the situation as it appeared to the assured when the peril struck. That the subsequent course of events showed that he was mistaken is therefore in principle irrelevant. It is thus not necessary that there was a *de facto* situation that warranted the implementation of measures to avert or minimise the loss; the deciding factor is that the assured *believed* that the situation was that serious. However, it is a prerequisite that the assured has shown due diligence. If he was wrong, his conduct must be judged under the rules in Chapter 3, Section 5, of the Plan relating to casualties caused intentionally or negligently by the assured. If he has, through gross negligence, misjudged the situation, the compensation may be reduced or be forfeited altogether under Cl. 3-33.

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

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

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

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

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

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

Clause 4-8. General average

The second sentence of sub-clause 1 was editorially amended in the 2013 Plan to avoid any possible misunderstandings. **The Commentary was further amended in the 2019 Version.**

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

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

The first sentence makes the insurer liable for general average contributions which are apportioned on the insured interest, which is normally the insured ship. If so, it is the hull insurer which is liable for the general average contributions apportioned on the insured ship. The hull insurer will under the second sentence also be liable for general average contributions which are apportioned on an otherwise uninsured interest – freight or charterparty hire - provided that the assured is the owner of the said interest. The extension will in practice hardly be of any great economic importance. Normally, the freight will be for the cargo owner's risk and thereby be included in the value of the cargo due to the fact that through clauses such as "freight non-returnable, ship and/or cargo lost or not lost" it has been prepaid with final effect.

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

The contribution is recoverable regardless of what items of loss are included in the general average adjustment, as long as the adjustment as such is correct. The Plan does not make exceptions for compensation of general average expenses. However, a more detailed regulation of the insurer's liability may follow from market agreements, if the Nordic market has explicitly supported these, cf. e.g. **the SCOPIC Clause** linked to Lloyds Open Form which is mentioned above in the introduction to this Section. **The SCOPIC Clause will regulate the apportionment of the salvage remuneration** in connection with an environmental salvage operation according to Articles 13 and 14 of the Salvage Convention of 1989, **with the SCOPIC tariff remuneration replacing the method of assessing Special Compensation under Convention Article 14(1) to 14(4) inclusive. The SCOPIC Clause provides that SCOPIC remuneration shall not be a general average expense to the extent that it exceeds the Article 13 Award; any liability to pay such SCOPIC remuneration shall be that of the shipowner alone and no claim whether direct, indirect, by way of indemnity or recourse or otherwise relating to SCOPIC remuneration in excess of the Article 13 Award shall be made in general average or under the vessel's hull and machinery policy by the owners of the vessel.**

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

The first sub-clause, *fifth sentence,* was added in 2010 as a result of amendments **introduced in** YAR 2004, rule VI, to the effect that salvage awards (including interest and costs of legal assistance in that connection) hereafter will not be recoverable in general average. These costs were previously recoverable in general average. **The same rule is also found in YAR 2016.** The salvage award was thus "re-distributed" on the basis of the contribution values determined under YAR, which could differ from the salvaged values that were determined when fixing the salvage award. If YAR 2004 **or 2016** is to serve as the basis for the general average adjustment, however, it is natural that the insurer is also liable for the salvage award apportioned on the insured interest and any salvage award apportioned on freight or charterparty hire for which the assured bears the risk, in the same way as for cover of general average contributions.

In practice, the question concerning the assured's interest claim in connection with general average adjustments has caused problems. Under YAR 1994 and **subsequent versions**, rule XXI, interest on disbursements, etc. is now recoverable up to three months after the date of the average adjustment. If the due date for the claim under the insurance, cf. Cl. 5-6, is fixed after that point in time**,** the assured must be entitled to interest under the general rules of the Plan, cf. Cl. 5-4. If, on the other hand, the due date for the claim under the insurance is set at a date prior to three months after the date of the average adjustment, the situation is different. In that case it is natural that the insurer does not have to pay interest recovered in general average after the due date prescribed in accordance with Cl. 5-6. This is now provided in the first sub-clause, sixth sentence.

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

An outcome such as this is less logical, however, if measures to avert or minimise loss have resulted in damage to or loss of the actual object insured. The consequence would then be that the assured would only obtain partial compensation under the hull insurance for damage incurred through measures to avert or minimise loss because he had breached a contract of affreightment. Liability for the excess loss would then have to be transferred to the P&I insurance. As long as the assured has not disregarded the insurance contract in such a manner that his cover is reduced or forfeited, the hull insurer should provide full cover for the damage which the ship sustains, regardless of whether the damage is due to measures to avert or minimise loss or has arisen by way of an accident. Cl. 4-10 of the Plan, which gives the insured an unconditional right to claim compensation for damage to or loss of the object insured under the rules relating to particular loss will therefore prevail over Cl. 4-8 and entitle the assured to full compensation. The limitation rule in sub-clause 2 will first and foremost be of significance for salvage, port of refuge expenses and "common benefit" costs.

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

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

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

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

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

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

When deciding whether and to what extent loss, expenses etc. are recoverable under sub-clause 3, it follows from sub-clause 3, *second sentence*, that the provisions in the York-Antwerp Rules **2016** shall be used as a basis, regardless of what rules the contract of affreightment might contain relating to general average. Cover under YAR does not, however, apply to interest and commission, the costs of which will have to be recovered under Cl. 4-3 and Cl. 5-4 of the Plan, cf. the reference to Cl. 4-11, sub-clause 2, second sentence**.** This must otherwise mean that interest and commission, which in such case are to be apportioned under the rules of the Plan and not YAR, are recoverable in addition to the maximum amount stipulated in the insurance contract for sub-clause 3 (a). It is also considered to be

most natural that fees for issuing the claim adjustment and the insurer's handling of the matter are recoverable in addition to this maximum amount.

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

This Clause is identical to Cl. 71 of the 1964 Plan.

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

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

This Clause **was amended in the 2019 Version**.

The provision **gives the assured a right to claim** compensation for general average damage to the ship under the rules relating to particular average. **The rationale is that the assured shall always have the right to claim under the insurance contract in respect of any physical damage to thevessel, including sacrificial damage, and settle this concurrently with the particular average damage, thus not having to wait for a general average adjustment which often may take a long time to finalize.**

Where the insurer indemnifies hull damage according to the rules relating to particular average, he is subrogated to the assured's claim against the other participants in the general average. **Therefore, even if sacrificial damage has been claimed under the rules relating to particular average pursuant to this Clause, there is still a duty to secure the claim against the other parties to the general average, ref. Chapter 5, Section 3, and particularly Cl. 5-16. In other words, the assured should consider to declare general average in order to recover other parties' contribution of sacrificial damage, otherwise he may become liable for the loss to the insurer if he fails to declare general average, see particularly the duty of the assured to maintain and safeguard a claim against third parties as per Cl. 5-16. T**he insurer **will not, however,** be subrogated to the assured's claim against the P&I insurer for the hull damage if the contributions are irrecoverable, irrespective of whether the loss of or damage to the object insured is recoverable under the rules relating to general average or under the rules relating to particular damage. **Finally, it should be noted that even if sacrificial damage is claimed pursuant to the rules relating to particular average, any deductible agreed under Cl. 12-18 is not applicable to such damage, cf. Cl. 12-18, sub-clause 3. However, any other deduction agreed in the policy will be applicable in the ordinary manner.**

Clause 4-11. Assumed general average

This Clause corresponds to Cl. 73 of the 1964 Plan.

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

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

By applying the general average rules to measures to avert or minimise loss for ships in ballast, the cover will be the same regardless of whether the ship is carrying a small cargo or is completely empty. In practice, however, this principle is not carried into full effect. Under sub-clause 2, there are certain limitations to the assured's right to claim wages and maintenance for ships in ballast under the general average rules. Under the general average rules, the shipowner shall receive compensation for part of the loss of time during the final repairs of the damage, cf. YAR **2016** Rule XI. The shipowner is not entitled to this advantage when permanent repairs of damage the ship has sustained while in ballast are carried out, cf. *sub-clause 2, first sentence*. On this point the 1964 Plan contained an addition to the effect that the limitation also applied to "expenses in substitution of such outlays". This part of the provision had been incorporated in order to eliminate an earlier unfortunate practice that has now ceased, and it has therefore been deleted. According to established practice, the limitation does not comprise any waiting time before repairs are commenced, but does include waiting time that arises during the repairs because necessary parts are missing. The special rules relating to commission and interest applicable in general average have been set aside as well, cf. sub-clause 2, second sentence, of this Clause.

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

This sub-clause corresponds to Cl. 68 and Cl. 69 of the 1964 Plan and relevant Nordic Insurance Contracts Acts (Nordic ICAs). **The Commentary was amended in the 2019 Version.**

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

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

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

However, the apportionment of the loss under this sub-clause is not entirely consistent. In the first place, it is established practice that the separate insurances against total loss (hull and freight interests)

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

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

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

Section 3
Liability of the assured to third parties

Clause 4-13. Main rule

This Clause is identical to Cl. 74 of the 1964 Plan.

Clause 4-14. Cross liabilities

This Clause is identical to Cl. 75 of the 1964 Plan.

Under Cl. 4-14, *first sentence*, the Plan maintains the principle of cross-liabilities in connection with liability of the assured to third parties. The principle is in accordance with established customary Norwegian marine insurance law, cf. *Brækhus* in AfS 4.468-69 with references, and is of the greatest practical importance in connection with collision settlements. This is best illustrated by a somewhat stylised example:

The insured ship A has collided with ship B. The blame fraction is one half. A's hull damage is 300, the time loss 120, a total of 420. B's loss totals 350. The settlement between the ships under Section 161, second sub-clause, 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, paying 35 to A. Such a single-liability settlement results in a single claim. Or A could also be held liable to pay half of B's loss, i.e. 175, and B to pay half of A's loss, i.e. 210. These two claims are set off against each other, with the result that B must pay the balance of 35 to A. This is the cross-liability settlement.

In the relationship between the parties, the result will be the same regardless of which principle is adhered to. In the ensuing settlement between the individual shipowner and his insurers, the choice between the two methods of settlement will, however, be of great importance. The reason for this is that the compensation obtained from the other ship will often, to a greater or lesser extent, be credited to other persons than those who shall bear the liability of the oncoming ship. The compensation from the oncoming ship shall, as regards the loss of time, fall to the shipowner (if appropriate, the loss-of-hire insurer, cf. Chapter 16), whereas the compensation for hull damage shall normally be divided proportionately between the hull insurer and the owner, cf. Cl. 5-13, sub-clause 2. Liability towards the oncoming ship, however, shall as a rule be covered in its entirety by the hull insurer, cf. Chapter 13 (sometimes the P&I insurer will also come into the picture, see below). If the settlement between the shipowner and the insurer is based on the cross-liability principle, it is the gross liability amounts before the set-off that shall be debited and credited respectively under these rules. If, however, the single-liability principle is adopted, there will be only one amount, the liability balance, to be apportioned. If the balance is in the oncoming ship's favour, it shall be debited to the hull insurer as liability insurer. If it is in the insured ship's favour, it shall be divided proportionately between the owner and the hull insurer. In the light of the cross-liability settlement, the single-liability settlement may lead to the result that a claim from the oncoming ship, which shall accrue to a person, e.g., compensation for loss of time payable to the owner, is used as a set-off to cover the liability of the oncoming ship which, under the insurance conditions, should be covered in full by the hull insurer.

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

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

In the event of a single-liability settlement, there will only be one amount, *viz.* the balance of 35 in A's favour, which shall be divided proportionately between A and his hull insurer. As A's total loss was 420, this means that the compensation from B gives a refund of 35/420 = 1/12, and we get the following settlement:

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

There can be no doubt that the cross-liability settlement is preferable; it gives the shipowner exactly the refund from the other ship warranted by the portion of blame. In the case of a single-liability settlement, the refund is reduced, in our example from 1/2 to 1/12, despite the fact that the oncoming ship has been held liable for one half of the loss.

The collision settlement will sometimes also affect the P&I insurer: firstly where the liability of the oncoming ship exceeds the limit of the hull insurer's liability, cf. Cl. 13-3 and, secondly, in the event of what is termed indirect personal-injury and cargo liability. For personal injury caused by a collision,

both ships are jointly and severally liable, cf. Section 161, third sub-clause, of the Norwegian Maritime Code; under US law the same also applies to liability for cargo damage. It is therefore conceivable that the oncoming ship B must pay compensation for personal injury, or for damage to the cargo on board the cargo-carrying ship A and that, in the settlement with A, B attributes half of the compensations paid to A. A for its part may have suffered far more extensive damage from the collision than B, which would mean that a settlement of the hull damage alone would give a substantial profit in A's favour. However, this is wholly or partly set off by B's refund claim in connection with the personal injury and cargo damage compensations. In this case as well, the final balance that emerges from the external settlement must be divided into claims and counterclaims according to the cross-liability principle, given that the indirect liability for personal injury and damage to the insured ship's own cargo shall be attributed to the P&I insurer, cf. Clause 13-1, sub-clause 2 (b), (c), (d) and (j). See also *Brækhus* 1. c. pp. 482-97.

Special difficulties arise where one or both of the colliding ships limit their liability. In the relationship between the ships, the limitation will, under the laws of most countries, first be applied in respect of the liability balance, in other words, on the basis of the single-liability principle, cf. Article 5 of the Limitation of Liability Convention of 1976 and Section 172, last sub-clause, of the Norwegian Maritime Code. In consequence hereof, the calculated gross liability will not concord with the balance which is in actual fact paid, and the normal cross-liability settlement in the relationship between the shipowner and his insurers will not be correct. In English marine insurance, which is based on cross-liability as the principal rule, this has led to a switch to single liability as soon as one of the involved ships limits its liability, cf. I.T.C., Hulls, no. 8.2.1. However, this solution results in an unfortunate discontinuity. An insignificant increase in liability, making limitation applicable, may result in a very substantial reduction of the reimbursement of the owner's loss of time. Danish and Norwegian practice has instead adopted a modified cross-liability settlement in the limitation cases by reducing the largest gross amount of liability in the insurance settlement by the same amount by which the liability balance in the external settlement has been reduced as a result of the limitation rule, see further *Brækhus*, 1. c., pp. 469-82 and 497 *et seq*. This method of settlement was also approved by the Norwegian Supreme Court in the FERNSTREAM case, ND 1963.175, and it is explicitly adopted as a basis in the Plan, cf. Cl. 4-14, *second sentence*. For the sake of clarity, the *third sentence* of the Clause specifies how the settlement shall be effected when the limitation is applied to the liability balance.

Incidents causing mutual damage and liability that affect the insurance settlements do not occur only in connection with collisions between ships, although collision cases are probably predominant. The cross-liability principle must also be applied in a case such as the following: a cargo of slimes which is carried by the insured ship becomes liquid. The ship, which does not have the necessary longitudinal bulkheads, takes a list and ends up turning over and going down. The accident was due partly to negligence of the cargo owner: he had failed to say that the slimes were of a particularly difficult type, and partly to negligence of the ship: even when carrying ordinary slimes, the ship should have had

longitudinal bulkheads. In the claims settlement, the cargo owner's (partial) liability for the loss of the ship will, to some extent, be offset by the owner's (partial) liability for the loss of the cargo. In the ensuing insurance settlement, the balance must be broken down as follows: the compensation the cargo owner pays for the loss of the ship must be covered by the hull insurer, while the compensation to the cargo owner for the loss of the cargo must be paid by the P&I insurer.

In the above example, it is assumed that both the assured's own loss and his liability to third parties are covered by insurance. However, the cross-liability principle must be applied, even if it is only the assured's own loss, or only the liability, which is insured. The individual insurer's liability shall not depend on how the assured has covered his other interests. For this reason, the application of the cross-liability principle has been authorised specifically with a view to liability insurance in this Clause and with a view to the apportionment of subrogation claims in Cl. 5-13, sub-clause 1, second sentence.

Clause 4-15. Unusual or prohibited terms of contract

This Clause is identical to Cl. 76 of the 1964 Plan.

The collision liability covered by the hull insurer will normally have been incurred vis-à-vis a third party with whom the assured does not have any contractual relationship. However, it is conceivable that the assured's contracts may be of significance, especially in connection with liability to owners of tugboats or quays, canals and similar installations the ship has used.

Under *sub-sub-clause (a)*, the insurer shall always cover liability based on terms of contract that must be considered customary in the trade concerned. In offshore contracts, it is customary to use limitations of liability in the form of "knock-for-knock" clauses, which entail that the contracting parties shall cover damage to their own objects, even if the other contracting party may be held liable for the damage under general law of damages. Such clauses must in this context be considered "customary". However, limitation of liability clauses in offshore contracts are often linked to a waiver-of-subrogation clause in the claimant's insurance contract, whereby the insurer waives the right to seek recourse against the assured's contracting counterpart. In that event, the question whether such limitation of liability clauses are customary is of little independent significance.

The limitation of liability in *sub-sub-clause (b)* relates to Cl. 3-28, which authorizes the insurer to prohibit or require the use of certain contractual forms.

In contracts for repairs, it is not unusual to find clauses to the effect that everything that is scrapped during repairs shall accrue to the repair yard, without compensation. Such clauses are also binding on the insurer according to custom and practice and by analogy from Cl. 4-15, cf. *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), pp. 603-604.

Clause 4-16. Objects belonging to the assured

This Clause is identical to Cl. 77 of the 1964 Plan.

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

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

The sister-ship rule represents a positive extension of the liability cover. Hence, it cannot be invoked against an insurer who has only insured the "innocent" ship. He will only be liable for the ship's hull damage in accordance with the insurance contract. On the other hand, liability under this provision for the insurer of the ship at fault is subject to the condition that he would have been liable under the rules of the Plan if the claimant had been an outside third party. Accordingly, if the insurer would not have been liable for the collision liability, etc., on account of the rules in Chapter 3, including the identification rules, he will also be free from liability to the assured under the current provision.

Another question is whether the insurer of the "innocent" ship will have recourse against the assured in his capacity as owner of the ship at fault. The question is first and foremost of interest when the ship at fault is not insured and is, accordingly, not of any great practical significance. The correct solution must be that his position as assured under the innocent ship's insurance protects him against such a recourse claim to the same extent that he has a claim against his own insurance. This means that it is the general rules in Chapter 3 of the Plan which decide the question.

If a fault was committed on board both of the colliding ships, the application of the sister-ship rule must be "based on the calculated gross liabilities before any set-off", cf. Cl. 4-14.

The extended cover under Cl. 4-16 applies only to loss of or damage to objects other than the insured ship and its supplies and equipment, cf. second sentence. Damage to such objects is not recoverable under these rules.

A corresponding "sister-ship rule" is applied when the ship is salvaged or receives assistance from another vessel belonging to the assured, cf. Cl. 10-11.

Clause 4-17. Determination of the liability of the assured

This Clause corresponds to relevant Nordic Insurance Contracts Acts (Nordic ICAs). Cl. 4-17 was editorially amended in the 2013 Plan in order to better safe guard against non-Nordic courts allowing a direct action against the insurer.

The Nordic ICAs contain a provision which gives an injured third party a direct claim against the tortfeasor's liability insurer. This provision is not appropriate in marine insurance. Consequently, for insurances taken out on the basis of the Plan, an injured third party will have no such right to direct action. This is reflected in *paragraph 1* of the provision. However, an injured third party under the relevant Nordic ICAs is protected against the compensation being paid to the assured without the latter having proved that the injured party's claim has been honoured. Furthermore, the injured party will have a direct claim against the insurer if the assured is insolvent, cf. Section 7-8, second paragraph. These provisions are mandatory in marine insurance as well, cf. the relevant Nordic ICAs.

Sub-clause 2 sets out a number of procedures the assured may follow in order to document his claim. The deciding factor for the insurer's obligation to indemnify the assured is, however, that the claim is justified, not that the relevant procedure has been complied with. This is reflected in *sub-clause 3.* Consequently, if the assured has, contrary to the umpire's decision, cf. Cl. 5-11, accepted that a dispute shall be decided by arbitration, the insurer must cover the assured's liability under the arbitration decision, provided that the assured is able to prove that he would have incurred liability even if he had complied with the umpire's decision, cf. *Brækhus/Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 572.

Section 4
The sum insured as the limit of the liability of the insurer

Clause 4-18. Main rule

This Clause corresponds to Cl. 79 of the 1964 Plan, and Cefor I.3 and PIC Cl. 5.7.

This provision establishes the principle that the insurer is liable up to the sum insured for each individual casualty, and shall apply in all branches where a sum insured is agreed.

Sub-clause 1, first sentence, is based on Cl. 79 of the 1964 Plan, sub-clause 1. The insurer is liable with up to one sum insured for "loss caused by any one casualty". The term "any one casualty" is discussed in further detail below.

Sub-clause 1, second sentence, is based on the Special Conditions (Cefor I.3, and PIC Cl. 5.7), but with certain amendments. The provision is bound up with the traditional principle in insurance law that the insurer, in addition to the sum insured, is liable for costs of measures to avert or minimise loss. Under the 1964 Plan, the insurer originally had unlimited liability for these costs. However, this liability was limited in the Special Conditions (Cefor I.3, and PIC Cl. 5.7) so that the costs of measures to avert or minimise loss basically had to be covered up to the sum insured under Cl. 79, sub-clause 1, or possibly the separate sum insured under Cl. 196. There was nevertheless a certain extension of the cover: if the separate sum insured under Cl. 196 of the Plan was not used to cover costs of collision or measures to avert or minimise such liability, the balance could be used to cover costs of measures to avert or minimise damage to or total loss of the ship to the extent that such measures exceeded the sum insured.

According to this, the cover under the Special Conditions of costs to avert or minimise loss were more limited than the corresponding cover under the relevant Nordic Insurance Contracts Acts (Nordic ICAs). Under the Norwegian ICA Section 6-4, the rule is that the insurer is fully liable for costs of measures to avert or minimise loss. During the revision of the Plan, there was general agreement that the limitation in the Special Conditions went too far. The intention was originally that the P&I insurers were to cover the costs of measures to avert or minimise loss which were not recoverable under the hull insurance. However, this applied only to the Norwegian P&I insurers, and the assured therefore ran the risk of being without cover if he had a foreign P&I insurer. Nor was the solution laid down in any agreement, and it was therefore uncertain to what extent it would be complied with in practice. The regard for the interests of the assured therefore warranted a certain expansion of the scope of cover. Out of regard for the reinsurers, however, cover of costs of measures to avert or minimise loss had to be subject to a limitation. These conflicting interests have been resolved by the introduction of a separate sum insured for the costs of measures to avert or minimise loss stipulated in sub-clause 1, second sentence. This sum insured comprises the total costs of measures to avert or minimise loss for the relevant insurance under the Plan. For hull insurance, this means that both costs of measures to avert or minimise loss associated with the property insurance, as well as costs of measures incurred to avert collision liability, are included. The insurer's maximum liability for one and the same casualty thus consists of three sums insured. Such a solution concords with the solution in the English conditions.

If the sum insured for property damage under a hull insurance has not been exhausted by compensation paid for such damage, it should be possible to use the excess of the sum insured to cover

costs of measures to avert or minimise loss that exceed the separate sum insured for such costs. This solution is reflected in sub-clause 1, *third sentence*. On the other hand, it should not be possible to transfer the separate sum insured for the collision liability under sub-clause 2 and Cl. 13-3 for the purpose of covering costs of measures to avert or minimise loss in this way. The provision relating to a separate sum insured for collision liability contained in *sub-clause 2* and Cl. 13-3 is bound up with the regulation of the owner's liability. According to the Limitation of Liability Convention of 1976, the owner is liable up to a certain amount per ton, regardless of the fate of the ship. Without a separate sum insured for collision liability, collisions causing extensive damage to both ships may result in the P&I insurer having to cover a substantial part of the collision liability.

The fact that the insurer covers collision liability "separately" means that he does not cover collision liability within the actual hull insurance sum. Thus, whatever might be left of the ordinary sum insured after the damage to the ship has been covered shall not be used to cover liability. The separate sum insured for collision liability has been fixed at an amount equal to the sum insured under the hull insurance, cf. Cl. 13-3.

It follows from the regulation in Cl. 4-18 that the limit in terms of amount of the insurer's liability is linked to "any one casualty". The question whether one or more casualties occurred will rarely give rise to problems. Difficulties do not arise until a series of events occur in rapid succession or with a strong mutual causal connection. In that event, the distinction between one and several casualties must be decided on a case-to-case basis. Some guidance may be found in practice in connection with Cl. 12-18 concerning deductibles; the deductible, too, shall be calculated for each individual casualty. However, the content of the casualty concept will not necessarily be the same in both connections.

The question as to when successive events constitute one or more casualties may arise in three standard scenarios:

1. One and the same peril materializes several times. By way of example, a ship sustains hull damage while navigating in ice on a number of clearly separate occasions, cf. e.g. ND 1974.103 NH SUNVICTOR, which concerned the question relating to the number of deductibles under an Anglo-American deductible clause. As a rule, this problem will concern the number of deductibles. The ship will normally be a constructive total loss if several incidents of damage exceed the sum insured. However, in principle it may in such situations also be a question whether the insurer shall be liable for up to more than one times the sum insured.

2. Damage caused by one event interacts with new circumstances and results in further damage. By way of example, the steering gear of a ship is damaged in a collision with the result that the helm is locked in a starboard position. Before the crew manages to stop the engine, a new collision occurs. As regards property-damage cover, in this group of events as well, it will be the question of

deductibles which is the most interesting. However, in the event of several successive collisions, the total collision liability may become so extensive that the question of whether the insurer is liable for up to one or several times the sum insured becomes relevant.

3. One incident of damage requires several repairs. The typical example is that the first repairs were inadequately performed, or that they were not thorough enough, cf. ND 1977.38 NH VESTFOLD I, which concerned the question whether new damage resulting from errors committed during the repairs of the engine after a grounding was to be regarded as a consequence of the grounding. If the first damage has been repaired before the next one occurs, there may also be a need for more than one sum insured.

There is no case law regarding the distinction between one and several casualties in relation to the sum insured. Certain elements may be taken from ND 1974.103 NH SUNVICTOR and ND 1977.38 NH VESTFOLD I, cf. above. In addition, some guidance may be found in case law concerning limitation of liability under Section 175 no. 4 of the Norwegian Maritime Code, which ties the limit of liability to "the sum total of all claims arising from one and the same event". If it is a situation where the ship collides with several other ships in quick succession, causing a total loss exceeding the sum insured for the collision liability, the natural thing to do would be to tie the solution to the decision regarding the owner's right to limit his liability to third parties. However, also in other cases where a limitation of liability under the Norwegian Maritime Code is relevant, the interpretation of the term "one and the same event" in the Norwegian Maritime Code may help shed some light on the question concerning the distinction between one and several casualties in relation to the sum insured. Reference is made to ND 1984.129 NH TØNSNES, where damage to seven net loops in the course of roughly one hour was regarded as caused by one event; and ND 1987.160 NH NY DOLSØY, where it was regarded as one event that contaminated bunkers delivered at an interval of 24 hours to two ships within the same fishing area caused damage to the machinery of these vessels.

Accordingly, the question whether one or several casualties have occurred in relation to the sum insured must be the subject of a case-to-case evaluation, where the following elements may come into play:

1. Is there a close connection in terms of location and time between the successive incidents of damage, or are the new accidents of a totally independent nature? Taking the two limitation of liability judgments referred to above as a point of departure, it is nevertheless hardly possible to stipulate very strict requirements as to connection in time and place in order for several incidents of damage to be regarded as one casualty. As long as the incidents occur within a limited area, it must be accepted that they occurred at certain intervals.

2. What possibilities did the assured have of averting the last damage? As regards this element, a distinction must, however, be made between the number of deductibles and the number of sums insured. If it is a question of whether new damage shall trigger several deductibles, the assured's negligence must be regarded as a new and independent cause that breaks the chain of causation from the first incident. This follows from the view that the deductible shall have a deterrent effect. However, in relation to the number of sums insured, the deterrence aspect may suggest that negligence on the part of the assured does not give rise to a new sum insured. Deterrence considerations might, in other words, warrant varying the distinction between one and several casualties depending on whether it is a question of more than one sum insured or more than one deductible.

3. Does the initial damage or its cause entail an increased risk of new damage, or is the last incident a result of a "generally prevailing risk of damage" which would have occurred with the same effect independently of the first damage or its cause?

Clause 4-19. Liability in excess of the sum insured

This Clause corresponds to Cl. 80 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts.

It is a traditional principle in marine insurance that the assured, in addition to the cover which the insurance affords him within the limits of the sum insured, is entitled to separate cover of a number of accessory expenses and other losses which the casualty has caused him. In the 1964 Plan, all these expenses were stated in Cl. 80. In the new Plan, loss caused by measures to avert or minimise loss has been isolated for separate regulation in Cl. 4-18, cf. above. The other accessory costs, however, are still mentioned in Cl. 4-19.

Sub-clauses (a) and (b) state the expenses that are to be covered in addition to the sum insured: costs of providing security, of filing suit against or defending a suit filed by a third party, costs in connection with the claims settlement, costs of necessary measures to preserve the object insured and interest on the compensation.

It furthermore follows from Cl. 15-21, which concerns liability for the removal of war wrecks that the war-risks insurer covers such liability even if the sum insured is exceeded.

Clause 4-20. Limit of liability where loss is caused by a combination of perils

This Clause corresponds to Cl. 81 of the 1964 Plan.

The provision is based on ND 1956.323 NH PAN, where the question was how the limitation up to the sum insured was to be applied in the event of a casualty with a "mixed cause". Liability for the damage to the ship was apportioned, with the marine insurer covering 40% and the war-risks insurer

60%. The costs of repairs, etc. exceeded the hull valuation, but the assured demanded full compensation, alleging that each of the insurers was liable for his share of damage to the ship up to his sum insured. The Supreme Court rejected the claim on the grounds that the assured shall not "in a case of a combination of different perils, be in an economically more advantageous position than if there had been no combination of different perils". This solution has been adopted as a basis in Cl. 4-20.

Clause 4-21. Right of the insurer to avoid further liability by payment of the sum insured

This Clause corresponds to Cl. 82 of the 1964 Plan.

Under *sub-clause 1*, the insurer may avoid further liability by paying the sum insured. There is no time-limit on the insurer's right to limit his liability.

The principle in sub-clause 1 is only applicable in property insurance. The insurer cannot invoke the provision if the assured, contrary to his wishes, wishes to institute legal proceedings regarding liability covered by the insurance. In that case, it is necessary to resort to the rules contained in Cl. 5-11. If the assured in such a case is supported by the umpire, but liability which absorbs the entire sum insured is nevertheless imposed on the assured in the legal proceedings, the insurer shall cover the litigation costs under the general rules.

If the insurer pays the sum insured in accordance with Cl. 4-21, the further salvage operation will be for the assured's own account and risk. If the salvage operation is successful, the assured will keep the wreck, but he must pay the full cost. However, he may claim compensation for the costs he has incurred before he was informed that the insurer had decided to pay the sum insured, cf. *sub-clause 2*. The measures the assured has implemented prior to that time are for the insurer's account, even if the costs do not accrue until later.

This apportionment of risk has caused certain problems where the assured has entered into a salvage contract before the insurer has paid the sum insured. If the contract does not allow the assured to cancel the contract without paying salvage, the insurer will be liable for the salvage expenses; here the measure has been "implemented", cf. sub-clause 2. If, however, the assured has the right to get out of the salvage contract, the insurer has the right to order him to do so, and may in that event pay the sum insured according to sub-clause 1, and avoid further liability. These principles must apply regardless of whether the salvage contract has been entered into on a no-cure-no-pay basis or is based on an hourly rate.

Sub-clause 3 establishes that the insurer has no right to take over the object insured under Cl. 5-19, where he chooses to pay the sum insured under sub-clause 1.

Chapter 5
Settlement of claims

Section 1
Claims adjustment, interest, payments on account, etc.

Clause 5-1. Duty of the assured to provide information and documents

This Clause corresponds to Cl. 83 of the 1964 Plan, Cefor I.29, and PIC Cl. 5 no. 8, and the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

Sub-clause 1 is identical to the 1964 Plan. The provision establishes the duty of the assured to provide the insurer with such information and documents as are required for the purpose of settling the claim. It is irrelevant whether the insurer has specifically requested such information; the duty concerns any and all information the insurer, from an objective point of view, requires. The duty of disclosure applies both in relation to the claims leader and in relation to the co-insurers.

In practice, the insurer often raises a number of specific questions related to the settlement. Incorrect answers to these questions represent a clear breach of Cl. 5-1, sub-clause 1. However, the provision shall also apply where the assured, on his own initiative, gives incorrect information or withholds information which he should understand is of significance for the insurer. The duty of the assured to provide information is, in other words, an active and not a passive duty of disclosure.

The requirement to provide information may vary in the different types of insurance. In loss-of-hire insurance, the duty of disclosure under Cl. 5-1 entails that the assured shall make all accounting material that shows the ship's earnings, relevant bills, invoices, etc. available to the insurer in so far as this is necessary in order to calculate the correct compensation.

If the assured fails to fulfil his duty under sub-clause 1, he risks forfeiting his right to claim interest for the time lost, cf. Cl. 5-4, sub-clause 2. However, loss of interest would normally only be a reasonable sanction where the assured has failed to comply with an explicit request from the insurer for a specific item of information or a specific document. However, an exception must be made for the general invoice. If the assured fails to submit this, he risks forfeiting his right to claim interest under Cl. 5-4, sub-clause 2, even if he has not received any specific request from the insurer.

Sub-clause 2 is new and regulates the insurer's sanctions if the assured, intentionally or through gross negligence, breaches the duty to provide information stipulated in sub-clause 1. The 1964 Plan did not

contain any sanctions against the intentional or grossly negligent breach of this duty of disclosure, although sub-clauses 2 of Cl. 92 and Cl. 99 (cf. currently sub-clauses 2 of Cl. 5-9 and Cl. 5-16) of the 1964 Plan contained such sanctions for certain special situations. However, there is no reason why the failure to fulfil the general duty to provide information under Cl. 5-1 should result in a more lenient reaction than the failure to comply with the other provisions. Accordingly, sub-clause 2 establishes that, in the event of the assured, intentionally or through gross negligence, breaching the duty of disclosure, the insurer is not liable for any loss that would have been averted if the duty had been fulfilled.

If the assured has acted fraudulently in connection with the claims settlement, the traditional point of departure in insurance law is that the assured forfeits any claim against the insurer. This point of departure had been softened in the 1964 Plan, where Cl. 83, sub-clause 2, merely stated that compensation might be reduced or lapse altogether where the assured had fraudulently or dishonestly failed to fulfil his duty of disclosure. However, this provision was considered unfortunate in practice, and the alternative, a reduction of liability was therefore abolished in the Special Conditions, cf. Cefor I.29 and PIC Cl. 5.8, which stated that liability lapsed where the assured had fraudulently or dishonestly breached the duty of disclosure. The solution in the Special Conditions has been maintained in the new Plan, cf. *sub-clause 3, first sentence*. This rule may seem strict if the fraud is of secondary importance and concerns only certain losses, and there is consequently a risk that the courts may in such cases fail to hold that fraud has been committed. However, the loss of all rights concords with the point of departure in the relevant Nordic Insurance Contracts Acts (Nordic ICAs).

In the 1964 Plan, fraud was placed on a par with “dishonesty”. This is in accordance with the solution in the Norwegian ICA, which applies to an assured who, in connection with a claims settlement, deliberately gives incorrect or incomplete information which he knows or must understand may result in the payment of a compensation to which he is not entitled. This solution has not been maintained in the new Plan, under which a total loss of rights will only be relevant in the event of fraud. This is the most consistent procedure in relation to the other rules relating to subjective duties, and also makes it unnecessary to decide the difficult question as to what the term “dishonest” implies.

Cl. 83, sub-clause 2, second sentence of the 1964 Plan equated fraud and dishonesty with the situation where the assured refused to provide information from the classification society. This rule has been amended and moved to Cl. 3-7, sub-clause 3.

Sub-clause 3, *second sentence*, is new and gives the insurer the right to cancel any agreement with the assured by giving 14 days’ notice if the assured has acted fraudulently. This provision is taken from the Norwegian ICA Section 8-1, third paragraph, although that Section stipulates only one week’s notice. Because it is important that the assured be given clear information as to where he stands as

soon as possible, it follows from the *third sentence* that the insurer shall act without undue delay after he has become aware of the fraudulent act, cf. the corresponding rule in Cl. 3-6.

Clause 5-2. Claims adjustment

This Clause corresponds to Cl. 84 of the 1964 Plan and the relevant Nordic Insurance Contracts Acts (Nordic ICAs). The Commentary was amended in the 2010 version.

The *first sentence* to the effect that the insurer shall issue the claims adjustment as promptly as possible is identical to the 1964 Plan. However, the second sentence of the 1964 Plan contained more detailed time-limits: in the event of a settlement under the rules relating to a total loss, the claims adjustment was to be issued at the latest within 14 days, and in other cases at the latest within three months after the insurer had received the necessary information and documents. The provision was connected with Cl. 89 relating to due dates, which was tied to the time-limits in Cl. 84 and Cl. 86 relating to interest, which authorized penalty interest plus 1% in relation to the ordinary rate of interest if the due date is not adhered to. However, in the Special Conditions the system of interest on overdue payments had been superseded by a common rate of interest.

The approach of the new Plan is to establish a due-date and interest system that is somewhere in between the solution in the 1964 Plan and the solution in the Special Conditions. On the one hand, there is reason to show caution when it comes to imposing interest on overdue payments. The sharp calculation of time-limits in Cl. 84, sub-clause 1, second sentence, of the 1964 Plan has therefore been taken out of the Plan text and does not have any direct impact on the due date. The insurers should nevertheless endeavour to meet a deadline of 14 days for total losses and three months for other settlements.

On the other hand, a common rate of interest before and after the due date will not give the insurer very much of an incentive to be quick about the claims adjustment if the market rate is higher than the rate in the insurance contract. The possibility cannot be disregarded that the courts may in such a situation apply the Act relating to interest on overdue payments (for Norway *Morarenteloven*), even if the Plan did not contain any rules relating to interest on overdue payments. The due date in Cl. 5-6 therefore refers to the criterion “as promptly as possible” in Cl. 5-2, first sentence, and a rule relating to interest on overdue payments has been introduced in Cl. 5-4, sub-clause 4. An insurer who fails to pay compensation within six weeks after the “as promptly as possible” period has expired must pay overdue interest.

The provision in the *second sentence* has been taken from Cl. 84, sub-clause 2, first sentence of the 1964 Plan. The insurer has been given a general right to engage an average adjuster to carry out the claim adjustment on his behalf. The 1964 Plan also contained a provision to the effect that the insurer

had one month to decide whether or not to accept the average adjuster's calculation. This rule was deemed to be superfluous and has been deleted.

The assured does not have a right equivalent to that of the insurer to require that the adjustment is made by an average adjuster. However, there is nothing to prevent the parties from making an explicit agreement that the assured shall be given such a right.

Clause 5-3. Rates of exchange

Sub-clauses 2 and 3 was amended in the 2013 Plan to abolish the reference to "Norwegian Kroner" (NOK). The wording of paragraph 2 and 3 below was edited to clarify the relevant points. It is standard international practice that the conversion from one currency to another in the claims adjustment is based on the rate of exchange on the date of the assured's disbursement, cf. *sub-clause 1, first sentence*. This means that the assured bears the exchange risk for the period of time between the disbursement and the final claims settlement.

As regards general average, it is standard international practice for the conversion of currencies to be based on the rate of exchange on the date of disbursement. If, in exceptional cases, a different rate of exchange has been applied, the insurer has the right to apply for change of the actual average adjustment. If the adjustment is confirmed by the courts of the country concerned, the settlement should be made on the basis of the average adjustment.

Sub-clause 2 regulates the conversion of costs that have not been paid when the adjustment is issued. The adjustment is "issued" when the completed adjustment is sent from the insurer to the interested parties. Hence, if there is a change in the rate of exchange during the period from the time the actual adjustment is issued until payment is made, this currency risk must be born by the assured.

Sub-clause 3 regulates the conversion of deductible and other amounts in the insurance contract if the sum insured is stipulated in a currency other than the currency stipulated for the deductible etc.; the conversion to the currency of the sum insured is based on the banks' latest official selling rate before the insurance took effect. The meaning of "the insurance attaches" is further regulated in Cl. 1-5 of the Plan. The time at which it takes effect poses no problems for ordinary insurance **contracts** which attach for one year. If it has been agreed that the insurance shall attach for a period longer than one year, it follows from Cl. 1-5, sub-clause 4, that the insurance period shall be deemed to be one year in relation to Cl. 5-3, sub-clause 3. The further calculation of the period of insurance in such cases is shown in the Commentary on Cl. 1-5.

Clause 5-4. Interest on the compensation

Sub-clauses 3 and 4 were amended in the 2013 Plan. **Sub-clause 3 was further amended in the 2019 Version.**

In the event of a total loss, it is the notice of the casualty, and not the claim for total loss, that forms the basis of the duty to pay interest. This also applies to condemnation, even if it takes a long time to decide the question of condemnation. If the matter is delayed because the assured is late in submitting the request, the question of applying the rule in sub-clause 2 may arise.

Under Cl. 11-7, sub-clauses 1 and 2, the assured's right to compensation for total loss will, in certain cases, be contingent on the expiry of a certain time-limit. However, under Cl. 11-7, sub-clause 3, he may claim compensation without awaiting the expiry of the time-limit if he can prove that he will not recover the ship. In such cases, the obligation to pay interest will accrue one month after the assured proves that he has definitively lost the ship.

In the event of the insurer having to refund the assured's disbursements, interest does not accrue until the date of the disbursement, cf. sub-clause 1, *second sentence*. Thus, no interest is charged on costs that have not yet been incurred.

If the assured has had disbursements at different times, interest shall be calculated separately for each disbursement. In such cases, the deductible shall be apportioned over the various disbursements on a proportional basis so that the assured can only claim interest on that part of the disbursement which exceeds the relevant proportion of the deductible, cf. the Commentary on Cl. 12-18.

Sub-clause 1, *third sentence*, states that in the case of loss-of-hire insurance the interest accrues from one month after expiry of the period for which the insurer is liable. There is no reason why the duty to pay interest shall be postponed until the repairs have been completed if the insurer's liability is limited to a shorter period.

The provision in *sub-clause 2, first sentence*, regulates the duty to pay interest if the assured fails to provide information under Cl. 5-1; in that event, he cannot claim interest for the loss of time resulting from the delay.

By making payments on account the insurer will, to a large extent, eliminate the duty to pay interest. If the assured refuses to accept such payments on account, or if he unrightfully refuses to accept settlement, wholly or in part, he cannot claim interest for the resulting loss of time, cf. sub-clause 2, *second sentence*.

Sub-clause 3 **was amended in 2019 to protect the interest of the assured in a situation with negative interest rates. The effect of the amendment is that the assured shall as a minimum receive 2 percentage points interest per annum. The practical main rule will still be the established** calculation system where **sub-clause 3** automatically reflects the general level of interest at the time in question **by tying** the rate of interest to CIBOR (Copenhagen Interbank Offered Rate) if the sum insured is given in Danish Kroner, NIBOR (Norwegian Interbank Offered Rate) if the sum insured is given in Norwegian Kroner or STIBOR (Stockholm Interbank Offered Rate) if the sum insured is given in Swedish Kronor, and LIBOR (London Interbank Offered Rate) if the sum insured is in some other currency, cf. *sub-clause 3, first sentence*. By CIBOR, NIBOR and STIBOR is meant the interest offered by the leading banks in the respective Nordic countries for interbank loans in DKK, NOK or SEK for the interest period in question in the respective interbank markets, i.e. the market where the banks can obtain deposits in Danish Kroner, Norwegian Kroner or Swedish Kronor, respectively through the international swap market. CIBOR, NIBOR and STIBOR will vary depending on the life of the loans. In the Plan, the six-month CIBOR, NIBOR and STIBOR has been adopted as a basis, because it is somewhat more stable than the three-month rate of interest.

If the sum insured is in another currency, the six-month LIBOR shall be used. By LIBOR is meant the rate of interest determined for interbank loans in the relevant currency for the corresponding period in the London Interbank Market. The rate of interest is determined at 11:00 a.m. London time with effect from and including spot, i.e. two banking days after the setting of the rate of interest. Average rates of interest for various periods are readily available in all major banks.

The mark-up on CIBOR, NIBOR, STIBOR and LIBOR is calculated at 2 **percentage points**.

As regards the time to which the rate of interest shall be tied, there are basically three alternatives. The rate of interest may be tied to the time when compensation is paid. This is the logically correct solution, but it is complicated, because it is necessary to calculate the interest for each individual payment. Another alternative is to tie the interest to the time of loss. This solution is also complicated, however: there will be a rate of interest for each insured event, and it may also be difficult to pinpoint the individual incident in time. A final alternative is to tie the rate of interest to the time the insurance contract attaches. This is the simplest solution, and the one on which the Plan is based, cf. sub-clause 3, *second sentence*. The rate of interest shall be determined as at 1 January "of the year the insurance contract comes into effect". By this is meant the time when the individual insurance contract takes effect. If the insurance has been renewed with the same insurer, the time of renewal is decisive.
The time when the insurance contract comes into effect poses no problems for ordinary insurance contracts which attach for one year. If it has been agreed that the insurance shall attach for a period longer than one year, Cl. 1-5, sub-clause 4, which was added in the 2003 version, provides that the insurance period shall be deemed to be one year in relation to Cl. 5-4, sub-clause 3. The calculation of the insurance period is explained in further detail in the Commentary on Cl. 1-5. In order to prevent

the rate of interest becoming dependent on major, random fluctuations in the market, the applicable rate is the average rate of interest for the last two months of the year preceding the attachment of the insurance contract. The relevant average rate of interest will be calculated on request by most banks. The Nordic Association of Marine Insurers (Cefor) publishes on its web-site early January every year the applicable rates for the most important currencies.

Sub-clause 4 was amended in 2013 to abolish the reference to the Norwegian Interest Act. Instead the rate for overdue payments is to be the same rate as in sub-clause 3 with an addition of 2 **percentage points**. This amendment will further facilitate calculation of interest on overdue payments. **The effect of the amendment to sub-clause 3 in the 2019 Version is that the rate for overdue payments as a minimum will be 4 percentage points.**

Pursuant to Cl. 4-19 (b), interest shall be covered in addition to the sum insured.

If the claims leader has had disbursements on behalf of the insurers, he will be entitled to charge interest under Cl. 9-11.

Clause 5-5. Disputes concerning the adjustment of the claim

Sub-clause 1 of this Clause was amended and a new sub-clause 4 was added in the 2013 Plan.

Sub-clause 1 sets out a right for both parties to demand that the adjustment be submitted to a Nordic average adjuster before the matter is brought before the courts. The average adjuster shall not make any arbitration award, but merely give his opinion as to how he believes the claims settlement should be effected. Experience shows that this provision has had a litigation-deterring effect, because the assured will often accept the opinion of the average adjuster he has designated himself even if he does not support his claim. The insurer too will normally accept an average adjuster's decision that is not in his favour.

The last sentence in sub-clause 1 is new in the 2013 Plan, and states that the insurer may appoint the adjuster if the assured fails to do so. There have been cases where the assured refuses to appoint an adjuster even if the insurer so request. In such cases the insurer may either leave it to the assured to pursue his claim before the competent courts, or appoint an adjuster on his own. It has then been argued by the assured that the opinion issued by an adjuster appointed by the insurer should not be given any weight. It seems unreasonable that the assured in this way may interfere with the insurer's right to get an opinion from a Nordic adjuster pursuant to Cl. 5-5.

Sub-clause 2 states who shall bear the costs of submitting the matter to an average adjuster. When the average adjuster submits his opinion, he must also decide this question. The costs of submitting the

case to an average adjuster comprises first and foremost the adjuster's fee. The adjuster may also incur costs by appointing or consulting with experts of his own choice previously not involved in the case. Also such costs as well as any other expenses the adjuster may have incurred must be deemed costs that shall be distributed according to sub-clause 2. The costs incurred by the parties must be distributed according to Cl. 4-5. The adjuster may if so requested by any of the parties also render an opinion on distribution of the costs incurred by the parties.

Even if no claims adjustment exists, there may be grounds for litigation between the assured and the insurer, *viz.* when the latter has refused a request for condemnation, or has repudiated a claim on the ground that no recoverable casualty has taken place. *Sub-clause 3* makes the provisions contained in sub-clauses 1 and 2 similarly applicable to such situations.

If the assured and the insurer, after having obtained the average adjuster's opinion, cannot reach an agreement about the claims settlement, the dispute must be referred to the ordinary courts or to arbitration if so agreed.

Sub-clause 4 is new in the 2013 Plan and contains a special rule for adjustments when the insurance contract is subject to Finnish or Swedish law. The reason for the provision is that under Section 1 of the Finnish Act of 16 January 1953 relating to official adjusters and the Regulation of 6 March 1936 relating to the activities of the adjusters any disputes under insurance contracts must be placed before the official Finnish adjuster before the matter can be brought before a Finnish court. Thus in such disputes governed by Finnish law the official Finnish adjuster will be the mandatory first instance.

Under Chapter 17, Section 9 of the Swedish Maritime Code (1994:1009), cf. Chapter 10, Section 17 of the Swedish Administration of Justice Act all marine insurance disputes must be placed before the official Swedish adjuster before the matter can be brought before a Swedish court. Thus in such disputes governed by Swedish law the official Swedish adjuster will be the mandatory first instance. By judgment of 11 December 2009 the Gothenburg first instance court (Göteborgs tingsrätt) confirmed that the law is mandatory also for disputes on insurance of pleasure boats.

Thus, if the individual contract is subject to either Finnish or Swedish law, the free choice of one of the Nordic adjusters pursuant to Cl. 5-5 is restricted in the sense that no party can bring suits before the Finnish or Swedish courts if a Danish or Norwegian adjuster has been appointed pursuant to Cl. 5-5. The parties may still ask for an opinion from either a Danish or Norwegian adjuster if they wish to incur the potential extra costs of an opinion from one of these adjusters in addition to the opinion from either a Finnish or Swedish adjuster required if the matter does not settle and has to be brought before either a Finnish or Swedish court.

Clause 5-6. Due date

The time-limit was changed from six to four weeks in 2016.

The time-limit takes effect from the time the claims adjustment "is or should have been issued", cf. Cl. 5-2 for further details. If the time-limit is exceeded, the calculation of interest will be affected, cf. Cl. 5-4, sub-clause 4.

Clause 5-7. Duty of the insurer to make a payment on account

This Clause corresponds to Cl. 90 of the 1964 Plan. The provision has a parallel in ICA Section 8-2, second paragraph, which provides that the insurer shall make a payment on account if it is clear that he is liable for at least part of the claim.

Sub-clause 1, first sentence, gives the assured contractual entitlement to a payment on account. In Cl. 90 of the 1964 Plan, the obligation to make a payment on account to the assured was made subject to "substantial disbursements to cover loss". This has been amended to "major expenses or losses" in order to emphasize that this duty also applies to loss-of-hire insurance. The duty to make payments on account applies only to "major" expenses or losses; in that event, the assured is entitled to an "appropriate" payment on account. The criteria are discretionary, and leave a lot of latitude. If the assured requests a payment on account concerning expenses which he has not yet paid, the insurer has the right to pay the amount directly to the third party in question, cf. *second sentence*.

However, an unconditional legal duty to make payments on account may not be advisable for the insurer. If he refuses to make a payment on account in a case that later turns out to involve major recoverable damage, he may become liable for the loss which his refusal to make a payment on account may have caused the assured, e.g. by his vessel being sold by forced auction. In order to protect the insurer against such a risk, *sub-clause 2, first sentence* states that the duty to make payments on account shall only exist if the insurer does not have "reasonable doubts as to his liability". It goes without saying that a payment on account does not decide anything with regard to the question of liability, but to avoid any misunderstanding, this has been stated explicitly in sub-clause 2, *second sentence*.

The insurer may deduct outstanding premiums from the payment on account and from the final claim, without this having to be stated explicitly.

Under Cl. 90, sub-clause 3, of the 1964 Plan, the insurer was entitled to claim interest at the rate in force for savings banks on payments on account. This has been changed to the same rate as the rate used for the insurance contract, cf. the reference to Cl. 5-4, *sub-clause 3, first sentence*. For payments on account of amounts recoverable in general average, it follows from the *second sentence* that the

rate of interest for the average adjustment shall apply as long as the general average interest accrues, cf. YAR **2016**, rule XXI.

The insurer's interest claim under sub-clause 3 will normally be deducted from the final claim. However, if the interest exceeds the assured's outstanding claim, the insurer may claim a corresponding reimbursement.

In practice, it has turned out that owners have from time to time received excessive payments on account. In that event, the payment on account must be considered equivalent to a loan from the insurer, and interest shall be charged in the usual manner on the entire excess amount. The rate of interest should be the same on the payment on account and the claims amount.

The provision in sub-clause 3, *third sentence*, is new and establishes that in loss-of-hire insurance the insurer may demand interest on payments on account from the same time as the **contract** interest accrues, i.e. one month after expiry of the period for which he is liable. The reason for the rule is that the assured's loss under loss-of-hire insurance accrues as the period of repairs progresses, even if the insurer, formally speaking, starts to pay interest only as of one month after expiry of the period for which he is liable. In real terms, a payment made during the period of repairs is more in the nature of compensation rather than a payment on account.

Clause 5-8. Payment on account when there is a dispute as to which insurer is liable for the loss

This Clause is identical to Cl. 91 of the 1964 Plan.

According to the *first sentence*, the insurers shall make a proportionate payment on account of the compensation if there is a dispute as to which one of them is liable. A dispute as to which insurer is liable for a certain loss should not be to the detriment of the assured. Until it has been finally decided which of the insurers is liable for the loss, the assured may not demand any payment on account under Cl. 5-7, and special authority is therefore required in order for him to claim a payment on account from the insurers who may conceivably be liable. The wording to the effect that the insurers shall make a "proportionate payment on account" means that the disputed claims amount shall be divided equally among them. The duty to make payments on account applies only in the relationship between insurers who have in principle accepted liability, but who do not agree which one of them has to pay. If one of the insurers has any other objections to the claim, e.g. that the loss was caused by the assured by an act which is in breach of the insurance conditions, none of the insurers is obliged to make any payment on account, cf. *second sentence*.

Where the insurers' contingent liability for the loss does not represent the same amount, the payment on account shall be based on the lowest liability in order to avoid the assured having to repay the proportion of the payment on account which refers to a compensation he will not be awarded.

This provision may become applicable in a number of situations. It will apply to the relationship between the marine-risks and war-risks insurers if it is a question of an apportionment of the loss under Cl. 2-14 or Cl. 2-15. Further, the principle will be applicable if it is a question of referring the liability for damage back to a former insurer in accordance with Cl. 2-11, sub-clause 2. Also conceivable is a dispute as to which of several successive casualties has caused a certain loss where the casualties occurred during the insurance periods of different insurers.

Similar conflicts may also arise in the relationship between the hull insurer and the P&I insurer. If the provision is to apply in such conflicts, however, it is a prerequisite that the P&I conditions contain a reference to the Plan.

Section 2
Liability of the assured to third parties

Clause 5-9. Duties of the assured when a claim for damages covered by the insurance is brought against him

This Clause corresponds to Cl. 92 of the 1964 Plan.

The provision is closely bound up with Cl. 3-29 concerning the duty of the assured to notify the insurer of a casualty.

Sub-clause 1 applies first and foremost where the assured is held liable for a loss which he has caused a third party, but it may also become applicable where a third party makes a claim for a salvage award or payment for repairs. Accordingly, the *first sentence* of the Clause uses the term "liability" and not "liability to pay damages".

In the event of a dispute with third parties, the assured and the insurer will normally have common interests. However, there may be cases where a certain conflict exists, first of all in the event of fault on the part of the assured. Consequently, the insurer must have unconditional and immediate access to all documents and other evidence, cf. *third sentence*.

Under the 1964 Plan, the insurer also had the right to be represented by his own counsel. This provision has been deleted. Under Section 3-1 of the Norwegian Dispute Act *(Tvisteloven)*, the court may allow the assured to be represented by more than one counsel if there are special reasons for

doing so. If the insurer wishes to be joined as a party to the action, the ordinary rules relating to joinder of causes of action and accessory intervention apply.

Under *sub-clause 2*, the insurer may only plead that the assured has been in breach of his duty if the assured has shown intentional or gross negligence, cf. also Cl. 3-31 as regards breach of the duty to avert and minimise loss.

Clause 5-10. Right of the insurer to take over the handling of the claim

This Clause is identical to Cl. 93 of the 1964 Plan.

The *first sentence* states that the insurer may, subject to the consent of the assured, take over the handling of a claim brought against him. From the insurer's point of view, it will always be desirable to be able to take over the handling of the assured's disputes with third parties. In this area the insurer has the widest experience, and it will therefore normally also be in the assured's own best interest to give his consent. That the insurer takes over the case obviously does not imply acceptance on his part of any obligation to pay the amount for which the assured may be held liable; in order to avoid any misunderstanding, this is stated explicitly, cf. *second sentence*.

The insurer does not have an unconditional right to take over the handling of the claim, nor to bring an action in the name of the assured. Such a solution could be unreasonable vis-à-vis the assured in situations where he himself has interests in the dispute, which are of greater economic importance than the insurer's, for example, in connection with his own counterclaims concerning loss of time. It is also conceivable that both the hull insurer and the P&I insurer will want to take over the case when it is evident that they will each be covering their part of the assured's liability. In that event, the most reasonable procedure will be for the assured himself to conduct the case on behalf of both insurers.

Clause 5-11. Decisions concerning legal proceedings or appeals

Sub-clause 1 was amended in the 2013 Plan.

Difficult questions may arise where the assured and his liability insurer disagree as to how to handle a dispute with a third party, for instance, whether to accept an offer of an out-of-court settlement, or whether to accept or appeal against a court decision. Relevant questions are: who is authorized to make the decisions, the insurer's liability if the assured refuses to comply with his decision, and liability for litigation costs in connection with the various outcomes the dispute may have. The situation is made even more complex by the fact that there will often be two liability insurers behind the assured - the hull and the P&I insurer, respectively - and the fact that their interest in the outcome of the assured's dispute with a third party may differ. The following example shows how the conflict may arise: insured vessel A has collided with vessel B, which is lost with a valuable cargo and many

passengers. The cargo on board vessel A is also damaged. Disputes arising from the collision are to be tried under American law. By a judgment of a court of first instance, the fault has been attributed entirely to A, but the owner has been granted the right to limit his liability. The owner and the hull insurer want to appeal against the judgment with a view to obtaining an apportionment of fault, under which the owner would obtain partial cover of his loss of time, and the hull insurer would obtain a reduction of the collision liability and partial cover of the repair costs. The P&I insurer objects to an appeal for two reasons: partly because an apportionment of fault would impose an indirect liability on him for half of the damage to A's own cargo and partly because he fears that the superior courts would not only place the entire fault with vessel A, but would also find this to be a case of fault, which would deprive the owner of the right to limit liability. Unlimited liability for damages would first and foremost affect the P&I insurer, given that the hull insurer's liability for collision damages is limited to the sum insured, cf. Cl. 13-3.

Normally the parties will reach an agreement. In case of disagreement, the parties will as a rule consult internal expertise. However, if one of the parties brings the matter to a head, there must be rules to fall back on.

Under *sub-clause 1*, conflicts between the assured and the insurer about the filing of suits or appeals shall be decided with binding effect by an umpire designated by the Association of Nordic Average Adjusters. In earlier versions the appointment of the umpire was to be made jointly by the Norwegian average adjusters, but this is changed due to the Plan now being Nordic.

Sub-clause 2 lays down certain principles the umpire shall adhere to in his decision. The basic rule is that he must choose the solution which, in his opinion, will in all probability result in the least overall loss for the assured and his insurers, cf. *first sentence*. A crucial point in this connection will be the risk of the assured being denied the right to limit his liability by the court of appeal. However, sub-clause 2, *second sentence*, also indicates a factor which the umpire shall not take into account. As evidenced by the example given above, the P&I insurer will sometimes prefer the fault for a collision to be placed solely with the assured, in view of the fact that he will thus avoid the so-called "indirect cargo liability". The assured will have a similar interest in relation to the hull insurer if he has not taken out P&I insurance. However, attempting to have the degree of fault of the insured vessel reduced through a hearing of the case by a higher court must at all events be a legitimate interest worth protecting. A rule has accordingly been incorporated to the effect that the umpire shall not take into account the advantage which the assured or his P&I insurer may have through an acceptance of, or an attempt to be allocated, a higher degree of fault than necessary in a collision case.

The umpire shall decide the conflict of interest between the assured and his insurers with final effect, but there are no enforcement measures vis-à-vis the assured if he does not comply with the umpire's directions. The assured's failure to do so will affect both the liability of an insurer in whose favour the

umpire's decision was made, and the payment of the litigation costs, cf. *sub-clause 3*. If the insurer wants to accept an offer of an out-of-court settlement or a court decision and is supported on this point by the umpire, he shall cover the liability which would have been imposed on the assured by the out-of-court settlement or a court decision, cf. *first sentence*. If the insurer wishes to lodge an appeal and is supported by the umpire, he will cover the liability he anticipated would be imposed on the assured by a superior court and which he has accordingly offered to cover. It is therefore important that, during the umpire's consideration of the matter, the insurer makes it clear to him exactly what he wants to achieve by lodging an appeal. As mentioned in Cl. 4-21, the insurer does not in such situations have the right to pay out the sum insured for the liability and refuse any further involvement in the case.

Should it turn out that the umpire was wrong, and the assured's choice was justified so that the insurer in actual fact incurs less extensive liability than that which he had declared himself prepared to accept, it is reasonable that he shall also pay his proportionate share of the litigation costs. This is explicitly stated in the *second sentence*.

Clause 5-12. Provision of security

This Clause is identical to Cl. 95 of the 1964 Plan.

Under *sub-clause 1*, the insurer has no legal obligation to provide security. Such an obligation could result in liability for him vis-à-vis the assured in cases where the security is provided too late, or where no security is provided at all due to unforeseen difficulties. However, in practice the claims leader will, to a large extent and at the assured's request, provide security for liability covered by the insurance, and this practice will obviously continue. If the insurer refuses to provide security, and the assured is able to document that this refusal constitutes arbitrary discrimination, he may claim compensation from the insurer.

Sub-clause 2 states explicitly that the provision of security does not imply an acceptance of liability.

The costs involved in the provision of security constitute an expense that follows from the fact that liability has been invoked against the assured. If the insurer covers the liability, he must also cover these costs. However, if it turns out that the liability does not concern him, he will be able to claim a refund of his expenses from the assured, cf. *sub-clause 3*.

The questions which arise in the relationship between the claims leader and the co-insurers in connection with the provision of security are discussed in Cl. 9-7.

Section 3
Claims by the assured for damages against third parties

Clause 5-13. Right of subrogation of the insurer to claims by the assured for damages against third parties

The Commentary was amended in 2016.

Sub-clause 1 establishes the insurer's right to be subrogated to the assured's claims against third parties. When the assured has a claim for damages against a third party on account of a loss, either wholly or in part, e.g., as a general average contribution or as compensation for collision damage, the insurer will automatically be subrogated to the assured's claim against the third party when he pays compensation under the insurance contract.

The insurer is subrogated to "the rights of the assured against the third party concerned". This entails that he takes over the claim for damages regardless of the basis on which it is founded. However, this does not apply where the assured has a claim by virtue of another insurance contract. Here the special rules relating to double insurance contained in Cl. 2-6 and Cl. 2-7 shall apply. If one of the insurers is liable by virtue of the rules relating to costs of measures to avert or minimise loss, however, the entire loss shall be covered by that insurer, cf. Cl. 2-7, sub-clause 3.

The insurer is subrogated to the claim as it is in the assured's hands. If there is a maritime lien or some other security connected with the claim, the insurer may exercise this right, cf. ND 1939.269 NH CONGO.

The insurer only takes over claims for damages that are connected with the interest insured and refer to the very losses that the insurer has covered. If the assured has suffered any other loss that is not covered under the insurance (e.g., loss of time in connection with a collision), he retains the claim for damages or the claim for contribution in respect of these items.

For H&M insurance, situations have arisen where e.g. an engine maker or a shipyard have accepted liability (wholly or partly) for damage done to the ship, a guarantee claim or the like. In such situations it may not be readily apparent whether there is a recovery to be dealt with under this Clause, or whether there is e.g. a "discount" or the like to be deducted from the claim.

In this respect, it should be noted that there can not be any recovery to be dealt with under Cl. 5-13 unless there is a liability for insurers to pay compensation in the first place. As an example, in case an engine maker accepts liability for damage to an engine and repairs the engine free of charge, there is no liability on H&M insurers to pay compensation under Cl. 12-1 for the work by engine makers, as

nothing is payable to them (see particularly Cl. 12-1, sub-clause 2). The value of repairs by engine maker therefore represents unbilled repairs, which would be equivalent to a discount to be deducted from the claim, and Cl. 5-13 is not applicable. The assured may however have to pay associated costs such as shipyard expenses for repair support, classification of repairs and other costs, which would be claimable under the H&M insurance contract pursuant to Chapter 12 of the Plan. In case engine makers accept liability and reimburse such costs, the reimbursement will represent a recovery to be dealt with under Cl. 5-13. Therefore, as a general guideline the value of unbilled and/or unpaid repairs do not give rise to application of Cl. 5-13, whilst reimbursement of recoverable repair costs previously paid (incl. costs which are obviously payable although not yet paid) by the assured constitutes a recovery to be dealt with under Cl. 5-13.

The rule in sub-clause 1, second sentence, is referred to in connection with Cl. 4-14.

Sub-clause 2 regulates the situation where the insurer is only partly liable for the loss. In marine insurance the situation will often be that the insurance conditions provide that the assured shall bear part of the loss in the form of deductions or deductibles. In that event, the assured shall retain a proportion of the claim for damages against the third party concerned equivalent to the loss he has sustained himself, cf. *first sentence*.

A simple example:
A shipowner has agreed the deductible for PA damage per Cl. 12-18 to be USD 100,000. His ship (ship A) is damaged in a collision. Cost of repairs is USD 400,000, and insurers therefore pay compensation for damage to ship A in the amount of USD 300,000 net of deductible. Thereafter the opponent vessel (ship B) is held liable and are eventually found 60% to blame. Recovery is consequently USD 240,000. Pursuant to Cl. 5-13, sub-clause 2, the recovery shall be apportioned as follows:
Insurers recover 300,000/400,000ths of USD 240,000 = USD 180,000
And owners of ship A recover 100,000/400,000ths of USD 240,000 = USD 60,000

This is relatively straightforward when the deductible is agreed with a fixed amount for PA damage, pursuant to the standard Cl. 12-18 solution. And even if the insured vessel has incurred liability during the same event (e.g. 40% in the above example), the standard Plan solution is that the parties should agree a separate deductible to be applied for any collision liability, see Cl. 13-4.

In practice it is sometimes agreed in the policy that in case there are PA damage to the ship as well as liability under the Plan's Chapter 13 during the same event (e.g. in a both to blame collision), the maximum total amount to be deducted shall be equivalent to the higher of the 2 deductibles agreed (Cl. 12-18 and Cl. 13-4). However, for recovery purposes it is necessary to identify the amount of deductible attaching to each of the two categories of claim (i.e. PA damage to own ship and liability to

other ship). The general principle for a H&M claim is that a deductible is proportioned over all claim items / disbursements to which the deductible is applicable. (This will also follow from interest calculation guidelines found in the Commentary to Cl. 5-4.) As a starting point, the same principle must apply in case a deductible attaches to PA damage as well as to liability. If we expand on the example above we can assume that in the policy for ship A the agreed PA deductible (Cl. 12-18) is USD 100,000, and the liability deductible (Cl. 13-4) is USD 50,000, With damage to the ship and liability during the same event, the maximum total deductible for damage and liability should be equivalent to the higher of the two (i.e. USD 100,000). The following examples may serve as a guideline:

1. Ship A suffers PA damage USD 400,000 (recoverable under Chapter 12) and ship B suffers damage in the amount of USD 250,000. Ship A was 40% to blame and had to pay liability 40% of B's loss = USD 100,000. Total claim subject to deductible for ship A would then be (ship damage 400,000 + liability 100,000) USD 500,000 and the deductible shall then be apportioned with 400,000/500,000ths of deductible 100,000 = USD 80,000 attaching to PA damage, and 100,000/500,000ths of deductible 100,000 = USD 20,000 attaching to liability. In other words, the deductible is apportioned pro rata in accordance with general principles. The consequence for apportionment of recovery from opponent vessel would be that the assured has carried USD 80,000 of vessels own damage, and therefore receives 80,000/400,000ths of recovery from ship B. If total recovery is (60% of 400,000) USD 240,000, then the assured receives (60% of 80,000) USD 48,000, and the balance (60% of 320,000) USD 192,000 is credited the insurer.

2. Ship A suffers PA damage USD 400,000 (as the example above), but now ship B suffers damage in the amount of USD 1.5 million, whereof vessel A is liable for 40% or USD 600,000. Total claim subject to deductible for ship A would then be (ship damage 400,000 + liability 600,000) USD 1,000,000 and if deductible is proportioned, the share attaching to liability would be USD 60,000. However, as the deductible applicable for liability is stated to be USD 50,000 in the policy, this is the maximum amount applicable to the liability claim, and therefore USD 50,000 would be applicable to liability, and the balance of the total deductible USD 50,000 would be applicable to damage to own ship. The consequence for apportionment of recovery from opponent vessel would be that the assured has carried USD 50,000 of vessels own damage, and therefore receives 50,000/400,000ths of recovery from ship B. If total recovery is (60% of 400,000) USD 240,000, then the assured receives (60% of 50,000) USD 30,000, and the balance (60% of 350,000) USD 210,000 is credited the insurer.

It should also be noted that the above principles for apportionment of deductible is applicable irrespective of whether the PA claim or liability claim is settled first. For collision cases, usually the PA claim is adjusted and settled before the collision claim, and then in practice the full deductible will be deducted on the PA adjustment. Still, the deductible must be reapportioned in the collision adjustment, primarily in order to obtain a correct basis for apportionment of recovery.

The claim for damages shall also be divided when the value of the interest affected by the loss is estimated to be a higher amount in the relationship between the assured and the third party than in the relationship between the assured and the insurer, and the third party is only liable for a portion of the loss, or is unable to cover the full value of the interest, cf. *second sentence*. Hence, the claim for damages shall be divided proportionately if the ship becomes a total loss as the result of a collision and its value is estimated to be higher than the hull valuation, whilst the third party, due to the rules relating to limitation of liability, pays a smaller amount in damages than what the insurer has paid to the assured. Conversely, if the value of the ship in a collision case is estimated to be an amount equivalent to or lower than the hull valuation, the insurer shall keep the entire claim for damages, unless the assured has also suffered other losses.

It is the assured's claim against third parties which may be subjected to a proportionate division, and not the amount of damages which may be paid. The insurer shall invoke his portion of the claim in his own name. If the assured does not wish to pursue his part of the claim, he is free to drop it. If both the insurer and the assured invoke their claims, it would be natural to try these claims in the same action; such action shall then be conducted in the names of both parties.

Where it is the assured's claim that is divided, it is superfluous to issue rules relating to the apportionment of the costs of recovery. Each of the parties shall bear the costs that have been necessary in order to recover his own claim.

If the claims brought by the assured and the insurer against the third party concerned are not met in full, for example because the third party only has limited liability or is insolvent, the assured competes on a par with the insurer. The Plan has not adopted the rule that is common in types of insurance of a more social nature to the effect that the assured's claim for damages prevails over that of the insurer in the event of the relevant third party's bankruptcy.

If the value of the interest insured is set at a higher amount in the relationship between the assured and the third party than in the relationship between the assured and the insurer, and the third party is furthermore liable for the full loss and is able to pay the entire amount, the insurer's portion of the claim will be larger than the compensation he has paid to the assured. It would not be reasonable for the insurer to make a profit from his right of subrogation in this way, and *sub-clause 3* therefore establishes that such profit shall be transferred back to the assured. There will obviously be no

question of any profit until the insurer has been reimbursed the expenses covered in connection with the recovery of the claim and the interest accrued on the compensation he has paid to the assured. The loss of interest for the period following the claims settlement with the assured must also be taken into account.

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

A special question arises where several insurers are entitled to a portion of the claim for damages. The problem poses no difficulties if the various insured interests are assessed separately in the claims settlement. However, if the ship is a total loss as a result of a collision, the compensation will be fixed at one specific amount, representing the value of the ship, including the value of a lost charterparty, if relevant. In practice, it has been disputed how the compensation received shall be apportioned among the hull insurer, the hull-interest insurer and the freight-interest insurer. One solution is to make a proportional apportionment also among the total-loss insurers. In the alternative, the traditional layer distribution of the total-loss insurances may be adopted, and the hull insurer must be given first priority to compensation to the extent of his claim. The hull-interest insurer will then be given second priority, whilst the freight-interest insurer will only get his share if there is still anything left of the compensation. The reason for this solution is that it would not be reasonable if, in the event of a total loss, the hull insurer's claim for damages were to be affected by the extent of the freight-interest insurance that the shipowner has taken out.

During the revision, there was general consensus that in the normal situation where the hull value is equal to or higher than the market value, the hull insurer should be given priority. In the event of a total loss with a subsequent refund from the party causing a loss of NOK 3 million and a hull valuation of NOK 18 million, the hull insurer should receive the entire compensation if the market value is lower than NOK 18 million. In these cases, the hull interest and the freight-interest insurers will not get anything. If, however, the hull valuation is lower than the market value, an apportionment must be made so that each insurer receives a portion of the compensation that is proportionate to his share of the market value. The excess amount accrues to the assured. If the market value in the example above is NOK 25 million and the hull interest is insured at NOK 4.5 million, the hull insurer will thus receive 18/25 of NOK 3 million, the hull-interest insurer 4.5/25 of NOK 3 million, and the owner 2.5/25 of NOK 3 million.

The insurer's right of subrogation to claims by the assured for damages against third parties is also regulated in Cl. 5-22. The relationship between these provisions appears from the Commentary on that provision.

Clause 5-14. Waiver of claim for damages

This Clause is identical to Cl. 97 of the 1964 Plan.

The Clause regulates the effect of the assured's waiver of his right to claim damages from a third party. It is primarily applicable in connection with damages in a contractual relationship where the assured has waived in advance his right to claim damages from the other party to the contract.

As mentioned in Cl. 4-15, the question of whether the waiver can be considered customary in the trade in question must be evaluated on a case-to-case basis. An advance waiver of the right to claim damages may, for example, occur in contracts concerning pilotage or towage. In some cases, the ship may be able to obtain a contract where the other contracting party undertakes greater liability for any faults that may be committed, in return for higher remuneration. It is difficult to make any general statements about the assured's right to choose the less expensive alternative. Whether it would have been reasonable to demand that he, by incurring a somewhat higher expense, obtain a contract which would have been more satisfactory from the insurer's point of view must be decided on a case-to-case basis.

Sometimes clauses are used where the party to a contractual relationship who is likely to sustain damage waives any and all claims for damages to the extent his loss is covered by an indemnity insurance. When such a "benefit-of-insurance" clause becomes applicable between the parties, no claim for damages arises which the insurer can take advantage of. The clause will accordingly have to be evaluated under this Clause.

If the waiver is not made until after the claim for damages has arisen, the situation will be covered both by the present clause and by Clause 5-16. The assured will obviously always have the right to waive the portion of the claim that accrues to him. If he waives the insurer's portion, the deciding factor must be whether the insurer would have had to accept the waiver if it had been made before the claim arose, cf. *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 600.

The provision does not cover the situation where the assured has waived the entire claim for damages after the insurer has exercised his right of subrogation. In that event, the assured is not entitled to waive the claim.

Clause 5-15. Duty of the assured to assist the insurer with information and documents

This Clause corresponds to Cl. 98 of the 1964 Plan.

As regards the interpretation of sub-clause 1, reference is made to what is stated in Cl. 5-1, sub-clause 1.

Cl. 98, sub-clause 2, second sentence, of the 1964 Plan, contained a provision to the effect that, in the event of litigation between the assured and a third party, the insurer would be entitled to be represented separately. This provision has been deleted. This is a question that should be solved in accordance with the law of procedure in the country where the case is being tried by the courts, cf. in this respect the Commentary on Cl. 5-9.

Clause 5-16. Duty of the assured to maintain and safeguard the claim

The Commentary was amended in the 2019 Version.

Under *sub-clause 1*, the assured shall secure a claim against third parties on behalf of the insurer. The provision is particularly relevant where the owner has the right to claim general average contributions from the cargo. The owner has the right to refuse to surrender the cargo unless the consignee assumes personal liability for the contribution (signs an "average bond") and, possibly, provides security. This provision implies that it is the owner's duty to obtain a general average bond before the cargo is surrendered.

If the assured, intentionally or through gross negligence, breaches sub-clause 1, the assured is liable for the loss thereby incurred by the insurer, cf. *sub-clause 2*. If the assured realized that it was a case of general average, surrendering the cargo without taking care of the necessary formalities with a view to securing the right of recourse will normally constitute gross negligence. In that event, the owner cannot lodge a claim for the entire general average damage against the hull insurer, cf. the comments on Cl. 4-8. If the fault was committed by the master of the ship, the question arises as to whether the assured is to be identified with the master, cf. Cl. 3-36. Normally, it will be a question of the delegation of the decision-making authority that provides the basis for identification. If the hull insurer is to cover the entire general average by agreement, normally in the form of a **general average** absorption Clause, cf. Cl. 4-8, sub-clause 3, this problem will admittedly not arise **as long as the claim for general average falls within the general average absorption amount agreed in the policy**. In that event, the owner will be entitled to claim compensation for the entire damage from the hull insurer, even though it would not have been covered in general average. **On the other hand, if the general average claim exceeds the general average absorption clause and no steps are taken by the assured to secure right of recourse, the assured will usually be liable for any loss incurred by the insurer due to such failure. An exception from this is where the assured can show that he reasonably expected the general average to remain below the general average absorption amount or that there would be no or limited prospects of recovering contribution from cargo in any event e.g. due to an obvious breach of contract.**

Clause 5-17. Decisions concerning legal proceedings or appeals

This Clause is identical to Cl. 100 of the 1964 Plan.

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

The provision does not apply when the disagreement between the assured and the insurer merely consists of differing assessments of the chances of getting the claim for damages upheld, taking into account the costs involved in enforcing it. As mentioned in Cl. 5-13, the assured and the insurer will, in such a situation, have the right to pursue or waive their share of the claim, at their own discretion.

Clause 5-18. Salvage award which entails compensation for loss covered by the insurer

This Clause is identical to Cl. 101 of the 1964 Plan.

Under Section 446 (f) of the Norwegian Maritime Code, the material loss sustained by the salvor in connection with the salvage operation shall be taken into account when the salvage award is determined. Under Section 451, first sub-clause, of the same Code, any damage to the ship or cargo caused by the salvage operation shall be paid for out of the salvage award before anything is distributed among owner and crew. The payment of a salvage award does not entail that the insurer's liability ceases, but that the salvage award shall be considered in the same way as an ordinary claim for damages. However, it would not be correct to say that the insurer "is subrogated" to the salvage award claim, cf. Cl. 5-13. The claim for a salvage award is not a "claim for damages"; the assured does not have an unconditional right to receive a salvage award covering the damage the ship has sustained in connection with the salvage operation. It must therefore be stated explicitly that the assured shall refund the insurer whatever the latter has paid in settlement of the assured's loss, cf. *sub-clause 1*. The assured's obligation to reimburse the insurer will, first of all, comprise the portion of the salvage award with which he is credited in advance in a settlement under Section 451, first sub-clause, of the Norwegian Maritime Code, to cover damage to the ship. If this part of the salvage award is not sufficient, for instance, because damage to the ship was underestimated during the salvage award case, the assured shall also be obliged to reimburse the insurer out of the remainder of the salvage award which he has received.

The reference to Cl. 5-13 *et seq.* entails that the assured's share of the salvage award shall be divided between him and the insurer according to the same rules as those applicable to ordinary claims for

damages. The assured is therefore entitled to retain a portion equivalent to deductions and deductibles that he himself has borne. Furthermore, the assured shall, in relation to the insurer, be obliged not to waive the right to claim a salvage award to any exceptional extent, nor to neglect to pursue any claim to recover a salvage award which has arisen.

Section 4
Right of the insurer to take over the object insured upon payment of a claim

Clause 5-19. Right of the insurer to take over the object insured

This Clause corresponds to Clauses102 and 103 of the 1964 Plan.

Sub-clause 1 is a merger of sub-clauses 1, first sentences, of clauses 102 and 103 of the 1964 Plan, and confirms the principle that, upon payment of compensation, the insurer is subrogated to the assured's rights in the object insured or such parts thereof as he has indemnified. The rule applies to damage as well as to total loss, and entails that the insurer takes over all the objects which are comprised by the sum insured or the compensation which is paid, cf. *first sentence*.

In the case of damage, the greatest practical significance of the principle is in hull insurance, where repair work will often result in a quantity of scrap iron becoming available, in addition to damaged parts of a certain value. However, in a number of cases such parts will be left with the repair yard, either in return for the assured being credited for the value of the material in the repair settlement, or because a clause is incorporated in the repair contract to the effect that everything that is scrapped during the repairs will accrue to the repair yard without compensation, cf. *Brækhus/ Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 604. This will normally reduce the repair invoice for the insurer, and this means that there shall be no transfer to him under Cl. 5-19. However, the rule becomes applicable if the remaining parts do not accrue to the repair yard, but are sold to a third party. In that event, the proceeds must accrue to the insurer, or possibly be divided between the insurer and the assured under Cl. 5-13, cf. below.

In the event of a total loss, the insurer is subrogated to the title to the wreck. The title comprises the wreck with all appurtenances that were covered under the insurance at the time the total loss occurred.

The insurer is entitled to waive ownership if he has explicitly made a statement to that effect no later than upon payment of the compensation. The insurer is therefore able to protect himself against the burdens that may be associated with owning what is left of the object insured or parts thereof and disposing of same. Under the 1964 Plan, this rule applied only to total losses; now it also covers the damage situation. This right will, however, be particularly relevant in the event of a total loss, where

wreck-removal and pollution liability may be imposed on the owner of the wreck. In hull insurance, where the question is most relevant, the risk is admittedly limited by Cl. 5-20, sub-clause 1, which states that the insurer shall not bear the costs of removal that are not covered by the sale of the wreck. However, the position as owner of the wreck may expose the insurer to the risk of incurring liability for damages to third parties.

In practice, there have been cases where the insurer has wanted to take advantage of the value of the wreck without taking over the title to the wreck, *inter alia* for fear of potential pollution liability, cf. below. The Plan does not open the door to such a solution. If the insurer wants to take advantage of the value of the wreck, he will also have to take over ownership. There is, however, nothing to prevent the insurer and the assured from agreeing to the assured selling the wreck to a third party and having the proceeds deducted from the total loss compensation, or paid to the insurer if the total loss compensation has already been paid to the assured. However, the insurer does not have any right to demand this procedure if the assured refuses to co-operate.

If the insurer takes over the ship, a change of ownership will in principle take place, with the consequence that the ship's insurances will cease, cf. Cl. 3-21. If the ship subsequently causes pollution liability, this will accordingly be the insurer's own risk, cf. below in Cl. 5-20, unless the risk of a pollution liability had already struck the ship at the time when the title to the ship passed to the insurer.

In practice, it is conceivable that the wreck is sacrificed (is sunk or bombed) in order to avoid pollution liability. If the wreck had a certain value when it was sacrificed, it may be alleged that the hull insurer's interest in the wreck value of the ship was sacrificed in order to safeguard the interests of the assured and the P&I insurer in avoiding pollution liability. In that event the assured, and subsequently the P&I insurer, should be liable for the wreck value in relation to the hull insurer.
If the hull insurer has taken over the wreck after having paid total-loss compensation, or having clearly indicated before the ship was sacrificed that he is willing to take over the wreck, he must accordingly have a claim against the assured. However, the hull insurer will normally hesitate to do this because of the risk of having to cover pollution liability. Thus, if the hull insurer has adopted a wait-and-see approach before the wreck is sacrificed, he is only entitled to claim a refund for the wreck value from the assured or the latter's P&I insurer, if he establishes that he would have taken over the wreck.

The insurer is only subrogated to the right to the whole or parts of the object insured to the extent that he has covered the loss. In case of a total loss, the sum insured becomes payable without any deductions or deductibles. The insurer then takes over the full title to the wreck, unless there is under-insurance, cf. the reference to Cl. 2-4. Such a situation will rarely arise in hull insurance for ocean-going vessels when using agreed insurance contracts, but in exceptional cases it is reasonable that the assured is entitled to his proportionate share of what is left. Under the 1964 Plan, the reference

to Cl. 9 concerned only total losses - after the merger of the two provisions, it also comprises cases of damage.

In the event of damage, however, the assured will often have to bear a portion of the loss himself in the form of deductions and deductibles, in which case he will have to retain a corresponding portion of the value of the parts or objects which have been replaced or compensated. The apportionment must be effected in the same way as when the assured has a claim for damages against a third party in connection with the damage, cf. the reference to Cl. 5-13 in *sub-clause 3*.

Clause 5-20. Charges on the object insured

This Clause corresponds to Cl. 104 of the 1964 Plan.

Sub-clause 1 regulates the position where the insurer is ordered to remove objects (wreck, equipment) which he has taken over. In the 1964 Plan, the rule applied only to the insurer's take-over of the wreck; now it also applies to damage, e.g., where the insurer has taken over ownership of a lost anchor or other parts according to Cl. 5-19 and has later been ordered to remove them.

Under Section 18, third sub-clause, cf. Section 20, of the Norwegian Act of 8 June 1984 No. 51 relating to port authorities (*Havne- og farvannsloven*), the port authorities may remove a wreck which constitutes an inconvenience to the port or impedes general traffic. The costs of removal may be covered by the wreck and, if this is not sufficient, by the owner who will, however, normally have only limited liability. Similar rules apply in most countries.

The hull insurer does not cover the assured's liability in these cases, cf. Cl. 4-13. However, liability for the removal of the wreck may arise after the insurer has taken over title thereto under Cl. 5-19. Given that the hull insurer is entitled under the Plan to waive title to the wreck, one might think that he should also be fully liable for the costs of removal in the cases where he has decided to take over the wreck. However, there is a long-standing tradition in marine insurance law that the assured (in reality his P&I insurer) shall refund the insurer the portion of the costs which exceeds the value of the removed wreck. In practice, an order to refund the costs of removal will only be issued where the wreck is worthless and the responsibility for the removal could appear to be a trap for the hull insurer if he has failed to waive title to the wreck.

If the wreck founders after the insurer has taken it over, but as a consequence of the same casualty which resulted in the payment of the total-loss claim, the assured (his P&I insurer) shall pay the removal costs, if any. The liability must here be regarded as having arisen as a consequence of a casualty that occurred while the insurance was in effect. If, however, the wreck founders in consequence of a new casualty which occurs after it was taken over by the hull insurer, the assured

(his P&I insurer) will not be liable for the removal costs under sub-clause 1. A hull insurer who takes over a wreck that is afloat should therefore consider taking out separate P&I insurance for the wreck-removal risk. As regards what constitutes a "new casualty", reference is made to the comments in Cl. 4-18.

If the wreck suffers a new casualty after the insurer has taken it over, and the impaired condition of the ship after the first casualty is a contributory cause, the wreck-removal liability should nevertheless lie entirely with the hull insurer, cf. also *Brækhus/Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 605.

Under certain P&I insurance conditions, the insurance coverage ceases in the event of a casualty. In practice, such provisions have been applied as an authority for the P&I insurer to withdraw from the insurance contract before the details of the casualty have been finally clarified. The question then arises whether the hull insurers by taking over the wreck risk also taking over increased liability for the removal of the wreck, possibly also a pollution liability, as owners of the wreck. If the Plan has been used as background law for the P&I insurance, such a clause cannot exempt the P&I insurer from liability. A deciding factor must be when "the peril struck", not when liability arose and, as regards wreck-removal liability and pollution liability resulting from a total loss, the peril will have struck when the casualty occurred. Consequently, the fact that the insurance ceases before the wreck has to be removed or the actual pollution occurs is irrelevant to the P&I insurer's liability.

If the P&I insurance is effected on conditions with a background law other than the Plan, other solutions may well be reached as regards the P&I insurer's liability. However, it is difficult to see how the liability of the hull insurer as owner of the wreck can be increased even if the P&I insurer withdraws. If liability for the wreck-removal and potential pollution is a foreseeable consequence of the casualty that triggered the total loss, this must basically be the liability of the assured as the person causing the damage. The fact that the P&I insurer refuses to cover this liability means that the assured is left without insurance cover, but it cannot imply that liability is transferred to the new owner, *viz.* the hull insurer. Another matter is that it may be difficult to decide what are foreseeable consequences of the total loss and what constitutes a new casualty. The solution to this question must follow the general principles for the distinction between one and several casualties, cf. above.

Charges that do not concern the insurance, e.g. maritime liens for claims not covered by the insurance, do not concern the insurer, cf. *sub-clause 2*. The assured must cover such charges, regardless of whether or not he is personally liable for the claim.

The provision concerns only charges that have arisen before the title to the object insured passed to the insurer. If the wreck, after having become the property of the insurer, causes damage for which the

owner becomes liable, it is the insurer, and not the assured, who must cover this liability. Nor will the insurer be entitled to claim cover under the assured's P&I insurance.

Under the laws of some countries, the owner of the wreck has the right to abandon it to cover his liability for damages to a third party. If the owner is held liable after the title to the wreck has passed to the hull insurer, the owner must nevertheless be able to exercise his right to limit liability in the event of abandonment. A rule to this effect is explicitly stated in *sub-clause 3*. The rule of abandonment entails that the hull insurer loses the proceeds from the wreck, but it must apply even if the hull insurer does not cover the liability which attempts are made to limit, cf. *Brækhus/Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 602.

The provision presupposes that the ship is "abandoned". If the ship is sunk as a measure to avoid pollution liability, this does not constitute "abandoning the ship". Such loss shall therefore be charged to the P&I insurer as costs of measures taken to avoid pollution liability.

Clause 5-21. Preservation of the object insured

This Clause is identical to Cl. 105 of the 1964 Plan.

Under Cl. 3-30, it is the assured's duty to take measures to avert or minimise loss, and under Cl. 4-12 the insurer shall cover the costs involved in such measures. However, it may be doubtful whether these rules are applicable if it has already been established that a total loss has occurred, e.g., that the ship will be condemned. The sub-clause therefore establishes that it is the assured's duty to preserve the wreck for the insurer's account until the insurer gets the opportunity to safeguard his own interests, irrespective of whether or not the total-loss claim has been paid. This also applies if it takes time to decide the total-loss question, and considerable costs are incurred in keeping watch, paying port fees, etc. If, however, the insurer has accepted liability for the total loss vis-à-vis the assured, but stated that he is not willing to incur costs involved in preserving the object insured, the assured must respect this decision. Any expenses incurred will, in that event, be his risk.

If the assured fails to perform his duties, he may, depending on the circumstances, incur liability for damages to the insurer.

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

Clause 5-22. Right of subrogation of the insurer in respect of damage to the object insured

This Clause is identical to Cl. 106 of the 1964 Plan.

When the insurer takes over the object insured, the question arises as to what will happen to the claims for damages the assured has against third parties in connection with damage to the object insured. If a claim has arisen from the casualty that has resulted in a total loss, the matter is clear. The insurer will be subrogated to the claim under the general rules contained in Chapter 5, Section 3, of the Plan. However, it is conceivable that the ship has some older damage for which a third party is wholly or partly liable, or that new damage occurs after the occurrence of the casualty entitling the assured to a total-loss compensation, but before the compensation has been paid. In those cases, it may be doubtful whether the insurer can also be considered to have compensated the damage when he pays the total-loss claim, so that the rules in Chapter 5, Section 3, may become applicable. To avoid any misunderstanding, it is therefore stated explicitly in the *first sentence* that the insurer shall also take over such claims.

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

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

The *second sentence* establishes that the insurer does not have any right of subrogation to the assured's claim against third parties under insurance contracts. As regards insurance claims relating to older damage, the provision is bound up with the rule in Cl. 11-1, sub-clause 2, to the effect that the hull insurer cannot make any deductions for unrepaired damage when he pays compensation for a total loss, and with the fact that, according to standard practice, he furthermore does not have recourse against the insurer who may be liable for the damage, cf. the Commentary on Cl. 11-1. As regards casualties which occur after the casualty entitling the assured to total-loss compensation, the result also follows from Cl. 11-9, sub-clause 1, according to which the insurers who are not liable for the total loss are not liable for new casualties occurring after the casualty that resulted in a total loss, either. Thus, if the ship has suffered an extensive casualty as a consequence of marine perils, and the insurer against marine risks wants a war-risk cover of the value which the wreck will represent to him in case of condemnation, he will have to take out a separate war-risk insurance from the moment the assured requests condemnation.

Section 5
Limitation etc.

General

Section 5 concerns questions relating to limitation. It follows from Section 28 of the Norwegian Limitations Act of 18 May 1979 No. 18 (*Foreldelsesloven*) that the parties may not, before the claim has arisen, agree on longer limitation periods than the law provides. The provision covers agreements on the commencement of the limitation period as well as the duration and interruptions of the period. The regulation of these questions in the new Plan must therefore not result in longer limitation periods in relation to the insurer than that what would follow from Section 3, subsection 1 of the Limitations Act, which provides that a claim becomes statute-barred three years from the earliest date when the claimant is entitled to satisfaction of his claim. However, Section 30 of the Limitations Act opens the door for special regulation in special legislation, and such special regulation is contained in ICA Section 8-6. The Norwegian Insurance Contracts Act (ICA) Section 8-6 is not a mandatory provision in marine insurance for ocean-going vessels. However, if the regulation in the Norwegian ICA on this point is departed from, the mandatory protection of the insurer in the Limitations Act will nevertheless become applicable.

In the Plan it was decided to adopt the rules of the Norwegian ICA as a basis in this area. This entails a number of amendments and simplifications in relation to the rules of the 1964 Plan. Cl. 107 of the 1964 Plan relating to time-limit for notification of casualty has been retained, but amended. Cl. 108 of the 1964 Plan contained a rule relating to time-limits for taking legal action where the insurer had refused the claim. In that event, the claim became time-barred if the assured had not taken legal action or demanded that the dispute be submitted to an average adjuster under Cl. 87 within one year of receiving the insurer's notification of the refusal. If the dispute was submitted to an average adjuster, and his opinion was not in favour of the assured, the claim became time-barred, unless the assured had taken legal action within six months of receiving notification of the average adjuster's decision. At the same time Cl. 110 of the Plan indicated that the limitation period would not commence while the dispute was pending before the average adjuster. This solution may have been in violation of the Limitations Act with the result that the assured ran the risk of the claim becoming time-barred under the Limitations Act before the time-limit under Cl. 108 had expired, if more than two years had elapsed between the casualty and the insurer's refusal. This could come as quite a surprise for the owner, and the rule has therefore been deleted.

Cl. 109 of the 1964 Plan contained a provision relating to an extension of the time-limit on account of hindrance on the part of the assured. This problem is currently regulated in Section 10, subsections 2 and 3, of the Limitations Act. Through a reference to the Limitations Act in Cl. 107, sub-clause 3, the former Cl. 109 has therefore become superfluous. This provision has therefore also been deleted.

The real limitation rules were contained in Cl. 110 (three years' limitation) and Cl. 111 (ten years' limitation) of the 1964 Plan. These provisions have now been combined into a single limitation rule.

Clause 5-23. Time-limit for notification of a casualty

This Clause was amended in the 2013 Plan to adapt the Plan to its future application in Denmark, Finland and Sweden. **Further amendments were made in the 2019 Version.** The provision does not contain any actual limitation rule, but a passivity rule which supplements Cl. 3-29 and Cl. 3-31.

According to *sub-clause 1*, **the assured loses his right to claim compensation if notice of the casualty is not** given to the insurer within six months of the assured becoming aware of it. Due to the assured's duty of notification under Cl. 3-29, it will only rarely occur that the insurer has not been notified at an earlier stage. **T**he **main** purpose of the time-bar rules **is to ensure that the insurer has knowledge of a casualty at a time when it is still possible to investigate and record facts that are relevant both for the recoverability and quantum of a potential claim, and therefore** the time-limit should be **relatively** short.

In the 2019 Version, the time-limit commences from the moment "the assured" became aware of the casualty. **Under previous versions, the group of people with which the assured was identified included also the master and the chief engineer. However, in the revision process leading up to the 2019 Version, it was considered inappropriate to apply such a wide identification. Consequently, the general identification rules in Cl. 3-36 to 3-38 apply also for notification of a casualty, and only the knowledge of the assured and those with whom he can be identified is relevant.**

A failure by the assured to notify the insurer of a casualty will often be due to the fact that he has not himself received any notification of the casualty from the master. Such failure will under Cl. 3-36 be regarded as a fault committed by the master in connection with his service as a seaman, which cannot be invoked by the insurer.

The time-limit commences from awareness of "the casualty". When the insurer becomes liable for the assured's liability to a third party, "the casualty" is the actual event causing the damage. The assured must notify the insurer of this event within six months, provided that he had reasonable grounds for believing that a claim for damages would be brought against him.

Sub-clause 2 stipulates an absolute time-limit for notification of 24 months regarding anything other than hull damage below the light waterline. If this rule should have an unfortunate consequence in a particular situation, Section 36 of the Norwegian Contracts Act may become applicable.

In all other **cases,** the limitations act in the state where the insurance contract was entered into shall apply. The limitations acts of the Nordic countries are as follows: the Danish Act: Lov om forældelse af fordringer of 6 June 2007, the Finnish Act: Lag om preskription av skulder of 15 August 2003, the Norwegian Act: Lov om foreldelse av fordringer (foreldelsesloven) of 18 May 1979 and the Swedish Act: Preskriptionslag of 29 January 1981.

Clause 5-24. Limitation

The provision was amended in the 2013 Plan. According to the 1996 Plan, the limitation period was running even if the claim was pending before the average adjuster. This provision conformed to the Norwegian Limitation Act, which is mandatory for the benefit of the debtor, cf. Section 28. The regulation in Denmark is similar. **The Commentary was amended in the 2019 Version.**

The regulation in Finnish and Swedish law is different. According to Chapter 19 Section 1, paragraph 2 of the Swedish Maritime Code the limitation period stops running when a claim is referred to the Official Average Adjuster. The same rule applies in Finnish law, cf. Chapter 19 Section 1, paragraph 7 sub-paragraph 6 of the Finnish Maritime Code. Such provision is not possible to include in the Nordic Plan due to the mandatory limitation regulation in Norway and Denmark. However, sub-clause 3 provides a new special duty of notification for the insurer so that the assured shall get a warning before the insurer invoke limitation, cf. further below.

If the insurance is divided among several co-insurers, the assured has to prevent the limitation period from running vis-à-vis all the co-insurers, cf. the Commentary on Cl. 9-4.

The main rule concerning limitation is contained in *sub-clause 1, first and second sentences*, which stipulate that the limitation period is three years from the end of the calendar year during which the assured acquired the necessary knowledge of the facts on which the claim is based. The term "acquired the necessary knowledge of the facts on which the claim is based" is taken from the Norwegian Insurance Contracts Act (ICA) and must be interpreted to mean that it is sufficient for the assured to know that a claim exists - he is not required to have knowledge about its extent. The assured therefore cannot plead that he does not possess the necessary knowledge merely because the claim is pending before an average adjuster. On the other hand, the Plan must be interpreted such that the assured must understand that he has a claim. The limitation period will therefore not start running until the assured becomes aware of the fact that the damage has been caused by an incident that is covered by the insurance. It is also important to emphasize that the insurer will often recognize - explicitly or tacitly - that the assured has a claim, at the same time as there is uncertainty, and perhaps disagreement, concerning its magnitude. In that event, the recognition of the existence of a claim of the assured will in itself be sufficient to prevent the limitation period from running. Accordingly, if, for example, the ship's damage following a casualty has been surveyed and temporarily repaired, and

an estimate has been made of the costs of postponed permanent repairs, this must be interpreted as a recognition on the part of the insurer of the assured's claim, unless he makes explicit reservations against any liability at all.

Sub-clause 1, *third sentence*, stipulates an absolute limitation period of 10 years, and concords with Cl. 111 of the 1964 Plan, and relevant Nordic ICAs.

The provision in sub-clause 1 must, as far as hull insurance is concerned, be seen in conjunction with the rule relating to a five-year time-limit for repairs of damage, cf. Cl. 12-6. This is not a real limitation rule, because it implies that also the insurer's liability for costs that he has in actual fact accepted will cease. In practice, it will nevertheless to a large extent have the same effect.

The reference to the rules relating to limitation of the assured's liability for damages in *sub-clause 2* is taken from the Norwegian ICA Section 8-6, second paragraph. While the insurer's liability under the Norwegian ICA becomes time-barred under the same rules as those applicable to the assured's liability for damages, the assumption in the Plan is that this shall only apply if the rules relating to the assured's liability for damages provide a longer limitation period than the ordinary limitation rules. This specification is bound up with the special limitation rules in Chapter 19, notably Section 501, of the Norwegian Maritime Code. Of particular relevance in relation to hull insurance is Section 501, subsection 3 relating to claims for compensation arising from collision, which become time-barred two years from the day the damage was caused. If the claim against the insurer became time-barred at the same time as this claim for damages, this would result in a shorter limitation period than the ordinary one, whilst the purpose of the provision in the Norwegian ICA was to allow the assured to benefit from a possibly longer limitation period for the claim for compensation.

If the limitation period for the assured's claim for compensation is equal to or longer than the ordinary limitation period, the limitation period for the insurance claim will run in parallel with the limitation period for the claim for compensation. If the assured receives and pays the claim from the claimant immediately before it becomes time-barred, he risks that the claim against the hull insurer becomes time-barred before he has had time to lodge a claim against him. However, neither the Norwegian ICA nor the Limitations Act opens the door to introducing any further time-limits for the assured in this situation.

Sub-clause 3 conforms to the Norwegian ICA Section 8-6, third sub-paragraph. NSA wanted a provision stating that the limitation period would be interrupted if the claim was submitted to an average adjuster. The consequence would then be that the claim could not be time-barred whilst it was pending before the average adjuster. Such provision was contained in the 1964 Plan Cl. 108 first sub-clause. It was, however, deleted in the 1996 Plan because it was considered to be contrary to the rules in the Norwegian Limitation Act, cf. above. The result was that the claim under the 1996 Plan

could be time barred during the period it was under adjustment, which could come as a total surprise for the assured. In order to protect the assured against this result, it was decided that the insurer should notify the assured if he wanted to invoke limitation for a claim that had been notified to the insurer within the time-limit for notification provided in Cl. 5-23. **A notification from the insurer as per this provision will not reduce or in any way limit the three year time-bar limit in sub-clause 1.** This rule offers the assured a better protection than he has according to the Norwegian Limitation Act. However, the Norwegian Limitation Act Section 30 limit the application of the Act to questions concerning limitation that are not regulated in special legislation, and thus implies that special provisions concerning limitation in the Norwegian ICA take precedence over the rules in the Norwegian Limitation Act. As the new provision in sub-clause 3 conforms to the mandatory regulation in the Norwegian ICA Section 8-6, it is presumed that it will take precedence over the rules in the Norwegian Limitation Act.

As referred to in the Commentary to Cl. 5-23 the limitations act in the state where the insurance contract was entered into shall apply in all other respects to limitation.

Clause 5-25. Rules regarding claims notice and limitation for insurance contracts subject to Finnish law and jurisdiction

This Clause was new in the 2013 Plan.

Sub-clause 1 corresponds to Cl. 90, sub-clause 1, of the Finnish Marine Hull Insurance Conditions 2001 (English Version), but slightly rewritten to fit the terminology of the Plan. Sub-clause 2 corresponds to said Cl. 90, sub-clause 2. Sub-clause 3 corresponds to Cl. 91 of the said Finnish conditions. The parties' costs for preparing the case for the Finnish Average Adjuster are not covered under sub-clause 3.

Chapter 6
Premium

General

Chapter 6 contains rules on the payment of premium, additional premiums and reductions of premiums in certain situations. The Chapter has been greatly simplified in relation to the 1964 Plan, which contained a number of provisions that in practice were seldom or never applied. Accordingly, the following provisions have been deleted:

1. Cl. 114 of the 1964 Plan, which contained rules on premium reminders as an alternative to the ordinary procedure in the event of non-payment of a premium in Cl. 113 (now Cl. 6-2). The provision

corresponded to the Norwegian Insurance Contracts Act (ICA) Section 5-2, first paragraph, cf. Section 5-1, but under ICA the premium reminder is obligatory. The detailed and formal procedure was not very appropriate for shipowners' insurance, however, and the provision was thus not used in practice.

2. Cl. 115 of the 1964 Plan on fraud and dishonesty. Sub-clause 1, which affirmed that the full premium was to be paid in the event of invalidity due to fraud or dishonesty, conflicted with declaratory background law. In addition, the provision was of minor practical significance and of hardly any preventive effect.

Sub-clause 2, which conferred on the insurer entitlement to the full premium if the liability lapsed partially or in its entirety in the event of breach of the rules in Chapter 3 or Cl. 83, sub-clause 2, was superfluous. If the first breach led to the contract not being binding, it followed that no premium was paid either, cf. above. If, however, the consequence of the breach was that the insurer was entitled to disclaim liability for a casualty which had occurred, the contract ran in the usual manner, in which case a full premium was, of course, payable. If breaches of duties of disclosure or care led to the insurer cancelling the contract, it would already follow from Cl. 121 (now Cl. 6-5) that no premium would be paid for the time after the cancellation.

3. Cl. 117 of the 1964 Plan on additional premiums when the risk became greater than originally assumed due to incorrect information or an alteration of the risk, without the insurer being able to invoke Cl. 26 or Cl. 32, was viewed as impractical.

4. Cl. 119 of the 1964 Plan, on lapse of the entitlement to the premium when no risk attaches to the insurer, and Cl. 120, on the reduction of the premium when the sum insured is greater than the insurable value, were also impractical. Most situations in which the risk is reduced can be resolved using the provision in Cl. 6-5. If an exceptional situation arose which could not be brought within the provision or resolved through negotiations, background law, i.e. the Norwegian Contracts Act (*Avtaleloven*) Section 36: the doctrine on failure of implied basic assumptions, (translators note: roughly equivalent to frustration in Anglo-American law) could possibly be used to resolve the most inequitable situations.

5. Clauses 123-125 of the 1964 Plan on the calculation of return of premium during a stay in port were unnecessarily comprehensive and detailed, but the solutions have been worked into the Commentary on Cl. 6-6 on return of premium in the event of a stay in port.

In practice, the payment of the premium will often take place through a broker. Under English law, the broker is, in that case, liable to the insurer for the premium. By contrast, the 1964 Plan assumed that the issue of premium was a matter between the person effecting the insurance and the insurer and that the broker simply acted as the agent of the person effecting the insurance when the premium was paid

through the broker. This approach has been maintained in the new Plan. Since the broker is an intermediary and not a party to the contract, there is no need for a broker's cancellation clause as is used in English insurance conditions to allow the broker to cancel the contract if the person effecting the insurance does not pay the premium. The broker's status as an intermediary also makes it unnecessary to regulate the broker's relationship to the premium in the Plan text, although the use of a broker for paying the premium is referred to below in the Commentary where it is natural to do so.

In practice, it has been problematic that current payment routines lead to brokers being in possession of premiums and thereby earning interest income. This problem has been solved with the new broker regulations of 24 November 1995 No. 923.

Clause 6-1. Payment of premium

This Clause was amended in the 2013 Plan.

Under *sub-clause 1, first sentence*, the person effecting the insurance is "liable to pay the premium". The premium may, however, be paid by another party, for example the assured. The key point of the provision is thus that responsibility for the payment rests with the person effecting the insurance.

For a person to have the status of "person effecting the insurance" and thus be liable for payment of the premium, it is a precondition that the person acts in his own name and becomes, in his own capacity, a party to the contract. If the insurance has been taken out by an agent acting in another's name, then the principal is the person effecting the insurance. If a manager takes out hull insurance on a ship which is co-owned by several shipowners, the manager will often act as an agent for the owners, giving the owners the status of persons effecting the insurance. In bareboat chartering, however, the bareboat charterer will most often be listed as the person effecting the insurance, for example because the charterer wishes to have the status of co-assured under the insurance contract. In the mutual associations the status of person effecting the insurance will usually depend on who has been accepted as a member of the association and not on whose account the insurance has been taken out, cf. ND 1983.79 DH FRENDO, where the owners of the insured ships were listed in the insurance contract and given status as members of the association. As such, they were deemed to be persons effecting the insurance and held liable for the premium, despite the fact that, under the charterparty, the bareboat charterer was to keep the ship insured for his own account and was responsible for effecting the insurance and for all contact with the insurer.

Sub-clause 1, *second sentence* states that the premium falls due on demand in the absence of any agreement to the contrary.

It follows from what has been said by way of introduction that the rules on payment deadlines establish when the insurer is to have received payment of the premium. Accordingly, it is not sufficient that the person effecting the insurance has paid the amount to the broker.

Sub-clause 2 contains a provision on interest on overdue payments and refers to the rate of interest provided for in Cl. 5-4, sub-clause 4. This provision was amended in the 2013 Plan in order to adapt the Plan to its future application in Denmark, Finland and Sweden.

Clause 6-2. Right of the insurer to cancel the insurance in the event of non-payment of premium

This Clause corresponds to Cl. 113 of the 1964 Plan.

The provision corresponds to the Norwegian Insurance Contracts Act (ICA) Section 5-2, with the difference that the ICA provision contains detailed rules on obligatory premium reminders, cf. also Cl. 114 of the 1964 Plan, and rules on protection of the person effecting the insurance if the non-payment is due to unforeseen impediments for which he cannot be blamed. There is no need for such comprehensive protection in marine insurance, and ICA Section 5-2, including the second sub-clause on unforeseen impediments is, accordingly, not applicable to insurance based on the Plan.

By contrast, ICA Section 5-3, on when payment is deemed to have taken place, does apply to marine insurance as well. For the person effecting the insurance to be able to invoke the provision in the event of late payment, however, the premium must have been sent to the insurer. A delay in sending the amount from the person effecting the insurance to the broker is, accordingly, irrelevant, cf. the general comment above.

Clause 6-3. Premium in the event of total loss

This Clause corresponds to Cl. 116 of the 1964 Plan. The Commentary was amended in the 2010 version.

Sub-clause 1 is identical to Cl. 116 of the 1964 Plan, and is in line with established international practice in shipowners' insurance to the effect that the full premium is to be paid for the current insurance year when a total loss has occurred. In loss-of-hire insurance, total loss occurs when the entire liability period is expended.

Shipowners' insurance is usually taken out for a year at a time, meaning that the insurer will be able to demand one year's premium. The same applies, however, if it has been agreed that the insurance is to attach for a period longer than one year. In such case, it follows from Cl. 1-5, sub-clause 4, which was added in the 2003 version, that the insurance period is to be divided up into one-year periods in

relation to, *inter alia,* Cl. 6-3, sub-clause 1. The calculation of the insurance period in these cases is explained in further detail in the Commentary on Cl. 1-5. In mutual insurance the rule has been adapted to the insurance conditions.

Under the provision, the insurer is entitled to the "entire agreed premium". This poses no problem in relation to hull insurance. On the other hand, the rule cannot apply to the loss-of-hire premium in the event of a total loss under the hull cover. Under Cl. 16-2, a total loss under the hull insurance does not entitle the assured to loss-of-hire insurance. This means that the risk of the loss-of-hire insurer ceases in the event of a total loss, and that the insurer may only require payment of the loss-of-hire premium up to that date. The cut-off time for the duty to pay loss-of-hire premium in such cases is the time at which the casualty occurred. The duty to pay premium therefore ceases to apply at the same time, regardless of whether it is a question of a total loss which is ascertained at the time of the casualty or a condemnation settlement, which takes longer. If the insured has paid premium for the period of time after the casualty occurred, he is entitled to a reduction in premium for this amount.

A precondition for the application of the provision in sub-clause 1 is that the insurer actually pays total loss compensation during the insurance period. If the insurer is able to disclaim all or part of the liability because the total loss is due to a peril which is not covered by the insurance, the insurer should only be able to demand full premium for that period during which he bore the risk. This is expressed in *sub-clause 2*. If the loss has been caused by a combination of marine perils and war perils and liability is to be shared equally between the two groups of insurers pursuant to Cl. 2-14, the marine perils insurer may only demand half of the premium for the remaining portion of the insurance period. If the loss was partly caused by another peril that is expressly excluded and liability is apportioned according to the general apportionment rule in Cl. 2-13, the reduction in premium must be adjusted to reflect the apportionment fraction.

Under the 1964 Plan it was assumed that the exception in Cl. 116, sub-clause 2, only applied in the case of objective exclusion of perils. In the event of breach of the duties of disclosure or of care, the person effecting the insurance was to pay the full premium regardless, pursuant to Cl. 115, sub-clause 2. This provision has now been deleted, cf. the introduction to this Chapter, with the consequence that the exception in Cl. 116, sub-clause 2, will also cover a situation in which the total loss is totally or partially due to breach of the duties under Chapter 3. Consequently, the person effecting the insurance will always be entitled to a reduction of or to be released from the obligation to pay premium for the remaining insurance period, in so far as the insurer can disclaim liability for the total loss, wholly or in part. Full premium shall always be paid for the time up to the casualty, unless the contract is invalid, cf. above.

In the event of an ordinary total loss, the ship's insurances lapse at the time of the loss. Accordingly, the premium shall only be paid up to that time, unless either the insurer in question is liable for the

total loss, or there is a specific provision in the insurance conditions on the right of the insurer to receive a premium. However, in the event of condemnation or abandonment, or if the insurer wishes to avail himself of the deadline under Cl. 11-2, sub-clause 2, to attempt to salvage the ship, there will be a period of uncertainty during which one will not know whether total loss compensation will be paid, or whether the other insurances will lapse or continue to run in return for full premium during the period of repairs, cf. ND 1945.433 Oslo HAAKON JARL. If, in such cases, it turns out that total loss compensation is to be paid, it followed from Cl. 116, sub-clause 2, second sentence of the 1964 Plan that the risk for the other insurers had to be deemed to have lapsed at the time of the casualty. This provision has been deleted, although the intention is not to effect any changes on points of substance. If the ship has been abandoned, the risk must be deemed to have lapsed at the last time there was any information about the ship.

The 1964 Plan also contained a rule on depositing the premium until the issue of total loss was finally settled. This has also been found to be superfluous and has been deleted. If the issue is still not resolved at the expiry of the insurance period, the issue of a possible extension of the insurance, and the issue of the insurer's entitlement to a premium, must be resolved under the rules in Cl. 11-8 and Cl. 6-4.

Clause 6-4. Additional premium when the insurance is extended

This Clause is identical to Cl. 118 of the 1964 Plan.

Sub-clause 1 must be viewed in connection with the right to an extension of the insurance period. The provision is of significance in relation to both hull insurance and the separate insurance for total loss, cf. reference to the hull insurance rules in Cl. 14-3.

If, after arriving in port, the ship turns out to be condemnable, an insurer who is not liable for the total loss will not be liable for new casualties occurring after the casualty which caused the total loss, cf. sub-clause 11-9, sub-clause 1. In cases such as this, the insurer may only demand a premium for the time up to the casualty, cf. the Commentary on Cl. 6-3. There can accordingly be no question of extending the insurance.

Under Cl. 11-9, sub-clause 2, the insurer who is liable for the total loss shall cover all collision liability occurring after the casualty but before compensation is paid and which falls under the hull insurer's liability pursuant to the rules in Chapter 13. In this case, however, the insurance will not be “extended pursuant to Cl. 10-10”, cf. sub-clause 1 of This Clause, and the insurer cannot demand a separate premium for this liability cover. As soon as it is discovered that the ship is condemnable, it is clear that the insurer who is liable for the total loss is to receive a full year's premium, cf. Cl. 6-3, sub-clause 1. The liability of the other insurers is deemed to have lapsed as at the time of the casualty.

Sub-clause 2 regulates the entitlement of the insurer to a premium when it is not known at the expiry of the insurance period whether the assured will be entitled to claim compensation for total loss under the rules in Cl. 11-2, sub-clause 2, Cl. 11-7 and Cl. 15-11. The wording “at the expiry of the insurance period” must in this case be interpreted as meaning the expiry of the agreed insurance period regardless of whether it has been agreed that the insurance period is to attach for one year or for more than one year, compare Cl. 1-5, sub-clause 4, which explicitly mentions the provisions under which a multi-year insurance contract shall be divided up into one-year periods. The present provision is not included. If, at the expiry of the insurance period, the ship is stranded, but the insurer wishes to avail himself of the right to attempt to salvage it pursuant to Cl. 11-2, sub-clause 1, no premium shall be paid as long as it is not known whether the salvage attempt will be successful. If the ship is salvaged before expiry of the deadline, it will normally have sustained damage that would make the extension rules in Cl. 10-10 applicable. The premium will then begin to run again from the time the assured “gained control of the ship”, which in this situation will mean that it has been re-floated and can commence moving to a repair yard. If, however, it turns out that the ship is condemnable, the rules set out in the preceding sub-clause will have to be applied.

Under Cl. 11-7 and Cl. 15-11, the assured may claim compensation for total loss upon expiry of certain specified time periods when the ship has disappeared, been abandoned by the crew or been taken from the assured. If, at the expiry of the insurance period, it is not known whether compensation for total loss will be claimed under one of these rules, all payment of premiums is to cease. If compensation for total loss is subsequently paid, the settlement of premiums must take place along the lines described above pertaining to a case of condemnation.

Even though the time limit under one of the above-mentioned sub-clauses has expired, the assured may, however, still keep the issue of compensation open if, due to economic factors, he prefers to have the ship back rather than receive total loss compensation. This will be particularly relevant in wartime. If the ship is found before the assured has claimed compensation for total loss, the insurance shall under Cl. 11-8 be extended until the ship has reached port, and the rules in Cl. 10-10 shall apply after that. Under the present clause, sub-clause 2, the premium will begin to run again from the time the assured, or someone on his behalf, gains control of the ship.

If the ship becomes a total loss after it has been found but before the extended insurance extension has expired, the insurer may not demand a new, full year's premium. What the insurer may claim pursuant to Cl. 6-3 in the event of total loss is the entire "agreed premium", but an extension of insurance does not imply any agreement on insurance for a new insurance year. In this case, an additional premium shall only be paid for the period as of when the assured gained control of the ship until it was lost.

Clause 6-5. Reduction of premium

This Clause corresponds to Cl. 121 of the 1964 Plan and relevant Nordic Insurance Contracts Acts (Nordic ICAs) relating to termination of the insurance during the insurance period.

The term "insurance period" must be interpreted here as the expiry of the agreed insurance period regardless of whether the insurance period agreed upon is for one year or for several years, compare Cl. 1-5, sub-clause 4, which explicitly mentions the provisions where a multi-year insurance contract is to be divided up into one-year periods. The present provision is not included.

Under the 1964 Plan, a pro-rata reduction of the premium could only be claimed if the insurance period became shorter than agreed upon or if the insurance was rendered inoperative pursuant to Cl. 37, sub-clause 3, Cl. 41 and Cl. 44. The authority for the pro-rata reduction has now been generalised, so that a pro-rata reduction may also be effected when the suspension is due to circumstances attributable to the assured or the person effecting the insurance, e.g. when the ship navigates into an excluded trading area with the consent of the assured, cf. Cl. 3-15, sub-clause 3.

The Clause only applies to a reduction of the contractually agreed charge for the insurance. This does not, of course, exclude the insurer being entitled to demand compensation from the person effecting the insurance or the assured, if he has sustained an economic loss due to the circumstance which has caused the insurance to lapse and the conditions for compensation are otherwise met.

During the revision, there was also discussion as to whether the shipowner needs to have the possibility of terminating the insurance if the risk becomes less than agreed upon or disappears altogether. Out of consideration for the insurer's reinsurance cover, however, it is difficult to give the shipowner general authority to terminate the contract in these types of situations. If there is an obvious disparity between the agreed premium and the risk incurred, the parties will usually agree on some premium reduction. If not, the issue may have to be resolved under the rules on failure of implied basic conditions or the Norwegian Contracts Act (*Avtaleloven*), Section 36.

Clause 6-6. Reduction of premium when the *vessel* is laid up or in similar situations

This Clause corresponds to Cl. 122 of the 1964 Plan, Cefor V.1, sub-clause 1, and PIC Cl. 9.

Cl. 122 of the 1964 Plan did not contain any basis for a return of premium, but stated that if the parties had entered into an agreement on the matter, the premium reduction was to be calculated according to the rules in clauses 123-125. These rules were modified somewhat in the Special Conditions, cf. Cefor V 1, sub-clause 1, and PIC Cl. 9. The present Clause is based on the solutions in the Special Conditions, with some modifications.

The condition in *sub-clause 1,* to the effect that the entitlement to a return of premium is subject to the ship having been in one location for an uninterrupted period of at least 30 days with no cargo on board, is taken from the Special Conditions. The date of arrival and the date of departure are not to be included in the calculation of the length of stay. It makes no difference, for the purposes of the calculation, if the old insurance contract expires and a new one begins to run while the ship is in port; the decisive factor is the cumulative stay.

The provision assumes that the ship is lying "at one location for an uninterrupted period". Moving the ship within a port area is not to be deemed an interruption, unless the move is part of the voyage and the ship is held up before final departure. The issue of whether there is one or more locations (ports) must be decided as a question of fact according to the geographic and commercial circumstances at the place in question. Clauses 123 and 124 of the 1964 Plan and Cefor V.3 and PIC Cl. 9.3 contained detailed regulation of these and other questions. Even though the provisions are not repeated in the text of the Plan, it is assumed that the calculation method in future shall be based on the same principles.

The provision in sub-clause 1 only applies when the ship is laid up or more or less laid up, cf. the condition "with no cargo on board". This is a somewhat more narrow formulation than in the Special Conditions, which set out common rules for lay-up and other stays in port, etc. The ordinary reduction of premium rules should not usually be applied, however, in the case of a stay in port which occurs more or less by chance, during which the ship is earning full freight, cf. the criticism of the Special Conditions in *Brækhus/Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), pp. 340-341. Nevertheless, it is not a precondition for negotiations for a premium reduction that the ship is without freight income. Negotiations must also be possible in a situation in which a rig is laid up with its operating expenses covered but with orders to reduce operating expenses as much as possible.

The Special Conditions also contained a prerequisite that the ship be laid up "under safe conditions" and detailed provisions as to how these requirements were to be met. This has been deleted. Given that the provision now applies only to lay-up and similar stays, because under Cl. 3-26 the insurer is to approve the lay-up plan, and the requirement for safe conditions thereby becomes superfluous. In addition, the issue of safe conditions should affect the scope of the premium reduction and not be a condition for the return of premium.

When the conditions have been met, the assured is entitled to "demand negotiations" for a reduction of premium. This is a change in relation to earlier practice. While Cl. 122 of the 1964 Plan assumed that the scope of the premium reduction was a subject for negotiation, the Special Conditions operated with set return-of-premium rates. The general rule was that the return of premium was to be 90% with a minimum premium of 0.35% p.a. During the revision, there was agreement that the issue of return of

premium had to be a subject for negotiation and not a general and automatic right for the assureds, *inter alia* because a set rate might possibly be in conflict with the rules on price collaboration in the Norwegian Competition Act (*Konkurranseloven*). Accordingly, the return of premium rates must be agreed upon individually. This may be done either at the time the insurance contract is entered into or at a later time when lay-up, etc. enters the picture. This last approach is the most practical because that is when one has the best overview of the factual circumstances, although it does give the insurer a clear advantage in negotiations.

Particular return-of-premium issues arise when the ship is laid up at a shipyard. It follows from the general rule that the assured will not be entitled to a return of premium in such cases, but may negotiate with the insurer for a premium reduction if the conditions in sub-clause 1 are met. It is nevertheless less common to obtain a return of premium in the case of a stay at a shipyard than in the case of ordinary lay-up. Even though the navigation risk will be reduced, the total risk may in fact increase as a result of the increased risk of damage due to fire or explosion. In certain circumstances the question may therefore rather be whether an additional premium should be paid for the stay at a shipyard. This issue must be resolved by applying the ordinary rules on alteration of the risk. If the stay at the shipyard is a relevant alteration of the risk under Cl. 3-8, the insurer may cancel the insurance pursuant to Cl. 3-10 and then demand an increase in premium to resume the cover.

Sub-clause 2 corresponds to Cl. 125 of the 1964 Plan, but sub-sub-clause (b), which stipulated that the insurer was entitled to the full premium during a stay in port when the ship was in a port at which it could only call subject to an additional premium, has been deleted. This is also an issue that must be left to the parties to negotiate.

Clause 6-7. Claim for a reduction of premium

This Clause corresponds to Cl. 126 of the 1964 Plan.

Cl. 126 of the 1964 Plan contained deadlines for the bringing of claims for a reduction of premium, but made no provision for sanctions if the deadline was not complied with. The deadline provision has, accordingly, been amended to become a pure time-bar rule, so that the claim lapses if the deadline is not complied with. The provision applies whenever the duty to pay premium of the person effecting the insurance lapses wholly or in part under the rules in Chapter 6.

The "insurance year" means a period of one year, starting at the time the insurance came into effect. If the insurance contract is continuous, the insurance year will be a period of one year, starting from the time of expiry of the preceding insurance year. The insurance year may coincide with the calendar year, but need not do so.

Sub-clause 2 of the 1964 Plan provision conferred on the insurer the right to charge a reduction fee if the claim for a premium against the person effecting the insurance lapsed. This provision was of little significance in practice and has been deleted.

Chapter 7
Co-insurance of mortgagees

General

There were no amendments to the clauses in Chapter 7 in 2016, but the Commentary to all Chapter 7 clauses was rewritten, as well as this introduction to the Chapter.

Co-insurance of a mortgagee's interest is part of a larger set of problems concerning co-insurance of third parties. In the Plan, the rules on co-insurance of third parties are split between two chapters. Chapter 8 contains the general rules on co-insurance of third parties, whereas the rules relating to co-insurance of mortgagees are dealt with separately in this Chapter 7. This is due to the practical importance co-insurance of mortgagees has played, with loan agreements usually containing provisions relating to insurance of the interests of the mortgagee.

Under the heading General in the Commentaries to Chapter 8, the concept and use of co-insurance in traditional Nordic insurance law is explained. As mentioned there, the most common and practical co-insurance of third parties is that of the mortgagee. Chapter 7 provides an automatic cover of the mortgagee’s interest under the insurance. This means that the mortgagee is co-insured, regardless of whether the insurer has received any declaration to that effect. This is in contrast to the general rules of Chapter 8, where there is no automatic cover under the insurance to other third parties. The protection of the mortgagees is regulated exhaustively in Chapter 7, but does not provide the mortgagees with an independent cover.

The mortgagee will lose protection due to acts or omissions on the part of the person effecting the insurance or the assured who is responsible for the operation of the ship, see Cl. 7-1 *in fine*. However, extended cover of the mortgagee’s interest can be provided by giving the mortgagee independent co-insurance, or by establishing a completely independent cover, i.e. cover that is not linked to the owner’s insurance. Cl. 8-7 allows for the possibility of independent cover of a third party’s interest, including a mortgagee, linked to the shipowner’s insurance. As mentioned in the Commentaries to Cl. 8-7, the cover provided for the mortgagee in Cl. 8-7 is limited to the insurance to which it is attached and cannot be a complete substitute for a so-called Mortgagee Interest Insurance.

In practice, the position of the mortgagee is often specifically regulated in the insurance contract. Such specific provisions in the contract will have priority over the rules in Chapter 7. If the position of the mortgagee is incomplete in some respect in such provisions, the rules of Chapter 7 may supplement them.

Clause 7-1. Rights of a mortgagee against the insurer

The Commentary to this Clause was rewritten in 2016.

Sub-clause 1 states that the mortgagee's interest is automatically covered**.** The mortgagee is co-assured even though notice is not given pursuant to sub-clause 2. The consequence of failure to give such notice is simply that the mortgagee will not have the benefit of the protection provided for in clauses 7-2 to 7-4. This approach with automatic co-insurance for holders of registered charges is in line with relevant Nordic ICAs.

The Clause applies when the ship is "mortgaged", that is when a charge is created by agreement. Chapter 7 does not protect maritime liens and similar liens. It is not necessary that the charge is registered, but if the mortgagee's right is not legally protected, his right as a co-assured will not be protected against the creditors of the shipowner, cf. Rt. 1939.343 NH.

Sub-clause 1 also establishes the principle that the co-insurance is not independent. This is achieved by way of a reference to the general rules governing identification in Cl. 3-36 to Cl. 3-38. On this point the Plan deviates from the solution in the relevant Nordic ICAs.

The rule in Cl. 3-37 implies that the mortgagee must be identified with the assured or co-owner who has decision-making authority for the operation of the ship. This means that the mortgagee does not acquire any greater rights than the person who is responsible for the operation of the ship. If the party in charge of the operation of the ship is responsible for a breach of safety regulations or sends the ship into excluded trading areas without the insurer’s consent, the mortgagee will thus have to accept a loss of cover under Cl. 3-25 or Cl. 3-15, sub-clause 5, provided that the other conditions for applying sanctions against the assured are met.

If the ship sails into a conditional trading area without prior notice to the insurer, the sanction is that the assured, in the event of damage, only receives compensation subject to a deductible of one fourth, however, up to a maximum of USD 200,000, cf. Cl. 3-15, sub-clause 3. This will also apply in relation to the mortgagee.

If the responsible assured has delegated decision-making authority which is of material significance for the insurance to another organisation or person, Cl. 3-36, sub-clause 2, cf. Cl. 3-37, entails that the

mortgagee must also be identified with that person or organisation. If responsibility for the operation of the ship has been delegated to several parties, the mortgagee must be identified with all of those responsible parties. Nor does the mortgagee acquire any greater rights than the assured if the insurer has paid out compensation to which it subsequently turns out the assured was not entitled. If the *condictio indebiti* rules lead to the assured having to pay the compensation back to the insurance company, the mortgagee must do so as well, cf. ND 1985.126 NH BIRGO and Rt. 1995.1641 TORSON.

The cover is**,** however, independent in relation to other co-assureds who are not responsible for organising the operation of the ship, for example co-owners without such responsibility or other mortgagees. If they make a mistake, the cover of that mortgagee remains intact.

It also follows from the reference to Cl. 3-38 that the mortgagee must be fully identified with the person effecting the insurance. If the person effecting the insurance breaches his obligation to give correct and complete information or to pay the premium, the mortgagee will not have any rights against the insurer, either. General principles of contract law dictate that the mortgagee must also be identified with any agents or sub-contractors the person effecting the insurance may use, for example, if the contract is entered into through a broker.

Naturally, the mortgagee does not acquire any greater rights than the assured in relation to limitations of the scope of cover that are not linked to the issue of breach of obligations for the assured, for example, the war risk exclusion in an insurance against marine perils or the exclusion for insolvency. This is true even though the limitation of cover may seem like a reaction to negligence on the part of the assured, but is drawn up completely objectively, e.g., the limitation of liability for damage caused by inadequate maintenance in Cl. 12-3. It is unnecessary to spell this out explicitly in the Plan text.

The principle of dependent co-insurance creates a degree of uncertainty for the mortgagee. If, for example, the ship is lost due to a breach of a safety regulation for which the assured must be blamed, the mortgagee risks being left without cover. For insurance of ocean-going ships, this "subjective risk" is extremely small. It is, however, conceivable that the mortgagees may wish to insure themselves against this risk as well. This can be done through independent mortgagee cover in connection with the shipowner's insurance, cf. Cl. 8-7. For ships trading in American waters, the mortgagee may also need to take out Mortgagee Interest Additional Perils (Pollution) insurance (MAP) to ensure priority for his mortgage in situations where clean-up costs, etc. in relation to the American Oil Pollution Act give maritime liens on the ship priority over charges created by agreement.

The fact that the mortgagee's cover is not independent does not mean that the person effecting the insurance may arbitrarily give up his, and thereby the mortgagee's, rights under the insurance. Several provisions in Clauses 7-2 to 7-4 serve to protect the mortgagee against this eventuality and against the

prospect of compensation being paid out by the insurer without it benefiting the mortgagee. To achieve this protection, however, the mortgagee must arrange for the insurer to receive notice of the creation of the charge, see *sub-clause 2*. If the mortgagee fails to give notice but the insurer learns of the creation of the charge in some other way, this must however be sufficient for the expanded protection to apply.

The rule in *sub-clause 3* is not a substantive rule, but only intended for informative purposes: the mortgagee is covered pursuant to Cl. 7-2 to Cl. 7-4 even if the insurer neglects to give the prescribed notice.

Clause 7-2. Amendments and cancellation of the insurance

The Commentary to this Clause was rewritten in 2016.

The first sentence of the provision states that amendments to or cancellation of the insurance contract may not be invoked against the mortgagee unless he has been notified by the insurer. This expands somewhat the mortgagee's protection in relation to the general rule in Cl. 7-1, and is in conformity with the principles laid down in the Nordic ICAs. In the 2002 revision, however, it was emphasized that, upon cancellation of a war risk insurance contract, the position of the mortgagee is no better than that of the person effecting the insurance himself, see the reference in the provision to Cl. 15-8, sub-clause 1, second sentence.

The mortgagee is entitled to be notified in the event of amendments to the insurance contract during the insurance period and in the event of renewal of the insurance. He does not need to be notified, however, if the insurance expires because it is not renewed, cf. below. The duty to notify rests with both the leading insurer and the co-insurers. The notice period is 14 days.

In marine insurance it is not considered expedient to require the insurer to notify the mortgagee when the insurance expires. A marine insurance contract signed on the terms of the Plan lapses automatically upon expiry of the insurance unless it is renewed by the person effecting the insurance, cf. Cl. 1-5, sub-clause 3, and a duty to notify would have required the insurer to keep track of failures to renew. Furthermore, the Plan contains a number of rules to the effect that the insurance expires automatically or is suspended without the insurer having to be aware of this, cf. Cl. 3-14 on loss of the main class, Cl. 3-15 on trading area and Cl. 3-21 on change of ownership. In such cases, it will not be possible for the insurer to give notice before he has received notice himself of the reason for the expiry, which can take a long time. The issue of expanded protection of the mortgagee's interest upon sale of the ship is usually resolved by the purchaser always taking out new insurance as of the time of take-over.

Clause 7-3. Handling of claims, claims adjustments, etc.

The Commentary to this Clause was rewritten in 2016.

Sub-clause 1 reflects the situation in marine insurance where it is most practical for the person effecting the insurance or the assured who is responsible for the operation of the ship, to have authority to negotiate the settlement of the claim with the insurer. It would be inexpedient and bothersome to involve the mortgagee in every single settlement of a claim. Moreover, Cl. 7-4 ensures that the mortgagee has reasonable control over the payment of compensation, so that his interests are given sufficient protection. If, exceptionally, the mortgagee wishes to be in a better position in relation to the claims settlement, this must be agreed separately with the insurer. An agreement of this type may be reached right up to the time of payment of the compensation.

Under *sub-clause 2*, the right to compensation for total loss may not be waived, in full or in part, to the detriment of the mortgagee. It could be argued that the protection of the mortgagee should be expanded to apply to every payment of cash compensation (including compromised total loss), cf. Cl. 12-1, sub-clause 4 and Cl. 12-2, but this was deemed unnecessary. The mortgagee will in such cases have the protection afforded by Cl. 7-4, sub-clause 3.

Clause 7-4. Payment of compensation

The Commentary to this Clause was rewritten in **the 2013 Plan Version** 2016 **and further amended in the 2019 Version**.

Sub-clause 1 gives the mortgagee priority in the event of total loss. Parties other than the owner may also be entitled to compensation. Hence, the rule states that the mortgagee is given priority against all other possible claimants under the policy.

Sub-clause 2 regulates the settlement of partial losses**, i.e. where the object insured has been damaged without the rules relating to total loss being applicable**. If the compensation is used to cover the cost of repairs, the mortgagee's interest will normally be protected, since the value of the mortgaged object is usually restored in such cases. Consequently, the mortgagee should not be able to object to such a payment and there is therefore no reason to require his consent. The threshold for payment is 5% of the sum insured**, which as a starting point is applicable for each individual interest. However, for certain interests such as loss of hire insurance and liability insurance other provisions apply, cf. sub-clauses 4 and 5. For the hull insurance, this is a combined threshold for both damage repairs and costs of measures to avert or minimise loss, whilst**

collision liability covered by the hull insurance is regulated by sub-clause 5 below. If a lower **threshold than 5%** is needed, a separate agreement must be reached for that purpose.

A particular issue arises when the shipowner goes bankrupt after the repairs have been carried out but before the shipyard has received payment. If the ship is still at the shipyard, the shipyard may retain the ship to enforce payment of the entire repair invoice. The insurer will, in relation to the mortgagee, not be able to pay out the amount to the bankrupt estate unless the shipyard has been paid in full, cf. the wording "upon presentation of a receipted invoice for repairs carried out". The natural course of events may then be that the insurer pays the shipyard directly. If, however, the shipyard has not exercised its possessory lien and has let the ship sail, it is difficult to see why it should be in a better position than an ordinary creditor. In these types of situations, it is better to fall back on general rules of bankruptcy law, which entail that the insurance compensation goes into the bankrupt estate and that the shipyard only has a claim for a dividend. This approach should not create particular problems for the mortgagee.

Sub-clause 3 states that compensation under Cl. 12-1, sub-clause 4, and Cl. 12-2 may not be paid without the consent of the mortgagee. The provision is general so that the mortgagee's right to give consent applies in relation to everyone, cf. the comments above under sub-clause 1. Since the compensation in such a case is a substitute for the reduction in the value of the mortgage, the mortgagee must be entitled to have the compensation paid to him against a corresponding reduction of the mortgage.

The provisions in sub-clauses 1 to 3 only apply in relation to mortgagees holding security in the capital value of the ship. *Sub-clause 4* give**s** a mortgagee holding security in the ship's freight income the same security in the event of loss-of-hire as other mortgagees have in relation to payments under the hull cover. However, mortgagees holding security in the value of the ship or other security have no claim for protection in relation to payment under the loss-of-hire insurance.

Sub-clause 5 states that liability to a third party (collision liability, etc.) may only be paid by the insurer upon presentation of a receipt. Under some legal systems, like the Norwegian, the rule is, strictly speaking, superfluous, since the insurer is liable towards third parties if he pays compensation to others without having ascertained whether the claims of the third parties have been covered. The rule has nonetheless been retained out of consideration for the international market.

Sub-clause 6 relates to the insurer's right to set-off. Since set-off may be relevant to amounts due to the insurer other than the premium, for example, for disbursed advances for previous damage which exceed the repair invoice, the right to set-off to is stated in general terms. However , the right to set-off is limited to claims which arise from the insurance contract for the ship in question, since it is not possible to require the mortgagee to keep abreast of premium arrears or other claims which arise for

the assured's other ships. Furthermore, it is reasonable to apply a certain time frame. The rule therefore states that set-off against premium arrears and other claims may only be made for claims which have fallen due during the last two years.

The time limit is linked to payment of the compensation. This may entail some inconveniences if there are two years of premium arrears at the time of the casualty. In that case, the insurer will not simply be able to deduct these arrears in the compensation to be subsequently paid. The insurer must, however, have the opportunity to draw up an advance calculation as soon as the extent of the casualty has been established, and set off two years' arrears in that calculation. It is furthermore a condition that the right **of** set-off may only be used once per casualty. The insurer may not, in the middle of a dragged-out settlement of claim, prepare successive advance calculations and compensate more than two years' premium arrears altogether.

The limitation on the right of set-off applies not only to payment of total loss compensation when the mortgagee is to be paid in full, but also to payment of compensation for damage. From the point of the view of the mortgagee, it is of fundamental importance that the insurance ensures at all times that the shipowner has the necessary funds to carry out repairs so that the ship may be kept in operation.

Chapter 8
Co-insurance of third parties

General

In 2016, Chapter 8 had some new clauses added, see Cl. 8-2, Cl. 8-3, Cl. 8-5 and Cl. 8-6, whereas other clauses were amended and/or given a new placing, see Cl. 8-1, Cl. 8-4 and Cl. 8-7. The Commentary to all the clauses was rewritten, and this introduction to the Chapter was new.

In accordance with Nordic tradition and the Insurance Contract Acts of the Nordic countries, a marine insurance contract is a contract entered into between the insurer, cf. Cl. 1-1 litra (a), and the person effecting the insurance, cf. Cl. 1-1 litra (b). The term “the person effecting the insurance” is not a term commonly used outside the Nordic countries. If the person effecting the insurance enters into a marine insurance contract to insure his own ship, he is both the person effecting the insurance and the assured, as this term has been defined in Cl. 1-1 litra (c), since he is “the party who is entitled under the insurance contract to compensation” in case of a casualty. In practice, this assured owner is often called the “principal assured”, but the term is not used in any of the clauses of the Plan.

The term “the assured” is defined in Cl. 1-1 litra (c) to make room for others than the “principal assured” to be included as assureds under the insurance contract. This is done by making use of the

concept of co-insurance. There may be a number of reasons why the benefit of an insurance is extended to others. In many cases, the principal assured has committed himself to do so in a separate contract with a third party. The most common and practical case is that of the mortgagee. Here, the Plan's Chapter 7 provides an automatic cover of the mortgagee's interest under the insurance, making the mortgagee a co-insured party. As for other third parties, no automatic cover under the insurance will apply. For a third party to be given specific rights under the insurance, the insurance has to be explicitly effected for the benefit of that third party, cf. the Plan's Chapter 8.

Chapter 8 is applicable to all co-insured third parties other than the mortgagees. The protection of contractual mortgagees is exhaustively regulated in Chapter 7, but the mortgagees may obtain an extended protection pursuant to Cl. 8-7, see further the Commentary to that Clause. The rules in Chapter 8 apply when a specific and explicit agreement is concluded to the effect that the insurance shall also apply for the benefit of one or more third parties other than the contractual mortgagees. The most frequently occurring example is in connection with insurance of MOUs, cf. Cl. 18-1 litra (i).

The mechanism of co-insurance of third parties is used for a variety of reasons in different contexts. The need for co-insurance may conveniently be divided into three issues:

Firstly, it can be used to cover what might be described as a "value interest". Either a co-insured third party can have an interest in the economic value of the insured object, or in the income it produces. One example is the interest of the owner of equipment that is placed on board the vessel. This interest could be co-insured under the owner's hull insurance, see Cl. 10-1 litra (b). Another example is owner's supplies and stage payments, which can be co-insured under a builders' risks insurance taken out by the yard, see Cl. 19-3, cf. Cl. 19-9. It is also feasible, although seldom done in practice, to insure the loss of income of both the owner and a time charterer under a single insurance contract. A less common example could be that a buyer of a ship is co-insured under the owner's (seller's) insurance contract for a limited period, e.g. until the vessel is delivered. Since Cl. 3-21 provides that cover terminates when there is a change of ownership, such co-insurance of a buyer's interest has to be arranged by special agreement. In bareboat charterparties, the bareboat charterer often has the duty to take out both hull and P&I insurance. The bareboat charterer is liable to redeliver the vessel in the same condition as when he took it over, but the charterparty terminates if the vessel becomes a total loss. In such a case, the hull insurance may protect both the charterer's value interest in recovery for the cost of repairs of any damage incurred and the owner's interest as he will be compensated for the value of the vessel in the event of a total loss.

Secondly, co-insurance can be used to cover a third party's "liability interest". Managers, charterers of various kinds and others can become directly liable to third parties who suffer loss as a consequence of a vessel's operation. It is common practice to name managers of various types as co-insured, as they may have significant exposure to liabilities covered by different Plan insurances. Hull insurance under

the Plan is a combined insurance as collision and striking liability for vessels is covered pursuant to Chapter 13 and for MOUs by Chapter 18, Section 2-4. Chapter 15 on war risks insurance, Cl. 15-2 litra (e) and Section 7, includes full scale P&I insurance against war risks. The same goes for coastal and fishing vessels, which have liability insurance cover by virtue of Chapter 17, Section 6. Liability insurance can also be purchased under the builders' risks insurance in Chapter 19, Section 4. If co-insurance of a third party is agreed, Chapter 8 is applicable to all these liability schemes unless departed from as in Cl. 18-1 litra (i) or in the individual insurance contract.

Thirdly, the co-insurance can merely protect a third party from a subrogation claim by the insurer. The term "protective co-insurance" is sometimes used for this type of co-insurance. It refers to the situation where a third party is exposed to liability for loss of or damage to the insured object itself or where another assured might otherwise expose him to a claim. In such a case, the third party and the person effecting the insurance may agree to include the third party as a co-insured under the insurance. If the insurer has covered the loss to the assured, the status as co-insured would protect the third party against a possible subrogation claim from the insurer. Similarly, if the assured should elect to bring action against the third party instead of claiming under the insurance, the co-insured third party would be able to avail himself of the insurance cover. The central idea behind both situations is that the loss, damage or claim should rest with the insurer according to the insurance conditions, without him being able to seek recovery from or deny cover to the co-insured third party. In other words; the "protection" that is relevant differs from a co-insured's liability interest because it is protection as between co-insureds based on some form of underlying contractual relationship, which in turn is recognised and accepted by the insurer.

Protective co-insurance of a third party may be combined with a "value interest" co-insurance or with a "liability interest" co-insurance, as these expressions are explained above. However, there are many cases where a co-insured third party will lack a real "value interest" or "liability interest". An illustrative example is the manager of a vessel, who is often named as co-insured under the owner's hull insurance, irrespective of the fact that he has no ownership interest and irrespective of whether the insurance contract includes collision liability. The benefit to the co-insured third party under Nordic law and under many other jurisdictions is that the insurer in such a case may not exercise rights of subrogation against the co-insured in order to claim reimbursement for losses or liabilities that the insurer has covered. The protective interest of the co-insured is central to the way contracts and insurance are organised under a knock for knock regime. There are many different variants of this type of contract. The core of the knock for knock principle is an agreement that each party will retain and insure the risk for damage to its own property as well as liability for death or injury of its own personnel, and obtain from their respective insurers co-insurance and often a waiver of subrogation in favour of the other contracting party. Cl. 8-2 is a default solution for all cases where the primary purpose of the co-insurance is to cover a "protective" interest in accordance with an underlying

contract between the person effecting the insurance and the third party. Cl. 18-1 litra (i) contains more specific provisions for use in the case of MOUs, see also the Commentary to that provision.

The parties are free to enter into whatever co-insurance arrangements they think best serve their interests. However, it seems convenient to have a set of standard rules in the Plan as a point of departure. This should not discourage the parties from carefully considering the need for the various interests to be co-insured and carefully drawing up appropriate insurance clauses that match their underlying contractual arrangements. No standard rules on co-insurance can fit all the needs of the various parties doing business in the complex international shipping and offshore markets.

Clause 8-1. Rights of third parties against the insurer

The Clause corresponds to Cl. 8-1, sub-clause 1, of the 2013 Plan. In Version 2016, the last part of the sub-clause was added and the identification provision previously found in the sub-clause was moved to Cl. 8-3, sub-clause 3.

NMIP 2013 Cl. 8-1, sub-clause 2, had references to Cl. 7-3, sub-clause 1, and to Cl. 7-4, sub-clause 6. The first reference was replaced in 2016 with the present Cl. 8-5. As for the second reference, the provision was not repeated in 2016. This implies that the insurer is entitled to set-off outstanding premium and any other claim he may have in the compensation payable under the insurance contract, provided the conditions for set-off are satisfied according to the applicable law.

The first part of the provision defines under what circumstances a third party other than the contractual mortgagees may be given rights under the insurance contract. Contrary to the rules in Chapter 7, there is no automatic co-insurance cover for such third parties. The insurance has to be explicitly effected for their benefit. This solution is chosen to protect the assured owner from a situation where parts of the compensation have to be paid to co-owners or others with registered rights or other interests in the ship without an advance agreement with the assured owner. Such third party interests will in particular be relevant for the hull insurances, as described in the General Commentary to Chapter 8 above.

The insurance contract must spell out who the third party is in order for him to be included as a co-insured party. This is normally done by explicitly naming the third party in the insurance contract. However, in practice arrangements are also common with a number of entities included as co-insured by some form of general non-specific reference, e.g. affiliated, associated or subsidiary companies of a named assured. Wordings like “as their interests may appear” are occasionally used. This kind of generic references will also activate the rules in Chapter 8, with the exception of Cl. 8-7 where the third party has to be explicitly named in order to achieve the protection given under this Clause.

When named as a co-insured, the insurance will also cover the third party's interests. As explained in the General Commentary to Chapter 8 above, such interests may be of different kinds: "value interest", "liability interest" and "protective interest". It is ordinarily not difficult to identify what interests the particular third party will have covered under the insurance. Most co-insured third parties will have a "protective interest" under the insurance, safeguarding them against subrogation claims from the insurer. Whether or not they also have a "value interest" and/or a "liability interest" to be covered under the insurance, may vary.

The interests of the co-insured third party are only covered "within the scope and overall limits of the insurance". The wording was new in 2016, but entails no material amendment from NMIP 2013.The wording entails that co-insurance of a third party will not extend the scope of the insurer's obligation to indemnify losses, costs or liabilities as defined in the insurance contract. Furthermore, the insurer will not be liable beyond the limits that apply to the insurance, be it the sum insured, the separate liability sum or the sum to cover costs of measures taken to avert or minimise loss, cf. Cl. 4-18. As stated in Cl. 8-3, sub-clause 3, the co-insurance does not give the third party independent cover. However, such independent cover may be arranged through special agreement, cf. Cl. 8-7.

Clause 8-2. Protection of third parties against subrogation claims from the insurer

The Clause was new in 2016.

The first part of the provision states the main rule: The insurer has no right of subrogation against the co-insured third party. As mentioned in the General Commentary to Chapter 8 above, an important reason why the person effecting the insurance agrees to name the third party as a co-insured party under the insurance contract is normally to protect him from subrogation claims from the insurer.

The provision contains two exceptions from the main rule. The first is where the insurance contract itself prescribes that the right of subrogation of the insurer has been reserved. In such instances, the parties to the insurance contract have agreed specifically that the general principle of waiver of subrogation found in the main rule should not apply. If this is in breach with the promise given to the third party to protect him against a subrogation claim, the person effecting the insurance will need to find another insurer who is willing to accept the waiver of subrogation rule found in Cl. 8-2.

The second exception refers to a situation where the third party expressly has undertaken to remain liable for the relevant losses, even if he has been included as a co-insured party. Such undertaking should be in the form of a contractual obligation to the person effecting the insurance or to another assured. Since the third party's undertaking has to be express, it is normally not sufficient to rely on a provision in a standard contract making the third party liable for such loss. In order to fulfil the

requirement of an express undertaking, the commitment must be clear from a separate and individual provision in the contract between the parties. An example may illustrate how this can be done. If the standard charterparty between the assured owner of the ship and the charterer contains a "safe port" provision, the charterer will as a co-insured party be protected under the main rule of Cl. 8-2 against a subrogation claim from the insurer in case of damage caused by a breach of the provision. If the assured owner and/or the insurer requests a subrogation right for the insurer, he/they would have to secure that the charterer undertakes a specific contractual obligation to the assured owner. This can be done through a separate clause or rider in the contract with the owner, setting out that the charterer will remain liable for losses of the kind prescribed in the "safe port" provision despite the protection given to him by the co-insurance arrangement.

Some standard charterparties expressly regulate the question of the insurer's right to subrogation where the charterer is included as a co-insured party. Supplytime 2005 Cl. 17(a)(ii) states:

"The Charterers shall upon request be named as co-insured. The Owners shall upon request cause insurers to waive subrogation rights against the Charterers (as encompassed in Clause 14(e)(i)). Co-insurance and/or waivers of subrogation shall be given only insofar as these relate to liabilities which are properly the responsibility of the Owners under the terms of this Charter Party."

With wording like this, the condition "expressly undertaken a contractual obligation to the assured to remain liable" must be seen as having been fulfilled, since the provision explicitly and clearly regulate the extent of the insurer's right of subrogation in relation to the charterer
(the third party).

The insurer has the burden of proof that an express contractual obligation for the third party to remain liable exists, and that the third party has in fact accepted it.

Accordingly, the effect of the provision in Cl. 8-2 is that a co-insured third party is fully protected against a subrogation claim from the insurer, *unless* the insurance contract itself reserves a right of subrogation for the insurer *or* the third party himself has expressly undertaken a contractual obligation to remain liable for the relevant type of loss, even if he has status as a co-insured party under the insurance.

Where the charterer under a charterparty with the assured owner of a vessel is not a co-insured third party under the insurance, the insurer has a right of subrogation against him, whether or not the charterparty specifically allows such a right. If at a later stage the charterer and the owner agree to give the charterer status as a co-insured party, the insurer will lose his right of subrogation unless the charterer expressly undertakes a contractual obligation towards the owner to remain liable for the relevant type of loss.

Clause 8-3. Application of the rules in Chapter 3 and Cl. 5-1

The Clause was new in 2016. Sub-clause 1 is identical with Cl. 8-2, sub-clause 1, of the 2013 Plan, whereas Cl. 8-2, sub-clause 2, of the 2013 Plan is deleted. Sub-clause 3 repeats the identification clause found in the 2013 Plan, Cl. 8-1 *in fine*.

The provision in *sub-clause 1* regulates a situation where the third party is in possession of information that has a bearing on the insurer's assessment of the risk. If the co-insured third party knows that the insurance is also taken for his benefit, he has the same duty as the person effecting the insurance to give the information he has to the insurer. A co-insured third party's failure to do so will be assessed under the general rules relating to the duty of disclosure contained in the Plan. The rule means that there is a difference between mortgagees and other co-insured parties on this point, given that a mortgagee will not be subject to any duty of disclosure under Chapter 7.

A duty of disclosure for the third party presupposes that he is aware of the fact that the insurance is affected. If a third party is unaware of the insurance, it is hardly conceivable that he has failed to comply with the duty of disclosure (or other duties) in a blameworthy manner.

Failure to fulfil this duty means that the third party risks losing his insurance cover according to the same rules that apply in relation to the person effecting the insurance. As a main rule, other assureds will not be identified with the one neglecting his duties. If the co-insured third party is the one who has the decision-making power concerning the running of the ship, Cl. 3-37 will apply. This was previously expressed in Cl. 8-2, sub-clause 2, but the situation is unpractical and the express rule was left out in Version 2016.

The provision only governs the third party's breach of his duty of disclosure. This is due to the fact that these rules are aimed at the person effecting the insurance. Hence, a special authority is therefore required to impose a duty of disclosure on the co-insured third party.

Sub-clause 2 on the other hand governs the third party's breach of the rules relating to duty of care. The provision gives the insurer the right to invoke the rules in Chapter 3, Sections 2 to 5 or Cl. 5-1 against the third party. It may be argued that the provision is superfluous, since the rules relating to the duty of care are aimed directly at "the assured" and the third party as a co-insured party is covered by this expression. However, for the sake of information, it is considered helpful to introduce a specific provision to this effect. If a co-insured third party fails to comply with any of the duties found in the provisions referred to, the insurer will be entitled to invoke these rules directly.

Whereas sub-clauses 1 and 2 signalize the effect on the insurance cover of the co-insured third party of his own faults or negligence, *sub-clause 3* regulates the question of identification, i.e. to what extent

faults or negligence committed by others may be invoked against the co-insured third party. The provision states that the co-insurance of the third party is not providing an independent cover, and that he must accept identification with others in accordance with Cl. 3-36 to Cl. 3-38. A similar rule is found in Cl. 7-1 *in fine* for mortgagees under Chapter 7, and reference is therefore made to the explanations given in the Commentary to Cl. 7-1.

Clause 8-4. Amendments and cancellation of the insurance contract

This Clause corresponds to Cl. 8-3 of the 2013 Plan. The Clause was not amended in substance in 2016, but the words "any co-insured third party" has been replaced by the words "the co-insured third party".

The provision gives the person effecting the insurance a far-reaching authority to amend or cancel the insurance contract with effect for the co-insured third party. His agreement with the insurer to alter the insurance contract or end it, is binding on the third party. The Clause is different from Cl. 7-2, which requires that the mortgagee shall be given not less than 14 days' notice before his rights are affected by any amendments or cancellation of the insurance contract. The provision in Cl. 8-4 applies whether or not the contract between the person effecting the insurance and the third party contains provisions that requires consultations with the third party before such changes are made. Should the insurer be aware of the undertaking towards the third party, ordinary rules of law will decide whether the insurer is free to ignore this information.

Clause 8-5. Handling of claims, claims adjustment, etc.

The Clause was new in 2016, but corresponds to the provision found in Cl. 8-1, sub-clause 2, of the 2013 Plan which contained a reference to Cl. 7-3, sub-clause 1.

The provision states that a co-insured third party is not entitled to participate in discussions in respect of casualties, adjustments or claims against a third party. All decisions in this respect may be taken without the co-insured third party's agreement. This is the same rule that applies to a co-insured mortgagee, cf. Cl. 7-3, sub-clause 1. It would be inexpedient and bothersome to involve a third party in the settlement of a claim. If the party effecting the insurance wants to secure a better position for the co-insured third party, this must be agreed specifically with the insurer.

Clause 8-6. Other insurance

The Clause was new in 2016.

The provision prescribes that the insurance is subsidiary to another insurance that the co-insured third party has taken out. Consequently, the insurer shall only be liable to the extent that the co-insured third party has not obtained cover under the other insurance, cf. Cl. 2-6, sub-clause 2. If the other insurance also has a subsidiary provision, Cl. 2-6, sub-clause 1, shall prevail, cf. Cl. 2-6,

sub-clause 3, with the effect that the co-insured third party is free to claim under any of the two insurances.

Clause 8-7. Independent co-insurance of mortgagees or named third parties

The Clause was new in 2016 and corresponds to Cl. 8-4 of the 2013 Plan. The title was altered to clarify that the Clause applies both to mortgagees and to named third parties. Certain modifications were also made in the text itself.

The provision gives extended protection to a mortgagee and a third party compared to the rules found in Chapter 7 and in Cl. 8-1 to Cl. 8-6. The extended cover can only be activated by an explicit agreement stating that the rules in Cl. 8-7 shall apply to the co-insured mortgagee and/or third party. Contrary to other clauses in Chapter 8, in order to receive the protection given in Cl. 8-7 the co-insured third party must be explicitly named in the insurance contract.

The independent cover implies that the co-insured mortgagee or named third party is not identified with the person effecting the insurance or with other assureds if found in breach with their duties under the contract. This means that the insurer can neither plead breach of the duty of disclosure on the part of the person effecting the insurance, nor a failure to meet the duty of care on the part of other assureds, e.g. the breach of a safety regulation. On the other hand, those clauses in Chapter 3 that objectively limit or exclude cover, e.g. Cl. 3-17 and Cl. 3-19, will also apply to the co-insured mortgagee or named third party if granted independent cover under Cl. 8-7.

Cl. 8-7 does not protect the independent co-insured mortgagee or named third party in the case of loss of cover resulting from a failure of the person effecting the insurance to pay the premium. In that event, the insurance will lapse according to the ordinary rules in Chapter 6, unless the co-insured mortgagee or named third party is willing to pay the outstanding premium as a means of keeping the insurance in force. The independent co-insurance under Cl. 8-7 will have no influence on the rule set out in Cl. 8-4, which provides that any amendment or cancellation of the insurance contract shall also apply to the co-insured third party under Chapter 8. The question does not arise under the comparable provision in Cl. 7-2, since this provision already gives an ordinary co-insured mortgagee better protection than a co-insured third party under Cl. 8-4.

An obvious but important limitation of the cover provided by Cl. 8-7 is that it only applies to the insurance to which it is attached. Therefore, it cannot be a full substitute for a so-called Mortgagee Interest Insurance. This type of insurance is a separate insurance, which is taken out for the benefit of a mortgagee bank on either a portfolio, fleet or individual basis. Such insurance protects the mortgagee if his position is prejudiced due to the acts or omissions of

an assured resulting in a loss of cover under the core insurances, including P&I-insurance and war risks insurance.

Chapter 9
Relations between the claims leader and co-insurers

General

An addition was made to the general Commentary in the 2007 version.

Chapter 9 contains rules relating to the relationship between the claims leader and the co-insurers. In practice, both hull insurances and the separate insurances against total loss are covered with a number of insurers who separately take on a portion of the risk. Each of these partial insurances is based on an independent agreement and the insurers issue separate insurance contracts.

As a main rule, an owner does not want to negotiate the insurance conditions with each individual insurer, but confines himself to reaching an agreement with one individual insurer (the rating leader), or with a few insurers. Such agreements are normally accepted automatically by the others. The relationship between the rating leader and the other insurers is not regulated in the Plan.

Additionally, as regards questions which arise during the insurance period - first and foremost questions in connection with casualties, salvage and the claims settlement - one of the insurers (the claims leader) will normally represent all of the insurers vis-à-vis the assured. The basis for this is often contained in what is known as a claims-leader clause. However, the 1964 Plan established a few explicit rules relating to the relationship between the claims leader and the other insurers, and these rules have essentially been retained in the Plan. Cl. 147 of the 1964 Plan, which provided the right to sue the co-insurers at the claims leader's venue, has, however, been incorporated in Cl. 1-4**A**, sub-clause 1 (c) of the Plan for insurances with a **Nordic** claims leader, and in sub-clause 3 for insurances with a **non-Nordic** claims leader. **In the 2019 Version, a default arbitration clause was added as Cl. 1-4B for insurances with non-Nordic claims leader.** Furthermore, the claims leader's authority has been expanded, see first and foremost Cl. 9-3, and new rules have also been introduced relating to the question as to how to deal with the claims leader's disbursements in the event of the co-insurer's bankruptcy, and relating to the claims leader's right to interest on disbursements in Cl. 9-10 and Cl. 9-11, respectively.

Questions that have not been regulated must, as before, be resolved on the basis of business considerations on a case-to-case basis. In the event of conflicts, it will be necessary to fall back on any agreements that may have been entered into, possibly supplemented with general background law.

If the insurance has been effected on Plan conditions, the co-insurers will be aware that the claims leader chosen by the assured is authorised to act on their behalf under the rules of Chapter 9. If they wish to change this authorisation, they may include a "claims leader following clause". However, the standard clause is not intended for use in combination with Plan conditions.

The rules contained in this Chapter will only be applicable with respect to co-insurers who have also given insurances on Plan conditions.

Clause 9-1. Definitions

This Clause corresponds to Cl. 139 of the 1964 Plan.

Sub-clause 1 defines the term "claims leader" as the one who is stated as claims leader in the insurance contract. In practice, "claims leader" is used as the designation of the insurer who is to have contact with the assured in case of a casualty, who is to be in charge of the salvage operation and effect the claims settlement. The powers which under Cl. 9-3 to Cl. 9-9 are conferred on the claims leader are essentially in accordance with what has in practice been deemed to fall within his scope of competence.

Under English law a distinction is normally made between "rating leader" and "claims leader". The Norwegian term "hovedassurandør" under the Plan comes closest to "claims leader".

Sub-clause 2 deals with the other co-insurers.

The provisions in Chapter 9 concern all types of insurance covered by the Plan, but they are most relevant for hull insurance. If several types of insurance have been effected for the ship, one claims leader must be designated for each type of insurance. The claims leader for hull insurance therefore only binds the hull insurers, not the insurers who have taken out hull or freight-interest insurance, war-risk insurance or loss-of-hire insurance.

As the rules in Cl. 10-13 and Chapter 14 show, however, there is a close connection between the ordinary hull insurance and the hull- and freight-interest insurances. It would therefore be practical if the decisions made in the relationship between the assured and the hull insurers were binding to a certain extent on the interest insurers as well. According to Cl. 14-3, sub-clause 4, a certain community has therefore been established between the claims leader under the hull insurance and the interest insurers as well.

The possibility of entitling the claims leader for hull insurance to bind the loss-of-hire insurer was discussed during the revision, but rejected as inexpedient.

In exceptional cases, an owner may choose an insurance package with one claims leader for all the insurances. The rules in Chapter 9 shall apply in such cases as well. Normally, the claims leader for the hull insurance will then be designated as the overall claims leader, with the result that he will bind all other insurers, even if he himself merely has a share in the hull cover.

The rules contained in Chapter 9 are based on the assumption that one of the insurers has explicitly been designated claims leader when the insurance was effected. The assured is thus free to decide whether he wants to cover all parts of the interest with independent insurers, who will in that case not be mutually dependent on each other. If he wants the advantages that the claims-leader arrangement entails, he must therefore designate one of his insurers as the claims leader and notify the other insurers whom he contacts accordingly. It is not a condition that the claims leader knows who the co-insurers are, however, although certain rules will not become effective unless the assured has notified the claims leader about who the co-insurers are, see in particular Cl. 9-4 about notifications of casualties.

Clause 9-2. The right of the claims leader to act on behalf of the co-insurers

Sub-clause 1 was amended in the 2007 version. The sub-clause is otherwise identical to earlier versions of the 1996 Plan.

Sub-clause 1, first sentence, establishes the general principle that the claims leader has the right to bind the co-insurers in relation to the assured to the extent that this follows from Cl. 9-3 *et seq.* The arrangement is based on an extensive relationship of trust between the insurers, and it is therefore emphasised in the *second sentence* that when acting on behalf of all the insurers, the claims leader shall, as far as possible, take into consideration all the insurers' interests. Under *earlier versions of the 1996 Plan*, sub-clause 1, third sentence, he was also required to consult the co-insurers whom he knows of, provided that time permitted and that it was a matter "of importance". In the Commentary, this provision was followed up with the following wording: "If it turns out that there is a predominant desire among the insurers to resolve the matter in a specific manner, the claims leader is obliged to respect the majority's point of view. If not, he may become liable for damages vis-à-vis the co-insurers." This wording is not in keeping with the text of the Plan: the rule was a "should" rule and concerned consultation, not an obligation to take a poll to determine the majority opinion. Both the wording of the Commentary and the provision regarding consultation in the third sentence have given rise to problems in practice. Since the main point is that the claims leader has a duty to look after the interests of the insurers, both the rule on consultation and the statement in the Commentary have been deleted.

How far the duty to look after the co-insurers' interests goes must be determined on the basis of past practice and the purpose of the other provisions of Chapter 9. The Commentary on Cl. 9-8 explicitly states that the claims leader must submit questions relating to the institution of legal proceedings or the lodging of an appeal to the co-insurers. The co-insurers are obviously interested in being consulted in such situations and this should not cause any problems in terms of time.

With regard to the claims adjustment, on the other hand, the basic principle is that it is binding under Cl. 9-9 "provided that it is in accordance with the insurance conditions". An insurance settlement that is not in accordance with the insurance conditions is, on the other hand, not binding on the co-insurers and thus falls outside the scope of the claims leader's authority to act on their behalf, cf. also the Commentary on Cl. 9-9.

Otherwise, in keeping with the purpose of the provisions of Chapter 9 the claims leader normally does not need to consult the co-insurers in order to look after their interests. For instance, some of the point of the authority provided by Cl. 9-3 whereby the claims leader may approve the lay-up plan required under Cl. 3-26 will be lost if the claims leader is required to involve the co-insurers.

With regard to the claims leader's authority to make decisions in connection with salvage pursuant to Cl. 9-5, it will normally not be expedient to consult the co-insurers in connection with initiating a salvage operation. On the other hand, it is conceivable that the claims leader should notify the co-insurers before possibly abandoning a salvage operation, and should also keep the co-insurers informed about the salvage operation once it has commenced so that they have an opportunity to abandon the operation by paying the sum insured and limiting their liability for costs in accordance with Cl. 4-21. This applies in any case to more extensive salvage operations. Salvage can lead to great expense for insurers and the co-insurers therefore have a legitimate need to be informed about the situation in order to be able to limit their liability. The insurers who wish to continue the salvage operation may do so, provided the six-month time-limit laid down in Cl. 11-2 has not expired.

As far as removal and repairs are concerned, as well, the authority of the claims leader under Cl. 9-6 normally allows him to take action without consulting the co-insurers.

Even if the duty of the claims leader to safeguard the interests of the co-insurers normally does not entail any obligation to consult them, he is of course free to seek advice. It must be left to the discretion of the claims leader whether to consult the co-insurers in connection with questions relating to lay-up plans, salvage operations, removals and repairs.

Sub-clause 2 contains a rule concerning the authority of the claims leader that is of great importance. If the claims leader has vis-à-vis the assured taken a decision that falls within his scope of authority under Clauses 9-3 to 9-8, the decision will be binding on all co-insurers in relation to the assured.

This authority shall only apply within the area where the rules contained in this Chapter confer authority on the claims leader. However, there is nothing to prevent a provision in the agreement with the assured to the effect that the claims leader shall have either a wider or a more restricted scope of authority than indicated by the Plan. The extent of this authority will depend on an ordinary interpretation of the agreement. According to the general principles of the law of contract, the steps taken by the claims leader vis-à-vis the assured will be binding, provided they come within the agreed scope of authority, and the assured does not have any reason to believe that the interests of the co-insurers have been disregarded.

Steps which fall outside the scope of authority will, however, never be binding on the co-insurers, regardless of what the assured might believe about the claims leader's right to act.

If the co-insurers wish to reduce the authority that the claims leader has under the rules in this Chapter, they must make an explicit reservation to that effect on the conclusion of the agreement.

If the claims leader, or one of the other co-insurers, due to special circumstances is prevented from reacting to negligence on the part of the assured or the person effecting the insurance, this will obviously not affect the legal position of the other co-insurers.

Clause 9-3. Lay-up plan

According to Cl. 3-26, the assured shall if the ship is to be laid up draw up a lay-up plan and submit it to the insurer for his approval. It is not practical to send this plan to all the co-insurers; it must be sufficient that it is approved by the claims leader. Other notifications pursuant to Chapter 3, e.g., if a ship proceeds beyond the trading areas according to Cl. 3-15 must, however, be sent to all insurers.

Clause 9-4. Notification of a casualty

This Clause was amended in the 2013 Plan.

Notifications of a casualty may be given to the claims leader with binding effect on the co-insurers, cf. *sub-clause 1*. It is of great practical importance for the assured that, in the event of a casualty, he can look to the claims leader. If the co-insurers want a stronger position, this must accordingly be agreed separately.

Sub-clause 2 regulates the claims leader's obligation to pass on notifications to the co-insurers, unless the assured specifically agree with the claims leader to effect the notification to co-insurers directly or via brokers.

The provision is formulated as a duty for the claims leader, cf. the word "shall". However, no sanctions are imposed if the claims leader fails to pass on the information or is unduly delayed in doing so. As the assured according to sub-clause 1 is free of any further duty of notification by having notified the claims leader, any failure from the claims leader to pass on information will be risk of the co-insurers. Consequently, a failure to give notification will not affect the assured's claim against the co-insurers. If a co-insurer suffers a loss as a result of the failure to give notification, e.g., due to the fact that he does not manage to submit his objections to the claim in time, he may have to claim compensation from the claims leader under the general principles of the law of tort.

In practice, it will often be the broker who notifies the claims leader of the casualty, and the broker will then normally notify the co-insurers at the same time. If there is an assumption or it has been agreed with the co-insurers that notifications to the co-insurers under sub-clause 2 may be passed on through the assured's broker, delay on the part of the broker will be the co-insurers' risk. If they suffer a loss, they will in the event have to lodge a claim against the broker. They cannot recover the loss from the claims leader and refer him to recourse against the broker.

The Clause is primarily aimed at notification of casualties, cf. Cl. 3-29, the submission of claims for compensation, cf. Cl. 5-23, and demands that the claims adjustment be submitted to an average adjuster, cf. Cl. 5-5. But the provision also becomes significant during the further proceedings in connection with claims settlements. A co-insurer who is within the scope of the sub-clause cannot plead that the assured has forfeited a right by passivity, provided that the assured has vis-à-vis the claims leader done whatever is necessary to maintain his right.

However, the provision does not apply in relation to Cl. 5-24 relating to limitation. The limitation period must therefore be prevented from running in relation to each individual co-insurer. A different rule would be inexpedient and would in reality have to be based on the assumption that a judgment in an action against the claims leader would also have effect vis-à-vis the co-insurers. Nor is it sufficient to prevent the limitation period from running in relation to the co-insurers that the claims leader grants the assured an extension of the limitation period. However, the assured may stop the period from running by bringing a collective action against all the co-insurers in the venue of the claims leader, cf. Cl. 1-4**A**, sub-clauses 1**,** 2 **and 3**.

In the 2013 Plan it was specified that the duty to pass on information includes "claims advice with estimated costs". Such information should be presented by the claims leader as soon as possible after the relevant information about the casualty and the costs involved have been established. It is also a

duty for the claims leader to follow up with amended claim advices if major changes to the reserves arise.

Clause 9-5. Salvage

This Clause corresponds to Cl. 142 of the 1964 Plan.

The provision authorises the claims leader to decide if, and in the event how, a salvage operation shall be conducted, and to decide when to abandon the salvage operation or whether the insurer shall exercise his authority to limit his liability for the salvage costs by paying the sum insured. The claims leader's authority on this point is in accordance with standard practice.

Cl. 142 of the 1964 Plan furthermore authorised the claims leader to decide what regulations should be issued in accordance with Cl. 53. This authority to issue regulations has, however, been deleted in the new Plan, and the provision has therefore been deleted.

Clause 9-6. Removal and repairs

This Clause corresponds to Cl. 143 of the 1964 Plan.

The provision authorises the claims leader to grant requests for removal to a repair yard under Cl. 3-20 and to make decisions concerning repairs.

The claims leader's decision-making authority in relation to Cl. 3-20 is new and is based on practical considerations. The decision-making authority relating to repairs, however, is taken from the 1964 Plan and concords with established practice. However, Cl. 143, second sentence, of the 1964 Plan stipulated an exception as regards the question whether the ship was to be repaired at all, or whether the assured's request for condemnation should be granted. The reason for the exception was that the insurers might have conflicting interests, in particular where the claims leader had granted the owner a loan which he could perhaps only be expected to repay in the event of a total loss. The individual co-insurer had therefore been given an independent right to have the question of condemnation further elucidated by a removal of the ship for a survey under Cl. 166, or by inviting tenders. The provision had to be seen in conjunction with Cl. 43 of the 1964 Plan, which gave the co-insurers the right to limit their liability for damage resulting from the removal by refusing to accept it. In practice, the relationship between insurers who had and insurers who had not approved the removal caused problems: if the removal later proved successful with the result that the ship was not condemned, the question arose as to whether an insurer who had not approved the removal was to benefit from the result of the removal despite the fact that he had not borne any part of the risk associated with it.

The co-insurers' right to make an independent evaluation of the question of removal furthermore

raised a communication problem: when the decision regarding a removal was to be taken, all the insurers concerned had to be notified. This could result in delays in a situation where quick decisions were of the essence. In order to prevent such conflicts of interest between the insurers and delays as regards the condemnation decision, the Plan has authorised the claims leader to decide also this question of removal on behalf of all the insurers.

It follows from Cl. 9-2, cf. Cl. 14-3, that the claims leader's authority according to Cl. 9-6 applies both in relation to the co-insurers under the hull insurance and in relation to the insurers under the separate total-loss insurances. However, the authority does not apply in relation to the insurers under other insurances. These insurers may therefore demand that the ship be removed according to Cl. 11-6. The co-insurers' claims leader must in that event have the right to choose whether the hull insurers and the separate total-loss insurers shall participate in the removal or avoid further liability by paying the sum insured, cf. Cl. 4-21.

Clause 9-7. Provision of security

This provision corresponds to Cl. 144 of the 1964 Plan.

Sub-clause 1 regulates the claims leader's right to commission from the co-insurers upon the provision of security. Under Cl. 5-12 the insurer does not have any obligation to provide security for the assured's liability to third parties. However, in practice the hull insurer will to a large extent provide security for the assured's liability for salvage awards and collision compensation whenever required in order to prevent an arrest of the insured ship. Such security will normally be provided by the claims leader. The 1964 Plan did not contain any rules relating to commission for the claims leader when he in this manner in the interests of all the insurers provided a guarantee for collision liability vis-à-vis the person suffering the loss or for salvage awards vis-à-vis the salvors. However, it was accepted in practice that the claims leader was entitled to a commission, and this practice has now been explicitly established in the Plan. The commission is set at 1% and is charged once and for all, not on a per annum basis.

The claim for commission is subject to the condition that the guarantee is provided in "the interest of all the insurers". This will be the case if the person suffering the loss or the salvor demands a bank guarantee, and the claims leader is required to provide a guarantee vis-à-vis the bank because the assured is unable to obtain a guarantee himself against ordinary commission, cf. in this respect former practice.

Sub-clause 2 corresponds to Cl. 144, sub-clause 1, of the 1964 Plan, but has been somewhat simplified. The provision discusses the effect of the claims leader informing the co-insurers that he has provided security for the assured's liability for collision compensation or salvage award. Such

notification deprives the assured of his position as creditor as regards cover of the liability invoked against him. If a co-insurer who has received such notification pays compensation in connection with the liability directly to the assured, he risks having to pay all or part of the amount again to the claims leader to the extent that the latter's provision of guarantee has become effective.

Sub-clause 3 corresponds to Cl. 144, sub-clause 2 of the 1964 Plan and limits the co-insurer's right to plead a set-off when security has been provided. As mentioned in the Commentary on Cl. 7-4, the insurer has the right to set off any claims against the assured in respect of insurances on Plan conditions. This applies to outstanding premiums as well as to any other claims arising from the insurance contract. Unless otherwise agreed, a co-insurer's right to plead a set-off against the assured may also be exercised against the claims leader when the guarantee has become effective and the claims leader has a right of recourse. However, according to the Plan, the co-insurer's right is subject to the condition that he has reserved the right to plead a set-off prior to the provision of security. In practice, the claims leader will normally decide the question regarding security alone, which means that a co-insurer cannot expect to have the opportunity to make a reservation in connection with a notification of the provision of security according to Cl. 9-7. Accordingly, a co-insurer who wants at all times to be certain that his claims against the assured can be set off must keep the claims leader continuously informed of the magnitude of his claim.

It is only against the claims leader that the right to plead a set-off may be forfeited. If the assured himself covers the liability and the guarantee is released, the co-insurer may, of course, plead a set-off. Sub-clause 3 applies to all types of claims arising out of the insurance contract, including claims pertaining to other vessels.

It is conceivable that a creditor directs his claim against another ship that belongs to the assured, and that the claims leader for the ship to which the liability pertains provides security in order to obtain the release of the other ship. The rules in this sub-clause shall also apply to such a situation, given that no express condition has been stipulated to the effect that the purpose of providing security is to prevent the arrest of the insured ship.

The rules shall only apply, however, where the provision of security concerns a claim of the type described in this Clause, i.e. collision liability and salvage award. If the claims leader has provided security for a claim of a different type, e.g., a repair yard's outstanding claim, the co-insurers have an unconditional right to plead a set-off without making any special reservation in accordance with sub-clause 3.

Clause 9-8. Disputes with third parties

This Clause is identical to earlier versions of the 1996 Plan. The Commentary was amended in the 2007 version in accordance with the amendment to Cl. 9-2.

The claims leader should also be empowered to represent all the co-insurers in the event of legal proceedings against a third party. The Clause authorises him to make the necessary decisions in connection with the legal proceedings and may be invoked vis-à-vis the courts as a basis for a general power-of-attorney to conduct the case. According to earlier versions of the 1996 Plan, "the question of commencing legal proceedings or lodging appeals will constitute 'matters of importance' and, as there will in those situations always be time for discussions among the insurers, it will invariably be the duty of the claims leader to submit the questions to those co-insurers of whom he is aware, cf. § 9-2". This statement is not accurate now that the duty to consult the co-insurers has been revoked. It also follows from the rule prescribed in Cl. 9-2 that the claims leader has a duty to look after the interests of all the insurers that he must consult the co-insurers concerning the institution of legal proceedings or the lodging of appeals.

Clause 9-9. Claims adjustment

The provision establishes that it is the claims leader who is responsible for the claims adjustment. In accordance with established practice, this is binding on the co-insurers, provided that it is in accordance with the insurance conditions. This implies that the claims leader's discretionary decisions are binding, provided that the discretion is deemed to have been exercised within the framework of the conditions. If, on the other hand, he, for example, includes as recoverable a loss which, according to a correct interpretation of the Plan and the insurance contract, must be considered to be excluded, the co-insurers will not be bound. The co-insurers must also be entitled to contest a discretionary decision if the discretion has been exercised in such a manner that it must in reality be regarded as a departure from the conditions in favour of the assured.

In practice, the claims leader's authority is sometimes specified in a "claims-leader clause". In such clauses, the claims leader's authority will often be extended in relation to Cl. 9-9, e.g. to also cover "settlements" or "compromised total loss settlements". An extension of the claims leader's authority has been regarded as a market question which must be solved in the individual insurance, and not through a general extension of the scope of Cl. 9-9.

If there is no such claims-leader clause, agreed settlements fall outside the scope of the claims leader's authority under Cl. 9-9. An agreed settlement might, for instance, entail payment of a large amount in cash compensation in cases where the ship does not qualify for condemnation (in English often called "compromised" or "arranged total loss" under Cl. 11-3 of the Plan or the insurance conditions. Such settlements are not "in accordance with the insurance conditions" and are therefore not binding on the

co-insurers. In such cases, the claims leader therefore acts at his own risk. Therefore, if the claims leader is to get the co-insurers to agree to such settlements, he must consult them. If they agree, the settlement will also be binding on the co-insurers. If not, each individual insurer is free to do as he pleases as far as his own share of the insurance cover is concerned.

In connection with the claims settlement, the question may arise of whether the insurers can or should invoke the provisions of Chapter 3 of the Plan regarding breaches of the duty of disclosure, alteration of the risk, breach of safety regulations, etc. This type of decision lies outside the scope of the claims leader's authority, and the co-insurers will therefore not be bound by the views of the claims leader. In practice, the claims leader and the co-insurers will often discuss the question and come to an agreement as to the stance that they wish to adopt in relation to the assured. If, however, they do not agree, a majority of the insurers cannot be binding on a minority. Any disagreement regarding the facts or the application of the law must, in the customary way, be brought before the courts in accordance with the provision regarding jurisdiction in Cl. 1-4**A** of the Plan or be decided by arbitration if arbitration has been agreed in advance or is agreed in connection with the dispute.

A judgment in favour of the insurers is only binding on the insurers who are a party to the case. Insurers who have made full or partial payment as part of a compromise settlement with the assured will be bound by this agreement regardless of the outcome of the judgment. *Similarly*, a judgment in favour of the assured will not affect agreements that have already been concluded. The assured may not claim any additional settlement from insurers with whom he has entered into compromise agreements even if the latter entail payments that are lower than what the court has found to be correct.

Should the concluded agreements be contested by the assured or the insurer in accordance with the ordinary rules on the invalidity of agreements, a dispute concerning the validity of the agreement would have to be the subject of separate negotiations and court decisions.

Even if the assured is represented by a broker, and the claims leader has communicated with the co-insurers through the broker, the insurers may communicate with one another directly without going through the assured and the broker. In difficult cases involving important principles or of financial significance, the claims leader will often seek to establish a direct dialogue with the co-insurers**.**

Clause 9-10. Insolvency of a co-insurer

This Clause was amended in the 2013 Plan.

The provision regulates the risk of a co-insurer becoming insolvent when the claims leader has had disbursements, part of which the co-insurer should have paid.

According to the *first sentence*, the assured bears the risk of a co-insurer's insolvency if the claims leader has had disbursements on behalf of the assured. This concords with what has been assumed in practice, and may be justified by considerations of consequences. If no claims leader had been appointed, the assured would have had to bear the risk of the co-insurer's insolvency, because the other co-insurers would merely have had pro-rata liability in proportion to their share of the insurance. This would have applied both to the actual payment of compensation and to the disbursements which were made by the assured to third parties in connection with the claims settlement, and which were recoverable under the insurance, e.g., disbursements for survey. The claims-leader system should not give a different result in an insolvency situation. The system indicates that the assured is the claims leader's principal, which means that under general rules of contract law he is liable for disbursements made by the claims leader on his behalf.

Disbursements made by the claims leader on behalf of all the co-insurers, on the other hand, are in principle no concern of the assured's. In that event, it must therefore be the joint risk of all the insurers if one of the co-insurers becomes insolvent. The *second sentence* was amended in the 2013 Plan and establishes now that the insolvent co-insurer's share of these disbursements shall be shared pro rata by the claims leader and the other co-insurers. If it turns out that another of the co-insurers becomes insolvent his share shall then be shared pro rata between the claims leader and the solvent co-insurers, and so on. In legal terminology in the Nordic countries such distribution of liability is called principal pro rata, and subsidiary joint and several.

The provision raises the question of the distinction between disbursements made on behalf of the assured and disbursements made on behalf of all the insurers. Disbursements related to the claims leader's consideration of, e.g. questions regarding salvage award, collision liability or grounding liability, are made on behalf of the assured. The same applies to the guarantee commissions. These are disbursements which might just as well have been made by the assured himself, but which the claims leader has undertaken on his behalf as a service. The same must apply to expenses for technical or legal assistance, and for that part of the claims leader's claim for a fee that is tied to an average adjustment, if any. The rest of the claims leader's fee claim in connection with the claims adjustment and expenses for survey is, however, claims or disbursements on behalf of all the insurers. If the claims leader leaves it to an average adjuster to make a claims adjustment in accordance with Cl. 5-2, the average adjuster's fee must also be no concern of the assured's.

Clause 9-11. Interest on the disbursements of the claims leader

In practice, the claims leader will often make disbursements on behalf of all the insurers, e.g. for surveys. Accordingly, there is a need for a rule which entitles him to charge interest on these disbursements. For disbursements made by the claims leader on behalf of the assured, the duty of the

co-insurer to pay interest is in actual fact already implicit in the assured's right to interest under Cl. 5-4. However, it has sometimes been difficult in practice to gain acceptance for this view in the international insurance market. The provision therefore explicitly establishes that the duty to pay interest also applies to disbursements made by the claims leader on behalf of the assured.

It is the duty of the claims leader to show loyalty as regards the recovery of outstanding disbursements. If the insurance contract interest rate according to Cl. 5-4 is for a period of time higher than the market rate, he may not sit on the claim in order to thus increase the interest payable by the co-insurers.

Part two
HULL INSURANCE

Chapter 10
General rules relating to the scope of the hull insurance

Clause 10-1. Objects insured

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

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

Sub-clause 1 states the objects covered by hull insurance. *Sub-clause 1 (a) and (b)* distinguish between "ship", "equipment" and "spare parts". "The ship" comprises the hull as well as the machinery. "Equipment" is a collective term for loose objects that accompany the ship in its trade, but which cannot be deemed to be part of it, e.g. radio and radar equipment, search lights, loose shifting beams, furniture and other fixtures and fittings. The prerequisite for covering equipment and spare parts under the ship's hull insurance is nevertheless that they are normally on board, cf. the term "on board", which indicates that the object in question shall be on board for an indefinite or prolonged period of time. Objects brought on board while the ship is in port and taken ashore when the ship is leaving, such as a fork-lift truck to be used during loading and discharging, are therefore not covered whilst on board, cf. ND 1972.302 NV BALBLOM, notwithstanding the fact that the object is used only on board this one particular ship.

As under the 1964 Plan, ownership is irrelevant. The hull insurance also covers equipment and spare parts that the owner has borrowed, rented or bought with a seller's lien or similar encumbrances. This means that an owner does not have to take out a separate property insurance for equipment that he does not own, but for which he bears the risk. Under the 1964 Plan, reference was made to "retention of ownership". However, the concept "purchase with retention of ownership" has been superseded in Norwegian law by "purchase with a seller's lien". The term "or similar encumbrances" has been incorporated in order to cover similar systems under the laws of other countries. According to the Plan, the cover of third parties' interests also includes spare parts; this is new in relation to the 1964 Plan.

The fact that the relevant objects are automatically included in the ship's hull insurance nevertheless does not mean that the ownership interest or the mortgagee interest is automatically co-insured under

the insurance. If a third party is to acquire status as a co-assured, this has to be agreed specifically, cf. Cl. 8-1. A third party's rights will in that event be determined by the provisions in Cl. 8-1 *et seq*. Chapter 7 does not apply where the mortgage rights only concern equipment or spare parts.

Under Norwegian law, the provision relating to the cover of third parties' interests is of little practical importance concerning the purchase of equipment or spare parts with a seller's lien. Under Section 45 of the Norwegian Maritime Code, mortgages and other encumbrances on ships that shall or may be entered in the ship's register shall also comprise equipment which is on board or which has been temporarily removed. No special encumbrances on such equipment can be created. For ships that are insured on the Plan's conditions for ocean-going vessels, this provision accordingly rules out seller's liens on the equipment, cf. *Brækhus*: *Omsetning og Kreditt 2* (Sales and credit), pp. 173-174. Actual leasing of ship's equipment is accepted, however, provided the notice period satisfies the requirements of the law, cf. the six-month time-limit stipulated in Section 45, second sub-clause, of the Norwegian Maritime Code. Thus, in the event of such short-term leasing, the rule relating to the cover of third parties' interests may become relevant. This rule may also be practical when it comes to the cover of ships where the flag State's laws open the door to a separate provision of security in the equipment.

New equipment or new spare parts will be included in the ship's hull insurance from the time the object concerned "is swung over the railing" to be placed on board.

Sub-clause 1 *(c)* is new and extends the cover in relation to the 1964 Plan to also comprise bunkers and lubricating oil on board. The extension represents a harmonisation in relation to Anglo-American marine insurance conditions, cf. MIA schedule I, no. 15. It is first and foremost of significance where bunkers and lubricating oil are lost or contaminated in connection with a major casualty. If the casualty merely results in loss of bunkers and/or lubricating oil, the fact is that the economic loss will rarely exceed the deductible. If the owner wants an extended cover in respect of these consumer articles, he will therefore either have to take out a separate insurance, or agree on a lower deductible for them.

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

Sub-clause 2 lists the objects that are excluded from hull cover and which may have to be covered by an insurance for fishing vessels, cf. Chapter 17, Sections 4 and 5, or some other separate insurance.

Firstly, provisions, deck accessories and other articles intended for consumption are excluded. Paint will be a typical example of "other articles intended for consumption" in the same way as zinc and magnesium blocks, etc. for protection against corrosion were excluded under the 1964 Plan, cf. Cl. 176 (k) of the 1964 Plan, which stated this explicitly. However, as mentioned, it follows from sub-clause 1 that the hull insurance now covers bunkers and lubrication oil.

The exclusion of articles intended for consumption does not comprise objects that are fixtures on the ship, even if they are of such a nature that they have to be replaced fairly often; fixed ceilings in the holds, insulation and other fixed installations in connection with the carriage of cargo are thus covered by the insurance.

Secondly, in concordance with the 1964 Plan, boats and whaling, sealing and fishing tackle are excluded. However, even if a boat is used for one of those purposes, it will be covered by the insurance if it was under any circumstances required to be on board as a lifeboat.

Thirdly, the Plan excludes "loose objects exclusively intended for securing or protecting the cargo". The exclusion is limited to objects that are merely necessary in order for the cargo to arrive in as good a condition as possible. If, on the other hand, the objects are also intended for the protection and safety of the ship, they are covered by the hull insurance. Thus, loose ceilings which protect the cargo against dampness from the ship's side, and dunnage, which prevents the various types of cargo and units from damaging each other during the voyage, qualify as equipment that falls outside the scope of the hull insurance. However, hull insurance will cover objects such as hatches, tarpaulins and loose bulkheads which are used for the carriage of bulk cargoes. Similarly, hull insurance will also cover objects which must be regarded more as a means of rationalising the transport operation than as a protection of the cargo, such as fork-lift trucks used in the hold. However, the prerequisite is that the objects constitute "equipment" as defined in sub-clause 1 of the provision, cf. above and ND 1972.302 NV BALBLOM.

Finally, loose containers intended for the carriage of cargo are excluded from the hull cover. According to the Commentary on the 1964 Plan, such containers were covered by the hull insurance, but this solution was abandoned in the Special Conditions. Such containers must in any event be covered by property insurance during the period of time that they are on shore and not just temporarily removed from the ship, cf. Cl. 10-2, which makes it unnecessary to cover them under the ship's hull insurance as well.

Clause 10-2. Objects, etc. temporarily removed from the *vessel*

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

There is a close connection between Cl. 10-1 and Cl. 10-2. First of all Cl. 10-1 establishes as a main rule that the relevant objects have to be "on board". Cl. 10-2 is an exception of this requirement and establishes cover for objects that are temporarily removed from the vessel. **A prerequisite for cover under Cl. 10-2 is that the relevant object has been on board, and that the intention is to put it back on board after it has been ashore, cf. ND 1972.302 NV BALBLOM. New equipment on its way to the vessel from the manufacturer is therefore not covered by the hull insurance, cf. what is stated in Cl. 10-1 concerning conditions for the inclusion of new equipment in the vessel's hull cover. Nor does the cover extend to joint stocks of spare parts maintained by an owner for several of his vessels.**

Secondly, insurance of objects removed from the vessel is linked to "objects referred to in Cl. 10-1, sub-clause 1". This must be interpreted to mean that it covers everything mentioned there, including bunkers and lubricating oil, even if these are not normally referred to as "objects". The use of Cl. 10-2 might however be limited **due to** the value of the objects in question will often be lower than the deductible.

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

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

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

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

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

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

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

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

Clause 10-3. Loss due to ordinary use

This Clause is identical to Cl. 150 of the 1964 Plan.

The provision reflects a central principle of insurance law, viz. that the insurance shall only cover unforeseeable or unpredictable losses.

The Clause excludes from the insurance cover certain losses which are regarded as regular operating expenses and which must therefore be borne by the owner. What constitutes a "normal consequence of the use of the ship and its equipment" is a question of discretion that must be decided on the basis of traditional solutions. The deciding factor is that the assured has deliberately used the ship in a manner or in a trade where damage is foreseeable. Examples of non-recoverable damage are foreseeable stevedore damage and foreseeable contact damage sustained in connection with navigation through locks or in a shallow river. On the other hand, damage will be recoverable if the ship strikes a rock in the river, or suffers a major collision with a lock wall. The same must apply if the ship, whilst carrying an isolated cargo of sulphur, sustains extensive and extraordinary corrosion damage.

Traditionally, heavy-weather damage has in practice been kept outside the scope of Cl. 10-3, even if it is in certain trades quite foreseeable that the ship will over a certain period of time sustain heavy-

weather damage of a certain extent, cf. ND 1990.50 Hov R.V.S. TAKIS H, concerning the corresponding Swedish provision.

Clause 10-4. Insurance "on full conditions"

This Clause is identical to Cl. 151 of the 1964 Plan.

Insurance "on full conditions" means that the assured has the full normal cover that follows from the rules of the Plan relating to hull insurance. Any limitations to this cover must be agreed specifically. On the other hand, "full conditions" does not imply that the insurer shall indemnify each and every incident of damage in full, in view of the fact that the normal cover includes rules which in some cases provide for substantial deductions, cf. Cl. 12-15 to Cl. 12-19 and Cl. 13-4.

Most ships will be insured on "full conditions". The mortgagees will normally not accept that a mortgaged ship is insured on less comprehensive conditions. The deductible may nevertheless vary.

Clause 10-5. Insurance "against total loss only" (T.L.O.)

This Clause is identical to Cl. 152 of the 1964 Plan.

Insurance "against total loss only" occurs in very special situations, e.g. in connection with the towage of a ship that is to be sent to the breaker's yard. In that event the insurer will only be liable for total loss in accordance with the rules in Chapter 11, i.e. where a ship is lost or so badly damaged that it cannot be repaired, is a constructive total loss, etc.

Where the ship is insured against total loss only, the consequence in relation to loss in connection with measures to avert or minimise the loss is that the insurer is only liable for such loss if it is attributable to measures taken to avert a relevant risk of a total loss. This principle follows from the rules in Chapter 4, Section 2, of the Plan, and it is therefore unnecessary to have any special rule on this in Cl. 10-5.

Where a case of general average has occurred, it is therefore necessary to split up the general average statement and cover the contribution to the extent that it refers to measures taken to avert or minimise the risk of a total loss. Contributions to so-called "common benefit" expenses are never recoverable; expenses in connection with putting into a port of refuge if the ship has suffered minor engine damage would perhaps be more doubtful.

If the ship has been damaged in consequence of an act of general average (or a similar act to save a ship in ballast), the damage under Cl. 4-10 is recoverable in accordance with the rules relating to particular loss, if such settlement is more favourable for the assured. This rule shall not apply in the

event of T.L.O. insurance, given that, in that situation, no indemnity would have been agreed for the damage. The compensation will therefore always be calculated on the basis of the general average rules.

Furthermore, the rules contained in the general part of the Plan on accessory expenses shall apply. The insurer is liable for interest on the claim according to Cl. 5-4, and for costs in connection with the claims settlement, cf. Cl. 4-5. Furthermore, the insurer is liable for costs of providing security and costs of litigation, cf. Cl. 4-3 and Cl. 4-4, where the providing of security or the litigation is connected with events that would otherwise involve liability, thus primarily in connection with measures to avert a total loss. Costs in excess of the sum insured are recoverable in accordance with Cl. 4-19.

Clause 10-6. Insurance "against total loss and general average contribution only"

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

As mentioned in the preceding clause, it is necessary under a "pure" total-loss insurance to split up each general average statement and only cover the contribution to the extent that it concerns sacrifices that have been made in connection with a relevant risk of a total loss. Similarly, it is necessary in connection with an "assumed general average" to verify whether there was a risk of a total loss when the measures to avert or minimise the loss were taken. This complicates the claims settlements, and the assessment of the degree of risk may cause considerable uncertainty.

These difficulties are avoided by insurance in accordance with Cl. 10-6, under which the insurer shall indemnify general average contributions and costs incurred by measures to avert or minimise the loss in the event of an assumed general average to the extent that he would have done so if the insurance had been effected "on full conditions". The insurer is therefore liable for every general average contribution apportioned to the ship and every sacrifice made while the ship is in ballast, regardless of whether or not the measures were aimed at averting a total loss.

Otherwise, reference is made to the comments on the preceding clause.

Clause 10-7. Insurance "against total loss, general average contribution and collision liability only"

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

Hull insurance under this Clause covers the same things as insurance in accordance with the preceding clause, plus collision liability to third parties, cf. Chapter 13 of the Plan. The insurer's liability for loss in connection with measures to avert or minimise the loss, litigation costs, etc. will then be extended

correspondingly, given that he will be liable for losses resulting from measures taken to avert a collision, which would have resulted in liability to a third party, or to limit the liability for damages.

Clause 10-8. Insurance "on stranding terms"

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

This provision affords the same cover as Cl. 10-7, plus a limited cover against damage and against loss in connection with measures taken to avert such damage. The provision will hardly be of any great significance in connection with ordinary hull insurance, but barges and dories are to a considerable extent insured on stranding terms.

Sub-clause (d) defines "stranding". In the event of grounding, it is a condition that the ship is unable to re-float by its own means. If the ship has capsized, it must have heeled over to such a degree that the masts are in the water. Thus, the insurance does not cover damage to the ship if it has heeled over but is supported by a quay, a barge, or the like. However, the costs involved in righting the ship will be recoverable in such a case, provided that it was an established fact that the stability limit was exceeded and that the ship would have overturned completely if there had been nothing to support it. In case of fire or explosion, damage in the engine room is excluded from cover, provided that the fire or the explosion occurred there. Such damage is relatively frequent and very comprehensive, and the exclusion is necessary in order to retain insurance on stranding terms as an inexpensive insurance.

Clause 10-9. Duration of voyage insurance

This clause is identical to Cl. 156 of the 1964 Plan.

Hull insurance is normally effected for a specific period of time, and the provision will consequently not be of any great practical significance.

When deciding whether discharging "is proceeding with reasonable speed", the issue of whether the assured has due grounds for withholding the cargo on board the ship, e.g. for the purpose of enforcing payment of the freight, must also be taken into consideration. As long as it can be regarded as a commercially justifiable part of the voyage to have the cargo on board, the voyage insurance will remain in effect. However, the assured may not let the ship assume the function of becoming a semi-permanent warehouse.

Clause 10-10. Extension of the insurance

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

Under *sub-clause 1* in the earlier versions, the insurance was to be extended if the ship upon expiry of the insurance period had damage for which the insurer was liable and which affected its seaworthiness. In the 2007 version the rules on seaworthiness were removed. In accordance with the Norwegian Ship Safety and Security Act, use is now made instead of the wording "technical and operational safety", cf. in that respect Cl. 3-23, sub-clause 1. The wording "to make the ship seaworthy" in sub-clause 1 has therefore been replaced by "to make the ship compliant with technical and operational safety requirements". The reason for the rule is to avoid difficult questions of causation if new casualties occur before the situation has again become "normalised". Moreover, salvage, removal, repairs, etc. as part of dealing with the earlier casualty entail an additional risk which should be borne entirely by the insurer who is liable for the casualties.

The wording "upon expiry of the insurance period" must be interpreted here as meaning expiry of the agreed insurance period regardless of whether an insurance period of one year or more than one year has been agreed upon, compare Cl. 1-5, sub-clause 4, which explicitly mentions the provisions under which a multi-year insurance contract must be divided up into one-year periods. The present provision is not included.

The extension of the insurance is automatic; no action is required by the parties. It remains in effect until the ship has arrived at the first place where permanent repairs may be carried out and the damage has been repaired, if the repairs are carried out at that location. If the ship is instead moved to a different port for repairs, the question of insurance has to be clarified before the removal.

The extension of the insurance is subject to the condition that the ship is in actual fact repaired. If it is laid up with unrepaired damage, both parties shall have the right to terminate the insurance contract as soon as it is established that the conditions for applying sub-clause 1 of this provision have not been met.

Under *sub-clause 2, first sentence*, the time of commencement of a new insurance shall be adjusted in accordance with the extension of the old insurance. Pursuant to Cl. 1-5, the old insurance will remain in effect until 2400 hours on the day the repairs are completed, and the new insurance will consequently take effect as of the same time. If, however, the ship leaves the port of repairs earlier in the day, it would be reasonable to let the new insurance take effect as of departure, cf. sub-clause 2, *second sentence.*

The question of an extension of the insurance also becomes relevant where the ship, on expiry of the insurance period, is reported missing or abandoned, and is later recovered without the conditions for claiming for a total loss being met. This question is regulated in Cl. 11-8.

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

Clause 10-11. Liability of the insurer if the *vessel* is salvaged by the assured

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

Under Section 442, second sub-clause, of the Norwegian Maritime Code, a salvage award may be claimed even if the salvaging ship and the salvaged ship belong to the same owner. The rule allows the crew to claim their share of the salvage award under Section 451, second sub-clause, of the Norwegian Maritime Code, but it probably also allows the owner to claim a salvage award from his insurer. There is good reason to state the rule explicitly in the Plan, however.

Cl. 159 of the 1964 Plan concerned salvage or "assistance". The assistance concept, however, has been deleted from the Norwegian Maritime Code, and has therefore also been deleted from the Plan.

The provision applies, according to its wording, only when the salvage operation is performed by a vessel. If, however, the salvage operation is carried out in a different way, e.g. by the use of a crane on shore, and a third party would have been entitled to a salvage award in such a situation, it would be logical to apply Cl. 10-11 by analogy.

Clause 10-12. Reduction of liability in consequence of an interest insurance

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

Under Cl. 160 of the 1964 Plan, the hull insurer's liability was reduced if the assured received compensation under a hull-interest insurance in an amount that exceeded 25% of the agreed hull value. For freight-interest insurance, there was a similar provision in the Special Conditions, cf. Cefor I.13 and PIC Cl. 5.28. The limitation was applied in order to prevent a major part of the hull cover from being shifted to the separate total loss insurances. This might undermine the premium foundation of the ordinary hull insurance, at the same time as an excessive total sum insured might also conceivably create a temptation for the assured to cause an insurance event. Finally, the limitation had a certain connection with the condemnation rules, because the condemnation limit is basically decided by the proportion of the costs of repairs to the agreed insurable hull value, at the same time as condemnation under the hull insurance triggers the interest insurance. Thus, in the event of a low agreed hull value and high interest insurance, the assured would apparently be able to obtain a high aggregate total loss cover in case of relatively modest damage to the ship. Admittedly, the latter case is countered by the fact that the condemnation rule establishes that if the market value is higher than the agreed value, it shall be incorporated into the condemnation formula instead of the agreed value. Moreover, a low

agreed insurable hull value and high interest insurance may also be unfortunate, for other reasons, for the owner because there is a risk that the agreed insurable hull value is not sufficient to cover partial damage to the ship. Thus, if the ship's market value is 100, the agreed insurable hull value 50 and the interest insurances 50, the owner will be without cover for partial damage between 51 and the condemnation limit of 80.

In this light, the Plan affirms the rule from the 1964 Plan and the Special Conditions prohibiting interest insurance for more than a certain percentage of the agreed insurable hull value. Neither the hull interest insurance nor the freight interest insurance may be worded so that the assured under the relevant insurance may receive an indemnity which represents more than 25% of the agreed value in connection with the hull insurance against the same peril.

Elimination of the excess portion of the total loss interest insurance would be sufficient to enforce the prohibition. Such a rule has been laid down in Cl. 14-4, sub-clause 2. It is, however, conceivable that total loss interest insurance is not effected on Plan Conditions and that it is consequently not subject to this reduction rule. In such situations the hull insurer needs a reaction against violations of the prohibition, viz. a right to reduce his liability. Such a rule is contained in Cl. 10-12.

Chapter 11
Total loss

Clause 11-1. Total loss

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

Sub-clause 1 states when the assured may claim compensation for a total loss. The provision covers both actual loss and so-called "unrepairability". There will be a gradual transition from an absolute loss (the ship has foundered in such deep waters that it cannot be reached) to cases where it is a question of economic assessment whether or not to undertake salvage and repair work. Such assessment will depend on the extent to which the probable salvage and repair costs will exceed the agreed insurable hull value. If the agreed insurable hull value is high, it is conceivable under special market conditions that it will pay for the insurer to build a new ship around the remains of the old one. However, under sub-clause 1, the strictly economic evaluation of the repair question shall also be supplemented by a technical assessment. That the ship "cannot be repaired" implies that it must be considered destroyed as a ship, making repairs seem meaningless from a technical point of view. "Repairs" in this connection mean repairs which meet the conditions under Cl. 12-1, i.e. repairs which will restore the ship to the state it was in prior to the damage, and a state which is expected to last.

The question whether it is technically possible to repair the ship is an ordinary question of evidence, which will ultimately have to be submitted to the courts.

Sub-clause 2 establishes that no deductions shall be made in the total-loss compensation for unrepaired damage sustained by the ship in connection with an earlier casualty. If a total loss has occurred, the assured may under Cl. 4-1 demand payment of the sum insured, however not in excess of the insurable value. Where this has been defined as "the full value of the interest at the inception of the insurance", cf. Cl. 2-2, it will not be affected by the damage which the ship sustains during the insurance period, and the assured will consequently be entitled to the full agreed insurable hull value, regardless of any unrepaired damage which the ship may have sustained in connection with earlier casualties. However, the assured may not in addition claim separate compensation for such damage; this would give him an unjustified gain at the insurer's expense. This has now been explicitly laid down in Cl. 12-2, sub-clause 3, in connection with the generalisation of the right to compensation. According to the traditional principle that "a total loss absorbs partial damage", an insurer who has paid compensation for the total loss will not have recourse against the insurer who would have been liable for the repair costs if the repairs had been carried out, cf. sub-clause 2 hereof, and Cl. 12-1, sub-clause 2, which state that the insurer's liability for repair costs will normally not arise until the repairs have been carried out.

The principle that "a total loss absorbs partial damage" may appear to confer an unanticipated advantage on the former insurer who was liable for the unrepaired damage, or possibly on the assured if the damage was not covered by insurance. However, in the relationship between the insurers it will, in principle, even out in the long term. There are also strong practical considerations in favour of this system: it will often be difficult to establish the exact extent of damage after the ship is lost. A rule to the effect that unrepaired damage should be referred back to an earlier insurer might therefore easily give rise to a dispute between the insurers.

If the assured has claims for damages against third parties in connection with the unrepaired damage, they accrue to the insurer who pays the total loss claim.

Clause 11-2. Salvage attempts

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

The Clause constitutes a necessary supplement to the preceding clause and regulates the situation where the ship is lost under such circumstances that it is uncertain whether it can be salvaged.
The time-limit within which the salvage operation must be carried out is basically six months, cf. *sub-clause 2, first sentence*. The time-limit is extended to a maximum of 12 months if the salvage operation is delayed due to difficult ice conditions, cf. *second sentence*.

Clause 11-3. Condemnation

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

Sub-clause 1 sets out the principle that the total-loss cover also extends to condemnation of the ship. The rest of the provision contains the main rules on the material terms for condemnation.

According to *sub-clause 2, first sentence*, the conditions for condemnation shall be deemed met and the assured entitled to claim for a total loss if the cost of repairing the ship will amount to at least 80% of the insurable value. If the ship is undervalued so that its real value in repaired condition is higher than the agreed insurable value, the de facto value shall be used as the basis. Using the higher of the two values, means that it will not be easier for the assured to obtain a condemnation by using a particularly low agreed insurable value, and that the assured may not obtain condemnation above a low market value and subsequently be paid the higher agreed insurable value.

In accordance with the 1964 Plan, the wreck value shall not be brought into the condemnation formula, even though it might be said that this may lead to results which do not make good economic sense, cf. *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 434. However, an amendment on this point would entail that Nordic condemnation conditions differed from international marine insurance practice.

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

When a ship is declared a constructive total loss, not only the hull insurance but also the hull-interest insurances fall due for payment. These interest insurances are in effect hull insurances against total loss which are effected in addition to the regular hull insurance. Only the agreed insurable hull value, not the sum of that value and the agreed insurable values for the hull-interest insurance and/or the freight-interest insurance, is to be taken into account when making a decision on the question of

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

According to *sub-clause 3*, it is the time when the assured makes his request for a condemnation that is decisive for the determination of the value if the alternative "value of the ship in repaired condition" is used. However, the determination of value must be based on an "objective" market value of the relevant type of ship. Consequently the question whether the casualty may have resulted in a special reduction in value of the ship concerned in the form of "bad reputation", or the like, shall not be taken into consideration.

Sub-clause 4 gives a further definition of "casualty damage" and "costs of repairs". As regards what casualty damage shall be included in the condemnation formula, the question is whether the evaluation shall only take into account the damage which was caused by the latest casualty, or whether earlier unrepaired casualty damage to the ship should also be taken into account. By taking into consideration all casualty damage, the decision would be based on a realistic assessment of the possibility of restoring the ship to a seaworthy condition on a sound economic basis, and the assured and his insurers would not be forced to make unprofitable investments in a ship which should in reality have been declared a constructive total loss. At the same time, it did not seem like a good idea to take into consideration all old dents, etc., which the ship had sustained through a long life. Consequently, as under the 1964 Plan, a three-year time-limit has been set, so that casualty damage which has not been reported to the relevant insurer and been surveyed by him in the course of the three years preceding the casualty which caused the condemnation request shall not be taken into consideration. The three-year time-limit shall be calculated from the time of the actual casualty. The requirement that the damage must be surveyed does not apply to a situation where the owner has made a survey possible, but where the insurer chooses not to undertake such survey.

In exceptional cases, it is conceivable that compensation has been paid for unrepaired damage. However, the fact that a former owner has received compensation for such damage pursuant to Cl. 12-2, sub-clause 1, will not exclude the damage from being taken into account when the question of condemnation is being decided. If, on the other hand, the assured has received such compensation earlier, no importance can be attached to the damage when deciding the question of whether the ship qualifies for condemnation.

The term "casualty damage" also includes damage which is not recoverable under the insurance because it does not exceed the deductible or because of other forms of self-insurance. However, only damage which according to its nature is covered by the insurance shall be taken into account, and not damage consisting of rust or corrosion. The assured shall not be able to obtain a constructive total loss by ignoring the upkeep of the ship. However, if the damage is of such a nature as to make the insurer

liable under Cl. 12-3 or Cl. 12-4, this will also have to be taken into consideration when determining the question of condemnation.

As will appear from Cl. 11-1, sub-clause 2, the principle that "total loss absorbs partial damage" entails that the insurer who pays a total-loss claim does not have recourse to the insurer or insurers who should have indemnified the unrepaired damage which the ship had when it was lost. As under the 1964 Plan, this principle also applies in the event of a condemnation of a ship, given that a different solution might have resulted in very complicated settlements. Consequently, the agreed insurable hull value shall be paid in its entirety by the insurer who is liable for the casualty giving rise to the condemnation without any deductions for earlier, unrepaired damage.

The condemnation is based on a discretionary assessment of the future expenses that will be incurred in connection with complete repairs of the ship. The basis of the assessment is the ship in the state and at the place where it is at the moment when the assured makes his request for a condemnation. Thus, costs that have already been invested, e.g. in connection with temporary repairs, shall not be taken into consideration, in contrast to all foreseeable future costs. Salvage awards shall not be taken into account, however, cf. below.

Costs of "removal and repairs" comprise, in the first place, all costs for which the insurer would be liable if repairs were carried out. Furthermore, account must be taken of expenses the assured must cover himself in connection with the repairs, e.g. in the form of deductions or deductibles, or because the damage in question is specifically excluded from cover, e.g. in accordance with Cl. 12-5 (b) and (d)-(f). However, costs that do not refer directly to removals, repairs and similar measures, shall not be taken into account. Thus, the assured's general operating costs concerning the ship during the period of repairs, or expenses in connection with bringing passengers ashore shall not be considered. The calculation of the probable costs shall be based on the prices at the time when the request for a condemnation was made.

The fact that removal costs are included in the calculation means that the decision of the question of condemnation is founded on a more realistic basis than if the damage to the ship were the sole decisive factor, regardless of where the ship was. As regards the question of condemnation, there will, realistically speaking, be a material difference between a damaged ship that is in a port, e.g. Svalbard, and a ship with similar damage in a port with good possibilities of repairs.

If this line of thought were to be followed through, the salvage award that would foreseeably accrue before the ship could be moved to a repair yard would also have to be taken into account. However, it will always be very difficult to estimate the salvage award in advance, and this would introduce a serious element of uncertainty in the condemnation formula. In addition, it is difficult to get the damage surveyed properly as long as the ship has not been salvaged. Thus, under the Plan, a salvage

award that will accrue before a removal and repairs shall not be taken into consideration. The distinction between "salvage award" and such expenses as shall be included, especially removal costs, must be based on general maritime law criteria. The decisive factor must be the situation which the ship was in when the salvor was given the assignment, and not whether the remuneration agreed to on a "no cure - no pay basis" was determined in advance or shall be paid according to accounts rendered.

Even if the salvage award is not included in the condemnation formula, the insurer must in practice also take the salvage award into consideration if the assured claims for a total loss (or a condemnation, as the case may be) before the ship has been salvaged. If the insurer wants to salvage the ship in such a situation, he must proceed according to Cl. 11-2. The significance of the condemnation request being made while the ship is still at the place of stranding, lies in the fact that this is the point in time that will be decisive for the assessment of the costs and the market value of the ship.

According to Cl. 12-1, sub-clause 4, the insurer has the right, subject to certain conditions, to refuse to cover in full the costs of repairs that restore a ship to its former condition. In that case, he must pay special compensation for the depreciation in value caused by the fact that the ship will not be fully repaired. However, according to sub-clause 4, *last sentence*, the decision of the condemnation question shall not take into account the compensation for the depreciation in value which the insurer would have had to pay if he had been entitled to invoke Cl. 12-3, sub-clause 4. This rule is necessary to avoid a situation where a compensation for, e.g. damaged works of art or decorations based on a discretionary assessment would constitute the decisive amount that brings the costs of repairs above the condemnation limit. Nor would it be very reasonable if damage which does not affect the ship's ability to comply with technical and operational safety requirements and therefore does not need to be repaired in the first place were to be taken into account in the decision whether the ship, on a realistic basis and from an economic point of view, is "worth repairing".

The question whether the conditions for condemnation are met is a question of fact that must be decided according to ordinary rules of evidence. The Plan does not authorise any specific procedure for deciding this question. If it is not possible to solve the question by means of negotiations, it will have to be submitted to the courts, cf. also Cl. 5-5, sub-clause 3. Nor does the Plan provide any guidance in terms of special rules of procedure relating to the survey of damage or the invitation of tenders, as is the case in the event of repairs of damage, cf. Cl. 12-10 and Cl. 12-11. In ND 1992.172 Gulating BERGLIFT it was held that these rules could not be applied by analogy when deciding the question of condemnation.

Clause 11-4. Condemnation in the event of a combination of perils

This Clause is identical to Cl. 164 of the 1964 Plan.

The provision regulates the position where the casualty which gives rise to the condemnation is partly due to perils not covered by the insurance, cf. Cl. 2-13, Cl. 2-14 and Cl. 2-16. The situation may be that the assured has breached safety regulations or has sent the ship out to sea in an unseaworthy condition, and that the insurer is therefore only partly liable for the casualty, or that the casualty is attributable to a combination of marine and war perils under such circumstances that the rule of equal distribution contained in Cl. 2-14, second sentence, or Cl. 2-16, shall apply. In such cases, the insurer is only liable for a proportionate share of the total-loss claim. If liability is to be divided between the insurer against war perils and the insurer against marine perils, each of them shall pay half of the agreed value under the insurance in question.

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

Clause 11-5. Request for condemnation

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

Sub-clause 1 regulates the conditions for the request for condemnation. The provision must be interpreted antithetically: It is only the assured who can request condemnation. Hence, the insurer may not take advantage of an upward turn in the market to speculate by paying out the sum insured and taking over a damaged ship for the purpose of repairs and sale.

On the other hand, the insurer must be protected against the assured demanding that the ship be repaired, despite the fact that it is in reality fit for condemnation. Under Cl. 12-9, the insurer's liability for repair costs in such a situation is limited to the amount he would have had to pay if the ship had been declared a constructive total loss, in other words, the sum insured less the value of the wreck.

If the assured wants a condemnation, he must make a request without undue delay after the ship has been salvaged and he has had an opportunity to inspect the damage, cf. *first sentence*. He can not keep the question open and see how the market develops. If he does not make a decision, he will only be entitled to indemnity under the rules relating to damage, cf. *inter alia* the insurer's right to limit his liability for the costs of repairs under Cl. 12-9. However, this does not apply if the ship is in actual fact so severely damaged that it must be regarded as a total loss, cf. the comments on Cl. 11-1, sub-clause 1. In that event, the assured's right to claim for a total loss is not subject to any time-limit (apart from the standard limitation rules and rules on duty of notification).

On the other hand, the request for condemnation is not an irrevocable offer to the insurer which he may invoke. Thus, according to sub-clause 1, second sentence, the request may be withdrawn as long as it has not been accepted by the insurer. However, if a final agreement for a condemnation has been concluded, it will be binding on both parties.

Until the ship has been salvaged and the assured has had an opportunity to inspect the damage, it will often be uncertain whether a condemnation will be requested. It would be most unfortunate if the assured during this period of time were to take a passive approach to the salvage operation out of fear that an active approach would be interpreted as a waiver of his right to demand a condemnation. *Sub-clause 2* therefore establishes that salvage or failure to salvage the ship by one of the parties shall not be regarded as an approval or a waiver of the right to condemnation.

Clause 11-6. Removal of the *vessel*

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

When the assured makes a request for condemnation, it is important that the insurer be given the opportunity to have the ship inspected in a proper manner, e.g. in dock. The insurer therefore has an unconditional right to demand that the ship be moved to wherever he wants in order to have a proper survey conducted, cf. *sub-clause 1, first sentence*. According to the *second sentence*, this demand must be made without undue delay; the insurer should not be able to procrastinate later on, during the negotiations with the assured, by demanding a removal for a further survey. Consequently, the insurer must inspect the ship as soon as it has been salvaged and decide what type of survey he wants carried out.

A removal results in costs and may also entail a risk of loss. Such liability shall be borne by the insurer who demands the removal, cf. *sub-clause 2*. A removal for the purpose of a survey is undertaken as a defensive move by an insurer who has been presented with a claim for a total loss. If the ship is condemned, despite the new survey, the insurer will bear the risk of all losses that may arise after the casualty, cf. Cl. 11-9 and the Commentary on that provision. Under Cl. 43 of the 1964 Plan, an insurer who did not wish to bear the risk of removal could limit his liability for losses incurred during such removal. This provision has been deleted, and the claims leader has now been authorised to decide the question of removal, cf. Cl. 9-6. The co-insurers are therefore jointly liable for damage that arises during a removal decided by the claims leader. The claims leader's decision to remove a ship will also be binding on the interest insurers, cf. Cl. 14-3, sub-clause 4. If the other insurers wish to limit their liability for such damage, they may have to exercise the right in Cl. 4-21 to avoid further liability by paying the sum insured. If this is done, the insurer who causes the removal shall not only bear the costs, but also the risk of any loss that arises during or as a result of the removal, and which is not covered by other insurers, cf. sub-clause 2. The insurer who demands a removal of the ship will thus

bear the risk of losses which should otherwise have been covered by other insurers (e.g. war damage or liability for damages to third parties). In relation to the assured, he also bears the risk of losses which would normally have been uninsured. In practice this will mean that the insurer must take out the necessary supplementary insurances during the removal. If the risk is of such a nature that it is uninsurable, this is in itself an indication that the removal should not be carried out.

The costs incurred during the removal and the survey are incurred after the request for a condemnation is made and must be taken into account when deciding the condemnation question, cf. Cl. 11-3, sub-clause 4. However, any liability to third parties that may arise during the removal shall not be taken into consideration. If the ship is damaged, such damage shall be taken into account if the assured submits a new formal request for condemnation after the damage has occurred. It will then be the repair prices at that time which will be decisive for the assessment of the ship's total damage, cf. Cl. 11-3, sub-clause 4, second sentence.

Clause 11-7. Missing or abandoned *vessel*

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

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

According to *sub-clause 1*, the assured may claim for a total loss if the ship is reported missing and three months have elapsed from the date on which the ship was, at the latest, expected to arrive at a port. If there is reason to believe that the ship may be icebound, the time-limit is 12 months. According to *sub-clause 2*, the same applies if the ship has been abandoned by the crew at sea, but the point of departure for the time-limit is slightly different. In view of current means of communication at sea, the provisions will be of little practical significance, given that the assured will, as a rule, have the right to demand payment of the total-loss claim at an earlier point in time under sub-clause 3. It is nevertheless considered expedient to retain sub-clauses 1 and 2 as a point of departure.

The rule in *sub-clause 3* corresponds to Cl. 170, sub-clause 1, of the 1964 Plan and may be of considerable practical significance, e.g. if the ship is reported missing and survivors or wreckage from the ship are found before expiry of the time-limit.

If the ship or the wreck causes striking damage during the period before a total-loss claim has been paid according to Cl. 11-7, the hull insurer must be liable under Chapter 13 in the ordinary manner, provided that the damage is a result of a peril that struck during the insurance period, cf. ND 1990.8 S.

dispasch VINCA GORTHON. If the wreck causes damage after the total-loss claim has been paid, however, the hull insurer must be exempt from liability, unless he has taken over the right to the wreck according to Cl. 5-19.

Under sub-clauses 1 and 2, the ship must be "reported missing" or "abandoned … without its subsequent fate being known" at the time when the request for a total-loss claim is presented. If the ship has been recovered or released, the assured obviously may not submit a claim for total-loss compensation. However, *sub-clause 4*, which is taken from Cl. 170, sub-clause 2, of the 1964 Plan, regulates the situation where the conditions for a total-loss claim are met when the claim is presented, but where the ship is subsequently recovered or released before the compensation has been paid. In that event, the insurer cannot deny the request on the grounds that the ship has been recovered or released. The reason the assured submits the request will often be that he is making other arrangements in order to acquire a new ship. He should therefore, in the light of the request, have acquired an irrevocable right to total-loss compensation.

If it is an established fact that the assured will not get the ship back before expiry of the time-limits under sub-clauses 1 and 2, the limitation period in Cl. 5-24 will take effect from 1 January of the year after the fact has become clear and the conditions for the payment of total-loss compensation under sub-clauses 3 and 4 have been met.

Clause 11-8. Extension of the insurance when the *vessel* is missing or abandoned

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

Sub-clause 1 states that the insurance will be extended if the ship, on expiry of the insurance period, is missing or abandoned and is subsequently recovered without the assured being entitled to claim for a total loss. The provision is based on practical considerations: if, for the expiring insurance year, the insurer was not made liable for the damage which the ship turns out to have when it is again recovered, it would be necessary to establish the exact time when this damage occurred, which may be difficult or impossible. Furthermore, the assured will rarely have taken out any new insurances in such a case. The insurance is extended according to rules similar to those that apply when the ship has sustained serious damage, cf. Cl. 10-10, and the extension applies to all the ship's insurances under the Plan.

The wording "upon expiry of the insurance period" must be interpreted here as meaning expiry of the agreed insurance period regardless of whether an insurance period of one year or more than one year has been agreed upon, compare Cl. 1-5, sub-clause 4, which explicitly mentions the provisions under which a multi-year insurance contract shall be divided up into one-year periods. The present provision is not included.

When a time-limit under Cl. 11-7 has expired, the assured obtains a right, but not an obligation, to claim for a total loss. Under the Plan he may keep the question open until he recovers the ship or it is later established that the ship is definitively lost. Under Cl. 6-4, sub-clause 2, he shall not pay premium for the period of time from expiry of the agreed insurance period until he regains control of the ship. *Sub-clause 2*, however, establishes that the old insurance shall not be extended beyond two years from expiry of the insurance period. If the assured recovers the ship at a later point in time, he will not be entitled to claim compensation for damage to it without proving that it occurred less than two years after expiry of the original insurance. Moreover, he must take out a new insurance in order to be covered while the ship is brought into port and the damage repaired.

Clause 11-9. Liability of the insurer during the period of clarification

If the ship has sustained extensive damage as a result of a casualty and the assured claims for a total loss, there will be a period of uncertainty when it is not known whether or not the condemnation conditions under Cl. 11-3 are met. The same applies when the ship is stranded and the insurer wishes to use the time-limit to which he is entitled under Cl. 11-2, sub-clause 2, to attempt to salvage it, or when it has been abandoned or reported missing but the time-limits under Cl. 11-7 have not yet expired. If the end result is that the ship is not considered a total loss - its damage is not sufficiently extensive, or it is recovered before expiry of the stipulated time-limits or before the assured has lodged a claim for a total loss - no problems will arise. In that event, all insurances will have been continuously in effect throughout the period of uncertainty (see Cl. 11-8 regarding an extension of the insurance when the period of uncertainty extends beyond the agreed insurance period).

If, however, the end result is that a total-loss claim shall be paid, the insurer who is liable for the total loss shall take over the wreck in view of the payment of the claim, cf. Cl. 5-19. If there has been a further depreciation in the value of the wreck as a result of new events during the period of uncertainty, the risk shall be borne by the insurer concerned. Under Cl. 5-22, he is also barred from exercising any rights the assured might have under an insurance contract as regards such subsequent events. Thus, the insurer who is liable for the total loss will in actual fact bear the risk in respect of everything that happens to the wreck as from and including time of the casualty which gave rise to the total loss, whereas the other insurers, by contrast, will not bear any risk as of that same moment. This is explicitly set out in *sub-clause 1*. Under Cl. 6-3, sub-clause 2, the other insurers are also barred from claiming premiums for the period during which they did not bear any risk.

However, during the period of uncertainty there is a risk, not only of a further depreciation in the value of the ship, but also of the assured incurring liability for damages, which is covered by the insurance. Such liability may, depending on its nature, fall outside the scope of cover of the insurer who is liable for the total loss. It is, for example, conceivable that the ship has sustained extensive bombing damage

that later proves to have made the ship condemnable. During the manoeuvring of the wreck to or in a port, the master makes a clear nautical error, which imposes a collision liability on the assured. A liability of this nature must be covered by the insurer who is liable for the total loss, cf. *sub-clause 2*. He must be regarded as having assumed the risk for the wreck in every respect after the casualty which gave rise to the total loss. The rule can be justified by the fact that there will often be a certain connection between the damage to the ship and the event entailing liability. In this way the difficult questions of causation which might otherwise arise are avoided.

The fact that the insurance period has expired when it is established that a total-loss claim may be lodged is irrelevant for the insurer's cover of collision liability. However, it has been established that liability shall not remain in effect for more than two years from expiry of the original insurance period, cf. Cl. 11-8, sub-clause 2. After that point, the assured must arrange for liability cover himself. The insurer may not demand any additional premium for the period for which the liability insurance is extended under this Clause, cf. Cl. 6-4, sub-clause 1.

Chapter 12
Damage

General

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

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

Clause 12-1. Main rule concerning liability of the insurer

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

This Clause contains the substantive main rules concerning the extent of the insurer's liability for repair costs and supersedes the relevant Nordic Insurance Contracts Acts to the effect that the assured shall receive full compensation for his economic loss. According to *sub-clause 1*, the rules shall apply when the ship has sustained damage for which the insurer is liable without the rules relating to total loss "being applicable". For the rules relating to total loss to become applicable, it is required that both the conditions for a total loss are met and that the rules are invoked. If the ship is declared a constructive total loss, but the assured has it repaired, the insurer's liability will therefore in principle be regulated by the rules in this Chapter, cf., however, Cl. 12-9, which in this case limits the insurer's liability for the costs of repairs.

That the ship has been "damaged" means first and foremost that it has sustained physical damage. However, pollution of the ship itself is also within the meaning of the term, so that the insurer will cover the costs of removal and cleaning.

The main rule is contained in the statement that the ship shall be "restored to the condition it was in prior to the occurrence of the damage". This means first and foremost that the repairs shall satisfy the classification requirements. Certain qualifications must nevertheless be pointed out. On the one hand, the assured may not demand that the ship's standard after repairs shall satisfy the classification requirements if it did not do so prior to the casualty. On the other hand, the insurer must cover the extra costs caused by the fact that special materials or designs beyond the requirements of the classification society had been used when building the ship, unless the insurer can limit his liability under sub-clause 4, second sentence, of the Clause.

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

That the ship, as a result of the damage and the repairs, has a lower market value than it had before the damage, e.g. because a buyer is afraid that there may be latent damage, is not in itself decisive if the repairs must be regarded as complete from a technical point of view and are approved by the classification society. See the judgment by the Oslo City Court of 30 January 1996, which is published on Cefor's web page: http://www.cefor.no/Clauses/Nordic-Plan-2013/Related-documents/**.** Accordingly, in such cases, there is no room for the rules in sub-clause 4.

A special question arises if the requirements of the classification society have been made stricter than the requirements in effect when the ship was built or at the time of earlier repairs. If the assured, independently of the casualty, would have had to replace the damaged part at a later point in time, he may not claim compensation for the costs of the increase in standard. However, if transitional rules would not have required him to make a replacement if the casualty had not taken place, he must be entitled to claim compensation for his entire costs. But if the replacement, etc. results in a "special advantage for the assured because the ship is strengthened or the equipment improved", the assured will have to accept a deduction under sub-clause 3, cf. below.

The requirement that the ship be restored to the condition it was in prior to the occurrence of the damage cannot be taken quite literally. The assured must, to a large extent, accept that damaged parts are repaired and not replaced by new ones, even if this entails that the ship will not be restored to exactly the condition it was in before. An example of this is when damage to the crankshaft is repaired by grinding the crank pin to a size below standard, see also *Brækhus/Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 458. If the classification society accepts the repairs, the assured will not be entitled to compensation for a new crankshaft, unless he is able to establish that the repairs will result in depreciation in value. Moreover, a new part would often result in an increase in standard, to which the assured is not entitled, cf. sub-clause 3.

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

The assured must also, to a certain extent, be content with used components when older parts are damaged, e.g. in case of damage to an auxiliary engine. However, he shall have the right to demand that the used component is clearly at least as good as the damaged one, and that the classification

society approves the used part. In addition, it must normally be a requirement that the component is newly overhauled.

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

Class approval required

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

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

Class approval not required

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

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

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

Regardless of whether the repairs are carried out with used or new parts, it is a prerequisite that the part is obtainable within a reasonable period of time. The question as to what is "a reasonable period of time" must be decided on a case-to-case basis depending on the type of ship and the place of repairs. If the part cannot be obtained within a reasonable period of time, this means that there is a situation of "unrepairability", and the insurer must cover new and/or more expensive parts to the extent that this is necessary. If the waiting time is not so long as to entail unrepairability, the use of new parts in order to save time may have to be regarded as a cost in order to expedite the repairs according to Cl. 12-8.

In situations where casualty repairs necessitate the purchase of special tools and such tools are kept on board, it has been customary in practice to cover 50% of the costs of the tools if such tools could not ordinarily be expected to be found on board. This practice should be maintained where new parts necessitate the purchase of new tools, or if the repairs require special tools that cannot be expected to be on board. On the other hand, the costs of tools which, according to good seamanship, should have been on board before the casualty should not be indemnified. The same must apply to the rental of such tools.

Decisive for the insurer's liability are repair costs that have in actual fact been incurred, unless one of the special limitation rules applies. An advance approximate estimate under Cl. 12-10, sub-clause 3, will only affect the insurer's liability if the repairs are not carried out and cannot be used to limit the insurer's liability for the costs of repairs.

Foreign insurance conditions and YAR limit the liability to "reasonable cost of repairs". Because of the wide international distribution of the Plan, the issue of whether a corresponding limitation should be incorporated in the Plan text was considered, but it was decided that this was not a very good idea. In the first place, discussions might arise concerning the interpretation of "reasonable cost of repairs", in particular in relation to the identical formulation in the English conditions. It has been assumed that those conditions may, in certain cases, conceivably provide somewhat more extensive cover than the 1964 Plan, and it was not considered expedient to introduce a corresponding extension of the cover in the Plan. In the second place, such limitation may have an unreasonably adverse effect for the assured. If he has no option but to have the ship repaired at a repair yard which enjoys a monopoly at the location concerned, the invoice may, from an objective point of view, be unreasonably high in relation to the work carried out. The insurer should nevertheless cover the full cost of the repairs in such cases. In this and other cases, however, the insurer must be entitled to refuse to accept the invoice to a certain extent, e.g. if the yard has charged more for the recoverable casualty work than for maintenance work, or if the calculation of prices is in conflict with public price regulations in the country concerned. If in the latter case the assured does not succeed in having the invoice reduced through negotiations or litigation, the insurer must cover it in full, provided, however, that the assured's conduct has been loyal in relation to the insurer. Generally accepted business standards suggest that the discussion

concerning the amount of the cost of repairs be clarified with the insurer in advance by having the insurer's surveyor participate in the negotiations with the repair yard and stating his opinion. If the assured negotiates and accepts the invoices for the recoverable repairs without inviting the surveyor to the negotiations, he has the burden of proving that the repairs were carried out in the most reasonable way possible. If the insurer is otherwise able to document that the owner has not made any effort to obtain the least expensive repairs possible, or has in some other way been disloyal to the insurer, it follows from general principles of contract law that the insurer will not have to pay the additional costs. Depending on the circumstances, the insurer will in such cases also be able to invoke the rules relating to fraud during the claims settlement.

The insurer's liability covers not just the actual invoice from the repair yard, but also other expenses necessary to have the repairs carried out. These are expenses particularly associated with the repairs in question, as well as accessory expenses applicable to any and all repairs which must be apportioned as common expenses pursuant to Cl. 12-14 if non-recoverable work is carried out at the same time. According to general practice, the insurer is therefore liable for the bunkers required for testing the engines, costs of a trial run, oil used for "flushing", and the crew's overtime work in connection with their direct participation in the recoverable repairs.

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

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

Another category of costs necessary in order to carry out the repairs to the ship is the cleaning of tanks and, possibly, the removal and destruction of oil residue from the tanks. Costs in connection with the removal and destruction of contaminated bunkers, lubricating oil, etc. must also be covered, even though practice has here gone in the opposite direction. Removal and possible destruction of oil that must be regarded as part of the cargo are not covered, however, cf. Cl. 12-5 (b). Expenses of this nature are covered by the P&I insurer.

Also gas-freeing of gas tankers sailing in ballast which have retained a small quantity of gas in the tanks in order to cool them down must be regarded as necessary accessory expenses. In practice, it has been alleged that gas-freeing represents a loss of cargo and therefore falls outside the scope of the hull insurer's liability. However, the correct approach must be to see this as a loss of a cooling agent. Given that the rule of the Plan is that the ship shall be restored to the same condition as it was in prior to the casualty, the missing cooling agent must be replaced. The same applies to additional expenses for cooling down the tanks after the repairs. On the other hand, the loss of gas carried as a cargo is not covered.

However, as regards a number of the accessory expenses, the insurer's liability is regulated by special provisions, cf. Cl. 12-5 (a)-(c) and Cl. 12-13.

Another category of expenses that must be covered in addition to the actual repair invoice are expenses in connection with foreseeable consequences of docking and repairs, e.g. the removal, discarding and destruction of minor oil spills inside the dock. However, oil spills outside the dock must fall outside the hull cover. If the oil spill is of such an extent that it penetrates beyond the dock, it will normally be due to an accident or a misjudgement during the docking, which the P&I insurance must cover.

In the event of a risk of oil spill, the assured may receive an order from the port authorities to carry out temporary repairs of the ship. If the pollution risk is acute and immediate, the costs of such repairs must be covered by the P&I insurer as costs of measures to avert or minimise loss. In practice, however, there are examples of port authorities having demanded temporary repairs also in other cases, e.g. in connection with underwater welding of cracks out of fear of oil spill. If such temporary repairs are a condition for letting the ship into the port of repairs, it must be regarded as part of the costs of repairs under the hull insurance.

A difficult question is to the extent to which the insurer must cover expenses that must be regarded as a substitute for another loss which according to its nature had to be covered under the hull insurance, i.e. so-called "substituted expenses". A starting proposition under the 1964 Plan was that this type of expense was not covered, unless there was a special authority, cf. also *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 417. During the revision of the Plan, extended cover of such expenses was considered, but rejected. The content of the term "substituted expenses" is difficult to establish and, if basic cover of such expenses were allowed, the door would be opened to a discussion of a whole series of claims. If the insurer has to cover such expenses, this must be on the basis of an advance agreement between the parties, or the Special Conditions must provide a clear authority. The Plan itself contains a number of rules that explicitly preclude cover of such expenses, cf. e.g. Cl. 4-2, Cl. 4-12 and Cl. 12-5 (a).

Costs common to repairs that are recoverable and repairs that are not shall be apportioned according to Cl. 12-14. Access work is not a common expense to be apportioned under Cl. 12-14; it constitutes part of the actual repair work. If the access work has been necessary for the recoverable as well as the non-recoverable repairs, practice has, however, been to apportion all common access work on a 50/50 basis.

Sub-clause 2 maintains the traditional principle in hull insurance that the insurer does not cover damage unless the damage has been repaired. In the 2007 version, however, a general right to claim compensation has been introduced, cf. Cl. 12-2. The situation where the assured goes bankrupt before the invoice has been paid is referred to in the Commentary on Cl. 7-4, see also *Brækhus/Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 326.

The provision in *sub-clause 3* is in reality superfluous in view of sub-clause 1. The Committee has nevertheless decided to leave it. Deductions are subject to the condition that "the ship is strengthened or the equipment improved", and that this has entailed "special advantages" for the assured. If, in connection with the repair work, the assured takes the initiative himself to have the ship strengthened or the equipment improved, it is obvious that he must bear these additional costs himself. The same must apply where a classification society issues a general recommendation that, concurrently with repairs, work to strengthen a specific type of vessel shall be carried out. However, the provision will also apply where orders are issued to carry out repairs in a specific manner which entails that the ship will be better than it was, e.g. where an order is given to replace a damaged iron propeller by a propeller made of bronze. A deduction is nevertheless always subject to the condition that the strengthening or the improvement has made the repairs more expensive.

The "special advantages" requirement indicates some specific benefit or gain. As a starting proposition, it is natural to assume that the assured will have obtained an advantage if there has been an increase in standard. It is nevertheless not sufficient to justify a deduction that the replacement of a worn part by a new part, generally speaking, represents an advantage to the owner. For instance, the insurer may not claim a deduction under sub-clause 3 where an entirely new engine following an engine breakdown replaces an older, but still functional, auxiliary engine. But a deduction must be made if a part is installed with higher performance or better quality than the old part, e.g. where a new engine has greater active power or lower fuel consumption than the old one. This nevertheless presupposes that an engine of the "old" quality is obtainable. If that is not the case, and the improvement is inevitable, no deduction shall be made, regardless of whether or not the assured is able to take advantage of the improvement.

It is not considered an "advantage" under sub-clause 3 that an error from earlier recoverable repairs is corrected in connection with the repairs of a casualty which is a result of the error, provided that the relevant part was approved by the classification society, cf. Cl. 12-4.

Sub-clause 4, *first sentence* was amended in the 2007 version. Under earlier versions, if it was impossible to repair the damage completely, but the ship could be made seaworthy and fit for its intended use by less extensive repairs, the insurer was only liable for the depreciation in value in addition to the repair costs. However, the rules regarding seaworthiness were removed from the Plan in the 2007 version. Accordingly, the wording "the ship can be made seaworthy" has been replaced by "the ship satisfies the requirements as regards technical and operational safety", cf. in that respect the wording in Cl. 3-23.

If the repairs are feasible, but will be disproportionately expensive, the insurer has the right to limit his liability to the amount that less extensive repairs would cost, plus the depreciation in value, cf. sub-clause 4, *second sentence*. Typical situations where this provision may be applied is where the ship has sustained a dent in its keel, or where artistic decorations on board put in by the assured have been damaged. The situation is more doubtful when the bottom frame of the engine has been damaged and the choice is between welding it or replacing it. In such a situation it is hardly possibly to indicate a general solution.

It is only the insurer who can invoke the rule in sub-clause 4, second sentence. It may also be in the interest of the assured to make do with less extensive repairs, if complete repairs of the ship would result in a considerable loss of time for him, particularly if he is granted the right to claim compensation for the depreciation in value represented by the unrepaired damage. However, such a right for the assured entails a risk that claims for damages for a depreciation in value will be lodged very frequently, and these claims will be difficult to assess and might lead to the insurer being subjected to a great deal of pressure.

The fact that the assured has the ship restored to its prior condition at his own expense obviously does not mean that he is not entitled to claim separate compensation for the depreciation in value.

The claim for supplementary compensation arises when the repairs have been completed.

Clause 12-2. Compensation for unrepaired damage

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

According to relevant Nordic Insurance Contracts Acts (Nordic ICAs), the main rule is that the assured is entitled to full compensation for his economic loss, regardless of whether or not the damage

is repaired. The 1996 Plan adopted a different system: the basic principle in Cl. 12-1 was that the insurer's liability did not arise until the damage had been repaired, whereas Cl. 12-2 provided a limited right to compensation for unrepaired damage, namely when ownership of the ship passed from the assured by sale. In the 2007 version, the solution in Cl. 12-1 was maintained, but the right to compensation was made general. This solution concords with the English conditions, as well as with the solution for offshore structures, cf. the wording of Cl. 18-10 of the Plan prior to the 2007 version.

Cl. 12-2, sub-clause 1, of the 1996 Plan provided that the assured could claim compensation for the damage when the ownership of the ship passed from the assured by sale, enforced auction, seizure or requisition that did not give rise to compensation under Cl. 15-11. This limited right has now been replaced by a general right to claim compensation when the insurance period expires, cf. *sub-clause 1*. As mentioned above, this approach concords with the non-mandatory rule in Nordic ICAs, and with the solution that is widely practised in Norwegian non-marine insurance. The solution also concords with the ITCH. Even though it is primarily in a sale situation that the assured needs a right to claim compensation for unrepaired damage, it is therefore appropriate to generalise the rule. "(W)hen the insurance period expires" will as a rule mean upon the ordinary expiry of the insurance period. If the ship is sold, the insurance period expires at the time of sale, cf. Cl. 3-21. In the case of multi-year insurance contracts, on the other hand, each year constitutes an individual period which expires at the end of the year. Thus the assured does not need to wait until the entire multi-year period has expired, cf. Cl. 1-5, sub-clause 4, to which a reference to Cl. 12-2 has been added as one of the provisions under which a multi-year insurance contract is to be divided up into periods of one year.

As was the case under the 1996 Plan, only the assured is entitled to claim compensation. The insurer may not demand to pay compensation if the assured or the person to whom he transfers the ship wishes to repair it. The insurer's interests are deemed to be sufficiently well protected by the Plan's general rules regarding tender, etc.

The first sentence of sub-clause 2 states that compensation "is calculated on the basis of the estimated reduction in the market value of the ship due to the damage at the time of expiry, but shall not exceed the estimated cost of repairs". This provision concords with ITCH, and is a change in relation to earlier versions. The former solution was that compensation was to be calculated on the basis of the estimated cost of repairs at the time of the change of ownership, but was limited to the reduction in the proceeds of sale that is attributable to the damage. In addition, however, there were special presumption rules: in the event of a sale for scrapping, the damage was assumed not to have reduced the proceeds, and in other sale situations to have reduced the proceeds by the estimated cost of repairs. These special rules have now been deleted. The rule in sub-clause 2, however, must be expected to lead to the same substantive result.

The basis for the calculation is the significance of the damage for the ship's market value. However, the reduction in market value will only be significant if it is lower than "the estimated cost of repairs". In practice, therefore, the estimated repair costs will normally be decisive for the settlement. The amount of the estimated repair costs will vary depending on the location to which the assessment is to be tied. The basic principle must be to use the lowest price in the area in which it would have been natural to repair the ship if the repairs had been carried out. Under the rules of Cl. 12-12, sub-clause 3, the shipowner must have the right to demand that the price tendered by a yard be disregarded. Furthermore, the removal costs must be taken into account. If the ship is trading between a high-cost area and a low-cost area, only the prices in the low-cost area shall be taken into consideration, provided that it is feasible to carry out the repairs in the latter area.

As a basic principle, compensation must be based on the repair prices at the time the insurance period expires. In the case of multi-year insurance contracts, the expiry of each individual annual insurance period, cf. Cl. 1-5, sub-clause 4, is decisive. If the ship is sold, the insurance will terminate at the time of sale, cf. Cl. 3-21 of the Plan, and valuation must be carried out at that time. If no valuation was made at the time the insurance terminated, the damage must be assessed in another way, primarily on the basis of the survey reports. If the insurer wants to have a discretionary assessment of the repair costs carried out in connection with the survey of the damage, Cl. 12-10, sub-clause 3, gives him authority to require that this be done. Such assessment of unrepaired damage is not binding in relation to the settlement under Cl. 12-2, but it will be a very important element of evidence, particularly in the absence of a subsequent valuation. In the event of the ship being sold for scrapping, moreover, the limitation of liability due to the reduction in the market value of the ship as a result of the damage will normally make it superfluous to assess the damage with a view to repairs.

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

Sub-clause 3 was new in the 2007 version and states that no compensation may be claimed if the ship, later in the same period, becomes a total loss or qualifies for condemnation under Cl. 11-3 of the Plan. Although the provision is new in the Plan, the principle has traditionally applied that "a total loss absorbs partial damage", cf. the Commentary on Cl. 11-1. However, this principle becomes more relevant when the right to compensation is made a general entitlement, and it is therefore logical to formulate it as a separate rule. The provision concords with ITCH. The rationale is that a claim for

compensation for unrepaired damage in addition to compensation for total loss would give the assured an unjustified gain at the expense of the insurer. This rationale poses no problem in connection with condemnation under Cl. 11-3 because the assured is then clearly entitled to a condemnation settlement. However, this provision also applies if the total loss is not covered. In such case, there is no question of double compensation, whereas in this situation it follows from sub-clause 1 that the right to compensation is not triggered. Moreover, as a result of the subsequent total loss, the unrepaired damage will not affect the ship's market value. If the ship becomes a total loss or qualifies for condemnation in a subsequent insurance period, on the other hand, no deduction shall be made for compensation related to damage sustained in an earlier period. This solution applies regardless of whether or not the compensation has been disbursed.

Under sub-clause 4, the assured may, in the event of a transfer of ownership of the ship, transfer claims for known damage to the new owner. This provision is in accordance with Cl. 12-2, sub-clause 3, of the 2003 version. Although the right to compensation has been made a general entitlement, it is appropriate to retain certain limitations on the right to transfer ownership in the event of the sale of the ship. It is also an advantage to have a clear rule on this point because there is some uncertainty as to what follows from background law as regards the right to transfer such a claim.

The right to transfer the claim applies only to damage that was known at the time of transfer. If the ship is sold with undiscovered recoverable damage, the insurance settlement must be seen in conjunction with the regulation of liability between the parties under the contract of sale. If the damage is the assured's risk, he will be subject to the sanctions applicable under the law of sales. Insofar as the damage is a result of a risk for which the hull insurer is liable, the assured must subsequently be entitled to demand that the hull insurer who covered the ship when the peril struck cover any price reduction (or possibly repair costs) that he must pay to the buyer. Most contracts of sale relating to ships are, however, on "as is" terms, and in that event the undiscovered damage will be the buyer's risk. If damage is discovered, the buyer will not have any claim under the contract of sale against either the assured as seller or the assured's hull insurer. Nor is he entitled to cover under the assured's hull insurance through a transfer of the claim, neither in the form of transfer of a claim for unknown damage in connection with the sale, nor in the form of a later transfer when the damage is discovered. By accepting an "as is" condition, the buyer has taken a risk as regards this type of damage – the fact that the damage is insured should not put him in a better position. By making it a requirement that the damage must be known at the time of transfer, the transfer of unknown damage is thus precluded.

Where the damage is known at the time of transfer of the ship, the claim will normally be transferred at the same time. Should the need arise for a subsequent transfer of the claim for such known damage, however, the insurer must accept such transfer. Under Cl. 5-23, the assured has a time-limit of six months within which to give notice of known damage. Where a ship is transferred before expiry of

this time-limit, the assured should nevertheless notify the insurer of the damage as well as of the transfer of claim without the Plan stipulating any explicit requirement to that effect.

The basic principle when a claim is transferred is that the buyer is placed in the same position as the seller. The buyer may thus choose to have the ship repaired if it is sold in an unrepaired condition. Insofar as the buyer decides to claim compensation, sub-clause 2 applies in the usual manner.

Clause 12-3. Inadequate maintenance, etc.

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

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

Sub-clause 1 divides the risk of maintenance damage between the insurer and the assured. The provision establishes that the insurer is not liable for the costs of renewing or repairing the part or parts of the hull, machinery or equipment, which were in defective condition as a result of wear and tear, corrosion, rot or inadequate maintenance.

Given the way the provision is worded, the crucial question will be the technical condition of the ship at the time the casualty occurred. It must thus be established which parts of the ship, its machinery and equipment were in defective condition because of wear and tear, corrosion, rot or inadequate maintenance. The question whether the part or parts concerned were in a proper condition before the occurrence of the casualty will have to be evaluated by the surveyors and the technical experts. Only if they do not agree, will it be necessary to resort to the procedures available for deciding such disputes.

In the determination of whether one or several parts are “in defective condition”, the minimum requirements of the classification society will normally provide good guidance. Thus, if frames and shell plating have become thinner than the minimum requirements of the classification society, the insurer is not liable for the costs of renewing or repairing them. In this connection, it will be irrelevant whether the assured can demonstrate that he probably would have been able to continue sailing the ship until the next classification renewal without having to make replacements or repairs if the casualty had not occurred. Thus, if a ship has sustained cracks or dents in a bulkhead in bad weather and it is revealed that parts of the bulkhead were corroded below the minimum requirements of the classification society, it will be necessary to measure the parts of the bulkhead that fall below the minimum of the classification society and exclude the costs of renewing the steel in this area from

cover. On the other hand, the insurer shall cover the costs for those parts of the bulkhead that meet the classification society's minimum requirements.

The actual identification of what must be regarded as "part or parts" for the purpose of the provision shall be based on technical and economic considerations. If the classification society refuses to accept a partial renewal of a steel plate that is merely corroded in a limited area, the hull plate must thus be regarded as excluded from cover. The same will apply in relation to parts and components of the ship's machinery or equipment. If it is technically or economically justifiable and sensible to carry out a separate renewal or repair of one or several parts of the machinery or equipment, it is only that part or parts that are excluded from cover. If, however, the most expedient procedure from a technical/economic point of view is to replace a larger component, and not merely the part or parts which were in defective condition, the entire component will be excluded from cover.

Neither the size of the relevant part nor its value will be of significance. Thus, if a nut or bolt in the machinery has rusted to pieces and it would have been possible to replace it without any major problems, it is only the costs of the renewal of the nut or bolt that are excluded. It is nevertheless a condition that other parts of the machinery which have been damaged as a result of the breakdown of the bolt or nut concerned are not in defective condition. If they are, the insurer shall not cover the costs of replacing these parts either. Nor will the size of the ship in question be of any relevance. The fact that the rudder on smaller ships consists of one steel plate, whereas in larger ships it consists of several plates, is therefore irrelevant. If, in the latter case, it is technically and economically possible to repair the rudder by replacing the plate that was in a defective state, it is merely the costs of replacing the plate that are excluded.

As long as one or several parts cannot be regarded as being in proper condition, the costs of repairs or replacements shall be excluded from cover, regardless of their position or significance in the causal chain. It is therefore irrelevant whether the part concerned was the first that was struck and consequently triggered the casualty ("primary damage"), or whether the casualty can be traced back to another factor, where the part concerned was struck as a result of this factor ("consequential damage"). Thus, the surveyors will, in connection with any settlement, have to evaluate whether any of the parts for which compensation is now claimed, were in defective condition as a result of factors set forth in the provision.

If damage is caused to the machinery as a result of contaminated oil and feed water, the formal point of departure will be that if the oil, etc. has been contaminated as a result of inadequate maintenance, resulting damage to the machinery must be recoverable under Cl. 12-3, since the exclusions in Cl. 12-3 do not apply.

The “costs” which are excluded from cover under the provision are, in addition to the costs of purchasing or processing a new “part” to replace the defective one, the expenses incurred in access work and installation of “the part”, plus a reasonable proportion of the common costs of repairs, cf. Cl. 12-14.

By “corrosion” is meant the generation of rust and other attacks to which the material is exposed under the influence of chemical processes, whether or not humidity has been a contributory factor in the process. The exclusion is, however, limited to corrosion that occurs naturally of its own accord and over a certain period of time. “Corrosion” which can be traced back to a casualty must be regarded as recoverable damage, unless the assured can be blamed for not having prevented the corrosion. If the steel in hull or machinery is subjected to corrosion due to heat during a fire, the corrosion must be regarded as a consequence of the fire. The same applies if the packing around the propeller shaft is defective, either as a result of an error on the part of the repair yard, or following a casualty, and seawater penetrates and corrodes the shaft or bearings. In that case, corrosion must be regarded as a result of a casualty or inadequate work on the part of the yard. Furthermore, the insurer should cover more spontaneous corrosion damage if the corrosion is in itself in the nature of a “casualty”. An example is where the ship, whilst in port or laid up, is lying for a prolonged period of time in a place where external corrosion occurs to the hull or propeller to an entirely unanticipated and abnormal extent due to chemical pollution of the water, electrolytical corrosion, etc.

The exclusion for parts that are in defective condition due to “inadequate maintenance” presupposes the existence of a standard for “adequate maintenance”. Such a standard should be tied to the condition of the parts that are damaged. As regards most of the ship’s components, there are technical norms determining when a part should be replaced. Once the damage has occurred, the part or parts in question which are in a defective state must be examined to establish whether the norm for replacement has been exceeded. The fact that the defective part exceeds the norm for replacement is nevertheless not sufficient to constitute “inadequate maintenance”. If the owner is able to document that he has followed a planned and proper maintenance programme, but the part is nevertheless worn out, this will not be a case of “inadequate maintenance”. However, the damage will not be recoverable from the insurer if he can demonstrate that it is the result of normal wear and tear arising from the ordinary use of the ship. cf. below. If, on the other hand, the damage is the result of extraordinary wear and tear, it must be regarded as a casualty.

By a proper maintenance programme is meant that the assured has complied with the norms and rules associated with the maintenance of the part in question. Norms and rules on maintenance may partly follow from recommendations and rules from the classification society, partly from the ISM Code, and partly from the user’s manual from the supplier. The user’s manual will normally contain information as to the type of checks that should be carried out in order to prevent damage from wear and tear, the frequency of such checks and the extent and time of the actual maintenance. Wear and tear which it

was impossible to detect by means of the prescribed check or which could not have been prevented with the prescribed maintenance programme must basically be the insurer's risk, provided that it has the character of a casualty, c.f. the remarks above.

Also a less comprehensive maintenance programme than the one required by the recommendations and rules of the classification society, the ISM Code and the user's manual must, however, be justifiable in a specific case. However, in that event the assured must document that he has sufficient empirical material to have a less comprehensive maintenance programme than indicated above.

It is not a condition for establishing "inadequate maintenance" that the assured is aware of the risk of wear-and-tear damage. On the other hand: If the assured by means of the stipulated check, or in some other way, discovers irregularities, it is not sufficient that he follows the prescribed maintenance programme. In that event, he has a duty to act within a reasonable period of time.

A difficult problem relating to the definition of the term "inadequate maintenance" is the borderline for faults or negligence committed by the ship's master or crew, which are covered under Cl. 3-36, sub-clause 1. Generally speaking, it may be said that inadequate maintenance presupposes that it occurs over a certain period of time, and that it is not a question of an isolated fault, but of a failure of the system. The clearest example of "inadequate maintenance" is therefore inadequate routines for monitoring and carrying out maintenance. An isolated error in the performance of maintenance routines, e.g. forgetting to drain cooling water from an auxiliary engine - does not, however, constitute inadequate maintenance, but a fault on the part of the crew. The same applies in the event of an isolated incident where instructions relating to the maintenance were forgotten. However, an isolated fault may become inadequate maintenance if the fault is of such a nature that it should have been rectified quickly as part of the maintenance program, and this is not done. The problem is illustrated by ND 1988.21 Agder IONIO and ND 1990.442 Stavanger MARE PRIDE, even though both judgments applied the standard for adequate maintenance too strictly. In the IONIO case the failure to preheat the fuel oil on a number of occasions was regarded as inadequate maintenance because the requirement was that the fuel oil should be checked daily. In the ND 1990.442 Stavanger MARE PRIDE judgment, it was regarded as inadequate maintenance when they had failed to correct an earlier faulty connection of the fuel line on board and to clean the fuel oil that had become contaminated through the faulty connection. It follows from the way the standard for adequate maintenance is outlined above that in order for a failure to rectify faults to amount to inadequate maintenance, a norm must exist which stipulates the relevant duty to act, e.g. a daily check of fuel oil or regular inspections of couplings. These judgments give therefore little direct help in establishing the content of "inadequate maintenance".

Given the definition of inadequate maintenance, the exclusion for "wear and tear" acquires less independent significance. If ordinary wear and tear results in a part being in defective condition, this

will typically be a consequence of inadequate maintenance. On the other hand, if a part is worn in spite of adequate maintenance, wear and tear must normally be regarded as extraordinary. Ordinary wear and tear is therefore normally already excluded by virtue of the exclusion for inadequate maintenance. The exclusion of wear and tear will acquire independent significance where ordinary wear and tear is not caught by the prescribed maintenance routines, e.g. because they are based on wrong assumptions as to a part's durability in normal use. However, such extraordinary wear and tear will as a rule have to be regarded as casualty damage, e.g. where the extraordinary wear and tear can be traced back to earlier, unrepaired casualty damage, or to negligence on the part of master or crew which does not provide a basis for identification under Cl. 3-36, sub-clause 1.

The term "similar causes" is aimed at causes of damage such as rats, mice, worms, fungus and marine growth. However, faulty workmanship cannot automatically be equated with the causes mentioned in Cl. 12-3. Faulty workmanship refers to faults committed in connection with the building or repairs of the ship. If such errors were committed in connection with the repairs of damage covered under the insurance, the costs of rectifying the errors must be covered by the relevant insurer. By contrast, faulty workmanship committed in connection with non-recoverable work must in certain cases be equated with inadequate maintenance, viz. if the faulty workmanship is a result of the fact that the assured has chosen an incompetent repair yard or has failed to follow up the yard's work. In that event, the error must be considered in accordance with Cl. 12-3. If, however, it is a question of other faulty workmanship relating to non-recoverable work which is not in the nature of inadequate maintenance or the like, and which result in a casualty, the insurer must be liable in the normal way for both the damage to the part which was originally affected by the error, and for any consequential damage. The costs incurred in doing the repairs over again, i.e. by rectifying the actual error, will, however, not be recoverable. In that event, the assured would in reality obtain an improvement of the ship, cf. the principle in Cl. 12-1, sub-clause 3.

The exclusion for "inadequate maintenance", etc. is worded as a rule of causation. This means that the general rule on apportionment in the event of a combination of several perils in Cl. 2-13 applies. The insurer may therefore be held partly liable for replacing a defective part where the defect must in part be attributable to inadequate maintenance or to some other excluded cause of damage, and partly to the strain to which the part has been exposed in connection with a casualty.

The limitation of liability refers to the costs of repairing the parts that are in defective condition due to wear and tear, etc. It is irrelevant whether the wear and tear, etc. has resulted in a casualty. If, following an ordinary casualty, parts are discovered that are so worn that the classification society would have demanded a replacement, the repairs or replacement of these parts are the owner's liability, even if the relevant part may also have been damaged in the casualty. By way of example may be mentioned collision damage to hull plates that are corroded to a state below the classification

society's minimum requirements prior to the casualty, despite the fact that the ship is fully in class without class conditions.

The rules in sub-clause 1 must be seen in connection with the general rules relating to the insurer's liability. The insurer's liability for repairs or renewal of those damaged parts that were in defective condition therefore presupposes that the lack of maintenance or the like is not so serious or extensive that the ship is not compliant with technical or operational safety requirements. In that event, it is the rules in Cl. 3-22 *et seq.* that will decide whether and to what extent the insurer is liable. The exclusion in Cl. 12-3, sub-clause 1, is on the one hand less far-reaching than the rules regarding breaches of safety regulations under Cl. 3-22, cf. Cl. 3-25, but shall - in contrast to Cl. 3-22, cf. Cl. 3-25 - on the other hand apply regardless of the assured's subjective conduct. If the defective condition was of such a nature as to threaten the technical or operational safety of the ship, and blame for this could be ascribed to the assured, the insurer may disclaim liability under Cl. 3-25, not just for the replacement of the defective part, but also for the further consequential damage and losses. It is, however, a condition for applying the rules regarding breaches of safety regulations that the concrete breach of the regulations can be ascribed to the assured. If he can only be blamed for a general failure in the instructions and the checking routines regarding maintenance, the situation will have to be evaluated under Cl. 12-3.

The limitations of liability in Cl. 12-3 apply only to Chapter 12 on damage. If these perils result in a total loss, the insurer will be fully liable under Chapter 11, unless some of the exclusions in Chapter 3 become applicable, e.g. that the ship due to inadequate maintenance was not compliant with technical or operational safety requirements, cf. Cl. 3-22, cf. Cl. 3-25.

Sub-clause 2 in the earlier versions contained a rule to the effect that the insurer was not liable for the costs of renewing or repairing parts of the outer hull which were lost or damaged because frames or similar supporting and reinforcing elements were in defective condition as a result of inadequate maintenance or the like. This provision was deleted. The reason for the provision was that problems arose in practice as regards requiring timely maintenance to prevent parts of the ship's side from loosening or falling off. These problems now appear to have been solved, and there is therefore no need for a specific rule of this nature, which does not exist in other conditions.

Clause 12-4. Error in design, etc.

Introduction

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

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

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

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

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

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

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

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

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

Approved by class

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

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

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

As regards vessels that sail under the supervision of and with a certificate from the Maritime Directorate or other similar body, there will not normally be any approval of building and repair work from a classification society. Accordingly, they will not be entitled to cover under this provision. However, a few such vessels are built in accordance with requirements from their classification society, even though they are operating under the supervision and certificate of the Maritime Directorate. In relation to Cl. 12-4 the deciding factor must in that event be whether the relevant part was originally approved by the classification society, and not whether the ship is in class.

What constitutes damage, the meaning of part

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

The extent of the insurer’s Liability

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

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

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

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

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

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

Error in design and faulty material

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

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

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

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

An error in design will normally become apparent relatively early in the ship's planned lifetime, unless the error in question causes problems only in rare cases or in very special circumstances. The fact that parts of the ship become defective after three years due to previously unknown circumstances is an indication that an error in design is involved. If, however, the ship functions

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

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

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

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

Interaction with other provisions in the Plan

Duties of the assured Chapter 3

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

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

Causation, Cl. 2-13

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

Incidence of loss, Cl. 2-11

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

Clause 12-5. Losses that are not recoverable

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

Cl. 176 of the 1964 Plan contained a number of limitations in the hull insurer's liability for damage to the ship. Furthermore, the Special Conditions contained provisions relating to bottom painting, which replaced Cl. 176 (d) and relating to loss resulting from contamination of lubricating oil, etc., which replaced Cl. 176 (m). The provisions relating to bottom painting in sub-clause (d) and Cefor I.16 and PIC Cl. 5.18 are impractical and have therefore been deleted. This means that bottom painting in hull insurance for ocean-going vessels must henceforth be treated in the same way as other painting, and that the insurer shall always cover bottom painting in the damaged area. Sub-clause (e) contained a provision relating to the caulking of hull and deck. This provision is impractical in hull insurance for ocean-going vessels and has therefore been moved to Chapter 17 on insurance of fishing vessels and freighters, cf. Cl. 17-12 (c). The rules in sub-clauses (g) to (l) and (n) were considered unnecessary in conjunction with the general provision in Cl. 12-1 and have therefore been deleted.

The limitations in the provision apply first and foremost to compensation for particular damage. However, the provision shall also apply where general average under Cl. 4-10 is recoverable according to the rules relating to particular average, because this is more favourable for the assured.

The limitation in *sub-clause (a)* has been taken from Cl. 176 (a) of the 1964 Plan, but the term “similar direct expenses” has been replaced by “other ordinary expenses”. Ordinary operating expenses during repairs are not normally a necessary consequence of the repairs, and have traditionally not been covered by the hull insurer. Crew’s wages and maintenance and other ordinary operating expenses have, however, been covered during the period of time it takes to move the ship to the repair yard in accordance with Cl. 12-13.

The exception applies only to operating expenses that are incurred independently of the repairs, e.g. the cleaning of tanks on a chemical tanker, which would have been required regardless of the casualty. Expenses relating to the repairs must, however, be covered, such as bunkers consumption during testing of the engine and during a trial run, maintenance of a repair crew staying on board, and expenses for fire watch required by the repair yard or the authorities. The same applies to expenses for accommodation ashore for the crew where the damage to the ship makes it impossible for them to stay on board. According to practice, maintenance of the crew is nevertheless not covered in such cases, based on the point of view that the assured would have had to pay these expenses if the crew had stayed on board.

Until 1996, in practice, the crew’s overtime in connection with recoverable repairs was covered, but not maintenance and ordinary wages. In the 1996 revision this practice was explicitly maintained. Since then, however, it has proved to be difficult to make a distinction between ordinary working hours and overtime. Moreover, it has been the opinion that both the shipowner and the insurer benefit from the crew carrying out recoverable repairs during ordinary working hours. When preparing the 2002 Version, therefore, it was agreed to leave room for a change in practice on this point. Such a change in practice could in itself have been carried out without changing the wording, because "ordinary expenses connected with the running of the ship" may be interpreted as meaning that they do not cover expenses relating to the crew's participation in recoverable repairs during ordinary working hours. To prevent confusion and discussion concerning claims settlement, it has nonetheless been stated explicitly that "this must be specially agreed". This ensures that the assured and the insurer agree in advance on what is to be done and how much time is to be spent. For the assured and the claims leader, it is also an advantage to be able to refer to an explicit provision. However, a fundamental condition for cover is nonetheless that the insurer benefits from the repairs in the form of a reduction in the cost of repairs.

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

The limitation in *sub-clause (b)* is identical to Cl. 176 (b) of the 1964 Plan and is founded on the basic point of view that whether or not the ship carries a cargo shall, in principle, have no bearing on the hull insurer's liability. Expenses for discharging, warehousing, etc. of cargo necessitated by the repair work are therefore no concern of the hull insurer's. This provision applies both where the work in connection with the cargo has become more expensive because of the damage to the ship and where the cargo has sustained damage requiring special measures in order to remove it. It is furthermore irrelevant if the cargo has, due to the damage, shifted and moved to areas of the ship where it does not belong, or if the ship has to be discharged after the casualty in order to make a survey possible. Extraordinary discharging expenses may be recoverable under P&I insurance.

In practice, it has been assumed that the necessary thorough cleaning of bulkheads, etc. shall not be regarded as the removal of "cargo", and no changes are intended on this point.

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

Sub-clause (d) is taken from Cl. 176 (f) of the 1964 Plan, and excludes objects used for mooring, towage, etc., as well as tarpaulins, provided that certain specific conditions are met. Often such objects will fall outside the scope of cover simply due to the identification of articles intended for consumption in Cl. 10-1, sub-clause 2. However, for equipment covered in Cl. 10-1, sub-clause 1, the exclusion acquires independent significance. The term "etc." shall not be given a wide interpretation to include loading and discharging equipment.

In contrast to what applied under the 1964 Plan, the exclusion applies only if the object in question has been used. Thus, if a reserve mooring rope is soiled by paint before use, the damage shall be covered. The burden of proving that damaged objects have not been used is on the assured. The term "which must normally be replaced several times during the expected life of the ship" is also new in relation to the 1964 Plan. Anchors, chain and other equipment with a long life expectancy will therefore be within the cover, in contrast to a "pennant wire" which is used in connection with dropping and weighing the anchors on drilling vessels, and a tow wire on salvage vessels, etc.

Sub-clause (e) is identical to Cl. 176 (k) of the 1964 Plan. The provision covers all types of blocks and anodes that will be corroded over a period of time. This means that silver anodes also fall under this provision, even though this differs in certain respects from earlier practice on this point. Electric

anodes, however, fall outside the scope of cover. The exclusion covers every cause, including theft of the blocks.

Clause 12-6. Deferred repairs

The provision corresponds to Section 177 of the 1964 Plan. The provision was amended in the 2002 version.

In the 1996 version, the rule was formulated as an absolute time-limit for carrying out repairs, setting the time-limit at five years after the damage occurred, cf. Cl. 12-6, first sentence, of the 1996 version. If the repairs were carried out later, the insurer was not liable for any costs. However, in practice this provision could give rise to problems in relation to the limitation rules in Cl. 5-24 of the Plan, because the period of limitation and the five-year time limit for repair of damage were not coordinated. It was therefore asserted that the assured might run the risk of the claim being time-barred under Cl. 5-24, sub-clause 1, before the five-year time-limit under Cl. 12-6 had expired. Attempts to coordinate the provisions proved to be difficult because it was then also necessary to take into consideration repairs of unknown damage and total loss.

To avoid this type of coordination problem, it was agreed to revert in the 2002 version to the solution for deferred repairs that was used in the 1964 Plan. Consequently, the rule is that the liability of the insurer does not terminate after five years, but that the insurer shall not be liable for any increase in the cost of the repairs that may occur after expiry of the five-year time-limit. The absolute time-limit of five years was introduced into the Special Conditions when the conditions were made more stringent at the end of the 1980s, but the insurers have now concluded that there is no longer need for such a strict rule, and that the solution in the 1964 Plan was acceptable.

Thus, as before, the insurer is liable for the full costs of repair for repairs that are carried out within the time-limit of five years. For repairs that are carried out later, however, liability is limited to such costs as would have been incurred if the repairs had been carried out before expiry of the time-limit. Any increase in cost that may be incurred after expiry of the five-year time-limit thus becomes the risk of the assured. The deduction for the cost increase must be calculated on the basis of either an estimate of the repairs upon expiry of the five-year time limit or the ordinary index for repair costs.

Cl. 12-6, second sentence, of the 1996 version of the Plan contained a rule regarding extension of the time-limit for repairs if the classification society accepted a period of more than five years between each docking. The new rule renders this provision superfluous.

Clause 12-7. Temporary repairs

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

Sub-clause 1 is identical to Cl. 178 of the 1964 Plan and imposes full liability on the insurer for "necessary temporary repairs". Temporary repairs are "necessary" when permanent repairs cannot be carried out in a satisfactory manner at the place where the ship is lying, or where such repairs would be unreasonably costly. In such cases, it will be in the best interests of the assured as well as the insurer that temporary repairs of the damage are carried out, and the insurer will normally consent to such repairs being carried out and cover the full costs. If the insurer does not give his explicit consent, the assured may have the temporary repairs carried out for the insurer's account if permanent repairs cannot be carried out at the place where the ship is at the time.

The term "temporary repairs" comprises all measures necessary to get the ship to the repair yard, but which are not intended to be permanent. This includes renewal of parts of the ship or its equipment and in some cases also rental of equipment, e.g. the rental of a mobile generator. If parts are installed in the ship which are to be replaced later, e.g. a rented generator, this must be regarded as a temporary repair. This nevertheless presupposes that the ship sails to a repair yard. If the assured, after having received a rented generator to enable it to proceed to a repair yard, instead chooses to sail on without having repairs carried out, he forfeits his right to cover. In that event, the rented generator is no longer a part of necessary temporary repairs, and the cover lapses.

Destruction may also be regarded as temporary repairs if such destruction is necessary in order to get the ship to a repair yard, e.g. where part of a propeller blade has partly fallen off in connection with a casualty and the opposite blade is cut off as a provisional solution in order to reduce the vibrations, thus enabling the ship to proceed until it is convenient to replace or repair the propeller.

That repairs "cannot be carried out" means that no repairs that meet the requirements in Cl. 12-1, sub-clause 1, can be carried out. The provision is first and foremost aimed at a situation where repairs are physically impossible, i.e. that there is no repair yard that can carry out the work in a satisfactory manner. However, waiting time at the repair yard may, depending on the circumstances, also constitute "unrepairability" if the waiting time is long enough. The distinction between "unrepairability" and more ordinary waiting time, which is governed by sub-clause 2, must be decided on a case-to-case basis. Basically, the owner must accept a waiting time of 1-2 weeks, but not 3-4 months. The dividing line will, however, depend on the type of ship and the nature of the repairs. A high-cost ship cannot be expected to lie still for months waiting for some small part to be manufactured ashore. It is therefore not possible to stipulate any absolute upper or lower limits. In extreme cases, even two weeks' waiting time may have such unfortunate economic consequences for the owner as to qualify as "unrepairability".

Sub-clause 2 regulates the situation where there is no "unrepairability", but where the assured is nevertheless interested in postponing the permanent repairs and is content with a temporary

alternative. This will first and foremost be the case where the more extensive work in connection with permanent repairs cannot be carried out without waiting time, whereas it is possible to have temporary repairs taken care of immediately. However, it is also conceivable that, due to the general operation schedule of the ship, the assured is interested in postponing prolonged and permanent repairs, e.g. until the ship has to undergo a classification survey in any event, and will therefore be content with temporary repairs which can be effected quickly. If it is also to the insurer's advantage to have such temporary work carried out, e.g. because it makes it possible to have the permanent repairs done at a less expensive repair yard, sub-clause 2 makes the insurer liable for the costs of the temporary repairs within the limits of what he has saved.

The normal situation, however, is that the costs of temporary repairs are wasted from the insurer's point of view. In that event, the insurer will prefer that the damage to the ship is repaired immediately. This is just one aspect of a problem that may arise in several connections, viz. the conflict of interests between the assured and the hull insurer when the assured wishes to avert a loss of time. The assured normally wants repairs carried out as promptly as possible and at a time where it does not interfere with the operation of the ship. He may therefore be interested in choosing the tender that offers the shortest time of repairs, even if it is not the cheapest. He wants to use methods that expedite repairs, and he will be interested in temporary repairs of the damage if this makes it possible to postpone the permanent repairs to a more convenient time. As for the hull insurer, he is not liable for the loss of time and therefore wants the total costs of repairs to be as low as possible, provided that the quality of the work is up to standard.

The 1964 Plan solved these problems by requiring the insurer to consider the assured's interest in averting a loss of time in most of the situations where this question might arise. The rules were worded somewhat differently in the various situations, but the common denominator was that the value of the loss of time suffered by the assured, or which he averted through special measures, was set at 20% p.a. of the agreed insurable hull value, which corresponds to approximately 0.55 per thousand per day.

During the revision, discussion took place as to whether the current solution with a limited loss-of-time cover in connection with temporary repairs, costs of accelerating the repair work and inviting tenders should be retained, or whether this element of the cover should be transferred to loss-of-hire insurance. In contrast to the situation in 1964, loss-of-hire insurance is now so common that it may be natural to consider the cover of loss of time collectively for hull and loss-of-hire insurance, and attribute the essential part of the cover to the loss-of-hire insurance. The fact that the solution from the 1964 Plan was nevertheless maintained was due to several factors. One thing is that not all owners have loss-of-hire insurance, and that at any rate the fact must be faced that such insurance may become less common again if the loss-of-hire insurance premium increases. The elements of the loss-of-hire cover which fall within the scope of the hull insurance will furthermore often represent such modest amounts that they will fall below the deductible in the loss-of-hire insurance, so that a transfer

of the cover to the loss-of-hire insurer will in practice mean that the owner will not have his loss covered. Furthermore, it is a fact that it will, from a market point of view, be difficult to offer a hull insurance where the loss-of-hire element is significantly inferior to the situation in comparable markets.

As under the 1964 Plan, therefore, Cl. 12-7, sub-clause 2, *second sentence*, imposes a certain liability on the insurer for "unnecessary" temporary repairs, even if they are wasted from the insurer's point of view. The insurer shall, under any circumstances, cover the costs within the framework of the "normal loss of time" which the assured avoids by choosing such a procedure. When looking into the question as to how much time has been saved, it is, on the one hand, necessary to look at the time the temporary, and later the permanent, repairs took and, on the other hand, the time it would have taken if the ship had carried out the permanent repairs immediately.

A condition for applying the rule is that, from an overall point of view, the assured has saved time. Consequently, it will first and foremost be applicable where the ship would have had to lie and wait for repairs if such repairs were to be permanent. If a repair yard could in actual fact have taken the ship immediately, but the assured preferred short, temporary repairs in order to take the loss of time at a more convenient time, the final settlement will have to wait until it has been established how long the total repair time will be.

In the evaluation of whether the assured has saved time, not only the time for repairing the damage of the casualty in question shall be taken into account but, contrary to earlier practice, the time for other work shall also be included.

An example illustrates the problem:
The ship is lying in port (A), where temporary repairs take 10 days and permanent repairs 20. The assured chooses to postpone permanent repairs to a planned stay of 15 days at a repair yard for routine maintenance and classification work in 12 months in port (B). In port (B) it turns out that the casualty damage can be repaired permanently in 15 days. According to earlier practice, classification work was not taken into account, only the time for the casualty repairs was considered. Temporary repairs in (A) plus permanent repairs in (B) would then give 25 days of repairs, while permanent repairs in (A) would give 20 days of repairs. The assured would thus not save anything on the temporary repairs and did not get any compensation for the temporary repairs under the 20% rule. Under the Plan, however, the casualty repairs and the classification work shall be considered collectively. In that event, the assured will, by choosing temporary repairs in (A) and permanent repairs plus classification work in (B) have a total time of repairs of 25 days, whilst permanent repairs in (A) and classification work in (B) give a total repair time of 35 days. The assured will in that event save 10 days by having temporary repairs carried out in (A).

Cl. 178, sub-clause 2, of the 1964 Plan made the principle of the insurer's liability for loss of time applicable to all cases of "temporary repairs" which were not "necessary". In the Special Conditions, however, this solution was limited so that the 20% rule in sub-clause 2 was not to apply "where part of the ship or its equipment is renewed in order to save time for the assured". It has, moreover, been established practice to refuse compensation under sub-clause 2 in the event of rental of objects, e.g. mobile generators, in order to save time. These limitations have been generalised by sub-clause 2 now only applying to "temporary repairs of the damaged object". This means that, contrary to sub-clause 1, the term "temporary repairs" in sub-clause 2 only comprises repairs in a strict sense, i.e. the actual repair of the damaged part, but not the renewal of a part, nor the rental of substitute machinery. In the case of hull damage the "damaged object" must be regarded as synonymous with the "damaged part".

If the assured is also granted full or partial compensation for the temporary repairs in general average, the insurer will be subrogated to the assured's claim in the general average according to the normal rules. It is not necessary to state this explicitly.

To the extent that the temporary repairs are recoverable, this will be without ice damage or machinery damage deductions, cf. Cl. 12-17 (c).

Clause 12-8. Costs incurred in expediting repairs

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

The Clause is based on the view of the loss-of-time problem which was discussed in the preceding sub-clause. When the assured takes extraordinary measures to save time during the repairs, the insurer should be liable for the additional costs that the assured thereby incurs within the limits of the normal loss of time that he has averted. The rule may lead to the assured initiating extraordinary measures in exceptional cases, even if the possibilities of the ship making a profit are slight. Based on an overall evaluation, it will nevertheless normally be worthwhile from an economic point of view to use overtime or other extraordinary measures.

The provision is based on a distinction between "ordinary" and "extraordinary" measures to expedite repairs. The dividing line is, however, far from clear-cut, cf. *Brækhus/Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 493, and may also be adjusted over time if the methods of repair change. The provision therefore opens the door to discretionary evaluations, where the individual solutions must vary in accordance with technical developments. In the current situation, it is common practice to carry out certain types of work by means of mobile repair teams. Sending spare parts by charter plane is "extraordinary", however. Overtime payment to the repair yard will normally also be

"extraordinary". A bonus paid to the repair yard is "extraordinary" if overtime or other extraordinary measures have been used to obtain the bonus - in other cases such a bonus is ordinary.

As regards the dividing line between "increased ordinary travel expenses" and "extraordinary measures", reference is made to the discussion concerning Cl. 4-7.

Cl. 179 of the 1964 Plan concerned the expediting of "repairs". In the Special Conditions, however, it was emphasized that the provision did not apply where part of the ship or its equipment was renewed in order to save time for the assured. In practice, time saved by renting equipment has not been recoverable. The Plan maintains these limitations, and has therefore replaced the term "repairs" with "repairs of the damaged object". Other measures, such as rental of a generator, consequently fall outside the scope of Cl. 12-8. The same applies if the assured chooses to buy a new and more expensive part in a situation where the part in question could be obtained at a more reasonable price after some waiting time. This concords with prior practice. It has also been practice to indemnify new parts that are used to save time, up to the amount of what it would have cost to repair the parts. Here we are still dealing with repairs of the damaged object.

"Repairs of the damaged object" comprise all the time that will be required in connection with the repairs, including waiting time. In other words, the insurer's liability cannot be limited to the time when the repairs are in actual fact in progress. The deciding factor is the total period of time during which the ship would have been forced to lie idle in connection with the repairs if the extraordinary measures had not been initiated, compared with the period of time during which the ship in actual fact lies idle. Thus, if another ship is taken out of dock in order to allow space for repairs of the insured ship and save waiting time, expenses in connection with the other ship leaving and entering the dock are covered under the 20% rule. The narrowing of the repair concept applies only to the specification of the actual repairs, and not to the time frame of what constitutes "repairs".

If the repairs are carried out by mobile repair teams without causing delays in the ship's schedule, the loss of time must be set at zero. As mentioned above, the use of mobile repair teams will, however, normally fall outside the scope of the provision for the simple reason that today this form of repairs cannot be regarded as extraordinary.

Even though the provision applies to the *time* saved, practice has been that when overtime is used to save *dock rental*, the overtime costs have been covered up to the saved rental amount. The intention is not to make any change in this practice.

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

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

Often several repair jobs will be carried out concurrently, each of which could be expedited by separate measures. According to the *second sentence* of this Clause, the total repair time the assured saves by having the repairs carried out in this manner must in such cases be checked, and the total additional costs within the limits of the normal loss of time during the period of time saved shall be covered. If the ship is ready 10 days earlier by having the hull work done on overtime and sending a new propeller by air, the additional costs incurred by these measures are recoverable within the limits of the normal loss of time for 10 days.

As regards general average, the same applies under this provision as under Cl. 12-7. If the assured has received compensation for the additional costs as "substituted expenses" in general average, the insurer will be subrogated to his rights in the general average to the extent compensation has been paid for the same costs under this clause.

Clause 12-9. Repairs of a *vessel* that is condemnable

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

The provision is intended as a defence for the insurer if the assured insists on making repairs. If the assured repairs the ship because the insurer refused to approve a claim for condemnation, or the parties agree that repairs are expedient, the insurer can not invoke Cl. 12-9 if the actual costs of repairs exceed the sum insured plus additional costs. The provision is furthermore commented on in further detail under Cl. 11-5 above.

Clause 12-10. Survey of damage

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

Sub-clauses 1-3 are identical to the 1964 Plan and concern survey of damage and the submission of survey reports by the parties' representatives prior to repairs. In practice, *sub-clauses 1 and 2* concerning survey are often not adhered to because the assured either has not had his own representative present, or because the representative fails to submit a report. This type of conduct on the part of the assured must be interpreted to mean that he accepts the report from the insurer's representative. If he later wishes to contest it, he has the burden of proving that it is incorrect.

Sub-clause 3 gives both parties the right to demand the submission of preliminary reports with an approximate estimate of the costs of repairs. The significance of the provision is that each of the parties may demand that also the other party's representative submit such a preliminary report. For the assured, this right will be particularly relevant if he is in doubt as to whether it is worthwhile repairing the ship. The conclusions in the survey reports are not decisive in the claims settlement, but they will, of course, carry a great deal of weight. The surveyors' evaluation as to when and how the individual incidents of damage occurred may therefore in actual fact ultimately be decisive for the question of compensation.

Under the 1964 Plan, if the representatives of the assured and the insurer disagreed about these questions, they were to obtain a reasoned opinion from an umpire. *Sub-clause 4* leaves this decision to the parties and their discretion, cf. the fact that the word "shall" has been changed to "may". Like the parties' representatives, the umpire shall not make any binding decision, but his opinion will, of course, carry great weight as evidence in the event of a subsequent litigation.

Again under the 1964 Plan, if the parties disagreed as regards the choice of umpire, he was to be appointed by a notary public or the Norwegian consul if the ship was abroad. This system did not work very well in practice: if the parties disagreed to begin with, they would normally not manage to agree on the appointment of an umpire either, and it turned out that frequently the notary public or the consul appointed someone who did not command confidence in the relevant circles. In the event of disagreement, the umpire should therefore be appointed by a Nordic average adjuster, see sub-clause 4, *second sentence*. This may be done regardless of whether the claims settlement has already been submitted to an average adjuster. The right to demand an umpire will furthermore remain in effect until the claims settlement has been brought to its conclusion. It is therefore no condition that the umpire be given an opportunity to inspect the damage before the repairs have been completed.
In earlier versions the umpire in these cases was to be designated by a Norwegian average adjuster. The reason for this amendment is the desire to promote greater Nordic collaboration on use of the Plan.

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

According to *sub-clause 5*, private surveys are the normal procedure for the assessment of damage. Judicial valuation of the damage may only be undertaken when required by mandatory rules of law. See also Section 487 of the Norwegian Maritime Code.

If the assured has the ship repaired without first conducting a survey where the insurer has had the opportunity to attend, this will affect the assured's burden of proof, cf. *sub-clause 6*. The assured is required to notify the insurer well in advance as to the time and place of the repairs so that he can take

the appropriate measures. If the assured notifies the insurer of the survey so late that his representative is unable to form a definite opinion as to the cause and extent of the damage, this must be equated with making repairs without giving the insurer the opportunity to survey the damage. The assured will, in that event, have the burden of proving that the damage is not attributable to causes excluded from the cover by separate provisions, e.g. inadequate maintenance, etc., cf. Cl. 12-3, that it did not occur during an earlier insurance year, or was not attributable to causes which are subject to special deductions.

As regards the problems that may arise if the assured accepts the repair invoices without the insurer's surveyor having attended the negotiations with the repair yard, or agreeing about the amounts of the invoices, reference is made to the Commentary on Cl. 12-1.

Clause 12-11. Invitations to tender

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

Sub-clause 1, first sentence gives the insurer the right to demand that tenders be obtained. If the insurer is aware of the casualty, it must be his duty to clarify with the assured whether or not he will demand invitations to tender. If he fails to do so, he may not react if the assured commences repairs without further notice. If, on the other hand, the insurer has demanded invitations to tender and the assured fails to follow up, the *second sentence* establishes the insurer's right to obtain tenders himself, possibly after the repairs have been carried out. The same applies if the assured repairs the damage without having notified the insurer.

Given that the invitation for tenders from several repair yards is first and foremost in the insurer's interest, the insurer should not be allowed to cause the assured any further loss of time through the invitation to tender without being liable for a normal rate of compensation for the time that is in actual fact lost. However, it is normal procedure in connection with repairs of major damage that tenders are invited, and the assured must therefore in any event accept a certain delay. For this reason, the insurer's liability for loss of time does not start to run until after 10 days. It is also a condition that the loss of time is exclusively a consequence of the fact that tenders are to be invited. If there is any waiting time at all the relevant repair yards, the invitation to tender will not in itself have caused the assured any loss.

Clause 12-12. Choice of repair yard

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

According to *sub-clause 1*, the tenders received shall be adjusted by adding the costs of removal when ascertaining which tender is in actual fact the lowest.

It is a basic rule in Norwegian hull insurance that it is the assured himself who decides where his ship is going to be repaired, cf. *sub-clause 2*. However, if the insurer has obtained a less expensive tender from another repair yard than the one chosen by the owner, he cannot be held liable to pay the full costs of repairs at a yard that has submitted a more expensive tender. As mentioned above in connection with Cl. 12-7, however, the insurer shall consider the assured's interest in having the ship repaired at a yard which is expensive, but works fast, thereby reducing the loss of time. When it has been established which tender is in real terms the lowest, the insurer shall cover the assured's additional costs in choosing a faster repair yard within the limits of the "normal value of the time" which the assured saves. The additional liability will obviously be contingent on equivalent additional costs having accrued. The insurer is never liable to pay loss-of-time compensation as such in addition to the invoice for repairs, but in some cases a share of the assured's increased repair costs incurred because of his wish to use a faster repair yard.

Sub-clause 3 regulates the situation where the assured does not want to have the ship repaired at a particular repair yard. Provided that the assured "due to special circumstances" has "justifiable reason to object to the repairs", he may demand that the tender from that yard be disregarded. An example of circumstances which give the assured "justifiable reason" to object to the repairs being carried out at one of the yards is justifiable doubt as to whether the yard's technical and economic capacity is sufficient, cf. *Brækhus/Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 491. The fact that the assured is not on good terms with the repair yard due to disputes concerning the payment for earlier assignments is normally not relevant, unless the assured is able to prove that the disagreement is due to dishonesty or the like on the part of the repair yard. An actual threat of strike at the yard will also be relevant, as will a situation where the yard has relatively recently been the victim of repeated strikes and there is reason to fear that the conflict has not been resolved. The assured's objections to the yard must be made as soon as he becomes aware of the relevant circumstances, and of the fact that the insurer intends to invite the yard to submit a tender. If the assured has himself requested the yard to submit a tender, he may not normally raise objections concerning circumstances of which he was, or ought to have been, aware when he requested the yard to submit a tender.

Clause 12-13. Removal of the *vessel*

The Commentary was amended in the 2019 Version.

The removal of the ship to the repair yard constitutes part of the repairs, and the costs of the removal must therefore be covered by the insurer, cf. *sub-clause 1*. The costs of removal first and foremost cover costs of bunkers, towage if the ship has to be towed, canal and port expenses, etc. The assured also has a limited cover of his loss of time during the removal, in that the insurer is liable for the "necessary" crew's maintenance and wages throughout the period of time involved. The requirement that the crew must be necessary is new in relation to the 1964 Plan. In the consideration of this

question, regard must be had to what is necessary with a view to the removal. The maritime crew will obviously be covered, but normally not hotel and shop staff on a passenger liner, or mobile repair teams who work temporarily on board. However, the provisions must be implemented with some caution: it is not the intention to force the assured to empty the ship of crew for shorter voyages.

"Bunkers and similar direct expenses in connection with the running of the ship" include supplies and similar "out-of-pocket expenses". To this must be added expenses for the rental of objects necessary to get the ship to the repair yard, such as a rented generator. If it is necessary to take out additional liability insurance to cover any liability the ship may incur in relation to a rented tug, the premium must be regarded as removal expenditure. This shall also apply where the liability insurance shall cover the assured's liability for any damage which the tug may sustain whilst sailing to the place where the ship is moored. Liability for costs of removal does not, however, include interest on debt, general insurance premiums, or any share of the owner's general administrative costs.

In the offshore sector, there are often two crews per ship because the crew alternates between work and leisure time. The question whether the insurer is liable for the pay of one or both crews during removal has therefore been discussed. However, the issue is not quite to the point: the crew that is on board the ship during removal earns, in addition to the wages paid for work during the removal period, wages for its leisure time, but this part of its wages is not paid until the period of leisure time. If the crew had only been paid wages during the period in which it worked and nothing had been paid during the time when the crew was not working, the wages would have been twice as high. Thus it is not correct in this situation to say that it is a question of wages for two crews, but rather of pay earned for time off related to a period of work. This pay must therefore be covered in its entirety.

The "removal" covers the entire deviation to and from the repair yard. However, the expenses which the assured saves through the fact that the removal places an employed ship in a more favourable position, cf. sub-clause 1, *second sentence*, must be taken into consideration. Other advantages shall not be deducted, e.g. where the ship because of casualty damage has been removed to a repair yard where owner's repairs were less expensive than they would have been if the ship had followed its normal docking schedule. Nor shall any advantage the assured obtains by an unemployed ship getting into a more favourable position for chartering be taken into account. On the other hand, the assured will not be compensated for the disadvantage that arises if the ship gets into a less advantageous position.

In certain cases the ship is moved to the port of delivery in connection with a sale and has the casualty repairs carried out in that port. If the sale and the port of delivery were agreed on prior to the commencement of the removal, the removal must be regarded as strictly an owner's expense, even if the ship was in ballast during the removal. The call at the port must in that event be regarded as ordinary in connection with the running of the ship.

The removal costs must be regarded as accessory costs of repairs to be apportioned among recoverable and non-recoverable work under Cl. 12-14.

During a removal to a repair yard, all insurances concerning the ship will normally be in effect on the conditions agreed on. However, according to Cl. 3-20, each of the insurers may exclude liability for any loss arising during or as a result of the removal, if the removal involves a significant increase of the risk. According to *sub-clause 2*, liability is transferred to the insurer who is liable for the damage to the ship, unless he has also excluded liability, cf. *sub-clause 3*. If a claims leader has been appointed under the hull insurance, he has, as mentioned in the Commentary on Cl. 3-20, the right to decide the question of removal on behalf of the hull insurers under the hull insurance as well as the interest insurers, cf. Cl. 9-6 and Cl. 14-3, sub-clause 4. If the claims leader decides that liability for the removal shall be excluded, the removal will normally have to take place at the assured's own risk. If, however, the ship is moved as the result of damage covered by the war-risks insurance, and the marine-risk insurer, but not the war-risk insurer, has rejected liability for the removal, the war-risk insurer is also liable for marine perils during the removal. Reference is furthermore made to the Commentary on Cl. 3-20.

In accordance with practice, no portion of the removal expenses will normally be attributed to damage arising during the removal to the repair yard. By contrast, a proportion of these expenses shall be attributed to damage that is not discovered until the ship is at the repair yard, but which clearly existed before the removal commenced.

Clause 12-14. Apportionment of common expenses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a) Where one casualty and owner's work require dry dock:
If owner's work required 10 days in dry dock, and casualty repairs required 15 days in dry dock, the total of all dry dock related charges shall be apportioned as follows:
The sum of 10 days for owner's work and 15 days for casualty repairs is 25, and 10/25ths of dry dock costs are allocated to owner's work and disallowed, and 15/25ths allocated to casualty repairs and thereby allowed. If charges for a total stay of 15 days in dry dock are USD 75,000, 10/25ths or USD 30,000 would be disallowed, and 15/25ths or USD 45,000 would be allowed.

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

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

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

It should be noted that some of the above examples of "common expenses" are not necessarily related to all categories of repairs effected in which case they are often termed "accessorial expenses". They may in other words be accessorial to some, but not to all categories of work effected. As an example, removal expenses shall not be apportioned on any damage arising during removal (see Commentary to Cl. 12-13). And "extra" tank cleaning e.g. to allow hot work may be related to repairs in a particular tank. In case certain expenses are not common to all categories of work, they shall be attributed only to the category(ies) in respect of which they incurred.

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

Clause 12-15. Ice damage deductions

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

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

The ice damage deduction is based on the view that the assured may, through his actions with the ship, influence the risk of it sustaining ice damage. An ice damage deduction is therefore considered to have a certain deterrent effect.

If deduction of a fraction is used, it is unnecessary to introduce special rules on the calculation of deductions for the situation where the ship is navigating in ice for several days on end. Such special rules must also be agreed on individually if the owner wants the ice damage deduction in the form of a fixed amount, cf. below regarding the deductible.

Unless otherwise agreed the ice damage deduction shall also be applied in those cases where the assured has paid additional premium to be able to proceed beyond the ordinary trading areas. If the parties want another solution, this has to be agreed in connection with the notification that the ship will proceed beyond the trading areas, cf. Cl. 3-15, sub-clause 1.

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

Clause 12-16. Machinery damage deductions

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

Cl. 12-16 provides for a machinery damage deduction in addition to the standard deductible which the parties can activate by agreeing on the amount to be deducted, cf. *sub-clause 1*. It is assumed that such a deduction has a certain deterrent effect. The deduction first and foremost concerns "machinery and accessories", but in order to avoid difficult problems of definition, the provision also covers pipelines and electrical cables outside the machinery.

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

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

According to *sub-clause 2 (a)*, no deduction shall be made if the ship has been involved in a "grounding, collision or striking". The word "grounding was added in the 2013 Plan. In practice, the term "striking" has caused a number of problems in relation to the machinery damage deduction. The purpose of the deduction is that it shall apply to damage to the machinery attributable to defects in machinery or inadequate maintenance, wear and tear, etc. All damage that has an "external" cause and where it is a question of contact with foreign objects from the outside should therefore not be subject to a deduction. "Striking" therefore occurs in situations where the propeller strikes drift wood or drift ice, where pieces of ice or a plastic bag or the like are sucked up against the cooling water inlet obstructing the water circulation with the result that the machinery is overheated and damaged, and where a thin fishing line or the like gets twisted around the propeller shaft between propeller and stern tube and subsequently penetrates into the stern tube stuffing causing leakage and damage. On the other hand, deductions must be made if damage from overheating or vibration occurs in consequence of prolonged sailing through ice. However, doubtful borderline cases may arise in connection with damage caused by sailing through ice.

A prerequisite for "striking" is nevertheless that the ship strikes a foreign object. It will therefore never constitute "striking" when parts of the ship strike other parts of the ship, e.g. where the rudder or the nozzle loosens and gets into contact with the propeller. This applies regardless of whether or not the

propeller was moving. On the other hand, if the ship strikes its own fishing tackle or its own equipment outside the ship, this will constitute "striking".

According to sub-clause (b), moreover, no deduction is awarded in situations of "the engine room having been completely or partly flooded", cf. *sub-clause 2 (b)*. These will normally be casualties of a more serious nature. But the exclusion also covers a situation where the crew has forgotten an open valve with the result that water pours out into the engine room and causes damage to the machinery. Damage resulting from fire or explosion shall always be subject to a machinery damage deduction if the fire broke out or the explosion occurred in the engine room, cf. *sub-clause 2 (c)*. According to practice, the "engine room" must be understood to mean the room where the propulsion machinery is located. Separate rooms for pumps, fire pumps, etc. in front of the engine room bulkhead, or unconnected with the propulsion machinery in general, are not "engine rooms". If the engine room behind the engine room bulkhead has for practical reasons been split up into separate rooms, e.g. control room, pump room, auxiliary engine room, internal funnel with exhaust boiler, etc., the individual rooms form part of "the engine room", unless they are separated by bulkheads which constitute a protection against the spreading of fire corresponding to the engine room bulkhead.

The question whether it is a case of a nautical casualty or a machinery casualty must henceforth be decided on the basis of general burden-of-proof rules. If it has been demonstrated that certain damage detected later is probably attributable to an earlier grounding, no deductions shall be made, even if the damage is discovered more than three months after the casualty.

Deductions under this Clause shall be made in connection with repairs of the main engine with shafting, bearings and propeller, auxiliary engines, starting air tanks, exhaust pipes for main and auxiliary engines, electric motors (however, with the exception of household appliances, nautical instruments, etc.), generators, converters, steam boilers with flue outlet and internal funnels, condensers, coolers, pre-heaters, refrigeration machinery, steering gear, pumps, anchor windlasses, winches, deck cranes, pipelines with valves and cranes, electric panels and wires, as well as paint and insulation of parts falling within the scope of this Clause.

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

Clause 12-17. Compensation without deductions

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

Certain losses are covered without deductions. This applies to depreciation in value under Cl. 12-1, sub-clause 4, normal loss of time under Cl. 12-11, sub-clause 2, costs of removal under Cl. 12-13, unused spare parts and temporary repairs.

In practice, "shifting" within the port area is not regarded as removal and accordingly falls outside the scope of Cl. 12-13. Bunkers consumed during such "shifting" shall therefore be subject to deductions.

Furthermore, all accessory costs of repairs shall be subject to deductions, provided the costs are directly related to the repair work carried out. Costs which are recoverable in accordance with the general part of the Plan, e.g. survey or litigation costs, are, however, fully recoverable. In practice, no deductions have been made in costs incurred in classification surveys, but such expenditure has been subject to a deductible.

Costs of measures to avert or minimise loss, such as a salvage award for a ship in ballast and general average contributions, need not relate to any specific damage to the ship and are therefore recoverable without deduction. If, during the rescue operation, the ship sustains damage that is recoverable under general average, deductions will be made in accordance with YAR and a corresponding proportion of the repairs will be charged to the assured. Deductions shall also be made under Cl. 12-15 and Cl. 12-16 if the general average damage to the ship is settled under Cl. 4-10; the same applies to assumed general average, cf. Cl. 4-11. The reason is that the compensation for a certain type of damage to the ship shall be approximately the same regardless of the cause of the damage. This reasoning means that deductions must also be made where damage to the ship is recoverable under the general rule on particular measures to avert or minimise loss in Cl. 4-12, sub-clause 1, e.g. where the ship sustains damage solely for the purpose of averting liability, or a minor casualty which does not endanger the safety of the ship, cf. Cl. 12-19, sub-clause 2.

Clause 12-18. Deductible

In Cl. 189, sub-clause 1, of the 1964 Plan the deductible (formerly "the franchise") was set at one-thousandth of the sum insured, however, not less than NOK 1,000 and not more than NOK 10,000. The Special Conditions left the deductible to the parties' negotiations, however, and this approach has now been adopted in the Plan. This means that the amount of deductible will appear from the individual insurance contract, cf. *sub-clause 1*.

As under the 1964 Plan, the deductible is to be calculated for "each individual casualty". The purpose is to achieve a clear-cut limit for the size of the recoverable casualty, thereby eliminating the claims settlements for the minor casualties. It is also assumed that one deductible per casualty has a deterrent effect. However, the result may cause the assured economic problems if several casualties occur at short intervals. This is something the assured may have to take into consideration during the negotiations concerning the size of the deductible.

Normally, the distinction between one and several casualties will not cause any problems. If a fire in the engine room spreads and results in damage to other parts of the ship, this is clearly one casualty. On the other hand, if the ship sustains damage due to a grounding and later during the voyage sustains damage to the superstructure as the result of a hurricane, this will constitute two casualties. When several casualties are connected in terms of time and place, it may, however, be difficult to decide whether there has been one or several casualties. Reference is made to the description of relevant type cases concerning the corresponding problems associated with the insurer's liability for the sum insured, cf. Cl. 4-18.

The question regarding the dividing line between one and several casualties must be decided by a discretionary assessment of the same factors as those mentioned in relation to Cl. 4-18. However, the factors stated must be combined with the real considerations behind the provision regarding a deductible. Thus, it is not a foregone conclusion that the delimitation of the individual casualty will be identical under the two sets of rules.

In practice, the question has been raised regarding the extent to which a new deductible shall apply where there has been a further development of damage which the assured could have averted, e.g. damage to the stern tube due to postponed repairs of damage to the propeller, or where an error in design has been discovered which will lead to more and more cracks in the main engine unless it is repaired. The deciding factor for the number of deductibles in such cases must be when the assured's negligence acquires the nature of an independent damage cause which "breaks" the causal chain from the first damage. Such a new cause occurs if the assured's conduct can be characterised as negligent in relation to the development of the damage after the first damage was discovered. New damage must then give rise to a new deductible. This must apply even if the insurer has failed to object to a postponement of the repairs, but not, however, if the insurer has confirmed directly to the assured that it is safe to proceed without making repairs.

It is also irrelevant to the question of the number of deductibles whether the classification society has approved the postponement, unless it is a question of damage that may have a bearing on the safety of the ship, e.g. certain types of engine damage. If the classification society has given approval for the ship to proceed with damage that may threaten the safety of the ship, it must be assumed that the further development was not foreseeable, and that the assured was not guilty of negligence. As long as the requirements of the classification society are complied with, the further development should in such cases be recoverable without any new deductible.

In the type of situation where one incident of damage requires several repairs, a deciding factor for the number of deductibles must be whether the error committed by the repair yard is foreseeable, cf. ND 1977.38 NH VESTFOLD I: Only where the repair yard's error is unforeseeable, e.g. because it is a question of gross negligence on the part of the repair yard, shall the new damage be deemed to

constitute a new casualty which gives rise to a new deductible. An example of repair yard errors which may under the circumstances be considered unforeseeable is where the repair yard forgets tools or the like inside an engine resulting in damage when it is started. By contrast, it is not necessarily unforeseeable that a part is installed the wrong way in an engine, cf. the VESTFOLD I case. Sub-standard work, e.g. poor welding work, will normally also be foreseeable. If the yard's error is foreseeable, both the repairs of the same damage and the further development of the damage must be recoverable without any new deductible.

In the event of new damage caused by errors by the repair yard, considerable problems of evidence may arise, e.g. where welds in the propeller break open after a long period of time. If the period of time from when the damage was repaired until it reoccurs or new damage develops is lengthy, strict evidential requirements must be imposed before it is decided that the cause is the original damage and that no deductible shall apply. The assessment of evidence must also be stricter the more the part in question is exposed to damage.

A situation that has given rise to considerable problems in relation to the number of deductibles is where there is an error in design or the like in the cylinder linings from the factory which causes them to crack after a certain period of use. There may not necessarily be any pattern to when the cracks occur. In some cases it is discovered at the same time that several linings have cracked, whereas in other cases weeks or months may pass between each time a lining cracks. The deciding factor for the question regarding the number of deductibles in such cases must be the extent to which the cracks can be traced back to the same cause. If the cracks are attributable to the same cause, they must be regarded as one casualty, which only gives rise to one deductible. Elements in this evaluation include whether there is a close connection in terms of time or place between the incidents of damage, or whether the new incidents are of a totally independent nature, and whether the common underlying factor increases the risk of new damage, cf. above under Cl. 4-18. Cracks that may be traced back to the same error on the part of the manufacturer should be regarded as one casualty and only give rise to one deductible. The incidents described here take place within the same area in the ship and, in the event of an error in manufacture, it is foreseeable that the error will affect several of the manufactured units until the error is discovered. If, however, there are several separate errors, or it is clear that the manufacturer should have discovered the error and done something about it, the incidents will constitute several casualties in relation to the deductible.

At the same time, it is clear that if the assured can be blamed for not having averted the damage, this warrants the calculation of a new deductible from the time the assured should have intervened. If the assured has shown negligence in failing to replace the linings that have not yet cracked, new cracks should give rise to a new deductible. In that event, each new crack should be regarded as a new casualty in relation to the deductible, based on the view that the assured's motivation to replace the rest of the linings increases with each new crack that arises.

The deductible shall apply to the overall compensation for each casualty. If the casualty results in several invoices, the deductible must therefore be apportioned over all invoices, and not be settled on the basis of the initial costs. This is necessary in order for the calculation of interest and the apportionment of refund settlements not to be affected by the manner in which the decision is made to organise the repairs of the ship based on practical, technical and commercial considerations. The apportionment of the deductible results in the assured getting a proportionately equal share of insurance contract interest on all invoices subject to deductibles, regardless of whether the invoice is received at an early or late stage of the repairs of the ship. In connection with refund settlements, an apportionment of the deductible over all invoices will result in the assured benefiting from the proportion of the refund claim that corresponds to the proportion of the deductible for the relevant claim.

Sub-clause 2 creates an exception to the rule that the deductible is to be applied to each casualty in cases where it may be particularly difficult to decide whether there have been one or more casualties. Under the 1964 Plan, the exception was limited to damage due to "heavy weather". The exception has now been extended to include damage caused by "navigating in ice". The extension is taken from Cl. 4.6 of the Loss-of-Time Conditions in Cefor Form 237, and may be justified by the fact that the legal considerations constituting the background to the exception for heavy-weather damage are just as applicable to continuous navigation in ice.

So-called "ranging damage", which occurs in the event of bad weather lasting for several days while the ship is berthed, has in practice been recoverable with one deductible. This practice shall be continued.

The exception for damage sustained between the departure from one port until arrival at the next shall apply, regardless of the nature of the calls. Heavy-weather damage that occurs between a port of loading and a port of refuge will thus be subject to one deductible.

For voyages on the Great Lakes, Cefor IV, B 4, sub-clause 5, contained a clause to the effect that for damage caused by collision or striking "one deductible was to be calculated for the round voyage up from and down to Montreal". This rule has not been maintained. Previous experience with voyage franchises shows that they create problems of interpretation and evidence and are therefore likely to be abused.

Sub-clause 3 is identical to the 1964 Plan and states that the costs of measures to avert or minimise loss and certain accessory costs are recoverable without deductible. As the assured will never know the extent of the damage which might have been caused by the casualty which he has averted, it is important that he shall under any circumstances receive compensation for the losses he suffers through

measures to avert or minimise loss. Similarly, the insurer should cover in full the expenses incurred after a casualty for the purpose of ascertaining the extent of the damage.

Cover of the relevant costs without deductible shall not apply if it is clear in advance that the costs incurred in repairing the damage are lower than the deductible, cf. the Commentary on Cl. 4-6 and *Brækhus/Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 588.

If the ship is docked in order to establish whether damage has occurred after a grounding, the normal procedure has been to apply a deductible even if no damage is found. According to Cl. 12.1 of the English hull conditions (ITCH), such survey is recoverable without deductible if the survey was "reasonable". Today it is usually unnecessary to dock a ship to carry out such surveys. Normally a diver's inspection will be sufficient. If, in exceptional cases, the classification society demands docking, the costs should be regarded as survey expenditure, which is recoverable without deductible. The situation is different where docking is demanded and damage is in actual fact found. In that event, the docking expenditure follows the casualty and gets its share of the deductible, even if the repairs are not carried out the first time around due to the assured's commercial decisions.

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

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

Sub-clause 1 is identical to the 1964 Plan, but a reference to Cl. 3-15, sub-clause 2, which contains a new deduction provision relating to the situation where a ship proceeds beyond conditional trading areas, has been introduced. The provision entails that all deductions shall be made from the gross costs before any other deductions. Insofar as machinery damage deductions and ordinary deductibles are calculated in the form of fixed amounts of money, the provision is only relevant to the ice damage deduction and the deduction for proceeding beyond the trading areas.

Sub-clause 2 is discussed in further detail under Cl. 12-17.

Chapter 13
Liability of the assured arising from collision or striking

General

Hull insurance is first and foremost an insurance of property. In the absence of general liability insurance for the shipowners, however, the hull insurer also assumed cover of the assured's collision liability. However, P&I insurance has gradually become just as common as hull insurance, at any rate

for hull insurance of ocean-going vessels, and an international trend is also seen in the direction of the P&I insurer assuming the entire collision liability. It would therefore seem natural to ask whether the collision-liability risk should not be transferred to the P&I insurer, which would establish a more clear-cut dividing line between the hull insurer as property insurer and the P&I insurer as liability insurer.

There are practical reasons for letting the hull insurance include collision liability, however. Collisions will normally cause mutual damage. If both sides are at fault, the assured will have a claim against the oncoming ship's owner for a fraction of his own damage concurrently with being liable for a corresponding fraction of the oncoming ship's damage. The hull insurer's right under Cl. 5-13 to be subrogated to the claim against the oncoming ship gives him an interest in the collision settlement. This will often be the largest claim in the event of litigation. By also placing the collision liability vis-à-vis the oncoming ship on the hull insurer, it will normally be one and the same insurer (group of insurers) who is interested on both the "aggressive" and the "defensive" side in the collision proceedings. If collision liability were to be covered by the P&I insurer, both the hull insurer and the P&I insurer would have to act in practically every single collision settlement. During the revision of the Plan, the approach of grouping cover of collision liability under the hull insurance has therefore been maintained.

Even if the hull insurer covers collision liability, however, there will still also be a need for P&I insurance. This is first and foremost due to the fact that the hull insurer's collision liability is limited with regard to the nature of the liability covered. A line must therefore be drawn between the collision liability which belongs under the hull insurance, and the collision liability which shall be entirely covered under the P&I insurance. The new Plan essentially follows the pattern from the 1964 Plan, but a few adjustments have been made, see further Cl. 13-1 and the Commentary on that provision. The predominant view has been that the dividing line should be made as clear-cut and as easy to implement as possible. Whether certain types of liability shall come under hull cover or P&I cover is of less importance.

In addition to the fact that the P&I insurance covers certain types of collision liability in full, this insurance is also needed as a supplement to the cover of collision liability under the hull insurance. This is related to the principle that the hull insurer's liability is maximised to the sum insured, including as regards the cover of collision liability. A potential liability in excess of the sum insured, so-called "excess collision liability", may possibly be covered under a hull interest insurance with a special agreed value, cf. Cl. 14-1, but this insurance also has a limited sum insured. Liability in excess of the sum insured under the hull insurance, and possibly the hull interest insurance, is covered under the P&I insurance, where limitation of the cover is tied to the owners' right to limitations of liability. However, because the Plan operates with a separate sum insured for the cover of collision liability

under the hull insurance and the hull interest insurance, it will rarely be necessary to impose excess collision liability on the P&I insurer, see Cl. 13-3 and the Commentary on that provision.

Clause 13-1. Scope of liability of the insurer

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

Sub-clause 1 contains a specific statement of the liability the hull insurer shall cover.

(1) The insured ship, (with accessories, etc.) must have caused a loss "through collision or striking". The word "striking" in actual fact also covers "collision", i.e. striking against another ship, but the expression "collision or striking" is well established in practice and has therefore been maintained.

"Striking" presupposes that the physical contact between the ship and another object is a consequence of a (relative) movement so that the movement energy results in a pressure. "Striking" also includes pressure against or the touching of another object, e.g. where the ship causes damage by bumping or pressing against a quay. "Striking" may be the result of "pulling" or "sucking", e.g. where the ship sucks or draws an object towards itself. However, "pulling" is not in itself "striking", and is traditionally covered under P&I insurance. Pulling without striking contact with the insured ship will not normally result in any mutual damage, and it is therefore not expedient to involve the hull insurer in the liability settlement.

Damage caused by waves or backwash cannot be described as damage caused by striking.

(2) The object against which the insured ship strikes may be another ship or another object floating in the sea, e.g. logs from timber rafting, or an installation on shore, e.g. a quay, a bridge or a dock gate. Grounding is also "striking".

Normally the object against which the ship strikes will belong to a third party. This is not a requirement, however. Objects owned by the assured or ownerless objects are also covered, in principle. This is first and foremost of practical significance if the assured becomes liable towards a third party because the striking against an ownerless object or an object belonging to the assured is transmitted to an object belonging to a third party. An example is where the insured ship strikes an ice floe that in turn bumps against a quay that is damaged. In such cases the hull insurer is liable.

(3) It is the insured "ship, its accessories, equipment or cargo" which must have struck against another object. The term "equipment" is new and is included in order to cover equipment trailing after the ship, such as seismic cables and fishing equipment, and where there may be doubt whether the objects

can be classified as “accessories”. The ship’s “accessories” include everything that the ship has on board, whether or not the object is co-insured under Cl. 10-1, sub-clause 1, and regardless of whether it is a shipowner or a third party who owns the relevant accessories or equipment.

The wording “the ship, its accessories” etc. implies that the hull insurer is only liable for striking damage caused by the ship’s movements being transmitted via the accessories, equipment and cargo. Striking damage which accessories and cargo cause by independent movements must be covered by the P&I insurer. If, for example, a lifeboat, a derrick or the deck cargo juts out over the ship’s side, thereby causing damage to a shore installation during the ship’s manoeuvring to go alongside the quay, liability will be covered by the hull cover. If, however, a crate or a bale or the like slips out of the heave during discharging and hits a car on the quay, or a wire snaps with the result that a derrick falls down on top of and damages a crane, liability must be covered under the P&I insurance. Where equipment strikes against another object, there is nevertheless reason to be somewhat more liberal and cover the collision liability, even if the striking cannot be deemed to have been caused by the ship’s movements. An example of such a situation would be where the ship is lying with its engines switched off and the ship’s nets drift down onto another net and damage it.

If the ship has suffered a casualty that gives rise to total-loss compensation, the question is whether the hull insurer is liable for a possible subsequent collision liability. The point of departure must be that the hull insurer covers collision liability resulting from a peril that struck during the insurance period, as long as total-loss compensation has not been paid, and the insurer has not exercised his right under Cl. 4-21 to pay the sum insured. The hull insurer may therefore become liable for collision liability if the ship in a sunken state causes damage to cables on the sea bottom, see ND 1990.8 S. “Dispasch” VINCA GORTHON. However, after total-loss compensation has been paid, the insurer is no longer liable, unless he has taken over the title to the wreck under Cl. 5-19.

(4) The hull insurer must further cover the liability imposed on the assured due to the fact that the tug used by the ship causes damage by collision or striking. Such liability may be imposed on the assured according to the general liability rules under maritime law, or as a result of more far-reaching liability provisions in the towage contract. However, the insurer is protected by the limitation in Cl. 4-15 as regards unusual or prohibited contractual terms. The Cl. 13-1 also includes the assured’s liability towards the tug if the ship collides with it. The hull insurer shall, therefore, cover all liability for collision damage which the tow may incur under a towage contract on ordinary terms. In the 1996 version of the Commentary this intention was expressed in a way that caused practitioners to be unsure whether the previous practice really was to be abolished. Hence, the matter was tried before arbitrators, cf. ND 2000.442 NV SITAKATHRINE. The arbitrators decided unanimously that the Commentary in sufficiently clear terms bindingly determined that the previous practice should no longer be followed. The wording “caused through collision or striking” means therefore that the hull

insurer shall also cover the insured vessel's liability for damage to the tug resulting from its collision with a third party.

(5) The insurer must (within the limits of the sum insured) cover the assured's liability for the loss caused by the striking. In contrast to the English conditions where hull insurers are liable for 3/4 of the collision liability, the Plan stipulates a 4/4 liability.

The cover includes not only liability for damage to objects which are, directly or indirectly, affected by the striking, and damage which affects interests connected with these objects, but also liability for consequential damage resulting from the striking, provided that the assured is held liable for this.

(6) The insurer is only liable for liability that may be imposed on the assured according to the laws of the country under which the collision is judged. It is irrelevant whether it is liability based on fault, strict liability, or liability pursuant to agreement, cf. however, Cl. 4-15 concerning unusual or prohibited contractual terms. The assured must furthermore exercise any right he might have to demand limitation of liability.

It is not a requirement that the liability is established by judgment, cf. Cl. 4-17.

(7) The rules of the Plan on measures to avert or minimise loss shall apply in the normal manner. The hull insurer must therefore cover expenses, e.g. in the event of damage or liability incurred in order to avert collision liability.

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

Sub-clause 2 (a) excludes liability arising while the ship is engaged in "towing". Towage of other vessels, a dry dock, a raft, etc., limits the towing vessel's freedom of movement and creates a corresponding increase of the risk of collision.

Under the Plan, the hull insurer's cover of collision liability is suspended for the duration of the towage. The insurer is therefore free from liability, even if there is no causal connection between the towage and the damage. The purpose is to avoid discussions about difficult questions of causation where the significance of the towage in the course of events is uncertain.

The insurer is further free from liability where the collision occurs before towage has commenced, i.e. before the towage connection has been established, or after the towage has been concluded, if it is proved that the collision was caused by the towage. The insured ship collides, e.g. with the ship that is to be towed during an attempt to establish the towing connection, cf. "caused by the towage".

The limitation in the cover of liability does not apply where liability arises in connection with a salvage operation or a salvage attempt undertaken by the insured ship, provided that the salvage operation or salvage attempt is "permitted" under Cl. 3-12, sub-clause 2. The insurers' general interest in encouraging salvage operations makes it natural that they should automatically give the assured normal liability cover in such cases.

Collision liability which falls outside the scope of the hull insurance is, as mentioned above, normally covered by the P&I insurer. However, liability referred to in sub-clause 2 (a) may be covered by the hull insurers by special agreement, possibly in return for an additional premium.

Sub-clause 2 (b) excludes "liability for personal injury" from the hull cover. This liability is traditionally covered by the P&I insurer regardless of whether the injured persons were on board the insured ship, on board the oncoming ship, or ashore.

According to *sub-clause 2 (c)*, liability for "other loss suffered by passengers or crew on the insured ship" also falls outside the scope of the hull insurance. Examples of such liability include liability for the loss of time which the passengers suffer as a result of the collision, liability for the crew's repatriation expenses (cf. Section 4-6 of the Norwegian Ship Labour Act), and liability for loss of luggage and crew's effects. As regards the latter case, it will also follow from *sub-clause* 2 (d) that liability falls outside the scope of the hull cover.

Sub-clause 2 (d) excludes liability for cargo, other effects on board "the insured ship", or equipment which the ship uses. Liability for damage to the cargo of the insured ship is a typical P&I risk which should be covered by the P&I insurer, including cases where it is a result of collision or striking. The wording "equipment which the ship uses" is new and is aimed at covering seismic cables and other equipment trailing after the ship which are consequently not on board.

Collision liability in respect of own cargo will rarely occur. If the collision is judged under Nordic law or other rules based on the Collision Convention of 1910, the cargo owner will only have a claim against the oncoming ship for such proportion of the loss as is equal to the degree of fault of that ship. There will be no question of any recourse claim from the oncoming against the transporting ship. As regards the relationship between the cargo owners and the transporting ship, the Hague Rules as well as the Hague-Visby Rules will normally exclude liability. Any errors committed by the assured are normally errors "in the navigation or handling of the ship", and the assured will in that event be protected against liability, cf. Section 276, first sub-clause 1, no. 1, of the Norwegian Maritime Code. However, direct liability is conceivable, e.g. where the collision is due to unseaworthiness which existed at the commencement of the voyage and of which the master of the ship was aware, cf. Section 276, second sub-clause, of the Norwegian Maritime Code. Furthermore, liability for damage to a

ship's own cargo may arise in connection with collisions that are judged under American law. The United States have not ratified the Collision Convention of 1910 and do not have the Convention's rule to the effect that the colliding ships only have pro-rata liability to the cargo owners. In principle, the cargo owners may hold the ships jointly and severally liable. The transporting ship is first of all protected by the Hague Rules (US COGSA 1936). However, if the cargo owners bring a claim against the oncoming ship, the transporting ship will in the recourse round be allocated a share of the liability that corresponds to the transporting ship's share of fault. Traditionally, it is assumed that such "indirect" liability shall be regarded as liability vis-à-vis own cargo in relation to the rules regarding the hull insurer's cover of collision liability, cf. ND 1936.237 NH TERJE, cf. also ND 1959.19 NV FERNSIDE and ND 1963.175 NH FERNSTREAM. This must also, from a realistic point of view, be regarded as the most fortunate solution, cf. *Brækhus*: *Cross liabilities-oppgjør i sjøforsikring* (Cross-liabilities settlements in marine insurance) in AfS 4.488-494. It has therefore been explicitly maintained in sub-clause 2 (j) of this Clause.

Sub-clause 2 (e) excludes liability to charterers or others who have an interest in the insured ship. A collision may lead to a more or less lengthy suspension of the running of the ship, and hence to a loss for cargo owners who have to wait for the cargo, or for time-charterers, who are forced to charter replacement tonnage at higher freight rates, etc. If the collision is wholly or partly attributable to the assured's people, the assured will, according to general rules of maritime law, be liable for the loss. Such liability is a typical contractual liability and does not belong under the hull cover. Furthermore, the assured will normally have excluded liability in the contract of affreightment.

According to *sub-clause 2 (f)*, liability for pollution damage and damage from fire or explosions caused by oil or other liquid or volatile substances and contamination damage caused by radioactive substances and damage to coral reefs and other environmental damage is excluded from the hull cover. This provision is new and taken from the Special Conditions, cf. Cefor I.11 and PIC Cl. 5.26. It shall in any event apply in connection with collisions or striking, including grounding, and regardless of where the damage-causing substance is derived from. It may be oil that leaks out of the insured ship, an oncoming ship, a shore tank, etc. The leak does not necessarily have to be a direct consequence of the striking damage. The provision shall also apply if the collision results in an explosion that causes a ship to spring a leak or emit oil.

The term "pollution damage" includes both damage caused by soiling and damage from contamination of cargo. Pollution damage shall have been caused either by oil or by other liquid or volatile substances. By "oil" is meant first and foremost petroleum products, but the term also includes animal and vegetable oils. The wording "other liquid or volatile substances" is aimed at substances that pollute in the same way as oil, e.g. chemicals.

The provision further excludes liability for "damage resulting from fire or explosion caused by oil or other liquid or volatile substances". This covers first and foremost cases where the fire or the explosion of the relevant substance is a direct consequence of the collision. However, in cases where a collision results in fire or explosion of oil or other substances, and this fire or explosion subsequently leads to fire or explosion in another cargo, the total damage shall also be regarded as "caused" by oil, etc. However, the provision does not apply where the collision leads to fire in another cargo, which in turn results in "oil or other liquid or volatile substances" igniting, with ensuing fire or explosion. In such cases, there will be major practical difficulties in singling out the part of the damage that is attributable to the oil fire.

The exception for damage caused by radioactive substances is limited to "contamination damage", and accordingly does not cover all nuclear damage. Nuclear damage is, however, excluded on a more general basis in Cl. 2-8 (**e**) nos. 1 - 4.

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

It follows from the second sentence that an exception from the exclusion is stipulated in cases where the insured ship has collided with another ship. In that event, the hull insurer's collision liability shall cover the liability of the assured for pollution damage, etc. set forth in the first sentence, provided that the damage is inflicted on the oncoming ship with equipment and cargo.

According to *sub-clause 2 (g),* liability for loss caused by cargo or bunkers after grounding or striking against ice is excluded from the hull cover. The provision is identical to Cl. 194, sub-clause 2 (f) of the 1964 Plan. Given the new exception for contamination, etc. in sub-clause 2 (f), this exclusion will be of little practical significance, but it has nevertheless been maintained unchanged.

In the event of collision or grounding, the ship's cargo will often be damaged and spill out of the ship, causing damage to the surroundings. The most frequent examples are pollution damage or fire and explosion resulting from oil or similar substances spilling out or igniting. This type of damage is excluded under sub-clause 2 (f). However, it is also conceivable that another type of cargo may cause damage, e.g. dynamite which may explode in the event of collision damage, emission of prussic acid,

cargo being washed over board and obstructing traffic, etc. In the event of a collision with another ship, striking against a quay, etc. the hull insurer shall cover the liability of the assured for damage caused by such cargo. This is the most expedient solution in these types of situations because the hull insurer is already liable for the actual striking damage. If cargo causes damage following grounding or striking against ice, however, normally no liability to third parties for striking damage will arise. Accordingly, liability for damage caused by the cargo should come under the P&I cover in this situation.

In this respect as well, however, the rules relating to liability for measures to avert or minimise loss prevail over the special rules of cover. If cargo is thrown overboard in order to make the ship lighter after a grounding, liability for damage caused by the cargo may have to be covered by the hull insurer according to the rules in Chapter 4 of the Plan, subject to the limitations following from YAR **2016**, Rule C.

Sub-clause 2 (h) excludes liability for loss caused by the ship's use of anchor, mooring lines, etc. The provision was amended in the 2003 version by changing the wording "loading and discharging pipes" to "loading and discharging appliances" in order to bring it into conformity with the term used in the Regulations of 17 January 1978 No. 4 concerning Cargo-Handling Appliances in Ships. The purpose of this exclusion is to avoid difficult borderline questions between damage caused by striking by "the ship, its accessories, equipment or cargo", where liability under Cl. 13-1, sub-clause 1, shall be covered by the hull insurer, and the situation where objects on board cause "striking damage" on their own. The latter situation falls outside the scope of the hull cover. Especially as regards equipment which in one form or another is connected to the ship, typically anchor and chain or gangways, it may be difficult to distinguish between damage caused by the ship's use of the equipment and damage caused by the equipment on its own. Liability for loss caused by the ship's use of such objects is therefore excluded in general. This liability will rarely arise in connection with actual collisions. Realistically speaking, it is therefore quite remote from ordinary collision liability, and it is thus natural for it to be covered by the P&I insurer.

The exclusion applies whether the object belongs to the assured or to a third party, and comprises both liability for the damage inflicted on others by the use of the object and liability for damage to the object itself as a result of the use. The latter is relevant where it is a third party who owns the object, e.g. where the insured ship by pulling or dragging severs a loading line belonging to the cargo consignee. However, as a result of the rule in Cl. 4-16, the limitation will also be of significance where damage is caused to objects belonging to the assured.

It is only liability for damage caused "by the ship's use of" the anchor, etc., which is excluded from the hull cover. The anchor is in use when it is not in the hawsepipe. As regards the gangway, the cover shall apply as long as the gangway has not been hoisted up and fastened to the ship's side. Thus, if a

gangway which has been hoisted up and fastened causes damage by striking against an oncoming ship, this does not constitute damage caused by the use of the gangway.

The wording "caused by the ship's use of" must further be interpreted to mean that it presupposes that the object has been physically implicated in the transmission of the striking from the ship to the object that is damaged. The damage is only caused by the use where the striking (or dragging) is caused by or transmitted through the anchor or the mooring lines, etc. If the insured ship, by an incorrect manoeuvre, tightens the towing line with the result that the tug is pulled under, or tightens the mooring line with the result that a bollard is torn loose and the quay damaged, this will constitute damage caused by the use of the towing or mooring line, and liability is no concern of the hull insurer's.
If, however, the insured ship collides with the tug during towage, or while manoeuvring away from the quay and, before the mooring lines have been released, strikes against the quay, the striking damage shall not be regarded as caused by "the ship's use of" the towing or mooring lines, even if it must be assumed that the collision or striking would have been averted if the ship's freedom of movement had not been hampered by the towing or mooring lines.

If the casualty results partly in damage caused by striking, and partly in damage caused by the use of an object as mentioned in sub-clause 2 (h), the total damage must be divided between the hull insurer and the P&I insurer. If, however, striking damage is a direct result of the use of an object referred to in sub-clause 2 (h), the damage must be covered entirely by the P&I insurer, cf. ND 1976.263 NV MOSPRINCE/BIAKH.

Lastly, the wording "by the ship's use of" presupposes that the relevant object is used in accordance with its purpose. Mooring lines must be used to moor the ship, not e.g. to secure deck cargo. However, if the object has been used according to its purpose, it must be deemed to be in use from the time preparations for use commence and until the use is completed, cf. ND 1976.263 NV MOSPRINCE/BIAKH.

The exclusion applies to the use of anchor, mooring and towing lines, loading and discharging pipelines, gangways, etc. It shall therefore also apply to objects that are not explicitly mentioned, if such objects may be equated with them (*ejusdem generis)*. Characteristic of the objects mentioned is that they are to be used in connection with operations relating to the running of the ship, and whose purpose it is to transmit physical contact between ship and shore. The provision in Cl. 13-1, sub-clause 2 (h), is not aimed at regulating a situation where the relevant objects are used in connection with measures to avert or minimise loss in the hull insurer's interest. In such cases, the rules in Cl. 4-7 *et seq.* will prevail, and liability will (wholly or in part, cf. the general average rules) have to be borne by the hull insurer. Thus, if the ship picks up a cable while using the anchor in order to avoid running aground, the hull insurer will be liable for covering the assured's liability, cf. ND 1981.329 NV LINTIND, in contrast to ND 1969.1 NV MIDNATSOL.

The exclusion in *sub-clause 2 (i)* concerns liability for "removal of the wreck of the insured ship and for obstructions to traffic created by the insured ship". The exclusion of liability for removal of the wreck of the insured ship is taken from Cl. 194, sub-clause 2 (h) of the 1964 Plan and has a long-standing tradition in hull insurance. The wreck-removal liability is covered by the P&I insurer. It is irrelevant whether the removal is a consequence of the ship constituting a danger to navigation or an obstruction to traffic.

The exclusion of liability for obstruction to traffic is new. Obstructions to traffic may result in a loss for the owner of a port or a waterway because traffic comes to a standstill, for owners of other ships due to delays, for pilots, etc. who lose income, etc. In many cases, the cover of such consequential loss for the injured parties will admittedly be precluded, because the loss is considered unforeseeable, or because their interests are not considered protected under the law of tort. However, to the extent that the assured is held liable, such liability should be considered in the same way as the wreck-removal liability and be covered by the P&I insurance. The exclusion shall apply in all situations where the ship creates an obstruction to traffic. The extent of the damage to the ship is irrelevant.

According to *sub-clause 2 (j)*, final refund of amounts which a third party has paid by way of compensation for loss as mentioned under sub-clause 2 (a) to (i) is excluded. This provision is identical to Cl. 194, sub-clause 2 (i) of the 1964 Plan, and is primarily aimed at indirect cargo liability under US law, see further the Commentary on sub-clause 2 (d). However, the provision may also be applicable to other cases where the assured is jointly liable with someone who pays compensation to the injured party and subsequently claims recourse against the assured. An example is the above-mentioned liability to passengers who are injured in a collision where both ships are at fault. The two shipowners are jointly and severally liable for the personal injuries. If the owner of the oncoming ship pays compensation for such injuries, he may claim a proportionate refund from the owner of the insured ship of the amount paid equivalent to the insured ship's degree of fault. (Possible exclusions of liability are disregarded in this connection, cf. Section 161, fourth sub-clause, of the Norwegian Maritime Code). Like direct personal injury liability, such indirect personal injury liability falls outside the hull insurance, cf. sub-clause 2 (b).

Clause 13-2. Limitation of liability based on tonnage or value of more than one *vessel*

This Clause is identical to Cl. 195 of the 1964 Plan.

Where a tug and tow, or a string of barges, become involved in a collision, the calculation of the liable shipowner's limit of liability may cause problems. In certain cases, the owner will be liable along with several of the involved vessels, insofar as the limit of liability is calculated on the basis of the value or

tonnage of several vessels. See further *Brækhus* in ND 1949.633-51. If the vessels are insured with different insurers, it will be necessary to have a rule that regulates the apportionment of the total insurer liability among the various vessels. In accordance with the 1964 Plan, the apportionment shall be based on the tonnage or value of the individual vessels (depending on whether the limitation is based on tonnage or value).

When the limitation of liability is based on the value of the vessels, freight is also taken into consideration (e.g. under US law) or an additional amount is calculated which is to represent the freight (under the Brussels Convention of 1924, set at 10% of the value of the ship prior to the collision). When applying this provision, the increase of the individual ship's liability limit, which the freight or the equivalent additional amount represents, shall be disregarded.

Clause 13-3. Maximum liability of the insurer in respect of any one casualty

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

In addition to the Commentary on the Clause contained in the Commentary on Cl. 4-18, the following should be mentioned:

Practical considerations seem to call for using the ship's limitation amount as a limit for the hull insurers' liability for collision compensation. In that event, the need to involve the P&I insurer would be limited to cases of the assured's fault. However, because of reinsurance, it is essential for the hull insurers that their liability is limited. Consequently, a special sum insured has been stipulated for collision liability.

Clause 13-4. Deductible

The provision is worded in accordance with the same principles as the provision concerning deductible for hull damage, Cl. 12-18, and reference is made to the Commentary on that Clause. A provision has furthermore been added in Cl. 13-4 to the effect that the insurer is liable for litigation costs, regardless of the deductible. However, this is subject to the condition that the claim for compensation presented against the assured exceeds the deductible.

Part three
OTHER INSURANCES FOR OCEAN-GOING *VESSELS*

Chapter 14
Separate insurances against total loss

General

The 1964 Plan used two types of "interest" insurances in addition to the ordinary hull and freight insurances, i.e. hull interest insurance and freight interest insurance. Both of these types of insurance had to be viewed as an extension of the total loss cover under the hull insurance and, accordingly, were triggered only in the event of total loss. The hull interest insurance was aimed at covering that part of the capital value of the ship which was not covered under the ordinary hull insurance. The arrangement was used because the insurable value for hull insurance is normally agreed and, consequently, does not necessarily correspond to the ship's "full value at the inception of the insurance", cf. Cl. 2-2. Thus there is room for setting a capital value for the ship which is not covered by the agreed insurable hull value. In practice, insurers have also been willing to provide hull interest insurance in situations where the agreed insurable hull value corresponded to - or was even higher than - the full value of the ship at the time of inception of the insurance.

A freight insurance contract was linked to loss arising from expiry of a pre-determined, long-term contract of affreightment which the owner had entered into or to a pre-determined form of employment for the ship and was taken out in addition to ordinary freight insurance, which covered loss of isolated freight amounts or loss-of-hire in the event of damage to the ship.

Even though the two interest insurances concerned different interests, they were closely related. The capital value of the ship, which is covered through hull and hull interest insurance, will depend primarily on the earning capacity the market believes the ship will have in future. The value of the ship can be said to consist precisely of the future income the ship can generate, capitalised down to current value. In other words, a hull interest insurance contract which covers the market value of the ship includes part of the freight interest value. Strictly speaking, the object of the freight interest insurance is therefore only that portion of the freight income which is attributable to the fact that the ship is hired at a rate above the market rate. Nonetheless, in practice, higher agreed values have been accepted than what the foregoing might indicate.

Clause 14-1. Insurance against total loss and excess collision liability (hull interest insurance)

With the approach of the Plan to the separate forms of total loss cover, it is not necessary to draw a sharp dividing line between the interests covered under the various types of insurance. The primary issue will be one of expediency as to how the total capital value of the ship is to be apportioned between the ordinary hull insurance and the separate total loss policies.

The provision states what a hull interest insurance covers. The first part of the provision is new and specifies that the insurable value in a hull interest insurance is agreed and given in the form of an amount stated in the insurance contract. This provision must be read in the light of the limitations rule in Cl. 14-4. If the sum insured is lower than the insurable value, this will lead to a further reduction in the insurer's liability under the general rules in Cl. 4-18.

Sub-clause *(a)* sets out the principle that hull interest insurance is cover against total loss. Any casualty giving rise to entitlement to total loss compensation under Chapter 11 under hull insurance, or under Cl. 15-10 under war risk insurance, will also constitute total loss under hull interest insurance. Conversely, a compromised total loss will not trigger hull interest insurance.

Sub-clause (b) sets out the liability of the hull interest insurer for excess collision liability. The provision is related to the liability of the P&I insurer for collision liability, which only applies to collision liability which exceeds the market value of the ship. If the agreed insurable value under the hull insurance is lower than the market value of the ship, the shipowner is ensured cover for his liability for the difference between the agreed insurable hull value and the market value. However, the provision applies regardless of the relationship between the agreed insurable hull value and the market value in the actual situation.

Like the hull insurer, the hull interest insurer is liable "separately" for collision liability, i.e. for a separate sum insured for that liability. The deductible is not calculated under the separate cover. The rule implies that there is to be no transfer of collision liability over to the P&I insurer before the separate sums insured under both the hull insurance and the hull interest insurance have gone towards covering the liability.

If several separate insurances have been effected, each of the insurers will only be liable for excess collision liability in relation to their respective portions of the aggregate of the separate insurances. Consequently, if any of the insurances have been effected on non-Norwegian terms without cover for excess collision liability, a corresponding portion of this liability will be uninsured, unless the P&I insurer covers it.

Clause 14-2. Insurance against loss of long-term freight income (freight interest insurance)

As mentioned in relation to Cl. 14-1, it is unnecessary to define which interest is covered under the different insurances against total loss. Consequently, it is sufficient to state what freight interest insurance covers. The provision specifies that freight interest insurance like hull interest insurance is

total loss cover, cf. further on the reference to Chapter 11 above under the Commentary on Cl. 14-1 (a).

The Plan regulates only freight interest insurance with agreed insurable values, cf. Cefor 248, No. 2.1. The rationale is that there is deemed to be a limited need for an open freight interest insurance based on an existing charterparty. If the shipowner has especially favourable freight contracts, this will usually be reflected in the agreed insurable value under the hull insurance and thereby indirectly also in the interest insurances in that the maximum amounts for the latter will be based on the agreed insurable hull value, cf. Cl. 14-4. If, in an actual situation, it nonetheless becomes necessary to have an open insurable value for freight interest, Cl. 14-4, sub-clause 3 allows for this type of insurance being effected in addition to the agreed interest insurances, if need be.

As under Cl. 14-1 for hull interest insurance, Cl. 14-2 specifies that freight interest insurance has a separate agreed amount. The provision in Cefor 248, No. 2.1 also contained a maximum amount, set at 25% of the agreed insurable hull value. The maximum amounts and the effect of exceeding them are the same for hull interest and freight interest insurances, however, and, consequently, the rules imposing limitations have been grouped together under Cl. 14-4.

Clause 14-3. Common rules for separate insurances against total loss

A fundamental prerequisite for cover under the separate insurances against total loss is that the assured claim compensation for total loss from the hull insurer, cf. *sub-clause 1, first sentence*. Thus, the assured cannot demand payment under the separate insurance for total loss while at the same time demanding that the ship be repaired pursuant to Chapter 12. The insurer need not take over the wreck, however; it is sufficient that the assured claims compensation for total loss.

The provision only applies to the insurer's liability "for total loss". Cover of excess collision liability is not contingent on whether a claim for total loss has been filed with the hull insurer.

In one situation, however, it is not necessary that the assured has brought a claim for total loss: when the assured wishes to salvage the ship, but the hull insurer pays the sum insured pursuant to Cl. 4-21, cf. sub-clause 1, second sentence. If the salvage later proves to be unsuccessful, the assured is also entitled to payment under the separate total loss insurances. In that case, however, the separate total loss insurers will be entitled to take over the wreck under the rules in Chapter 5, Section 4 of the Plan. If separate insurances have been effected under both Cl. 14-1 and Cl. 14-2, the hull interest insurer has a first claim to the wreck, cf. sub-clause 1, third sentence.

Cl. 14-3, sub-clause 2, specifies that the insurance does not cover loss caused by measures taken to avert or minimise loss. It is established practice that the hull insurer covers both general average

contributions and particular costs of measures taken to avert or minimise loss concerning the ship, and does not draw the separate total loss insurers into a proportional sharing of the loss under Cl. 4-12, sub-clause 2.

Under Sub-clause 3, the general rules on hull insurance must be given corresponding application to the separate insurances against total loss to the extent they are appropriate.

Sub-clause 4 gives application to some of the rules on the leading insurer's competence and authority in the relationship between the leading insurer under the hull insurance and the insurers of the separate total loss insurances. This applies to rules on notification of casualty, proceedings against third parties for the assured's liability or claims for damages, as well as the rules governing venue. The Plan does expand the competence of the leading insurer in relation to the separate insurers by giving corresponding application to Cl. 9-5 on salvage and Cl. 9-6 on removal and repairs. This means that the separate total loss insurers are bound by the leading insurer's decision on removal in connection with a claim for condemnation and measures in connection with a salvage operation. However, the leading insurer's decision to abandon a salvage operation will not bind the interest insurers, cf. Cl. 14-3, sub-clause 4, which only refers to Cl. 9-5, first sentence.

Clause 14-4. Limitations on the right to effect separate insurances against total loss

Cl. 14-4, sub-clause 1 contains a limitation on the right to effect a separate insurance against total loss, set at 25 % of the agreed insurable value under the hull insurance for each of the insurances. Accordingly, if either hull or freight interest insurance has been effected for an amount exceeding 25% of the agreed insurable hull value against the same peril, the provision for the excess amount is void.

The limitation is aimed at discouraging parties from moving significant portions of hull cover over to the separate total loss insurances. This is explained in more detail in the Commentary on Cl. 10-12 above, which sets out the impact on the hull cover of the assured possibly being paid an amount higher than 25% of the agreed insurable value under the hull insurance either under the hull interest insurance or the freight interest insurance, or both.

Sub-clause 2 regulates the settlement when several hull interest or freight interest insurances have been effected and their aggregate cover exceeds the limitations set for hull interest and freight interest insurances, respectively, pursuant to sub-clause 1. In principle, this constitutes double insurance, cf. Cl. 2-6, but the provision rules out the joint and several liability which otherwise applies to double insurance, and states that instead there is to be a proportional reduction of liability.

As mentioned earlier in relation to Cl. 14-2, the Plan contains no rules on freight interest insurance with an open insurable value. However, *sub-clause 3, first sentence*, specifies that the limitations rule in sub-clause 1 does not preclude having an open freight interest insurance like this based on an actual charterparty. This may be a possibility for a ship for which the agreed insurable hull value does not reflect the earnings of the ship, for example, a gas ship with a low market value and a favourable charterparty which expires in the event of total loss. Usually, a freight insurance like this with an open insurable value will be based on a time charterparty or a charterparty for a series of voyages (charterparty for consecutive voyages), but this type of insurance may also be used when a contract to ship a certain quantity of goods is, exceptionally, performed using a single ship, cf. the term "contract" for a series of voyages.

It follows from the *second sentence* that any compensation under a freight interest insurance with an open insurable value is to go towards reducing the compensation the assured may claim under a freight interest insurance with an agreed insurable value effected pursuant to Cl. 14-2.

Chapter 15
War risks insurance

General

Some of the clauses and the Commentary to Chapter 15 were edited in 2016.

Chapter 15 provides a complete set of conditions on war risks insurance. Part One is also applicable as background law for Chapter 15. The perils covered under war risks insurance have therefore been kept in the general part of the Plan, see primarily Cl. 2-9. These rules are closely related to the rules on perils covered for marine insurance and, consequently, it is most appropriate to place them together.

Shipowners may combine war risks insurance on Nordic Plan conditions with marine perils covered by foreign (usually English) conditions. Since Chapter 15 has been adapted to marine perils cover in accordance with the other conditions of the Plan, the combination of war risks insurance under the conditions in Chapter 15 and marine perils insurance on foreign conditions may lead to gaps in the overall insurance cover or to double cover in certain areas. In particular: the piracy risk may be defined as a marine peril under some foreign conditions, while it is a war peril pursuant to Cl. 2-9, sub-clause 1, letter (d). If so, there will be a double cover of this peril. Likewise, there will be a gap in the cover with a marine peril insurance on the basis of the Plan and war risks insurance on foreign conditions that are not covering the piracy peril. It is in the parties' best interest to solve problems of this nature by special clauses available in the market.

Section 1
General rules relating to the scope of war risks insurance

Clause 15-1. Perils covered

Sub-clause 2 was edited in 2016 by deleting the word “are”.

Sub-clause 1 sets out the perils covered under the war risks insurance and is, strictly speaking, unnecessary, since the same effect follows from the general part of the Plan. For pedagogical reasons, however, it is a logical step to have a separate provision on perils covered in the introductory part of the war risks chapter.

Under *sub-clause 2*, war risks insurance also covers marine perils if the marine perils insurance has been suspended as specified in Cl. 3-19. This will apply in relation to all of the interests covered under Cl. 15-2 and not just in relation to the hull cover.

Clause 15-2. Interests insured

As a starting point all the interests listed in Cl. 15-2 can be part of a war risks cover based on Chapter 15, but in order to get this comprehensive war risks cover the parties must agree in each individual contract which interests that shall be included in the cover, see further Cl. 15-3.

Clause 15-3. Sum insured

The reference to Cl. 14-1 (a) was corrected in 2016 to Cl. 14-1 (b). Cl. 4-18 is not set aside by Cl. 15-3 apart from what is expressly stated in sub-clause 2 (a), see further below.

Cl. 15-3 *sub-clause 1* requires that a separate sum insured is agreed and inserted in the individual contract of insurance for each interest listed in Cl. 15-2. If not so inserted, the interest in question will not be deemed insured apart from what follows from sub-clause 2, see further below.

For Loss of Hire insurance, the sum insured is normally a product of the daily amount and the maximum number of days covered. Hence, the second sentence of sub-clause 1 requires that the daily amount, the deductible period as well as the number of days of indemnity per casualty and in all shall be agreed in order to give effect to letter (d).

Under the Loss of Hire insurance pursuant to Cl. 15-2 (d) there will be no extra sum insured available pursuant to Cl. 4-18, sub-clause 1, second sentence for costs of preventive measures. This follows from Cl. 16-11, sub-clause 2 which generally limits the cover for costs of preventive measures to avoid loss of time to what the insurer would have had to pay if such measures had not been taken.

Sub-clause 2 (a) contains a default combined sum insured for P&I and occupational injuries insurance equal to the sum insured for the hull insurance, which means that once a sum insured is agreed for the total loss and damage interest, Cl. 15-2 (a), the cover pursuant to Cl. 15-2 (e) is at the same time in place. If a sum insured is agreed also for hull interest - and/or freight interest insurance, the combined sum insured for the P&I and occupational injuries insurance is increased correspondingly. Also in this context the limitations contained in Cl. 14-4, cf. Cl. 10-12 is relevant. Thus the default combined sum insured for the P&I and occupational injuries insurance is limited to maximum 150% of the sum insured under the hull insurance. The parties are free to agree any other sum insured for the P&I and occupational injuries insurance.

Wreck removal liability is included in the combined sum insured for P&I and occupational injuries in war risk insurance covered on the basis of Chapter 15.

The P&I clubs' have since 2005 provided an excess cover against war and terrorism risks, which currently is limited to USD 500 million. This cover is in excess of what actually is covered under the P&I and occupational injuries insurance pursuant to Cl. 15-2 (e), but always provided that the sum insured under the Cl. 15-2 (e) P&I and occupational injuries insurance is at least equal to the market value of the vessel at the time of the casualty resulting in the liability in question.

The last sentence of Cl. 15-3 sub-clause 2 (a) contains an exception from Cl. 4-18. The Commentary to Cl. 4-18 makes it clear that the second sentence of Cl. 4-18 sub-clause 1 means that the extra sum insured for costs of preventive measures "comprises the total costs of measures to avert or minimise loss for the relevant insurance under the Plan", cf. definition of the word "loss" in Cl. 1-1 (d). The word "loss" also comprises liability according to this definition. Thus costs of preventive measures to avoid liability under the P&I and occupational injuries insurance pursuant to Cl. 15-2 (e) would potentially be covered under this extra sum insured pursuant to Cl. 4-18. However, in P&I insurance there is no extra sum insured for costs of measures to avert or minimise loss. Such costs are covered within the ordinary limit of liability for the P&I insurer. The same rule applies for P & I insurance under the war risk cover in the Plan. Cl. 15-3 sub-clause 2 (a), second sentence therefore makes it clear that no such extra sum insured is available for costs of preventive measures to avoid liability under the P&I and occupational injuries insurance pursuant to Cl. 15-2 (e).

Sub-clause 2 (b) is probably unnecessary as the same would follow from Cl. 4-18, sub-clause 2, but it was deemed advisable to include the provision to avoid any potential misunderstanding. Pursuant to Cl. 14-1 (b) it is only the hull interest insurance that covers collision liability in excess of the cover provided under the hull insurance. Cl. 14-2 on freight interest insurance does not provide any cover for collision liability. Thus the default sum insured for collision liability is limited to maximum 125 % of the sum insured under the hull insurance.

The Commentary to Cl. 4-18 makes it clear that the costs of measures incurred to avert collision liability are included in the extra sum insured available pursuant to Cl. 4-18, sub-clause 2, second sentence. Cl. 15-3, sub-clause 2 (b) contains no exception from Cl. 4-18 in this regard.

Clause 15-4. Safety regulations

Sub-clause 2 was amended in 2016 by deleting the references to Cl. 3-25, sub-clause 1.

Sub-clause 1 gives the insurer the right to stipulate safety regulations while the insurance is running. The regulations will, in reality, be an instruction to the assured to do or refrain from doing certain things. The provision sets out a number of aspects which the instruction may consist of or be aimed at. The enumeration is not exhaustive, however, cf. the wording "inter alia". As long as the instruction can be said to be "measures for the prevention of loss", cf. Cl. 3-22, it will fall within the scope of the provision.

Sub-clause 2 sets out the effect of the stipulated safety regulations not being followed. The assured loses cover if negligence is demonstrated and there is a causal connection between the breach and the loss. It must be emphasized in connection with the reference to Cl. 3-25, sub-clause 2, that safety regulations under Cl. 15-4 are to be viewed as special safety regulations, with the consequence that expanded identification is to apply.

It follows from Cl. 15-18, cf. Cl. 15-13, that if the insurer's instructions under that provision lead to loss of hire for the assured, he will be entitled to be compensated for that loss of hire and possibly also to total loss compensation if the loss of hire lasts for more than six months.

Section 2
Termination of the insurance

Clause 15-5. War between the major powers

The Clause was edited in 2016. It is intended to have the same effect as the Automatic Termination of Cover used for war risk insurance in the English market and regularly included in all war risks reinsurance contracts.

The provision means that if war or war-like conditions arise between two or more of the superpowers, the insurance terminates immediately. The expression "war-like conditions" is used to indicate that a formal declaration of war is not necessary for the provision to apply; it is sufficient that a state of war exists in reality.

Clause 15-6. Use of nuclear arms for war purposes

The Clause is intended to have the same effect as the nuclear arms clause used in the English market.

It follows from the *first sentence* that the insurance terminates immediately if nuclear arms are used for war purposes. The ship need not be involved in the use of the nuclear arms for the provision to apply; nor need it be in an area which is excluded or subject to an additional premium under the insurance.

Clause 15-7. Bareboat chartering

The Clause was edited in 2016 by inserting "automatically" instead of "immediately" in order to bring the wording in line with Cl. 15-6.

Firstly, the insurance will automatically *terminate* - and not just be suspended - if the ship is chartered out under a bareboat charterparty. Secondly, the provision applies to *all forms* of bareboat chartering, not just bareboat chartering to foreign charterers. If the insurer has in advance agreed to co-insure a group of companies, of which one or more are bareboat charterers, the insurance will only terminate if the vessel without the insurer's consent is bareboat chartered to a bareboat charterer outside the originally assured group of companies, cf. the Commentary to Cl. 18-65.

Clause 15-8. Cancellation

The provision concords with the approach in the English war risk insurance conditions. The provision was amended in 2016 by the addition of the words in brackets in the first sentence of sub-clause 1. Sub-clause 2 is completely rewritten.

Sub-clause 1, first sentence, gives both the person effecting the insurance and the insurer the right to cancel the insurance in the event of changed circumstances. The cancellation is subject to seven days' notice. The words in brackets are verbatim the same as used in English conditions and clarify when the cancellation takes effect, i.e. on the expiry of 7 days from midnight of the day on which notice of cancellation is issued by or to the insurer.

The provision is primarily of significance for the insurer, as it ensures him the possibility of being released quickly from the insurance contract, when the risk has changed after the insurance contract was entered into. Consequently, the provision must be seen as a supplement to, on the one hand, Cl. 15-5, Cl. 15-6 and Cl. 15-7, which entail automatic termination of the insurance under certain circumstances and, on the other hand, Cl. 15-9, which gives the insurer wide-ranging powers to amend the trading areas and thereby reduce the risk he will run.

The right to cancel under sub-clause 1 may also be of importance to the assured. If, for example, a war situation has apparently subsided, but the assured finds that the insurer, compared with other insurers, has a very conservative view of the significance this should have for trading areas, premium, etc., the assured may be released from the insurance contract quickly.

The second sentence was added in the 2002 revision. It previously followed from Cl. 7-2 that cancellation of an insurance contract would not affect the rights of the mortgagee, unless the insurer had given him at least fourteen days' specific notice of the situation. In relation to war risk insurance, however, such a solution is untenable, because it might entail an insurer being bound in relation to the mortgagee for longer than the period for which he in fact has reinsurance cover. Adding the second sentence underscores the fact that in relation to war risk insurance, cancellation - by either the person effecting the insurance or the insurer - will also affect the rights of the mortgagee. Consequently, the insurance cover terminates with seven days' notice, even if the mortgagee himself has not received notice. In the last part of the second sentence, it is nonetheless stated as a standard procedure that the insurer shall immediately notify the mortgagee of the cancellation, regardless of whether it was initiated by the person effecting the insurance or by the insurer.

Sub-clause 2 supplements sub-clause 1. This provision only imposes on the insurer a best effort obligation to provide the assured with an offer for continued insurance on new conditions, if relevant, and with a new premium, provided always that it is practically and commercially possible to continue the war risks insurance. It is conceivable under extreme circumstances that no commercial war risks insurance can be made available. Hence, the war risks insurer must be relieved of any obligation to offer continuation of the war risks insurance. This applies regardless of whether it was the insurer or the assured who cancelled the insurance under sub-clause 1.

Section 3
Trading areas

Clause 15-9. Excluded and conditional trading areas

The provision starts with the general trading areas set out in Cl. 3-15 and is based on the assumption that they will also apply to war risks insurance. In addition, the provision opens the door to the war risk insurer being able to determine different trading areas at any time. This implies, firstly, that the insurer may stipulate more limited trading areas than those set out in Cl. 3-15 at the time the insurance contract is entered into and, secondly, that the war risks insurer will be entitled to change a previously established trading area while the insurance is running. The change may mean a (further) limitation of the trading area or an expansion in relation to what applied at the time the insurance was effected.

The provision is based on the distinction in Cl. 3-15 between *conditional* areas, where the ship may continue to sail subject to an additional premium, and *excluded* areas, where the insurance cover is suspended unless trade within the excluded area is agreed in advance by the insurer.

War risks insurers normally adapt the limitations of the trading area issued by the Joint War Committee in London from time to time. Since the English conditions do not distinguish between conditional and excluded areas, some confusion may arise if these limits are adapted to a war risks insurance based on Chapter 15 of the Plan. Unless it is made expressly clear that any of these limitations of the trading area shall be deemed excluded areas, the presumption must be that they shall be deemed to be conditional areas.

Section 4
Total loss

Clause 15-10. Relationship to Chapter 11

The provision is, strictly speaking, unnecessary, but it does provide an appropriate bridge between Chapter 11 and the other rules in the Section.

Clause 15-11. Intervention by a foreign State power, piracy

Sub-clauses 1 and 2 were amended in the 2019 Version.

Sub-clause 1 states that the assured is entitled to total loss compensation if the ship is taken from him due to intervention by a foreign State power and he has not received it back within **six** months. It does not matter whether the intervention may be characterised as a "permanent" or "temporary" intervention. The wording "for which the insurer is liable under Cl. 2-9" has been incorporated to serve as a reminder that the perils covered may vary, depending on which war risk insurer is involved.

Sub-clause 2 uses the expression "similar unlawful interventions" which encompasses first and foremost mutiny and war-motivated theft, cf. ND 1945.53 NV IGLAND. Ordinary theft is covered by the marine perils insurer.

Only the assured may bring a claim for the ship to be deemed a total loss under the rules in sub-clauses 1 and 2; the insurer has no such right.

In connection with the amendments made in Cl. 2-8 and Cl. 2-9 regarding cover for State intervention in the 2019 Version, the time-limits in sub-clauses 1 and 2, which sets out when the assured can claim total loss, were reduced from twelve to six months.

Sub-clause 3 allows the deadlines in sub-clauses 1 and 2 to be disregarded when it is clear that the assured will not recover the ship.

It goes without saying that the assured will not be able to bring a claim for total loss compensation after the ship has been released. Conversely, *sub-clause 4* stipulates that the claim of the assured for total loss compensation will remain intact if the ship is released after he has brought a claim for total loss compensation. The fact that the compensation has not been paid out makes no difference. When an assured brings a claim for total loss compensation, it will often be in connection with other measures he takes to obtain a new ship. Consequently, it is proper that he acquire an irrevocable right to total loss compensation in view of his claim for total loss compensation.

Sub-clause 5 confers corresponding application on the provisions of Clauses 11-8 and 11-9.

Clause 15-12. Blocking and trapping

Sub-clause 1 gives the assured a right to total loss compensation when the ship is prevented from leaving port, etc., as a result of a war risk, and the hindrance lasts for over 12 months. The provision is aimed primarily at cases where the hindrance is of a physical nature, for example, when the ship remains trapped because the lock gates have been destroyed by bombing, or because a bridge has been blown up by sabotage and blocks the way out of port. The lines are fluid, however, between hindrances of this type and hindrances consisting of a foreign State power detaining the ship in port due to fear that it will fall into enemy hands. The detention may be reinforced by the area around the ship being mined or by other measures aimed at preventing the ship from leaving the area. Regardless of whether the authority in question implements separate physical measures, a detention of this nature will be deemed to be blocking and trapping within the meaning of the provision, and will also fall within the scope of Cl. 15-11.

The hindrance will be manifested by the ship being unable to leave port "or a similar limited area". The comparison shows that the area must not be too large geographically and, accordingly, must be comparable to a port. A typical example would be that the ship remains trapped in a canal, etc., because the lock gates or other structures have been destroyed. The events in Shatt-al-arab during the Iran-Iraq war and in the Suez Canal during the war between Israel and Egypt are examples of this type of situation. The provision will not apply, however, if a general cargo ship is prevented from leaving the Great Lakes because the lock gates have been bombed in the St. Lawrence Seaway. By contrast, in relation to the Strait of Hormuz, the provision must be given a wide interpretation. Accordingly, if an oil tanker is unable to get out of the Strait of Hormuz during a conflict, e.g. because the Strait has been mined, the provision will apply.

Sub-clause 2 stipulates that Cl. 15-11, sub-clauses 3, 4 and 5 shall apply correspondingly.

Clause 15-13. Restrictions imposed by the insurer

The provision confers on the assured entitlement to total loss compensation when restrictions imposed by the insurer prevent the ship from earning income for a period of over six months. This provision is related to the loss-of-hire cover, see Cl. 15-18. When the assured is covered for loss of time arising from orders issued by the insurer, it is reasonable for that cover at some point to be switched over to total loss cover. There is a fundamental difference between Cl. 15-18 and this provision, however. Under Cl. 15-18, it is sufficient that there has been a loss of time. This may very well be the case even though the ship is partially earning income, see Cl. 16-1. For the assured to be entitled to total loss compensation, however, the ship must have been entirely deprived of income. If then, the assured has been ordered to follow another route than the usual one, for example, on a voyage between Europe and the United States, the assured will be able to claim under Cl. 15-18, if that deviation leads to a loss of time. A claim for total loss compensation will not be possible, however, since the ship will still be earning income. This implies that the provision will be of most significance when the insurer orders the ship not to leave port or another area due to a war situation or other circumstances for which the insurer will be liable.

The deadline in Cl. 15-13 is, **as in Cl. 15-11,** set at six months and not twelve as provided for in Cl. 15-12. The reason for this is that a shorter time period is reasonable when it is the insurer's measure which leads to the ship sustaining a loss. The insurer will be able to assess the overall risk and, if he comes to the conclusion that, in view of the circumstances as a whole, the only sensible thing to do is to detain the ship for as long as six months, then he should compensate the actual loss of the asset the assured thereby suffers, and not just the loss of income.

Section 5
Damage

Clause 15-14. Relationship to Chapter 12

Sub-clause 1 determines, by way of introduction, that the rules in Chapter 12 apply fully to war hull insurance as well.

Cl. 15-14 does differ from Chapter 12 on one important point, however. The provision is aimed at solving an underlying problem when the assured has both hull cover and loss-of-hire cover and a conflict arises between the hull insurer's wish for a reasonably-priced (but slow) repair and the loss-of-hire insurer's wish for a fast (but expensive) repair. An arrangement for "comprehensive cover" was drawn up in the loss of time conditions of 1972, (see the Commentary on Cl. 6 of the Special Conditions and Appendix 2), but was not implemented at the time. Since the war risk insurer does cover against both hull damage and loss-of-hire, though, it is both reasonable and logical to attempt to give the assured full cover under the war risk insurance. Accordingly, this provision, and the

accompanying provision, Cl. 15-19, in the Loss-of-Hire Section, are based entirely on the arrangement which was proposed in 1972 although, formally speaking, it has been simplified somewhat, precisely because it was desirable to only have to deal with one type of insurance and one insurer. The assured then has a repair alternative which ensures him full cover for both the repair bill and the loss of time, with the limitations which follow from the agreed-upon deductibles. The simplification lies in the fact that it is the hull insurance which is primarily "charged with" the costs of full cover, instead of these costs being entirely apportioned between the hull cover and the loss-of-hire cover, as was the situation under the 1972 conditions. When it is ultimately the same insurer who will cover the overall costs anyway, the only logical step is to place most of the burden on one insurance, the hull cover, thereby freeing the loss-of-hire cover from its share of these costs, see Cl. 15-19. On this point a solution has been chosen in the war chapter that is different from those in Chapters 12 and 16, see the Commentary on Cl. 12-12 and Cl. 16-9.

Sub-clause (a) entails that the war hull insurance is "cleansed of" those elements of loss of time cover which are placed in Chapter 12 (and Cl. 4-11), so that that portion of war risk insurance stands apart as a pure property damage insurance.

Sub-clause (b), Sub-clause 1, first sentence, corresponds entirely to Cl. 12-12, Sub-clause 1. The *second sentence* states that the adjusted tenders shall be accompanied by an amount corresponding to the daily amount under the ship's loss-of-hire insurance, multiplied by the number of days the ship will be out of income-generating operations if the repair yard in question is used. "Daily amount under the loss-of-hire insurance" means the daily amount which, in the event, will be used for settlement under the loss-of-hire insurance, i.e. usually the agreed daily amount, but sometimes the actual loss of income per day, cf. .Cl. 16-5 and Cl. 16-6. The daily amount shall serve as a basis for calculations even though the sum insured at the time is lower. Thus reasonable account shall be taken of the uninsured portion of the shipowner's loss of time as well. The *third sentence* states that the sum of the adjusted tenders and loss-of-hire costs due to the choice of the repair yard in question shall constitute the total cost of repairs.

Sub-clause (b), second paragraph corresponds entirely to Cl. 12-12, sub-clause 3.

Sub-clause (b), third paragraph is based on Cl. 12-12, sub-clause 2, and maintains the principle that the assured decides where the ship is to be repaired, although liability under the hull cover is limited to the amounts referred to in the preceding sub-clauses. At the purely practical level, this implies, firstly, that the insurer will compensate what is referred to as total costs under sub-clause (b), sub-clause 1, insofar as the assured accepts the tender which leads to the lowest total costs. Secondly, it means that the insurer will not cover more than the total costs according to the lowest tender, even though the assured accepts another tender. Sub-clause (b) imposes a limitation here, however: if the tender with

the lowest total costs is submitted by a shipyard which the assured demands be disregarded, he will not be penalised as long as he accepts the next lowest offer.

Clause 15-15. Deductible

The Clause was amended in the 2019 Version.

The provision follows Cl. 12-18, which establishes that rules relating to the deductible should be stated in the insurance contract. The provision defines the concept of casualty when the ship is returned following a seizure, and establishes that all damage, etc., sustained by the ship during that period is to be deemed as being caused by a single casualty. Thus, only one deductible is to be calculated in these cases. **In the previous Clause, the same rule applied to requisition. However, this is misleading as requisition as a peril is excluded in Cl. 2-8 (c) and Cl. 2-9, sub-clause 2 (c), and the insurance is suspended in case of requisition according to Cl. 3-17. There is thus no insurance cover in case of requisition by a State. The reason why the provision included requisition was that the Norwegian Plan until 2013 included rules on cover for the Norwegian Shipowners' Mutual War Risks Insurance Association, and this cover included requisition by a foreign State power, cf. for instance the Norwegian Marine Insurance Plan 2007 § 15-24 (a). This cover was removed from the Plan in 2013. Clause 15-15 should have been amended at the same revision, but this was by a mistake not done.**

Section 6
Loss of hire

Clause 15-16. Relationship to Chapter 16

The provision is, strictly speaking, unnecessary, but it does provide an appropriate bridge between the general loss-of-hire rules in Chapter 16 and the rules in Section 6. The provision shows that the general rules on loss-of-hire apply to both the "actual" loss-of-hire cover and to the extensions afforded under Cl. 15-17 and Cl. 15-18. Thus, if a loss of time has occurred as a result of a peril covered by the war risk insurance, the rules in Chapter 16 determine whether and to what extent the assured will be entitled to cover from the war risk insurer.

On one point, however, the loss-of-hire cover under the war risk insurance goes further than the loss-of-hire insurance under marine perils insurance: with respect to loss of time due to blocking and trapping. Under Cl. 16-1, sub-clause 2 (b), for the insurer to be liable for a marine peril, the obstruction must be "physical". The loss-of-hire cover under war risk insurance also includes blocking and trapping due to intervention by a foreign State power, cf. *sub-clause 2*, which corresponds to Cl. 15-12.

Both Cl. 15-16 and Cl. 15-12 apply only to blocking and trapping in ports or similarly limited areas. In an arbitration award rendered on 8 May 2009 between Dolphin Drilling and the Norwegian Shipowners' Mutual War Risks Insurance Association (Bulford Dolphin), the court found that a rig anchored off the coast is not in a port or similar limited area. The court also stated that Cl. 15-16 only applies to blocking or trapping due to interventions by a State power, cf. in that respect the remark above, and that blocking or trapping due to threats of attack by terrorists or pirates is not recoverable under loss-of-hire insurance. This statement is an obiter dictum and concerns the construction of an issue that is highly controversial. However, as long as piracy was limited under Cl. 2-9 (d) to the "open sea", the statement had little practical significance in relation to piracy because it is unlikely that the geographical area specified in Cl. 15-12 and Cl. 15-16 would at the same time be in the "open sea". In view of the expansion that has now been made in the geographical aspect of the concept of piracy, however, piracy could conceivably take place within "a similar limited area", cf. the Commentary on Cl. 2-9 (d). To avoid this expansion of the concept of piracy having an unintended effect on loss-of-hire cover, the Committee agrees that it is natural to limit the scope of Cl. 15-16 to only cover interventions by foreign State powers. With regard to shipowners' overall need for loss-of-hire insurance in the event of attacks by pirates and terrorists, the cover provided under Cl. 15-16 will in any event be totally marginal.

In addition, the insurer will cover loss of time for the assured in those situations referred to in the subsequent sub-clauses, although the scope of the cover in those cases will be set according to the rules in Chapter 16. The provision in Cl. 15-19 is not really an "addition" to Chapter 16; instead, it replaces one provision from that Chapter by another. The reality of the circumstances should be unproblematic, however.

The rules on deductibles and number of days of indemnity are to be indicated in the insurance contract, see Cl. 16-7, and it is, therefore, not necessary to have a separate provision on these matters in this Section. Insofar as the general rules are not appropriate, the parties must make sure to agree separately on which deductibles and compensation days/days of indemnity are to apply, see the Commentary on Cl. 15-17 below.

Clause 15-17. Loss in connection with a call at a visitation port, a temporary stay, etc.

Sub-clause 1 sets out the situations in which the assured is entitled to cover under the provision. Calls at a port for visitation (sub-clause 1 (a)) are usually only relevant in wartime or war-like conditions, cf. Cl. 2-9, sub-clause 1 (a), but are also possible in other circumstances, for example, when a State power intervenes, cf. Cl. 2-9, sub-clause 1 (b) in connection with sanctions against a given country.

Capture and temporary detention (sub-clause 1 (b)) are also most relevant in wartime or war-like conditions, but may happen in peacetime as well, for example, in connection with customs inspection, embargo, etc. The detention must be by a foreign State power; thus, the provision does not apply if the ship is detained by reason of a strike, etc.: see the arbitration award in GERMA LIONEL (referred to in *Brækhus/Rein*, *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), at pp. 73-74, and pp. 239-240. The provision does not set out which type of loss is covered, but rather assumes that the general rules in Chapter 16 on the calculation of compensation for loss of time apply.

The provision does not contain any rules on how the period for which compensation is to be paid is to be calculated. Insofar as the usual rules on deductibles which are stated in the insurance contract for loss of time are not applicable, the parties must agree separately on rules on deductible periods.

The rules in Chapter 16 will determine the scope of the assured's claim for compensation.

Sub-clause 2 states that, as a general rule, the assured is not entitled to compensation for loss of time in cases where he is entitled to total loss compensation under Cl. 15-11 and Cl. 15-12, except for the first month of the loss of time. In a case of total loss, the assured will be entitled to interest as of one month after the time of the intervention and the loss-of-hire cover must be adapted to reflect this fact. If more loss-of-hire compensation has already been paid out than the assured is entitled to, the excess amount will be deducted from the total loss compensation.

Clause 15-18. Loss caused by orders issued by the insurer

The provision must be read in conjunction with Cl. 15-13, which confers on the assured entitlement to total loss compensation in the event of orders which have considerable impact on the operation of the ship.

Sub-clause 1 sets out when the assured is entitled to loss-of-hire cover under this provision. The decisive factor is whether the order from the insurer, cf. Cl. 15-4, has caused a loss of time for the ship. The order may result in a total loss of income, which will typically be the case when the order require the ship to remain in port. The ship may also be deprived of income wholly or in part if the ship is ordered to deviate or take another (longer) route than it would have otherwise taken.

It follows from sub-clause 1, *second sentence*, that the assured is not entitled to have his loss of time covered if the insurer issues an order in connection with the outbreak of war. This is such a special situation that the insurer must be allowed to "freeze" the situation until he has obtained a proper overview of the consequences. An obligation to compensate for the assured's loss of time in such cases would easily place the insurer in a difficult situation of double pressure. The insurer must, however, be under an obligation to decide which measures he wishes to implement and which ones do not need to

be maintained as soon as possible after the circumstances surrounding the outbreak of war have become clear. If these decisions are dragged out, the general rule in the first sentence will apply.

The rules in Chapter 16 on the calculation of loss of hire and adjustment of compensation shall apply.

Sub-clause 2 states that if the assured is entitled to total loss cover under Cl. 15-13, he will only be entitled to cover of the loss of time for the first month, cf. the Commentary on Cl. 15-17, sub-clause 2.

Clause 15-19. Choice of repair yard

This provision is based on the so-called alternative approach in the 1972 conditions, see the Commentary on Cl. 15-14 above. Since in war risk insurance it is usually the same insurer who covers the hull insurance portion and the loss of time portion, it has been possible to simplify the provision considerably. The alternative arrangement in the 1972 conditions also contained a separate provision on "Costs incurred to expedite repairs". However, that provision is so similar to Cl. 16-11 that a separate provision is not necessary.

The provision states that Cl. 16-9 does not apply to war risk insurance. It follows from Cl. 15-14 (b), sub-clause 3, and the Commentary on that provision that the hull cover ensures the assured full compensation for both repair costs and loss of time in connection with the repairs, as long as he accepts the tender from the repair yard which submits the tender with the lowest total costs, thereby eliminating the need for loss-of-time cover under Cl. 16-9.

Section 7
Owner's liability, etc. (P&I)

Clause 15-20. Scope of cover

Sub-clause 1, first sentence, establishes that the scope of the war risk insurer's P&I cover corresponds to the P&I cover of the ship in the sense that the insurance covers the same liability and expenses, i.e. the same range of losses.

In earlier versions, the war risk insurer's liability was linked to liability and expenses " which would have been recoverable under the ship's P&I insurance if the event in question had not been caused by a war peril, cf. Cl. 2-9". It was not clear whether the reference to war perils was based on the assumption that the peril in question was excluded as a war peril in P&I conditions. However, the intention was that the war risk insurer was to assume all perils defined in Cl. 2-9 regardless of how the peril in question was regulated in the P&I insurance. This has now been established in *sub-clause 1 (a).* This means, e.g., that the war risk insurer assumes liability and expenses related to piracy even if piracy is covered under the P&I Clubs' conditions as an ordinary marine peril.

Sub-clause 1 *(b)* entails that the war risk insurer also assumes the war peril as defined in the Pooling Agreement of the International Group of P&I Clubs. The rationale for this provision is that the P&I clubs do not define a war peril in the same way as Cl. 2-9 of the Plan. This difference could result in the assured being without P&I insurance if the scope of the war peril exclusion in the P&I insurance was wider than the range of war perils defined in Cl. 2-9.

An example:
Under the P&I rules, use of weapons of war is a war peril regardless of motive, while under Cl. 2-9 civilian use of weapons of war will only be a war peril if there is a political, social or religious motive for the act. This distinction is illustrated by the case of Peter Wessel (ND 1990.140). An anonymous bomb threat (which proved to be false) was considered to be a marine peril because there was no reason to assume that there was any political, social or religious motive behind the threat. Under the P&I insurance contract, a threat of use or use of a weapon of war, including a bomb, is regarded as a war peril. This peril would therefore have been excluded from the P&I cover, and the assured would not have had P&I insurance.

This risk of lack of cover has now been eliminated. The war peril exclusion in P&I insurance has been defined in relation to the definition of a war peril laid down in the Pooling Agreement of the International Group of P&I Clubs. Under this agreement each P&I club has a discretionary power to decide with binding effect in relation to the Pooling Agreement whether an event is to be regarded as an act of terrorism. Such a discretionary power for the P&I club to decide whether an event is a terrorism peril may not be decisive with regard to the war risk insurer's liability under Cl. 15-20 of the Plan. Whether a liability or an expense is due to an act of terrorism according to Cl. 15-20 must be decided pursuant to Cl. 2-9, sub-clause 1 (c) of the Plan. If the act falls outside the scope of the Plan's concept of terrorism, the assured's P&I cover will depend on the P&I clubs accepting that the act does not constitute an act of terrorism under the Pooling Agreement of the International Group of P&I Clubs ("the Pooling Agreement").

If the wording of the definition of the war peril applied by the P&I club in question is not identical to that of the Pooling Agreement, the definition of a war peril in the Pooling Agreement will be decisive. The Pooling Agreement provides that all use of "mines, torpedoes, bombs, rockets, shells, explosives or other similar weapons of war" constitutes a war peril. There has been discussion within the International Group as to whether pirates' use of automatic weapons entails that the attack is no longer a marine peril, but a war peril. In relation to Cl. 15-20, this issue is of no consequence because the war risk insurer assumes all war risks as defined in Cl. 2-9. Use of weapons of war by other criminals will not be covered by Cl. 2-9, but is covered by Cl. 15-20 provided such use of weapons is excluded in the Pooling Agreement. When applying Cl. 15-20, the P&I clubs' own definition of weapons of war shall be decisive. This is currently commented on as follows on the website of the International Group:

"What does 'similar weapons of war' mean? There is no definition in the Pooling Agreement or in club rules but the wording used 'or other similar weapons of war' indicates that such other weapons should be of a similar nature to those previously identified. The specifically identified weapons of war are mines, torpedoes, bombs, rockets, shells and explosives and show an intention that something more than guns/rifles/conventional ammunition would be needed to trigger the operation of the exclusion."

Generally speaking, it takes a great deal for a shipowner to be held liable for damage and losses that are a result of war perils. Even the strict oil spill liability under the CLC Convention does not apply if the oil spill is attributable to acts of war or damage caused by a third party with the intent to cause damage.

For the war risk insurer, assuming the range of war perils defined in the P&I conditions entails an increased risk because he is leaving it up to another insurer to define this range of perils. This is quite different from applying the range of losses covered by the P&I insurance because, by expanding the range of losses, the P&I clubs will also be exposing themselves in their day-to-day activities as a marine peril P&I insurer. It will be simpler for a P&I club to reduce its range of perils by expanding the war peril exclusion when it knows that the entire risk is transferred to the war risk insurer. Instead of leaving it up to the individual P&I club to define a war peril, reference has therefore been made to the definition in the Interclub agreement. The war risk insurer is thus protected against whatever an individual club might decide. A 3/4 majority is required to change the Interclub agreement, and there will normally be some forewarning of what is to come.

It is the Pooling Agreement, as it read at the time the war risks insurance contract pursuant to Chapter 15 was entered into, which is decisive for the P&I liability of the war risk insurer. This means that the P&I system cannot make any changes in the course of the insurance period that would have consequences for the war risk insurer. Under this approach, the war risk insurer will have time to change his conditions the next time they are renewed if he sees that the P&I system excludes from its range of marine perils any perils that the war risk insurer does not wish to cover.

Sub-clause 2 presumes that the ship has effected its ordinary P&I insurance with Gard, if such insurance is lacking.

Furthermore, it is a requirement that the ship's P&I insurance must be effected with a club that is party to the Pooling Agreement of the International Group of P&I Clubs. This ensures that conditions are approximately homogeneous as regards the war risk insurer's assumption of risk. If a ship has P&I insurance or liability insurance outside the International Group, Gard's conditions will determine the scope of cover (range of losses), cf. above.

Clause 15-21. (deleted)

Clause 15-22. Limitations to the cover

Sub-clause 1 establishes that as a basic rule the war risk insurer's cover under the P&I Section is subsidiary in relation to any other insurance which the assured may have effected. The effects for the assured and the insurer of the insurance being made subsidiary are set out in Cl. 2-6 and Cl. 2-7, and may vary depending on whether or not the other insurance has also been made subsidiary. The provision has been included to ensure that, in the event of double insurance, the war risk insurer will not be left with full liability in respect of other insurers who often use clauses which make the insurance subsidiary to all other insurances. The provision does not apply in relation to excess covers. The insurance cover in question here will be a genuine supplement to any cover the assured might otherwise have under his insurances.

Sub-clause 2 establishes that the war risk insurance is not subsidiary in relation to liability and expenses that are recoverable under both the ship's P&I insurance and Cl. 15-20, provided the P&I club concerned is party to the Pooling Agreement of the International Group of P&I Clubs. However, it is appropriate that the war risk insurance is the main insurance in this context. The amendment is otherwise in line with practice in piracy cases, where the war risk insurer has normally acted as the main insurer.

Some P&I clubs have their own excess cover. Insofar as this is done, the provision will not apply, as the insurance cover will actually come in addition to the cover the assured otherwise might have under its insurances. However, for clauses relating to the ordinary P&I clubs' usual cover which make the insurance subsidiary to all other insurances, the provision has full force and effect.

Section 8
Occupational injury insurance, etc.

Clause. 15-23. Scope of cover

Sub-clause 1 states that war risk insurance will cover death and disablement of the crew, insofar as it is a consequence of the assured's obligation by law or pursuant to a collective agreement to effect insurance to cover such eventualities.

Sub-clause 2 makes the insurance subsidiary to any other insurance the assured may have effected, provided that the insurance in question includes loss as referred to in sub-clause 1.

Chapter 16
Loss of hire insurance

General

The loss-of-hire conditions were revised in 2003, after remaining unchanged since 1996. The new conditions are based on the 1996 version, but certain amendments have been made in Cl. 16-1, Cl. 16-2, Cl. 16-4, Cl. 16-7, Cl. 16-9, Cl. 16-11, Cl. 16-12, Cl. 16-13 and Cl. 16-15. Although the text of Cl. 16-16 has not been amended, substantive amendments have been made to the Commentary. The Committee has discussed fundamental amendments to several provisions, but these amendments have not been effected.

The Commentary has been completely reworked, also in respect of provisions in which no amendments have been made from the 1996 version to the 2003 version.

Like the 1996 version, the 2003 version is largely a continuation of the main elements of the earlier conditions, primarily the 1972 general conditions for loss-of- hire insurance, with amendments made in 1977 and 1993 (Cefor Form No. 237, June 1993). The Commentary on the 1996 version contained extensive references to these earlier conditions, as well as to the so-called RANHAV judgment (ND 1967.269 NV), which was a key element in the preparation of the 1972 conditions. These references have been omitted in the 2003 version for the sake of clarity. In the introductory section of the various clauses, only the amendments introduced in the 2003 version are now emphasised. Persons interested in the historical evolution of the conditions are therefore referred to the Commentary on the 1996 version.

Clause 16-1. Main rules regarding the liability of the insurer

This provision was amended in the 2003 version. The Commentary was amended in the 2013 Plan. **Further amendments were made in the 2019 Version.**

Sub-clause 1, first sentence, contains the main rules regarding the insurer's liability under the loss-of-hire insurance, which require "damage to the ship" that "is recoverable under the terms of the Plan". As a main rule, therefore, the loss-of-hire insurance does not cover loss of time arising from causes other than damage to the ship. Thus the casualty that is recoverable under the loss-of-hire insurance is basically the underlying hull damage. Furthermore, the damage must be recoverable under the conditions of the Plan as they applied at the time the loss-of-hire cover came into effect. This applies regardless of whether the ship's hull insurance has been effected on different conditions or whether the ship has no hull insurance at all. If hull insurance has been effected on conditions other than those of the Plan, such as ITCH, and the loss-of-hire insurer has given his written acceptance that the loss-of-

hire cover is to be based on the said conditions, special rules nevertheless apply, cf. the second sentence and below. The reference to the Plan applies to the standard conditions, and not to the individual insurance contract. Consequently, the damage must entitle the assured to compensation in accordance with Chapter 10 *et seq*. In this connection, the rules regarding full cover pursuant to Cl. 10-4 will be decisive. Consequently, it is of no significance whether the ship is insured on conditions that are more or less favourable than the full conditions of the Plan. If the hull insurance has been effected on stranding terms pursuant to Cl. 10-8, the loss-of-hire insurer is therefore liable, provided that the damage would have been recoverable pursuant to Cl. 10-4. On the other hand, if the hull insurer has assumed extended liability for error in design and therefore must pay compensation for hull damage that would not have been recoverable under Cl. 12-4 of the Plan, the loss-of-hire insurer is not liable for the loss of time entailed by the casualty. Nor, in relation to the liability of the loss-of-hire insurer, does it make any difference if the damage is not covered by the hull insurance because it is less than the deductible, cf. the first sentence *in fine* to the effect that the deductible shall be disregarded when determining whether the damage is recoverable under the hull conditions. The same principle applies in situations where e.g. a repairer has accepted liability (wholly or partially) for damage caused to the ship provided the damage would have been recoverable under the terms of the Plan. This constitutes "damage" and the loss of hire insurer will still be liable if the damage results in the ship being deprived of income regardless of whether a claim has also been made under the hull insurance.

The term "damage" denotes the contrast to a total loss; in the event of the total loss of the ship, the question of cover under the loss-of-hire insurance does not arise, cf. below under Cl. 16-2. On the other hand, there is no requirement that the damage must be recoverable as particular average in accordance with the rules of Chapter 12. Damage to the ship which is recoverable under the hull insurance by virtue of the general average rules, cf. Cl. 4-8, also triggers the loss-of-hire insurance. On the other hand, if the general average situation causes a delay without there being any damage, this does not fall within the scope of sub-clause 1. In such cases, however, a special cover provision has been introduced in sub-clause 2 (d).

The reference to *the Plan* aims at the objective criteria for cover in Chapter 10 *et seq.* If the damage, objectively speaking, is recoverable under the Special Conditions but the assured loses his hull coverage on account of a breach of the rules of Chapter 3, he does not necessarily also lose his loss-of-hire cover. Breaches of the rules of Chapter 3 must be considered in direct relation to loss-of-hire cover. This means, on the one hand, that breaches of the rules regarding safety regulations, for instance, will be breaches which normally also are relevant in relation to the loss-of-hire cover, and which the loss-of-hire insurer therefore must be able to invoke. On the other hand, the loss-of-hire insurer will not be able to argue that the assured has failed to comply with his duty of disclosure to the hull insurer as long as he himself has been given full and correct information relating to his own cover.

Nor can the loss-of-hire insurer invoke breaches of special safety regulations included in the individual hull insurance contract, cf. what has been said above concerning cover of error in design.

In practice, the loss-of-hire insurer will often follow the decisions made in respect of the hull insurance with regard to whether damage is recoverable, the apportionment fraction in the event of concurrent causes of damage, etc. However, the loss-of-hire insurance is an entirely independent insurance, and the decisions made by the hull insurer are not binding on the loss-of-hire insurer.

The damage to the ship which gives rise to the loss of time may have various causes. In such cases, the general rules of Cl. 2-8 and Cl. 2-9 regarding the perils insured against apply. Pursuant to Cl. 2-10, the insurance only covers marine perils, unless otherwise agreed; under Cl. 2-8, however, marine perils encompass "all perils to which the interest may be exposed", with the exception of the perils that are mentioned in sub-clauses (a) to (c) of the provision, including "war perils". Loss-of-hire insurance against war perils will be included in the war risk cover in Chapter 15, which incorporates the present Chapter. If no war risk insurance has been effected in accordance with Chapter 15 of the Plan, loss-of-hire insurance against war perils in accordance with Cl. 2-9 must, if relevant, be agreed separately. Such cover will be directly related to Chapter 16, and will therefore be somewhat less comprehensive than the loss-of-hire cover provided by Chapter 15, cf. Cl. 15-16 to Cl. 15-18, which contain a number of additions to the loss-of-hire cover pursuant to Chapter 16.

The question of causation and concurrent causes of damage is basically also regulated by the general part of the Plan, cf. Cl. 2-13. If the loss has been caused by a combination of perils that are covered by the insurance and perils that are not covered, it must be apportioned proportionately between the perils insured against and the excluded perils according to the influence each of them must be assumed to have had on the occurrence and extent of the loss. The problems relating to cause were discussed thoroughly during the 2003 revision process. The Committee agreed that while no change was to be made in the causal principles that are currently applied in loss-of-hire insurance, it was appropriate to address causal issues from a broader perspective in the Commentary.

Concurrent causes in relation to loss-of-hire insurance may occur in a variety of situations, which may arise alone or in combination:

Firstly, the hull damage that causes the loss of time may be a consequence of a concurrence of perils that are covered under the hull insurance and perils that are not covered, such as a concurrence between navigational errors and breaches of safety regulations.

Secondly, several instances of hull damage may be repaired simultaneously. If one or more of these instances of damage is either not covered by the insurance or is covered under another insurance

period, the loss of time will be a consequence of damage that is covered and damage that is not covered.

Thirdly, there may be a situation where causes that are not covered or causes that must be attributed to another insurance period may result in the prolongation of a loss of time or stay in a repair yard that is due to the occurrence of hull damage. Such causes may be external factors in the form, for instance, of a strike, extreme weather conditions or the detention of the ship due to its arrest and the like, or factors related to the ship itself, such as the discovery during repairs of unknown damage to the ship that is not covered by this insurance.

In the *first* situation, where the hull damage that causes the loss of time is a consequence partly of perils that are covered and partly of perils that are not, an apportionment will be made in relation to the hull settlement on the basis of Cl. 2-13 of the Plan. In this case it will be natural to use the same percentage apportionment for the loss-of-hire settlement, unless the loss-of-hire insurer has special reasons for applying another ratio of apportionment, cf. above as regards the fact that the loss-of-hire insurer normally follows the decisions of the hull insurer. If, therefore, the assured himself must pay 30 per cent of the hull damage on account, for instance, of breaches of safety regulations, it is likely that he will also have to pay 30 per cent of the time lost in repairing the damage. If the damage is due to a concurrence of marine and war perils, the special rules of Cl. 2-14 to Cl. 2-16 apply. That portion of the loss of time that must be attributed to a war peril is not covered by a loss-of-hire insurance against marine perils, and must be covered by taking out either loss-of-hire cover under an insurance pursuant to Chapter 15 of the Plan, or an independent loss-of-hire insurance against war perils, compare above.

The *second* situation, in which several instances of hull damage are repaired simultaneously, is dealt with separately in Cl. 16-12. Here the general, discretionary rule of apportionment in Cl. 2-13 has been replaced by fixed criteria for apportionment. These rules may be applied cumulatively with the rules of Cl. 2-13 to Cl. 2-16; for further information see below under the Commentary on Cl. 16-12, sub-clause 1.

As to the *third* situation, we must fall back on the general rule of apportionment in Cl. 2-13. In this case, contrary to the first situation, there will be no apportionment settlement for the underlying hull damage, and Cl. 2-13 must thus be applied directly to the loss-of-hire settlement. Consequently, the loss of time shall be apportioned over the individual perils according to the influence each of them must be assumed to have had on the occurrence and extent of the loss. Guidance has to be sought in the Commentary to Cl. 2-13 where criteria for weighing the different causes in different situations are given. One of the criteria will be how foreseeable the event prolonging the loss of time is when the ship is sent to the repair yard. In relation to Loss of Hire insurance, this criterion of foreseeability must

be seen in connection with the rules regarding evaluation of tenders in Cl. 16-9, the assured's duty to reduce the loss and general preventive considerations.

Such considerations will be particularly relevant in connection with perils that prolong the loss of time and that are so foreseeable that the assured must be expected to take account of them when considering the choice of repair yard. The tenders on which the assured's evaluation is based pursuant to Cl. 16-9 will normally be based on the time it will take to carry out the actual repairs, and will not include an expected delay due, for instance, to an announced strike or the likelihood of poor weather or the like. In principle, therefore, foreseeable prolongations will not be included in the basis on which the assured makes his choice. On the other hand, the assured has a general duty to reduce the loss. Therefore, the assured cannot merely consider tenders when choosing a repair yard; he must also take account of expected delays in order to determine which yard will carry out the repairs most quickly, in real terms. This means, among other things, that the assured must inform the insurer if he is aware of factors that may prolong the ship's stay in a repair yard, so that the insurer can take this into account when discussing which of the tenders obtained entails the least loss of time in real terms. In the event of a grossly negligent breach of this duty, the insurer may apply Cl. 3-30 and Cl. 3-31 of the Plan. In less serious situations, however, preventive considerations may be used as an argument in favour of apportionment.

On the other hand, it is conceivable that a tender based on the estimated repair time at repair yard A, added to a foreseeable delay due to an announced strike or expected climatic problems, is more reasonable than alternative tenders from other repair yards. If the parties in such a situation jointly agree to choose repair yard A, the prolongation must be covered in its entirety. Reference is otherwise made to the Commentary on Cl. 2-13.

In practice, it is particularly the prolongation of stays in a repair yard due to strikes that has caused problems. The 1996 Commentary states that while, in principle, the apportionment rule in Cl. 2-13 was to be applied, in practice a prolongation of the stay in a repair yard due to a strike among the yard workers had been covered. However, the practice referred to consisted only of accepting local strikes at the yard as "foreseeable", and in such cases paying "full" compensation, i.e. without proportionate apportionment. In the Committee's view, prolongation due to a strike must be considered in the customary manner on the basis of Cl. 2-13, and not on the basis of whether or not the strike is local.

The problems raised by the "reference-back rule" in Cl. 2-11, sub-clause 2, are discussed in the Commentary on Cl. 16-14.

The loss covered by loss-of-hire insurance is referred to as "loss of time". This does not mean that the time lost is covered; loss-of-hire insurance is an insurance against loss of income (loss of freight), hence "loss-of-hire" or "loss of earning" insurance in English. The characteristic aspect of loss-of-hire

insurance is that income is **usually** lost as a direct consequence of loss of time, i.e. as a result of the fact that the **vessel** is temporarily unable to operate. **However, in certain circumstances the assured may be able to maintain the earnings even if the insured vessel as such is out of operation. For example, certain charterparties allows for hire to be paid for a number of "maintenance days" even if the vessel e.g. is out of operation for repairs (see e.g. Cl. 13 (c) of "Supplytime 2017"). Another example could be a situation where the assured employs a substitute vessel during repairs of a damaged vessel in order to maintain earnings under the charterparty of the damaged vessel. In these situations there is no claim for the agreed daily amount for the period during which the assured maintains the earnings, even if the insured vessel as such is unable to operate. On the other hand, if the assured incurs extraordinary expenses by employing a substitute vessel in order to maintain earnings, such extraordinary expenses may be allowable under Cl. 16-11.**

The loss of time is specified as "loss due to the ship being wholly or partially deprived of income as a consequence of damage". The loss of time will normally coincide with the time during which the ship is physically unable to operate. The time during which the ship is in a yard undergoing repairs, added to the time spent on surveys, obtaining tenders and rerouting the ship to the yard, will normally be lost in terms of income. If the ship cannot resume operation immediately after repairs have been completed, however, a loss of time may also occur after completion of repairs. These problems are solved by the provision in Cl. 16-13.

It is not required that there be a total loss of income; loss of time due to the ship being "partially" out of operation is also covered. This includes both the situation where the ship can partially operate, and the situation where the ship is operating normally but has reduced earnings due to the damage, for instance because the ship can no longer carry several types of cargo. This kind of loss will be recoverable under the loss-of-hire insurance if the insured can prove that the loss is a consequence of the damage, because he would have been able to accept another type of cargo if the damage had not occurred.

Sub-clause 1, second sentence, was added in the 2003 revision, and regulates the situation where loss-of-hire cover pursuant to Chapter 16 is effected for a ship for which hull insurance has not been effected on Plan conditions. This question gave rise to considerable discussion during the 1996 revision of the Plan. The problem was to determine which rules should be used to decide whether hull damage was recoverable, thereby providing grounds for covering the loss of time under the Plan's loss-of-hire conditions. During the 1996 revision, however, there was disagreement as to how such coordination could best be effected, and it was therefore not considered expedient to resolve this question in the Plan.

Lacking a solution to the problem in the Plan, each insurer has drawn up clauses to be applied when the hull insurance has not been effected on Plan conditions. Since these clauses are practically identical in content, it has now been agreed that the question is to be regulated in the Plan, thereby achieving a uniform solution to this problem.

If the hull insurance has been effected on the basis of conditions other than those of the Plan, and these conditions have been accepted in writing by the insurer, the *second sentence* establishes that the provisions in these conditions which correspond to Chapters 10, 11 and 12 of the Plan are to be applied to determine whether the damage is recoverable as hull damage, thereby triggering the loss-of-hire insurance. If no hull insurance has been effected, or if hull insurance has been effected on Plan conditions but adapted to individual cases, or if other conditions have been used which have not been accepted, the rules of the Plan are to be followed, cf. above.

If the insurer has accepted in writing hull conditions that are different from the Plan's hull cover, these other conditions will be decisive for the liability of the loss-of-hire insurer. Consequently, if the exclusions specified by such conditions for damage due to wear and tear or error in design, etc., are more comprehensive than what is provided under Cl. 12-3 and Cl. 12-4 of the Plan, the loss-of-hire cover will be reduced correspondingly. On the other hand, if the conditions offer more extensive cover than the Plan, liability under the loss-of-hire cover pursuant to Chapter 16 will be extended. Extensions or reductions of hull cover in individual cases in relation to standard cover may thus be of significance for loss-of-hire cover, provided that the insurer has accepted this in writing. This will also apply if the hull insurance is based on the Plan.

The coordination of loss-of-hire cover with hull conditions other than those of the Plan is binding provided the insurer has accepted the deviating hull conditions. Thus the assured may not choose to link his loss-of-hire cover to the Plan's conditions for hull cover once he has obtained acceptance for other hull conditions.

If the hull cover is divided up into several parts effected on different conditions, the loss-of-hire cover must be apportioned correspondingly. If, for instance, one third of the ship's hull cover has been effected on English ITCH conditions with the consent of the loss-of-hire insurer and two thirds on Plan conditions, one third of the loss of time must be covered in accordance with the ITCH rules that correspond to Chapters 10-12 of the Plan, while the remainder must be covered pursuant to the Plan.

Nevertheless, only the conditions in the insurance in question that correspond to Chapters 10-12 of the Plan are relevant in relation to the loss-of-hire cover. This means, on the one hand, that cover must be based on the conditions in question insofar as they state which objects are covered by hull insurance and the scope of the hull cover in the event of damage to the ship (Chapters 10 and 12). Furthermore, these rules must be followed as regards the delimitation between damage and total loss that does not

entitle the assured to loss-of-hire insurance, cf. Chapter 11 and Cl. 16-2. However, no reference to Chapter 13 is necessary because this Chapter concerns the hull insurer's cover of collision liability.

On the other hand, this means that issues that are regulated by Chapters 1-9 of the Plan and that concern the perils covered, incidence of loss, causation, breaches of the assured's duties relating to the underlying hull damage, etc. must always be decided on the basis of the rules in the general part of the Plan.

Coordination with other hull conditions is only linked to the assessment of the underlying hull damage; issues related to the loss-of-hire insurance itself, such as the rules regarding the duty of disclosure or special trading areas relating to loss-of-hire cover must always be decided in accordance with the rules of the Plan. If the ship is outside the trading area covered by the foreign hull insurance, but within the trading area covered by the Plan, the loss-of-hire insurer will therefore be liable even if no compensation is payable under the hull insurance.

Hull insurance conditions may conceivably change in the course of the insurance period covered by the loss-of-hire insurance, for instance from Plan conditions to English ITCH conditions. In such case, the hull insurance and the loss-of-hire insurance must be coordinated on the basis of the hull conditions that applied when the loss-of-hire insurance was effected, unless the assured has notified the insurer of a change to other standard conditions and received the latter's written acceptance of these. This type of solution is necessary because the loss-of-hire insurer calculates the premium in relation to the hull conditions that apply at the time the insurance is effected.

Sub-clause 2 represents an extension of the cover provided by loss-of-hire insurance in that in certain cases loss of time is covered even if there is no damage to the ship. This means that the loss-of-hire insurance's "casualty concept" has been extended: in addition to the hull damage defined in sub-clause 1, the events mentioned under sub-clause 2 (a) to (d) must also be deemed to be "casualties" for which compensation must be paid. Apart from the addition of a new sub-clause 2 (d), the provision is the same as in the 1996 Plan. The rules are structured on the basis of specific cases. Pursuant to *sub-clause 2 (a)***,** the insurance covers time lost because the ship "has stranded". To say that the ship "has stranded" means that the stranding must be in the nature of a casualty, even though there is no requirement that the stranding resulted in damage. If, on the other hand, the stranding is a consequence of "ordinary use", for instance foreseeable strandings during navigation on a shallow river, cf. Cl. 10-3, the insurer is not liable for the loss of time. This extension of cover must be assumed to have little significance in practice, since a stranding that does not cause damage to the ship will normally not result in a loss of time that exceeds the deductible period.

Sub-clause 2 (b) corresponds to Cl. 15-12, but is more restrictive in two respects. Firstly, contrary to Cl. 15-12, sub-clause 2 (b) stipulates "physical" obstruction. The difference arises from the fact that

Cl. 15-12 also encompasses blocking due to intervention by a State power. On the other hand, such blocking is excluded from the marine perils covered, which is decisive in relation to Cl. 16-1. Secondly, obstruction on account of ice is not included. In all other respects, reference is made to the Commentary on Cl. 15-12 as regards the scope of the provision. Loss of time that is covered pursuant to (b) must be deemed to be an independent casualty that triggers a separate deductible. However, this does not apply when the obstruction is a proximate consequence of an earlier stay in a repair yard. In such a case, the time lost during the ship's obstruction is covered pursuant to Cl. 16-1, sub-clause 1, and no new deductible is to be calculated.

Sub-clause 2 (c) extends cover to include loss of time resulting from action taken to salvage or remove damaged cargo.

Sub-clause 2 (d) was added in the 2003 version, and extends cover to include delay resulting from a general average situation that does not lead to damage to the ship. An example is where the cargo shifts in bad weather, and the ship seeks a port of refuge to avoid damage. The deviation to and from the port of refuge is a general average act. The time lost in seeking a port of refuge and staying there for a while in order to discharge and reload/restow will be covered by the loss-of-hire insurer under sub-clause 2 (d) even though there is no damage to the ship. This corresponds for instance with the solution under English loss-of-hire conditions**.** In connection with the recent pirate attacks, there has been discussion of how far the cover extends when the shipowner takes steps to avert an attack or limit its consequences. The wording "event that is recoverable in general average" must be construed as a general average act, or an expense or sacrifice that is recoverable in general average. An attack by pirates is therefore no general average act. On the other hand, expenses and sacrifices undertaken by the shipowner in order to avert or limit the attack could be such an "event", depending on the circumstances. However, what is covered by sub-clause 2 (d) is the loss of income "as a consequence of" such an expense or sacrifice. If the loss of income had already occurred when the expense or sacrifice was undertaken, the loss of income is not a consequence of the general average event. This means that loss of income resulting from a deviation or another measure taken to escape from pirates trying to board the ship may, depending on the circumstances, be recoverable because the loss of income is a consequence of the sacrifice. However, this is less practical because this type of time loss will seldom exceed the deductible. If, on the other hand, the ship has already been seized by pirates, the loss of income will already be a fact. In such case it is not the expense nor the sacrifice – such as ransom negotiations – that is the cause of the loss of income, but the pirate attack. In other words, the ship was deprived of income at the time the general average act was undertaken, and there is no causation between the event and the loss of income. Therefore, the time spent on ransom negotiations or other measures after the ship was seized by pirates is not recoverable under sub-clause 2 (d). This means that sub-clause 2 (d) will only cover a very marginal portion of a potential loss of time resulting from a pirate attack. If the assured needs loss-of-hire insurance for this risk, therefore, he must take out such cover in the market.

Sub-clause 3 **was moved from Cl. 16-4, sub-clause 2, without any change of wording. Pursuant to this provision, the daily amount multiplied by the maximum number of days covered per casualty or altogether during the period of insurance must be seen as a sum insured, i.e. a maximum monetary limit on the insurer's liability (per casualty and altogether during the period of insurance). The insurer is liable to pay a full daily amount for up to the stated number of days or a reduced amount for a correspondingly larger number of days. The stated number of days therefore does not impose a maximum limit on the total number of days for which the insurer may be liable.**

Further rules governing the term "insurance period" are set out in Cl. 1-5 of the Plan. The term poses no problems for ordinary insurance policies with a term of one year. If it has been agreed that the insurance is to attach for a period of more than one year, it follows from Cl. 1-5, sub-clause 4, that the insurance period is nevertheless to be deemed to be one year in relation to, inter alia, Cl. 16-1, sub-clause 3. Further details regarding the calculation of the insurance period in these cases are found in the Commentary to Cl. 1-5.

The rules regarding the limitation of the insurer's liability per casualty contain no provisions regarding the delimitation of the term "casualty" in the event of damage caused by heavy weather and the like. Such provisions are included, on the other hand, in Cl. 16-7 regarding the deductible period. Should there be a need for a corresponding delimitation in relation to Cl. 16-1, the rules of Cl. 16-7, sub-clauses 2 and 3, must be applied by analogy. However, the problem is not likely to arise in practice, since a total maximum number of days equal to the maximum number of days per casualty has as a rule been agreed.

Sub-clause 4 **was added in the 2019 Version, and automatically re-instates the policy to the original limit in case of a casualty during the policy period. It follows from sub-clause 3 that the insurance contract shall state a maximum liability for any one casualty and further a maximum liability for all casualties occurring during the insurance period. These limits are very often the same, e.g. 90 days cover per casualty and in all during the policy period. In the absence of a reinstatement clause, there will be less protection available for any subsequent casualties if more than one casualty occurs during the policy period. As an example, if the policy provides for 90 days cover per casualty and in all, and a casualty occurs whereby a claim is paid for 50 days in excess of the deductible, then under the provisions of sub-clause 3 there would only be 40 days protection remaining for any further casualties during the policy period. This is now remedied by including an automatic reinstatement clause, whereby the full 90 days limit is "reinstated" automatically after a casualty, against payment of a pre-defined additional premium.**

The wording is based on standard automatic reinstatement clauses which customarily have been included in most loss of hire insurance contracts in the recent years. It does not matter if a casualty occurs early or late in the policy period, reinstatement to original limits shall automatically take place in case of a casualty, and the corresponding premium automatically becomes payable. The premium rate is the same as for the original policy, however it is necessary to assess the amount to be reinstated, and the question is how much have been "used" of the sum insured which is to be multiplied with the premium rate in order to decide the amount of reinstatement premium payable. This also means that it is not possible to calculate the reinstatement premium until the adjustment of claim is completed, only then is the amount to be reinstated known to the parties. Interest allowance and certain costs are payable in addition to the sum insured (ref. Cl. 4-19), and therefore no reinstatement premium is payable for such allowances. The expression "irrespective of time" means that the reinstatement premium rate is the same as the premium rate for the original policy period, irrespective of when the casualty occurs during the policy period. However, if the insurance period is longer than one year, it will follow from Cl. 1-5 that the insurance period shall nevertheless be deemed to be one year in relation to Cl. 16-1, sub-clause 4, which means that the reinstatement premium shall be limited to the annual premium for the amount reinstated.

Clause 16-2. Total loss

This Clause was amended in the 2003 version.

The provision states a fundamental principle of loss-of-hire insurance: the insurance does not cover loss of time resulting from the total loss of the ship. Such loss of time can occur in two different connections. Firstly, considerable time may elapse from the time of the casualty until it is becomes clear that compensation for total loss will be paid. Secondly, time can be said to have been lost when the assured has used the lost ship for a specific purpose, such as on a liner route, and it takes time to procure a new ship to replace the old one.

Both these forms of loss of time are, however, covered by total loss insurances for the ship, i.e. ordinary hull insurance and interest insurances. Loss resulting from the interruption of operations due to the loss of the ship will to a certain extent be reflected in the ship's hull value; if this business interruption interest is particularly great, it can be covered by an interest insurance. To some extent, compensation for loss of time in connection with late settlement is also provided by the interest rule: interest is also payable on compensation for a total loss pursuant to Cl. 5-4, i.e. from one month from the day on which notice of the casualty was sent to the insurer.

By excluding loss of time resulting from total loss from the loss-of-hire insurance, the very difficult problems posed by the calculation of such losses of time are avoided.

The basic principle in Cl. 16-2 is that if the assured could have claimed total loss compensation pursuant to the rules of Chapter 11, he is not entitled to cover under the loss-of-hire insurance. The fact that he is not actually paid such compensation is irrelevant. If the ship meets the conditions for condemnation pursuant to Cl. 11-3 *et seq.* but the assured nonetheless prefers to have it repaired because of its low insurable value and rising ship prices, cf. Cl. 12-9, this will therefore not entitle him to claim compensation under the loss-of-hire cover.

As regards whether there is a total loss pursuant to Chapter 11, the loss-of-hire insurer will usually follow the decisions made in the relationship between the assured and his hull insurers. However, these decisions are naturally not binding on him, cf. what is said in the Commentary on Cl. 16-1, sub-clause 1, about a parallel issue.

The fact that the hull insurer pays the sum insured in accordance with Cl. 4-21 cannot be equated with payment of total loss compensation in accordance with Chapter 11. Should it later prove that the conditions for condemnation would have been fulfilled, Cl. 16-2 will be applicable. The same applies if the further development of the casualty results in the ship actually becoming a total loss, for instance where it has struck a reef and later sinks while being towed off.

If the ship's hull insurance has been effected on conditions other than those of the Plan, and the insurer has accepted these conditions, the question of the right to compensation for total loss must nonetheless be decided by the conditions of the insurance concerned. This solution, which is new, is explicitly stated in Cl. 16-2 in the 2003 version. However, only the rules in the relevant condition that correspond to Chapter 11 of the Plan shall apply. The general part of the Plan shall therefore apply in the usual way in relation to this rule as well.

In earlier versions of the Plan, the rule in Cl. 16-2 was that if the hull insurer, as a compromise, paid at least 75% of the agreed insurable hull value without taking over the ship and without requiring the assured to carry out repairs, this had to be regarded as equivalent to a total loss. The provision aimed at a so-called "compromised total loss" settlement. This type of settlement is appropriate when a ship is so badly damaged that it is not worth repairing, but when the ship nevertheless does not satisfy the conditions for condemnation because it has been overvalued, cf. Cl. 11-3, sub-clause 2.

This provision was deleted in the 2003 revision. It was considered unsatisfactory because it could result in the assured falling between two stools. If the damage repairs amounted to at least 75% of the agreed insurable hull value, but this amount was less than 80% of the ship's value once repaired, the shipowner would not be entitled to request condemnation, cf. Cl. 11-3, nor could he claim compensation under the interest insurances. At the same time, under the 75% rule he would not be covered under the loss-of-hire insurance, regardless of whether or not he chose to repair the ship.

The practice of undervaluation can be ascribed to the right to effect interest insurances, which gives the shipowner an incentive to supplement a low hull value with high interest insurances, giving rise to problems in the event of partial damage. As long as the system of high interest insurances is accepted, loss-of-hire cover should also be secured in the event of casualties that do not entitle the assured to compensation under the interest insurances. Insurers will not incur significant costs as a result of this amendment because this is a minor problem in practice.

If the assured chooses to repair the ship even if, objectively viewed, it is not worth repairing, he may claim compensation under the loss-of-hire insurance in accordance with the usual principles. However, repair of the ship is not a prerequisite for compensation for time lost in connection with this type of damage settlement. The shipowner is entitled to compensation for lost income during the period until it is finally determined that the ship is not to be repaired. In such situations, moreover, the shipowner also has a duty to limit the loss pursuant to Cl. 3-30, and therefore cannot cause undue delay.

Clause 16-3. Main rule for calculating compensation

The *first sentence* states the main rule for calculating compensation, and provides that compensation is to be determined on the basis of the time during which the ship has been out of operation and the loss of income per day.

The method of calculation indicated must be used even when the loss of income can be established more directly. This is because both the loss of time and the daily amount must be determined on account of the rules regarding days of indemnity (cf. Cl. 16-4) and the rules fixing a maximum limit for the insurer's liability per lost day (cf. Cl. 16-5).

"The daily amount" is the insurable value of the assured's loss of income per day. It must be distinguished from the agreed "sum insured per day". The daily amount is normally agreed and insured in full, and the agreed daily amount will thus also be the sum insured per day. However, this does not preclude partial cover; for instance, insurance can be effected for USD 5,000 per day of an agreed daily amount of USD 10,000. For further details, see the Commentary on Cl. 16-6.

A basic condition for compensation under the loss-of-hire insurance is that the ship has been deprived of income as a result of the damage. If the ship would have been unable to obtain employment even if it had not been damaged and would consequently have been laid up, there is no loss of time that entitles the assured to claim compensation, cf. *Cepheus Shipping Corporation v. Guardian Royal Exchange Assurance PLC,* The Capricorn, [1995] 1 Q.B. 622. However, in order for the loss of time to be recoverable, it is sufficient that the assured would have had a reasonable chance of obtaining

employment for the ship if it had not been affected by circumstances mentioned in Cl. 16-1. If the ship, therefore, is one of many that are waiting in the Gulf to be chartered, the condition is fulfilled. The assured cannot be required to prove that his ship would actually have obtained employment. However, the assured must prove that there was a genuine, commercially sound, chance of obtaining a charter, and that it was realistic to move the ship from the area in which it was located when the decision to make repairs was made to the area where there was potential employment. If, therefore, a drilling platform is damaged in the North Sea area, and it is evident that it would have been unable to obtain employment in Europe, but that there are employment opportunities in the Far East, the assured must prove that it would have been commercially realistic to move the platform there.

According to the *second sentence***,** the period of time lost cannot begin to run before the casualty or the event that gives rise to a claim under the loss-of-hire cover pursuant to Cl. 16-1 has occurred. This means that no compensation will be paid for loss of income relating to a prior period. Example: a ship sailing under a voyage charterparty suffers a casualty during the ballast leg. As a result of this casualty, the charterparty is terminated. In actual fact, the freight covers both the ballast leg and the loaded leg, and the assured could argue that the loss of income must be dated back to the start of the ballast leg. However, the provision in Cl. 16-3, second sentence, precludes such a claim.

The provision in Cl. 16-3 naturally does not prevent the parties from explicitly agreeing that the cover is to include loss of time irrespective of whether the assured can prove that the ship would have been employed if the damage had not occurred. However, an agreement pursuant to the rules of Cl. 16-6 cannot be perceived as such an agreement.

Clause 16-4. Calculation of the loss of time

The Clause was editorially amended in the 2019 Version by moving sub-clause 2 to Cl. 16-1, sub-clause 3, cf. the Commentary to this Clause.

This provision supplements Cl. 16-3, and lays down further rules for calculating loss of time once the extent of the time lost has been established.

Ascertaining and calculating the loss of time will primarily raise problems of a factual nature, namely establishing how long the insured ship has been deprived of income as a result of the damage that it has sustained. However, certain questions of principle also arise. A brief account of the calculation of loss of time in certain typical cases may be found in earlier versions of the Commentary on the 1996 Plan, and is therefore not repeated here.

The *first sentence* provides that the loss of time shall be stated in days, hours and minutes. The insured is therefore also entitled to compensation for loss of time that is less than one day. This method of

calculation is in conformity with the usual method for calculating loss of time in off-hire and demurrage settlements.

The *second sentence* states that time during which the ship has only partly been deprived of income shall always be converted into a period during which operations have halted completely. This is in accordance both with established practice in settlements and with the method of calculation used for off-hire and demurrage.

However, the provision has given rise to certain problems in practice in cases where the cause of the ship's being partly deprived of income is not reduced speed, but a fault in the ship's equipment, holds or tanks. If, in such a situation, the assured allows the ship to continue operating with the defective equipment for a period of time, and subsequently carries out repairs when this is convenient in relation to the ship's charterparties, the result is first a partial time loss linked to the ship's reduced operations, followed by a full loss of time during the period of repairs. In principle, however, the insurer should not be liable for a loss of time that is greater than what would have occurred if the ship had been repaired immediately. In connection with the 2003 revision, therefore, the Committee considered limiting the conversion provision to situations where the reason for the ship's being partly deprived of income was reduced speed, and giving more limited cover if the reduced income was due to other causes. In this respect, however, it suffices to refer to Cl. 3-30 and Cl. 3-31 of the Plan which state that the shipowner has a duty to limit his loss. Under Cl. 3-30, second sentence, the assured has a duty to consult the insurer if there is an opportunity to do so. If, for commercial reasons and without consulting the insurer, the assured chooses to postpone making repairs that could have been carried out immediately, and this inflicts a loss on the loss-of-hire insurer, the latter must therefore be able to invoke these rules.

Clause 16-5. The daily amount

The provision lays down rules for calculating the daily amount under open policies, i.e. policies that do not specify any agreed value for the daily amount. As mentioned in the Commentary on Cl. 16-3, the "daily amount" is the insurable value of the assured's loss of income per day. In practice, the daily amount is usually agreed. The provision in Cl. 16-5 is therefore primarily applicable in cases where the agreement "is opened" in accordance with Cl. 16-14, sub-clause 2.

Sub-clause 1 states that the daily amount shall be fixed at the equivalent of the calculated gross freight per day less the costs saved per day due to the ship's not being in regular operation. The gross freight per day poses no difficulty when the ship is under a time charter. In the case of a voyage charter of the whole ship, the estimated freight must be divided by the number of days that would normally be required for the voyage and any necessary prior or subsequent ballast voyages. In both cases, the freight according to the contract of affreightment in force when the loss of time occurs is decisive.

Sub-clause 2 prescribes the daily amount in cases where the ship is not employed under a contract of affreightment when the period of interrupted operations begins. This rule provides for an objective calculation of loss for practical legal purposes: it can be very difficult to decide how the ship would have been employed if it had not been out of operation. To avoid the difficulties of deciding which course of action the assured would have chosen, the daily amount in such cases is fixed at "the average freight rates for ships of the type and size concerned" for the period during which the ship is deprived of income. The term "average freight rates" means a "weighted average"; account must be taken of how long each rate has been in effect. In practice, this can be achieved by dividing the period of interrupted operation into shorter periods during which freight rates were relatively constant and calculating the compensation for each individual period. If rates for long-term charters and voyage charters differ, compensation must be based on an average in these cases, too.

If the insured ship is employed in a liner trade, the daily amount must be calculated on the basis of the information available concerning the earnings of other ships in the same line during the period in which the ship was out of operation.

The reference to the ship being "unchartered" does not cover the situation where a charterparty lapses due to a casualty covered by the insurance. This situation must be evaluated in accordance with sub-clause 1.

Clause 16-6. Agreed daily amount

In 2016 the word "assessed" was replaced with "agreed" corresponding with the amendment to Cl. 2-3.

The provision regulates the agreed daily amount. As mentioned under Cl. 16-5, the daily amount is usually agreed; the reason for doing so is to avoid difficulties in calculating the daily amount under an open loss-of-hire insurance contract. Under Cl. 2-2, an agreement of the daily amount means that the insurable value is fixed "by agreement … at a certain amount".

If it is clearly stated in the text of the insurance contract that the daily amount is agreed, the matter is straightforward. In practice, however, policies often merely state the amount the insurer is to pay for each day of time lost. This may be an agreed daily amount, but it is also conceivable that only the sum insured per day is stated. In this connection, Cl. 16-6 lays down an important rule of presumption: if the insurance contract states "that the loss of income shall be compensated for by a fixed amount per day, this amount shall be regarded as an agreed daily amount unless the circumstances clearly indicate otherwise". In such case, the amount will also be the sum insured per day; in other words, the agreed value is fully insured.

Both the assured and the insurer may invoke the agreement. For the insurer, this is primarily relevant in the case of under-assessment, i.e. when the agreed daily amount is lower than the real loss of income per day. In such case, the agreement will limit the assured's claim for compensation. However, the agreement may also be relevant when the rules of Cl. 16-11 are applied and when there is a question of seeking recourse against a third party who is responsible for the loss of time. Under Cl. 16-11 the agreed daily amount will be decisive when calculating the savings the insurer makes as a result of the extraordinary measures taken to expedite repairs. As far as recourse is concerned, it must be proven to the insurer that the agreed daily amount represents the full loss, and that it therefore is not appropriate to apply the rule of apportionment laid down in Cl. 5-13, sub-clause 2. Only when the insurer's loss has been recovered in full can the assured make any claim, cf. Cl. 5-13, sub-clause 3.

In view of the consequences of under-assessment, not every amount that is mentioned in the insurance contract should automatically be regarded as an agreed daily amount. If the amount is so much lower than the real loss per day that there can be no question of any rounding-off or rough calculation of the loss, the insurance contract should be treated as an open insurance contract. The provision has been worded with this in mind. If, for instance, the gross freight per day is USD 10,000, and the assured has effected a loss-of-hire insurance contract for USD 3,500 per day, one can safely say that "the circumstances clearly indicate" that the amount is a sum insured per day, not an agreed daily amount: thus there is an open insurance contract with under-insurance. Naturally, there is nothing to preclude combining under-insurance with agreement. In our example, for instance, it may be agreed that the insurance contract is to cover USD 10,000 of an agreed daily amount of USD 15,000. In terms of settlement, it would be an advantage if the apportionment ratio pursuant to Cl. 5-13, sub-clause 2, first *sentence*, is fixed at the ratio between the insured daily amount and agreed daily amount. It would therefore be expedient to have separate spaces on the first page of the insurance contract for "sum insured per day" and "agreed daily amount".

The system of agreed insurable values is well established in hull insurance. Ship values change constantly, and it can often be difficult to establish what a ship is really worth at a particular point in time - there is clearly a need to fix the value in advance. In freight insurance, the situation appears to be slightly different; in this case the exact amount of freight of which the assured is deprived will often be known, and an agreement that exceeds the freight amount is likely to be perceived as excessive compensation for the assured's actual loss. Nevertheless, the system of agreement has been maintained without exception. If it is evident that a loss of time has occurred, cf. Cl. 16-3, and the daily amount has been agreed, the assured must be paid the amount agreed for the number of (full) days during which the ship is out of operation. The only exception from this rule is where the assured has supplied misleading information about matters that are relevant for the agreement, cf. Cl. 2-3, sub-clause 1. The insurer must therefore ensure that the assured provides enough information concerning the ship's potential earnings to give the insurer a basis for evaluating whether the agreement is correct

when the insurance contract is effected. This also applies to the question of the duration of the charterparty, so that account can be taken when fixing the agreed daily amount of the possibility of the contract of affreightment lapsing.

It follows from Cl. 16-14, sub-clause 2 that the agreed daily amount shall not apply to time lost during repairs that are carried out after the insurance period expires, if the actual loss of income per day calculated pursuant to Cl. 16-5 is less during this period. This provision is sometimes set aside in individual insurance contracts. As a rule, this is only done by adding the words "fixed and agreed", or if relevant, "chartered or unchartered". If the parties to the insurance contract have a common understanding that the purpose of this addition is to nullify Cl. 16-14, sub-clause 2, it is of course binding on both parties. However, not all insurers take this view of the provision, in which case it is highly uncertain whether such an addition is sufficient to set aside Cl. 16-14, sub-clause 2. If this is the intention, the setting aside should be formulated more clearly.

If the insured ship is sailing under a charterparty for consecutive voyages, the agreement must be based on the average gross freight per day that the ship would have earned if all the voyages had been completed in the normal way. It may then be relevant to deduct from the gross freight an amount for costs that will be saved if the ship must dock for repairs. There are numerous uncertain factors in this calculation. The uncertainty is even greater for ships in the liner and tramp trades. In general, it can be said that the greater the degree of uncertainty in the calculations, the more important it is that the daily amount be agreed in advance.

It is conceivable that, after the expiry of the contracts of affreightment on which the agreement was based, the ship is chartered on even more advantageous conditions. In such case, the agreement still has significance, since it always constitutes the maximum limit for the insurer's liability.

Clause 16-7. Deductible period

Sub-clause 3 was amended in the 2007 version. The Clause is otherwise identical to the 2003 version.

Sub-clause 1 has been simplified, but the substantive content is unchanged. The *first sentence* of sub-clause 1 provides that a deductible period, stated in the insurance contract, shall be established for each casualty. In accordance with the solution that follows from Cl. 12-8 as well as from Cl. 16-7 of the 1996 version, the provision merely provides a number of rules for calculating the deductible period. The number of days must therefore be fixed in the insurance contract. This is linked to the fact that the number of deductible days is a key factor when fixing the premium and therefore an important element of the negotiations between the assured and the insurer. Thus the deductible period is agreed in each individual case.

The term "casualty" here means an event that gives rise to the right to claim under loss-of-hire insurance in accordance with Cl. 16-1, i.e. also events which are mentioned in Cl. 16-1, sub-clause 2, but which do not result in damage to the ship.

A separate deductible period is applied for each casualty; this is in accordance with the other deductible provisions in the Plan, cf. Cl. 12-18 and Cl. 13-4. However, if one and the same casualty leads to a number of separate delays, e.g. delay at the place where the casualty occurred, delay in connection with temporary repairs and delay during permanent repairs, then only one deductible period shall be applied for the aggregate of all the delays. As far as the wording "each casualty" is concerned, reference is made to the Commentary on Cl. 12-18 and Cl. 4-18. In loss-of-hire insurance, the question of whether there has been one or more casualties will probably seldom be acute, because the deductible periods for several more or less contemporaneous casualties will usually coincide. An example would be where the insured ship collides with three other ships within a short space of time; the rudder is jammed by the first collision and it is impossible to stop the ship before the second and third collisions occur. For the hull insurer who covers collision liability it will be important to decide whether one or three casualties have taken place; this will determine whether his maximum liability is one or three times the sum insured, cf. Cl. 13-3. For the loss-of-hire insurer, on the other hand, the number of casualties will seldom be important. Even if one assumes that there are several casualties, the delay and the deductible period will run parallel, both at the site of the casualty and during subsequent repairs - thus the result will in practice be the same as if the events were regarded as a single casualty.

According to sub-clause 1, *second sentence*, the deductible period runs "from the commencement of the loss of time". In the 1996 version, the starting point for calculation of the deductible period was stated as "the casualty", but strictly speaking this is somewhat inaccurate. In order for the deductible period to be able to run, there must be a loss of time. The wording was therefore amended in the 2003 version. If, for instance, the ship runs aground but continues her voyage immediately at her normal speed, there is no loss of time nor does any deductible period run. If bottom damage is later discovered that necessitates a lengthy stay in a repair yard, on the other hand, a loss of time occurs. In this case, the deductible period begins to run in parallel with the loss of time.

The rule that the deductible period begins to run at the commencement of the loss of time also means that the deductible period is to be placed at the beginning of the period of lost time. This also applies where the loss of time runs during several separate periods. The deductible period is therefore not to be apportioned pro rata between the various periods. On this point, the rule in loss-of-hire insurance differs from the rule applied in hull insurance where the deductible is apportioned pro rata between the expenses to be covered by the insurer. The placement in time of the deductible period can have the following consequences for the settlement:

Firstly, it is significant in relation to the rule of apportionment in Cl. 16-12 regarding simultaneous repairs. It will be a distinct advantage for the assured to have owner's work (i.e. repairs that are not covered by insurance) carried out during the deductible period; the assured does not receive any loss-of-hire compensation for this period in any event. On the other hand, if owner's work is carried out during a period of time that is covered by the loss-of-hire insurer, the result is that the assured may only claim 50 % of the compensation that he would have received if only repairs covered by the insurance had been carried out, see Cl. 16-12, sub-clause 1.

Secondly, the placement in time of the deductible period may become significant where the daily amount pursuant to Cl. 16-5, sub-clause 2, or Cl. 16-14, sub-clause 2, is lower for the last repair period than for the first. In this case, the assured may not demand that the deductible period be placed during the last period so as to enable him to receive compensation for correspondingly more days at the highest daily amount.

Thirdly, the placement in time of the deductible period may become significant when apportioning costs of measures to avert or minimise loss and extra costs incurred to save time, cf. Cl. 4-12, sub-clause 2, and Cl. 16-11, sub-clause 3. Insofar as such costs are incurred in saving time during the deductible period, they must be covered by the assured, cf. further information in the Commentary on Cl. 16-11, sub-clause 3.

Finally, the placement in time of the deductible period may become significant when apportioning claims for reimbursement pursuant to Cl. 5-13 and Cl. 16-16.

The second sentence also states that the deductible period is to be calculated in accordance with the rule in Cl. 16-4, sub-clause 1, second sentence. This corresponds with the 1996 version. If the ship is only partly deprived of income, the deductible period lasts until the loss of time, converted into a period of total loss of income, has reached the agreed number of days. This means that if a machinery casualty causes a ship to sail at half speed for 40 days and the deductible period has been fixed at 14 days, the deductible period lasts for 28 days, reckoned from the time of the casualty.

The same applies where the loss of time resulting from a casualty is spread over several periods, separated by periods in which the ship is in full operation. In such cases, only the days with (full) loss of time are counted. The deductible period does not expire until the fixed number of days is reached.

Sub-clause 1, *third sentence*, states that loss of time during the deductible period is not covered by the insurer. This is in accordance with the 1996 version.

In the 1996 version, Cl. 16-7, sub-clause 2, contained a rule prescribing that heavy weather damage arising during the period of time while the ship navigates between two ports should be regarded as a

casualty, as well as a rule of apportionment in the event that the insurance period expired during this period. sub-clause 3 gave sub-clause 2 a corresponding application for damage resulting from the ship's passing through ice and for damage caused by grounding or contact with the seabed while the ship is navigating in shallow waters. In the 2003 version, these two sub-clauses have been combined and simplified along the lines of the corresponding provision in Cl. 12-18. *Sub-clause 2* states that damage which is due to heavy weather or the ship's sailing through ice, and which occurred during the period of time between the ship's departure from one port and its arrival at the next, is to be regarded as one casualty. The provision is identical to Cl. 12-18, sub-clause 2. The provision regarding damage caused by grounding or contact with the seabed in Cl. 16-7, sub-clause 3, of the 1996 version, cf. above, has been deleted, but no change in practice as regards this point is intended.

The reason for the rule is the technical difficulties that might easily arise in connection with settlement if an attempt was made to categorise heavy weather damage, damage caused by ice, etc. sustained during one and the same voyage as separate casualties.

However, the rule is of far less importance in loss-of-hire insurance than in hull insurance. As mentioned in the Commentary on sub-clause 1, instances of damage that occur during one and the same voyage will normally all be repaired at the same time. Even if the various instances of damage are ascribed to several different casualties, both the deductible period and the delay will coincide for them all; for settlement purposes, therefore, the result is the same as if all the damage had been regarded as one casualty.

The provision in sub-clause 2, second sentence, in the 1996 version stated that if the insurance should attach or expire during the period between two ports, the insurer covered the same proportion of the total loss of time resulting from all heavy weather damage occurring during the period as the number of heavy weather days during the insurance period bore to the total number of heavy weather days occurring throughout the period. This rule has been deleted to bring the provision into line with Cl. 12-18, but no change in practice is intended on this point either.

The principle of apportionment is most easily illustrated by an example. On a voyage which lasts from 20 December 1995 to 10 January 1996, the ship sails in heavy weather for six days before and three days after the new year, resulting in a total loss of time of 60 days. The 1995 insurance contract has a 30-day deductible and covers 180 days per casualty, while the 1996 insurance contract has a 15-day deductible and covers 90 days per casualty. The 1995 insurance contract thus covers 6/9 of the 60 days of lost time, i.e. 40 days, subject to a deduction of 2/3 of the deductible period of 30 days, i.e. 20 days; hence 20 days of loss of time is recoverable. The 1996 insurer covers 1/3 of the loss of time, i.e. 20 days, subject to a deduction of 1/3 of the 1996 deductible period, i.e. five days; hence 15 days are recoverable. The maximum number of recoverable days under the 1995 insurance contract is 2/3 of

180 days, i.e. 120 days, and under the 1996 insurance contract 1/3 of 90 days, i.e. 30 days. Thus, in our example limits would have no relevance.

Sub-clause 3 was added in the 2007 version. In practice, it is not uncommon for a separate deductible period to be agreed for damage to machinery. This has given rise to questions as to how the term "damage to machinery" should be defined in this context, and whether this deductible should be applied regardless of the cause of such damage. Sub-clause 3 therefore states that Cl. 12-16 shall apply correspondingly, so that the term "damage to machinery" has the same meaning in relation to loss-of-hire insurance as in relation to machinery damage deductions under Cl. 12-16. The provision in Cl. 12-16, sub-clause 2, applies correspondingly, so that the damage referred to in the provision does not trigger a separate deductible period.

Clause 16-8. Survey of damage

The provision refers to the rules for survey of damage in Cl. 12-10 of the Plan. The reference also applies even if the hull insurance has been effected on conditions other than those of the Plan with the written consent of the insurer. Consequently, any survey rules in the differing standard conditions shall not be used.

The statement that the survey rule applies "correspondingly" to loss-of-hire insurance means that the loss-of-hire insurer must be notified and given an opportunity to survey the damage before it is repaired, cf. Cl. 12-10, sub-clause 1.

The primary purpose of the survey and survey reports is to secure proof of the circumstances that are decisive for the liability of the insurer and for the extent of such liability. However, the survey can also provide a necessary basis for evaluating where and when repairs should be carried out, cf. Cl. 12-10, sub-clause 3, regarding preliminary reports.

A main condition for the loss-of-hire insurer's liability is, in most cases, that the loss of time is due to damage that is recoverable under the ordinary hull conditions, cf. Cl. 16-1, sub-clause 1. The necessary information regarding the cause, nature and extent of the damage will normally appear in the hull survey reports. The loss-of-hire insurer can use these reports, cf. Cl. 5-1, in which case it will not be necessary to include a detailed description of the damage in the loss-of-hire survey reports. But in exceptional cases the situation may be different: such large deductibles may have been agreed that no compensation can be claimed for the damage under the hull insurance contract and therefore no hull survey is carried out. However, the loss-of-hire insurer may be liable, in which case he must ensure that the necessary facts concerning the damage are established. There may conceivably also be cases where the loss-of-hire insurer is not willing to automatically accept the survey that has been

conducted for the hull insurance; he is then fully entitled to require that all the relevant facts are included in the loss-of-hire survey report.

In survey reports for the loss-of-hire insurance, it is necessary to include facts that are particularly significant for the loss-of-hire settlement. It is important to include exact indications of time for when the casualty occurred, any time spent at the site of the casualty, the ship's rerouting to the shipyard, times of arrival at and departure from the shipyard in connection with temporary repairs, if any, and in connection with permanent repairs. If repairs arising from different casualties or maintenance or other owner's work are carried out on the same occasion, the amount of time that each of these would have required if carried out separately must be specified, (cf. Cl. 16-12). If extraordinary measures have been taken to save time (cf. Cl. 16-11), this must be stated and the cost of the measures and the amount of time saved must be specified.

Clause 16-9. Choice of repair yard

Sub-clause 3 was amended in the 2003 version.

This provision regulates the right of the assured to choose a repair yard and the consequences his choice of yard has for the extent of the loss-of-hire insurer's liability.

Sub-clauses 1 and 2 concern the invitation of tenders on which to base the choice of repair yard. *Sub-clause 1* has the same wording as Cl. 12-11, sub-clause 1. Once the insurer learns of the casualty, he must be obliged to make it clear to the assured whether or not he will require that tenders be obtained. If he fails to do so, Cl. 16-9 will not apply, and the loss-of-hire insurer must then cover the actual loss of time. In practice, tenders will normally be obtained after consultation between the assured, the hull insurer and the loss-of-hire insurer. If necessary, however, the insurers must be entitled to take independent action, together or individually.

It is conceivable that the loss-of-hire insurer enters the settlement process at such a late stage that it is impossible to obtain tenders prior to carrying out repairs from the repair yards from which he would have been interested in receiving tenders. If this is due to the fact that the assured has not notified the insurer of the casualty pursuant to Cl. 3-29, the insurer may invoke Cl. 3-31. The insurer must also have the right to obtain tenders after the repairs have been carried out.

Sub-clause 2 is identical to Cl. 12-12, sub-clause 3, see further the Commentary on that provision.

Sub-clause 3, first sentence, establishes an important principle; the assured is always entitled to decide at which yard the repairs are to be carried out. However, the assured's choice may affect the relationship between his loss-of-hire cover and his hull cover. If there are several alternatives as

regards repair yards, the hull insurer will in principle want the cheapest repairs, even if they take longer, while the loss-of-hire insurer will want the quickest repairs, even if they will cost more.

In principle, it should be possible to resolve this conflict by having the hull insurer be liable for the cheapest repair alternative; the additional costs of more expensive, but quicker repairs should be covered as costs incurred in order to save time under the loss-of-hire insurance. Traditionally, however, the hull insurance has also covered part of the loss-of-hire risk on this point, partly out of consideration for assured parties who do not have loss-of-hire insurance, and this solution has been maintained in the Plan, cf. Cl. 12-7, Cl. 12-8 and Cl. 12-11 to Cl. 12-13, and the Commentary on these provisions, particularly Cl. 12-7. The choice of repair yard is regulated in Cl. 12-12, which in brief entitles the assured to charge the hull insurer for the additional costs of more expensive, quicker repairs up to an amount equal to 20 % per year of the agreed insurable hull value for the time saved by the assured by choosing the more expensive tender. The relationship between the other provisions in the hull cover and the loss-of-hire insurance is further explained in the Commentary on Cl. 16-11.

The issue here is how the loss-of-hire conditions should be coordinated with the rules concerning choice of repair yard that have been adopted in the hull conditions. This will depend on how the loss-of-hire and hull insurances are organised. The simplest situation is where the underlying hull insurance has been effected on Plan conditions, and both hull insurance and loss-of-hire insurance have been effected with the same insurer. This will be the case in war risk insurance effected with the Norwegian Shipowners' Mutual War Risks Insurance Association, where the insurance in accordance with Cl. 15-2 comprises both hull insurance and loss-of-hire insurance unless otherwise agreed. In such cases, it is possible to fully coordinate loss-of-hire cover with hull cover, so that the loss-of-hire insurance covers the entire loss of time that is not covered under the hull insurance.

If loss-of-hire insurance and hull insurance are effected with different insurers, the question of coordination is more complicated because of the underlying conflict of interest between the insurers. If the hull insurance has been effected on Plan conditions, however, the assured can be provided with full cover by linking the liability of the loss-of-hire insurer to the quickest repair alternative, thereby giving the assured full cover under the hull insurance. This solution has therefore been chosen in situations where the loss-of-hire insurance has been effected on Plan conditions, compare with the comments below on sub-clause 3, second sentence.

If, on the other hand, the hull insurance has been effected on conditions other than those of the Plan, with the insurer's written consent, this solution is less satisfactory for the loss-of-hire insurer. If the hull conditions in question have no loss-of-hire cover, the loss-of-hire insurer risks being fully liable for the loss of time resulting from the choice of the cheapest repair alternative. However, there is no reason why the loss-of-hire insurer's liability should be any higher because the hull insurance has been

effected on conditions other than Plan conditions. In this situation, therefore, an intermediate solution has been chosen, see further the Commentary on sub-clause 3, fourth sentence.

If the underlying hull insurance has been effected on Plan conditions, it follows from the *second sentence* that the loss-of-hire insurer's liability is limited to the loss of time resulting from the repair alternative that takes the shortest time among those alternatives that the hull insurer is obligated to cover *in full* in accordance with Cl. 12-12. This solution is best illustrated by means of an example, in which the figures are stated in USD, 20 % per year of the agreed insurable hull value and the daily amount are both USD 10,000 per day and the loss of time at repair yard A is 30 days, at repair yard B 45 days and at repair yard C 75 days:

REPAIR YARD	A	B	C
Cost of repairs and removal	1.8 million	1.2 million	1.0 million
Loss of time	0.3 million	0.45 million	0.75 million
Total	2.1 million	1.65 million	1.75 million

Under Cl. 12-12, the insurer's liability for the costs of repairs is limited to the lowest tender, with the addition of 20 % per year of the agreed insurable hull value for the time saved by the assured by not choosing this tender. In this example, the lowest tender is C = USD 1 million. If we assume that the assured chooses B, he saves 30 days, which is the difference between the loss of time resulting from the cheapest repair alternative, i.e. 75 days, and the loss of time resulting from alternative B, i.e. 45 days. He can thus claim USD 1 million (costs of repairs at C) + USD 0.3 million (30 days of time saved multiplied by USD 10,000) from the hull insurer = USD 1.3 million. This means that the hull insurer will be obligated to cover the entire costs of carrying out repairs at B (= USD 1.2 million), since this amount is within the limit of USD 1.3 million.

In this case, the loss-of-hire insurer will cover the time lost by choosing this alternative, i.e. 45 days or USD 450,000. In total, the assured thus receives USD 1.65 million, i.e. he obtains full cover when he chooses the alternative which, seen as a whole, is financially most favourable. Naturally he has no obligation to choose this alternative. He remains free to decide which repair yard to use, cf. first *sentence*, but the extent of his loss-of-hire cover is determined on the basis of his choice. On the other hand, if the assured chooses this alternative, it makes no difference if the tender should prove to have been based on an over-optimistic estimation of the time required for repairs. It follows from the *third sentence* that the assured would in such case be entitled to require that the settlement be based on the actual loss of time. If the repairs take 60 days rather than 45 days as stated in the tender, the assured would thus be entitled to compensation for 60 days of time lost or USD 600,000.

The purpose of this solution is to provide the assured with full cover by means of a cover alternative that is also the most advantageous, seen as a whole, for the hull insurer and the loss-of-hire insurer. In practice, however, this is not necessarily the case, because the hull insurer's liability is not linked to the repair alternative that is most favourable seen as a whole. The Committee has nonetheless chosen to maintain the solution because it will be difficult to find a rule that always leads to the financially most favourable result. In this connection, it is important to emphasise that the loss-of-hire insurer and the assured cannot obtain a more favourable result by regarding the greater expense of quicker repairs as extraordinary costs in accordance with Cl. 16-11, see further the Commentary on Cl. 16-11.

Under the 1996 version of the Plan, the loss-of-hire insurer's liability was coordinated with the hull insurer's liability regardless of whether or not the hull insurance was effected on Plan conditions. Application of the rule was therefore not contingent on the assured having hull cover that contained a component of loss-of-hire cover, as is the case in Cl. 12-12 of the Plan. If the assured had hull insurance that only covered the cheapest repair alternative without any form of compensation for higher repair costs incurred in order to save time, the loss-of-hire insurer, pursuant to Chapter 16, therefore had to cover the loss of time resulting from the longer but cheaper stay in a repair yard. In the example above, the loss-of-hire insurer would in such case be liable for 75 days. The result was then that hull insurance on such conditions provided better loss-of-hire cover than hull insurance on Plan conditions. Cl. 16-9 could thus be perceived as an incentive for the assured to choose hull conditions other than those of the Plan, and this was considered to be unsatisfactory. During the 2003 revision, therefore, a certain reduction was made in cover where the hull insurance has not been effected on Plan conditions, cf. sub-clause 3, *fourth sentence,* which for such cases reintroduces the solution that generally applied under the 1972 conditions. In accordance with Cl. 16-1, the reduction only applies if the insurer has accepted the deviating conditions in writing. The provision entitles the assured to cover of the loss of time under the tender that would have entailed the least loss of time plus half of any additional loss of time that may arise. Based on the above-mentioned example, the result is as follows: the hull insurer covers the costs of repair according to the cheapest alternative C (= USD 1.0 million). The loss-of-hire insurer covers the loss of time resulting from the quickest tender, i.e. 30 days at repair yard A, and half of any further loss of time that may arise. If the assured chooses C, the loss-of-hire insurer will be liable for 30 days + (1/2 x 45) = 22.5 days. In this case, the assured will receive compensation for 52.5 days from the loss-of-hire insurer. His total cover will therefore be USD 1.0 million + USD 0.525 million = USD 1.525 million. He thus has an uncovered loss of time of 75 days - 52.5 days = 22.5 days or USD 0.225 million. If the assured instead chooses repair alternative B, the loss-of-hire insurer will be liable for 30 days + (1/2 x 15) days = 37.5 days. The assured's settlement will then be USD 1.0 million + USD 0.375 million = USD 1.375 million, giving the assured an uncovered loss of USD 0.2 + USD 0.075 = USD 0.275 million. This means that the assured will therefore normally choose alternative C. If the assured has effected hull insurance on conditions other than Plan conditions without the insurer's written consent, settlement must follow the lines laid down in sub-clause 3, second and third sentences.

Clause 16-10. Removal to the repair yard, etc.

The wording of this Clause was amended in the 2013 Plan. The terms "class of repairs" and "class of work" has been replaced with "category of repairs" and "category of work" in order to make the Plan´s use of terms consistent.

The provision regulates the insurer's liability for loss of time in connection with the ship's removal to a repair yard, carrying out surveys, obtaining tenders, etc., which is in addition to the actual period of repairs after damage has been sustained. Liability for such loss of time is conditional on the insurer being liable for the time lost pursuant to Cl. 16-1. In other words, Cl. 16-10 does not provide any independent legal basis for covering loss of time in connection with removal, etc.

Sub-clauses 1 and 2 regulate loss of time in connection with the removal itself, while sub-clause 3 regulates time lost in connection with surveys, tenders, tank-cleaning, waiting and the like which are necessary in order to carry out the repairs.

In accordance with *sub-clause 1*, loss of time during removal to a repair yard is to be allocated to the category of repairs that has "necessitated the removal". The assured would not normally send the ship to a repair yard unless this was necessary for the further operation of the ship. Therefore, if the damage sustained in a casualty is of such a nature and extent that it must immediately be repaired at a repair yard, it is the repair of this damage that has "necessitated the removal". If, on the other hand, the ship must be docked by a certain date in order to carry out a classification survey or similar operations, and the repair of the casualty damage per se could be postponed, the costs of removal must be for the owner's account, since it is the survey required for classification that makes removal necessary.

It follows from the above that if a casualty "necessitates" repairs at a repair yard, the assured has the opportunity to have owner's work carried out during this repair period without having to carry any of the removal time for his own account. On the other hand, if it is the owner's work that is necessitating the repair yard stay, all of the removal time must be for the assured's account, even if the casualty damage is repaired at the same time. It is therefore irrelevant for the allocation of removal costs whether owner's works, carried out simultaneously, might require more extensive repairs or take more time, or which of several simultaneous repairs take the longest time.

The assessment of which category of works made the removal to a repair yard necessary, must be based on the situation when the removal commenced. If the ship is on its way to a yard to carry out extensive maintenance repairs but suffers a casualty on the way which requires immediate repairs, it is the maintenance work that has necessitated the removal. Therefore, none of the removal time is to be allocated to the casualty repairs, even though the removal time has in fact also proved to be advantageous for such repairs. The same applies where unknown damage from a previous casualty is

discovered while the ship is at the repair yard; none of the removal time must be allocated to this damage either.

Sub-clause 1, *second sentence*, of the 1996 version made the rule in the first sentence correspondingly applicable in the event of time lost after completion of repairs. This rule has now been moved to Cl. 16-13.

Sub-clause 2 regulates the situation where removal to a repair yard "was necessitated" by more than one category of repairs. In such cases, the removal time must be apportioned according to the time each category of repairs would have required if carried out separately, cf. *first sentence*. The Committee considered introducing a rule for a division of the time into two equal parts along the lines of the rule that applies in the case of simultaneous repairs, cf. Cl. 16-12, but decided not to do so. If, for instance, it takes the ship 20 days to sail to a repair yard, where casualty repairs and owner's work which separately would have required 90 and 10 days respectively are carried out, it is likely to seem unreasonable to allocate half the removal time or 10 days to the owner's work. The natural solution is to allocate the removal time on a pro rata basis according to the time each category of work would have required if they had been carried out separately. In our example, consequently, 90/100 of the removal time, i.e. 18 days, must be allocated to the casualty work and 10/100 of the owner's work, i.e. 2 days, must be attributed to owner's work.

Sub-clause 2, *second sentence*, establishes that removal time occurring during the deductible period is not to be apportioned. The rule only has significance in those cases where removal time is to be apportioned; if the removal time falls in its entirety on the insurer, the deductible period will run during the removal in the normal way. The reason for this provision is that it may seem unreasonable to make the assured bear a portion of the removal time that falls during the deductible period. Apportioning 50 % of the removal time to the insurer would, for instance, mean that half of the removal time would be added to the deductible period. If the removal period is 30 days and the deductible period is 15 days, the entire removal period would be converted into a deductible period, and the owner would receive no compensation for the removal time. The consequence of the provision is that the deductible period runs in the normal way, each day counting in full during the removal period, even in cases where the removal time is to be apportioned. In other words, the principle of apportionment is not to be applied until the deductible period is over. In the above-mentioned example, the assured therefore receives compensation for 1/2 (30-15) = 7 1/2 days, if each category of work would have required the same amount of time if they had been carried out separately.

Sub-clause 3 specifies that loss of time in connection with carrying out surveys, obtaining tenders and cleaning tanks is to be dealt with according to the rules in sub-clauses 1 and 2. The provision is not exhaustive, cf. the phrase "or due to other similar measures". In many cases, loss of time of the kind

referred to in Sub-clause 3 will have been "necessitated" by one category of work; time lost in obtaining tenders must, for instance, be allocated in its entirety to the work to which the tenders apply.

Clause 16-11. Extra costs incurred in order to save time

The Commentary was amended in the 2019 Version.

This provision regulates the liability of the loss-of-hire insurer for costs incurred in order to save time, and must be seen in connection with the provision in Cl. 4-7 regarding compensation for the costs of measures to avert or minimise loss. Costs of this kind occur at two levels in connection with loss-of-hire insurance: firstly, there are costs which are incurred in order to avert or minimise loss under the hull insurance and which more indirectly benefit the loss-of-hire insurer. These costs are covered by the hull insurer. Secondly, there are costs incurred to avoid loss of time, i.e. to save time. To the extent that this type of cost qualifies as costs to avert or minimise loss under the loss-of-hire insurance, they must be covered in accordance with the rules in Cl. 4-7 *et seq.* of the Plan. The provision in Cl. 16-11 may be regarded as an extension of the rules for costs incurred to avert or minimise loss, in the sense that it specifies, in relation to an area of practical importance, the costs that will be covered by the insurer.

Sub-clause 1, first sentence, establishes that the insurer is liable for "extra costs incurred in connection with temporary repairs and in connection with extraordinary measures taken in order to avert or minimise loss of time covered by the insurance". This provision corresponds to the 1996 version, apart from the fact that the wording "other extraordinary measures" has been replaced by "and in connection with extraordinary measures" in order to make it clear that temporary repairs are to be covered as extraordinary measures even if such repairs must not necessarily be regarded as an extraordinary measure. As regards other measures, on the other hand, the assured must prove that they are of an extraordinary nature in order for the insurer to be liable. The wording "taken in order to avert or minimise" loss of time is in accordance with Cl. 4-7.

The provision entails that all extraordinary measures taken in order to save time must be covered, not just measures to expedite repairs. However, it is a condition that the costs in question are extra costs incurred to save time; the insurer will not cover extra costs incurred for some other purpose. On the other hand, it is not a condition that the measures satisfy the requirements for compensation for the costs of measures to avert or minimise loss, cf. above.

The loss-of-hire insurer's liability for costs incurred in order to save time only applies "insofar as such extra costs are not recoverable from the hull insurer". The provision must be seen in connection with Cl. 12-7 regarding temporary repairs and Cl. 12-8 regarding costs incurred to expedite repairs. Pursuant to these provisions, the hull insurer is liable for the entire cost of necessary temporary repairs

if permanent repairs cannot be carried out at the place where the ship is currently located. For other temporary repairs of the damaged object and measures to expedite repairs, liability is limited to 20 % per year of the agreed insurable hull value for the time saved by the assured. These provisions are based on the assumption that the rest of the costs related to measures to expedite repairs will be covered by the loss-of-hire insurer, so that the assured receives compensation for that portion of the costs that are not recoverable from the hull insurer. In this respect, loss-of-hire insurance becomes a supplement and subsidiary to the hull insurance. On the other hand, the loss-of-hire insurer's liability is not extended if the costs are not covered by the hull insurance due to the deductible; the decisive criterion is whether the costs are of such a nature that they are recoverable under the hull insurance.

In the 1996 version, this was adopted as the basic solution regardless of which kind of hull insurance was used. This has been changed in accordance with the amendment to Cl. 16-1, cf. sub-clause 1, *second sentence*. If the insurer has given his written approval of hull conditions that do not cover such loss-of-hire components, he is fully liable for the costs of temporary repairs and extraordinary measures that are not covered by the hull insurance up to the limitation laid down in sub-clause 2, cf. below. If, on the other hand, the assured has effected such hull insurance without written approval, the rule in the first sentence applies, i.e. compensation is to be based on the Plan's hull cover.

The costs encompassed by sub-clause 1 are costs related to "temporary repairs and in connection with extraordinary measures". This wording includes those measures which in accordance with Cl. 12-7, sub-clause 2, and Cl. 12-8 activate the hull insurer's limited liability for loss of time, but also embraces a wider range of measures. The provision in Cl. 16-11 therefore encompasses any temporary repair; i.e. all measures taken to enable the ship to be removed to a repair yard, but which are not intended as permanent repairs. This includes the replacement of parts of the ship or its equipment, if relevant also the hire of such parts or equipment, e.g. a mobile generator. The fact that the ship is supplied with parts that will later be replaced is of no significance. Nor is it required, contrary to Cl. 12-7, sub-clause 1, that the temporary repairs are "necessary".

The rules in Cl. 16-11 only become significant when temporary repairs are made in order to save time. Occasionally, such repairs are also made in order to reduce the total costs of repair: a ship that has suffered a major casualty in America may, for instance, only carry out such repairs there as are necessary for the ship to be allowed to sail to Europe, where permanent repairs can be carried out so much more cheaply that, all in all, money is saved for the hull insurer. In these cases, the costs of the temporary repairs pose no problem; they will be covered by the hull insurer in accordance with Cl. 12-7, sub-clause 2, first alternative, of the Plan. The problem is the increased loss of time resulting from the temporary repairs and the ship's removal to Europe. The solution to this problem must be sought in Cl. 16-9. Temporary repairs at A + permanent repairs at B must be regarded as an alternative to permanent repairs at A. The loss-of-hire insurer's liability is then limited to the loss of time under the alternative that would have resulted in the least loss of time of the tenders (for A and A+B) for

which the assured would have been able to claim compensation under the hull insurance. The relationship between Cl. 16-11 and Cl. 16-9 is otherwise further explained below.

In all cases where the question of temporary repairs arises, it is important that the assured fulfils his duties pursuant to Cl. 3-29 and Cl. 3-30, i.e. that he immediately notifies the loss-of-hire insurer of the casualty and keeps him informed of developments. If the assured fails to do so, the insurer may demand that his liability be reduced pursuant to the rules of Cl. 3-31.

In the event of the hire of generators and boilers, the insurance will cover the costs of hire and shipment, installation and removal on board, connection and disconnection, etc. On the other hand, it will not cover fuel, lube oil and other ordinary operating costs while the object hired is being used on board. If the change leads to higher operating costs, however, the increase in costs will also be covered. The wording "extraordinary measures" will also cover the increase in costs related to the use of overtime in connection with the damage repairs, an agreed bonus to be paid in the event the ship is returned to service earlier than stipulated in the repair contract, and the higher costs of replacement rather than repairs that entail a lengthy repair period. **There has been some uncertainty related to situations where an assured is able to engage a substitute vessel during repairs of a damaged vessel, in order to maintain earnings under the damaged vessel's trade/charterparty. A characteristic aspect of such a situation is however that the assured receives hire and is thus not "deprived of income", which is a requirement for cover in Cl. 16-1. On the other hand, the extra costs incurred in connection with employing the substitute vessel are recoverable subject to the terms of Cl. 16-11. This is already clearly the solution adopted for fishing vessels, cf. Commentary to Cl. 17-59, and there is no reason why other vessel segments should be treated differently.** The extent to which the costs of a charter aircraft are to be regarded as an extraordinary measure must be assessed in each individual case, having particular regard to what is recoverable under the hull insurance according to the doctrine of "impossibility of repair". **In previous versions of the Plan, the Commentary established that the costs of using extra tugboats for port calls and canal transits due to, for instance, reduced engine capacity or damage to thrusters and the like did not qualify for allowance under this Clause. Part of the rationale for not covering such costs has been related to burden of proof issues. Factors such as weather, wind and sea current may also influence the necessity of employing tugs, and if extra tugs are necessary in any event due to such factors, there is no cover under this Clause. However, in many cases it is clear that such tug costs are indeed extra for the assured due to the damage. If the assured can prove that the costs are extra due to the damage, it is now established that allowance can be made also for extra tug costs under the terms of this Clause.** Costs that are not deemed to be extraordinary in this connection are primarily those that can be described as increased voyage expenses, i.e. the extra voyage costs incurred in order to keep the **vessel** gainfully employed. These increased voyage expenses have to be paid by the assured according to his duty to minimise the loss. If the assured

chooses to keep the vessel idle waiting for repair, the insurer shall not be liable for greater loss than that for which he would have been liable if the duty of the assured had been fulfilled.

The wording "extraordinary measures" does not include the choice of a tender under which the repair costs pursuant to Cl. 12-12 are not fully recoverable from the hull insurer. There may conceivably be situations where it will be financially advantageous for the loss-of-hire insurer if the assured, in order to save time, chooses a tender that is not fully recoverable pursuant to Cl. 12-12, in return for the loss-of-hire insurer compensating the assured for the repair costs that are not recoverable. However, the choice of repair yard is exhaustively regulated in Cl. 16-9, and cannot be supplemented by Cl. 16-11. Questions as to what constitutes "extraordinary measures" in relation to the choice of repair yard must be regarded in relation to what appears to be the "normal alternative". The normal repair alternative is permanent repairs carried out in the manner and at the speed that must be said to be normal at the repair yard in question during the period of repair. Repair costs incurred under this alternative must always be borne by the hull insurer, even if certain savings could have been achieved if more time-consuming work methods were used. Cl. 16-11 applies only to costs incurred in connection with extraordinary measures to expedite repairs.

In any event, the insurer's liability is limited to the amount of the reduction in compensation under the loss-of-hire insurance that results from the measures taken, cf. *sub-clause 2.* The liability of the loss-of-hire insurer for the costs is therefore determined in the form of an amount and not, as under the hull insurance, in the form of a percentage of the agreed insurable hull value. The relevant amount for the loss-of-hire insurer will normally be equal to the number of days saved multiplied by the amount or amounts per day that the insurer would have had to pay. If the measures taken reduce the repair time so that it does not exceed the deductible period, however, any days that may have been saved within the deductible period may not be taken into account. If the days that are saved fall within a period during which other work is also carried out , and where the rules of apportionment in Cl. 16-12 apply, the time saved cannot exceed that which should have been covered by the insurer.

Because of the limitation in Cl. 16-4, sub-clause 2, the costs which are to be paid by the insurer must be converted into days of indemnity by dividing the total costs by the amount that is to be compensated per day.

Sub-clause 3 states that the assured shall bear a share of the extraordinary costs that is proportionate to the time saved for his account. In reality, the solution is a departure from the solution that otherwise applies to the apportionment of costs of measures to avert or minimise loss, cf. Cl. 4-12, sub-clause 2. As further explained in the Commentary on Cl. 4-12, the basic rule is that no apportionment is to be made in cases where the costs of measures to avert or minimise loss have also benefited the assured's uninsured interests. The principles applicable to apportionment under a loss-of-hire insurance must take account of the way in which the cover is normally structured in such insurance: the assured is

liable for the agreed deductible period, after which the insurer is liable for the number of days of indemnity stated in the insurance contract, and should the loss of time exceed this maximum, the assured is again liable for the excess number of days. Costs must therefore be apportioned in such a way that the assured and the insurer cover the costs related to a saving of time during the periods of loss of time for which they are respectively liable. This means that the assured first bears costs related to any reduction of the number of days in excess of the insurance contract maximum, where after the insurer must cover costs related to any reduction of the number of days covered by the insurance contract, and finally the assured must cover costs related to time saved within the deductible period.

Clause 16-12. Simultaneous repairs

Sub-clause 4 was amended in 2016.

Sub-clause 1 (b) was amended in the 2007 version. The provision is otherwise identical to the 2003 version, in which minor amendments in sub-clauses 2 and 3 were made, former sub-clause 1 (c) was deleted, while former sub-clause 1 (b) was split up into sub-clause 1 (b) and (c).

The provision regulates the liability of the loss-of-hire insurer in cases where repairs that are covered by the insurance and work that is not covered by it are carried out at the same time. The latter may be relevant to a loss-of-hire insurance for an earlier or later year, or it may be work that is not covered by any insurance, e.g. work relating to classification or modifications.

When repairs relating to one or more casualties (under one or more loss-of-hire policies) are carried out at the same time as work on board for the assured's account (e.g. work in connection with periodic classification surveys), the loss of time during the stay at the repair yard will in actual fact be due to several concurrent causes of damage. In the absence of other provisions, the loss in such cases must be apportioned between the assured and the various insurers in accordance with the rule of apportionment in Cl. 2-13. However, this type of solution is unsatisfactory from a technical legal standpoint because it will entail numerous decisions that are made largely on a discretionary basis. In order to avoid these problems, therefore, more clear-cut rules of apportionment have traditionally been applied in the loss-of-hire conditions. The rules of apportionment in Cl. 16-12 are based on such principles, with the result that the causation rules in Cl. 2-13 are set aside in two respects:

Firstly, by applying relatively simple criteria, Cl. 16-12 prescribes when simultaneous repairs are to be regarded as concurrent causes of the loss of time, and when one of the repairs is to be regarded as the only cause. In this way, difficult and, to some extent, subtle questions of causation are avoided. Secondly, Cl. 16-12 fixes the exact proportions to be used when apportioning the time lost among the various repairs; it is therefore unnecessary to use the discretionary rule of apportionment in Cl. 2-13.

These two departures from the main rule considerably simplify the issue. The fact that the provisions may occasionally give one of the parties an unwarranted advantage is of little significance compared to the substantial advantages achieved for the settlement process.

Sub-clause 1, which was amended in the 2003 version, deals with the question of apportionment which is most important from the standpoint of the assured, i.e. the apportionment between work relating to a casualty and owner's work.

Pursuant to sub-clause 1 (a) to (c), an apportionment is to be made between the assured and the insurer when specified owner's work is carried out at the same time as casualty work.

Sub-clause 1 (a) establishes how loss of time is to be apportioned when casualty work is carried out at the same time as owner's work in order to fulfil a requirement issued by a classification society. In the 1996 version, it was specified that this rule applied regardless of whether the classification requirement was issued in connection with a periodic survey, and that the time limit for complying with the requirement need not have expired. This already follows from the wording "classification requirement" and thus does not need to be stated explicitly. However, it is a condition that the classification society has issued the requirement; repairs which the classification society has recommended or advised making, without actually imposing a requirement, do not fall within the scope of sub-clause (a), although they might conceivably fall within the scope of one of the other sub-clauses.

On the other hand, the term "requirement" does not cover repairs that the classification society has recommended or advised making without actually imposing a requirement.

Sub-clause 1 (b) was amended in the 2007 version. According to the 2003 version, an apportionment was to be made in the case of repairs that were necessary for the seaworthiness of the ship or for its capacity to perform its contractual obligations. However, the rules regarding seaworthiness were removed from the Plan in the 2007 version in conformance with the new Norwegian Ship Safety and Security Act. The wording "the seaworthiness of the vessel" was therefore replaced by "to enable the ship to meet technical and operational safety requirements", cf. in that respect the wording in Cl. 3-23.

Under the 1996 version, sub-clause 1 (b) also included rebuilding; this has been moved to sub-clause 1 (c), cf. below. The wording "necessary for … its capacity to perform its contractual obligations" covers both freight contracts and other types of assignment, such as a contract for a research project. Examples of repairs that are necessary in order to perform a contract of affreightment and the like are the replacement of hatch coamings and the application of a new coating in cargo tanks.

As mentioned above, *sub-clause 1 (c)* was taken from the former sub-clause 1 (b), and covers rebuilding of the ship.

Pursuant to sub-clause 1 (c) in the 1996 version, an apportionment should also be made in the case of work relating to "strengthening, repairs or maintenance", but with the exception of work which "would not by itself have necessitated a separate stay at a repair yard". This rule was so comprehensive that it included the majority of the situations mentioned in the then sub-clause 1 (a) and (b). However, the reason for making it a separate provision was that the principles of apportionment in this case favoured the assured, because he was given 30 days of grace before the apportionment could be effected: In reality, therefore, there was seldom any basis for apportionment in connection with this type of work. During the 2003 revision, it was agreed that the provision should be deleted.

In accordance with sub-clause 1, *last sentence*, the apportionment is to be made on the basis of an equal shares principle: the insurer shall pay compensation for half of the common repair time in excess of the deductible period. This is in accordance with the solution in the 1996 Plan. The said principle may be justified by the argument that the common repair time is assumed to be utilised equally effectively by both parties, and that it is therefore reasonable to share liability for the loss of time during this period equally; furthermore, this type of 50/50 rule is very easy to apply in practice.
Two numerical examples can illustrate the rule of apportionment in relation to the deductible:
1. In the case of common repair time totalling 40 days and a deductible period of 14 days, which begins to run when the ship arrives at the repair yard, the insurer will pay compensation for:

    1/2 (40-14) days = 13 days of common repair time.

2. In the case of common repair time totalling 40 days and a deductible period of 30 days, 20 of which have been spent in bringing the ship to the repair yard, the insurer will pay compensation for:

    1/2 (40-10) days = 15 days of common repair time.

The provision is based on the assumption that a category of work that is fully covered by the insurance is carried out simultaneously with a category of work which is not covered at all. However, it is conceivable that damage and the repairs relating to it have been caused by a concurrence of several perils, only some of which are covered by the insurance. In such a case, the rules of apportionment in Cl. 2-13 to Cl. 2-15 will apply in addition to the rules of apportionment in Cl. 16-12. First the loss-of-hire insurer's liability must be calculated, assuming that the damage in its entirety has been caused by one of the perils insured against, after which his liability must be reduced in accordance with the rules of apportionment pursuant to Cl. 2-13 to Cl. 2-15. A simple numerical example: casualty work and owner's work, which if carried out separately would have taken 80 and 60 days, respectively, are carried out simultaneously in a total of 80 days. The casualty was the result of the kind of combination of marine and war perils that makes the rule of equal apportionment in Cl. 2-14 *in fine* applicable. If

the deductible period under the loss-of-hire insurance against marine perils is 20 days, the insurer's liability will be as follows:

Of the common repair time in excess of the deductible, i.e. 40 days, half is recoverable pursuant to this sub-clause	= 20 days
Further time to complete casualty work	= 20 days
Had the damage been caused solely by marine perils, the insurer would have been liable for	= 40 days
Pursuant to the rules of Cl. 2-14 *in fine*, however, the insurer is only liable for half the loss	= 20 days

No problems arise when repairs relating to two casualties, both of which are covered by the insurance, are carried out simultaneously, provided the deductible periods for both casualties also run in parallel; in such case the assured must only carry one deductible period, but also only receives compensation once for the loss of time in excess of the deductible period. It is conceivable, however, that the deductible period for one casualty expires before that of the other. This situation is regulated by *sub-clause 2*, which states that the rule of apportionment in sub-clause 1 shall in such case apply to the time that falls within the deductible period of one casualty, but not within the deductible period of the other casualty. This provision corresponds with the 1996 version, but certain adjustments have been made to its wording. This can be illustrated by the following example: the ship sustains machinery damage in February and must call at a port of refuge to carry out temporary repairs. The prolongation of the voyage and the stay at the port of refuge total 14 days, which is also the deductible period. In March of the same year, the ship suffers heavy weather damage, the extent of which is ascertained during a stay at a repair yard in June. During this stay, permanent repairs of both casualties are completed; carried out separately, it would have taken 40 days to repair the machinery damage and 20 days to repair the heavy weather damage. Thus the common repair time is 20 days. In the case of the machinery damage, the deductible period had expired when repairs were commenced; the entire period of repair is therefore recoverable. As far as the heavy weather damage is concerned, on the other hand, the first 14 days of the repair period are the deductible period, and only six days are recoverable. Pursuant to sub-clause 2, the 50/50 rule in this case must apply to the first 14 days. The rule can be justified by the need for consistency: like owner's work, work during the deductible period must normally be carried out in the assured's own time and, as mentioned above, it is unreasonable to make the insurance more expensive by giving the assured "free time" to carry out owner's work that just happens to be carried out at the same time as work covered by insurance. In accordance with this solution, the insurer is only liable for half of the time lost as long as the deductible period for the second casualty continues to run.

Sub-clause 3 regulates the apportionment of time lost in carrying out repairs of damage that is relevant to more than one loss-of-hire insurer, e.g. damage covered by the 1995 insurer and damage covered by the 1996 insurer, or damage covered by the marine perils insurer and damage covered by the war risks insurer. The *first sentence* states that the 50/50 rule must be applied. The *second sentence* provides that the same rule also applies to common repair time that falls within the deductible period of one insurance (in the example above, the 1995 insurance contract or the war risks insurance), with the result that the assured only receives compensation for half the loss for this period of time. Another variant of the apportionment problem arises where casualty repairs covered by two different loss-of-hire insurances are carried out at the same time as owner's work of the type mentioned in Cl. 16-12, sub-clause 1, cf. *third sentence,* which was simplified in the 2003 version in accordance with the simplification in sub-clause 1. In this situation, a rule of 50/50 apportionment patterned on sub-clause 1 must be applied, i.e. the assured must pay one half, after which the insurers divide the remaining loss of time equally between them, i.e. each of them covers 1/4 of the loss. The view taken in this case is that it is the dichotomy between owner's work on the one hand and casualty work on the other that is significant for the assured - the fact that two sets of insurers just happen to be liable for the time spent on casualty work should not reduce the share of the common time to be covered by the assured. In accordance with practice, the rule must be interpreted as meaning that the maximum the assured must cover is half the common repair time, and he must not have to bear a further 1/4 for the period during which the deductible period runs under one of the insurances but not the other. The insurer whose deductible period has expired must then pay compensation for half of the common repair time until the deductible period under the other insurance has expired.

The conditions do not address the conceivable, but hardly practical situation in which repairs relating to three different loss-of-hire policies are carried out simultaneously, but an analogy from the rule applicable to two insurances quite clearly leads to the conclusion that each insurer must only carry 1/3 of the common time in excess of the deductible period for the insurance contract in question. Furthermore, if owner's work of the type mentioned in Cl. 16-12, sub-clause 1, is carried out, the analogy would require that each of the three insurers must bear 1/6 of the loss of time, while the assured must bear 1/2.

Sub-clause 4 is identical to the 1996 version. The main rule in the *first sentence* can most easily be explained by an example: during a stay at a repair yard, both extensive casualty repairs and various work for owner's account are carried out. The total time spent at the yard is 98 days. The casualty repairs continue during the entire stay, while the owner's work is completed after 50 days. It would appear, therefore, that there are 50 days of common repair time, and if a deductible period of 14 days has been agreed, pursuant to the rules in the first sub-clause the owner himself should have to carry the loss of time for 14 + 1/2 (50-14) days = 32 days.

However, the provision requires that an important correction be made. One must ascertain how much time each category of work would have required if it had been carried out separately. In many cases, it will be found that, had this been done, the work would have been completed earlier. In our example, it may be found that the work for owner's account would only have taken 30 days if carried out separately. There may be various reasons why more time is lost when repairs are made simultaneously: a deliberate reduction of the pace of the owner's work in order to achieve a better overall utilisation of the time required for casualty repairs, or limited capacity or technical problems may result in simultaneous repairs taking more time than if each category of work had been carried out separately.

It is not reasonable that delays of this nature should be borne in full by the interest affected. On the contrary, the basic principle must be that each category of work should only be allocated the amount of time that would have been required if they had been carried out separately. The 50/50 rule in Cl. 16-12, sub-clause 1, must also be seen as presupposing such a correction. It is only where both parties can make full use of the time without any hindrance from the other party that it can be said that they have had equal benefit and should thus each bear half of the loss of time. If the owner's work in our example would only have taken 30 days if carried out separately, while the casualty repairs would in any event have taken 98 days, the owner must bear 14 + 1/2 (30-14) days = 22 days of lost time.

When it has been decided that the lesser number of days that would have been required in a particular case is to be used instead of the actual time used, it is also necessary to decide how dates for this lesser number of days are to be fixed. Fixing the dates of the relevant periods is necessary both in relation to the rules concerning the deductible period and apportionment in the event of simultaneous repairs, and when establishing the daily amount and when pursuing any claim against a third party, cf. here the Commentary above to Cl. 16-7 regarding the equivalent problem of placing the deductible period in time. The natural solution is to assume that the work was performed continuously from the time it was started until the expiry of the number of days that the work would presumably have taken if carried out separately, cf. the *first sentence* of sub-clause 4.

However, the *second sentence* of sub-clause 4 contains an important supplementary rule: it is presumed that all categories of work are commenced at the same time, i.e. on the arrival of the ship at the repair yard. This presumption must prevail even for work which has been postponed in the overall plan for the progress of the work and which may not have been started at all during the initial period at the yard; this postponement is merely a practical adjustment between the various categories of work. By way of contrast, a clear example of different starting points in time would be where a ship suffers a casualty while it is in dock to carry out classification surveys; the casualty repairs cannot, of course, be assumed to have begun before the casualty occurred. The reverse situation may also arise: a ship is in a yard to repair a major casualty; after the work has been in progress for some time, the owner decides to undertake certain rebuilding work during the remaining portion of the ship's stay at the yard.

Calculations must also be based on different starting points in time if an unknown casualty is discovered some time after work has begun on repairing other casualty damage. In this case, a new deductible period must be calculated from the time when the new casualty is discovered.

The *third sentence* regulates the situation where each category of work would have taken less time if carried out separately than the total number of days that the vessel was at the repair yard. The previous example can be adjusted slightly to illustrate this point: it is assumed that the casualty work would also have taken less time if carried out separately, e.g. 90 days instead of the 98 days actually required. Thus, two categories of work which would have required 30 and 90 days, respectively, if carried out separately, take 98 days when carried out in parallel. In other words, the repair time has been prolonged by 8 days as a result of the simultaneous repairs. It would not be fair to allocate all 8 days to a single category of work. They should be apportioned between both categories according to the number of days each would have required if carried out separately. In our example, the 8 days must thus be apportioned in the ratio of 30:90; 3/12, i.e. 2 days, are allocated to owner's work and 9/12, i.e. 6 days, to the casualty work. These shares must be allocated in their entirety to the category concerned; they are not part of the apportionment in accordance with sub-clauses 1 and 2. Thus the total loss of time to be borne by the assured will in this case be:

14 + 1/2 (30-14) + 2 days = 24 days,
while the following would be allocated to casualty repair work:
1/2 (30-14) + (90-30) + 6 days = 74 days.

The reason for apportioning a delay caused by several categories of work being effected simultaneously is that the assured as well as the insurer usually will benefit from effecting simultaneous repairs. Cl. 16-12 generally provides for apportionment of the "common advantage" by effecting such simultaneous repairs. However, it should be noted that the assured is free to effect certain types of work without any deduction of claim (see sub-clause 1 above). The assured may e.g. also be able to complete his own work within expiry of the deductible period (when no apportionment is to be made in any event). Therefore, a situation may arise whereby the full period of repairs (less deductible) is claimable even if several categories of work have been effected simultaneously. The *fourth sentence* was therefore added in the 2016 Version in order to make it clear that the insurer's liability in any event is limited to what would be claimable in case the category of work for which he is liable had been carried out separately.

The following may illustrate the problem: In the example above the net claim after apportioning the delay is 74 days. If damage repairs had been carried out separately there would not have been any 8 days delay, and the claim would have been 90 days less 14 days = 76 days. Therefore the insurer has in fact benefited from the simultaneous repairs even if he covers his share of the delay.

On the other hand, if we adjust the deductible in the example to be 30 days, the situation would have been different. If applying the apportionment of delay, the claim would have been 90 days less 30 days deductible (owner's work would have been completed within the deductible period, therefore no apportionment of simultaneous repairs) + share of delay 6 days = 66 days. However, it is clearly unreasonable that the insurer's liability should increase because of the decision to effect owner's work simultaneously with damage repairs. Therefore, the fourth sentence makes it clear that insurer can limit his liability to what would have been payable in case damage repairs had been carried out separately, viz. 90 days less deductible 30 days = 60 days.

Clause 16-13. Loss of time after completion of repairs

Sub-clause 1 (b) was amended in the 2013 Plan.

This provision limits the insurer's liability for loss of time that occurs after repairs have been completed. According to the main rule for calculating loss of time set out in Cl. 16-4, the insurer would have been fully liable for time lost after completion of repairs to the extent that this loss of time was a result of the casualty. The insurer therefore had to pay compensation for loss of time until the ship was again gainfully employed, as well as any loss of time resulting from the termination of the contract of affreightment. Thus Cl. 16-13 involves a limitation on the liability that follows from Cl. 16-4 in respect of time lost after completion of repairs. In accordance with *sub-clause 1, first sentence*, the insurer is only liable for such loss of time in the cases that are specifically mentioned in letters (a) to (d); in all other cases the liability of the loss-of-hire insurer ceases when the repairs have been completed.

Sub-clause (a) deals with the situation where the ship, after completion of repairs, is to continue to sail under the contract of affreightment that was in effect at the time of the casualty; in such case, the insurer is liable for time lost until the ship has resumed its former employment. The provision applies irrespective of the type of contract of affreightment concerned. Contractual obligations that are not set out in an actual contract of affreightment must be regarded as equivalent to such a contract in this connection. If, on the other hand, the contract of affreightment is cancelled due to the ship's stay at a repair yard, the insurer is only liable for the time lost up to the completion of repairs.

Sub-clause (b) regulates loss of time for ships that are used in a liner trade or in another way follow a fixed route or operate in a defined geographical area. In these cases, too, loss of time is covered until the ship can resume its activity. Earlier versions of the Plan referred to ships used in a "limited" geographical area. This term was replaced with "defined" in the 2013 Plan.

Sub-clause (c) applies to ships for which a binding contract of affreightment has been entered into before the casualty occurs but which have not begun to operate under the contract, and where the

contract is not cancelled as a result of the casualty. As regards the term "contract of affreightment", see the Commentary on sub-clause (a).

Sub-clause (d) was added in the 2003 version, and applies only to passenger ships. The reason for this provision is that the other letters in sub-clause 1 are not entirely appropriate for this type of ship, which sails in a regular line or follows a pattern, for instance departing once a week from the place of departure. However, this type of ship should also have cover for the time that it is obliged to spend waiting. On the other hand, cover of loss of time after completion of repairs is limited to 14 days. The term "passenger ship" also includes cruise ships.

Loss of time after completion of repairs covers both the situation where the ship remains in the repair yard for a while after repairs have been completed and while the ship sails to a place to resume its activity. However, loss of time due to the fact that the ship is unable to find employment immediately after repairs have been completed is not covered. Such loss of time may in certain cases be said to be a consequence of the repairs and hence also a consequence of the damage that was repaired. However, the most significant cause of the loss of time will be market conditions, or possibly decisions made by the assured, and it is therefore natural that the loss should not be covered.

Sub-clause 2 has been taken from Cl. 16-10, sub-clause 2, second sentence, cf. the Commentary on this provision.

Clause 16-14. Repairs carried out after expiry of the insurance period

The Commentary was amended in the 2019 Version.

It follows from Cl. 2-11, sub-clause 1, that the decisive criterion as regards the insurer's liability is whether the peril "strikes" during the insurance period; if so, the insurer is also liable for any loss that occurs later. If, for instance, the insured ship is subject to a collision or grounding just before the expiry of the insurance year on 31 December **2017**, the **2017** insurer will be liable for the loss of time, even if most of the loss occurs in **2018**. Conversely, the **2018** insurer can as a general rule disclaim liability for a loss of time that occurs in **2018**, but which can be referred back to a peril that "struck" in an earlier year. If, for instance, the ship suffers an engine casualty in **2018** as a result of cracks in the engine that occurred the previous year, the **2018** insurer is not liable for the loss of time. If the assured had loss-of-hire insurance in **2017**, his loss will be covered by the **2017** insurer. However, there is a significant modification in this respect in accordance with Cl. 2-11, sub-clause 2: if the cracks were "unknown" when the **2018** insurance contract came into effect, they must be regarded as a marine peril that struck the ship when the casualty occurred in **2018**. The **2018** insurer must then cover the loss of time relating to the repair of the consequential damage; the time lost in repairing the crack itself, on the other hand, must be referred back to the **2017** insurer.

However, the loss-of-hire insurance stands in a special relationship to the rules in Cl. 2-11 in that, provided the damage does not cause a breach of technical and operational safety rules, the assured himself may decide when the repairs are to be carried out and the loss is to occur. In the interest of the loss-of-hire insurer, a limit is set to the assured's right to postpone the repairs. The insurer should be able to demand settlement of claims for which he is liable under the insurance contract within a reasonable period of time; however, the loss of time cannot be established until the repairs have been carried out. *Sub-clause 1* therefore sets a time limit for how long the assured can wait before commencing repairs. This time limit has been fixed at two years. For the assured it would have been most convenient to have a five-year limit in order to achieve concordance between the loss-of-hire and the hull insurance; this is not possible, however, in loss-of-hire insurance, which is traditionally short-tail business. If the assured wishes to have a time limit of more than two years, this must be agreed when the insurance is effected.

The time limit has been fixed at two years after expiry of the insurance period. Further rules governing the term "insurance period" are set out in Cl. 1-5 of the Plan. The term poses no problems for ordinary insurance policies with a term of one year. If it has been agreed that the insurance is to attach for a period longer than one year, it follows from Cl. 1-5, sub-clause 4, which was added in the 2003 Version, that the insurance period is to be deemed to be one year in relation to Cl. 16-14. Further details regarding the calculation of the insurance period in these cases are found in the Commentary on Cl. 1-5.

The time limit is linked to the "stay at a repair yard" in order to make it clear that the assured cannot circumvent the rule by having the ship begin temporary repairs or repairs of a limited part of the damage within the two-year limit. If the repairs are split up into several separate stays in a repair yard, the rule regarding the time limit must be applied separately to each stay. The stay has "commenced" the moment the ship begins its voyage to the port of repair.

A postponement of repairs will often be chosen **in situations where repairs can reasonably be deferred until next scheduled docking, or e.g. in situations where there is a long delivery time for necessary replacement items, or** when the **vessel** is trading at particularly favourable rates. Even if the loss of time is covered under an insurance contract with a correspondingly high daily amount **under a favourable freight contract**, interrupting operations in order to carry out repairs will mean a loss for the shipowner; among other things, he himself must carry the loss of time during the deductible period. One can never be certain how long a strong freight market will last; next year the situation may have changed - at which time the repairs can be carried out. The loss-of-hire insurer has no cause to object to such a practice. However, it will often mean that the assumption on which the daily amount was agreed no longer applies. *Sub-clause 2* therefore establishes an important time limit for the validity of the agreed daily amount: if a stay at a repair yard is commenced after the insurance

period expires, the agreed daily amount is only a maximum limit for the insurer's liability. Within that limit, the assured may only claim compensation pursuant to Cl. 16-5. **It is however accepted that the agreed daily amount shall apply for vessels having been continuously off-hire from before expiry of the policy period, even if the actual stay at a repair yard does not commence until after expiry.**

Clause 16-15. Liability of the insurer when the *vessel* is transferred to a new owner

Sub-clause 2 was amended in the 2010 version. Sub-clause 2 in the 1996 version was deleted in the 2003 version.

Sub-clause 1 has not been amended and regulates the situation where damage to the ship is repaired in connection with the ship's transfer to a new owner. In this case, the basic principle is that the normal loss-of-hire cover applies up to the time the ship is delivered. However, the insurer is not liable for the time that would in any event have been lost as a result of the transfer, cf. *first sentence*. The provision takes into account the fact that, in connection with a sale, the seller will often take the ship out of operation and place it in dock for a survey. If he can use part of this time to carry out repairs, he has not suffered any loss, cf. also what has been said under Cl. 16-3 concerning the assumption that the assured has suffered a loss of time: if the ship would in any event have been lying idle in connection with the transfer, there is no loss of time for which the insurer is liable.

The deductible period must run in the ordinary manner even if the damage is being repaired in connection with a sale of the ship. The deductible period therefore begins to run at the time of the casualty, and continues until the entire deductible period is exhausted. If a survey is carried out within the deductible period, the survey will have no consequences for the cover; the assured would not in any circumstances have received compensation for the loss of time during this period.

If the assured chooses to repair the ship before the transfer of ownership, and the ship was unemployed at the time the repairs are carried out, the assured would not in principle have suffered any loss. Therefore, he has no claim against the insurer. But if the delivery must be postponed due to the repairs and as a result the purchase amount is paid later than planned, the assured will suffer a loss of interest. The assured should be covered for this loss, cf. sub-clause 1, *second sentence*. The interest is to be determined pursuant to the rules in Cl. 5-4.

Sub-clause 2 in the 1996 version regulated the transfer of the ship with unrepaired damage to a new owner. The provision entitled the assured to claim compensation under the loss-of-hire insurance contract in connection with the transfer of ownership, even if the damage had not been repaired at the time. Compensation was limited to the assured's real loss "because the ship will be out of service while repairs are being carried out by the new owner". This provision has now been deleted. In cases

where the buyer accepts the ship with unrepaired damage, he will be able to postpone repairs until such time as the ship will in any event be in dock or have to be taken out of service in order to have owner's work carried out. Such damage will therefore normally not cause the buyer to suffer loss of time.

In accordance with *sub-clause 2, first sentence*, compensation pursuant to sub-clause 1 is limited to the sum insured per day multiplied by the time for which delivery was delayed or the estimated time of the buyer's repairs, less the agreed deductible period. In cases where the daily loss of interest calculated pursuant to sub-clause 1 is different from the daily amount under the insurance, discussion has arisen as to whether the deductible is to be calculated in consecutive days or whether the loss of interest in the deductible period is to be converted to the number of days with the full daily amount. Practice under earlier versions of the Plan seems to have supported conversion. However, the approach is to be that the deductible is calculated in consecutive days, and this is laid down in the second sentence in the 2010 version. The difference is best illustrated by an example:
The handover of a ship that has been sold is delayed because the seller has to repair some recoverable damage before the handover can take place. The repairs take 30 days, and result in a 30-day delay in delivery and payment. According to the rules and the interest rate prescribed in Cl. 5-4, the interest on the selling price amounts to USD 5,000 per day. At the time the damage occurred, the ship was insured with an agreed daily amount of USD 7,500 per day, and a deductible of 14 days.

When the conversion alternative is applied, the basic principle is that if the loss of interest differs from the sum insured per day, the ship has only partially been deprived of income. The loss of income per day is calculated as the ratio between the interest loss per day, USD 5,000, and the agreed daily amount of USD 7,500 = 2/3. Under the rules of Cl. 16-4, sub-clause 1, this must be converted. In such case, the loss has been 2/3 of 30 days, i.e. only 20 days of "total loss of income", and the indemnity will be (20 - 14) 6 days @ USD 7,500/day = USD 45,000, which means 21 days of lost interest before the deductible period is exhausted.

If, on the other hand, no conversion is carried out, the assured is entitled to interest for (30 – 14) = 16 days @ USD 5,000 = USD 80,000. This must be the basic approach.

The insurer is not liable for loss of time after completion of repairs in accordance with Cl. 16-13; when a ship is being sold, the insurer will not know how the buyer intends to use the ship, cf. sub-clause 3, *third sentence*.

Sub-clause 3 establishes that the claim against the loss-of-hire insurer may not be transferred in connection with a transfer of the ship to a new owner. The rule in this provision is thus different from the one that applies in hull insurance.

Clause 16-16. Relationship to other insurances and general average

This provision has not been amended. However, amendments were made on points of substance in the Commentary in the 2010 version.

It follows directly from Cl. 5-13 that the loss-of-hire insurer is subrogated to the assured's claim against any third party who is liable for the loss of time for which the insurer has paid compensation. If the insured ship has collided with another ship, the loss-of-hire insurer will therefore be subrogated to the assured's claim against the owner of the other ship for (full or partial) compensation for the time lost due to the collision. A claim for compensation for operating costs (board and crew's wages) in general average must, in this connection, be regarded as a claim against a third party for (partial) compensation for the loss of time as a result of a casualty. Bunkers are normally not part of the daily amount, unless the circumstances clearly warrant a different approach.

Pursuant to Cl. 16-16, the loss-of-hire insurer is also subrogated to claims against the hull insurer in cases where the latter provides cover for loss of time, see *sub-clause 1 (a)*. Here an explicit provision is required, since this is a case of double insurance, which in the absence of such a provision would be subject to the rules of Cl. 2-6. The rule in *sub-clause 1 (b)* could conceivably have significance where the loss is covered by another freight insurance.

The provision is a subrogation clause and not one that makes the insurance subsidiary to other insurances. This means that the assured can always choose to claim the full amount from the loss-of-hire insurer. In practice, however, the assured will often receive compensation from the hull insurer for the loss covered by the hull insurance contract. In this event, such amounts must naturally be deducted from the loss-of-hire settlement.

According to the Commentary on the 1996 version, any amount recovered had to be apportioned between the assured and the insurer according to the procedure suggested in the Commentary on Cl. 16-11, sub-clause 3, i.e. that the apportionment should be effected according to the so-called "top down" principle. First the assured was to receive compensation for the number of days that exceeded the insurance contract maximum, then the insurer was entitled to recover for the number of days covered by the insurance contract, and finally the assured could claim compensation for the deductible period. However, this procedure was not followed in practice, and it was regarded as unreasonable. It was therefore decided that, under the 2003 version, the sum recovered should be apportioned according to the general pro rata principle in Cl. 5-13. However, this already follows from the wording of the first part of the provision, and it is therefore not necessary to amend the text of the Plan in order to change the principle of apportionment. The top-down principle is no longer to be applied.

An example will illustrate how the apportionment is to be carried out: the ship is insured for 90 days per casualty. The daily amount is USD 10,000 and the deductible period is 14 days. After a collision, the ship suffers a loss of time of 180 days equivalent to USD 1,800,000. The casualty is settled as follows: the assured must carry the first 14 days, after which the insurer covers the next 90 days, paying a total of USD 900,000 in compensation, and finally the assured covers the remaining 76 days. It is assumed that there are no simultaneous repairs. Blame in the collision settlement is apportioned on a 50/50 basis, and the opposite party accepts the loss of time of 180 days as the basis for the settlement. The insured ship then recovers 50% of USD 1,800,000 = USD 900,000. The recovery must be apportioned on a pro rata basis between the parties according to the time each of them has covered. The assured receives 50 % of (14 + 76) = 90 days of lost time, i.e. USD 450,000, while the insurer receives 50 % of the loss of time that he has covered (90 days), i.e. USD 450,000.

The net result of this procedure is that the insurer only pays USD 450,000 despite the fact that the sum insured is USD 900,000. At the same time, the assured will have an uncovered loss of 50 % of the uninsured time, i.e. USD 450,000. When the loss-of-hire conditions of 1972 and 1993 were practiced, it was claimed that since the insurer's net payment did not amount to the full sum insured, he had to use his share of the recovery to "continue" to cover the assured's uncovered loss of time in excess of the deductible period. In actual fact, however, this would be reintroducing the "top-down" principle. The rule of pro rata apportionment pursuant to Cl. 5-13 must be applied consistently in all cases. Therefore the insurer must not be obliged to use the amount he recovers to compensate for further loss of time.

As an extension of this issue, there has in practice been discussion as to whether the insurer is liable for use of the unused part of the sum insured – in the example above, USD 450,000 – to cover a subsequent casualty in the same insurance period. The answer to that question is no. In practice, it can take many years from the time of the casualty to which the refund applies until the refund is actually paid out. The possibility of transferring such a refund to a subsequent casualty will create uncertainty as regards the scope of the cover. Normally, the parties will also have agreed that cover is to be automatically reinstated. In such case the calculation of the reinstatement premium must be deferred until the time of refund or, if appropriate, adjusted once the refund is ready. This can take place many years after the insurance contract period has been "closed". The same approach must therefore be adopted for subsequent casualties as for the casualty to which the refund applies: in no case may the refund be used to cover the assured's uncovered losses.

However, the apportionment principle in accordance with Cl. 16-16, cf. Cl. 5-13, only applies to recovery settlements. Other principles apply to apportionment settlements between the assured and the insurer in accordance with Cl. 16-11, sub-clause 3; see the Commentary on this provision.

Part four
OTHER INSURANCES

Chapter 17
Insurance for fishing vessels

General

Chapter 17 **was fundamentally altered in the 2019 Version. The Chapter contains solely** the rules relating to insurance of fishing vessels, and contains conditions for hull insurance (Sections 2 and 3), catch and equipment insurance (Sections 4 and 5) and loss of hire insurance for fishing vessels (Section **6**). This Section is not applicable unless it has been explicitly agreed that the insurance is also to cover loss of hire.

All the insurances under this Chapter are subject to the rules in part I of the Plan (Chapters 1 to 9).

The rules for other types of vessels with limited trading areas are singled out in a new Chapter 20. The same goes for the liability insurance, former Section 6 of this Chapter. This insurance is also singled out as a standalone cover in the new Chapter 21.

Section 1
General provisions

Clause 17-1. Scope of application

Chapter 17 provides a special insurance cover for **fishing** vessels and constitutes a supplement to the other rules of the Plan. The hull part of this Chapter (Sections 2 and 3) is an addition to the general hull part of the Plan (Chapters 10 to 13), while the special insurance for catch and equipment (Sections 4 and 5) do not have any parallel in the Plan. The special rules on loss-of-hire insurance for fishing vessels (Section **6**) supplement the general provisions on loss-of-hire insurance in Chapter 16 of the Plan. However, there is no clear dividing line between vessels that are insured according to Chapters 10 to 13 of the Plan and vessels that are insured according to Chapter 17. Certain fishing vessels are thus insured on so-called hull conditions for ocean-going vessels (Chapters 10 to 13). It is therefore necessary to have a rule determining the applicable cover if this is not clear. According to Cl. 17-1 the rules in Chapter 17 shall only apply to the extent that this is explicitly stipulated in the insurance contract. The provision has the greatest practical significance in relation to the hull cover because there are two sets of rules to choose between here. If hull insurance has been effected on Plan conditions without Chapter 17, Sections 2 and 3, being mentioned in the insurance contract, only the rules in Chapters 10 to13 shall apply.

Given that the provision relating to the scope of application is contained in Section 1, Sections 4 to 6 must be stated in the insurance contract in order to be applicable. As mentioned, the Plan does not

contain any alternative covers for these insurances. If it is not stated that a catch and equipment insurance or an owners' liability insurance has been effected, the vessel will therefore be sailing without such cover on Plan conditions.

Insurance for catch and equipment according to Sections 4 and 5 may, as mentioned, be tied to a hull cover on the general hull conditions of
the Plan in Chapters 10 to13. In that event, the common rules in Section 1 apply to the catch and equipment insurance and the liability insurance, but not to the hull cover. The consequence of this is that the hull cover is not automatically renewed, cf. Cl. 1-5, sub-clause 3, and that the ordinary rules relating to trading areas, classification and safety regulations must be adhered to.

Clause 17-2. Renewal of the insurance/Ref. Clause 1-5

The non-mandatory rule in the Norwegian Insurance Contracts Act (ICA) Section 3-6 concerning automatic renewal has been departed from in Cl. 1-5, sub-clause 3, of the Plan, which establishes that the insurance is not renewed unless this has been specifically agreed. Many of the persons effecting insurances in this industry do not have professional offices. It may therefore be problematic for them to be required to ensure that the insurance is renewed, particularly if it expires while they are at sea. However, the reinsurance is frequently not finalised until immediately before the insurance takes effect, and insurers do not want to bear the risk if it turns out that reinsurance is not obtainable on the conditions anticipated 30 days before the renewal. The problem of reinsurance may be resolved by the insurers cancelling the insurance not less than 30 days before expiry, if it is not clear whether satisfactory reinsurance is obtainable. This special rule has therefore been maintained in the form of a rule providing for automatic renewal if the insurance is not cancelled 30 days before the date of expiry.

In the rule regarding automatic renewal it is specified that in such case the insurance is renewed at the same premium and on the same conditions as before, cf. sub-clause 1. If the insurer does not wish to renew the insurance, or if he is only willing to renew it on different conditions or at a different premium rate, he must follow the procedure set out in sub-clause 2, cf. below.

The basic rule in sub-clause 1 is that the insurance remains in force on the same conditions and at the same premium rate unless it is cancelled within 30 days prior to expiry of the insurance period, cf. above. If the insurer wishes to cancel the insurance or change the premium rate or the conditions, it now follows from sub-clause 2 that he must notify the person effecting the insurance of this within one month of expiry of the insurance period. The person effecting the insurance is thereby given a reasonable amount of time to consider alternative cover. For insurance contracts that run for several years, the decisive point in time for the insurer's duty of notification will be when the multi-year

insurance contract is about to expire. Thus the provisions do not apply to payments of due premium during the period covered by the multi-year insurance contract.

Under sub-clause 3, the person effecting the insurance has a time limit of 14 days before expiry of the insurance period to consider the insurer's renewal offer. If he notifies the insurer, before the time limit expires, that he does not wish to accept the renewal offer, this will result in the contract lapsing from the date the insurance period expires unless the parties agree on new conditions. On the other hand, if the person effecting the insurance fails to respond within the time limit, he is bound by the renewal at the proposed premium rate and on the proposed conditions. Therefore, if the person effecting the insurance accepts an offer from a competing insurer, it is important that he at the same time ensures that the previous contract is cancelled within the specified time limit. Otherwise, he will be bound by two insurance contracts, in which case he must ask one of the insurers to release him from the contract.

If the insurer wishes to renew the insurance on the same conditions and at the same premium rate, it will not be necessary for him to send notification pursuant to sub-clause 2. If, in such a case, the person effecting the insurance should not wish to renew the insurance, possibly not on the same conditions or at the same premium rate, he must notify the insurer accordingly within the same time limit as stated above, i.e. 14 days prior to expiry of the insurance period. Otherwise the insurance will remain in force on the same conditions and at the same premium rate pursuant to sub-clause 1.

Clause 17-3. Trading areas for fishing vessels/Ref. Clause 3-15

The consequence of the rules relating to trading areas being placed in Section 1 is that they automatically become applicable to all three types of insurance, hull, equipment and **loss of hire**.

The basic rule for vessels insured under Chapter 17 is that the trading areas are as indicated in Cl. 3-15 of the Plan with Appendix, unless otherwise provided by the insurance contract. In such case, the system of sanctions for conditional and excluded trading areas applies in the normal manner. For freighters, any departure from Cl. 3-15 must be explicitly stated in the insurance contract, cf. the fact that Cl. 17-3 applies only to fishing vessels. The normal procedure for freighters is that the trading areas in the insurance contract are linked to what is stated in the vessel's trading certificate. Furthermore, it is normally only a matter of ordinary and excluded trading areas, so that navigation in conditional trading areas, which are regulated in Cl. 3-15, sub-clause 2, is not relevant.

Such a procedure may also be used for fishing vessels, cf. sub-clause 1 which states that the provision only applies unless "otherwise provided in the insurance contract".

For fishing vessels, however, there is a need for a standard solution that is different from the one that follows from Cl. 3-15 and the Appendix. On the one hand, parts of the fishing fleet operate close to ice-strewn waters, and therefore need an extension of the normal trading areas northwards. On the other hand, there is a considerable risk associated with small fishing vessels that operate in remote waters. A special rule regarding trading areas for fishing vessels is therefore incorporated into Cl. 17-3, sub-clause 2. The trading area is 55 degrees east longitude south of Novaya Semlya and 65 degrees east longitude north of Novaya Semlya, cf. point III, second sentence, of the Appendix and maps nos. 4 and 5. To the west the limits are 65 degrees west longitude north of Saint John and 75 degrees west longitude south of Saint John, cf. point III, third sentence, and maps nos. 4 and 6**.** The trading area include**s** ports on the east coast of the USA and Canada north of 40 degrees north latitude, cf. the fact that the southerly limit at 40 degrees north latitude. On the other hand, the seaward approach to the St. Lawrence River and the Hudson Bay are outside the trading area.

The trading area to the north is open/scattered drift ice concentration (4/10-6/10) or higher. This limit applies in all directions, see point III, last sentence, of the Appendix. The purpose of this limitation is to ensure that the vessel does not enter waters where there is ice. It may be difficult to achieve such a limitation by means of a fixed geographical specification because the ice limit will vary considerably. The trading area is therefore linked to the ice charts issued by the Norwegian Meteorological Institute (DNMI). The ice charts distinguish between "ice free", "open water", "very open drift ice", "open drift ice", "close drift ice", "very close drift ice" and "fast ice". The trading limit is stated to be the limit between "very open drift ice" and "open drift ice", cf. the wording "open/scattered drift ice concentration (4/10-6/10) or higher". In this context, 4/10 indicates the lower limit for "open drift ice".

The ice limit may move during the period between the publishing of two ice charts. For the definition of trading limits, the most recent ice chart available from the Norwegian Meteorological Institute is the decisive factor. The question as to whether or not the chart is available must be subject to an objective assessment. If the assured has failed to obtain the most recent chart made available to the public, this must therefore be his risk.

If the ice limit has moved from one chart to the next, the assured has a duty to remove the vessel from waters where the concentration of ice is too high. In such a situation, however, the vessel must be given time to proceed into a permitted trading area. Consequently, the vessel cannot be deemed to have proceeded beyond the trading limits if it reacts promptly to new information about the ice limit, even if the vessel, strictly speaking, was in an excluded trading area for a brief period of time.

The provision relating to trading limits in the general part of the Plan stipulates ordinary trading limits, a conditional trading area and an excluded trading area. A vessel may sail within the conditional trading area, but if the insurer has not been notified of this, an additional deduction shall be made in the event of damage. For fishing vessels a slightly simpler system is used: if the assured wishes to

proceed beyond the trading limits defined in the insurance contract, permission must be obtained in advance, possibly subject to payment of an additional premium. Areas beyond the trading limits specified in the insurance contract are automatically regarded as excluded. Trading in these areas shall therefore be treated in accordance with the rules relating to excluded trading areas in Cl. 3-15, sub-clause 5. This means that the insurance automatically ceases to be in effect when the fishing vessel enters the area, but that the insurance comes into effect again if the vessel leaves the excluded area before expiry of the insurance period.

The rules in Cl. 17-3 apply only to "fishing vessels". Consideration was given to whether there was a need to define the term "fishing vessels", but in view of the strict marking and registration rules, this was considered unnecessary. If the vessel is registered as a fishing vessel and has been given a registration number, it must be regarded as a fishing vessel under Cl. 17-3, even if it is used for purposes other than fishing in a specific situation.

The rules in Cl. 17-3 relating to trading areas must be viewed in conjunction with the authorities' regulation of the trading area for certain vessels, cf. the Norwegian Maritime **Authority**'s Regulation of 4 November 1981 No. 3793 relating to trading areas. The rules for fishing, whaling and sealing vessels are contained in Chapter IV. The trading area stipulated by the authorities is normally described in a trading certificate for the vessel in question. As a rule, the trading area in the trading certificate will be more limited than the area specified in sub-clause 1. If the insurer wants the trading area under the insurance to coincide with the trading area in the trading certificate, this must follow from the insurance contract, cf. sub-clause 1. Normally, however, this type of official regulation is only in the nature of a special safety regulation in relation to the insurance, cf. Cl. 17-5 (b). Under these rules, if a vessel proceeds beyond the trading limits specified in the trading certificate, this will only have consequences for the insurance coverage if the infringement can be ascribed to the assured, or someone with whom he may be identified, and if there is a causal connection between the infringement and the casualty. This means that the sanction will be somewhat less strict than it would have been pursuant to Cl. 3-15, sub-clause 3.

If the vessel has lost its trading certificate, the rules in Cl. 17-4 shall apply.

It may in certain cases be expedient to state the vessel's type of use in the insurance contract. Infringements of the stated type of use must in that event be considered an alteration of the risk under Cl. 3-8 et seq. If the vessel is used contrary to the stated purpose, the insurer is free from liability, provided that he can prove that he would not have accepted the insurance if he had known that the alteration would take place, cf. Cl. 3-9, sub-clause 1. If he would have accepted the insurance, but on other conditions, he is free from liability if the casualty was caused by the alteration of the risk, cf. Cl. 3-9, sub-clause 2. In addition, the insurer has the right to cancel the insurance, cf. Cl. 3-10.

Clause 17-4. Classification and *vessel inspection*/Ref. Clause 3-14 and Clause 3-8

Sub-clause 2 was amended in the 2013 Plan.

Cl. 3-14 of the Plan **assumes** that the vessel is in class and establishes that the insurance will automatically lapse in the event of loss of class. Change of classification society is deemed to be an alteration of the risk, cf. Cl. 3-8, sub-clause 2, last sentence. However, there is no reason to introduce such an assumption for vessels that are insured under Chapter 17, see *sub-clause 1*, which merely establishes that *if* the vessel is classed with a classification society at the inception of the insurance, Cl. 3-14 and Cl. 3-8, sub-clause 2, shall apply in the normal way. The provision means that the insurance lapses if the assured cancels the class and proceeds to sail legally under the rules of the vessel´s flag state.

Vessels which are not in class will be subject to the vessel´s flag state. According to the rules of the Norwegian Maritime Directorate, fishing vessels of more than 50 gross registered tonnes will be issued a trading certificate. For vessels of less than 50 gross registered tonnes the rules differ to a certain extent for fishing vessels. Fishing vessels shall - depending on their length - have an equipment certificate/safety certificate, which is a simplified form of trading certificate.

Trading certificates, equipment certificates, safety certificates and the like issued by the vessel´s flag state have the same significance as class has for larger vessels. At the same time it is a condition for coverage on Plan conditions that these are vessels with a length of 15 meters or more. Norwegian vessels with a length of less than 15 meters are insured on separate conditions according to the mandatory rules of the Norwegian Insurance Contracts Act. Under *sub-clause 2, first sentence*, the insurance of a vessel that is not in class is made subject to the condition that it has a valid certificate according to the rules of the vessel´s flag state. This sentence was amended in the 2013 Plan. Previous versions referred to the rules of the Norwegian Maritime Directorate instead of the rules of the vessel´s flag state. The term “certificate” covers trading certificate, equipment certificate/safety certificate, survey certificate and any other form of certificate which the vessel´s flag state might issue. The lapse of a valid certificate will for such vessels result in the lapse of the insurance, cf. *second sentence*, which refers to the rules relating to the loss of class. This provision may seem strict, but the reaction is necessary because normally it should take a lot more to lose a trading certificate or another certificate than it does to lose a class.

Orders from the vessel´s flag state are regulated in Cl. 3-22.

Clause 17-5. Safety regulations/Ref. Clause 3-22 and Clause 3-25

Section 7, sub-clause 1, of the Norwegian Ship Safety Act No. 9 of 15 February 2007 reads as follows in English translation:

"The operator of the ship shall ensure that a safety management system which can be documented and verified is established, implemented and developed in his organisation and on the individual vessels in order to identify and control the risk and also to ensure compliance with requirements laid down in a statute or in the actual safety management system. The contents, scope and documentation of the safety management system shall be adapted to the needs of the operator and his activities."

There has been discussion on whether Section 7 of the Norwegian Ship Safety Act applies to ships below 500 gt. The reason for this discussion is that the ISM Code has not been made applicable for ships below 500 gt. However, the Norwegian Maritime Authority has reiterated that said Section 7 pursuant to Section 2 of the Act is applicable for all ships except pleasure craft less than 24m length.

Similar provisions as in Section 7 of the Norwegian Ship Safety Act do not exist in the other Nordic countries whose legislation refers to the standard of the ISM Code when it comes to what ships have a statutory obligation to apply safety management systems.

Section 7 of the Norwegian Ship Safety Act is in itself a safety regulation as defined in Cl. 3-22 of the Plan; breach of which will be governed by Cl. 3-25. However, as Section 7 of the Norwegian Ship Safety Act is so vague it will for practical purposes be very difficult to invoke it against the assured until the Norwegian Maritime Authority has adopted a regulation setting out what a safety management system for vessels under 500 gt. should comprise. For ships or vessels or other crafts or units that are subject to the ISM Code, reference is made to the Commentary to Cl. 3-22 and Cl. 3-25 where it is made clear that the ISM Code is a safety regulation pursuant to the definition in Cl. 3-22; breach of which is governed by Cl. 3-25.

The provision provides three special safety regulations for the insurance of fishing vessels and comes in addition to Cl. 3-22 *et seq.* in the general part of the Plan.

Due to the fact that it is incorporated in the Section containing common rules, it is applicable also to equipment and liability insurance. The purpose of the provision is to avoid any deliberate fisheries, etc. under difficult ice conditions with a high risk of ice damage.

The provision constitutes "a special safety regulation laid down in the insurance contract" under Cl. 3-25, sub-clause 2. This means that the assured must be fully identified with anyone "whose duty it is on behalf of the assured to comply with the regulation or to ensure that it is complied with". This will normally be the duty of the master of the vessel. As a special safety regulation Cl. 17-5 (a) also

prevails over the provision relating to the situation where the owner is the master of the vessel in Cl. 3-25, sub-clause 1, second sentence. If the owner himself is the master of the vessel, he will therefore forfeit coverage if the vessel sustains damage due to negligent ice-forcing.

Sub-clause 1 (a) applies only to ice-forcing. Ice-forcing presupposes that the vessel proceeds through ice as the result of a deliberate choice. It further follows from the rules relating to safety regulations that the damage must be a foreseeable consequence of this choice. If ice damage is sustained accidentally, e.g. by striking against drift ice in open sea, this does not constitute ice-forcing. Nor does the provision cover "ice-forcing" in order to avert major damage or total loss where a vessel has unexpectedly become ice bound; this would constitute a measure to avert or minimise loss. On the other hand, sub-clause (a) will apply if the master has deliberately proceeded into an area where it is foreseeable that the vessel will become ice-bound.

It is further a condition that the forcing concerns "ice". If the vessel is sailing in an open lane, this does not constitute ice-forcing. This was earlier stated explicitly in the Special Conditions, but is superfluous. Furthermore, the content of the term "ice" can be difficult to define precisely. The term must be defined on the basis of discretionary criteria, such as the thickness, solidity and extent of the ice. There may also be reason to take into consideration the time of year in question and whether any ice-breaker service has been organised. A certain support may also be obtained from the ice classification requirements.

Sub-clause (b) concerns the trading certificate, which is referred to in Cl. 17-3. As mentioned, the trading certificate defines the trading area as it has been determined by the authorities for the vessel in question. The provisions contained in the trading certificate automatically constitute safety regulations under Cl. 3-22. However, the advantage of mentioning them specifically here is that the identification rule in Cl. 3-25, sub-clause 2, second sentence, becomes applicable.

Orders from the vessel´s flag state are not subject to any special regulations. If the assured fails to comply with orders issued by the flag state, the trading certificate might become invalid, in which case the insurance will automatically lapse according to Cl. 17-4.

Sub-clause (c) concerns vessels at quay or laid up, and is consequently more extensive than Cl. 3-26, which merely concerns vessels laid up. For fishing vessels it is more practical to stay in port than to be laid up. There is moreover a special need for safety regulations in connection with the risk of theft, because it is normally quite simple to gain access to this type of vessel. It is therefore the assured's duty to provide daily supervision of the vessel and its moorings and furthermore to secure the vessel

and its equipment. The provision also contains a requirement that the equipment shall be kept in such a way that it can only be removed by the use of tools.

Clause 17-6. Savings to the assured

The provision is taken from the P&I conditions in the 1964 Plan, but contains a general principle of insurance law and has therefore been generalised.

Section 2
Hull insurance

General

Section 2 deals with the standard cover of hull insurance for fishing vessels. The provisions in Section 2 are supplementary to Part II of the Plan, Chapters 10 to 13, relating to hull insurance. This was previously stated in the Commentary, but has now also been included in the text of the Plan, cf. Cl. 17-7.

In addition to the provisions in Section 2, this insurance is therefore subject to the common provisions in Section 1 and the provisions in the general part I of the Plan (Chapters 1 to 9) and part II relating to hull insurance (Chapters 10 to 13).

The system of a standard cover for fishing vessels and an extended cover for fishing vessels has been retained in that the standard cover is incorporated in Section 2, while the extended cover is incorporated in Section 3.

In accordance with the general system of the Plan, the most practical approach is for deductibles and machinery damage deductions to be agreed on an individual basis. Hence, it is sufficient here to apply the rules in Cl. 12-16 and Cl. 12-18. There was also agreement that the new for old deductions were cumbersome and outdated, and that they should therefore be deleted and replaced by machinery damage deductions and deductibles which took into account the age of the vessel and machinery and the sum insured. However, insurance without new for old deductions is conditional on these deductions being compensated for by the other deductions. If the assured is not willing to accept a sufficiently high level of deductible and machinery damage deductions, the insurers must therefore be entitled to incorporate provisions concerning new for old deductions in the individual insurance contract.

Clause 17-7. The relationship to Chapters 10 - 13

The provision states that for hull insurance the rules of Chapters 10 to 13 apply, with such amendments as follow from Cl. 17-7A and Cl. 17-10 to Cl. 17-17 inclusive. Certain amendments in

the general rules of the Plan, see Cl. 17-8 and Cl. 17-9, also apply. The reference to Cl. 17-7A is new in the 2013 Plan.

Clause 17-7A. Fixed equipment temporarily removed from the vessel

This Clause is new in the 2013 Plan. The two sub-clauses used to be found in Cl. 10-2 sub-clause 2 and 3.

It is an absolute prerequisite for this extended cover that the object has been on board before it was stored ashore. This extension of the insurance applies only to the explicitly stated objects, viz. fixed equipment for fishing vessels. The cover only applies where the insurer is notified before the vessel leaves port about what equipment has been brought ashore, its value and where it is stored in order for it to be covered. Lastly, the only risks this cover of objects removed from the vessel comprises, is fire and burglary through forced entry into a locked storage building or room.

The term “burglary” is identical to "burglary" as defined in Section 9 of the English Theft Act 1968:
“A person is guilty of burglary if
(a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below; or
(b) having entered into any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.”

The cover also has a special safety regulation obliging the assured to store the equipment in a locked storage building or room.

Sub-clause 2 establishes that in the event of a total loss of the vessel, a deduction shall be made from the total-loss compensation for the value of the stored equipment.

Clause 17-8. Change of the open or agreed insurable value/ Ref. Clause 2-2 and Clause 2-3

According to the rules of the Plan, the parties may choose between open and agreed insurable value, cf. Cl. 2-2 and Cl. 2-3. An open insurable value is fixed at the “full value of the interest at the inception of the insurance”, cf. Cl. 2-2. However, an agreed insurable value is fixed by agreement between the parties when the insurance is effected, cf. Cl. 2-3. According to Cl. 2-3, such an agreed insurable value is binding unless the assured has given misleading information about matters that are relevant for the agreement. There are, however, possibilities of demanding a revision of the agreed insurable value in the event of market fluctuations, cf. Cl. 2-3, sub-clause 2.

A common denominator for open and agreed insurable value is thus the fact that in principle there is no basis for taking into account any changes in value after the contract is entered into (unless the right to a revision in Cl. 2-3, sub-clause 2, becomes applicable**).** However, the value of a fishing vessel is largely contingent on the vessel's fishing rights, and it is therefore necessary to have a provision that entitles the insurer to take account of changes in such rights. The *first sentence* imposes a duty of notification on the assured in two situations. The first situation was defined in earlier versions of the Plan as changes in concession conditions. This wording has been amended to "conditions prescribed by public authorities relating to the vessel's fishing rights". This amendment was necessitated by changes in fisheries insurance contract, such as the introduction of perpetual fishing rights. Fishing rights now go by a variety of names, such as concessions, structural arrangements, unit quota systems, participation rights, etc., depending on the type of fishing the vessel is engaged in and the size of the vessel. The wording "concession conditions" is therefore no longer adequate to cover changes of relevance to the insurer.

Such changes may have a direct impact on the value of a fishing vessel and create the need for a renegotiation of the agreed insurable value. Similarly, there will in connection with the determination of an open insurable value be a need to take such factors into consideration. In the second situation, the assured shall notify the insurer if he has accepted an offer of a state destruction subsidy which is lower than the agreed insurable value. The state will often offer a subsidy to break up the vessel in order to reduce the fishing fleet. Because it may take some time from when the offer is accepted until the vessel is taken out of service, the assured will need insurance in the interim period. If the assured has accepted an offer for such a subsidy which is lower than the agreed insurable value, it is natural that the insurer is given a right to renegotiate the agreed insurable value. Similarly, it should be possible to take this fact into account in connection with a subsequent calculation of an open insurable value.

The *second sentence* provides the insurer with a right to demand a reduction of the open or agreed insurable value in cases such as mentioned in the first sentence. This provision thus gives the insurer a possibility of renegotiating the agreed insurable value during the insurance period. If the assured has failed to give the necessary notices, the insurer must nevertheless have the right to set aside the agreed insurable value in a subsequent settlement.

It follows from Cl. 2-4 that the question of under-insurance must be based on the agreed insurable value, even if it is set aside under sub-clause 1. The rule entails that if the agreed insurable value is 5, the real value 2.5, and the sum insured 4, the insurer will be liable for 4/5 of 2.5, i.e. 2.

If the assured has accepted an offer for a state subsidy to break up the vessel, and the vessel is damaged before being broken up, the insurer will be liable in the normal way. In the event of a total loss, the insurer will be liable for total-loss compensation. Such compensation will be deducted from

the state subsidy. The same applies if the vessel at the time of condemnation has an unrepaired damage for which the insurer is liable. Damage which has already been repaired and indemnified will, however, not have any influence on the condemnation settlement.

If the parties disagree as to whether there is any reason to reduce the agreed insurable value, or about the size of the reduction, the provisions in Cl. 2-3, sub-clause 3, shall apply. The question will then be decided with final effect by a Nordic average adjuster designated by the assured. The provision shall be applied by analogy if the parties disagree about the significance of the said matters for a subsequent calculation of an open insurable value.

When the parties renegotiate the agreed insurable value, they must also negotiate the possibility of a reduction in premium.

Clause 17-9. Damage to lifeboats, fishing, whaling and sealing tackle and catch/ Ref. Clause 4-7 to Clause 4-12 and Clause 4-16

The dories, fishing gear and catch have in principle been lifted out of the hull insurance through the exception in Cl. 10-1, sub-clause 2. The insurer is nevertheless in principle liable for damage to such objects if the damage occurs during a measure to avert or minimise loss. Damage to or loss of such objects should, however, be covered by the owner himself on the basis of a "knock-for-knock" line of thought. Where several fishing vessels are operating together, it is foreseeable that equipment will be damaged in various connections. Instead of involving the owner's own insurance company or that of the party causing the damage in an often difficult insurance settlement with complicated evidentiary problems, it is therefore more expedient to let the owner bear his own damage.

The provision in Cl. 17-9 therefore explicitly excludes such damage from the cover in cases where it is connected with a measure to avert or minimise loss only applies to fishing vessels and not to freighters.

Clause 17-10. Hull and freight-interest insurance/Ref. Clause 10-12

Today separate total-loss insurances for fishing vessels and freighters are not normally offered. However, the owners wish to have such an offer. It has therefore been stated explicitly that the hull insurer may consent to the effecting of interest insurance. In that event, the reduction rule will only apply to interest insurances which are larger than what the hull insurer has consented to.

Clause 17-11. Condemnation/Ref. Clause 11-3

The condemnation limit is 90% in relation to Cl. 11-3. A limit of 80% is too advantageous when taking into account that the average age of the fleet is far higher today than 30-40 years ago, that the international marine insurance market relies on a condemnation limit of 100%, and that the value of

the concession is part of the insurable value of fishing vessels, at the same time as this value is retained by the assured in a condemnation settlement.

Clause 17-12. Damage to the hull of vessels which are not built of steel/ Ref. Clause 12-1

Sub-clause 1 (a) is first and foremost relevant to insurance of vessels deserving of preservation.

Sub-clause 1 (b) is not intended to cover more unforeseeable forms of striking against ice, e.g. where an ice floe has drifted out from a branch of a fjord to an open area of water where there is normally no ice.

Sub-clause 1 (c) excludes caulking of hull and deck. This is typical maintenance work, and it will not be easy to decide to what extent the caulking has in reality been necessitated by the casualty. The exclusion does not cover expenses incurred in caulking those parts of hull and deck which have to be replaced as a result of the casualty. Here the caulking represents a normal cost of renewal of a part of the vessel, and it must therefore be covered.

Clause 17-13. Limited cover of damage to machinery

The Commentary to Cl. 17-13 was amended in 2016. **The wording was editorially amended in the 2019 Version to underline the fact that this Clause applies unless otherwise agreed in the insurance contract.**

The Clause provides limited cover for damage to machinery. On the other hand, extended cover for damage to machinery may be effected in accordance with Cl. 17-18.

The first part of the *first sentence* specifies that the insurer is “only” liable for the enumerated perils.

The second part of the *first sentence* states the perils covered by the insurer. This part of the provision was amended in the 2013 Plan. The damage must be a result of collision, striking, an earthquake, an explosion outside the engine room, fire, or of the vessel having sunk or capsized. The term “engine room” replaces the term ”machinery” in the earlier versions of the Plan. It comprises only the main and auxiliary engine rooms. Further, it is new in the 2013 Plan that the insurer is liable where the vessel has been filled with water as a result of a breach of a hose or a pipe onboard the vessel. The breach may occur on the hose/pipe itself or at any couplings/sockets, provided the hose or pipe couplings/sockets are fitted either in accordance with Nordic Boat Standard or public statutory rules applicable to the vessel. Thus, consequential damage of a leakage which arises suddenly and unexpectedly and is a result of external influence or faulty material will be covered. Such damage is not covered if attributable to a breach of a hose or a pipe that has not been statutory fitted as described

above**.** The insurer will cover that peril provided the breach was not caused by corrosion or age. A breach caused by corrosion or age is a maintenance issue or rather lack of maintenance. It is the duty of the assured to carry out maintenance. The insurer's liability for "the vessel having sunk or capsized" also applies when the vessel is moored.

The *second sentence* stipulates an exception to the rule in the first sentence as regards damage to electronic equipment. If such damage is caused by bad weather and the same casualty causes damage to hull or superstructure, the damage to the electronic equipment shall be covered.

Clause 17-14. Costs incurred in saving time/Ref. Clause 12-7, Clause 12-8, Clause 12-11 and Clause 12-12

The provision excludes the time-loss element in the ordinary hull conditions from the cover under the coastal hull insurance conditions.

Clause 17-15. Deductions/Ref. Clause 12-15, Clause 12-16 and Clause 12-18

Sub-clause (a) refers to ice damage. This sub-clause was amended in the 2013 Plan. Previous versions of the Plan stated that damage resulting from striking against or contact with ice north of 75° north latitude and the waters of Greenland, including the Strait of Denmark, was covered subject to specified deductions. According to the 2013 Plan the deduction will be the subject of individual negotiations where inter alia the strength of the hull and ice class will be taken into account. According to the Plan, the deduction applies only to partial damage in accordance with the general system of the Plan.

Sub-clause (b) refers to electronic equipment. The deduction will be the subject of individual negotiations where *inter alia* the age of the equipment can be taken into account. It is therefore unnecessary to make the size of the deduction dependent on the age of the equipment in the actual Plan text.

The term "electronic equipment" covers three main groups, viz. radio equipment, fish-finding equipment and navigation equipment.

Radio equipment includes main transmitters with short-wave and receiver, watch-receivers, AM-VHF telephone monitors, VHF transmitters and receivers, lifeboat transmitters, direction-finding beacons, emergency communication sets for aircraft frequency, receivers and TVs for mess rooms or cabins, walkie-talkie transmitters and receivers, equipment for communication between bridge, engine room, cabins, mess rooms, and deck, and weather map recorders.

Fish-finding equipment includes sonars, display screens, echo sounders, echo enlargements connected to main sounders, trawl monitors, echo scopes, echo sounders for trawl probes and probe receivers.

Navigation equipment includes gyrocompasses, autopilots, course controllers, all types of radar, electronic logs for satellite navigators and display screens, radio sounders for AM VXF and WT, satellite navigators, Omega receivers and Loran C receivers.

In addition to deductions for electronic equipment, the Plan's rules relating to machinery damage deductions and deductibles, cf. Cl. 12-16 and Cl. 12-18 shall apply. For the sake of clarity, this is repeated in sub-clauses (c) and (d). As regards the basis for calculating the various deductions, Cl. 12-19 applies so that all deductions shall be calculated on the basis of the full amount of compensation according to the Plan before deductions under any of the relevant provisions.

Given that the normal cover has not allowed for new for old deductions, the age of the vessel and the machinery, possibly also the sum insured, shall be taken into account when determining deductions and deductibles. In the event that the agreed deductions do not compensate for the lack of new for old deductions, the insurer may have to agree on individual new for old deductions.

Clause 17-16. Collision liability for fishing vessels/Ref. Clause 13-1

This cover follows Cl. 13-1 as regards general liability for collision and striking. The purpose of this amendment is to ensure that cover includes collision and striking with aquaculture structures, which are not covered under P&I insurance. However, cover for collision has now been generalised. At the same time, however, this cover has been limited with regard to collision with vessels and with fishing, whaling or sealing tackle, cf. below.

Under *sub-clause (a)*, cover in the event of "collision with or striking against" another vessel is limited to damage caused to the vessel with fixed accessories. Thus the insurance does not cover floating accessories. "Fixed accessories" means equipment which is normally on board, but is not necessarily "nailed down". Catch, fishing gear and dories which are not lifeboats are examples of objects which do not constitute "fixed accessories". Loss of catch and other loss of time are also outside the scope of cover. The provision refers to the "knock-for-knock" principle which is mentioned in the Commentary on Cl. 17-9. When several vessels participate in the same fishing team, collisions between the individual vessels and fishing gear, catch and dories which are in the sea are foreseeable. It serves little purpose to use resources on a detailed distribution of liability in such cases. It is therefore assumed that each fishing vessel owner covers damage to his own equipment. A natural extension of such a "knock-for-knock" principle is to exclude such damage from the liability insurance of the person who has caused the damage.

Under *sub-clause (b)*, the insurer does not cover any liability for collision with or striking against fishing, whaling or sealing tackle in the sea. This limitation is explained by the fact that this liability is

covered under P&I conditions. *Sub-clause (c)* is identical to sub-clause 2 in earlier versions.
The provision is a continuation of the "knock-for-knock" principle mentioned above. When several vessels participate in the same fishing team or operate as pair trawlers, it is expedient to further limit the cover, thereby also excluding damage to or loss of the vessel with fixed accessories from the collision liability.

Clause 17-17. Collision liability/Ref. Clause 13-1

The heading and the Clause was amended in 2016 to make it applicable for all types of vessels insured under Chapter 17. The amended wording is partly editorial amendments. Also, by adding the new sentence "By a call is meant arrival, anchoring, working, discharging, loading and leaving", it is made clear that the insurance does not cover any collision liability to the relevant structure or any fish contained therein during the whole period when the insured vessel is calling at the structure. The previous wording was by some owners read to the effect that the exclusion of cover for collision liability only applied if damage occurred during loading or discharge.

The provision emphasises that the exclusion also comprises damage to the actual device and shall apply irrespective of what is loaded or discharged. The provision is first and foremost aimed at floating devices which are easily damaged, such as where the vessel runs into an enclosure for fish and the fish escape. In such cases it is difficult or impossible to determine the extent of damage. The application of the provision is not subject to the condition that there is loss of or damage to live fish; the deciding factor is the nature of the device. If there are several independent devices in the same area, however, liability to another device than the one from which loading or discharging shall take place will be covered.

Section 3
Hull insurance – extended cover

Clause 17-18. Extended cover of damage to machinery

Section 2 applies in full to the other parts of the hull insurance.

The fact that extended cover for damage to machinery has been agreed will be evident from the insurance contract, see *sub-clause 1*. In such case, damage to machinery, electronic equipment, etc. will be covered in accordance with the ordinary rules of Chapter 12 of the Plan, with certain minor exceptions. These follow in part directly from sub-clause 1, in part from sub-clauses 2 and 3.
Sub-clause 1 refers to Cl. 17-14 and Cl. 17-15, which thereby apply correspondingly in the event of extended cover for damage to machinery.

Sub-clause 2 states that damage must have been caused by the listed perils in order to be covered. The insurer is liable for damage to other machinery in the usual way, on the basis of the all-risk principle set out in Cl. 2-8. The remainder of the provision is unchanged.

Sub-clause 3 establishes that costs of removal of the vessel in connection with damage to seine winches and the like are not covered if the damage to machinery is subject to a deduction pursuant to the rules of Cl. 17-15 (c). It is illogical, in a way, that the cover of removal costs will thus be better under Cl. 17-13 (c) than under the present sub-clause in cases where the damage to seine winches and the like is a consequence of the vessel having been subjected to a collision, striking, etc. However, the solution corresponds to the solution that was introduced in the Norwegian Plan of 1996.

Section 4
Catch and equipment insurance – standard cover

General

Catch and equipment insurance corresponds to the former fishing insurance. In addition to this Section, the general part of the Plan and Chapter 17, Section 1, shall apply. However, Chapter 17, Sections 2 and 3, shall not apply.

Dories are excluded from the Plan according to Cl. 10-1, sub-clause 2.

The sum insured for insurance of catch and equipment is determined in the insurance contract on an annual basis or for a round voyage.

Clause 17-19. Objects insured

The provision states the objects and interests covered by the insurance. *Sub-clause (a), first sentence*, concerns the catch. By catch is meant the quantity taken on board the assured's own vessel at sea. It is irrelevant whether it was caught by the relevant vessels itself or bought from others at sea. The provision also covers catch which has been processed, packaged and frozen. However, the provision is limited to the vessel's operation as a fishing, whaling or sealing vessel, and does not apply if the vessel is used as a cold store whilst laid up.

The *second sentence*, establishes that the insurance, subject to certain specific conditions, also covers freight. This applies only where the catch has in actual fact been reported to a fish sales co-operative and the vessel directed to a specific place for unloading before the casualty occurred. It is not sufficient if the reporting, etc. takes place later. In addition to catch and freight, the fishing insurance also covers fishing gear and accessories which are on board the vessel, cf. *sub-clause (b)*. It is a condition that the gear belongs to the assured. The assured may therefore not take on board seines

which belong to other owners and obtain compensation for damage to these without this having been agreed in advance with the insurer. The gear must be on board the vessel; gear onshore or in the water therefore falls outside the scope of cover. The gear is deemed to be in the water from the moment setting starts and until it is back on board again. The requirement that the object must be on board is otherwise commented on in more detail under Cl. 10-1.

The reference to Cl. 10-1 in sub-clause (d) is included for the purpose of making it clear that the cover under the fishing insurance will not be extended by agreeing on a more limited scope of cover under the hull insurance.

It follows from Cl. 2-12 that the assured has the burden of proving that he has suffered a loss which is covered by the insurance. This rule entails that the assured must prove that the catch or the equipment was in actual fact on board when it was lost or damaged.

Clause 17-20. Insurable value

The provision states the value of the interests covered by the insurance based on certain "objective" criteria. Sub-clause 1 regulates the insurable value of the catch, while sub-clause 2 determines the insurable value of the other objects which are insurable under an insurance of catch and equipment.

The provision does not prevent the parties to the insurance contract from agreeing on a specific insurable value. However, an agreement of the insurable value is not very common for insurance of catch, but is more widely used in insurance of fishing gear, etc.

The basis for the calculation of the insurable value of the catch is under *sub-clause 1* the market price of the catch at the place of loading at the time of loading. The market price of the catch will be the value of the catch to the seller's hand, before he has incurred costs in connection with the forthcoming transport. The market price is the price at which the catch can be sold, taking into account the seller's place in the chain of distribution.

The value refers to price conditions "at the time of loading", i.e. at the time when the catch is loaded on board the vessel.

If the catch was reported to a sales cooperative and directed to a specific place for unloading, it follows from the provision that the insurable value also covers freight, "transport surcharge", see Cl. 17-19 (a), second sentence.

Sub-clause 2 regulates the insurable value of objects covered according to Cl. 17-19 (b), (c) and (d). Here the insurable value represents the replacement cost of the object at the inception of the insurance.

The provision is in accordance with Cl. 2-2. The "inception of the insurance" is the time when the insurer's liability takes effect. The time for calculating the insurable value under sub-clause 2 is accordingly different from that under sub-clause 1, where the value refers to the time of loading.

Clause 17-21. Extraordinary handling costs

The need for this cover is linked to the problems that arose in winter 1998/99 when a number of fishing vessels proved to have been infected with salmonella due to the fact that the ice used to preserve fish on board was infected with the bacteria. In addition, there is the fact that the authorities set stringent requirements for the destruction of catch in a controlled manner. There is therefore a need for cover of extraordinary costs in connection with the removal and destruction of damaged catch.

The cover applies only when the shipping company has effected insurance for the catch. The insurer is liable for an amount equivalent to the sum insured and is in accordance with the cover for costs of measures to avert or minimise loss, which is largely similar to the cover for extraordinary costs.

Clause 17-22. Excluded perils/Ref. Clause 2-8

The provision states limitations to the perils covered by the insurance, and must be seen in conjunction with the provisions in Cl. 2-8 to Cl. 2-10. According to Cl. 2-8 an insurance against marine perils covers any peril to which the interest is exposed, with the exception of the perils stated in sub-clauses (a) to (d). The war peril has been taken out of the marine-perils cover through the exception in Cl. 2-8 (a) and has been made the object of a separate war-risks insurance under Cl. 2-9. If there is no specific statement as to what perils are covered by the insurance, the rule in Cl. 2-10 is that the insurance covers marine perils under Cl. 2-8.

The exclusions in Cl. 17-22 largely reflect the general principle of insurance law that the insurance shall only cover unforeseeable losses. Losses resulting from the inherent nature of the catch, inadequate packaging, loss in weight or volume of the catch, etc. are foreseeable and should therefore fall outside the scope of cover. *Sub-clause (a)* excludes damage due to the inherent nature or condition of the catch when the catch was taken on board. The exclusion also covers cases where the catch is unable to stand up to the foreseeable exposures on board. This provision is particularly relevant to mackerel and herring in bulk, which are unfit to stand movements on the way to port if the vessel has remained for too long in the field with the fish on board.

Sub-clause (b) regulates inadequate packaging and preservation. Inadequate preservation includes cases where refrigerated or frozen catch did not have the correct temperature at the time it was refrigerated or frozen down.

Sub-clause (c) excludes loss as a result of ordinary loss in weight or volume.

Sub-clause (d) relates to refrigerated or frozen catch. The treatment of refrigerated catch is subject to extensive EU regulation, and buyers also have stringent criteria as regards the quality of the fish. The assured will therefore normally be very careful to ensure that the water is sufficiently cooled down before the catch is taken on board. If the refrigeration plant is not functioning or has not been started up, fish will not normally be taken on board.

Quality standards for frozen fish are so stringent that any thawing may result in loss because the fish cannot be sold at the ordinary price.

If the loss in question has resulted from a delay which has no connection with a preceding casualty, it follows from Cl. 4-2 that the insurer is not liable. It is also conceivable that loss resulting from a delay is excluded through Cl. 17-22 (a), in that the fish has to stand a few days' delay. If, on the other hand, the delay is a result of an earlier casualty, the insurer must be fully liable in the normal way, cf. the cover of further developments according to the Special Conditions. This follows from general rules of causation and applies independently of the cause of the delay or its duration. The fact that damage to the catch develops further during transport to the place of destination is a risk which must be covered by the insurance. However, the insurer's liability for the delay is based on the assumption that the assured could not have avoided this delay. If the assured, following a casualty, chooses instead of taking the **vessel** directly to a port, to remain at sea in order to prevent loss of time, the loss caused by the delay is not a consequence of the casualty. If it is found that the loss is partly a result of the casualty, partly of a delay, the rule of apportionment in Cl. 2-13 shall be used.

Clause 17-23. Deck cargo

The provision entails that further restrictions are made in the perils covered for deck cargo. In sub-clause (b) the term "dirt" first and foremost covers pollution from the ship's own exhaust system.

Clause 17-24. Total loss

The provision concerns all objects insured under the catch and equipment insurance, i.e. both the catch and the accessories, cf. the introductory words of the provision.

Sub-clause 1 defines when a total loss has occurred, and is taken from the Norwegian Cargo Clauses **Cl.** 35, sub-clause 1. Under *sub-clause (a)*, a total loss has occurred if the objects insured have been destroyed. The objects have been "destroyed" where they are totally burnt up, dissolved, evaporated or have leaked out, or where they are in some other way physically totally destroyed. In principle, all objects insured, including the entire catch, must be affected in order for it to constitute a total loss. The rules relating to loss in weight, cf. Cl. 17-25, however, make sub-clause 1 of Cl. 17-24 similarly applicable where part of the objects insured/catch are totally lost. The condemnation rules in

sub-clauses (c) and (d) do not call for a more precise definition of the term "destroyed". On the other hand, the distinction between condemnation and partial damage may be difficult to make. Reference is made to the Commentary on Cl. 17-26.

Under *sub-clause 1 (b)* a total loss has also occurred where the objects insured (including the catch) "have been removed from the assured without any possibility of his recovering them". The objects have been "removed from" the assured if he does not have physical disposal of them. They have sunk, been washed over board, stolen, impounded or handed over to a wrongful recipient. There is, however, no requirement that the objects shall be physically damaged or impaired. The actual removal must be complete. The objects must have been removed from the assured "without any possibility of his recovering them".

If the objects have disappeared without there being any basis or information to indicate how this happened, the assured has the burden of proving that the total loss was caused by a peril covered by the insurance.

Rules relating to condemnation are contained in *sub-clause 1 (c) and (d)*. The provision in (c) sets the condemnation limit at 100% for fishing gear and accessories. For other objects, however, the condemnation limit is 90% in line with the solution in the Norwegian Cargo Clauses § 35, sub-clause 1, no. 4. The reason for the difference is that catch, packaging and supplies may be considered equivalent to goods, while the insurance of fishing gear is more similar to an ordinary property insurance.

The condemnation rules apply when the objects insured are so extensively damaged that at least 100% or 90% of their value must be considered lost. When deciding whether the objects are condemnable, damage must be assessed under Cl. 17-25 and Cl. 17-26 and be seen in relation to the insurable value. In the assessment only loss of value resulting from damage covered by the insurance shall be taken into account. If several insured incidents occurred during the transport, it is the aggregate damage which must have resulted in a loss of value of 100% or 90% respectively.

Sub-clause 2 regulates the further content of a total-loss settlement. The provision corresponds to the Norwegian Cargo Clauses § 35, sub-clause 2. In the conditions for fishing insurance there was no such rule. The fundamental principle is that the assured is entitled to payment of the sum insured for the object insured, limited, however, to its insurable value, cf. *first sentence.*

If the objects, before becoming a total loss, sustain damage, it follows from the *second sentence* that no deduction shall be made for such damage in the total-loss claim. It is, however, a condition that the damage occurred during the insurance period. For pre-existing damage prior to the inception of the

insurance, deductions shall be made, given that such damage will reduce the insurable value of the object correspondingly.

Clause 17-25. Damage to or loss of catch

Due to the renumbering of the Clauses of Chapter 17 in the 2010 version, the number of the Clause was changed from 17-26 to 17-25.

The provision regulates the claims settlement where catch is damaged or lost without the rules relating to total loss in Cl. 17-24 becoming applicable. Because there is no question of any repairs in respect of a catch in the event of damage or partial loss, as would be the case for other objects covered by the insurance, the provision determines that the assured will in these cases always be entitled to compensation. As regards the size of this compensation, it shall be determined in the same way as under Cl. 17-26, sub-clause 2, and reference is therefore made to the Commentary on that provision.

Clause 17-26. Damage to other objects

The provision regulates settlement in the event of damage to fishing gear, accessories and equipment insured according to Cl. 17-19 (b), (c) and (d).

Sub-clause 1 is taken from the Norwegian Cargo Clauses Cl. 37, sub-clause 1, and establishes that the insurer is always entitled to demand that damage be repaired, thus ruling out any compensation to the assured for unrepaired damage. Repair means that the object is restored to its original state. Only the insurer may demand repairs. The assured will be referred to the compensation alternative in sub-clause 2. He may not, over the insurer's objection, carry out repairs and claim compensation for the costs incurred in that connection.

The insurer's right to demand that damage be repaired is not unconditional. Repairs must be feasible without "unreasonable loss or inconvenience for the assured". In the evaluation of this question, the length of time such repairs will take must amongst other things be taken into account.

Presumably the costs of repairs will constitute a smaller amount than the sum insured; if not, it will be a case of condemnation under Cl. 17-24, sub-clause 1 (c) or (d). If the insurer has demanded repairs under Cl. 17-26, sub-clause 1, and these repairs turn out to be significantly more expensive than anticipated, he must, however, pay all costs in full. The same applies if the repairs turn out to be inadequate.

Sub-clause 2 regulates settlement when the damage is not repaired, either because the insurer is not entitled to demand it, or chooses not to do so. The provision is taken from the Norwegian Cargo Clauses Cl. 37, sub-clause 2. In such cases a cash settlement shall be made based on the determination

of a damage percentage for the object. The damage percentage shall reflect the final reduction in the value of the damaged objects, i.e. the market value of the object in undamaged condition in proportion to the value in damaged condition at the place of destination. The damage percentage shall be calculated on a discretionary basis

When the damage percentage has been determined, the insurer's liability will be the product of the damage percentage and the insurable value. However, if the sum insured does not cover the entire insurable value, such under-insurance must be taken into account by a pro-rata calculation of the insurer's liability, cf. Cl. 2-4.

Sub-clause 3 is taken from the Norwegian Cargo Clauses § 38 and concerns damage to or loss of an object which consists of several parts. It is mainly relevant in the event of damage to fishing gear and similar equipment. Under the provision, the insurer's liability is limited to covering repairs or renewal of the part that is lost. The assured therefore never has the right to demand a new object in the event of such damage.

Clause 17-27. Survey of damage

Insurance of catch and equipment is not subject to the rules in Chapter 12. It is therefore necessary to have a reference to Cl. 12-10 in order to have authority to carry out a survey of damage.

Clause 17-28. Deductible

The deductible applies to damage, total loss and loss arising from measures to avert or minimise loss.

Section 5
Supplementary cover for nets and seines in the sea

General

The supplementary cover under this Section cannot be effected separately, but must be effected in combination with the standard cover under Section 4.

Clause 17-29. Objects insured

The distinction between objects which are on board the vessel and objects which are in the sea is commented on in further detail in the Commentary on Cl. 17-19 (b). The insurance does not cover any seines other than ring-nets in the water.

The objects that are insured under the supplementary cover in Section 5 are to a large extent the same as the objects that are insured under the normal cover in Section 4, cf. Cl. 17-19 (b). Normally a sum

insured will be agreed for each cover. If a sum insured has been agreed for the objects concerned under the normal cover, but not under the supplementary cover, it must, however, be assumed that the sum insured shall be the same under both covers.

Clause 17-30. Excluded perils/Ref. Clause 2-8

The most common damage is that seines get caught on the sea bed. The insurers are prepared to cover such damage subject to the limitations that follow from sub-clauses (a) to (e). Such cover could actually be achieved by extending the Clause defining liability, while otherwise retaining the principle of a positive specification of the perils covered. Because it is difficult to prove that "currents" and "heavy catch" are causes of damage, the Committee found it more expedient to change to a negative specification of the perils covered, even if such a transition may cause some uncertainty as regards the actual content of the cover. To safeguard the position of the insurer in connection with such a revision of the description of the perils covered, the burden of proof in respect of exclusions has been reversed in relation to Cl. 2-12, cf. below.

Sub-clause (a) entails that the insurer is only liable for loss resulting from the net or seine getting caught in an unknown wreck or unknown wreckage. Damage resulting from ordinary contact with the sea bed, for instance if the net or seine gets caught on natural obstacles that are part of the general character of the sea bed, is not covered.

The wreck is "known" when it is indicated on a chart, in e.g. the Notices to Mariners published by the Norwegian Maritime Directorate or in corresponding foreign publications. The term "unknown" is meant to be an objective criterion. The assured cannot argue that he was not aware of wreckage that has been made known to the public as stated above. On the other hand, the wreckage must be regarded as known if the assured had knowledge of it, even if it might not have been made known to the public.

Sub-clause (d) provides that the insurer is not liable for loss resulting from nets and seines being in contact with ice. Sub-clause (e) is based on the same principle as Cl. 10-3 of the Plan, and establishes that the insurer does not cover losses resulting from normal use of the object insured. This will be the case, for example, where large seines and nets are lost due to the weight of the fish and sea currents.

It follows from the principle in Cl. 2-12, sub-clauses 1 and 2, of the Plan that the insurer, under an all-risks insurance, has the burden of proving that the damage was caused by an excluded peril. Under Cl. 17-30, sub-clause 2, this rule of the burden of proof for exclusions has been reversed, thus placing the burden of proof on the assured. This has been necessary in order to give the assured the better cover inherent in a negative specification of the perils covered.

The earlier exclusions in sub-clause 2 (b) of the provision regarding gear used for shore-locking and the like, sub-clause (c) regarding infringements of statutes or official regulations, and sub-clause (d) regarding measures to avert or minimise loss have been deleted. The exclusion for shore-locking was superfluous because gear is no longer used in that way, while infringements of statutes or regulations are governed by safety regulations. The insurers are willing to cover measures to avert or minimise loss.

Clause 17-31. Deductible

The deductible shall be agreed on an individual basis and be stated in the insurance contract. The deductible shall also apply in the event of total loss.

Clause 17-32. Duties of the assured in the event of casualty/Ref. Clause 3-29

The purpose of the provision is to make it possible to identify lost objects if they are recovered. This provision comes in addition to the ordinary duty to notify the insurer in Cl. 3-29. In the event of a failure to comply with this duty, Cl. 3-31 shall apply.

The text was slightly amended in the 2013 Plan by changing the wording "Norwegian Fisheries Inspectorate" to "Fisheries Inspectorate".

Section *6*
Loss of hire insurance for fishing vessels

General comments

Until a few years ago, insurers did not ordinarily provide loss-of-hire insurance for fishing vessels. This has changed recently since parts of the fleet now fish all year long and the units have become larger and more costly. Thus, an interruption of operations can have significant financial consequences for the assured. This is particularly the case for the seagoing fishing fleet where the largest, most costly units are to be found.

Clause 17-33. Relationship to Chapter 16

Loss of time for fishing vessels is covered on the basis of Chapter 16, subject to the changes that follow from Cl. 17-**34** to Cl. 17-**38**. These special rules are intended to apply only to fishing vessels.

Clause 17-34. Liability of the insurer/applies instead of Clause 16-1

This Clause corresponds to Cl. 16-1, but replaces Cl. 16-1 in its entirety because it is the provisions regarding hull insurance in Chapter 17, Section 2, that determine whether compensation is payable under the loss-of-hire cover. Sub-clause 2 of Cl. 16-1 has not been incorporated and will therefore not

apply to fishing vessels. The reason for this is that these provisions are not presumed to be of any practical significance for fishing vessels.

Clause 17-35. Total loss/applies instead of Clause 16-2

This Clause corresponds to Cl. 16-2, but is subject to the change that follows from Cl. 17-11 to the effect that the threshold for condemnation has been set at 90 %.

Clause 17-36. Calculation of compensation for fishing vessels/Ref. Clause 16-3

When calculating compensation for loss of time for fishing vessels, Cl. 16-3 will apply in full in addition to Cl. 17-**36**, but Cl. 17-**36** contains important limitations on the extent of the compensation that can be claimed under the loss-of-hire insurance.

The rationale is that calculating compensation under loss-of-hire insurances for fishing vessels poses special challenges and difficulties compared with ordinary merchant vessels, whether they be seagoing or have a limited trading route along the coast, because fishing vessels are subject to official control of fishing operations. Official control may consist of time limitations on the fishing of certain fish species, quotas for individual fishing vessels and overall seasonal or annual catch quotas. Seagoing fishing vessels will, nevertheless, have possibilities of obtaining a licence or permit to switch from one type of fishing to another in different areas and it will thereby be possible to use the vessel for income-generating fishing operations throughout or during large parts of the year.

Fishing is strictly regulated in almost all European countries as well as internationally through cooperation under the International Council for the Exploration of the Sea (ICES). Legal authority for regulating fishing in Norway is provided by the Act of 6 June 2008 on the Management of Wild Living Marine Resources (Marine Resources Act) *(havressursloven)*. The Act empowers the authorities to establish national quotas, group quotas, district quotas and quotas for individual fishing vessels. Permits for individual fishing boat owners to engage in fishing are governed by the Act of 26 March 1999 No. 15 relating to the right to participate in fishing and hunting (*deltakerloven).* Quotas for the different types of fish are fixed for one year at a time by the fishery authorities pursuant to the Marine Resources Act.

Cl. 17-**36**, *sub-clause 1*, therefore provides very generally that the insurance does not cover losses resulting from the vessel being deprived of income due to regulatory measures introduced by the authorities or from the authorities having stopped fishing operations. The wording “authorities” includes national authorities, authorities in other countries and supranational authorities like the EU. This provision is a logical consequence of the principle expressed in the Commentary on Cl. 16-3 with reference to the English judgment “CAPRICORN”, which determined that loss of time that occurred

during a period when the vessel would have been deprived of income regardless of the damage is not recoverable.

Therefore, the question of whether there is a recoverable loss cannot be considered solely on the basis of whether the vessel has been unable to operate regularly due to damage. Consideration must also be given to whether the vessel has been prevented from fishing its full allocated quota of a specific species of fish. If, once the vessel is back in operation after an interruption due to damage, it is able to fish its full allocated quota, the assured has suffered no loss and is thus not entitled to compensation.

This can be illustrated by the following examples:

(1) A purse seiner licensed to fish mackerel suffers damage to machinery on 1 October, as a result of which the vessel is unable to operate until 1 December of the same year. Mackerel is normally fished in the period September-November. Prior to the interruption, the vessel had fished two-thirds of its quota. When it began to operate again on 1 December, the assured was unable to fish the rest of his quota since the fish were no longer present in the Norwegian zone. In this case, the assured has in fact been deprived of the possibility of fishing during the period 1 October to 1 December. In principle, however, the loss will be limited to the time the vessel would need to fish the remainder of its mackerel quota. On the other hand, the vessel could conceivably lose income that it might have earned from alternative fishing operations, such as herring and autumn mackerel fishing.

(2) A fishing vessel is licensed to trawl for Norwegian spring spawning (NSS) herring. The vessel began fishing for herring on 1 February, but due to grounding on 20 February spent 30 days in a yard for repairs. When the grounding occurred, the vessel had fished 30 % of its quota of NSS herring. After repairs of the vessel were completed, it continued to fish for blue whiting, for which it also had a quota. In the autumn of the same year, the vessel resumed fishing for NSS herring and fished its entire quota before the end of the year. The assured was able to fish the remainder of his quota of NSS herring before the end of the calendar year, but missed the opportunity to fish for blue whiting during the period in which repairs were carried out and is thus entitled to compensation for this loss of time, unless the vessel had also fished its full blue whiting quota.

(3) A trawler has a quota to fish sand eel (tobis) in the North Sea. The fishing season starts on 1 May. On that day a fire breaks out on board the boat, which spends 30 days in a shipyard to repair the damage. On 25 May the authorities stop the fishing because the proportion of stunted fish is too high. Fishing is not re-opened that season. The vessel has had a time loss of 30 days, but due to the moratorium on fishing, the vessel would only have been able to fish for 25 days. The recoverable loss of time is therefore limited to 25 days. If, on the other hand, the vessel had had the right to fish other species for which the authorities had not halted fishing activities, the number of days of indemnity is not reduced.

If the assured leases another vessel to fish his full quota while the insured vessel is deprived of income, the costs of such leasing must be recoverable under Cl. 16-11.

Cl. 17-**36**, *sub-clause 2, second sentence,* provides that quotas which are not fished in full during the quota year due to damage to the vessel, cf. Cl. 17-**34**, and which the authorities allow to be transferred to a new quota year, are to be regarded as quotas fished in the original quota year if the quota is fished in the new quota year. This provision has been included because in some cases the fishery authorities may allow quotas that are not fished in full in the quota year to be credited to the quota fixed for the following year. This can apply to both group quotas and vessel quotas. The legal basis for such "transfer" is provided by the individual regulations governing the fishing activities in question, which are laid down pursuant to Cl. 11 of the Marine Resources Act. If, despite the damage, the assured is able to fish his full quota for one year in the course of two quota years, he will not have suffered any loss that is recoverable under the loss-of-hire insurance. However, this is conditional on the displacement in time of the fishing activities not having negative consequences for the assured's possibility of fishing his full quota for the new quota year or in the form of a reduced quota as a result of the transfer.

Once the fixed quota for individual vessels or groups has been fished in full, the fishery authorities may grant an extra quota. As a rule, this is done if the fishery authorities see that a great deal of the total quota for individual species of fish remains unfished in the quota year. When the total quota has been fished in full, fishing activities are stopped. If the assured is allocated an extra quota of this nature, it may be taken into account in the calculation of loss. However, such extra quotas may raise difficult issues in practice that must be resolved on a case-by-case basis. If the assured has not been able to fish his full ordinary quota on account of the damage, but would in any event have been allocated an extra quota, he will have suffered a loss. If the assured received the extra quota because he was unable to fish his full ordinary quota, the extra quota could be seen as compensation for the loss of all or part of his ordinary quota. Quotas which the vessel would obviously not have managed to fish are not recoverable. Situations where the vessel would obviously not have managed to fish its quota may arise as a result of poor operational decisions, the unavailability of fish or the fact that extra quotas are allocated so late that they cannot be fished in the quota year or the following quota year in cases where quotas are allowed to be transferred from one year to the next.

Under *sub-clause 2, second sentence,* of the provision, the rule set out in the first sentence, to the effect that quotas fished in full in the new quota year are, in certain cases, to be regarded as having been fished in full in the original quota year, applies correspondingly to quotas transferred by the vessel to other vessels in the quota year. The rationale for this expansion of cover is that shipowners may transfer all or parts of their quota to other vessels in accordance with rules laid down by the

authorities. These quotas may be used both in the event of a casualty and in connection with the vessel's ordinary operations, and consequently will limit the shipowner's loss.

Due to the quota rules, *sub-clause 3* contains a special rule in relation to the general rule in Cl. 5-2 regarding when the claims adjustment is to be issued. Whether or not the vessel has managed to fish its full allocated quota is not ascertained until the end of a quota year. This means that the insurer will not be able to assess whether the assured has suffered a real loss until the end of the year. The duty to issue the claims adjustment has therefore been deferred to as soon as possible after the end of the quota year. The same applies when quotas are transferred to a new quota year. In such case, the duty to issue the claims adjustment arises as soon as possible after the end of the new quota year.

Under Cl. 5-6, compensation thus falls due for payment six weeks thereafter. This applies even if the agreed insurance period has expired at an earlier date. This special rule will have relevance for the point in time when interest on overdue payments begins to accrue, cf. Cl. 5-4, last sub-clause. For loss-of-hire compensation, however, interest under Cl. 5-4 will accrue as provided in Cl. 5-4, sub-clause 1, third sentence, from one month after the end of the period for which the loss-of-hire insurer is liable, which will normally be one month after repairs of the vessel were completed, cf. Cl. 16-13. The expiry of the quota year will be of no relevance in this connection. If the insurer wishes to avoid paying interest under Cl. 5-4, he must make a payment on account under Cl. 5-7 in the usual manner.

Clause 17-37. The daily amount for fishing vessels/applies instead of Clause 16-5

This Clause corresponds to Cl. 16-5, but has been rewritten because fishing vessels do not normally have freight contracts and freight rates, but have earnings from fish that are delivered to a fish landing site. Ordinarily, there is no guaranteed price for fish delivered to a fish landing site, and consequently earnings may vary depending on the price levels at any given time. The price level may therefore change during the period before and after a loss of time.

In the case of an open insurance contract, the daily amount fixed in the agreement will serve as a sum insured per day. The sum insured multiplied by the number of days of indemnity will constitute the maximum limit for compensation and will form the basis for the calculation of premium.

The daily amount that is recoverable under an open insurance contract must be calculated on the basis of the average earnings of comparable vessels during the period in which the loss of time occurred. Variations in price during this period are to be taken into account when calculating averages. As a result of this method of calculation, the assured cannot invoke a right to higher compensation on account of the difference between the prices when the damage occurred and the prices when the vessel was again able to resume fishing.

Any expenses saved or expenses that ought to have been saved as a result of the vessel being unable to operate must be deducted from the earnings.

Clause 17-38. Agreed daily amount for fishing vessels/applies instead of Clause 16-6

The provision establishes that a daily amount agreed in the insurance contract is to be construed as the sum insured per day and the insurer's maximum liability per day, unless it is clearly evident that the daily amount is to be regarded as an agreed amount. Under this approach, the presumption for an agreed daily amount in Cl. 16-6 has been reversed. The provision is necessary because it is not practical, on account of the authorities' regulation of fishing activities, to provide cover based on an agreed daily amount. Such cover should only be provided in cases where the earnings from fishing activities are reasonably stable throughout most of the year.

If the parties have agreed on the daily amount, the insurer may only set aside the daily amount if it can be proven that the person effecting the insurance has given "misleading information about characteristics of the subject-matter insured that are relevant for the agreement", cf. Cl. 2-3.

Even if the daily amount is agreed, the limitations on compensation prescribed in Cl. 17-**36** will apply.

Chapter 18
Insurance of mobile offshore units (MOUs)

Wherever used in the Clauses and these Commentaries, "MOU" includes all objects listed under Cl. 18-2.

Overview

This Chapter was substantially amended in the 2013 Plan. In the 2016 Version a new Section 6 on construction risks was added, and Section 5 on war risks was expanded by incorporating all clauses from Chapter 15, amended as appropriate to fit war risks insurance for MOUs. In the 2016 Version, Cl. 18-1 was also amended by adding a new sub-clause 2 to letter (b) and a new no. (3) to letter (e) necessitating amendment also of sub-clause 2 of letter (e). Also letter (h) of Cl. 18-1 was amended in the 2016 Version.

By incorporating Chapters 10 – 14 and Chapter 16 in 2013 and in 2016 also Chapter 15 and adding a new Section 6 on construction risks, the purpose to let Chapter 18 provide all relevant clauses on each type of insurance was completed. There are no longer any cross references to any other parts of the

Plan except to Part One, which according to the express provision of
Cl. 18-1 also constitutes the "background law" for insurance of MOUs unless specifically amended by Cl. 18-1. This applies also for the new Section 6 on construction risks.

Section 1
General rules relating to the scope of the insurance

Clause 18-1. Scope of application and applicable rules

This provision was amended in 2016.

The *first sentence* establishes that the rules in Part One shall apply unless specifically amended under this Clause. It is no longer deemed necessary to state in cl. 18-1 that Chapter 18 only applies to the extent it is set out in the insurance contract. The 1996 Commentary to the previous Cl. 18-1 stated that "there is no clear distinction between ordinary ships that are insured under the general hull insurance conditions of the Plan, Chapters 10 to 13, and offshore structures that are insured in accordance with Chapter 18". Developments since 1996 have demonstrated that insurance of conventional trading and passenger vessels is a complete different risk from insurance of MOUs. The insurance market is today very much aware of the different risks involved and will know when they are insuring MOUs which appropriately should be covered on the basis of Chapter 18. If the parties should have forgotten to expressly incorporate Chapter 18 in an insurance for MOUs covered on the basis of the Plan, the presumption must be that the insurance is intended to be on the basis of Chapter 18 unless it is apparent from the wording or implied terms that the parties did not so intend.

MOUs are not defined in the Plan but in practice, however, Chapter 18 will first and foremost be used for vessels and other mobile installations that are used for the exploration for, exploitation or storage of natural resources offshore, or in support of such activity. The designation of the insurance as an insurance of "mobile offshore units" means that it accordingly covers both various forms of vessels operating on the continental shelf and various forms of mobile units. It is irrelevant whether the unit is designed like a ship and is a ship (e.g. a drilling vessel or a Floating Production Storage and Offloading vessel "FPSO" or a Floating Production Storage vessel "FPS"), or if it falls outside the normal concept of a ship, e.g. jack-up or semi-submersible units.

The heading of Chapter 18 contains the word "mobile". This means Chapter 18 is not intended to be used for fixed or stationary installations, e.g. platforms resting on poles rammed into the seabed. Other types of stationary facilities, e.g. pipelines are not intended to be insured on the basis of Chapter 18. However, Chapter 18 is not based on any such absolute distinction between mobile and stationary facilities or structures. The stationary platforms and structures which were the solutions for offshore field developments up until mid 1990s are no longer the chosen concept for new developments,

particularly in frontier areas where there is no existing infrastructure in place, and when the field is in deep water. Newer fields have therefore been developed with floating MOUs connected to various equipment placed on the seabed. This underwater equipment may also belong to the owner of the MOU and is then normally comprised by the insurance of the MOU. Chapter 18 has been amended as appropriate to adapt to applying also to such underwater equipment belonging to the MOU.
Traditional fixed installations are for the most part owned by the licence owners and insured under their comprehensive energy insurance arrangements. By fixed installations are thus meant steeljacket or concrete gravity base installations which are placed in the field to be used throughout the life of the field. However, there is no point in drawing a sharp distinction between a mobile and a fixed installation. The parties must evaluate together which insurance conditions that are best suited for insuring their interests.

Cl. 18-1 (a) Insurable value/Sum insured/Ref. Cl. 2-2 and Cl. 2-3
In previous versions, Cl. 18-1, letter (a), sub-clause 1, stated that the sum or sums insured shall be deemed to constitute the assessed insurable value(s) unless circumstances indicated otherwise. This provision was in 2016 made general and moved to Cl. 2-2, sub-clause 2, and thus deleted in Cl. 18-1 letter (a). As a consequence, the remaining sub-clauses were renumbered.

Cl. 18-1 (a) sub-clause 1 now opens for the parties to agree separate sums insured for the MOU and disconnectable equipment. The reason is that owners of certain MOUs, in particular FPSOs, may also own subsea equipment which is disconnectable from the unit, and left behind on the offshore field location when the MOU is temporarily away from the location. Such equipment, consisting of flexible risers, umbilicals, mooring lines and a buoy, can often represent significant values. When the MOU and such subsea equipment are disconnected and the MOU is away from the field they are no longer exposed to common risks of loss or damage as would be the case when together at the field location. A serious loss to the MOU or the subsea equipment whilst disconnected may render the damaged unit/equipment condemnable if only the value of the unit or the subsea equipment is taken into consideration and not the combined values.

Cl. 18-1 (a) sub-clause 2 provides that when the parties have agreed to insure with separate values, the insurance operates as separate insurances for the MOU and the disconnectable equipment respectively.

Cl. 18-1 (a) sub-clause 3 provides that when the MOU is within the field at which it is to operate, the MOU and its equipment are considered one insured object with the combined scheduled values as the sums insured.

Cl. 18-1 (b) Perils insured against/Ref. Cl. 2-8 and Cl. 2-9
Cl. 18-1, letter (b), sub-clause 2, was added in 2016.

Cl. 18-1, letter (b), sub-clause 1, contains a limitation in the cover of perils and must be seen in conjunction with the rules relating to perils insured in Cl. 2-8 to Cl. 2-10. The Plan has two main types of perils: "marine perils", cf. Cl. 2-8, and "war perils", cf. Cl. 2-9. The rules in Chapter 18 are applicable to insurance against marine perils, as well as to insurance against war perils. If no special agreement concerning perils insured against has been made, under Cl. 2-10 the insurance will only cover "marine perils". There is obviously nothing to prevent one and the same insurance contract covering marine perils as well as war perils.

An insurance "against marine perils" shall be an "all risk" insurance from the outset: The insurance covers all perils to which the interest is exposed, unless specific exclusions are stated. The exclusions from marine perils appear from Cl. 2-8 (a) to (**e**). The exclusion in Cl. 18-1 (b) come**s** as an addition to these exclusions.

By contrast, an insurance against war perils only covers "named perils", i.e. the war risks insurance only covers the perils "named" in Cl. 2-9. Cl. 18-1, letter (b), is a relevant exclusion also under a war risks insurance if the blow-out and thus the need for drilling a relief well should have its root cause in a "named" war peril as defined in Cl. 2-9.

The provision in Cl. 18-1, letter (b), sub-clause 1, must also be seen in conjunction with the limitations of the perils insured against which follow from Section 2 of Chapter 18 on H&M insurance, in particular the exclusion for loss due to ordinary use in Cl. 18-4 (cf. Cl. 10-3), and the exclusions for damage due to inadequate maintenance in Cl. 18-19 (cf. Cl. 12-3), and error in design, etc., in Cl. 18-20 (cf. Cl. 12-4).

The background for the provision is the risk of blow-outs, i.e. uncontrolled ejecting of drilling fluid through the drilling hole and into the sea or the air, followed by uncontrolled emission of oil, gas or fluid from the well and into the sea or the air caused by a pressure from the underground. Such blow-out may be followed by ignition of the well fluids and explosion and fire. Blow-outs will often need to be stopped by the drilling of a relief well. It is perfectly conceivable that an insured drilling unit may be requested to drill one or more such wells in order to assist another unit/installation, and it may, depending on the prevailing circumstances, be natural, or even necessary, for such a request to be complied with. Commercial vessels in distress threatening life, environment and property requiring emergency salvage or rescue operations are a natural parallel. For the insured unit to embark on a salvage operation will very often represent a relevant alteration of the risk under the hull insurance, cf. Cl. 3-8 and Cl. 3-9. However, according to Cl. 3-12, sub-clause 2, the insurer automatically covers the added risk involved in "measures taken for the purpose of saving human life" or by "the insured ship salvaging or attempting to salvage ships or goods during the voyage". A salvage operation which consists in the drilling of a relief well is, however, considered a high risk operation. The risk to the salvaging unit is not comparable to a salvage operation in commercial shipping. It is first and foremost

the licensees'/operator's interests which are at stake: the risk of the oil well being destroyed and the risk of extensive pollution liability, etc. The consideration of mutuality which may be said to be the background for Cl. 3-12, sub-clause 2, in ordinary hull insurance is missing here. The provision therefore excludes this special "salvage risk" from the perils insured against. This obviously does not preclude the possibility of having the risk covered under a separate agreement, possibly subject to an additional premium.

The exclusion for the drilling of a relief well must apply, even if the drilling is ordered by the authorities. It is therefore irrelevant for the insurer's liability whether it is the operator who decides that a relief well shall be drilled, or whether the operator is acting on the instructions of the authorities.

Earthquake and volcanic eruption are not excluded perils.

Cl. 18-1, letter (b), sub-clause *2,* makes it clear that construction risks insurances pursuant to Section 6 also cover strike and lock-out in the same way as construction risks covered pursuant to Chapter 19, cf. Cl. 19-1, see further the Commentary to Cl. 19-1.

Cl. 18-1 (c) Alteration of the risk/Ref. Cl. 3-8

Storage and use of explosives or radioactive material is a normal occurrence during operations on the Continental Shelf and therefore constitutes a foreseeable risk, which the insurer can calculate when entering into the contract.

Cl. 2-8 relating to marine perils contains no limitation concerning damage resulting from the storage or use of explosives. Explosion, fire and other damage resulting from such storage or use must therefore be covered in the normal way, unless the assured has breached any of the obligations in Chapter 3. However, Cl. 2-8 (**e**) nos. 1 to 4 contain general exclusions for various types of nuclear-related risks. If the storage or use of radioactive material causes radiation, radioactive contamination or any other nuclear-related risk as specified in these provisions, resulting loss or damage will therefore fall outside the scope of cover. The same applies to insurance against war risks, see Cl. 2-9, sub-clause 2 (b), nos. 1 - 4.

Cl. 18-1 (d). Loss of the main class/Ref. Cl. 3-14

This sub-clause (d) corresponds to Cl. 3-14 with some amendments to adapt to normal modus of operations for MOU. The heading and wording of Cl. 3-14 was amended in the 2013 Plan emphasising that Cl. 3-14 applies only to loss of the main class as opposed to loss of optional additional class notations. The wording of sub-clause (d) is amended in the same way. See further the Commentary to Cl. 3-14.

Sub-clause (d) expressly states that the insurance does not terminate until the on-going operation can be terminated in accordance with applicable regulations and the field operator's consent and arrives at the nearest safe port in accordance with the insurer's instructions. Thus it is safeguarded that the assured is protected by the insurance until he safely can terminate the on-going operation and bring the MOU to a for the MOU safe port as instructed by the insurer. If the class can be restored while the MOU is on the field or off-shore, there should not normally be any need for the insurer to require the assured to bring the MOU into port. But if the insurer all the same should require surveying the MOU in port, the insurance will continue until the MOU has arrived at the port designated by the insurer.

Cl. 18-1 (e). Safety regulations/Ref. Cl. 3-22 and Cl. 3-25
A new no. (3) was added to sub-clause 1 in 2016. This is relevant for construction risks insurance covered pursuant to Section 6. A corresponding relevant amendment to sub-clause 2 was made.

Sub-clause 1 no. (1) provides that the well to which the MOU is connected shall be equipped with blow-out preventer(s) (BOP) or other well pressure control equipment which are wellhead safety devices used to prevent pressure build-up in the well from extending up to the MOU when the primary barriers in the well fail to contain the formation pressure under control and thus prevent surface blow-outs. As mentioned in the Commentary to Cl. 18-4, a blow-out may occur when the drilling reaches a subsurface formation which contains oil, gas or other fluid under higher pressure than the hydrostatic pressure of the drilling fluid in the well. The formation fluids will then flow into the well bore and mix with the drilling fluid and increase the pressure in the well and push up through the hole and via the MOU and into the environment, unless it is stopped by a blow-out preventer. A surface blowout will also involve the risk that the oil or gas may ignite with extensive fire and explosion damage as a result. Some types of loss resulting from such a blow-out will, according to their nature, fall outside the scope of cover under Chapter 18, *inter alia* liability for personal injury and liabilities in connection with oil spilled into the sea. The MOU itself may be damaged or become a total loss as a result of a surface blow-out. Losses of this nature are normally covered under Chapter 18, subject to the exceptions which follow from sub-clause (f), cf. also sub-clause (b). It is therefore of the utmost importance for the insurers that all reasonable measures are taken in order to prevent a blow-out. Most important of all in this connection is the use of blow-out preventers.

Offshore petroleum activities are subject to extensive safety regimes through public authorities regulations stipulate that drilling, well work-over and production operations shall be carried out in a safe manner.

The requirement is that the well, to which the MOU is connected, shall be equipped with pressure control device on the top of the well when this is actually feasible. The deciding factor as to when the wellhead safety device shall be installed must therefore be what follows from "standard practice". The same requirement applies to the procedures for the installation, the number and the testing of the

device. “Standard practice” means the practice that is common within the offshore industry for the type of well drilling, work-over or production operation and shall as a minimum be in accordance with the requirements of the relevant regulatory authority. As regards the reference to “standard issue” it means that the wellhead safety device shall be of the type which is common for the type of well and operation with the adequate pressure rating as the actual or expected well pressure will require.

Sub-clause 1 no. (2) contains safety regulations in respect of moves of MOUs. Prior to move, the assured must prepare a move plan, which shall be approved by the claims leader. If an operation manual exists which has been approved by the classification society or regulatory or flag state authorities, it may be used as a basis for the move plan. If no such manual exists, the insurer is entitled to demand that technical expertise be brought in to evaluate the move plan and physical arrangements associated with the move.

The move plan shall be adhered to during the move and serves as a special safety regulation under Cl. 3-25, sub-clause 2, cf. sub-clause (b), second sentence.

Sub-clause 1 no. 2 (a) limits the requirement for a separate move plan to such MOUs that do not move by own propulsion but require assistance of other vessels, tugs, heavy-lift vessels and the like to move. The market practice has developed that for shorter moves within a confined area which are routinely carried out specific move plans do not have to be submitted to the claims leader for approval and in such cases an agreed distance of move is agreed as between insurers and the assured. A panel of approved marine warranty surveyors to review move plans and give recommendations are often written into the insurance contracts.

Sub-clause 1 no. 2 (b) is new and in response to the development of new practice in the deep water drilling industry to move the MOU over shorter distances without pulling up the whole length of the riser string and the BOP before moving the MOU. Although the newer MOUs are specially equipped to move with riser and BOP hanging under the MOU, insurers consider the operation may represent an increased risk and require such moves to be specially reviewed and approved. Shorter moves between wells within the same offshore field, often within the industry referred to as “well-hopping” which are done routinely, do not require specific move plans to be prepared for each move provided, however, that the MOU is technically equipped to do such move with riser and BOP suspended. Insurers’ main concern about such operations, in addition to the MOU’s capability to move with the riser and BOP suspended, is the increased fatigue stresses that the riser string is exposed to during such moves. The move plan shall in particular contain due consideration of the remaining fatigue life in the riser system before the move, the stresses during the move and remaining fatigue life after the move. Another concern is the risk of grounding or striking seabed infrastructure of any kind, for which the sailing route shall be part of the move plan with minimum clearances to be defined and approved by claims leader, an appointed warranty surveyor or other technical expert approved by the claims leader.

If the move entails a change of the area of operation, both parties may demand an adjustment of the premium according to Cl. 18-1, sub-clause (h).

Sub-clause 1 no. (3) is applicable for construction risks covered pursuant to Section 6. Under this provision the assured is obliged to appoint a surveyor, approved by the claims leader, to review the project plan and procedures for moves and lifts and, when applicable, offshore installation of components or modules. The surveyor shall draw up an initial risk assessment on the basis of his initial review. The claims leader is granted the authority to approve the surveyor on behalf of all participating co-insurers. On the basis of the surveyor's initial risk assessment, the claims leader is authorised to approve the further scope of survey that is deemed required from the insurers' point of view to identify the risks involved in the various phases of and operations during the project. If the project in the view of the claims leader does not require any such survey, the claims leader may, on behalf of all participating co-insurers, waive the right to demand such survey.

The claims leader may for certain operations, subject to the further scope of survey, demand that the surveyor shall issue a certificate of approval when he is satisfied with the preparations for the particular operation, e.g. a heavy lift involving risk for substantial damage if something goes wrong. If the assured commences the operation in question before the certificate of approval is issued, he will be in breach of the safety regulation.

Sub-clause 2 of Cl. 18-1, letter (e), provides that the regulations in sub-clause 1 no. (3) shall be regarded as safety regulations. With regard to no. (3), as opposed to nos. (1) and (2), it is expressly referred to Cl. 3-25, sub-clause 1. This is done to make it clear that for breach of the regulations in no. (3), the ordinary rules of identification under Cl. 3-36 to Cl. 3-38 shall apply and not the extended identification pursuant to Cl. 3-25, sub-clause 2, which is applicable for breach of the regulations in nos. (1) and (2).

Cl. 18-1 (f). Measures to avert a blow-out, etc./Ref. Cl. 4-7 to Cl. 4-12
The provision limits the insurer's liability for costs incurred in controlling blow-outs and cratering, or fire in connection with a blow-out.

As regards the term "blow-out" reference is made to the Commentary on Cl. 18-1 (e) sub-clause (1). "Cratering" is an after-effect of a blow-out in that a submarine crater is formed in the subsoil around the well due to uncontrolled flow of oil, gas or fluid in the well. If oil or gas is suddenly released in large quantities, the pressure conditions in the subsoil may change to such an extent that the area around the oil well collapses so that an underwater crater is formed. For an MOU resting on the sea bottom (a totally submersible or jack-up structure) such "cratering" may result in the foundation being pulled away with the result that the MOU loses its stability and topples.

Blow-out and cratering of a well, possibly accompanied by fire, will first and foremost be a great concern for the licensees and the exposure they face from such incident. There will be a risk of the loss of human life and economic assets, in addition to a major potential pollution liability. Extensive measures will be initiated to get the flow of oil, gas or other fluid under control and stopped. The licensees are the ones who bear the liability for any pollution emanating from the well fluids, etc., and they are the ones to suffer the loss of or damage to the well. Where an MOU is brought into the efforts to fight a blow-out, etc., the regard for the safety of the actual MOU will often merely be a collateral motive. If the Plan's rules were to be applied in full in such cases, this would require a discretionary allocation of the overall loss in connection with the well control operation among the interests at stake for the owner and the licensees, cf. Cl. 4-12, sub-clause 2. Only the portion attributed to the owner would be recoverable from the hull insurer. However, it would not be easy to carry out such an apportionment, first and foremost because the values of the assets at stake for the licensees (including the potential oil pollution liability) are difficult to estimate. Given that Cl. 18-1 sub-clause (f) excludes this item from cover; the owner has a strong incentive to secure an agreement with the licensees (in practice the operator) to the effect that they shall cover the costs of averting or minimising the loss in connection with a blow-out, etc., in full. This is also in concordance with the allocation of risk normally used in offshore contracts.

Only measures aimed at gaining control of a blow-out, etc., are covered by the provision. If a fire has broken out on board the MOU as a result of a blow-out, the costs (possibly salvage award) incurred in connection with the fire fighting or the towing of the MOU away from the area of danger, will have to be covered by the insurer under the rules in clauses 4-7 *et seq.* of the Plan.

Sub-clause 2 states that loss or damage to the insured MOU is not excluded by virtue of this exclusion. Such loss or damage will be recoverable in accordance with the terms and conditions as otherwise applicable.

Cl. 18-1 (g) The limit of liability of the insurer/Ref. Cl. 4-18

Sub-clause (g) is repeating to a large extent verbatim what is provided in Cl. 4-18, but a cap of USD 500,000,000 is put on the cover for costs of preventive measures. Sub-clause (g) is spelling out that it is the cover under the hull insurance that is governed by the Clause. Cover under other types of insurances, namely Loss of Hire insurance (Section 4), and War Risks (Section 5) will be governed by Cl. 4-18 to the extent it is not deviated from in these Sections.

MOUs with sum insured under the hull insurance of USD 500,000,000 or less will still have available two times the sum insured. If costs of preventive measures exhaust the separate sum insured available for such costs, they may as before be compensated under the sum insured under the hull insurance provided that this sum is not consumed by the damage to or loss of the MOU. For MOUs with a sum

insured higher than the limit, costs of preventive measures will be limited to USD 500,000,000, but if this amount is consumed there may of course still be available an un-used part of the sum insured under the hull insurance. If this sum insured is e.g. USD 750,000,000 and the costs of repair only amounts to USD 500,000,000, there will be available to cover costs of preventive measures the remaining un-used USD 250,000,000 under the hull insurance. In this example there will be available altogether USD 750,000,000 to cover costs of preventive measures (USD 500,000,000 limit on costs of preventive measures + USD 250,000,000 from un-used portion of the hull insurance).

Sub-clause 2 provides for in the same way as Cl. 4-18 that a third separate sum insured shall be available to cover collision liability according to Cl. 18-36 to 18-38. According to Cl. 18-37 this sum insured corresponds to the sum insured under the hull insurance, but it is now also capped at USD 500,000,000 or for 50% of the sum insured whichever is the greater amount, see further the Commentary to Cl. 18-37.

Thus for MOUs with sum insured under the hull insurance of USD 500,000,000 or less, there will be as before available up to three times the sum insured under the hull insurance. But for MOUs with sum insured under the hull insurance of e.g. USD 1,000,000,000, there will now be two times the sum insured available.

The reason for introducing these capped/reduced limits is that for MOUs with high values it binds up too much capacity to insure/reinsure an exposure of three times the sum insured. Even if the risk of reaching the theoretical maximum exposure is remote, reinsurers charge premium for making such capacity available. Typically salvage costs are by law limited to 100% of the salved values, which are the values in damaged condition. In serious salvage cases the salved values are therefore normally significantly lower than the insured values as the MOU will have suffered serious damage in order to need salvage assistance. Besides, the salvage awards for values in the hundreds of millions of USD, will never reach 100% of the salved values. Even in complicated and long lasting salvage operations for high value vessels or MOUs, salvage awards will only in rear cases reach as high as 50 % of the salved values. For practical purposes it is inconceivable that anybody will use as much as USD 500,000,000 in costs of preventive measures.

The same reasoning goes for collision liability. Normally the assured will be entitled to limit liability to sums below USD 500,000,000, and it binds up capacity and costs unnecessary premium to reinsure liability of this magnitude. Besides, collision liability is also covered under the hull interest insurance, cf. Cl. 18-39 (b) with a separate sum insured equal to the sum insured under the hull interest insurance, see further the Commentary to Cl. 18-39.

If an assured should be required by contract to cover more than USD 500,000,000 for costs of preventive measures and collision liability, the assured must get such excess cover on individual basis.

Cl. 18-1 (h) The area of operation/Ref. Cl. 3-15
This Clause was amended in 2016.

Sub-clause 1 provides that the area of operation is worldwide within the ordinary trading area as defined in Cl. 3-15, sub-clause 1, unless otherwise agreed in the insurance contract. If the assured wishes to operate the MOU in an excluded or conditional trading area, cf. the Appendix to Cl. 3-15, he must notify the insurer in accordance with Cl. 3-15. Any such operation will be subject to Cl. 3-15. However, the maximum ¼ deduction pursuant to Cl. 3-15, sub-clause 3, first sentence, is increased to USD 1,000,000. If the insurer is entitled to any further deduction according to Cl. 3-15, sub-clause 3, last sentence, such deduction comes in addition to the ¼ deduction maximised at USD 1,000,000.

Sub-clause 2 is edited to fit to the new sub-clause 1 so that if the area of operation shall not be worldwide within the ordinary trading area, but restricted to e.g. a smaller area or one or more specific fields, such area of operation must be set out in the insurance contract. The same goes, of course, if the area of operation shall be within any excluded or conditional trading area.

The description may be relatively narrow, e.g. associated with a field, e.g. Ekofisk, or a larger area, e.g. the North Sea or the Gulf of Mexico. If the assured changes the area of operation set out in the insurance contract, this may, depending on the circumstances, represent an alteration of the risk according to Cl. 3-8. The change from one field in the North Sea to another, e.g. from Ekofisk to Statfjord, will normally not represent an alteration of the risk. If, however, the new area of operation is considerably further away, e.g. from the North Sea to the Gulf of Mexico, the consideration may be different, in particular if the move shall take place during a period with a high weather risk, or where it involves an MOU that has to be towed (wet or dry) and the towage is considered particularly risky. If the change of the area of operation represents an alteration of the risk the insurer is entitled to cancel the insurance, cf. Cl. 3-10. If the assured has failed to give notice of the change, and a casualty occurs, the insurer is also free from liability provided that he can prove that he would not have accepted the insurance if he had known about the change. If, however, the insurer would have accepted the insurance even if he had known of the change, but would have agreed different conditions, he will be liable if the casualty was not caused by the change, cf. Cl. 3-9.

If the insurance contract does not set out the area of operation, the MOU may operate all over the world within the trading area, cf. sub-clause 1 and Cl. 3-15. The move of the MOU from one area of operation to another will in that event not represent an alteration of the risk, as long as the MOU remains within the ordinary trading area. However, it follows from Cl. 18-1 sub-clause (e), (2) that a move of the MOU by other means than by its own propulsion or with its riser and BOP suspended shall be made in accordance with a removal plan approved by the claims leader. This applies

irrespective of whether or not the area of operation is stated in the insurance contract. In the event of a breach of this safety regulation, the insurer may be free from liability according to Cl. 3-25.

Sub-clause 2, first sentence, imposes a duty on the assured to notify the insurer if the MOU is to change its area of operation set out in the insurance contract. If several areas of operation have been agreed, a move between these areas of operation does not give rise to any duty to notify the insurer, but will still require approval according to sub-clause (e), see above. Sub-clause 2, first sentence, does not stipulate any sanctions if the assured fails to give notice of the move of the MOU to an area of operation outside the area agreed with the insurer. However, if the insurer is entitled to charge an additional premium, he may do so retroactively once he gets to know about the move.

A change of the area of operation may decrease the risk for the insurer. Hence, the *second sentence* entitles both parties to demand an adjustment of the premium in the event of a change of the area of operation, while the *third sentence* establishes that in the event of an increase in premium, the insurer must notify the person effecting the insurance not later than 14 days after the insurer has received notice of the changed area of operation.

Cl. 18-1 (i) Co-insurance and waiver of subrogation of third parties
An insurance effected on the basis of the Plan automatically also covers a mortgagee's interest, cf. Cl. 7-1. However, other third parties' interests are not covered, unless specifically agreed, cf. Cl. 8-1. In connection with the insurance of offshore MOUs there is, however, a need for a more extensive cover of third parties' interests than what follows from Chapters 7 and 8.

To the extent that a co-insured third party has ownership interests or other economic interests in the capital value of the insured MOU, a co-insurance will, in addition to protection against subrogation, also afford him insurance cover of the said economic interest. That the said persons have such ownership interests is in particular relevant in connection with various types of equipment covered under the insurance of the MOU. Where the relevant third parties do not have such economic interest, it is the protection against subrogation, and not full scope of the co-insurance cover, which will be the entire purpose of the co-insurance. The need for protection against subrogated claims is related to the fact that the party in question is in such a position that he risks causing damage to the MOU. At the same time the contract between the owner of the damaged object and the person causing the damage will normally contain mutual hold harmless and indemnity provisions, commonly referred to as "knock-for-knock" principle, which means that it is the owner, and not the person causing the damage, who shall cover the damage. The owner has in other words waived the right to hold the contractor, charterer, etc., liable for damage which they may cause to the MOU. The basis of the "knock-for-knock" principle is, however, that the insurer is not entitled to be subrogated to the assured's claim against the person causing the damage in recourse proceedings, cf. Section 4-3 of the Norwegian

Compensatory Damages Act and Cl. 5-13 of the Plan. Protection against subrogation under the insurance therefore becomes an important part of the "knock-for-knock" regulation.

During the revision of the Plan it was found expedient to distinguish between those situations where there was merely a need for protection against subrogated claims, and those situations where there was a need for more extensive co-insurance status. This has been done by sub-clause 1 regulating the protection against subrogated claims, while sub-clause 2 regulates co-insurance.

According to *sub-clause 1*, the insurer waives the right of subrogation against any person causing damage who has contractually disclaimed liability for damage to the MOU and reserved the right to protection against recourse from the insurer. The protection against subrogated claims has in other words been given those persons causing damage who have, on a contractual basis, been given an undertaking that the insurer shall not be entitled to claim against them, and is not given to any specifically named groups of persons. In this way the insurance contract comes in as an extension of the "knock-for-knock" agreements entered into concerning the use of the structure or the equipment in offshore operations. Often the protection against recourse will benefit typically contractors, charterers, or licensees in the area of operation in question. However, the protection may also be extended to others, e.g. another contractor/supplier engaged by the licensees (the operator) to carry out certain services or work in connection with the MOU or other field operations, units or installations within the same field license.

The provision stipulates the condition that the relevant contractual regulation, where the person causing the damage disclaims liability and reserves the right to protection against recourse, "is regarded as customary in the activities in which the MOU is involved". Implicit in this condition is first and foremost that protection against recourse shall only be reserved for those groups of persons who normally obtain such protection under the contractual system used in the petroleum industry. The question as to what is "customary" must be evaluated, both in relation to the type of activities in question, and in relation to the geographical area where the MOU is located. In many areas petroleum activities will normally be based on a "knock-for-knock" principle with extensive and relatively clear and unambiguous rules as to who shall be covered by the regulation. However, it is also conceivable that there are areas where such regulation is not customary, in which event this must be decisive. Reference is furthermore made to the Commentary on Cl. 4-15 concerning unusual or prohibited contractual conditions.

The provision does not state who must have entered into the contract with the person causing the damage. This has been done deliberately. The protection against subrogated claims may be set out in different contracts in the contractual pyramid frequently encountered in the petroleum industry, at the same time as these contracts may have been entered into by different groups of persons. The crucial point is that the person causing the damage is, through such a contract, ensured protection against any

subrogated claims from the insurer, and not who is his contracting partner under this contract. The protection for the insurer lies in the fact that the protection against subrogation of the person causing the damage shall be in accordance with customary contractual regulation in the industry, see above. If the insurer wants a more narrow protection against subrogation, he will have to stipulate this in the insurance contract.

The provision is worded as a traditional "waiver-of-subrogation" and may appear, on the plain reading of its wording, to be an absolute waiver of the insurer's right of subrogation. However, such far-reaching exclusion of liability will not be valid. A person causing damage may not disclaim liability for his own intentional or grossly negligent acts under Nordic countries´ laws, cf. e.g. Section 36 of the Norwegian Contracts Act. In reality, it is therefore Cl. 3-33 of the Plan which will determine the limit of the insurer's right of subrogation, ref. Commentary to *sub-clause 3 below*.

Sub-clause 2 regulates the co-insurance question. However, also here it was decided to tie the insurer's obligation directly to the persons who on a contractual basis have been given the right to co-insurance under the insurance of the MOU, and not to defined groups of persons. This ensures that the co-insurance satisfies contractual obligations, and at the same time prevents the status of a co-assured being given to groups of persons who in reality have no need for, nor any expectation of, such cover.

Where a co-insurance is tied to contractual obligations, it is no condition for co-insurance that the co-assured has an economic interest in the insured MOU. It is conceivable that a contract presupposes co-insurance protection also of groups of persons without such economic interests, e.g. a drilling contractor who has no ownership interest in the MOU or any part of the associated equipment. In that event, the full co-insurance protection under Cl. 18-1, sub-clause (i)(2), would not give the co-assured very much more than the limited protection against subrogation according to sub-clause 1. However, often the co-assureds will have such ownership interests, e.g. by owning the equipment they are going to use themselves. As mentioned in Cl. 18-2, sub-clause 1 (b), such equipment will be covered by the insurance, regardless of ownership. In that event, the co-assured has a direct insurance against damage to his own property.

The co-insurance may also be of significance in connection with the cover of collision liability. If an MOU is chartered on bare-boat conditions, a collision liability will lie with the charterer in his capacity as manager and operator, i.e. employer of the crew of the MOU. Provided that the owner of the MOU is required to co-insure the bare-boat charterer, such liability will be covered under a hull insurance effected by the owner.

The normal situation will be that the owner of the MOU will act as the person effecting the insurance when an MOU is insured. In that event, he also has status as assured. The provision in sub-clause 2 will in such cases first and foremost be significant for the charterer, including bare-boat charterers,

contractors and sub-contractors engaged by the owner. The provision will also encompass the interests of the licensees, including the operator and their contractors who are contracted to perform services on-board in direct connection with the MOU operations, provided that they have in contracts with the owner or others in the chain of contracts with the owner have reserved the right to co-insurance under the insurance of the MOU. If, in exceptional cases, the insurance is effected by a charterer, contractor/sub-contractor or licensee/operator, the owner of the MOU will in the same way be co-insured, provided he has a contractual right to status as co-assured under the insurance.

As in sub-clause 1, sub-clause 2 stipulates a prerequisite that the contractual regulation of a co-insurance must be "customary in the activities in which the MOU is involved". In relation to the co-insurance protection it is, however, not sufficient to have a liability regulation based on a "knock-for-knock" principle. The contracts must in addition normally contain a requirement for co-insurance protection of the relevant group of persons. This question will first and foremost be significant where the relevant co-assured has an economic interest in objects covered by the insurance. If no such interest exists, he will normally be sufficiently protected through the waiver of subrogation in sub-clause 1.

Sub-clause 2, second sentence, contains a subsidiarity regulation and establishes that the co-assured's cover under the insurance of the MOU is subsidiary to any insurance effected by the co-assured himself. One of the purposes of the co-insurance clauses in contracts is to avoid double-insurance. If the co-assured has nevertheless taken out a separate insurance against the same risks, there is no reason why the loss, damage or liabilities shall also be covered under the insurance of the MOU.

Co-insurance under sub-clause 2 follows the rules in Chapter 8.

The new sub-clause 3 in the 2013 Plan regulates that the subrogation protection and co-insurance rights of third parties under this Clause shall under no circumstances be any broader than what has been agreed under the relevant contracts under which such rights and protections accrued. This means that the third-party who is protected by the waiver of subrogation or has status as co-assured, does not have wider protection or rights against the insurers than he has against the owner of the MOU under the contracts or at law.

Section 2
Hull insurance

Section 2-1
General rules relating to the scope of the H&M insurance

Clause 18-2. Objects insured

This Clause corresponds to Cl. 18-2 of the 1996 Plan but was edited in the 2013 Plan.

This provision is divided into two and patterned on Cl. 10-1 and Cl. 10-2. Cl. 18-2 regulates the objects of the insurance, while the cover of objects removed from the MOU is contained in Cl. 18-3.

Sub-clause 1 (a) provides that the insurance first and foremost covers the MOU stated in the insurance contract. The types of MOUs which are normally covered under this Chapter are described in further detail in the commentaries to Cl. 18-1.

Damage to or loss of the MOU will first and foremost affect the owner, and he is the primary assured. Any mortgagees are automatically co-assured under the rules in Chapter 7. However, a number of other persons will be co-assured under the insurance contract, see Cl. 18-1, sub-clause (i)(1), and Chapter 8 of the Plan. The owner will also normally be the person effecting the insurance. However, insurance under Chapter 18 can also be effected by others, e.g. a bare-boat charterer or manager. In those cases the owner will normally be co-assured.

As a rule, a separate insurance will be effected for each individual MOU, but several MOUs may also be insured collectively. If the same insurance contract is to cover several MOUs, an (agreed) insurable value will be stated for each MOU. A natural interpretation of such agreement is that each MOU shall be regarded as being insured separately. A corresponding interpretation is natural where separate insurable values are agreed for equipment, machinery, etc.

The fact that individual MOUs s (possibly parts of an MOU) are insured separately will in the first place be of significance in the event of a total loss. It will be sufficient that the conditions for compensation for total loss (e.g. the condemnation conditions) are met for the individual insured object. The same applies to Cl. 6-3 on premium in the event of total loss. Furthermore, a deductible according to Cl. 18-34 shall be calculated separately for each insured object.

According to *sub-clause 1 (b)*, which has been amended from earlier versions of the 1996 Plan, the insurance also covers machinery, equipment, plant and spare parts for structure, machinery and

equipment. The term “spare parts” concords with the conception in practice that equipment included spare parts.

Point (1) of sub-clause 1 (b) has been rewritten in the 2013 Plan in accordance with Cl. 10-1 and modified for MOUs. The provision establishes that only machinery, equipment, plant and spare parts which belong to the assured, or which have been borrowed, leased or purchased with a sales lien or similar encumbrance, are covered. The provision reflects the fact that equipment used in the petroleum industry often has different owners; it may belong to the owner of the MOU, the licensee for whom the MOU is carrying out contract work/operation, a charterer of the MOU or an independent contractor. Often certain parts of the equipment will belong to one party, while other parts of the equipment will belong to others.

The term “assured” automatically includes anyone who is co-assured under the insurance. In other words, all equipment on board which is either owned by or in the care, custody or control of the co-insured persons in their capacity of borrower, lessee or purchaser under a vendor’s lien, is covered by the insurance.

If the person operating the MOU leases the equipment and operates the equipment himself, the owner of the equipment will normally be co-assured. By contrast, a firm or a person who or which is subcontracted by the contractor and operates his or its own equipment, e.g. a divers’ firm with its own diving equipment, will normally not have the status of co-assured. If, as an exception, such a firm should have such status, the equipment will be covered under Cl. 18-2 (b). On the other hand, equipment which belongs to the crew or other personnel of contractors, license operator or third parties on-board the MOU will always fall outside the scope of cover.

Point (2) in sub-clause 1 (b) provide cover in general for all machinery and equipment etc. listed under (b) regardless of whether it is on board, above water or subsea or in the well.

Given that all equipment is covered, it goes without saying that this includes drilling equipment, even if this is not explicitly mentioned. The drill string and safety equipment against blow-outs located in the water are therefore also covered. However, the cover of the drill string is subject to important limitations, see Cl. 18-22.

The provision will not cover subsea equipment which are either left on the seabed when the MOU leaves the place of operation, or which are launched in advance of the MOU’s arrival on location unless such equipment is scheduled separately as per Cl. 18-1 (a), paragraphs 2 and 3. Anchors, anchor chains, etc. which are cast in advance are, however, covered under Cl. 18-3, sub-clause 1 (b), and for blow-out preventers an extended cover is given in Cl. 18-3 (c).

*Sub-clause **1** (c)* is new, but concords with Cl. 10-1, sub-clause 1 (c), according to which the hull insurance covers bunkers and lubricating oil on board.

Sub-clause 2 contains certain limitations of the cover of accessories. Sub-clause 2 (a), in accordance with the principle in Cl. 10-1, sub-clause 2, excludes certain articles of consumption from the scope of cover. The assumption is that such articles will be covered under a special equipment insurance. *Sub-clause 2 (b)* excludes helicopters from the cover. Helicopters may be covered by the term "equipment … on board" in sub-clause 1 (b), and in the absence of a specific exclusion, they could therefore come within the scope of cover, provided they were owned, etc. by one of the assured. However, the natural solution is for helicopters with equipment and spare parts to be covered under a separate aircraft hull insurance. The exclusion is general and also cover helicopters which land on the MOU due, for instance, to engine problems.

Sub-clause (c) excludes "blueprints, plans, specifications, logs, etc." including "copies" cf. the term "etc.". The exclusion covers various documents and records which may be of considerable value (in particular the logs kept of drilling operations may contain very valuable information about the geological structure of the seabed and accordingly concerning the probability of finding petroleum in the area. The reason why the documents are nevertheless excluded from cover is partly difficulties in agreeing on their value in terms of money, partly the possibility which the interested parties have of continuously transmitting important data to shore. Much of the logs and data which used to be paper documents are now kept as digitally stored data. The exclusion is equally applicable to such digitally stored data/information; however, the hardware on which such data/information is stored on, including the software, is nevertheless covered but only for the cost of replacement. Costs or recovering digital data/information will thus not be recoverable under the insurance.

Sub-clause 2 (d) excludes mini-submarines and remotely controlled underwater equipment (Remote Operated Vehicles) whilst in operation. This type of equipment is basically covered by sub-clause 1 (b) (2), cf. "under water". However, the most expedient solution is for such equipment to be covered under a separate insurance, because practice as regards the use of the equipment varies. Submarines, etc. are therefore only covered under the MOU's insurance up until the time where they may be said to be "in operation". Normally, the object is deemed to be "in operation" when rigging, lifting, etc. starts. There is in other words no requirement that the object shall be removed from the MOU in order for it to be deemed to be "in operation".

Clause 18-3. Objects temporarily removed or separated etc. from the MOU

This Clause corresponds to Cl. 18-3 of the 1996 Plan but was edited and amended in the 2013 Plan.

The provision supersedes the provision relating to "insurance of objects removed from the ship" in Cl. 10-2, which does not quite fit in with insurance of MOUs.

Sub-clause (a) corresponds to Cl. 10-2 for hull insurance of ships.

This part of the insurance covers in the first place machinery and equipment as well as spare parts for the structure, machinery or equipment, if the objects are on board a "vessel, structure or fixed installation" which is moored to or is in the vicinity of the insured MOU and has been used in connection with that structure, cf. point (1). On this point there has thus been a certain extension. However, as the insurance of objects removed from the structure is limited, in terms of function as well as location: the vessel/structure/installation in question must be used in conjunction with the operations carried out by the insured MOU, and must either be moored to the insured MOU or be in its vicinity.

Secondly, the insurance of objects removed from the MOU covers machinery, equipment, etc., which have been temporarily removed from the MOU for repairs, rebuilding, storage, etc., cf. point (2). The cover includes transport to and from the MOU in connection with work or storage as mentioned. However, only objects which have been on board, cf. "removed", are covered. The scope of cover consequently does not comprise new equipment in storage at the base and in transit for the first time to the MOU. However, a certain cover of such objects is provided in point (3), cf. below. The insurance of objects removed from the MOU further does not cover - subject to the exceptions which follow from sub-clauses (b) and (c) - equipment which is left behind when the MOU has to leave the place of operation temporarily because of repairs of damage, etc.

The third element of the insurance of machinery, equipment, etc., removed from the MOU covers storage which falls outside the scope of point (2). This part of the insurance is new. The cover includes storage of the removed object, regardless of the purpose of the storage or its duration. Nor is there any requirement that the stored object must be removed from the MOU. New objects, which were purchased for the MOU, but which are kept in storage before being used on board, are therefore also included. A fundamental prerequisite for cover is, however, that the object concerned "belongs to" the insured MOU. If the object can be used on several MOUs, and it has not been clearly decided during the storage period that it is going to be used on the insured MOU, it must be covered under a separate storage insurance. If an object is purchased and stored as belonging to the insured MOU, but is later taken on board a different MOU than the one insured, the cover will cease under point (3) as soon as the decision has been made that the object is to be shipped to another MOU and will have to be insured in conjunction with that particular MOU.

The cover under point (3) is, however, subject to certain limitations. In the first place to a limitation in amount: the objects in question are covered up to 10% of the sum insured under the hull insurance.

This has to do with the fact that practice regarding storage varies considerably, and the insurers need to have control of this part of the cover. If the assured wants more comprehensive cover, a separate insurance must be effected. On the other hand, the insurer is fully liable for any damage up to the stated amount, cf. the fact that Cl. 2-4 relating to under-insurance does not apply.

Secondly, a separate deductible shall be calculated for this part of the cover. The fact that a deductible shall be calculated in the event of damage to stored objects goes without saying. However, the provision relating to a separate deductible becomes significant if one and the same incident should, in exceptional cases, occur to both the MOU and the objects stored. In that event, two deductibles must be calculated in the claims settlement (unless it is a case of total loss). If only one deductible has been agreed, a deduction of twice that amount shall thus be made. If the assured wants a lower deductible for objects covered under point (3) than for the MOU in general, this must be specifically agreed in the insurance contract.

Objects covered under point (3) shall be kept out of a total-loss settlement concerning the structure. The value of these objects must therefore be deducted from the insurable value in the event of a condemnation settlement. However, objects covered under point (2) shall be included in the total-loss settlement in the normal way.

Sub-clause (b) is new and extends the cover to “anchor, anchor chain, etc.”, which are used for the MOU at the operation site. In addition to the anchor(s), this cover includes buoyancy elements and buoys which are integral parts of the mooring system. Further, both anchor chain and other types of moorings, e.g. wires or synthetic ropes/lines, cf. “etc.”, are covered. The cover applies both when the anchor(s), etc., was cast before the arrival of the MOU, and when left behind after the MOU has departed, e.g. in connection with repairs. Cover is, however, subject to the condition that the mooring/anchor system forms part of the insured MOU’s equipment. If the mooring/anchor system is left behind in connection with a replacement of the insured MOU in order to be used by another MOU it will no longer belong to the insured MOU.

Sub-clause (c) entails cover of blow-out preventers (BOP) left on the well location due to casualty or measures to avert such casualty. The provision only covers “blow-out preventers”, and not any other type of device.

Normally a BOP left behind will be mounted on the wellhead, but the provision also covers the situation where the BOP is left next to the wellhead. That a BOP is “left behind” means that there was a decision made to leave it.

The cover only concerns the situation where the BOP is left behind due to a casualty or measures to avert or minimise such casualty. If the BOP is left behind as part of the normal operation of the MOU, it is not covered by the insurance.

When an MOU suffers damage for which it will need to move to a repair location to perfect the repairs, it will not be able to retrieve the BOP when it is mounted on the wellhead as the ultimate blow-out barrier for the well. In such circumstances, the MOU will return to the well location and reconnect to the BOP to resume the well operation it was engaged in when the casualty occurred.

If the MOU cannot reconnect to the BOP and continue the operation it is engaged in immediately prior to the casualty the expenses involved in lifting a BOP left behind are recoverable as costs of measures to avert or minimise loss. Such expenses are incurred for the purpose of averting a total loss of the said BOP.

Sub-clause (d) is new in the 2013 Nordic Plan, and provides cover for subsea equipment associated with an MOU which is disconnectable from the unit, and which is not insured with a separate sum insured as per Cl. 18-1 (a) paragraphs 2 and 3. Similar to mooring/anchoring systems under sub-paragraph (b) above, the cover applies to such equipment installed at the offshore location both prior to the MOU arrival and after its departure.

Clause 18-4. Loss due to ordinary use

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 10-3. Reference is made to the Commentary to Cl. 10-3.

Clause 18-5. Extension of the insurance

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 10-10. Reference is made to the Commentary to Cl. 10-10.

Clause 18-6. Liability of the insurer if the MOU is salvaged by the assured

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 10-11. Reference is made to the Commentary to Cl. 10-11.

Clause 18-7. Reduction of liability in consequence of an interest insurance

This Clause was new in the 2013 Plan and is by and large verbatim the same as Cl. 10-12 apart from some editorial amendments. Reference is made to the Commentary to Cl. 10-12.

Section 2-2
Total loss

Clause 18-8. Total loss

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 11-1. Reference is made to the Commentary to Cl. 11-1.

Clause 18-9. Salvage attempts

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 11-2. Reference is made to the Commentary to Cl. 11-2.

Clause 18-10. Condemnation

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 11-3. Reference is made to the Commentary to Cl. 11-3.

Clause 18-11. Condemnation in the event of a combination of perils

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 11-4. Reference is made to the Commentary to Cl. 11-4.

Clause 18-12. Request for condemnation

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 11-5. Reference is made to the Commentary to Cl. 11-5.

Clause 18-13. Removal of the MOU

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 11-6. Reference is made to the Commentary to Cl. 11-6.

Clause 18-14. Missing or abandoned MOU

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 11-7 apart from that the words "at the latest, expected to arrive in port" is replaced by the words "last heard of" as the starting point of the three months period. Reference is made to the Commentary to Cl. 11-7.

Clause 18-15. Extension of the insurance when the MOU is missing or abandoned

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 11-8. Reference is made to the Commentary to Cl. 11-8.

Clause 18-16. Liability of the insurer during the period of clarification

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 11-9. Reference is made to the Commentary to Cl. 11-9.

Section 2-3
Damage

General

This Section is a complete incorporation of the Clauses of Chapter 12 which are relevant for hull insurance of MOUs. The Clauses are amended as found necessary to suit repairs of MOUs which may be complex and involve significant costs and expenses and require different considerations than repairs of conventional ships' damages. An MOU will, in addition to its hull and machinery, also have special equipment and/or processing plant which represent high proportions of the MOU's total value. Remote areas of operation compared to possible suitable repair facilities may result in significant costs in moving the MOU to a repair facility. Equipment and processing facilities for floating production units will often be specially designed for that particular unit and damage repair options of such facilities may for various reasons be limited. The availability of replacement items for damaged parts which need to be replaced will often be limited and involve extensive delivery time; 6 to 12 months is not unusual.

Clause 18-17. Main rule concerning liability of the insurer

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 12-1. Reference is made to the Commentary to Cl. 12-1.

Clause 18-18. Compensation for unrepaired damage

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 12-2. Reference is made to the Commentary to Cl. 12-2.

Clause 18-19. Inadequate maintenance

This Clause was new in the 2013 Plan w and is verbatim the same as Cl. 12-3. Reference is made to the Commentary to Cl. 12-3.

Clause 18-20. Error in design, etc.

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 12-4. Reference is made to the Commentary to Cl. 12-4.

Clause 18-21. Losses that are not recoverable

The Clause corresponds to Cl. 18-12 of the 1996 Norwegian Plan, which made an amendment to Cl. 12-5 (a). In the 2013 Plan, Cl. 12-5 has been partly incorporated into Cl. 18-21 and has been partly re-written. Cl. 18-21 (e) was deleted in 2016.

Cl. 18-21 (a): Clause 12-5 (a) has been split into Cl. 18-21 (a) regulating the coverage of crew wages and maintenance costs and Cl. 18-21 (b) regulating the exclusion of ordinary expenses connected with the running of the MOU during the period of repair.

According to Cl. 12-5 (a) the insurer does not cover costs of wages and maintenance of the crew during the period of repairs. However, in connection with insurance of MOUs the insurer has in practice covered costs of wages and maintenance of the crew that has been engaged in repair work or otherwise necessary, e.g. marine, nautical, etc. crew, during repairs carried out at sea. The reason is that often it is less costly to carry out the repairs while the MOU is offshore or in sheltered waters nearby its offshore location rather than to bring it over a long distance to a shore repair facility/yard. Hence, what was previously provided in Cl. 18-12 of the 1996 Plan is in the 2013 Plan stated in sub-clause (a).

Cl. 18-21 (b): In connection with damage to an MOU, it is conceivable that the assured engages a supply vessel which is under contract with him or the licence operator and is therefore in the area, to be used during offshore repairs. If the assured incurs additional expenses in this connection, his expenses must be covered by the insurer as part of the costs of repairs. When repairs are carried out at sea, either at the offshore location or in sheltered waters, insurers will also be liable for the costs associated with catering, accommodation and safety services for the crew engaged or necessary for the repairs at sea.

Cl. 18-21 (c): This sub- clause was new in the 2013 Plan and is verbatim the same as Cl. 12-5 (b). Reference is made to the Commentary to Cl. 12-5 (b).

Cl. 18-21 (d): This sub-clause was new in the 2013 Plan and corresponds to Cl. 12-5 (c). Reference is made to the Commentary to Cl. 12-5 (c). However, as MOUs do not carry passengers under issued passenger tickets, but will accommodate third party personnel and occasional visitors which are not part of the MOU's regular crew, "passengers" are replaced by "third party personnel or visitors". Such personnel or visitors include the license operator's, the operator's contractors and sub-contractors personnel, as well as personnel of the MOU owner's contractors or sub-contractors, unless the MOU owner contractually has assumed the responsibility for such personnel. This does not apply to repairers personnel.

Clause 18-22. Damage to the drill string

This Clause is the same as Cl. 18-11 of the 1996 Plan, but with some editorial amendments in the 2013 Plan.

The provision establishes certain limitations to the cover, which are additional to the limitations in Cl. 12-3 to Cl. 12-5.

The provision concerns "loss of or damage to the drill string … whilst in the well or in the water". Unless due to "external circumstances, for which the drilling contractor is liable under contractual conditions which are regarded as customary within the area concerned".

"External circumstances" comprises typically fire, blow-out, cratering, lightning, explosions above the seabed, floods, tidal waves, ice, tornadoes, storms, cyclones, hurricanes, earthquakes or collisions. The underlying drilling contracts places the risk of such causes of damage with the owner of the MOU/the drilling contractor, while the licensees/operator cover other damage. Damage attributable to wear and tear, inadequate maintenance, etc, or to the fact that the drill string for other reasons cannot take the strain to which it is subjected during the performance of the work will in this context not be deemed as "external circumstances". However, the term "external circumstances" also covers more ordinary heavy-weather damage than hurricanes, storms, etc., e.g. where high seas or difficult current conditions result in damage to or loss of the drill string. The term does not, however, cover the situation where the drill string is left in the well due to technical problems in retrieving it, or where the string gets jammed in connection with ordinary drilling. Nor do "external circumstances" comprise damage to the string as a result of negligence on the part of the drilling contractor, or someone for whom he is liable. However, if the direct cause of damage is fire, etc., and the fire is caused by negligence, the insurer will not be free from liability. Here the question of liability must be evaluated under the general rules in Chapter 3 relating to the duties of the assured.

The cover only extends to external circumstances for which the drilling contractor is liable according to customary contractual practice within the relevant area. If, for example, it is customary for the license operator to assume the risk in respect of damage caused by fire or explosion, this damage does not concern the insurer. In that event, it is irrelevant whether the drilling contractor under the relevant contract has accepted this risk if this is contrary to customary contractual practice.

The limitation applies to the drill string, as installed, including any of its component parts such as weights, stabilisers, thread connections etc.

Sub-clause (b) excludes from cover drill strings "left in the well for purposes other than drilling" if a decision is made to that effect by the persons who are responsible for the drilling operations.

The provision does not apply to cases where attempts to retrieve the string from the hole are abandoned due to technical difficulties which this entails. In such cases the string shall be considered lost, and the loss is, as mentioned, excluded from cover according to sub-clause (a). The purpose of leaving the string must be that it is intended to serve as tubing for gas or oil produced from the hole. This means that it is no longer part of the drilling equipment, and it should for that reason no longer be covered. Effectively, this also follows from the principle stated under Cl. 18-3 (b) (in respect of mooring/anchoring system which is left behind for other use than the insured MOU): the drill string left behind no longer constitutes part of the "equipment" of the MOU.

The limitations in Cl. 18-19 to Cl. 18-21 apply in addition to the limitations in Cl. 18-22.

Clause 18-23. Deferred repairs

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 12-6. Reference is made to the Commentary to Cl. 12-6.

Clause 18-24. Temporary repairs

This Clause was new in the 2013 Plan and corresponds to Cl. 12-7. Reference is made to the Commentary to Cl. 12-7.

When the MOU with disconnectable equipment are insured with separate sums insured as per Cl. 18-1 (a), sub-clause 2, and the loss or damage occurs whilst disconnected as per Cl. 18-1 (a), sub-clause 3, the 20% p.a. shall be calculated of the sum insured for the part to which the loss or damaged occurred.

Clause 18-25. Costs incurred in expediting repairs

This Clause was new in the 2013 Plan and corresponds to Cl. 12-8. Reference is made to the Commentary to Cl. 12-8.

When the MOU with disconnectable equipment are insured with separate sums insured as per Cl. 18-1 (a), sub-clause 2, and the loss or damage occurs whilst disconnected as per Cl. 18-1 (a), paragraph 3, the 20% p.a. shall be calculated of the sum insured for the part to which the loss or damaged occurred.

Clause 18-26. Repairs of an MOU that is condemnable

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 12-9. Reference is made to the Commentary to Cl. 12-9.

Clause 18-27. Survey of damage

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 12-10. Reference is made to the Commentary to Cl. 12-10.

Clause 18-28. Invitations to tender

This Clause was new in the 2013 Plan and corresponds to Cl. 12-11. Reference is made to the Commentary to Cl. 12-11.

When the MOU with disconnectable equipment are insured with separate sums insured as per Cl. 18-1 (a), sub-clause 2, and the loss or damage occurs whilst disconnected as per Cl 18-1 (a), sub-clause 3, the 20% p.a. shall be calculated of the sum insured for the part to which the loss or damaged occurred.

Clause 18-29. Choice of repairers

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 12-12. Reference is made to the Commentary to Cl. 12-12.

Clause 18-30. Removal for repairs

This Clause was new in the 2013 Plan and corresponds to Cl. 12-13. Reference is made to the Commentary to Cl. 12-13.

There have been discussions whether the costs involved in getting an MOU back to the place of operation are covered in a case where the MOU has been brought to shore for repairs. It follows from the Commentary on Cl. 12-13 that the insurer's liability for "removal" covers the entire deviation to and from the repair yard, which must imply that basically the insurer is liable for such removal back to the place of operation. However, this presupposes that the damage occurs after the MOU has arrived at the place of operation. If the damage occurs prior to that point in time, e.g. during towage from land to the first place of operation, the insurer's liability is limited to the removal back to the place of damage, and not to the place of operation.

Liability during removal also covers wages and maintenance of the crew, provided that the crew is "necessary", cf. for further details Cl. 12-13 and the Commentary on that provision.

Clause 18-31. Apportionment of common expenses

An editorial amendment was made to the Clause in the 2019 Version.

The Clause regulates the apportionment of repair expenses that are common to work the insurers are liable for and work not covered by the insurance.

According to the first sentence, expenses that are common to recoverable and non-recoverable work shall be apportioned based on the cost of each category of work. The second sentence makes an exception for common expenses which depend on the length of the period of repairs, whereby the costs shall be apportioned over the time each category of work would have taken if it had been carried out separately.

The wording of the corresponding provision in Chapter 12, i.e. Cl. 12-14, was amended in 2016 where all common expenses with the exception of dry dock charges and quay rental shall be apportioned on the basis of the cost of each category of work. However, repairs of an MOU are to a certain extent different from repairs of trading vessels. It is more common to arrange for repairs offshore, with vessels and equipment where costs are based on the rental time. As such there will be more types of common expenses that reasonably and logically should be apportioned over time. Thus the wording of Cl. 18-31 provides a broader basis for apportionment of common expenses over time.

Where equipment or vessels are hired on time, there might still be lump sum costs involved, for example mobilization and demobilization fees. Here the lump sum costs shall be apportioned on a cost basis and hire on a time basis.

If the time related common expenses are so minor that it is not worthwhile making an extra calculation of them, these costs may on a discretionary basis be apportioned based on the costs of each category of work, provided that this is considered reasonable.

With exception of the broader basis for apportionment of common expenses under this Clause, the adjusting practice as explained in the Commentary to Cl. 12-14 is relevant and reference is made to what is said there.

Clause 18-32. Ice damage deductions

The sub-clause 1 was new in the 2013 Plan **with further amendments in the 2019 Version** and is verbatim the same as Cl. 12-15. Reference is made to the Commentary to Cl. 12-15.

The sub-clause 2 was new in the 2013 Plan and is verbatim the same as Cl. 12-17. Reference is made to the Commentary to Cl. 12-17.

Cl. 12-16 is not incorporated into Section 2 of Chapter 18, hence the incorporation of Cl. 12-15 is made into Cl. 18-32.

Clause 18-33. Deductible

This Clause corresponds to Cl. 18-13 of the 1996 Plan, but incorporates with amendments Cl. 12-18 in the 2013 Plan. Reference is made to the Commentary to Cl. 12-18.

Damage caused by bad weather arising as a result of the same atmospheric disturbance shall be regarded as one casualty. All loss or damage arising from the entire atmospheric disturbance shall be regarded collectively as one casualty. This provision supersedes the rule in Cl. 18-34, sub-clause 2. ”Atmospheric disturbance” means a low atmospheric pressure which results in a severe storm pattern with strong winds combined with heavy seas, rain, snow, sleet, hail, ice, thunder and lightning, hurricane, typhoon, cyclone or tornadoes etc., as defined by a public weather bureau.

As in Chapter 12, the deductible must be calculated for each MOU. In the event of damage to several MOUs, an equivalent number of deductibles shall be calculated in the settlement.

It follows from the reference to Cl. 18-34 that no deductible shall be calculated in the event of a total loss of the insured MOU.

Clause 18-34. Basis for calculation of deductions according to Clauses 18-32, 18-33 and 3-15

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 12-19. Reference is made to the Commentary to Cl. 12-19.

Section 2-4
Liability of the assured arising from collision or striking

Clause 18-35. Scope of liability of the insurer

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 13-1. Reference is made to the Commentary to Cl. 13-1.

Under Cl. 18-14 of the 1996 Plan, MOU owners’ liability for damage to or loss of fixed installations on the continental shelf was excluded from the cover. This exclusion is now removed under the 2013 Plan, but in order to limit the exposure for the insurers a cap on the amount covered for MOUs with insured values in excess of USD 500 million has been introduced, cf. Cl 18-37.

Clause 18-36. Limitation of liability based on tonnage or value of more than one MOU

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 13-2. Reference is made to the Commentary to Cl. 13-2.

Clause 18-37. Maximum liability of the insurer in respect of any one casualty

This Clause was new in the 2013 Plan and corresponds to Cl. 13-3. Reference is made to the Commentary to Cl. 13-3.

As the exclusion of liability for damage to or loss of fixed installations that was contained in Cl. 18-14 of the 1996 Plan was removed is considered to represent a significant extension of coverage due to the very high values that fixed installations represent, lower limits of cover for such collision/striking liabilities are imposed for MOUs with values in excess of USD 500 million. For an MOU with sum insured of USD 500,000,000 or less the additional limit available to cover collision liabilities equal the sum insured as per Cl. 13-3. Thus if e.g. the sum insured under the H&M insurance is USD 400,000,000, the additional sum insured available for collision/striking liability is also limited to USD 400,000,000.

For an MOU with sum insured higher that USD 500,000,000 the additional limit available for such liabilities is USD 500,000,000 or 50% of the sum insured, whichever is the higher amount. That means that for an MOU with sum insured between USD 500,000,000 and USD 1,000,000,000 the collision liabilities will be covered under the insurance up to USD 500,000,000. If the sum insured is higher than USD 1,000,000,000 the sum available for such liabilities will be 50% of the sum insured. Thus if the sum insured is USD 1,500,000,000, the additional amount available for collision/striking liability will be USD 750,000,000.

Clause 18-38. Deductible

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 13-4. Reference is made to the Commentary to Cl. 13-4.

Section 3
Separate insurances against total loss

Clause 18-39. Insurance against total loss and excess collision liability (hull interest insurance)

This Clause corresponds to Cl. 18-15 of the 1996 Plan, but is in the 2013 Plan verbatim the same as Cl. 14-1. Similarly to Cl. 18-37 it introduces a cap on the collision/striking liability. Reference is made to the Commentary to Cl. 14-1.

Cl. 18-39 (b) provides that the hull interest insurer, as opposed to the freight interest insurer, cover collision/striking liability in accordance with Cl. 18-35 – 18-37 with a separate sum insured equal to the sum insured under the hull interest insurance.

Clause 18-40. Insurance against loss of long-term freight income (freight interest insurance)

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 14-2. Reference is made to the Commentary to Cl. 14-2.

Clause 18-41. Common rules for separate insurances against total loss

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 14-3. Reference is made to the Commentary to Cl. 14-3.

Clause 18-42. Limitations on the right to insure separately against total loss

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 14-4. Reference is made to the Commentary to Cl. 14-4.

Section 4
Loss of hire insurance

Clause 18-43. Main rules regarding the liability of the insurer

This Clause was new in the 2013 Plan and **was amended in the 2019 Version. The Clause** is verbatim the same as Cl. 16-1. Reference is made to the Commentary to Cl. 16-1.

Clause 18-44. Total loss

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 16-2. Reference is made to the Commentary to Cl. 16-2.

Clause 18-45. Main rule for calculating compensation

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 16-3. Reference is made to the Commentary to Cl. 16-3.

Clause 18-46. Calculation of the loss of time

This Clause was new in the 2013 Plan and **was amended in the 2019 Version. The Clause** is verbatim the same as Cl. 16-4. Reference is made to the Commentary to Cl. 16-4.

Clause 18-47. The daily amount

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 16-5 apart from the words "area of operation" which are added to sub-clause 2. Reference is made to the Commentary to Cl. 16-5.

This Clause lays down rules for calculating the daily amount under open insurance contracts, i.e. insurance contracts that do not specify any agreed value for the daily amount. As mentioned in the Commentary on Cl. 18-45, cf. Cl. 16-3, the "daily amount" is the insurable value of the assured's loss of income per day. In practice, the daily amount is usually agreed. The provision in Cl. 18-47 is therefore primarily applicable in cases where the agreement "is opened" in accordance with Cl. 18-56, sub-clause 2.

Sub-clause 1 states that the daily amount shall be fixed at the equivalent of the calculated gross hire per day less the costs saved per day due to the MOU's not being in regular operation. The hire per day poses no difficulty when the MOU is under a time charter. In the case of a lump sum contract of the MOU, the agreed hire must be divided by the number of days that would normally be required for the contract works and any necessary mobilisation or subsequent mobilisation periods. In both cases, the hire according to the contract of offshore work/operation in force when the loss of time occurs is decisive.

Sub-clause 2 prescribes the daily amount in cases where the MOU is not employed under a contract when the period of interrupted operations begins. This rule provides for an objective calculation of loss for practical legal purposes: It can be very difficult to decide how the MOU would have been employed if it had not been out of operation.

To avoid the difficulties of deciding which course of action the assured would have chosen, the daily amount in such cases is fixed at "the average hire for MOUs of the type and size and area of operation concerned" for the period during which the MOU is deprived of income. The term "average rates of hire" means a "weighted average"; account must be taken of how long each rate has been in effect. In practice, this can be achieved by dividing the period of interrupted operation into shorter periods during which rates of hire were relatively constant and calculating the compensation for each individual period. If rates for long-term charters and spot charters differ, compensation must be based on an average in these cases, too.

The reference to "area of operation concerned" means that only the charter rates in the area where the MOU is or otherwise would have taken up work during the time when the interruption for repairs took place, e.g. Norwegian sector of the North Sea or U.S. Gulf of Mexico. If charter rates in a "new" area are to be considered account needs to be taken to the MOU's state of readiness to take up work in another area within which regulations would require the MOU to undergo significant works or even

modifications to be allowed to enter and operate in the "new" area. If such preparation works will require such works that will constitute "simultaneous works" as per Cl. 18-54, the charter rate in the area that the MOU is leaving shall be used for the period of time that will be equivalent to the preparation works, and the period beyond such preparation works the charter rate within the "new" area when calculating the "weighted average". The reference to the MOU being "unchartered" does not cover the situation where a contract of work lapses due to a casualty covered by the insurance. This situation must be evaluated in accordance with sub-clause 1.

Clause 18-48. Agreed daily amount

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 16-6. Reference is made to the Commentary to Cl. 16-6.

This Clause regulates the agreed daily amount. As mentioned under Cl. 18-47, the daily amount is usually agreed; the reason for doing so is to avoid difficulties in calculating the daily amount under an open loss-of-hire insurance. Under Cl. 2-2, an agreement of the daily amount means that the insurable value is fixed "by agreement between the parties … at a certain amount". If it is clearly stated in the text of the insurance contract that the daily amount is agreed, the matter is straight forward.

In practice, however, insurance contracts often merely state the amount the insurer is to pay for each day of time lost. This may be an agreed daily amount, but it is also conceivable that only the sum insured per day is stated. In this connection, Cl. 18-48 lays down an important rule of presumption: if the insurance contract states "that the loss of income shall be compensated for by a fixed amount per day, this amount shall be regarded as an agreed daily amount unless the circumstances clearly indicate otherwise". In such case, the amount will also be the sum insured per day; in other words, the agreed value is fully insured.

Both the assured and the insurer may invoke the agreement. For the insurer, this is primarily relevant in the case of under-insurance, i.e. when the agreed daily amount is lower than the real loss of income per day. In such case, the agreement will limit the assured's claim for compensation. However, the agreement may also be relevant when the rules of Cl. 18-53 are applied. Under Cl. 18-53 the agreed daily amount will be decisive when calculating the savings the insurer makes as a result of the extraordinary measures taken to expedite repairs. As far as recourse against a third party is concerned, it must be proven to the insurer that the agreed daily amount represents the full loss, and that it therefore is not appropriate to apply the rule of apportionment laid down in Cl. 5-13, sub-clause 2.

If the amount is so much lower than the real loss per day that there can be no question of any rounding-off or rough calculation of the loss, the insurance contract should be treated as an open

insurance contract. The provision has been worded with this in mind. If, for instance, the gross hire per day is USD 50,000, and the assured has effected a loss of hire insurance for USD 20,000 per day, one can safely say that "the circumstances clearly indicate" that the amount is a sum insured per day, not an agreed daily amount: thus there is an open insurance contract with under-insurance.

Naturally, there is nothing to preclude combining under-insurance with agreement. In our example, for instance, it may be agreed that the insurance contract is to cover USD 20,000 of an agreed daily amount of USD 30,000. In terms of settlement, it would be an advantage if the apportionment ratio pursuant to Cl. 5-13, sub-clause 2, first *sentence*, is fixed at the ratio between the insured daily amount and the agreed daily amount. It would therefore be expedient to have separate spaces on the first page of the insurance contract for "sum insured per day" and "agreed daily amount".

In the offshore sector there may be instances when the insured daily amount is fixed at a certain amount and the MOU only earns a part of that amount when the operation is interrupted. Certain MOUs may have contracts where the charter hire payable is tied to defined levels of output from the operation, e.g. feet of well drilled per day or quantum of production throughput. Particularly in contracts for FPSOs there may be scaled rates of hire payable dependent on the volumes of throughput, particularly in the early phase of production when the volume gradually increases as new wells are tied in for production. In such circumstances there will be over-insurance and the insurance contract will operate as an open insurance contract.

The system of agreed insurable values is well established in hull insurance. MOU values change constantly, and it can often be difficult to establish what an MOU is really worth at a particular point in time - there is clearly a need to fix the value in advance. In loss of hire insurance, the situation appears to be slightly different; in this case the exact amount of hire of which the assured is deprived will often be known, and an agreement that exceeds the hire amount is likely to be perceived as excessive compensation for the assured's actual loss. Nevertheless, the system of agreed insurable values has been maintained without exception. If it is evident that a loss of time has occurred, cf. Cl. 18-45, and the daily amount has been agreed, the assured must be paid the amount agreed for the number of (full) days during which the MOU is out of operation. The only exception from this rule is where the assured has given misleading information about matters that are relevant for the agreement, cf. Cl. 2-3, sub-clause 1. The insurer must therefore ensure that the assured provides enough information concerning the MOU's potential earnings to give the insurer a basis for evaluating whether the agreement is correct when the insurance contract is effected. This also applies to the question of the duration of the charterparty or contract of works; so that account can be taken when fixing the agreed daily amount of the possibility of the contract of work lapsing.

It follows from Cl. 18-56, sub-clause 2, that the agreed daily amount shall not apply to time lost during repairs that are carried out after the insurance period expires, if the actual loss of income per day calculated pursuant to Cl. 18-47 is less during this period. This provision is sometimes set aside in individual insurance contracts. As a rule, this is only done by adding the words "fixed and agreed" or, if relevant, "chartered or unchartered". If the parties to the insurance contract have a common understanding that the purpose of this addition is to nullify Cl. 18-56, sub-clause 2, it is of course binding on both parties. However, not all insurers take this view of the provision, in which case it is highly uncertain whether such an addition is sufficient to set aside Cl. 18-56, sub-clause 2. If this is the intention, the setting aside should be formulated more clearly.

If the insured MOU is chartered under a contract for consecutive works, the agreement must be based on the average gross hire per day that the MOU would have earned if all the works had been completed in the normal way. It may then be relevant to deduct from the gross hire an amount for costs that will be saved if the MOU must dock for repairs. There are numerous uncertain factors in this calculation. The uncertainty is even greater for MOUs operating under spot charters. In general, it can be said that the greater the degree of uncertainty in the calculations, the more important it is that the daily amount be agreed in advance.

It is conceivable that, after the expiry of the contracts of work on which the agreement was based, the MOU is chartered on even more advantageous conditions. In such case, the agreement still has significance, since it always constitutes the maximum limit for the insurer's liability.

Clause 18-49. Deductible period

This Clause was new in the 2013 Plan and corresponds to Cl. 16-7. Reference is made to the Commentary to Cl. 16-7. Sub-clause 1 is verbatim the same as Cl. 16-7, sub-clause 1. In sub-clause 2 the words "or location" is added as MOUs seldom enters ports but rather more often moves between locations. Sub-clause 3 is included to suit the normal modus of operation of MOUs, which is to operate stationary on a field. Damage caused by heavy weather occurring as a result of the same atmospheric disturbance whilst the MOU is stationary at one location shall be regarded as one single casualty and only one deducible period shall be drawn for the resulting loss of hire, cf. sub-clause 2 of Cl. 18-33.

Sub-clause 3 of Cl. 16-7 is not included in Cl. 18-49 as separate deducible period for machinery damage is not common in loss of hire insurance for MOUs. Cl. 12-16 on machinery deduction is not included in Section 2 either, cf. Commentary to Cl. 18-32.

Sub-clause 1, first sentence provides that a deductible period, stated in the insurance contract, shall be established for each casualty. The provision provides a number of rules for calculating the deductible

period. The number of days must therefore be fixed in the insurance contract. This is linked to the fact that the number of deductible days is a key factor when fixing the premium and therefore an important element of the negotiations between the assured and the insurer. Thus the deductible period is agreed in each individual case.

The term "casualty" here means an event that gives rise to the right to claim under loss of hire insurance in accordance with Cl. 18-43, i.e. also events which are mentioned in Cl. 18-43, sub-clause 2, but which do not result in damage to the MOU.

A separate deductible period is applied for each casualty; this is in accordance with the other deductible provisions in the Plan, cf. Cl. 18-33 and Cl. 18-38. However, if one and the same casualty leads to a number of separate delays, e.g. delay at the place where the casualty occurred, delay in connection with temporary repairs and delay during permanent repairs, then only one deductible period shall be applied for the aggregate of all the delays. As far as the wording "each casualty" is concerned, reference is made to the Commentary on Cl. 18-33, cf. Cl. 12-18 and Cl. 4-18. In loss of hire insurance, the question of whether there has been one or more casualties will probably seldom be acute, because the deductible periods for several more or less contemporaneous casualties will coincide unless parts of the deductible periods have been consumed prior to the joint repair period commences. For example, one of the casualties may have involved salvage operation and temporary repairs which may have consumed part of the deductible period applicable to that casualty.

According to *sub-clause 1*, *second sentence*, the deductible period runs "from the commencement of the loss of time". If, for instance, the MOU should touch a protrusion on the sea bed but continue its voyage immediately at normal speed, there is no loss of time nor does any deductible period run. However, if inspection reveals that bottom damage occurred and that they necessitate a lengthy stay in a repair yard, on the other hand, a loss of time occurs. In this case, the deductible period begins to run in parallel with the loss of time.

The rule that the deductible period begins to run at the commencement of the loss of time also means that the deductible period is to be placed at the beginning of the period of lost time. This also applies where the loss of time runs during several separate periods. The deductible period is therefore not to be apportioned pro rata between the various periods. On this point, the rule in loss of hire insurance differs from the rule applied in H&M insurance where the deductible is apportioned pro rata between the expenses to be covered by the insurer.

The placement in time of the deductible period can have the following consequences for the settlement:

Firstly, it is significant in relation to the rule of apportionment in Cl. 18-54 regarding simultaneous repairs. It will be a distinct advantage for the assured to have owner's work (i.e. works that are not covered by insurance) carried out during the deductible period; the assured does not receive any loss of hire compensation for this period in any event. On the other hand, if owner's work is carried out during a period of time that is covered by the loss of hire insurer, the result is that the assured may only claim 50 % of the compensation that he would have received if only repairs covered by the insurance had been carried out, see Cl. 18-54, sub-clause 1.

Secondly, the placement in time of the deductible period may become significant where the daily amount pursuant to Cl. 18-47, sub-clause 2, or Cl. 18-56, sub-clause 2, is lower for the last repair period than for the first. In this case, the assured may not demand that the deductible period be placed during the last period so as to enable him to receive compensation for correspondingly more days at the highest daily amount.

Thirdly, the placement in time of the deductible period may become significant when apportioning costs of measures to avert or minimise loss and extra costs incurred to save time, cf. Cl. 4-12, sub-clause 2, and Cl. 18-53, sub-clause 3. Insofar as such costs are incurred in saving time during the deductible period, they must be covered by the assured, cf. further information in the Commentary on Cl. 18-53, sub-clause 3.

Finally, the placement in time of the deductible period may become significant when apportioning claims for reimbursement pursuant to Cl. 5-13 and Cl. 18-58.

The second sentence also states that the deductible period is to be calculated in accordance with the rule in Cl. 18-46, second sentence. This corresponds with the 1996 Plan. If the MOU is only partly deprived of income, the deductible period lasts until the loss of time, converted into a period of total loss of income, has reached the agreed number of days. This means that if an equipment or plant casualty causes an MOU to operate at half capacity for 100 days and the deductible period has been fixed at 45 days, the deductible period lasts for 90 days, reckoned from the time of the casualty. The same applies where the loss of time resulting from a casualty is spread over several periods, separated by periods in which the MOU is in full operation. In such cases, only the days with (full) loss of time are counted. The deductible period does not expire until the fixed number of days is reached. This, however, only applies when the MOU is capable to continue its normal operations at reduced capacity following a casualty. If the owners negotiate that the MOU is utilized for other operation during the deductible period, such work shall not be taken into consideration in this context.

Sub-clause 1, *third sentence*, states that loss of time during the deductible period is not covered by the insurer. This is in accordance with the 1996 Plan.

Sub-clause 2 states that damage which is due to heavy weather or the MOU's sailing through ice, and which occurred during the period of time between the MOU's departure from one port or location and its arrival at the next, is to be regarded as one casualty. The provision is identical to Cl. 12-18, sub-clause 2.

The reason for the rule is the technical difficulties that might easily arise in connection with settlement if an attempt was made to categorise heavy weather damage, damage caused by ice, etc. sustained during one and the same voyage as separate casualties. However, the rule is of far less importance in loss of hire insurance than in hull insurance. As mentioned in the Commentary on *sub-clause 1*, instances of damage that occur during one and the same voyage will normally all be repaired at the same time. Even if the various instances of damage are ascribed to several different casualties, both the deductible period and the delay will coincide for them all; for settlement purposes, therefore, the result is the same as if all the damage had been regarded as one casualty.

Sub-clause 3 was new in the 2013 Plan and corresponds with Cl. 18-33, *sub-clause 2,* and provides that all loss or damage resulting from the same atmospheric disturbance whilst the MOU is stationary at one location shall be regarded as one casualty subject to one deductible. What "atmospheric disturbance" means is explained in the commentaries to Cl. 18-33.

Clause 18-50. Survey of damage

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 16-8. Reference is made to the Commentary to Cl. 16-8.

Clause 18-51. Choice of repairer

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 16-9. Reference is made to the Commentary to Cl. 16-9.

Clause 18-52. Move to the repair location, etc.

This Clause was new in the 2013 Plan and is nearly verbatim the same as Cl. 16-10, but the words "class of works" has been replaced by "category of work". Reference is made to the Commentary to Cl. 16-10.

Clause 18-53. Extra costs incurred in order to save time

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 16-11. Reference is made to the Commentary to Cl. 16-11.

Clause 18-54. Simultaneous works

This Clause was new in the 2013 Plan and corresponds to Cl. 16-12. In addition to some editorial amendments substantive amendments were done in 2013 Plan compared to Cl. 16-12 by adding two new sentences to sub-clause 1. The Commentary to Cl. 16-12 is relevant also to Cl. 18-54 and is therefore referred to, but below the reason for and the effect of the substantive amendments is put into the right context and explained.

The provision regulates the liability of the loss-of-hire insurer in cases where repairs that are covered by the insurance and work that is not covered by it are carried out at the same time. The latter may be relevant to a loss-of-hire insurance for an earlier or later year, or it may be work that is not covered by any insurance, e.g. work relating to classification or modifications.

When repairs relating to one or more casualties (under one or more loss-of-hire insurance contracts) are carried out at the same time as work for the assured's account (e.g. work in connection with periodic classification surveys), the loss of time during the stay at the repair yard will in actual fact be due to several concurrent causes of damage. In the absence of other provisions, the loss in such cases must be apportioned between the assured and the various insurers in accordance with the rule of apportionment in Cl. 2-13. However, this type of solution is unsatisfactory from a technical legal standpoint because it will entail numerous decisions that are made largely on a discretionary basis. In order to avoid these problems, therefore, more clear-cut rules of apportionment have traditionally been applied in the loss-of-hire conditions. The rules of apportionment in Cl. 18-54 are based as a starting point on such principles as applies to Cl. 16-12, with the result that the causation rules in Cl. 2-13 are set aside in two respects:

Firstly, by applying relatively simple criteria, Cl. 18-54 (and Cl. 16-12) prescribes when simultaneous repairs are to be regarded as concurrent causes of the loss of time, and when one of the repairs is to be regarded as the only cause. In this way, difficult and, to some extent, subtle questions of causation are avoided. Secondly, Cl. 18-54 (and Cl. 16-12) fixes the exact proportions to be used when apportioning the time lost among the various repairs; it is therefore unnecessary to use the discretionary rule of apportionment in Cl. 2-13.

These two departures from the main rule considerably simplify the issue. The fact that the provisions may occasionally give one of the parties an unwarranted advantage is of little significance compared to the substantial advantages achieved for the settlement process.

Pursuant to sub-clause 1 (a) to (c), an apportionment is to be made between the assured and the insurer when specified owner's work is carried out at the same time as casualty work. Owner's

maintenance work which is not falling within the categories of work defined in letters (a) to (c) shall never be subject to any apportionment pursuant to Cl. 18-54.

In accordance with sub-clause 1, *first sentence*, the apportionment is to be made on the basis of an equal shares principle: the insurer shall pay compensation for half of the common repair time in excess of the deductible period. The said principle presupposes that the common work time is utilized equally effectively by both parties, and that it is therefore equitable to share the loss of time during this period equally; furthermore, this type of 50/50 rule is very easy to apply in practice.

This reasoning is generally relevant also to MOUs, but compared to vessels carrying goods and/or passengers, MOUs will to a much larger extent carry out not only ordinary maintenance work, but also letters (a) to (c) work while they are offshore and still earn hire wholly or in part.

Hence, a new second sentence was added to sub-clause 1 providing that works under letters a) to c) which would not have deprived the MOU from income if it had been carried out separately shall not be taken into account for apportionment pursuant to the first sentence of sub-clause 1. This means that the assured may carry out e.g. classification work simultaneously with casualty work without any apportionment of the common time if the classification work could have been carried out separately without loss of income. It will be a question of fact whether the classification work was of such nature that it could have been carried out without loss of income. If not, the 50/50 apportionment shall be applied on the common time. If the owner's work delays the casualty work, sub-clause 4 of Cl. 18-54 applies also on how the delay shall be apportioned between the casualty- and owner's work.

It was considered whether the principle adopted in the new second sentence of sub-clause 1 should be applied in the insurers favour in those cases where the casualty work is deferred to a period when the MOU is out of service due to owner's work. It was, however, agreed that it is in both the insurers as well as the assured's long term interests to encourage the owner to defer the casualty work to a convenient time rather than risk to impose on the insurer an unnecessary loss by repairing casualty work at once. The obligation to mitigate loss according to Cl. 3-30 cf. Cl. 3-31 would of course limit the owner's possibilities to impose an unnecessary loss on the insurer. But all the same it was felt prudent to supplement the potential contentious Cl. 3-30 with an economic incentive for the owner to defer casualty work whenever prudent to a convenient time and still get compensated half the common time according to the first sentence of sub-clause 1.

However, the new third sentence of sub-clause 1 provides that if casualty damage are discovered or occurs during a period when the MOU would have been deprived of income if works under letters a) to c) had been carried out separately, time for repairs carried out simultaneously with scheduled works under letters a) to c) shall not be compensated. The third sentence of sub-clause 1 only applies if casualty work is repaired simultaneously with the same scheduled works under letter a) to c) during

which the casualty work was discovered or occurred. If the casualty work so discovered or occurred are deferred to a subsequent period when other scheduled works under letters a) – c) are carried out, then what is written above on deferred casualty work shall apply, cf. also in this regard Cl. 3-30.

Clause 18-55. Loss of time after completion of repairs

This Clause was new in the 2013 Plan and is corresponding to Cl. 16-13, but letters (b) and (d) are not deemed relevant to MOUs and are therefore not included in Cl. 18-55. Reference is made to the Commentary to Cl. 16-13, letter (a) of Cl. 18-55 is for the purpose of cover unamended even though the language is adapted to suit the modus of operation of MOUs. Letter (b) is amended as compared to Cl. 16-13 letter (c).

This provision limits the insurer's liability for loss of time that occurs after repairs have been completed. According to the main rule for calculating loss of time set out in Cl. 18-46, the insurer would have been fully liable for time lost after completion of repairs to the extent that this loss of time was a result of the casualty.

The insurer therefore had to pay compensation for loss of time until the MOU was again gainfully employed, as well as any loss of time resulting from the termination of the contract of work. Thus Cl. 18-55 involves a limitation on the liability that follows from Cl. 18-46 in respect of time lost after completion of repairs. In accordance with *sub-clause 1, first sentence*, the insurer is only liable for such loss of time in the cases that are specifically mentioned in letters (a) and (b); in all other cases the liability of the loss-of-hire insurer ceases when the repairs have been completed.

Letter (a) deals with the situation where the MOU, after completion of repairs, is to continue to operate under the contract of works that was in effect at the time of the casualty; in such case, the insurer is liable for time lost until the MOU has resumed its former employment. The provision applies irrespective of the type of contract of works concerned. Contractual obligations that are not set out in an actual contract of works must be regarded as equivalent to such a contract in this connection. If, on the other hand, the contract of works is cancelled due to the MOU's stay at a repair location, the insurer is only liable for the time lost up to the completion of repairs unless cover is provided under letter (b).

Letter (b) regulates loss of time for MOUs that do not return to the location at which the casualty occurred but moves to another location, either to commence new operations that it was scheduled to move to after the completion of the operations it was engaged in at the time of the casualty irrespective of whether the MOU actually completed those operations, or to take up work under a new contract of works that was concluded prior to "the commencement of the move to the repair location". These words are new as compared to Cl. 16-13 letter (c) which only compensates loss of time after

completion of repairs if the contract was entered into prior to the occurrence of the casualty. A contract may be legally binding and therefore concluded even if the contract is not formalized in a written agreement duly executed and signed by the parties. A mere letter of intent, however, will not satisfy the requirement of a binding contract pursuant to letter (b).

The next location may be in a different direction from the repair location than the location at which the casualty occurred, but the insurer's liability will be limited to the time to move in the new direction for a distance equal to the distance return to the casualty location would have represented.

Loss of time after completion of repairs covers both the situation where the MOU remains in the repair yard for a while after repairs have been completed and while the MOU moves to a location to resume its normal activity. However, loss of time due to the fact that the MOU is unable to find employment immediately after repairs have been completed is not covered. Such loss of time may in certain cases be said to be a consequence of the repairs and hence also a consequence of the damage that was repaired. However, the dominant cause of the loss of time will be the market conditions, or possibly decisions made by the assured, and it is therefore natural that the loss should not be covered.

The reference in *sub-clause 2* to Cl. 18-52 is made in respect of its sub-clause 2, second sentence, which establishes that removal time occurring during the deductible period is not to be apportioned, cf. the Commentary on Cl. 18-52.

Clause 18-56. Repairs carried out after expiry of the insurance period

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 16-14. Reference is made to the Commentary to Cl. 16-14.

Clause 18-57. Liability of the insurer when the MOU is transferred to a new owner

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 16-15. Reference is made to the Commentary to Cl. 16-15.

Clause 18-58. Relationship to other insurances and general average

This Clause was new in the 2013 Plan and is verbatim the same as Cl. 16-16. Reference is made to the Commentary to Cl. 16-16.

Section 5
War risks insurance

Section 5-1
General rules relating to the scope of war risks insurance

Clause 18-59. Perils covered

This Clause was new in 2016 and is verbatim the same as Cl. 15-1. Reference is made to the Commentary to Cl. 15-1.

Section 5 will only apply if it has been agreed that the insurance of the MOU also covers war perils. If the insurance contract is silent on whether it covers marine or war perils, the presumption according to Cl. 2-10 is that the insurance only covers marine perils. Therefore, it must be expressly agreed if the insurance of the MOU shall cover war risks. War risks insurance may be covered separately or in combination with marine perils cover.

Clause 18-60. Interests insured

This Clause was new in 2016 and is verbatim the same as Cl. 15-2 apart from the cross references to the relevant sections in Chapter 18. Reference is made to the Commentary to Cl. 15-2.

Clause 18-61. Sum insured

This Clause was new in 2016 and is verbatim the same as Cl. 15-3 apart from the cross references to the relevant sections and clauses in Chapter 18. Reference is made to the Commentary to Cl. 15-3. It is in Cl. 18-61, sub-clause 2, letter (b), expressly made clear that the limitation of cover of collision liability contained in Cl. 18-37 shall apply also for any war risk collision liability. This also follows from the reference to Section 2-4 in Cl. 18-60 (b) that i.a. Cl. 18-37 shall apply also to the war risk collision liability cover.

Clause 18-62. Safety regulations

This Clause was new in 2016 and is by and large verbatim the same as Cl. 15-4 apart from some editorial amendments. Reference is made to the Commentary to Cl. 15-4.

In particular to letter (a), the words “complete a move or operation in progress” means that the assured must be allowed to comply with applicable regulations issued by relevant authorities and/or his contract requirements to complete an operation in a safe manner so that e.g. the well is properly secured against blow-out before leaving it.

Section 5-2
Termination of the insurance

Clause 18-63. War between the major powers

This Clause was new in 2016 and is verbatim the same as Cl. 15-5. Reference is made to the Commentary to Cl. 15-5.

Clause 18-64. Use of nuclear arms for war purposes

This Clause was new in 2016 and is verbatim the same as Cl. 15-6. Reference is made to the Commentary to Cl. 15-6.

Clause 18-65. Bareboat chartering

This Clause was new in 2016 and is largely verbatim the same as Cl. 15-7 apart from an editorial amendment. Reference is made to the Commentary to Cl. 15-7.

Bareboat chartering is rather common in the offshore industry, and very often the bareboat charterer is co-insured either expressly or by virtue of Cl. 18-1, letter (i). If so, the war risks insurance will not terminate automatically according to Cl. 18-65. Such termination will only occur if the MOU is bareboat chartered without the consent of the war risks insurer to a third party outside the agreed group of assureds or co-assureds.

Clause 18-66. Cancellation

This Clause was new in 2016 and is verbatim the same as Cl. 15-8. Reference is made to the Commentary to Cl. 15-8.

Section 5-3
Areas of operation

Clause 18-67. Excluded and conditional areas

This Clause was new in 2016 and is largely verbatim the same as Cl. 15-9 apart from some editorial amendments. Reference is made to the Commentary to Cl. 15-9.

Section 5-4
Total loss

Clause 18-68. Relationship to Section 2-2 above

This Clause was new in 2016 and is verbatim the same as Cl. 15-10 apart from the cross reference to Section 2-2 of Chapter 18. Reference is made to the Commentary to Cl. 15-10.

Clause 18-69. Intervention by a foreign State power, piracy

This Clause was new in 2016 and is verbatim the same as Cl. 15-11 apart from some editorial amendments and correcting the cross references to the relevant clauses in Chapter 18. **The time limits in sub-clauses 1 and 2 were amended in the 2019 Version in line with the amendments made to Cl. 15-11.** Reference is made to the Commentary to Cl. 15-11.

Clause 18-70. Blocking and trapping

This Clause was new in 2016 and is verbatim the same as Cl. 15-12 apart from some editorial amendments and correcting the cross reference to the relevant Clause in Chapter 18. Reference is made to the Commentary to Cl. 15-12.

Clause 18-71. Restrictions imposed by the insurer

This Clause was new in 2016 and is verbatim the same as Cl. 15-13 apart from some editorial amendments and correcting the cross reference to the relevant Clause in Chapter 18. Reference is made to the Commentary to Cl. 15-13.

Section 5-5
Damage

Clause 18-72. Relationship to Section 2-3 above.

This Clause was new in 2016 and is largely verbatim the same as Cl. 15-14 apart from some editorial amendments and correcting the cross references to the relevant Section and clauses in Chapter 18. Reference is made to the Commentary to Cl. 15-14.

Clause 18-73. Deductible

This Clause was new in 2016 and is verbatim the same as Cl. 15-15 apart from some editing and correcting the cross reference to the relevant Clause in Chapter 18. Reference is made to the Commentary to Cl. 15-15.

Section 5-6
Loss of hire

Clause 18-74. Relationship to Section 4 above

This Clause was new in 2016 and is largely verbatim the same as Cl. 15-16 apart from some editorial amendments and correcting the cross references to the relevant Section and clauses in Chapter 18. Reference is made to the Commentary to Cl. 15-16.

Clause 18-75. Loss in connection with a call at a visitation port, a temporary stay, etc.

This Clause was new in 2016 and is largely verbatim the same as Cl. 15-17 apart from some editorial amendments and correcting the cross references to the relevant clauses in Chapter 18. Reference is made to the Commentary to Cl. 15-17.

Clause 18-76. Loss caused by orders issued by the insurer

This Clause was new in 2016 and is verbatim the same as Cl. 15-18 apart from some editorial amendments and correcting the cross references to the relevant clauses in Chapter 18. Reference is made to the Commentary to Cl. 15-18.

Clause 18-77. Choice of repairer

This Clause was new in 2016 and is verbatim the same as Cl. 15-19 apart from correcting the cross reference to the relevant Clause in Chapter 18. Reference is made to the Commentary to Cl. 15-19.

Section 5-7
Owner's liability, etc. (P&I)

Clause 18-78. Scope of cover

The Clause was new in 2016 and corresponds to Cl. 15-20 although somewhat simplified as P&I insurance for MOUs is not poolable within the International Group (IG) of P&I Clubs' Pooling Agreement and thus not reinsured through the IG's reinsurance arrangements.

Sub-clause 1 establishes that the scope of the war risks insurer's P&I cover corresponds to the P&I cover of the MOU in the sense that the insurance covers the same liability and expenses, i.e. the same range of losses.

Sub-clause 1 entails that the war risks insurer also assumes the war peril as defined in the Pooling Agreement of the International Group of P&I Clubs. The rationale for this provision is that the P&I

clubs do not define a war peril in the same way as Cl. 2-9 of the Plan. This difference could result in the assured being without P&I insurance if the scope of the war peril exclusion in the P&I insurance was wider than the range of war perils defined in Cl. 2-9.

An example:
Under the rules of the P&I clubs, use of weapons of war is a war peril regardless of motive, while under Cl. 2-9 civilian use of weapons of war will only be a war peril if there is a political, social or religious motive for the use of such weapons. This distinction is illustrated by the case of Peter Wessel (ND 1990.140). An anonymous bomb threat (which proved to be false) was considered to be a marine peril because there was no reason to assume that there was any political, social or religious motive behind the threat. Under the P&I insurance, a threat of use or use of a weapon of war, including a bomb, is regarded as a war peril.

If the wording of the definition of the war peril applied by the P&I club in question is not identical to that of the Pooling Agreement of the IG (the Pooling Agreement), the definition of a war peril in the Pooling Agreement will be decisive. The Pooling Agreement provides that all use of "mines, torpedoes, bombs, rockets, shells, explosives or other similar weapons of war" constitutes a war peril. There has been discussion within the International Group as to whether pirates' use of automatic weapons entails that the attack is no longer a marine peril, but a war peril. In relation to Cl. 18-78, this issue is of no consequence because the war risks insurer assumes all war risks as defined in Cl. 2-9. Use of weapons of war by other criminals will not be covered by Cl. 2-9, but is covered by Cl. 18-78 provided such use of weapons is excluded in the Pooling Agreement. When applying Cl. 18-78, the P&I clubs' own definition of weapons of war shall be decisive. This is currently commented on as follows on the International Group's web site:

"What does 'similar weapons of war' mean? There is no definition in the Pooling Agreement or in club rules but the wording used 'or other similar weapons of war' indicates that such other weapons should be of a similar nature to those previously identified. The specifically identified weapons of war are mines, torpedoes, bombs, rockets, shells and explosives and show an intention that something more than guns/rifles/conventional ammunition would be needed to trigger the operation of the exclusion."

Generally speaking, it takes a great deal for a shipowner to be held liable for damage and losses that are a result of war perils. Even the strict oil spill liability under the CLC Convention does not apply if the oil spill is attributable to acts of war or damage caused by a third party with the intent to cause damage.

For the war risks insurer, assuming the range of war perils defined in the P&I conditions entails an increased risk because he is leaving it up to another insurer to define this range of perils. This is quite

different from applying the range of losses covered by the P&I insurance because, by expanding the range of losses the P&I clubs will also be exposing themselves in their day-to-day activities as a marine peril P&I insurer. It will be simpler for a P&I club to reduce its range of perils by expanding the war peril exclusion when it knows that the entire risk is transferred to the war risks insurer. Instead of leaving it up to the individual P&I club to define a war peril, reference has therefore been made to the definition in the Pooling Agreement. The war risks insurer is thus protected against whatever an individual club might decide. A 3/4 majority is required to change the Pooling Agreement, and there will normally be some forewarning of what is to come.

Under the last part of sub-clause 1, reference is made to the Pooling Agreement as it read at the time the agreement was entered into as decisive for the P&I liability of the war risks insurer. This means that any changes in the Pooling Agreement during the insurance period will not have any consequence for the war risks insurer. Under this approach, the war risks insurer will have time to change his conditions the next time they are renewed if he sees that the P&I system excludes from its range of marine perils any perils that the war risks insurer does not wish to cover.

In *sub-clause 2,* it is presumed that the MOU had effected its ordinary P&I insurance with Gard if such insurance is lacking.

Clause 18-79. Limitations to the cover

Sub-clause 1 establishes that as a basic rule the war risks insurer's cover under the war risks section is subsidiary in relation to any other insurance the assured may have effected. The effects for the assured and the insurer of the insurance being made subsidiary are set out in Cl. 2-6 and Cl. 2-7, and may vary depending on whether or not the other insurance has also been made subsidiary. The provision has been included to ensure that, in the event of double insurance, the war risks insurer will not be left with full liability in respect of other insurers who often use clauses that make the insurance subsidiary to all other insurances.

The provision does not apply in relation to excess covers. Such excess insurance cover will be a genuine supplement to any cover the assured might otherwise have under his insurances.

Furthermore, the war risks insurance is not subsidiary in relation to the piracy risk. It is appropriate that the war risks insurance is the main insurance in this context. This is in line with practice in piracy cases, where the war risks insurer has normally acted as the main insurer.

Some P&I clubs offer excess war risks cover. Insofar as this is activated, the provision will not apply as the insurance cover will come in addition to the cover the assured otherwise might have under its

insurances. However, for clauses relating to the ordinary P&I clubs' usual cover that make the insurance subsidiary to all other insurances, the provision has full force and effect.

Section 5-8
Occupational injury insurance, etc.

Clause. 18-80. Scope of cover

This Clause was new in 2016 and is verbatim the same as Cl. 15-23 apart from one editorial amendment. Reference is made to the Commentary to Cl. 15-23.

Section 6
Construction risks insurance

Section 6 was new in 2016.

Section 6-1
General rules relating to the scope of construction risks insurance

Clause 18-81. Scope of application

Section 6 is drawn up first and foremost with the interests of the owner in mind when he e.g. converts a tanker into an FPSO and enters into various contracts with a yard and/or other contractors and/or suppliers for different parts of the total project. Such projects may be tailor-made for a specific field where the owner has entered into a contract with the field operator for the provision of and/or operation of the FPSO. Very often the charter hire for the FPSO will not commence until the FPSO is ready to start its operations at the field. This means that it is for the FPSO owner, who then normally will be the assured, to ensure that the insurance includes cover in respect of offshore installation, hook-up and commissioning works.

The rules in Section 6 of Chapter 18 are intended to apply to both newbuildings, conversion work and major upgrade of MOUs. A yard building e.g. an FPSO from scratch as a turnkey project on account of an owner for delivery at the yard's quayside may choose between covering the insurance on the basis of this Section 6 or Chapter 19. Chapter 19 will probably be the most appropriate alternative for the yard as this Chapter is drawn up for insurance of projects where the yard is taking out the insurance to protect its interests. It is for the parties to evaluate and agree the terms of the insurance contract, including the choice between Chapter 19 and Section 6 of Chapter 18. The parties must see to it that the terms of the individual insurance contract make it clear whether the insurance is effected on the basis of Chapter 19 or Section 6 of Chapter 18.

Section 6 also applies to offshore installation, hook-up and commissioning works if the project comprises also these stages of the construction work. Thus "the Project", which is the word used in Cl. 18-81 to describe the scope of application of Section 6, may vary considerably from case to case. It is therefore of utmost importance to specify in the insurance contract exactly the scope of application of the insurance.

Clause 18-82. Insurance period/Ref. Clause 1-5

The Clause corresponds to Cl. 19-2, but as opposed to Cl. 19-2 is focusing also on attachment of the insurance. Sub-clause 1, first sentence, presupposes that the attachment date of the insurance is expressly set out in the insurance contract. If not, the default position of Cl. 1-5, sub-clause 1, will apply so that the insurance attaches immediately when the parties have agreed on the terms. If only the date of attachment is agreed and not the exact hour, Cl. 1-5, sub-clause 2, will apply so that the insurance attaches at 00:00 UTC on that date.

Depending on the individual project insured, it may not be anything of substance to insure at the agreed attachment date. That will be the case if the project is to build a new MOU and the insurance attaches before any construction work has begun or any procurement has been made. If the assured has purchased a tanker or other vessel or unit for conversion, he should insure such unit under the construction risks insurance from the moment the risk is transferred from the seller to the assured. He can achieve this by agreeing an appropriate attachment date for the insurance comprising such procurement. For each component, equipment and materials manufactured or procured for the project the insurance will attach from the time the risk is transferred to the assured. This may be at different times depending on the terms of the contracts entered into between the assured and the sellers, suppliers, contractors of each component etc. Often the risk will be transferred only when the contractor or supplier has completed its obligations under the contract, e.g. when the component, part or equipment is completed and delivered to the assured. However, the risk may be transferred at an earlier stage during construction, or the assured may have agreed to carry the risk throughout the construction period. If the assured has entered into several contracts with different contractors or suppliers, each contract must be treated individually in this respect as various components, parts or equipment may attach under the insurance at different times.

MOUs in operation prior to the commencement of the Project will normally be covered under ordinary insurances for MOUs in operation. If the assured owns and operates the MOU, there may not be any transfer of risk if the assured maintains the ownership and the risk of the MOU also during the construction period. Unless the operation insurance shall cover the MOU during the construction period, the assured must agree with his insurers the date when the operation insurance shall be terminated and the MOU shall be covered under the construction risks insurance. The same applies if the assured owns and operates a vessel which will be converted to an MOU. It is recommended that

the assured ensures that the latter insurance attaches when the operating insurance contract is cancelled or expires to avoid any double insurance or gap between the operating insurance and the construction risks insurance. In case of double insurance, whether intended or not, Cl. 2-6 and Cl. 2-7 applies.

Sub-clause 2 set aside Cl. 1-5, sub-clause 3. The first sentence states that the insurance remains in effect until the date stipulated as the completion of the project. The parties must agree which date shall be set as completion date. Normally this would be the delivery date agreed in the contract between the assured and his contractor, or in the contract between the assured and the field operator, whichever is the latter, ref. Cl. 18-81 above. If the project is delayed, the *second sentence* entails that the insurance automatically remains in effect until the actual completion date, provided the Project is not delayed more than nine months. The assured must pay an additional premium for the extension period calculated pro rata of the premium agreed for the initial insurance period, unless the parties have agreed in advance the premium for the extension period. If delivery takes place before the stipulated delivery date, the assured may be entitled to a return of premium, cf. Cl. 6-5.

It is conceivable that the operation insurance intended to apply after completion comes into force before the construction risks insurance terminates when the construction risks insurance is extended. In that event, the rules relating to double insurance shall apply, cf. Cl. 2-6 and Cl. 2-7.

If the completion is delayed beyond the nine months' extension period, the parties must negotiate new terms for continuation of the insurance.

Clause 18-83. Place of insurance – project locations

Sub-clause 1 provides that the insurance is in effect anywhere in the world, subject to the requirements under sub-clause 2, see further below. Thus the assured is free to place orders with suppliers and constructors wherever they may be located. At what time the insurance will attach for the various components, parts or equipment must be decided according to Cl. 18-82, see the Commentary to this Clause.

Sub-clause 1 implies that once the component, part or equipment is attached to the construction risks insurance, subsequent transport for incorporation into the project at another port or place where assembly takes place is comprised by the insurance as long as this takes place within the insurance period, cf. Cl. 18-82, sub-clause 2.

Sub-clause 2 requires that all locations of yards, workshops and/or work sites for construction and assembling of main components shall be agreed with the insurer. This may probably most conveniently be done in connection with the review of the project and initial risk assessment required

pursuant to Cl. 18-1, letter (e), no. 3. What is a main component must at the same time be agreed in order to avoid any subsequent dispute on whether such agreement should have been reached. Any change of location shall be notified to and agreed by the insurer. Failure to notify must be treated as an alteration of the risk, cf. Section 2 of Chapter 3.

Sub-clause 3 provides that sea trials are covered within the area allowed by the MOU's certificate. Such certificate will be issued by the flag state. Temporary certificates may be issued prior to completion, which will suffice for this purpose. If sea trials should be carried out outside the area of operation according to Cl. 18-1, letter (h), Cl. 3-15 will apply unless otherwise agreed.

Sub-clause 4 requires that when it is agreed that the insurance also covers offshore installations, hook-up and commissioning, the offshore location shall be set out in the insurance contract. If for one reason or another the offshore location is not set out in the insurance contract, it may imply that the insurance does not comprise any work offshore. But it may also imply that such location is not important to the insurer. The latter seems to be the reasonable conclusion if the insurer has agreed that the insurance should comprise offshore installations, hook-up and commissioning, but not secured agreement on the offshore location. Any change of the offshore location must be treated as an alteration of the risk, cf. Section 2 of Chapter 3.

Clause 18-84. Escalation

This Clause is verbatim the same as Cl. 19-7. Reference is made to the Commentary to Cl. 19-7.

Clause 18-85. Deductible

This Clause is verbatim the same as Cl. 19-8 apart from correcting the cross references as appropriate. Reference is made to the Commentary to Cl. 19-8.

Clause 18-86. Premium in the event of total loss

The combined effect of Cl. 6-3, cf. Cl. 1-5, sub-clause 4, is that for insurance contracts attaching for more than one year, the insurer would be entitled to only one year premium in case he pays the sum insured as a result of total loss, constructive total loss or payment pursuant to Cl. 4-21. This solution is workable for MOUs in operation. For MOUs under construction, conversion and/or major upgrade, Cl. 18-83 set Cl. 6-3 aside and provides that the insurer is entitled to the entire agreed premium if the insurer compensates for total loss pursuant to Cl. 18-88, sub-clause 1. If so, the project is completed and pursuant to Cl. 18-89 the assured is entitled to payment of the whole sum insured limited to the insurable value calculated according to Cl. 18-88, sub-clause 1, if the latter is the lesser amount. Cl. 1-5, sub-clause 4, is not applicable as neither Cl. 18-88 nor Cl. 18-89 is listed therein. Therefore, the entire agreed premium is the whole premium for the total period of the project even if this period is longer than one year.

Sub-clause 2 provides that the insurer is only entitled to a proportion of the entire agreed premium if the insurer compensates for total loss pursuant to Cl. 18-88, sub-clause 2. If so, the project is not completed and pursuant to Cl. 18-89 the assured is only entitled to compensation for the insurable value calculated according to Cl. 18-88, sub-clause 2. In short, this is the value of the project as far as it has been completed at the time when it is deemed a total loss, see further the Commentary to Cl. 18-88 and Cl. 18-89. This compensation will be lower than the sum insured, which normally will be agreed to the same amount as the total costs of the completed project. The proportion of the entire agreed premium payable under sub-clause 2 is the proportion corresponding to the ratio between the compensation paid and the sum insured. If the project is deemed a total loss after it is 50% completed and the compensation paid is e.g. 50% of the sum insured, then the insurer is entitled to 50% of the entire agreed premium.

Section 6-2
Loss of or damage to the MOU

Clause 18-87. Objects insured/Ref. Clause 18-2

This Clause is nearly verbatim the same as Cl. 19-9 apart from letter (b), which is not incorporated into Cl. 18-87 as there is no need to distinguish between yard and owner's supplies in the construction risks insurance when the risk is assumed by the assured.

Letter (a) comprises all components, parts and equipment constructed, manufactured or procured for the Project, subject to the limitations pursuant to Cl. 18-83.

Letter (b) includes the assured's costs in connection with design, drawings and other planning of the Project. Here the object insured is not the specific drawings, models, etc.; these can normally be reconstructed at low cost if they are destroyed, but the general costs incurred by the assured in his own planning department and/or to hiring consultants. If the Project is not completed due to damage or other incidents covered by the insurance, these costs will normally be lost and should be compensated by the insurer.

If the existing plans etc. may be used in connection with other Projects of the assured, a reasonable deduction of the costs corresponding to the residual value of the plans etc. may be appropriate. However, the burden of proving any such residual value must rest with the insurer.

Letter (c) provides that the insurance also comprises bunkers and lubrication oil on board, cf. Cl. 18-2 (c).

Clause 18-88. Insurable value

This Clause is nearly verbatim the same as Cl. 19-10 but edited as appropriate to fit construction and rebuilding of MOUs. A new letter (d) is added to sub-clause 1.

The Clause defines the insurable value in construction risks insurance.

Sub-clause 1 defines the insurable value when the Project is completed. The basis for the insurable value is the contract price originally agreed less subsequently agreed deductions. The wording "subsequently agreed deductions" concerns changes that result in a reduction in the contract price. Normally, the insurer will be notified of such deductions for the purpose of obtaining a reduction in premium. In that event, the deductions will also be stated in the insurance contract. However, to avoid that the insurable value exceeds the assured's real loss, it is necessary to take such deductions into account in the calculation of the insurable value regardless of whether or not the insurer has been notified.

The wording "subsequently agreed additional amounts" in sub-clause 1, letter (b), refers to variation work in relation to the original contract that results in an increase in the price. The consequence of such variation work/additions not having been reported to and agreed by the insurer is that this increase in the costs of the construction contract will not be covered by the construction risks insurance. It follows from *sub-clause 1, letter (c),* that the value of the owner's deliveries is also included in the insurable value. As opposed to Cl. 19-10, sub-clause 1, letter (c), there is no requirement that such owner's deliveries are covered by the insurance. This means that owner's deliveries will be part of the insurable value even if they are not declared to the insurer, see further the Commentary to Cl. 18-89. The same goes for an existing vessel or MOU that shall be converted or upgraded as part of the Project.

Sub-clause 2 defines the insurable value before the Project is completed. The provision is based on the fact that the insurable value under the construction risks insurance increases as the Project progresses. Deductions shall be made in the insurable value calculated according to sub-clause 1 for work that has not been carried out, and components and materials that have not been procured or manufactured for the Project, cf. *letters (a) and (b)*. Components and materials that have been procured shall be included, provided that they are within the place of insurance, cf. Cl. 18-84.

Clause 18-89. Compensation in the event of total loss/Ref. Clause 4-1

This Clause corresponds to Cl. 19-13 but is simplified in accordance with the general rule in Cl. 4-1.

In the event of total loss, cf. Cl. 18-90, the insurer covers the sum insured, but not in excess of the insurable value, cf. Cl. 18-88.

According to Cl. 18-88, the insurable value is defined as the original contract price with any deductions or additions and the value of the owner's deliveries including existing vessel or MOU. If the assured wishes to insure all of the elements mentioned, they must be declared to the insurer and included in the agreed sum insured. If a sum insured has been agreed at the inception of the insurance and notice of additional work is later given to the insurer, the assured must also ensure that the sum insured is increased correspondingly. The same goes for owner's supply. If not declared, the sum insured may be lower than the insurable value at the time of loss. This will according to Cl. 2-4 constitute under-insurance. However, the wording of Cl. 18-89 does suggest that in case of total loss the full sum insured shall be paid if the sum insured is lower than the insurable value. This means that the proportion rule in Cl. 2-4 shall not apply.

Likewise, the assured must ensure that the sum insured is reduced in the event of deductions resulting from parts of the work not being carried out. If this is not done, the sum insured will be higher than the insurable value, and the compensation will be limited to the insurable value. This rule corresponds with the rule on over-insurance in Cl. 2-5. In that event, the assured will have paid premium on a larger sum insured than he can recover under the insurance.

In the event of a total loss before the Project is completed, the sum insured will normally be higher than the insurable value and the compensation will be limited to the insurable value calculated according to Cl. 18-88, sub-clause 2. The calculation of the insurable value if this is the case is commented on in more detail under Cl. 18-88, sub-clause 2.

If the insurer pays total loss compensation pursuant to Cl. 18-89, he has a right to take over the title to the Project including any undamaged components or materials, cf. Cl. 5-19, sub-clause 1. The insurer can therefore utilize the residual value that the Project or the components or materials may have after the damage triggering the total loss compensation. If the assured should find it expedient to complete the Project after having received the total loss compensation, he cannot utilise any residual values or undamaged components or materials unless the insurer agrees. Normally, it would be in the insurer's interest to come to agreement with the assured on an appropriate reduction in the compensation payable in consideration for leaving the title to any residual values or undamaged components or material with the assured.

Clause 18-90. Total loss/Ref. Section 2-2

The Clause was amended in the 2019 Version.

The concepts of insurable value and sum insured is of particular relevance when deciding if the conditions for claiming compensation for a total loss under this provision is fulfilled. These amounts and the relationship between them are explained in Cl. 18-88 and Cl. 18-89, **and the Commentary to these provisions. The solution in Chapter 19 is a bit different where Cl. 19-11 has to be considered together with Cl. 19-12**.

Cl. 18-90 expressly provides that the rules on total loss in Section 2-2 of Chapter 18 shall apply also to the construction insurance pursuant to Section 6, but with an important amendment of Cl. 18-10. **First of all, t**he assured may claim compensation for total loss if casualty damage to the Project is so extensive that the costs of repairs amount to more than 100% of the insurable value calculated as provided in Cl. 18-88. **As the calculation of the insurable value during the construction period is dynamic and increases during the performance of the Project, the threshold for claiming total loss compensation will also be dynamic and develop during the construction period.** In Cl. 18-10 the market value **will** be put into the condemnation formula if this value is higher than the insurable value. This alternative is not included in the wording of Cl. 18-90 and will therefore not apply to construction risks pursuant to Section 6. If the Project is extensively damaged, the only relevant criteria to determine whether the Project is condemnable is to compare the estimated costs of repair calculated in accordance with Cl. 18-10, sub-clause 4, last sentence, with the insurable value calculated in accordance with Cl. 18-88. This goes also for damage to the Project occurring before completion. If the estimated costs of repair exceed the insurable value as calculated pursuant to Cl. 18-88, sub-clause 2, the assured is entitled to claim total loss compensation, limited to the insurable value if this is lower than the sum insured.

At the completion of the Project it is presumed that the insurable value will be equal to the sum insured. To harmonize the condemnation formula in Cl. 18-90 with the condemnation formula under Cl. 18-10, the assured has an alternative option to claim for total loss compensation if costs of repairs amount to more than 80 % of the sum insured. This secures a seamless transfer from the construction risk insurance to the operations insurance under Section 2.

Clause 18-91. Damage/Ref. Section 2-3

Cl. 18-91 expressly provides that Section 2-3 shall apply to the construction risks insurance, but as amended by Cl. 18-92 and Cl. 18-93. If the Project (or components and materials for the Project) are damaged without constituting a total loss pursuant to Cl. 18-90, the insurer shall indemnify the costs of repairing the damage or re-acquiring lost objects.

It is conceivable that a damage can be repaired but the assured nevertheless demands new equipment rather than repairs; e.g. water damage to a generator may be repaired but the assured fears that the generator may be subject to future damage due to undiscovered defects caused by the water damage.

Here the insurer's liability must be tied to the contractor's obligation vis-à-vis the assured according to the construction contract. If under the contract it is sufficient for the contractor to carry out repairs, possibly combined with a warranty against future damage, the insurer's liability is limited correspondingly. If the assured, out of consideration for its customers or for other reasons, chooses to buy a new object rather than repair the damaged, any amount incurred in excess of the costs of repair will be for the assured's account and is not recoverable under the construction insurance.

Clause 18-92. Error in design, etc.

Sub-clause 1 is verbatim the same as Cl. 19-15. Reference is made to the Commentary to Cl. 19-15.

Sub-clause 2 provides that for parts or components that are completed, Cl. 18-20 shall apply. This entails that for such parts or components there will be the same cover for error in design etc. under the construction insurance as under an MOU hull insurance. Sub-clause 2 will give somewhat wider cover than the cover under sub-clause 1 because sub-clause 2 also covers the defective part(s) if the part(s) have been approved by the classification society. Reference is made to the Commentary to Cl. 18-20, which again refers to the Commentary to Cl. 12-4 as
Cl. 18-20 is verbatim the same as Cl. 12-4.

Clause 18-93. Costs incurred in order to save time/Ref. Clauses 18-24, 18-28 and 18-29

Cl. 18-93 corresponds to Cl. 19-17 and exclude from the construction risks insurance the so called 20% p.a. rule. This limitation of the cover as compared with the cover for MOUs in operation only applies when damage to the Project occurs and is discovered whilst at a yard or any other onshore project location. For any damage occurring or discovered offshore, the cover for costs incurred in order to save time will be the same as for the hull insurance including the 20% p.a. rule, provided the insurance also comprises any offshore part of the Project,
cf. Cl. 18-81.

Reference is made to the Commentary to Cl. 19-17 and to the Commentary to Clauses 18-24, 18-28 and 18-29, cf. also the Commentary to the respective corresponding Clauses 12-7, 12-11 and 12-12.

Section 6-3
Supplementary covers

Clause 18-94. Applicable rules

Sub-clause 1 expressly provides that Sections 6-1 and 6-2 shall apply also to any supplementary covers agreed according to Cl. 18-95 to Cl. 18-99 unless otherwise provided in Section 6-3. As explained in the introductory overview of the Commentary to Chapter 18, Section 1 applies to all

sections of Chapter 18 including Section 6. Thus Part One of the Plan also applies to Section 6-3 unless deviated from in Section 1.

Sub-clause 2 states what ought to be obvious, namely that none of the supplementary covers apply unless the parties have agreed a separate sum insured, deductible and premium for each supplementary cover.

Clause 18-95. Additional costs arising from unsuccessful launching

This Clause corresponds to Cl. 19-18, and reference is made to the Commentary to Cl. 19-18. However, the wording of Cl. 18-95 states that "the insurer will indemnify *the assured's liability* for any additional costs incurred to complete launching". The cover is therefore limited to additional costs of repair etc. necessary to complete the launching, and does not comprise any and all costs in connection with the damage to the dock, slip way, cranes and/or other property caused by the unsuccessful launching.

The assured who carries the risk for successful launching is under his contract normally liable to complete the launching. If it is sufficient to carry out minor or temporary repairs to the dock or other facilities used for launching in order to complete the launching, the cover under this Clause is limited to such cost. Any costs in excess of this in order to repair such facilities are not covered by the construction risks insurance, but may be covered under the assured's or co-insured facility owner's property insurance. Alternatively, it will be for their own retention in the absence of such insurance cover.

Clause 18-96. Costs of removal of wreck and debris

This Clause was new in 2016. It provides cover for the assured's legal or contractual liability for the costs of removal of wreckage or debris of property insured under this Section which is lost as a result of a casualty. Compared with the cover under Cl. 19-19, which covers "necessary removal of wrecks", Cl. 18-96 covers "the assured's liability for costs of removal of wreck and debris". The cover under Cl. 18-96 is both narrower and wider than the cover under Cl. 19-19.

It is narrower in the sense that it does not cover removal costs that is only necessary in order to clear the assured's own property, but for which the assured has no liability towards any third party. In the same way as presupposed in Cl. 18-95, the assured may have a liability towards his contracting party to complete the Project. If removal of wreck and debris is necessary in order to comply with contract obligations to complete the Project, then there is a liability covered under Cl. 18-96. The same will apply if the assured is obliged to remove wreck and debris in order to complete other projects or contracts entered into. But if the wreck or debris removal is only necessary to be able to enter into new contracts, there will be no legal liability involved but certainly a commercial need to incur the costs in

order to continue the business. The latter would have been covered under Cl. 19-19 as expressly explained in the Commentary to this Clause.

Cl. 18-96 is on the other hand wider than the cover under Cl. 19-19 in the sense that liability towards third parties to remove the wreck and debris will be comprised by Cl. 18-96. The Commentary to Cl. 19-19 mention as an example a situation where the wreck and debris causes obstruction to traffic. Any liability to remove the wreck and debris will be covered under Cl. 18-96, while such third party wreck removal liability falls outside the scope of cover under Cl. 19-19. Such liability is expressly covered if imposed by authorities under Cl. 19-20, but is not comprised by Cl. 18-98.

Clause 18-97. Liability of the assured arising from collision and striking

This Clause makes it expressly clear that Section 2-4 shall apply correspondingly and reference is made to the Commentary to Clauses 18-35 to 18-38.

Clause 18-98. Liability insurance

Clause 18-98 is verbatim identical with Cl. 19-20 and Cl. 19-21 as they were amended in 2016. The limitations of the liability insurance pursuant to Cl. 19-21 are included in Cl. 18-98 as sub-clauses 5 and 6. Reference is made to the Commentary to Cl. 19-20 and Cl. 19-21.

However, wreck removal liability is not comprised by Cl. 18-98, as opposed to Cl. 19-20, but covered under Cl. 18-96, cf. Cl. 18-98, sub-clause 5, letter (c).

The same goes for liability towards third parties for collision and striking, which is covered by Cl. 18-97. The "sister ship" collision and striking cover pursuant to Cl. 18-98, sub-clause 2, is maintained under the general liability cover in Cl. 18-98, cf. Cl. 19-20, sub-clause 2, and the Commentary thereto.

Clause 18-99. Delay in delivery

Section 4 shall apply correspondingly to delay in delivery of the Project caused by damage recoverable under Section 6-2. As provided in Cl. 18-94, a separate sum insured must be agreed as well as deductible and premium. For delay in delivery this means that the daily amount must be agreed, cf. Cl. 18-47 or Cl. 18-48, and the number of days of indemnity per casualty and in all, cf. Cl. 18-**43**, sub-clause **3**. The sum insured is the amount arrived at by multiplying the daily amount with the number of days insured in all for the insurance period. Deductible must be given as a period, i.e. a number of days, cf. Cl. 18-49.

If one casualty results in a delay recoverable under Cl. 18-99 and a second casualty occurs which does not extend the period of delay, meaning that repairs are carried out simultaneously,

Cl. 18-54 on simultaneous works applies correspondingly. Reference is made to the Commentary to Clauses 18-43 to 18-58.

Chapter 19
Builders' risks insurance

General

Chapter 19 previously aimed primarily at covering newbuildings, but practice in recent years has shown that the Chapter is increasingly also applied in connection with the rebuilding of ships and building of other units, where the parties and the insurer deem it most appropriate to apply Chapter 19. As a result, "newbuilding" has been replaced in the provisions by "subject-matter insured". The scope of Chapter 19 has thus in fact been widened. The insurance is generally taken out by the yard, but there is nothing to prevent it being taken out by the owner or buyer.

A new Clause has been introduced in Cl. 19-7 that deals with the escalation of the sum insured by up to 10% without the insurer's prior approval. There are corresponding provisions in the English Clauses, ICBR 01.06.1988 and MARCAR 01.09.2007, respectively.

A new provision has been added to Section 4 – Liability Insurance, which deals with the assured's liability for environmental damage. This provision has been included in Cl. 19-20 as a new sub-clause 4, and is based on a 2004 EU Directive which has subsequently been incorporated into the legislation of the individual countries.

The provisions concerning towage and removal of the subject-matter insured have now been placed under Section 5 – Supplementary covers, under a new Cl. 19-27. As a result, Cl. 19-6 – Removal plan has been deleted in its entirety. Towage of the subject-matter insured or components thereof is a key focus of the Clause, since towage is the form of removal that is most commonly used in the context of building risk. This is due to the change in production method that has taken place in the 2000s. More and more hulls/modules and Sections are being built at yards other than the outfitting yard (the assured), including yards outside the Nordic region (foreign yards). Until now, towage risk has often been covered separately under builders' risks insurance, whereas it will now be covered under a supplementary cover as part of the ordinary builders' risks insurance.

The Clause also covers transport of the subject-matter insured or components thereof on board a ship, during transport on land or by air.

In addition to the provisions of Chapter 19, builders' risks insurance is also subject to the provisions of Chapters 1 to 9 of the general part of the Plan and the provisions of Chapters 10 to 12, insofar as this is evident from Chapter 19, Section 2.

Section 1
Common provisions

Clause 19-1. Perils covered/Ref. Clause 2-8, cf. Clause 2-10

This Commentary was amended in the 2013 Plan.

Cl. 19-1 applies to marine perils, cf. Cl. 2-8, and to strikes and lockouts. If the assured wishes to take out cover against riots, sabotage, piracy and mutiny, it must be done under Section 6 – Supplementary cover for war perils. This cover applies from the time the subject-matter insured has been launched.

The cover against strikes and lockouts must be seen in conjunction with the fact that the builders' risks insurance is a hull insurance, or where relevant, a liability insurance for the yard. The insurer will therefore only become liable if a strike or lockout results in damage to the subject-matter insured or components thereof, materials etc., or in the event the yard becomes liable for damage inflicted on a third party. The fact that a strike or lockout results in a delay is not sufficient to trigger the right to indemnification under the builders' risks insurance.

Clause 19-2. Insurance period/Ref. Clause 1-5

The provision and the commentaries were amended in the 2013 Plan. The term "newbuilding" is replaced with "subject-matter insured" because practice in recent years has shown that the Chapter is increasingly also applied in connection with the rebuilding of ships and building of other units. Further, the wording is made more accurate by replacing the term "takeover" with "delivery", and "taken over" with "taken delivery".

Sub-clause 1, first sentence, states that the insurance is terminated as from the delivery date stated in the building contract. However, the first sentence seen in conjunction with the *second sentence* entails that the insurance remains in effect until the buyer has in actual fact taken delivery of the subject-matter insured, provided this takes place before expiry of the time-limit of nine months under sub-clause 3. The primary significance of the point of departure in the first sentence is therefore that, in the event of an extension beyond the date of delivery stipulated in the building contract, the insurer is entitled to an additional premium as established in the insurance contract. If delivery takes place before the stipulated delivery date, the assured will, on the other hand, be entitled to a return of premium, cf. Cl. 6-5.

To ensure continuous insurance cover, therefore, the basic principle has been adopted that the insurance remains in effect until delivery, regardless of whether the subject-matter insured is ready and regardless of whether the delivery date under the building contract has been met. If the parties agree to postpone the originally agreed date of delivery because of additional work, or because the yard is delayed, the builders' risks cover therefore remains in effect until the delivery actually takes place, provided this happens within nine months, cf. sub-clause 3. However, as mentioned, the insurer is entitled to an additional premium.

Normally, the building contract will contain a specification of the date of delivery. If no such agreement has been entered into, the delivery date will depend on the parties' actions, assessed against the background of general principles of contract law and the provisions of the building contract in general.

It is conceivable that the hull insurance under the agreed conditions may come into force before the builders' risks insurance terminates, for example in the event of late delivery. In that event, the rules relating to double insurance shall be applied, cf. Cl. 2-6 and Cl. 2-7.

Sub-clause 2 states that the insurance is extended automatically subject to an additional premium as agreed in the insurance contract if the buyer has not taken delivery of the subject-matter insured. The extension lasts until another buyer has in actual fact taken delivery of the subject-matter insured.

Here too, however, a time-limit of nine months under sub-clause 3 shall apply.

If the original buyer takes delivery of the subject-matter insured after first having refused to take delivery, sub-clause 1 regulates the termination of the insurance.

If the yard builds the subject-matter insured for its own account, the insurance must be adjusted accordingly. The parties must in that event conclude a special agreement about the insurance period.

Sub-clause 3 stipulates a maximum period for how long the supplementary cover will remain in effect without a separate agreement, viz. up to nine months after the takeover date in the building contract.

Clause 19-2A. Premium in the event of total loss

This Clause was added in 2016 and corresponds to Cl. 18-83.

The combined effect of Cl. 6-3, cf. Cl. 1-5, sub-clause 4, is that for insurance contracts attaching for more than one year, the insurer would be entitled to only one year premium in case he pays the sum insured as a result of total loss, constructive total loss or payment pursuant to Cl. 4-21. For subject-

matters insured pursuant to Chapter 19, Cl. 19-2A sets Cl. 6-3 aside and provides that the insurer is entitled to the entire agreed premium if the insurer compensates for total loss pursuant to Cl. 19-13, sub-clause 1. If so, the project is completed and pursuant to Cl. 19-13 the assured is entitled to payment of the whole sum insured limited to the insurable value calculated according to Cl. 19-10, sub-clause 1, if the latter is the lesser amount. Cl. 1-5, sub-clause 4, is not applicable as none of the clauses in Chapter 19 is listed therein. Therefore, the entire agreed premium is the whole premium for the total insurance period even if this period is longer than one year.

Sub-clause 2 provides that the insurer is only entitled to a proportion of the entire agreed premium if the insurer compensates for total loss pursuant to Cl. 19-13, sub-clause 2. If so, the project is not completed and pursuant to Cl. 19-13, sub-clause 2, the assured is only entitled to be compensated the insurable value calculated according to Cl. 19-10, sub-clause 2. This is in short the value of the subject-matter insured as far as it has been completed at the time when it is deemed to be a total loss, see further the Commentary to Cl. 19-13 and Cl. 19-10. This compensation will be lower than the sum insured, which normally will be agreed to the same amount as the total costs of the completed project. The proportion of the entire agreed premium payable under sub-clause 2 is the proportion corresponding to the ratio between the compensation paid and the sum insured. If the subject-matter insured is deemed a total loss after it is 50% completed and the compensation paid is e.g. 50% of the sum insured, then the insurer is entitled to 50% of the entire agreed premium.

Clause 19-3. Co-insurance/Ref. Clause 8-1

The Commentary was amended in the 2013 Plan.

The subject-matter insured will normally be built according to a building contract entered into between the yard and the buyer. In order to safeguard the interests of both parties in the subject-matter insured and components/parts to be incorporated in the subject-matter insured, it is therefore necessary for the insurance to be for the benefit of both the yard and the buyer. Normally, it will also follow from the shipbuilding contract that one of the parties, usually the yard, is required to take out insurance. This obligation to take out insurance normally also comprises the buyer's deliveries in the form of paid instalments and deliveries of equipment. This means that the buyer will also have a direct claim against the insurer in the event of a total loss as far as instalments and the value of delivered equipment are concerned. In relation to this type of contractual regulation as well, the builders' risks conditions must therefore cover the interests of both parties.

The conditions are based on a normal situation where the yard is the person effecting the insurance and the buyer is given the status of co-insured according to Cl. 8-1, cf. *first sentence.* This means that both the yard and the buyer will have the status of assured and be entitled to compensation for their economic interest in the subject-matter insured to the extent that this follows from the conditions.

Only the yard takes out the insurance that is secured under Chapter 19. In principle, the insurance does not comprise the subcontractors, cf. the fact that the co-insurance provision in Cl. 19-3 applies only to the buyer. If it is desirable for the insurance also to comprise the subcontractors' interests, it is therefore necessary to take out a separate co-insurance according to Chapter 8. In that event it is also necessary to ensure that the place of insurance as agreed under Cl. 19-5, sub-clause 2, includes the subcontractor's premises.

The insurance is effected for the benefit of the yard as the person effecting the insurance to the extent that the yard bears the risk for the subject-matter insured and components thereof, etc., when a casualty occurs. Normally, the risk transfers to the buyer upon delivery of the subject-matter insured. Until delivery has taken place, the yard bears the risk for the subject-matter insured. If the subject-matter insured is totally destroyed with the effect that the yard's duty to deliver is terminated, the yard must therefore refund to the buyer the instalments on the contract price which the latter has paid during the period of construction. The "total-loss risk" for the yard therefore consists in the investments that it has made in the subject-matter insured being lost without the contract price, or a proportion thereof, being recoverable from the buyer. In addition the yard bears the risk of partial damage, which consists in the yard having to repair, at its own expense, any damage which the subject-matter insured sustains in connection with less extensive accidents before the risk has passed to the buyer.

The co-insurance of the buyer covers the buyer's economic interest as defined through the building contract. If the buyer is required, for his own account, to procure certain components, equipment or materials to be incorporated in the subject-matter insured, the buyer's status as co-insured entails that these are included in the builders' risks insurance, provided that this is set out in the insurance contract or is otherwise indicated by the conditions. However, the buyer´s deliveries (often referred to as "OFE" – Owner Furnished Equipment) are only covered by the insurance from the time they arrive in the builder's yard in the port where the yard is located, cf. Cl. 19-5. If the buyer´s deliveries are delivered directly on board the subject-matter insured and the latter is outside the place of insurance, the buyer´s deliveries are covered from the time they arrive on board the subject-matter insured. However, this is subject to the condition that the buyer's deliveries are covered by the insurance, cf. Cl. 19-9 (b).

In addition to the risk for the buyer´s own deliveries, the co-insurance comprises the buyer's interest in a refund of instalments paid on the contract price in the event of a total loss. Prior to delivery, risk relating to the subject-matter insured will normally be borne by the yard. This means that the yard must refund instalments paid in the event of a total loss. However, in exceptional cases it is conceivable that the buyer bears the risk for loss of the object of the contract prior to delivery, in which case this interest will be covered. This is also the case if the insurance period is extended

beyond the date of delivery so that the risk for the subject-matter insured has passed to the buyer. However, the buyer's position as co-insured must also give him a direct claim against the insurer in the event of a total loss, even if this is the yard's risk. This is of significance if the yard is insolvent so that the insurance compensation would in its entirety have gone to the bankruptcy estate, while the buyer would have had to be content with a dividend claim. The co-insurance will therefore ensure that the yard, or its bankrupt estate, does not receive any total-loss compensation without the buyer at the same time being refunded his advance payments.

Co-insurance of the buyer for the instalments paid on the contract price is, on the other hand, only valid if he has made the payments himself, or if they were paid by others on his behalf. Other intervening payers will not receive a corresponding automatic status as co-insured.

The fact that the buyer is co-insured "under Cl. 8-1" means that his ranking right against the insurer will be no better than that of the yard. This tallies with Cl. 19-3, sub-clause 2, of the conditions. If the buyer wants a better cover in the form of an independent co-insurance, he must take out co-insurance under Cl. 8-4.

As mentioned above, Cl. 19-3 is based on the normal situation where the yard is the person effecting the insurance. However, it is conceivable that the buyer might want to take out the insurance himself, e.g. because he has the title to the subject-matter insured. Such procedure is normal in offshore insurance. In that event, a separate agreement must be concluded if the yard is to be co-insured.

The cover of mortgagees is effected in accordance with the general rules of the Plan: see Chapter 7.

The *second sentence* states that the co-insurance does not apply to the expense coverage according to Section 3. The buyer himself must also arrange for separate insurance cover for any additional expenses incurred in connection with an unsuccessful launching or the removal of the subject-matter insured.

Under sub-clause 2, the co-insurance also applies to liability under Section 4, i.e. liability which the buyer may incur as a result of employees or management's wrongful acts in respect of a third party in connection with the implementation of the building project.

Liability cover under the builders' risks insurance is subsidiary to any other liability insurances taken out by the buyer.

Clause 19-4. Transfer of the building contract/Ref. Clause 3-21

It has been made some editorial amendments in the Commentary of the 2013 Plan.

This Clause states that the insurance will terminate if the building contract is transferred to a new yard. In the Plan, a distinction is made between a transfer to a new buyer and a transfer to a new yard. If the building contract is transferred to a new yard, the insurance will terminate. If the yard is the person effecting the insurance and the owner, the solution follows from Cl. 3-21. But the rule must apply also if the buyer is the person effecting the insurance and the owner of the subject-matter insured, and the yard is co-insured. Such transfer must be regarded as a change of ownership according to Cl. 3-21. Furthermore, the termination of the insurance will normally follow from Cl. 19-5 concerning place of insurance, because on transfer of the building contract to a new yard, the subject-matter insured will have to be moved to the new yard and will thereby move outside the place of insurance.

The insurance continues to be in effect if the building contract is transferred to a new buyer. There is no requirement that the insurer must be notified of the transfer, but the insurer will normally be notified as a co-insured party will be changed.

The rule that the insurance shall remain in effect even if the buyer transfers the building contract is subject to the condition that it is the yard, and not the buyer, who is the owner of the subject-matter insured. If it is the buyer who is the owner, it is stated in Cl. 3-21 that the insurance will terminate if the buyer transfers the building contract. This applies both in relation to the new buyer and in relation to the yard. In such cases, if the new buyer and possibly the yard, want the insurance to continue, this will have to be agreed with the insurer before the transfer, possibly against a payment of additional premium.

Clause 19-5. Place of insurance

Cl. 19-5 sub-clause 1 (b) was amended in the 2013 Plan.

This provision defines the geographical scope of the insurance. *Sub-clause 1 (a)* delimits the insurance to the builder's yard or other premises in the port where the yard is situated and transport between these areas. A shipyard will often have its activities spread over a number of different places, partly in the form of warehouses and factories close to the building berths, partly in the sense that its building berths are located at different places within the same port. It is therefore practical that those parts and materials that are intended for the subject-matter insured are covered by the insurance, regardless of where they are located within the yard's premises or areas, provided that it is in the same port. If parts of the subject-matter insured are to be built in a different port, however, this will fall outside the scope of the insurance, cf. the wording the builder's yard or other premises "in the port where the yard is situated". In that event, the yard will either have to extend the cover by a separate agreement under sub-clause 2, or take out a separate insurance.

"Local" transport within the areas of the builder's yard situated in the same port is in principle also covered by the insurance. If the parts or the materials are made or stored relatively close to the building berth, it would be unpractical if a separate insurance had to be taken out for each individual transport to the building site. If the parts have to be sent to a department of the yard situated in another port, the transport risk should, however, be evaluated separately, cf. sub-clause 2, or be covered by a separate insurance.

On the other hand, the insurance does not cover transport of parts from subcontractors to the yard. This applies regardless of whether it is the yard that has ordered the parts, or they are delivered by the buyer. Parts delivered to the yard are included in the insurance once they are in the builder's yard, cf. sub-clause (a). Where the yard has ordered the main engine or other parts for the ship from a subcontractor, the risk will pass to the yard when the part is "delivered" according to the law pertaining to the sale of goods. The time and place will depend on the terms of delivery that have been agreed.

Sub-clause (b) was amended in the 2013 Plan. Previous versions only stated that the insurance was in effect during trial runs. It now states that the insurance comprises trial runs carried out within the area specified by the certificate, including the trading area. If the subject-matter insured proceeds beyond the specified trading limits, the insurance cover is suspended. However, the insurance will take effect again when the subject-matter insured comes within the relevant area.

For subject-matters insured that are registered under Norwegian flag, such provisional certificates are issued by the Norwegian Maritime Directorate. In the past, the Maritime Directorate also issued provisional certificates for foreign newbuildings that were built in Norway, but that arrangement was terminated, cf. Circular 12/97. Today it is therefore the flag state of the subject-matter insured that must draw up such certificates. Different rules may apply for other countries. It was therefore discussed whether the certificate requirement would lead to problems, and whether it would be better to have an absolute limit of 250 nautical miles. The reason why it was nevertheless decided to base the trading limits on the provisional certificates is partly that the certificate requirement is absolutely fundamental in relation to the operation of the ship, and partly that the buyer and the yard must therefore be expected to ensure that these papers are in order. Additionally, a limit of 250 nautical miles may cause considerable problems in relation to a provisional certificate that prescribes a narrower trading area, because it will then be unclear whether the insurance is suspended whenever the subject-matter insured proceeds beyond the limits stated in the certificate, but stays within 250 nautical miles.

The provision in sub-clause (b) must be seen in conjunction with Cl. 3-15 relating to trading areas. If the trading area indicated in the subject-matter insured's provisional certificates comprises areas which entail an additional premium according to Cl. 3-15, sub-clause 2, this provision must apply to

the builders' risks insurance. In such case, the insurer must be notified if the ship has proceeded beyond the ordinary trading areas, and is entitled to demand an additional premium or other conditions. If the assured fails to notify the insurer, Cl. 3-15, sub-clause 2, second and third sentences, concerning an additional deductible shall apply in the event of a casualty.

Sub-clause 2 states that the insurance will also apply elsewhere than in the building port, provided this is specifically agreed and set out in the insurance contract. Normally the insurer will consent to such extension of the cover for the building of sections at the assured's own yards other than the main yard, but not for components manufactured and purchased by subcontractors. As long as the component is the subcontractor's risk, the yard will not have any need for such additional insurance. However, it is conceivable that the yard would be interested in postponing the collection of the relevant component from the subcontractor until the work on the subject-matter insured has progressed so far as to allow the fitting of the component. In such case, it is not unusual that the yard will have to bear the risk for the component while it is stored by the supplier. The yard will then need supplementary cover in the same way as for transport of the object from the supplier's factory, cf. above.

If it is necessary to move the subject-matter insured outside the areas specified in Cl. 19-5, Cl. 19-27 regarding towage and removal shall apply.

The buyer is co-insured according to Cl. 19-3, and the buyer's deliveries will be covered by the insurance to the extent that they are stated in the insurance contract, or it is evident in some other way that the deliveries are included, cf. Cl. 19-9. However, the question as to where the deliveries must be located in order to be included must, like the other objects covered by the insurance, be resolved through the provision in Cl. 19-5 and the insurance contract's specification, if any, of the geographical scope of application of the insurance.

Clause 19-6. The sum insured as the limit of the liability of the insurer/ Ref. Clause 4-18 and Clause 4-19

This provision entails that the insurer may become liable for up to three sums insured: one sum insured for loss of or damage to the subject-matter insured according to Section 2, one sum insured for loss in connection with measures to prevent or minimise a casualty covered under Section 2, and one sum insured for additional costs in connection with an unsuccessful launching and costs of wreck removal (Section 3), including any liability covered under Section 4. According to Cl. 4-18, sub-clause 1, third sentence, any unused sum insured to cover loss of or damage to the subject-matter insured may furthermore be "transferred" to cover measures to avert or minimise such loss.

Clause 19-7. Escalation of the sum insured

This Clause was new in the 2013 Plan.

The rationale for this Clause is that the assured must be able to be certain that he is covered even if the contract price increases during the building process by, for instance, 5%. At present, insurers are only bound to a maximum of the sum insured fixed in the insurance certificate; in principle, any increase must be approved by the insurers. This is usually solved in practice by agreeing on a certain amount of "leeway", either in the form of framework agreements or in the individual insurance certificate. It has been decided to introduce this flexibility into this Chapter, as has been done in ICBR 01.06.1988 and MARCAR 01.09.2007.

Given the current situation, a 10% automatic increase is sufficient. Imposing a higher fixed limit could result in the insurer's cover tying up substantial capacity that remains "unused" throughout the project period. If a need arises for an increase of more than 10%, this issue should be resolved on a case-by-case basis.

Clause 19-8. Deductible

Sub-clause 1 of the Clause states that the deductible must be specified in the insurance contract, and that if the one and the same casualty entitles the assured to compensation under Sections 2, 3 and 4, only one deductible applies.

Sub-clause 2 emphasizes that no deductible shall apply to total loss, costs in connection with the claims settlement or costs to avert or minimise a loss. This is in accordance with the General Plan system.

Section 2
Loss of or damage to the subject-matter insured

Clause 19-9. Objects insured/Ref. Clause 10-1

The provision covers the financial effort made by the yard and the buyer at any given time in order to complete the subject-matter insured. Sub-clause 1 (a) and (c) and the commentaries were amended in the 2013 Plan.

Sub-clause (a). The term "subject-matter insured" means whatever at any time is being built, and components, equipment and materials manufactured or procured for the subject-matter insured. This sentence refers to the yard's operations.

If the subject-matter insured consists of several sections/modules that are being built at several different yards, the insurance basically only covers the part of the subject-matter insured that is built in the yard of the person effecting the insurance, cf. Cl. 19-5, sub-clause 1 (a). If the parties want

insurance cover which also comprises sections/modules built elsewhere, a separate agreement must be made for an extension of the place of insurance according to Cl. 19-5, sub-clause 2. In that event, it may also be relevant to give the subcontractor status as co-insured, cf. the comments on Cl. 19-3.

Sub-clause (b), refers to the buyer, and specifies that the buyer's delivery of components, equipment and materials is only covered by the insurance if this is stated in the insurance contract or if it transpires from conditions in general.

If the sum insured is insufficient to cover the interests of both the yard and the buyer, it will, however, be difficult to decide whether this is due to the fact that the sum insured has been calculated too low in relation to the overall values, or to the fact that the buyer's interest in materials and components delivered shall not be comprised. A clearer procedure is therefore for the insurance contract to state to what extent the buyer's components and materials shall be covered. On the other hand, such a rule may become too rigid and lead to unreasonable results if the yard were to forget to state the buyer's deliveries in the insurance contract despite the intention for them to be included. If the yard is in such cases obliged under the building contract to insure the buyer's deliveries, and the insurer invokes the fact that the insurance contract does not contain any information to this effect, the yard will incur liability for the omission vis-à-vis the buyer. In order to avoid such an outcome, sub-clause (b) states that the deliveries are included, also if this "transpires from circumstances in general". This may for example be the case if the buyer's deliveries are included in the contract price and the contract price is identical to the sum insured. On the other hand, it may have been understood between the parties that the buyer shall take out his own insurance, for example where it is a question of comprehensive seismic equipment of great value. In such cases the buyer's deliveries will not be included.

Where the buyer's deliveries are included in the insurance in this way, it is important that the yard ensures that the sum insured is sufficient to cover both the yard's and the buyer's deliveries. If the sum insured is too low, the result will be that the yard is underinsured for its own deliveries and furthermore incurs a liability to the buyer for the latter's deliveries to the extent that the yard is obliged to keep these insured.

Sub-clause (c) includes the yard's costs in connection with the drawing and other planning of the subject-matter insured in the cover. Here the object insured is not the specific drawings, models, etc. - these can normally be reconstructed at low cost if they are destroyed - but the general costs incurred by the yard in its own planning department and to hire consultants in connection with the planning of the subject-matter insured. If the building contract is terminated, these costs will normally be wasted.

If the subject-matter insured is part of a series which the yard is going to build, the costs can be distributed over all the subject-matters insured in the series. If it is quite clear that the existing plans will be used in connection with the building of subsequent subject-matters insured, it will be possible

to say that "the yard's costs in connection with the drawing and other planning of the subject-matter insured" only comprise the proportion of the costs which come under the builder´s risk insurance in question. However, if this is not perfectly clear, no deduction shall be made from the compensation on account of the potential value which the plans may have for the execution of subsequent contracts.

Sub-clause (d). Under the conditions, deck and engine accessories were covered in addition to bunkers and lubricating oil. This cover now follows from the use of the term "equipment" in sub-clause (b). This means that it is sufficient that the equipment has been "procured for the subject-matter insured"; it need not be on board. The conditions also stipulated that the said objects, etc., must belong to the yard. However, bunkers and lubricating oil belonging to the buyer should also be covered.

The rules in sub-clause 1 must be compared with Cl. 1-5, first sentence, regarding when the insurance period starts. The yard's investments in materials etc. will only be covered from that point in time. However, there is obviously nothing to prevent an agreement that the investments shall be insured from an earlier point in time.

Clause 19-10. Insurable value

The Clause defines the insurable value in builders' risks insurance. Some editorial amendments were made in the Commentary of the 2013 Plan.

Sub-clause 1 defines the insurable value when the subject-matter insured is ready for delivery. The basis for the insurable value is the contract price originally agreed less subsequently agreed deductions. The wording "subsequently agreed deductions" concerns changes which result in a reduction in the contract price. Normally the insurer will be notified of such deductions for the purpose of obtaining a reduction in premium. In that event, they will also be stated in the insurance contract. To avoid that the insurable value exceeds the assured's real loss, however, it is necessary to take such deductions into account in the calculation of the insurable value, regardless of whether or not the insurer has been notified.

The wording "later agreed additional amounts" in sub-clause (b) refers to variation work in relation to the original contract which results in an increase in the price. The consequence of such variation work/additions not having been reported is that this increase in the building contract will not be covered by the builder´s risk insurance. It follows from *sub-clause (c),* that the value of the buyer's deliveries is also included in the insurable value. Under Cl. 19-9 (b), such deliveries are included in the insurance if this is set out in the insurance contract or transpires from conditions in general. In such case, it is logical that the value of these deliveries is also stated in the insurance contract and included in the insurable value.

If the insurable value is based on the contract price with agreed additions, the yard's profit will be included. On the other hand, such a definition of the insurable value does not comprise the buyer's profit on the building contract arising from the difference between the contract price with additions, etc., and the market value of the subject-matter insured. *Sub-clause 2* defines the insurable value before the subject-matter insured is ready for delivery. The provision is based on the fact that the insurable value under the builders' risks insurance increases as the project progresses. Deductions shall be made in the insurable value calculated according to sub-clause 1 for work that has not been carried out and components and materials which have not been procured or manufactured for the subject-matter insured, cf. *sub-clauses (a) and (b)*. Components and materials which have been procured shall, however, be included, provided that they are within the place of insurance, cf. Cl. 19-5.

However, the definition of the insurable value under sub-clause 2 does not afford cover for the yard's profit on the investments which have not yet been made. In order to obtain the full profit, the contract must therefore be executed by rebuilding the subject-matter insured. However, this is conditional on the profit being specified as a separate item of the sum insured, which it is currently not customary to do.

Clause 19-11. Total loss in the event of condemnation

The definition of total loss and the determination of compensation in the event of total loss are combined in a joint Clause, Cl. **4-1**. In Chapter 19 the rules are split into three clauses. Cl. 19-11 and Cl. 19-12 define total loss and thus correspond to Cl. 11-1, Cl. 11-3 and Cl. 11-7 of the Plan. Compensation in the event of total loss is regulated in Cl. 19-13, which corresponds to Cl. 4-1 of the Plan, but is more complicated.

This Clause determines a rule regarding condemnation and is additional to the total-loss rule in Cl. 19-12 relating to the situation where the yard's obligation to deliver is terminated. The purpose is to obtain a simpler total-loss rule under which it is not necessary to decide whether extensive damage to the subject-matter insured results in the termination of the obligation to deliver because of failed contractual assumptions. In the event of extensive damage to the subject-matter insured, the condemnation rule is now directly applicable.

The assured is entitled to compensation for total loss if the subject-matter insured has such extensive damage that the costs of repairs will constitute more than 100% of the sum insured. This condemnation limit differs from the corresponding rule in the hull conditions, where the condemnation limit is set at 80% of the insurable value or the value of the subject-matter insured in repaired condition. The reason is that Cl. 19-11 does not contain any corrective in the event of the market value being higher than the sum insured, making a higher limit necessary.

If the subject-matter insured is damaged without this constituting a total loss, settlement shall be effected according to the rules relating to damage contained in Cl. 19-14 *et seq.*

Clause 19-12. Total loss where the yard's obligation to deliver no longer applies

This Clause ties total loss under the builders' risks insurance to the termination of the yard's obligation to deliver under the building contract due to damage to the subject-matters insured or the yard. However, due to the fact that a condemnation rule has now also been introduced, cf. Cl. 19-11, the total-loss rule in Cl. 19-12 has become less relevant.

The Clause specifies that it is only the termination of "the yard's" obligation to deliver which triggers the right to the total-loss compensation. It is not sufficient that the parties, in connection with an incident of damage, agree that the contract shall not be executed, or that the buyer has stipulated in the building contract a unilateral cancellation right in case of delay due to damage.

The question as to when the building contract is terminated must be decided on the basis of the building contract, cf. e.g. Cl. 2, sub-clauses 2 and 3, of the 1981 Contract relating to cases of force majeure, supplemented by general non-statutory rules on force majeure and failed contractual assumptions. A total loss will only exist if the damage to the subject-matter insured or the yard is so extensive that the yard may demand to be released from the obligation to fulfil the contract on the basis of these rules. The force-majeure concept in the 1981 Contract presupposes that the damage to the subject-matter insured or the yard has made it impossible, or practically impossible, to fulfil the contract. This question is discussed in further detail in Knudtzon: "*Den nye kontrakt for bygging av skip ved norske verksteder, Nordisk Skipsrederforenings medlemsblad 1984 A",* pp. 19 *et seq*. ("The new contract for the building of ships at Norwegian shipyards, the Northern Shipowners' Defence Club's bulletin 1984 A").

A total loss is contingent on "the obligation to deliver" being terminated "as a result of" the said circumstances. The insurer is not liable if the obligation to deliver is terminated for other reasons, e.g. where the yard has the right to cancel without any loss or damage as mentioned having occurred. Nor will the termination of the obligation to deliver due to the yard's failure to meet its obligations trigger the right to total-loss compensation. This is a strictly commercial risk which cannot be covered by insurance, cf. also the exclusion for insolvency in Cl. 2-8 (**d**).

The Clause specifies three reasons for the termination of the yard´s obligation to deliver: damage to the subject-matter insured itself, damage to components of the subject-matter insured, or damage to the yard, cf. *sub-clauses (a) and (b)*. The decisive factor is that the actual subject-matter insured is so extensively damaged that the yard cannot be expected to rebuild it, or that the yard itself suffers such extensive damage that it must be released from its obligations, cf. above.

According to *sub-clause (c)*, a total loss furthermore occurs when the obligation to deliver is terminated due to similar circumstances for a subcontractor, provided that manufacturing at the premises of the relevant subcontractor is covered according to Cl.19-5, sub-clause 2.

Clause 19-13. Compensation in the event of a total loss/Ref. Clause 4-1

Sub-clause 1 regulates the insurer's liability for damages in the event of total loss when the subject-matter insured is ready for delivery. The basis for the total-loss settlement may in such cases be either the condemnation rule in Cl. 19-11, or the rule in Cl. 19-12 concerning the termination of the obligation to deliver. In that event, the insurer covers the sum insured, but not in excess of the insurable value, cf. Cl. 19-10.

In addition to the sum insured, the insurer shall in the event of total loss cover costs and other losses as set out in Cl. 4-19.

According to Cl. 19-10, the insurable value is defined as the original contractual price with any deductions or additions and the value of the buyer's deliveries. All of the elements mentioned must therefore be included in the agreed sum insured. If a fixed sum insured has been agreed at the inception of the insurance and notice of additional work is later given to the insurer, the assured must therefore ensure that the sum insured is increased correspondingly. If not, the sum insured will be lower than the insurable value at the time of loss and this will result in under-insurance, cf. Cl. 2-4.

In the same way the assured must ensure that the sum insured is reduced in the event of deductions resulting from parts of the work not being carried out. If this is not done, the sum insured will be higher than the insurable value, and the compensation will be limited to the insurable value. In that event, the assured will have paid premium on a larger amount than what he can recover under the insurance.

Sub-clause 2 defines the insurer's liability for damages in the event of a total loss before the subject-matter insured is ready for delivery. The insurer's liability for damages in this case constitutes the proportion of the sum insured which corresponds to the insurable value calculated according to Cl. 19-10, sub-clause 2. The calculation of the insurable value in this case is commented on in more detail under Cl. 19-10, sub-clause 2. If the total loss here only affects part of the subject-matter insured, the insurer's liability must be adjusted accordingly. If the sum insured is equivalent to the insurable value, the entire insurable value under Cl. 19-10, sub-clause 2, will be payable. However, if the sum insured is less, the assured shall only receive the proportionate share which corresponds to the ratio between the sum insured and the insurable value.

The rule that a total loss has occurred when the yard's obligation to deliver is terminated because of damage to the yard or the premises of a subcontractor may result in the insurer having to cover the value of the subject-matter insured and components or materials procured for the same, even if both the subject-matter insured and the components are relatively, or even totally, undamaged. This may be the situation if the yard or a subcontractor sustains damage, e.g. in a fire or natural disaster, which does not affect the subject-matter insured, components or materials, and the damage is so extensive that it would be unreasonable to expect the yard to complete the building project. In that event, under sub-clause 2 in conjunction with the definition of the insurable value in Cl. 19-10, sub-clause 2, the assured will also recover compensation for the part of the subject-matter insured and materials or components which are undamaged, cf. the fact that deductions shall only be made from the insurable value for investments which have not been made. The reason is that where the obligation to deliver is terminated due to damage to the subject-matter insured or damage to the yard/the subcontractor's yard, it is clear that all the investments made are in principle lost for the assured. He should therefore receive compensation for these investments, even if the subject-matter insured and any components/ materials are wholly or partly undamaged. However, this is conditional on the components, equipment and materials being within the place of insurance, cf. Cl. 19-5.

On the other hand, in connection with the total loss settlement the insurer will take over the title to the subject-matter insured and any undamaged components or materials, cf. Cl. 5-19, sub-clause 1. The insurer can therefore utilize the market value which the subject-matter insured or the components may represent after the damage. If the buyer and the yard find it expedient to rebuild the subject-matter insured after payment of the total-loss claim, this is therefore conditional on the insurer agreeing with such a decision.

Under-insurance in the event of total loss before delivery now follows from Cl. 19-13, sub-clause 2, in that the insurer's liability is limited to the proportion of the sum insured which corresponds to the insurable value calculated according to Cl. 19-10, sub-clause 2. As regards total loss on delivery, however, the under-insurance principle, follows from Cl. 2-4 on under-insurance.

In practice, the buyer will normally have paid one or several instalments of the contract price, and these must be reimbursed when the yard's obligation to deliver is terminated due to a total loss. According to Cl. 19-3, the buyer shall be regarded as co-insured as far as the instalments paid are concerned and will in the event of a total loss acquire a direct claim against the insurer.

Clause 19-14. Damage/Ref. Chapter 12

This Clause was edited in 2016 in order to bring the text in line with the Commentary.

This provision refers to Chapter 12, which entails that if the subject-matter insured (or components and materials for the subject-matter insured) are damaged without this constituting a total loss, the insurer shall indemnify the costs by repairing the damage or re-acquiring lost objects. The costs of repairing the damage also comprise ordinary profit for the yard from such work. The repair work must in other words be calculated in the same way as if the yard had undertaken work paid by the hour for someone else, and the insurer shall indemnify the full amount. However, Cl. 12-1, sub-clause 2, to the effect that liability arises as and when the repair costs are incurred protects the buyer against a major compensation for damage being paid to the yard without the corresponding repair work being carried out.

It is conceivable that the damage can be repaired, but that the owner nevertheless demands new equipment rather than repairs, e.g. out of fear of delayed damage in connection with water damage to a generator. Here the insurer's liability must be tied to the yard's obligation vis-à-vis the buyer according to the building contract. If under the contract it is sufficient for the yard to carry out repairs, possibly combined with a warranty against future damage, the insurer's liability must be limited in the same way. If the yard, out of consideration for its customers or for other reasons, chooses to buy a new object rather than repair it, this must accordingly be of no concern to the insurer.

Cl. 12-3 regarding adequate maintenance, etc. shall be applied correspondingly in connection with the rebuilding/conversion of ships or other entities where the conditions set out in Chapter 19 are applied. This is now expressly stated in the text itself by limiting this exception to newbuildings only.

Clause 19-15. Limitation of the insurer's liability/Ref. Clause 12-1

The Commentary has been rewritten in the 2013 Plan. It is patterned on the definitions in Cl. 12-4, and much of the content must be seen in conjunction with the Commentary on this Clause. Cl. 12-4 deals with the terms "error in design" and "faulty material", and the terms in Cl. 19-15 must therefore have the same meaning, but account must be taken of the fact that Cl. 19-15 relates specifically to newbuildings or rebuilding/conversion projects at the building yard. Furthermore, Cl. 19-15 makes specific mention of "faulty workmanship".

Error in design

The term "design" refers to the entire process from the drawing of the component concerned, specification of types of material and dimensions, how the individual components of the subject-matter insured are produced/manufactured, structure/shape, the quality of the materials and the construction/composition of the components that eventually will constitute the subject-matter insured.

An error in design means that the subject-matter insured has deficiencies or defects because it has been wrongly designed or built. Such errors apply in particular in cases where a part or parts of the

subject-matter insured have been given the following characteristics or the following errors have been made:

1. An unsatisfactory shape, arrangement or function
2. A degree of strength that proves to be inadequate
3. An error in drawings of the individual parts
4. An error in the specification of types of material, dimensioning and strength
5. An error in the specification of the manufacturing procedure/the method used to manufacture the component and the choice of procedure/method.
6. An error in the execution of the process of manufacturing the part. If an incorrect specification of the manufacturing process has been given, the resulting defects must be regarded as errors in design. On the other hand, defects attributable to the fact that a performing link in the production process has failed to comply with the specifications given cannot be classified as errors in design. However, the definition of the term is by no means clear-cut.

An error in design can be subjective or objective

A subjective error in design means that the design is such that, in the light of current knowledge and standards, it is unsuitable and that this should have been evident. This thus constitutes a reproach to the assured for the choices that were made. In order for an error in design to be regarded as subjective, however, steps must have been taken to remedy the error before the subject-matter insured was delivered if the error had been discovered. An objective error in design means that the design is such that it appeared to be reasonable when it was chosen, but subsequently proved to be inadequate or sub-standard. This can, for instance, apply to new and untested materials.

Faulty material

The term “faulty material” implies that the material in a part of the subject-matter insured is of a quality inferior to the presupposed standard. These faults in material consist particularly of cases where the material in a part or parts of the subject-matter insured:

1. is of a quality inferior to materials that would otherwise have been chosen in accordance with good shipbuilding practice
2. is defective in the sense that the material used does not correspond to the specifications
3. is defective in terms of the structure and/or strength of the material. The material may be suitable, but has deteriorated, is inappropriate or unfit for its intended use.

Faulty material will normally be concealed in the sense that it is not detectable by a superficial examination. Detection will normally require more complex methods, such as material analyses, load tests, etc.

Consequently, the yard, too, will be unaware of the fault in material until it materialises in the form of damage. Faulty material thus refers to the inherent or original fault in the material, and not to a fault that is discovered at a later date. The faulty material must therefore have been present during the entire lifetime of the part. It is not, for instance, a question of faulty material when material used in the subject-matter insured has been weakened as a result of an earlier casualty. The quality deficiency may be due to a defect in casting or some other fault in the structure of the material which occurred during processing, or to the supplier of the material having delivered a quality which is not in accordance with the quoted specifications (e.g. the steel supplied is too brittle).

However, faulty material can also be caused by an external influence, such as when the part falls during processing in the workshop and sustains a flaw.

Faulty workmanship

Faulty workmanship will as a rule be related to work that is carried out on the subject-matter insured. This type of fault applies in particular when work on a part or parts of the subject-matter insured relates to the following:

1. an error in workmanship has occurred, such as when the material chosen, the dimensioning or the actual execution of the work is contrary to regulations, recognised norms and good ship-building practice;
2. an inferior quality of work/poor workmanship has been done by the building yard due to deficient quality, knowledge and technical execution.

The limitation with respect to faulty workmanship is due to fundamental doubts about covering the building yard's costs of rectifying a fault due simply to poor workmanship. Faulty "workmanship" has occurred, for instance, when the welding is not in compliance with the designer's regulations or generally recognized building standards.

Damage due simply to accidents during work, e.g. fire damage resulting from negligence during welding, or hull damage that occurs when the subject-matter insured is topples over due to inadequate support in the building dock, is not, however, to be regarded as "faulty workmanship".

It is also conceivable that faulty workmanship may be carried out which does not cause any direct physical damage to the subject-matter insured or its components, but which nevertheless gives rise to a loss for the insured. e.g. that the wrong type of propeller is installed and must later be replaced. Such losses also fall within the scope of the term "faulty workmanship" and are thus included in the exclusion.

The incorrect choice of material is also included in the term "faulty workmanship". This could, for instance, comprise the choice of the wrong steel quality or overly thin steel during the building process.

The limitations apply only to "costs of renewing or repairing the part or parts" which were not in proper condition due to the stated perils. This means that the exclusion applies only to the costs of repairing the part that is defective, i.e. the primary damage. In such case, the assured must cover the costs of renewing or repairing the part that was not in proper condition, while the insurer is liable for the consequential damage. If the subject-matter insured runs aground during the trial run due to faulty design or faulty workmanship as regards the steering gear, the grounding damage will thus be recoverable, but not the costs of repairing or replacing the steering gear.

Clause 19-16. Compensation for unrepaired damage/Ref. Clause 12-2

Sub-clause 1 deals with the parties' right to claim compensation for the damage upon expiry of the insurance period even if repairs have not been carried out. Whether the yard and/or the buyer has this right will depend on who owns the damaged interests.

Sub-clause 2 states that the compensation shall be calculated on the basis of a discretionary estimate of the cost of repairs upon termination of the insurance, limited to the reduction in price resulting from the damage. The provision concords with Cl. 12-2, sub-clause 2.

Clause 19-17. Costs incurred in order to save time/Ref. Clause 12-7, Clause 12-11 and Clause 12-12

This Clause was edited in 2016 so that loss of time appears as a new separate letter (c) in order to bring the lay-out in line with Cl. 18-93.

This clause deals with the cover of the yard's costs applied in order to expedite repairs. Such a rule is expedient also in builders' risks insurance because damage may have negative consequences both for the yard's possibility of timely performance of the building contract and for its overall building program. The cover of such costs follows from the reference in Cl. 19-14 to the rules in Chapter 12. Cl. 19-17 limits this cover as compared with what follows from Clauses 12-7, 12-11 and 12-12 by excluding from cover the 20% p.a. of the insurable value of the subject-matter insured.

If the yard has, in addition to the ordinary hull insurance under Section 2, also taken out insurance against the yard's loss of interest and daily penalties in the event of late delivery, this supplementary cover will only apply where the yard's loss exceeds the insurer's liability under Cl. 12-8. The yard's liability for loss of interest and daily penalties must thus be set off against the cover for extraordinary costs before the supplementary cover is triggered.

Section 3
Indemnification of additional costs incurred in an unsuccessful launching and costs of wreck removal

Clause 19-18. Additional costs incurred in an unsuccessful launching

This Commentary was rewritten in the 2013 Plan.

This Clause deals with the indemnification of additional costs in connection with unsuccessful launching. This means that the costs that are covered are additional to what is covered under the other conditions of the builders' risks insurance. An example might be damage to the building berth and/or slipway cranes in connection with a launch. The insurer covers the costs of repairing the berth and/or the cranes so that another launch can be made. If the slipway cranes are not used in connection with the launch, the damage is not covered by the builders' risks insurance. In that case, the damage must be covered by the yard's other insurances. The damage to the berth is covered insofar as the repairs are necessary for a new launch, but full repairs are not covered. This also applies to other parts of the yard's property/assets which need to be repaired in order to carry out a new launch.

Clause 19-19. Costs of wreck removal

This Commentary was rewritten in the 2013 Plan.

This Clause deals with the insurer's indemnification of costs incurred by the assured for the "necessary removal of wrecks". In this connection, "wreck" means the wreck of the subject-matter insured or its components. Removal is necessary when it is impossible for the yard to continue to operate without removing the wreck. Only costs related to the removal of the wreck from sites owned or used by the yard are recoverable, and only the expenses that exceed the value of what is removed, on condition that such costs are reasonable.

If the subject-matter insured/wreck causes an obstruction to traffic in areas belonging to or used by others, such as in a port area owned by the public authorities, removal costs must be covered as wreck removal liability under Cl.19-20.

Section 4
Liability insurance

Clause 19-20. Scope of the liability insurance

The provision was amended in the 2013 Plan. In sub-clause 1 the term "imposed" has been replaced by "required" and sub-clause 4 regarding the assured's liability for damage to the environment if the damage occurred in direct connection with the performance of the building contract is new.

The liability cover comprises the yard's liability to third parties. Additionally, the buyer is co-insured under this provision in order to ensure that he is covered if he has not taken out a separate liability insurance that covers liability in connection with the building project. If the yard has taken out the insurance, it therefore follows from Cl. 19-3 that the term "assured" in Cl. 19-20 comprises both the yard as the person effecting the insurance and the assured and the buyer as co-insured. If, however, the insurance is taken out by the buyer, the yard will not be co-insured according to Cl. 19-3 and will thus not be comprised by the liability part of the builders' risks insurance either. In such cases the yard must take out its own insurance or arrange to be co-insured under the buyer's cover.

The first *sentence* establishes that liability comprises personal injury and loss of life. The basis for liability is irrelevant; it may be liability based on fault for the yard's management, employer's liability or non-statutory strict liability. On the other hand, there is an important limitation to the requirement that the injury must have arisen in direct connection with the performance of the building contract, cf. below.

The issue of whether trial trips/delivery voyages are comprised by the insurance depends on whether they are carried out within the area specified by the certificate, including the trading area, cf. Cl. 19-5, sub-clause 1 (b). If this is the case, damage caused by the yard during such runs must be regarded as damage that has arisen "in direct connection with the execution of the building contract." Whether there are invited guests or others who are injured is irrelevant in this connection: see, however, the exclusion in Cl. 19-21, sub-clause 1 (a), in respect of the yard's own employees, cf. below. The same must be the case for injuries during transport to or from the subject-matter insured with another vessel to the extent that the yard becomes liable for such damage. Here the yard may incur transport liability if he owns or leases the vessel. If, however, the transport is handled by another carrier it will normally be that carrier, and not the assured, who will be liable.

The terms "personal injury" and "loss of life" are referred to in further detail in Cl. 17-34. Reference is therefore made to the comments on that provision.

The s*econd point* establishes the insurer's liability for property damage caused to a third party. That the object must belong to a "third party" means that damage to or loss of the yard's own objects is not covered. The term "third party" must be read as a "third party" here in relation to the yard or buyer as tort-feasor. If the yard causes damage to the buyer's property, this will in principle be comprised by the liability insurance. The same applies if the buyer causes damage to the yard's property. To the extent that such damage is covered by the hull conditions in Chapter 19, Sections 1, 2 or 5, the damage will, however, fall outside the scope of the liability insurance, cf. Cl. 19-21 (c). Reference is furthermore made to the comments on Cl. 17-35, sub-clause 1.

The *third point* concerns liability for removal of wrecks that is required by the authorities. In the 2013 Plan the word "imposed" was replaced with "required". The wreck-removal liability concords with the international liability according to IMO rules and comprises the assured's liability in connection with the raising, removal, destruction, marking or illumination of the subject-matter insured or parts thereof. Only liability imposed by the authorities, and thus not contractual liability, is covered. This also follows from Cl. 19-21, sub-clause 1 (e). Reference is furthermore made to Cl. 17-39 of the Commentary on coastal and fishing vessels.

Only the assured's legal liability for damages is covered. The yard must therefore be liable according to general rules of liability law determining the basis for liability, causation and loss in order to trigger payment of the insurance. If the yard out of consideration for its customers or for other reasons chooses to cover damage for which it does not have liability, this is irrelevant to the insurance.

A further condition is that the liability has arisen "in direct connection with the performance of the building contract". Like shipowner's liability insurance, liability insurance under a builders' risks cover is therefore tied directly to a specific subject-matter insured - i.e. in this connection a building contract. Liability for damages in connection with other building projects must be allocated to the builders' risks cover of these projects.

That liability arises "in direct connection with the performance of the building contract" means that liability is connected with the actual construction work or the handling of parts or materials intended for the relevant subject-matter insured. Liability in connection with the handling of materials or parts before it has been decided that these parts, etc., shall be used for the said subject-matter insured, accordingly falls outside the scope of cover and will have to be covered under a more general liability insurance for the yard or the buyer. The same must be the case for liability connected with the assured's general operations.

On the other hand, it is not a condition that liability arises in connection with the actual construction work. Liability arising during storage or transport of parts for the relevant subject-matter insured must also be covered, provided that this takes place within the place of insurance according to the insurance contract. Similarly, liability arising during a trial run or a delivery run within the place insured must be covered.

The provision in Cl. 19-20 must be seen in conjunction with the general rule regarding perils in Cl. 19-1. The insurance therefore applies to any marine peril and to the war perils strikes and lockouts. However, it does not cover the yard's liability for damages resulting from other war perils, unless a war-risk insurance has been effected under Section 6.

Sub-clause 2 deals with the insurer´s cover of damage to objects belonging to the yard resulting from collision or striking after the subject-matter insured has been launched. This provision must be seen in conjunction with the general sister-ships rule in Cl. 4-16 about the insurer's liability in the event of damage to objects belonging to the assured. If the subject-matter insured causes damage to objects belonging to the assured during or after launching, and this is attributable to circumstances for which the assured would have been liable if the damaged objects belonged to a third party, the insurer is liable to the assured according to Cl. 4-16 to the same extent as he would have had to cover the assured's liability to third parties. This now follows from the reference to Cl. 4-16 as regards damage from collision or striking following launching. The provision is worded such that the sister-ships rule shall not apply to any damage to the assured's own property other than what is specifically mentioned.

The fact that the liability cover in Section 4 has been extended to include buyer's liability if it is the yard that is effecting the insurance, cf. Cl. 19-3, entails that Cl. 4-16 shall also apply if the subject-matter insured causes damage to the buyer's property. However, this is hardly a very practical situation.

Cl. 4-16 does not cover the situation where the subject-matter insured causes damage to the buyer's property without the assured's conduct having given rise to liability. However, such damage should be covered by an ordinary property insurance taken out by the assured, and not under the builders' risks insurance, which concerns either damage to or loss of the subject-matter insured and components thereof, etc., or the assured's liability for damages.

Sub-clause 3 establishes that the insurer covers the assured's liability for bunker oil pollution damage in accordance with the provisions laid down in national legislation that are based on the provisions of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention). Through this provision, cover under the Plan is expanded to include all liability under the Bunkers Convention. This approach tallies with practice, where it has been customary for the parties to agree on a corresponding expansion of cover by incorporating a special clause in the insurance contract. The provision corresponds to Cl. 17-41.

Sub-clause 4 was new in the 2013 Plan.

Sub-clause 4 establishes that the insurer covers the assured's liability for damage to the environment. Vessels trading in the waters of the states in the European Economic Area are liable for damage to the environment pursuant to the rules of the EU Directive 2004/35CE of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. The purpose of the Directive is to establish a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy environmental damage. The Directive applies where environmental damage and damage to protected species and natural habitats are concerned, to occupational activities which

present a risk for human health or the environment. The Nordic countries have incorporated the rules of the Directive into their national legislation. In Denmark, the relevant acts are Act of 17 June 2008 No 466 relating to environmental damage (Lov om undersøgelse, forebyggelse og afhjælpning af miljøskader - Miljøskadeloven) and Act of 22 December 2006 No 1757 relating to environmental protection (lov om miljøbeskyttelse); in Finland, Act of 29 May 2009 No 383 relating to remedying certain environmental damage (Lag om avhjälpande av vissa miljöskador); in Norway, Act of 19 June 2009 No. 100 Relating to the Management of Biological, Geological and Landscape Diversity (Nature Diversity Act) – (Lov om forvaltning av naturens mangfold - naturmangfoldloven); and in Sweden, the Environmental Code of 11 June 1998 (Miljöbalken).

Examples of environmental damage that can give rise to a claim for environmental compensation include:

- A vessel, tow, etc. sails into waters that are too shallow and the keel damages a coral reef.
- A vessel, tow, etc. drifts into a wetlands area and runs aground. The vessel/hull and the rescue vessels that must enter the area destroy nesting sites and disturb the birds' food supply, with the result that the area is partly abandoned.

Environmental damage in the form of the discharge of bunkers is regulated in sub-clause 3 above.

Clause 19-21. Limitations on the liability insurance

Clause 19-21 was amended in 2016 to be verbatim the same as Cl. 18-98, sub-clauses 5 and 6. Apart from mere editorial amendments, the only amendment of substance is that the words "contractor or sub-contractor" were added in sub-clause 1, letters (a), (b) and (d).

Sub-clause 1 (a) excludes liability for personal injuries or loss of life of the yard's own employees. This exclusion is also extended to the employees of the yard's contractors or sub-contractors. For Norwegian yards this liability will normally be covered by the occupational injury insurance. In that event, it follows from sub-clause 2 that this liability falls outside the scope of liability insurance under the builders' risks insurance. It is nevertheless necessary to have a separate rule to cover foreign yards that do not have the type of insurance or social benefit schemes for their employees as mentioned in sub-clause 2. A person is "employed" by the assured if the yard, in addition to wages or salary, covers the employer's social security contributions for the person in question. The same applies to employees of the yard's contractors or-sub-contractors. A consultant with a consultant's fee and without any contract of employment is, by contrast, not employed.

Sub-clause 1 (b) excludes objects that belong to the yard's employees from the cover. This exclusion is also extended to belongings of employees of the yard's contractors or sub-contractors. The

exclusion is in accordance with the exclusion in sub-clause (a), and also with the provision in Cl. 17-35, sub-clause 2.

Sub-clause 1 (c) is patterned on Cl. 17-47, sub-clause 1 (a), but applies only to damage which is recoverable under Chapter 19, Sections 1, 2 and 5. This has to do with the fact that the liability insurance under the builders' risks insurance terminates concurrently with the termination of the hull insurance under Section 2 or Section 5, which means that there is no question of tying this liability cover to the ordinary hull insurance or other insurances on Plan conditions.

In accordance with the provisions in Chapter 17, this insurance is complementary in relation to other covers. It is therefore irrelevant whether the said insurance has in actual fact been effected; whether or not the loss could have been covered under the relevant insurance is the decisive factor.

Only losses which, according to their nature, could have been covered under the said insurances fall outside the liability cover under the builders' risks insurance. If the buyer suffers a loss which falls outside the scope of the said insurances, e.g. consequential loss, this must be covered under the liability conditions, provided that the requirements as regards adequate causation are satisfied.

Sub-clause 1 (d) contains a delimitation in relation to other liability insurances which the yard has taken out. If the liability is e.g. covered by an ordinary liability insurance taken out by the yard, this will prevail over the liability cover under the builders' risks insurance. However, this applies only if such liability insurance has been effected; on this point the cover is thus subsidiary, not complementary. The liability cover pursuant to Cl. 19-20 is also subsidiary to any liability insurance effected by the yard's contractors or sub-contractors.

According to *sub-clause 1 (e)*, furthermore, the insurer does not cover liability which is based exclusively on a contract. This exclusion concords with normal non-marine liability insurances which do not cover contract liability. However, the rule differs from ordinary shipowners' liability insurance, which does not have such an exclusion.

Examples of such contracts include:

- Liability which exceeds what follows from general rules of liability law, but which the assured nevertheless has committed himself to bear by a promise, a contract, an agreement or a guarantee (e.g. guarantee commitments in a building contract);
- Liability which the assured must ultimately bear because he has waived his right of recourse;
- Liability for expenses/costs/losses related to the performance of the assured's contract (i.e. agreed performance, delivery, contract work, etc.)
- Liability in connection with unusual or prohibited contractual conditions (cf. Cl 4-15 and associated Commentary)

Sub-clause 2 deals with cases of liability for personal injury which the insurer does not cover. It is evident from the provision that arrangements other than insurance have been included, cf. *sub-clause 2 (a),* and to some extent the cover has been made complementary to insurance benefits which are imposed by collective agreement and financed by the liable employer (cf. *sub-clause 2 (c)*).
The solution is almost identical to Cl. 17-47, sub-clause 2, but the relationship to the occupational injury insurance has been adjusted to the fact that the insurance shall also be applicable to building projects at foreign yards. Reference is therefore made to Cl. 17-47, sub-clause 2.

Section 5
Supplementary covers

Clause 19-22. Applicable rules

The Commentary was rewritten in the 2013 Plan.

This Clause maintains the principle that it is possible to expand the builders' risks insurance by taking out supplementary covers. A factor common to all such supplementary covers is that the Clauses of Chapter 19, Sections 1 to 4, as a rule are applicable. The same applies to Section 5, but only insofar as the content of the Clauses does not deviate from the main rule.

The 2013 Plan introduces one entirely new standardised supplementary cover which may be agreed upon, i.e. Cl. 19-27 covering towage of the subject-matter insured in the water or on a barge.

Furthermore, the former Cl. 19-25 has now been divided into two parts. In the 2013 Plan, it was decided to split up the supplementary cover for the yard's loss of interest and its daily penalties in the event of late delivery into two different clauses. This was done because it has not always been logical for the yard to buy both insurances. Cl. 19-25 now concerns only the yard's loss of interest in the event of late delivery, while supplementary insurance of the yard's daily penalties must from now on be covered under the new Cl. 19-26.

All such supplementary covers must be agreed on in advance and must be explicitly included in the insurance certificate for the builders' risks insurance.

Clause 19-23. Insurance of additional costs in connection with rebuilding and/ or building of a new subject-matter insured

The heading and the Commentary were amended in the 2013 Plan.

This Clause concerns insurance of additional costs in connection with the rebuilding/building of a new subject-matter insured. It therefore only applies in the event of a total loss necessitating rebuilding and does not apply to repairs of damage covered under Cl. 19-14 *et seq*. In the event of total loss that does not result in a rebuilding, such costs are not incurred.

The insurer's liability is defined as the difference between what is recoverable under the builders' risks insurance and the costs of rebuilding. The difference will normally consist of the ordinary increase in the price of materials, components and equipment, and any wage increases during the rebuilding period, e.g. if the building project should be delayed by 12 months.

Compensation for additional costs will not be payable until the sum insured under the ordinary builders´risk insurance has been used up.

It follows from Cl. 19-22 and the reference in Cl. 19-14 to Chapter 12, cf. Cl. 12-1, sub-clause 2, that the insurer's liability arises as and when costs are incurred.

Normally, the additional costs according to the building contract will be the yard's risk which means that it is the yard that is entitled to the compensation.

The sum insured shall always be stated in the insurance contract. The same applies to the insurable value, cf. Cl. 2-2 and Cl. 2-3. If only one amount is stated in the insurance contract, it must be presumed that the insurance has been effected with an open insurable value.

The sum insured for additional costs is normally set at 10% of the contract price.

This provision must not be confused with the new escalation Clause in Cl. 19-7, which also provides for an increase of up to 10% of the sum insured. The escalation cover is now part of the ordinary builders' risks insurance, and is not defined as a supplementary cover in Chapter 5. Nor, unlike the present provision, is it applicable in the case of rebuilding after a total loss.

Clause 19-24. Insurance of the yard's liability for the buyer's interest claim for instalments paid

The Commentary was amended in the 2013 Plan.

It is specified in the Clause heading that this supplementary cover applies to the yard's liability for the buyer's claim for interest on instalments paid. This is done in order to make it clear that it is a question of a liability insurance taken out by the yard.

The insurance is effected by the yard and relates to the yard's contractual obligations in relation to the buyer. In contrast to the ordinary liability cover under the builders' risks insurance in Section 4, Cl. 19-24 therefore concerns contract liability associated with the building contract.

The yard's liability for the buyer's interest claims in the event of a total loss refers to the instalments that have been paid by the buyer to the yard during the building period. The liability is limited to the sum insured.

The supplementary cover only comprises the interest claim if "the duty to deliver is terminated due to loss or damage which is recoverable under Cl. 19-12". If the buyer cancels the building contract due to a breach of contract and in this connection is entitled to a refund of the instalments, the buyer's interest claim is not covered under an insurance according to Cl. 19-24. It is also based on the assumption that the loss or damage does not result in a rebuilding, cf. the references to Cl. 19-12. In the event of rebuilding the instalments shall not be repaid. The reference to Cl. 19-12 must be seen in conjunction with the requirement that the duty to deliver is terminated; if an incident of damage is settled under the condemnation rule in Cl. 19-11 without the duty to deliver being terminated, there will be no interest cover.

According to the *second sentence*, interest shall be calculated from the date of payment of the individual instalment until the time of the total loss. It follows from general rules of liability law that the buyer has the burden of proving his loss in relation to the yard, and from Cl. 2-12 that the yard has a corresponding burden of proof vis-à-vis the insurer.

Clause 19-25. Insurance of the yard's loss of interest in the event of late delivery

The Clause was amended in the 2013 Plan. In previous versions of the Norwegian Marine Insurance Plan the insurance covered both the yard´s loss of interest and its daily penalties, but the daily penalties was removed from the cover in the 2013 Plan. Further, there was made some amendments in sub-clause 4.

The provision is comparable to a loss of hire insurance or an insurance against late delivery of a newbuilding which is taken out by the buyer. However, the provision in Cl. 19-25 only covers the yard's loss. The supplementary cover is expensive in relation to the ordinary builder's risks insurance, but is in practice used to some extent,

Sub-clause 1 states that the insurance covers the yard's interest loss resulting from late delivery due to damage which is recoverable under the builders' risks insurance according to Sections 1 and 2. According to Cl. 2-12 the yard has the burden of proving the loss suffered.

Sub-clause *2* contains rules regarding deductible. In the same way as for an ordinary loss-of-hire insurance, deductible is agreed in the form of a deductible period. Today a deductible period of 14 days is customary. The deductible period shall apply to any one casualty that results in delays and subsequent loss of interest under the builders' risks insurance.

Sub-clause 3 states the insurer's maximum liability for any one casualty. The insurer's liability for the yard´s loss of interest in the event of late delivery is limited to a certain number of days. The loss of interest must be specified in whole days.

Sub-clause 4 was editorially amended in the 2013 Plan. The terms "takeover date" and "taken over" in the 1996 Plan was replaced with "delivery date" and "taken delivery". The Clause lays down rules regarding the length of the insurance period. If the assured and the buyer agree to postpone the delivery date due to circumstances which do not provide grounds for compensation under this supplementary cover, the insurance will automatically be extended subject to an additional premium. As in the event of an extension of the principal cover, cf. Cl. 19-2, the additional premium shall be determined in the insurance contract. Extensions are limited to nine months, cf. the reference to Cl. 19-2, sub-clause 3.

When determining whether there has been "late delivery", the basis for the calculation is the delivery date agreed between the assured and the buyer. *Sub-clause 5* lays down a specific rule on loss due to a combination of causes and concords in that respect with the principle in Cl. 2-13. If the delay is the result partly of damage entitling the assured to compensation under the builders' risks insurance, partly of uncovered circumstances, the insurer covers a proportional part of loss of interest calculated on the basis of the loss which the two groups of causes of delay would have entailed beyond the deductible period if they had arisen separately.

Sub-clause 6 states that if the assured takes measures to avert or minimise the delay covered by the insurance, the insurer shall not be liable for more than the amount he should have paid if no such measures had been taken. This solution is in accordance with Cl. 16-11, sub-clauses 2 and 3. In many ways, cover under Cl. 19-25 is built up in the same way as loss-of-hire insurance, with a deductible period, etc., and it is therefore logical to include a corresponding rule here.

Clause 19-26. Insurance of the yard's daily penalties in the event of late delivery

As stated in the Commentary on Cl. 19-22, in the 2013 Plan it was decided to split up the supplementary cover for the yard's loss of interest and daily penalties in the event of late delivery into two different clauses. This has been done in order to make it easier for the yard in the event it wishes to purchase just one of the products, i.e. cover for either loss of interest or for daily penalties.
It has been seen in practice that it is expedient to distinguish between the two categories because

supplementary cover for loss of interest and such cover for daily penalties are almost always agreed separately and independently of one another. This Clause therefore deals only with the yard's daily penalties in the event of late delivery. No change in the substance of the content of the former Cl. 19-25 was intended.

For the same reason, the Commentary on Cl. 19-26 is virtually identical to the Commentary on Cl. 19-25.

With regard to daily penalties in the event of late delivery, the Clause is comparable to a loss-of-hire insurance or an insurance for late delivery of a newbuilding that is contracted by the buyer. *Sub-clause 1* states that the insurance covers the yard's daily penalties resulting from late delivery due to damage which is recoverable under the builders' risks insurance under Sections 1 and 2. Under Cl. 2-12, the yard has the burden of proving the loss that has been suffered.

Sub-clause 2 contains rules regarding deductibles. As is the case for an ordinary loss-of-hire insurance, the deductible is agreed in the form of a deductible period. The deductible period applies to any one casualty that results in a delay and subsequent daily penalties under the builders' risks insurance.

Sub-clause 3 states the insurer's maximum liability for any one casualty. As under loss-of-hire insurance, the insurer's liability is defined in the form of an agreed daily amount and a certain number of days.

Sub-clause 4 sets out rules regarding the length of the insurance period. If the assured and the buyer agree to postpone the delivery date due to circumstances that do not constitute grounds for compensation under this supplementary cover, the insurance will automatically be extended subject to an additional premium. As in the case of an extension of the principal cover, cf. Cl. 19-2, the additional premium shall be determined in the insurance contract. The extension is limited to nine months, cf. the reference to Cl. 19-2, sub-clause 3.

When determining whether there has been "late delivery", the basis for the calculation is the delivery date agreed between the assured and the buyer. *Sub-clause 5* lays down a specific rule on loss due to a combination of causes and in that respect tallies with the principle in Cl. 2-13. If the delay is the result partly of damage entitling the assured to compensation under the builders' risks insurance, and partly of uncovered circumstances, the insurer covers a proportional part of the daily penalties calculated on the basis of the loss which the two groups of delay causes would have entailed beyond the deductible period if they had arisen separately.

Sub-clause 6 states that if the assured takes measures to avert or minimise the delay covered by the insurance, the insurer shall not be liable for more than the amount that he would have had to pay if no such measures had been taken, This solution concords with Cl. 16-11, sub-clauses 2 and 3. In many ways, cover under Cl. 19-26 is built up in the same way as loss- of-hire insurance, with a pre-agreed deductible period, and it is therefore logical to include a corresponding rule here.

The problem can be illustrated by an example:

Just before a fishing vessel is delivered, the sonar's bottom equipment is damaged and the damage is recoverable under the builders' risks insurance. The ordering, delivery and installation of new parts will delay delivery by 10 days. To avoid late delivery, alternative bottom equipment is leased and installed, and the replacement of this equipment with "correct" new equipment is postponed to a later date when it can be done without extra loss of hire.

In this way, ten days of delay are avoided by paying for the lease of alternative equipment and extra installation/dismantling costs. However, covering this amount in full without regard for the fact that the assured would not have received any compensation at all if a 14-day deductible was applied is not reasonable and contrary to the solution under Cl. 16-11. In relation to Cl. 19-25, it is therefore more logical to follow the same principles as under the loss-of-hire insurance.

Clause 19-27. Towage and removal of the subject-matter insured

This Clause is new in the 2013 Plan. The Clause has been placed in Chapter 19, Section 5, which means that it is a "supplementary cover" that may be agreed on and included in the ordinary builders' risks insurance contract.

The rationale for incorporating a clause regarding towage under the builders' risks insurance is that more and more hulls/sections and modules are being built at yards other than the outfitting yard, including foreign yards, while outfitting and commissioning largely take place at the yard that has taken out the builders' risks insurance. Up until now, the towage risk has often been covered separately under the builders' risks insurance, while this risk can now be covered through such supplementary cover as part of the ordinary builders' risks insurance. However, this is conditional on the supplementary cover having been agreed in advance with the company and on this being stated in the insurance certificate. It will also be logical to include in the insurance certificate particulars regarding the agreed sum insured, the locations from and to which the tow is to be carried out, and the time period for the tow.

The provision regarding the range of perils covered in Cl. 19-1 will also apply when the subject-matter insured is under tow. The provisions of Chapter 19 otherwise apply. This means, for instance, that the

condemnation limit applicable to towage is determined by the provision in Cl. 19-11, which means that the condemnation limit is set at 100% (and not 80% as stated in Chapter 11 of the Plan). Correspondingly, some of the clauses in Chapter 12 of the Plan (damage) will be excluded in accordance with the content of Cl. 19-14. If there should be a desire to expand or limit the scope of cover during towage in this connection, it will be logical to do so by using one of the alternative covers in Chapter 10 of the Plan, cf. Cl. 10-4 to Cl. 10-8, for instance Cl. 10-5, *Insurance "against total loss only".*

With regard to liability arising during towage, it follows from Cl. 19-7 that the insurance covers liability up to the sum insured per casualty. Any payment made under the liability insurance will be additional to compensation paid for damage/total loss and salvage costs. If a special insurance for towage under Cl. 19-27 has been taken out, the sum insured agreed for the tow will be the limitation amount, as opposed to the total sum insured for the entire builders' risks cover.

The tow can be carried out as an ordinary "wet tow", where the subject-matter insured is towed floating in the water. But the insurance also covers "dry tows", where the subject-matter insured is placed on a barge. In such event, the range of perils is the same as for tows in the sea. The insurance also covers the transport of the subject-matter insured or components thereof on board a vessel during land or air transport.

Sub-clause 2 deals with the special risk related to loading and discharge operations, which has been treated slightly differently. When the tow has arrived at the destination – which will as a rule be the outfitting yard - the builders' risks insurance will continue to apply until the work is completed and the subject-matter insured is delivered. In other words, if additional cover has been taken out for the tow, the discharge from a barge will take place during the actual insurance period. For the same reason, it is specified in sub-clause 2 that the discharge of the subject-matter insured, is covered by the supplementary cover for the tow.

On the other hand, loading on board a barge will not automatically be covered. Whether such loading is for the account and risk of the hull yard or the outfitting yard is determined by the delivery conditions set out in the agreement between the two. If the outfitting yard takes over the sections/modules before they are loaded on board the barge, the yard in question will usually include this operation in its insurance. In such case, this must be specified in the builders' risks insurance contract in connection with the inception of the insurance cover, which will thus be prior to the commencement of the tow.

Sub-clause 3 sets out the safety regulations for towage. Tows must always be surveyed and approved by a surveyor that is approved in advance by the insurer. Admittedly, there are no formal requirements or standard templates for the survey report on the towage risk. Large, reputable surveyors will

normally use their own approved "Certificates of Approval". These documents generally contain provisions regarding the securing of the tow for the voyage, stability requirements, permitted towing speed, "weather windows" (i.e. maximum wind speeds and wave height) and sometimes also provisions specifying when and where the tug must put into a port of refuge. This certificate is routinely signed by the tugmaster, i.e. the captain of the tug that is to be used for the voyage/another representative of the owner, after which it is sent to the yard and its leading insurer. If the assured has ensured that the safety regulations in Cl. 19-27, sub-clause 3 (a)-(d), are complied with prior to the commencement of the tow, any loss that may be incurred as a result of the tug not following the orders issued by the assured will not be attributed to him.

The requirement that the tow must be surveyed does not apply to internal berth shifts and removals of the subject-matter insured on the yard's own site, cf. the last sub-clause of the Clause. Such removals could, for instance, be a transfer from the building site to the yard's own outfitting dock. It makes no difference whether the subject-matter insured is moved by means of winches, is towed or proceeds under its own power. The decisive factor is that it must at all times remain within the yard's own area in order not to trigger the survey obligation.

If the insurer wishes to make the towage risk subject to special safety regulations, this must also be specified in the insurance certificate.

Sub-clause 4 establishes that if the subject-matter insured is moved in other ways, the safety regulations in sub-clause 3 apply correspondingly. When the subject-matter insured or components thereof are transported by ship, over land or by air, this operation will also have to be surveyed and approved.

Section 6
Supplementary cover for war risks

The supplementary cover for war risk under the builders´ risks insurance contract has been tied to Chapter 15 of the Plan. The war risks cover is set out in three Clauses: Cl. 19- specifies the perils insured, Cl. 19-30 prescribes rules regarding the insurance period, and Cl. 19-31 states which rules from Chapters 15 and 19 apply correspondingly to the war risk insurance.

Clause 19-28. Perils insured

The range of perils insured under the builders' risks insurance contract has been reduced as regards war perils, cf. Cl. 19-1. The main rule is that only marine perils are covered by the insurance. Cl. 19-1 refers to Cl. 2-8, which means that the distinction between marine perils and war perils applied in builders' risks insurance basically also concords with the provisions of the Plan. An exception is

damage arising from strikes and lockouts. Under the builders' risks insurance, these two elements have been moved from the range of war perils insured to civil perils. As a consequence, it is not necessary to include strikes and lockouts in the supplementary cover for war perils under the present Clause.

Clause 19-29. Insurance period

Sub-clause 1 states that the insurance does not attach until the subject-matter insured has been launched. While the subject-matter insured is on land it thus has no war risk cover. The limitation has to do with the fact that it is not until after the subject-matter insured has been launched that it can be moved out of the war zone. However, the ordinary builders' risks insurance against marine perils also covers strikes and lockouts so that the subject-matter insured is protected against these perils whilst in dry-dock, cf. above under Cl. 19-1.

The Committee considered extending the war risk insurance to cover the entire building period, thereby achieving a distinction between marine perils and war perils which concords with Cl. 2-8 and Cl. 2-9 of the Plan. However, it is difficult to implement such a solution because the reinsurance market has so far not been willing to reinsure such cover. Moreover, the condition that the subject-matter insured must be launched concords with international builders' risks conditions.

Sub-clause 2 differs from sub-clause 1, and states that machinery, parts and materials are not covered by the war risks insurance until the parts, etc., are on board the subject-matter insured.

Clause 19-30. Other applicable provisions

Sub-clause 1 states that the provisions in Sections 1 to 4 shall apply to the war risks insurance. The war risks insurance thus partly covers hull insurance, partly damage and costs recoverable under Section 3, and partly liability insurance for the yard under Section 4.

Sub-clause 2 refers to Cl. 15-5 concerning the outbreak of war between the major powers, which entails the immediate termination of the insurance in the event of a war or war-like conditions between the powers specified in Cl. 15-5.

Chapter 20
Insurance for vessels with limited trading area

General

Chapter 20 was new in the 2019 Version and applies to all vessels with limited trading areas other than fishing vessels. The vessels in question are freighters, passenger vessels, specialised vessels for fish farming, barges, lighters and the like that trade in Nordic waters. All clauses are identical to the equivalent clauses in Chapter 17 and certain clauses in Chapter 10. Section 2 contains the clauses for the standard hull insurance with limited machinery cover. Section 3 contains the clause for extended hull cover i.e. extended cover of damage to machinery, and Section 4 contains two options for limited cover.

The purpose of this new Chapter is to present a set of easily accessible clauses for hull cover for vessels with limited trading areas. Thus, Chapter 20 provides a special cover for vessels with limited trading areas and constitutes a supplement to the other rules of the Plan. The hull part of this Chapter (Sections 2 and 3) is an addition to the general hull part of the Plan (Chapters 10 to 13). Except for the provisions in the vessel's trading certificate, there is no clear dividing line between vessels that are insured according to Chapters 10 to 13 of the Plan and vessels that are insured under this Chapter.

Section 1
Common provisions

Clause 20-1. Scope of application

As mentioned under General, certain freighters and other vessels are insured on so-called hull conditions for ocean-going vessels (Chapters 10 to 13). It is therefore necessary to have a rule determining the applicable cover if this is not clear. According to Cl. 20-1 the rules in Chapter 20 shall only apply to the extent that this is explicitly stipulated in the insurance contract. The provision has the greatest practical significance in relation to the hull cover because there are two sets of rules to choose between here. If hull insurance has been effected on Plan conditions without Chapter 20, Sections 2 and 3, being mentioned in the insurance contract, only the rules in Chapters 10 to 13 shall apply.

Clause 20-2. Renewal of the insurance/Ref. Clause 1-5

Cl. 1-5, sub-clause 3, establishes that the insurance is not renewed unless this has been specifically agreed. Many of the persons effecting insurances in this industry do not have

professional offices. It may therefore be problematic for them to be required to ensure that the insurance is renewed, particularly if it expires while they are at sea. However, the reinsurance is frequently not finalised until immediately before the insurance takes effect, and insurers do not want to bear the risk if it turns out that reinsurance is not obtainable on the conditions anticipated 30 days before the renewal. The problem of reinsurance may be resolved by the insurers cancelling the insurance not less than 30 days before expiry if it is not clear whether satisfactory reinsurance is obtainable. This special rule has therefore been maintained in the form of a rule providing for automatic renewal if the insurance is not cancelled 30 days before the date of expiry.

In the rule regarding automatic renewal it is specified that in such case the insurance is renewed at the same premium and on the same conditions as before, cf. sub-clause 1. If the insurer does not wish to renew the insurance, or if he is only willing to renew it on different conditions or at a different premium rate, he must follow the procedure set out in sub-clause 2, cf. below.

The basic rule in *sub-clause 1* is that the insurance remains in force on the same conditions and at the same premium rate unless it is cancelled within 30 days prior to expiry of the insurance period, cf. above. If the insurer wishes to cancel the insurance or change the premium rate or the conditions, it now follows from sub-clause 2 that he must notify the person effecting the insurance of this within one month of expiry of the insurance period. The person effecting the insurance is thereby given a reasonable amount of time to consider alternative cover. For insurance contracts that run for several years, the decisive point in time for the insurer's duty of notification will be when the multi-year insurance contract is about to expire. Thus, the provisions do not apply to payments of due premium during the period covered by the multi-year insurance contract.

Under *sub-clause 3*, the person effecting the insurance has a time limit of 14 days before expiry of the insurance period to consider the insurer's renewal offer. If he notifies the insurer, before the time limit expires, that he does not wish to accept the renewal offer, this will result in the contract lapsing from the date the insurance period expires unless the parties agree on new conditions. On the other hand, if the person effecting the insurance fails to respond within the time limit, he is bound by the renewal at the proposed premium rate and on the proposed conditions. Therefore, if the person effecting the insurance accepts an offer from a competing insurer, it is important that he at the same time ensures that the previous contract is cancelled within the specified time limit. Otherwise, he will be bound by two insurance contracts, in which case he must ask one of the insurers to release him from the contract.

If the insurer wishes to renew the insurance on the same conditions and at the same premium rate, it will not be necessary for him to send notification pursuant to sub-clause 2. If, in such a

case, the person effecting the insurance should not wish to renew the insurance, possibly not on the same conditions or at the same premium rate, he must notify the insurer accordingly within the same time limit as stated above, i.e. 14 days prior to expiry of the insurance period. Otherwise the insurance will remain in force on the same conditions and at the same premium rate pursuant to sub-clause 1.

Clause 20-3. Classification and vessel inspection/Ref. Clause 3-14 and Clause 3-8

Clause 3-14 assumes that the vessel is in class and establishes that the insurance will automatically lapse in the event of loss of class. Change of classification society is deemed to be an alteration of the risk, cf. Cl. 3-8, sub-clause 2, last sentence. However, there is no reason to introduce such an assumption for vessels that are insured under this Chapter, see *sub-clause 1*, which merely establishes that *if* the vessel is classed with a classification society at the inception of the insurance, Cl. 3-14 and Cl. 3-8, sub-clause 2, shall apply in the normal way. The provision means that the insurance lapses if the assured cancels the class and proceeds to sail legally under the rules of the vessel´s flag state.

Vessels which are not in class will be subject to the vessel´s flag state. According to the rules of the Norwegian Maritime Authority, freighters of more than 50 gross registered tonnes will be issued a trading certificate.

Trading certificates, equipment certificates, safety certificates and the like issued by the vessel´s flag state have the same significance as class has for larger vessels. Norwegian vessels with a length of less than 15 meters are insured on separate conditions according to the mandatory rules of the Norwegian Insurance Contracts Act. Under *sub-clause 2, first sentence*, the insurance of a vessel that is not in class is made subject to the condition that it has a valid certificate according to the rules of the vessel´s flag state. The term "certificate" covers trading certificate, equipment certificate/safety certificate, survey certificate and any other form of certificate which the vessel´s flag state might issue. The lapse of a valid certificate will for such vessels result in the lapse of the insurance, cf. *second sentence*, which refers to the rules relating to the loss of class. This provision may seem strict, but the reaction is necessary because normally it should take a lot more to lose a trading certificate or another certificate than it does to lose a class.

Orders from the vessel´s flag state are regulated in Cl. 3-22.

Clause 20-4. Safety regulations/Ref. Clause 3-22 and Clause 3-25

Section 7, sub-clause 1 of the Norwegian Ship Safety Act No. 9 of 15 February 2007 reads as follows in English translation:

"The operator of the ship shall ensure that a safety management system which can be documented and verified is established, implemented and developed in his organisation and on the individual vessels in order to identify and control the risk and also to ensure compliance with requirements laid down in a statute or in the actual safety management system. The contents, scope and documentation of the safety management system shall be adapted to the needs of the operator and his activities."

There has been discussion on whether Section 7 of the Norwegian Ship Safety Act applies to vessels below 500 gt. The reason for this discussion is that the ISM Code has not been made applicable for vessels below 500 gt. However, the Norwegian Maritime Authority has reiterated that said Section 7 pursuant to Section 2 of the Act is applicable for all vessels except pleasure craft less than 24m length.

Similar provisions as in Section 7 of the Norwegian Ship Safety Act do not exist in the other Nordic countries whose legislation refers to the standard of the ISM Code when it comes to what vessels have a statutory obligation to apply safety management systems.

Section 7 of the Norwegian Ship Safety Act is in itself a safety regulation as defined in Cl. 3-22 of the Plan; breach of which will be governed by Cl. 3-25. However, as Section 7 of the Norwegian Ship Safety Act is so vague, it for practical purposes will be very difficult to invoke it against the assured until the Norwegian Maritime Authority has adopted a regulation setting out what a safety management system for vessels under 500 gt. should comprise. For ships or vessels or other crafts or units that are subject to the ISM Code, reference is made to the Commentary to Cl. 3-22 and Cl. 3-25 where it is made clear that the ISM Code is a safety regulation pursuant to the definition in Cl. 3-22; breach of which is governed by Cl. 3-25.

The provision provides three special safety regulations for the insurance of vessels with limited trading areas and comes in addition to Cl. 3-22 *et seq.* in the general part of the Plan.

The provision constitutes "a special safety regulation laid down in the insurance contract" under Cl. 3-25, sub-clause 2. This means that the assured must be fully identified with anyone "whose duty it is on behalf of the assured to comply with the regulation or to ensure that it is complied with". This will normally be the duty of the master of the vessel. As a special safety regulation Cl. 17-5 (a) also prevails over the provision relating to the situation where the owner is the

master of the vessel in Cl. 3-25, sub-clause 1, second sentence. If the owner himself is the master of the vessel, he will therefore forfeit coverage if the vessel sustains damage due to negligent ice-forcing.

Sub-clause 1 (a) **applies only to ice-forcing. Ice-forcing presupposes that the vessel proceeds through ice as the result of a deliberate choice. It further follows from the rules relating to safety regulations that the damage must be a foreseeable consequence of this choice. If ice damage is sustained accidentally, e.g. by striking against drift ice in open sea, this does not constitute ice-forcing. Nor does the provision cover "ice-forcing" in order to avert major damage or total loss where a vessel has unexpectedly become ice bound; this would constitute a measure to avert or minimise loss. On the other hand, sub-clause (a) will apply if the master has deliberately proceeded into an area where it is foreseeable that the vessel will become ice-bound.**

It is further a condition that the forcing concerns "ice". If the vessel is sailing in an open lane, this does not constitute ice-forcing. Furthermore, the content of the term "ice" can be difficult to define precisely. The term must be defined on the basis of discretionary criteria, such as the thickness, solidity and extent of the ice. There may also be reason to take into consideration the time of year in question and whether any ice-breaker service has been organised. A certain support may also be obtained from the ice classification requirements.

Sub-clause (b) **concerns the trading certificate, which is referred to in Cl. 20-3. The trading area stipulated by the authorities is normally described in a trading certificate for the vessel in question. As a rule, the trading area in the trading certificate will be more limited than the area specified in the Plan. If the insurer wants the trading area under the insurance to coincide with the trading area in the trading certificate, this must follow from the insurance contract. Normally, however, this type of official regulation is only in the nature of a special safety regulation in relation to the insurance. Under these rules, if a vessel proceeds beyond the trading limits specified in the trading certificate, this will only have consequences for the insurance coverage if the infringement can be ascribed to the assured, or someone with whom he may be identified, and if there is a causal connection between the infringement and the casualty. This means that the sanction will be somewhat less strict than it would have been pursuant to Cl. 3-15, sub-clause 3. If the vessel has lost its trading certificate, the rules in Cl. 20-3 shall apply.**

The provisions contained in the trading certificate automatically constitute safety regulations under Cl. 3-22. However, the advantage of mentioning them specifically here is that the identification rule in Cl. 3-25, sub-clause 2, second sentence, becomes applicable.

Orders from the vessel´s flag state are not subject to any special regulations. If the assured fails to comply with orders issued by the flag state, the trading certificate might become invalid, in which case the insurance will automatically lapse according to Cl. 20-3.

***Sub-clause (c)* concerns vessels at quay or laid up, and is consequently more extensive than Cl. 3-26, which merely concerns vessels laid up. For small vessels, it is more practical to stay in port than to be laid up. There is moreover a special need for safety regulations in connection with the risk of theft, because it is normally quite simple to gain access to this type of vessel. It is therefore the assured's duty to provide daily supervision of the vessel and its moorings and furthermore to secure the vessel and its equipment. The provision also contains a requirement that the equipment shall be kept in such a way that it can only be removed by the use of tools.**

Clause 20-5. Savings to the assured

The provision is taken from the P&I conditions in the 1964 Plan, but contains a general principle of insurance law and has therefore been generalised.

Section 2
Hull insurance

General

Section 2 deals with the standard cover of hull insurance for vessels with limited trading areas. The provisions in Section 2 are supplementary to Part II of the Plan, Chapters 10 to 13, relating to hull insurance. This was previously stated in the Commentary, but has now also been included in the text of the Plan, cf. Cl. 17-7.

In addition to the provisions in Section 2, this insurance is therefore subject to the common provisions in Section 1 and the provisions in the general part I of the Plan (Chapters 1 to 9) and part II relating to hull insurance (Chapters 10 to 13).

The system of a standard cover and an extended cover has been retained in that the standard cover is incorporated in Section 2, while the extended cover is incorporated in Section 3.

In accordance with the general system of the Plan, the most practical approach is for deductibles and machinery damage deductions to be agreed on an individual basis. Hence, it is sufficient here to apply the rules in Cl. 12-16 and Cl. 12-18. There was also agreement that the new for old deductions were cumbersome and outdated, and that they should therefore be deleted and replaced by machinery damage deductions and deductibles which took into account the age of

the vessel and machinery and the sum insured. However, insurance without new for old deductions is conditional on these deductions being compensated for by the other deductions. If the assured is not willing to accept a sufficiently high level of deductible and machinery damage deductions, the insurers must therefore be entitled to incorporate provisions concerning new for old deductions in the individual insurance contract.

Clause 20-6. The relationship to Chapters 10 - 13

The provision states that for hull insurance the rules of Chapters 10 to 13 apply, with such amendments as follow from this Section.

Clause 20-7. Hull and freight-interest insurance/Ref. Clause 10-12

The hull insurer may consent to the effecting of interest insurance. In that event, the reduction rule will only apply to interest insurances which are larger than what the hull insurer has consented to.

Clause 20-8. Condemnation/Ref. Clause 11-3

The condemnation limit is 90 % in relation to Cl. 11-3. A limit of 80 % is too advantageous when taking into account that the average age of the fleet is far higher today than 30-40 years ago, that the international marine insurance market relies on a condemnation limit of 100 %.

Clause 20-9. Damage to the hull of vessels which are not built of steel/ Ref. Clause 12-1

Sub-clause 1 (a) **is first and foremost relevant to insurance of vessels deserving of preservation.**

Sub-clause 1 (b) **is not intended to cover more unforeseeable forms of striking against ice, e.g. where an ice floe has drifted out from a branch of a fjord to an open area of water where there is normally no ice.**

Sub-clause 1 (c) **excludes caulking of hull and deck. This is typical maintenance work, and it will not be easy to decide to what extent the caulking has been necessitated by the casualty. The exclusion does not cover expenses incurred in caulking those parts of hull and deck which must be replaced as a result of the casualty. Here the caulking represents a normal cost of renewal of a part of the vessel, and it must therefore be covered.**

Clause 20-10. Limited cover of damage to machinery

The Commentary to Cl. 17-13 was amended in 2016. Cl. 20-10 is identical to Cl. 17-13.

The Clause provides limited cover for damage to machinery. On the other hand, extended cover for damage to machinery may be effected in accordance with Cl. 17-18. The wording has been editorially amended in the 2019 Version to underline the fact that this Clause applies unless otherwise agreed in the insurance contract.

The first part of the *first sentence* specifies that the insurer is "only" liable for the enumerated perils.

The second part of the *first sentence* states the perils covered by the insurer. The damage must be a result of collision, striking, an earthquake, an explosion outside the engine room, fire, or of the vessel having sunk or capsized. The term "engine room" replaces the term "machinery" in the earlier versions of the Plan. It comprises only the main and auxiliary engine rooms. Further, the insurer is liable where the vessel has been filled with water as a result of a breach of a hose or a pipe onboard the vessel. The breach may occur on the hose/pipe itself or at any couplings/sockets, provided the hose or pipe couplings/sockets are fitted either in accordance with Nordic Boat Standard or public statutory rules applicable to the vessel. Thus, consequential damage of a leakage which arises suddenly and unexpectedly and is a result of external influence or faulty material will be covered. Such damage is not covered if attributable to a breach of a hose or a pipe that has not been statutory fitted as described above. The insurer will cover that peril provided the breach was not caused by corrosion or age. A breach caused by corrosion or age is a maintenance issue or rather lack of maintenance. It is the duty of the assured to carry out maintenance. The insurer's liability for "the vessel having sunk or capsized" also applies when the vessel is moored.

The *second sentence* stipulates an exception to the rule in the first sentence as regards damage to electronic equipment. If such damage is caused by bad weather and the same casualty causes damage to hull or superstructure, the damage to the electronic equipment shall be covered.

Clause 20-11. Costs incurred in saving time/Ref. Clause 12-7, Clause 12-8, Clause 12-11 and Clause 12-12

The provision excludes the time-loss element in the ordinary hull conditions from the cover under the coastal hull insurance conditions.

Clause 20-12. Deductions/Ref. Clause 12-15, Clause 12-16 and Clause 12-18

***Sub-clause (a)* refers to ice damage. According to the 2013 Plan the deduction will be the subject of individual negotiations where inter alia the strength of the hull and ice class will be taken into account. According to the Plan, the deduction applies only to partial damage in accordance with the general system of the Plan.**

Sub-clause (b) **refers to electronic equipment. The deduction will be the subject of individual negotiations where *inter alia* the age of the equipment can be taken into account. It is therefore unnecessary to make the size of the deduction dependent on the age of the equipment in the actual Plan text.**

The term "electronic equipment" covers three main groups, viz. radio equipment, fish-finding equipment and navigation equipment.

Radio equipment includes main transmitters with short-wave and receiver, watch-receivers, AM-VHF telephone monitors, VHF transmitters and receivers, lifeboat transmitters, direction-finding beacons, emergency communication sets for aircraft frequency, receivers and TVs for mess rooms or cabins, walkie-talkie transmitters and receivers, equipment for communication between bridge, engine room, cabins, mess rooms, and deck, and weather map recorders.

Navigation equipment includes gyrocompasses, autopilots, course controllers, all types of radar, electronic logs for satellite navigators and display screens, radio sounders for AM VXF and WT, satellite navigators, Omega receivers and Loran C receivers.

In addition to deductions for electronic equipment, the Plan's rules relating to machinery damage deductions and deductibles, cf. Cl. 12-16 and Cl. 12-18 shall apply. For the sake of clarity, this is repeated in sub-clauses (c) and (d). As regards the basis for calculating the various deductions, Cl. 12-19 applies so that all deductions shall be calculated on the basis of the full amount of compensation according to the Plan before deductions under any of the relevant provisions.

Given that the normal cover has not allowed for new for old deductions, the age of the vessel and the machinery, possibly also the sum insured, shall be taken into account when determining deductions and deductibles. In the event that the agreed deductions do not compensate for the lack of new for old deductions, the insurer may have to agree on individual new for old deductions.

Clause 20-13. Collision liability /Ref.Clause 13-1

"By a call is meant arrival, anchoring, working, discharging, loading and leaving", it is made clear that the insurance does not cover any collision liability to the relevant structure or any fish contained therein during the whole period when the insured vessel is calling at the structure. The previous wording was by some owners read to the effect that the exclusion of cover for collision liability only applied if damage occurred during loading or discharge.

The provision emphasises that the exclusion also comprises damage to the actual device and shall apply irrespective of what is loaded or discharged. The provision is first and foremost aimed at floating devices which are easily damaged, such as where the vessel runs into an enclosure for fish and the fish escape. In such cases it is difficult or impossible to determine the extent of damage. The application of the provision is not subject to the condition that there is loss of or damage to live fish; the deciding factor is the nature of the device. If there are several independent devices in the same area, however, liability to another device than the one from which loading or discharging shall take place will be covered.

Section 3
Hull insurance – extended cover

Clause 20-14. Extended cover of damage to machinery

Section 2 applies in full to the other parts of the hull insurance.

The fact that extended cover for damage to machinery has been agreed will be evident from the insurance contract. In such case, damage to machinery, electronic equipment, etc. will be covered in accordance with the ordinary rules of Chapter 12 of the Plan, with certain minor exceptions. These follow in part directly from the clause which refers to Cl. 20-12 and Cl. 20-13, which thereby apply correspondingly in the event of extended cover for damage to machinery.

Section 4
Hull insurance – limited cover

Clause 20-15. Insurance "against total loss only" (T.L.O.)

This Clause is identical to Cl. 10-5.
Insurance "against total loss only" occurs in very special situations, e.g. in connection with the towage of a ship that is to be sent to the breaker's yard. In that event the insurer will only be liable for total loss in accordance with the rules in Chapter 11, i.e. where a ship is lost or so badly damaged that it cannot be repaired, is a constructive total loss, etc.

Where the ship is insured against total loss only, the consequence in relation to loss in connection with measures to avert or minimise the loss is that the insurer is only liable for such loss if it is attributable to measures taken to avert a relevant risk of a total loss. This principle follows from the rules in Chapter 4, Section 2, of the Plan, and it is therefore unnecessary to have any special rule on this in Cl. 10-5.

Where a case of general average has occurred, it is therefore necessary to split up the general average statement and cover the contribution to the extent that it refers to measures taken to avert or minimise the risk of a total loss. Contributions to so-called "common benefit" expenses are never recoverable; expenses in connection with putting into a port of refuge if the ship has suffered minor engine damage would perhaps be more doubtful.

If the ship has been damaged in consequence of an act of general average (or a similar act to save a ship in ballast), the damage under Cl. 4-10 is recoverable in accordance with the rules relating to particular loss, if such settlement is more favourable for the assured. This rule shall not apply in the event of T.L.O. insurance, given that, in that situation, no indemnity would have been agreed for the damage. The compensation will therefore always be calculated on the basis of the general average rules.

Furthermore, the rules contained in the general part of the Plan on accessory expenses shall apply. The insurer is liable for interest on the claim according to Cl. 5-4, and for costs in connection with the claims settlement, cf. Cl. 4-5. Furthermore, the insurer is liable for costs of providing security and costs of litigation, cf. Cl. 4-3 and Cl. 4-4, where the providing of security or the litigation is connected with events that would otherwise involve liability, thus primarily in connection with measures to avert a total loss. Costs in excess of the sum insured are recoverable in accordance with Cl. 4-19.

Clause 20-16. Insurance "on stranding terms"

This Clause is identical to Cl. 10-8.

This provision affords the same cover as Cl. 10-7, plus a limited cover against damage and against loss in connection with measures taken to avert such damage. The provision will hardly be of any great significance in connection with ordinary hull insurance, but barges and dories are to a considerable extent insured on stranding terms.

Sub-clause (d) **defines "stranding". In the event of grounding, it is a condition that the ship is unable to re-float by its own means. If the ship has capsized, it must have heeled over to such a degree that the masts are in the water. Thus, the insurance does not cover damage to the ship if it has heeled over but is supported by a quay, a barge, or the like. However, the costs involved in righting the ship will be recoverable in such a case, provided that it was an established fact that the stability limit was exceeded and that the ship would have overturned completely if there had been nothing to support it. In case of fire or explosion, damage in the engine room is excluded from cover, provided that the fire or the explosion occurred there. Such damage is relatively frequent and very comprehensive, and the exclusion is necessary in order to retain insurance on stranding terms as an inexpensive insurance.**

Chapter 21
Liability insurance

Chapter 21 was new in the 2019 Version. The liability insurance was previously a part of Chapter 17 linked to insurance of fishing vessels and small freighters etc. In the 2019 Version the liability insurance is an independent cover that is applicable to all types of vessels insured under the Plan.

Clause 21-1. Scope of application

This Clause is new in the liability insurance as a consequence of the independent status of the cover. As in all special covers under the Plan, the insurance in Chapter 21 is only applicable if agreed upon in the insurance contract between the parties.

Clause 21-2. Renewal of the insurance/Ref. Clause 1-5

This Clause is new in the liability insurance because of the independent status of the cover. Reference is made to the Commentary to the equivalent Clause 20-2.

Clause 21-3. Classification and vessel inspection/Ref. Clause 3-14 and Clause 3-8

This Clause is new in the liability insurance as a consequence of the independent status of the cover. Reference is made to the Commentary to the equivalent Clause 20-3.

Clause 21-4. Savings to the assured

The Clause is taken from the P&I conditions in the 1964 Plan, but contains a general principle of insurance law and has therefore been generalised.

Clause 21-5. Perils covered

Former Cl. 17-33.

Sub-clause 1, first sentence **specifies the perils covered by the insurance as losses mentioned in Cl. 21-6 to Cl. 21-18. The provision reflects the basic principle that the P&I insurance only covers liability and other losses which are specifically stated. In other words, this is not a general liability insurance. On the other hand, a number of types of loss which are not in the nature of liability, viz. various forms of expenses and damage which the assured may incur, are covered. Such expenses and damage must also be specifically stated.**

The provisions in Cl. 21-6 to Cl. 21-18 partly state the nature of the loss, partly the extent to which the loss is covered. Both sets of conditions must be satisfied in order for the insurer to be liable.

While Cl. 21-6 to Cl. 21-18 state the extent of liability, Cl. 21-19 *et seq.* state limitations to the cover. The provision in Cl. 21-5 must therefore also be seen in conjunction with these limitations.

Another fundamental principle for owner's liability insurance is that the cover only includes liability and loss which "has occurred in direct connection with the operation of the vessel covered by the insurance". The claims filed must be specifically linked to the running of the insured vessel. Liability and other loss which concern the shipping business in general, or which are common to several vessels, are normally not covered.

Accordingly, all liability and losses in connection with the running of the assured's shore installations, social and other expenses which are not associated with any specific vessel are excluded from the cover. However, it is not a requirement that the loss occurred on board the vessel, or that it was caused by the crew.

The liability which is covered must be a legal liability for damages. The fact that the assured feels obligated from a business or moral standpoint to cover a loss is not sufficient. Legal liability normally means the personal obligation to pay for which the assured is liable to the extent of all his assets. However, also liability *in rem* where the assured is only liable with certain objects, typically the vessel and freight, is covered by the insurance. The country under whose law the liability occurs is also irrelevant, as is whether it is a contractual liability (e.g. cargo liability), or liability outside contractual relations (e.g. collision liability), and on what basis the liability is founded. However, contractual liability is subject to certain limitations according to Cl. 4-15.

The *second sentence* entails that the cover is extended in certain situations to include liability incurred by vessels other than the insured vessel.

***Sub-clause 2, first sentence*, is taken from Cl. 224, sub-clause 1, second sentence, of the 1964 Plan and establishes that the insurer covers liability according to sub-clause 1, irrespective of whether the liability is caused by marine perils or war perils. The liability insurance is therefore basically an insurance against marine perils, cf. Cl. 2-8, as well as against war perils, cf. Cl. 2-9. The war risks cover is, however, somewhat limited under the second sentence.**

Clause 21-6. Liability for personal injury

Former Cl. 17-34.

Sub-clause 1 **defines the cover in the event of personal injury or loss of life. The main rule in the** ***first sentence*** **affords a very comprehensive cover. If the injury is "sustained in direct connection with the operation of the vessel covered by the insurance", the insurer covers the assured's liability regardless of where and how the injury was inflicted and regardless of whether the assured is liable as personal wrongdoer, or e.g. is liable on the basis of the rules relating to vicarious liability in Section 151 of the Norwegian Maritime Code. The assured's liability to crew and passengers is nevertheless subject to certain limitations, cf. below.**

Nor are any limitations stipulated as regards which items of loss shall be covered. In the event of "personal injury", liability covers expenses for treatment, expenses for artificial limbs, loss of income during the treatment and loss of future earnings as a result of full or partial disability, cf. Section 3-1 of the Norwegian Compensatory Damages Act (NCDA). In the event of losses more in the line of consequential losses, the assured's, and hence the insurer's, liability will, however, be limited by foreseeability considerations.

The term "personal injury" also covers shock and other mental injuries, as well as "compensation for permanent injury" according to Section 3-2 of the NCDA. However, the liability will normally not cover non-economic loss under Section 3-5 of the NCDA. Such liability presupposes that the assured has personally caused the bodily injury intentionally or through gross negligence, in which event the insurer's liability will normally lapse under the rules in Cl. 3-32 and Cl. 3-33.

If it is a question of "loss of life", liability will cover loss of provider and funeral expenses, including expenses for shipping home the coffin or urn, cf. Section 3-4 of the NCDA.

Liability under sub-clause 1, first sentence, also covers liability for salvage awards in the event of the saving of life. Such salvage remuneration will only be relevant where a vessel or cargo has been salvaged at the same time, cf. Section 441 of the Norwegian Maritime Code. As regards salvage awards for the salvaging of vessels and cargo, the owner of these assets may recover the award as costs of measures to avert or minimise loss under the hull insurance and the cargo insurance respectively. In the same way, the liability insurer covers salvage awards for the saving of life under clauses 4-7 ***et seq.,*** **if the salvage operation is in effect a measure to avert or minimise loss. However, the provision in Cl. 21-6 provides an independent authority for coverage of a salvage award, regardless of whether or not it qualifies as a cost of measures to avert or minimise loss. On the other hand, only salvage awards determined specially due to the**

saving of life are covered. It is not sufficient that the salvage award as such has probably increased due to the saving of life, without this being specified in a judgment or an agreement.

It is only the assured's liability for life-saving which is covered by the liability insurer. The assured may not claim a refund from the liability insurer for that part of the salvage award which may have been allocated to the cargo interests without liability for the assured. Nor does the liability insurer cover the liability in respect of which the assured may claim cover from the hull insurer under the relevant hull conditions, cf. Cl. 21-19.

As regards the persons who shall be covered by the assured's liability, certain limitations are stipulated. In the first place, the cover under *sub-clause 1, second sentence*, does not include the assured's liability to the crew or their dependents for wages in the event of a shipwreck, death, illness or injury. This insurance is not included in the Plan, and the definition has therefore been incorporated directly in Cl. 21-6. This liability will today normally be covered under an occupational injuries insurance. However, the insurer does cover certain social benefits to the crew under Cl. 21-16 (b)

The crew's personal effects are excluded under Cl. 21-7, sub-clause 2 (c).

The delimitation applies only in relation to "the crew". In the event of injuries sustained by others who work in the service of the vessel without belonging to the crew, e.g. persons who carry out work on board or in connection with the vessel while it is in port, the insurer covers the assured's liability under sub-clause 1, first sentence.

Secondly, the assured's liability for injury sustained by or loss of passengers is only covered where this has been specifically agreed, cf. *sub-clause 2*. The provision applies to passengers and "other persons accompanying the vessel without belonging to the crew" to merely applying to "passengers". Under Skuld's and Gard's P&I Conditions, liability for passengers is included in the normal cover. According to the Plan's rules, however, it is necessary to have a separate agreement about this. The requirement for a separate agreement, however, only applies to ordinary paying passengers. Family, friends or others who accompany the vessel are therefore covered in the usual way.

The cover under Cl. 21-6 must be seen in connection with the limitations of liability in Cl. 21-19, sub-clause 3, relating to insurance and social benefits for the crew, and the requirement for limitation of liability as regards liability to passengers in Cl. 21-20.

Clause 21-7. Liability for property damage

Former Cl. 17-35.

The Clause was amended in 2016 by adding new letters (d), (e) and (f) to sub-clause 2. The said letters are identical to previous sub-clause 2 (b), (c) and (a) respectively. Sub-clause 3 was consequently deleted. The following sentence was added to new letter (d) "By a call is meant arrival, anchoring, working, discharging, loading and leaving" cf. the corresponding amendments to Cl. 17-17 and Cl. 20-14.

Sub-clause 1 **contains the practically speaking most important cover provision in liability insurance and provides that the insurer covers the assured's liability for damage to or loss of an object which "does not belong to the assured". Loss in the event of damage to or loss of the assured's own objects does not belong under a liability insurance subject to the limitations which follow from Cl. 4-16. The insurance includes liability for damage to objects which are not subject to private ownership, e.g. shell fish and seaweed which are damaged by oil pollution with the result that those who exploit them for business purposes suffer a loss.**

By "object" is meant objects of every type or form, real estate as well as chattels. The object may be on board the insured vessel, on board another vessel, or on shore. Certain objects which are on board are nevertheless excluded in sub-clause 2, cf. below. The term "object" furthermore comprises another vessel, a vessel or other floating structure. "Damage" means any form of physical impact on the object which results in a deterioration in value: breakage, water damage, decay, infection, smell and radiation damage, etc. "Loss" covers not only cases where the object has physically been destroyed, but also cases where it has been stolen, impounded or mislaid so that the owner cannot expect to recover it within the foreseeable future.

The insurer covers liability for property damage regardless of the basis on which the liability is founded. It is irrelevant whether it is liability under contract law or non-contractual liability, and it is further irrelevant whether liability is non-statutory or is founded on statutes. The liability therefore covers cargo liability, liability to tugs, liability for property damage in the event of a collision, liability for property damage in the event of oil pollution and other non-contractual liability for property damage, provided liability has "occurred in direct connection with the operation of the vessel covered by the insurance", cf. Cl. 21-5. Cargo liability is subject to certain limitations, see Cl. 21-23, and the assured is furthermore obliged to disclaim liability for damage to and loss of cargo to the extent that this is allowed under current rules of law, see Cl. 17-48.

Cl. 21-7 only regulates liability for property damage. Loss resulting from incorrect description of goods in the bill of lading or from the goods being handed over to a wrong recipient does not constitute liability for property damage. However, these types of liability are in certain contexts covered under Cl. 21-8 and Cl. 21-9. But, if liability for property damage occurs, then not only the part of the liability which corresponds to the reduction in the value of the object will be covered, but also the part which is associated with any consequential loss, cf. the wording "liability resulting from damage to or loss of".

Sub-clause 2 (a) **is normally superfluous, see Cl. 4-16, second sentence, which excludes the relevant objects if they are owned by the assured. Furthermore, the provision in Cl. 21-19 will exclude these objects if they are insurable under the rules in part II, part III or part IV, Chapter 17, Sections 2 to 5, of the Plan.**

Sub-clause 2 (e)) **excludes damage to or loss of live fish carried in the vessel. Under the rules of the Norwegian Maritime Code it may be uncertain whether the assured has the right to disclaim liability for damage to or loss of live fish. This issue has now been resolved in a Supreme Court ruling, cf. the 2001 Norwegian Supreme Court Reports, p. 676, whereby the disclaiming of liability for live fish was found invalid, cf. Section 254, fourth sub-clause, of the Norwegian Maritime Code. However, the insurers are under no circumstances willing to accept this liability. It is therefore excluded from the cover according to *sub-clause 2 (d) and (e)*. The provision must be seen in conjunction with the limitation of liability in Cl. 17-17 and Cl. 20-14, which establishes that the hull insurer does not cover liability under Cl. 13-1 for damage to or loss of fish or devices for keeping live fish in connection with calling at such an installation for loading or discharging.**

Previous sub-clause 3 referred to "freighters, including well-boat" and led sometimes to confusion amongst owners of so-called working-boats. The term "freighter" refers to the Norwegian Maritime Authority's definition which comprises all kinds of vessels that are not passenger- or fishing vessels.

Clause 21-8. Liability for description

Former Cl. 17-36.

The *first sentence* establishes that the insurer covers the assured's liability for inadequate or incorrect description of the goods or other incorrect information in the bill of lading or similar document.

In principle, the liability covers all types of liability under bills of lading. If liability is imposed under the principle of estoppel, see Section 299, third sub-clause, of the Norwegian Maritime Code, it will, however, normally be a cargo damage liability and accordingly be covered under the rules in Cl. 21-9.

Liability is covered even if the vessel's crew or the owner's employees have been grossly negligent in connection with the issue of the bill of lading. By contrast, the assured will not be covered if he has himself been grossly negligent, cf. Cl. 21-21, sub-clause 1.

Liability under bills of lading applies to "a bill of lading or similar document". The term "bill of lading'" comprises both shipped bills of lading (Section 292 of the Norwegian Maritime Code), through bills of lading (Section 293 of the Norwegian Maritime Code) and received-for-shipment bills of lading (Section 294 of the Norwegian Maritime Code). In connection with transhipment, not only liability under bills of lading where the bill of lading is issued in connection with the loading of the insured vessel is covered, but also where the bill of lading is issued by an earlier carrier on behalf of all concerned.

By other "similar documents" is meant other documents issued as evidence of goods received for carriage. A practical example is the non-negotiable sea waybill (Section 308 of the Norwegian Maritime Code). Admittedly, goods in transit will rarely be bought or paid for on the strength of the description of the goods in such a sea waybill, but it does happen. If the assured then becomes liable under general liability rules for negligent, incorrect or incomplete description of the goods, etc., this will be covered under this provision.

The last part of the provision contains a limitation of the insurer's liability. If the assured or the master of the vessel knows that the description in the document of the cargo, its quantity or condition is incorrect, the insurer is not liable. This provision concords with the solution in, e.g. Gard's P&I Conditions. On the one hand, it is sufficient that the master of the vessel knows that the description is incorrect. The assured is not required to know. On the other hand, the exclusion does not cover negligence. The assured or the master must have definite knowledge that the description is incorrect.

Clause 21-9. Liability for the misdelivery of goods

Former Cl. 17-37.

The cover of the assured's liability for wrongful delivery is on *inter alia* Gard's P&I Conditions. The basic principle is admittedly still that the assured's liability for wrongful delivery is covered, see *sub-clause 1*. However, due to sub-clause 2, this principle will in reality only be relevant

where the goods are carried on a sea waybill or some other non-negotiable document. In that case liability for wrongful delivery acquires an entirely different content than in the event of carriage under a bill of lading, because such non-negotiable documents do not constitute evidence of the right to the cargo. The assured's duty to hand over the goods is therefore not tied to the document in the same way as under a bill of lading, where he is obliged to hand over the goods to the third party who presents the document in the port of discharge. In the event of non-negotiable documents, the assured shall hand over the goods to the consignee stated in the document, possibly to some other consignee named by the consignor, see Section 308 of the Norwegian Maritime Code. If the goods are handed over to someone else, and the assured incurs liability in that connection, such liability will be covered under sub-clause 1.

Sub-clause 2 **initially establishes that liability for wrongful delivery is not covered if the goods are handed over to a person without presentation of a proper bill of lading. The main rule where the carriage in question takes place under a bill of lading will thus be that the insurer does not cover the liability for wrongful delivery incurred by the assured because the goods were handed over to someone who is not entitled to them without presentation of the bill of lading. However, the rest of sub-clause 2 stipulates a small exception to this rule. The assured's liability for wrongful delivery in such a situation is in fact covered if the goods were carried by the assured in accordance with a sea waybill or some other non-negotiable document and handed over as prescribed by this document, but he incurs liability under a bill of lading or some other negotiable document issued by or on behalf of someone else for carriage partly in the assured's vessel, partly in another vessel. Such a situation may arise if a non-negotiable document and a negotiable document have been issued for the same cargo, and the bearer of the negotiable document is someone other than the cargo consignee named in the non-negotiable document. An example may illustrate the situation. Carrier A issues a bill of lading for a shipment from Kristiansund to Kiel. A is in charge of the shipment from Kristiansund to Oslo, while the shipment from Oslo to Kiel is to be handled by sub-carrier B. Under the bill of lading, each carrier is liable for damage to or loss of the goods while they are on board his vessel. B has issued for his leg of the shipment a non-negotiable document with the same named consignee as stated in the bill of lading. However, the bill of lading is transferred to someone else, and this new bearer of the bill of lading demands that B deliver the goods to him. If B has already handed over the goods in accordance with the non-negotiable document, his liability to the bearer of the bill of lading will be covered under the provision.**

Clause 21-10. General average contributions

Former Cl. 17-38.

Sub-clause 1 **establishes that the insurer covers the assured's loss resulting from his being precluded from claiming cargo's contribution in general average by reason of a breach of the contract of affreightment. In the event of general average, the assured will normally be entitled to recover cargo's contribution from the cargo owner or his insurer. Basically, this also applies where the general average is caused by the assured's breach of contract, e.g. where a fire with major fire-extinguishing damage is caused by defects in the vessel when it last left port, and where this defect was known, or ought to have been known, to the vessel's crew and made the vessel unseaworthy. However, in such cases the cargo owner may have recourse against the assured for the general average contributions they are obliged to pay, cf. YAR rule D and ND 1993, p. 162 NH FASTE JARL. If it is the assured who has incurred the general average expenses and who collects the contributions, the cargo owner will exercise his recourse claim by a set-off. If the counterclaim succeeds, the cargo owner will not have to pay the general average contribution, and the assured suffers a loss. This loss is covered by the liability insurer under sub-clause 1. This cover may be seen as a continuation of the coverage of the assured's cargo liability: Formally, the assured will not be precluded from claiming a contribution, but he has to accept being held liable for the loss which the cargo owner has suffered by the imposition of the duty to pay contribution.**

The general average contribution may also be lost or reduced for reasons other than a breach of contract or the cargo's unwillingness or inability to pay, e.g. where the assured does not comply with the time limit for filing the claim. This will in that event be the assured's risk. Nor does the cover extend to excess general average contributions from the cargo, where a loss arises for the assured because sacrifices and disbursements exceed the value of the contributions, at the same time as the cargo owner's liability is limited to the value of the cargo.

The provision applies only in relation to the cargo's contribution. This is due to the fact that the freight contribution shall normally be covered by the assured. However, in the event of sub-chartering, the contribution shall be allocated to the charterer. The failure to pay contributions which may then occur is, however, not covered by the liability insurer.

Sub-clause 2**. Expenses incurred in connection with the collection of general average contributions will often be recoverable as costs of measures to avert or minimise loss, cf. Cl. 4-7 and Cl. 4-12. However, sub-clause 2 imposes a direct obligation on the liability insurer to cover such costs regardless of whether or not they qualify as costs of measures to avert or minimise loss. The provision is of particular importance if legal proceedings must be instituted in**

connection with general average, but it also covers other costs in connection with collecting cargo's contribution, e.g. costs in connection with out-of-court collection.

As regards the assured's duties to maintain and secure the claim against the cargo, Cl. 5-16 shall apply.

Clause 21-11. Liability for removal of wrecks

Former Cl. 17-39.

The *first sentence of the* provision provides that the insurer shall cover the assured's liability for removal of wrecks, provided such removal is ordered by the authorities. If the assured becomes liable for the removal of a wreck, it is normally because the vessel has been involved in a collision with another vessel or object, or because it has run aground. To the extent that the liability is covered by the vessel's hull cover, it falls outside the scope of the liability insurance, cf. Cl. 21-19, sub-clause 1 (a) with the exception of excess collision liability, cf. sub-clause 2. Under the Plan, the hull insurance covers liability for the removal of the wreck of another vessel with which the insured vessel has collided, cf. Cl. 13-1, sub-clause 1, but not liability for the removal of the wreck of the vessel itself, cf. Cl. 13-1, sub-clause 2 (i). Liability for the removal of the wreck of the insured vessel is therefore in its entirety covered under Cl. 21-11. Excess collision liability for an oncoming vessel, i.e. liability for the removal of wrecks for the oncoming vessel which exceeds the sum insured for collision liability is covered partly under Cl. 21-11, partly under the rule of cover for the assured's ordinary liability for property damage, cf. Cl. 21-7.

The provision covers liability for the removal of wrecks "ordered by the authorities". This restriction entails that liability for the removal of wrecks according to contract is not covered by the insurance. Otherwise, the cover is very general. It covers any basis for liability and liability for the removal of wrecks which present an obstruction to traffic according to the port regulations of the country concerned, cf. for Norwegian law the Ports and Waters Act of 17 April 2009, No 19, Section 35, liability for removal of wrecks because the vessel has gone down at a location where the cargo may cause damage, and liability for removal of wrecks as a result of collision to the extent that this liability is not covered under the hull insurance. Both strict liability (e.g. under the Ports Act) as well as *culpa* liability are included. It is also irrelevant whether the costs incurred in removing the wreck concern the insured vessel or another vessel, and it is irrelevant whether the vessel becomes a wreck due to a casualty or for other reasons.

Under Cl. 230 of the Norwegian Plan of 1964, the insurance only covered liability for the removal of wrecks where the vessel was lost in consequence of other causes than war perils. This

was due to the fact that the war risks hull insurer covered liability for the removal of wrecks where the vessel was lost as a result of a war peril. In the Plan, liability for the removal of war wrecks has been incorporated in the liability insurance part in Chapter 15 on war risks insurance, cf. Cl. 15-21. It must therefore also be included in the liability insurance in this Chapter.

A vessel is a "wreck" when salvage has been abandoned because it would be unprofitable, i.e. the value of the object to be salvaged is less than the costs involved in salvaging it. It is irrelevant whether the vessel is condemnable under the Norwegian Maritime Code or under the hull conditions. In practice, it may be difficult to decide when the insurer's liability for removal of wrecks is triggered. When an owner is instructed to remove a wreck, he must without undue delay decide whether he wants to salvage the vessel so that the insurer may start the work of removing the wreck before the port authorities do it.

If the insurer pays the costs involved in removing the wreck, the proceeds will accrue to him, even if the wreck should prove to be worth more than the costs involved in removing it.

The term "liability for the removal of wrecks" also covers the costs of removing the cargo, etc. to the extent that this is necessary in order to remove the wreck. Otherwise the removal of wreckage other than the actual shipwreck will not be covered, e.g. cargo which the vessel has lost, or parts of vessel or cargo which have sunk. Nor does the cover include liability for obstructions to traffic vis-à-vis owners of ports, canals, etc. It is only the actual wreck-removal expenses that are covered. On the other hand, the cover includes the costs of marking and illuminating the wreck as required by the public authorities.

The *second sentence* states that the insurer's liability also includes the assured's liability for disposal and destruction of the wreck. The reason for this is that such costs must be regarded as part of the costs of removing the wreck.

Clause 21-12. Liability for special salvage compensation

Former Cl. 17-40

According to this provision the insurer is required to cover the assured's liability for special compensation to the salvor where the assured is required to pay such compensation under the rules of the relevant sections of the Nordic Maritime Codes or other rules of law or contract rules which are based on Article 14 of the International Convention on Salvage of 1989. Article 14 of the Convention, on which e.g. Section 449 of the Norwegian Maritime Code of 1994 is based, arises from the amendments to the international salvage rules relating to prevention of damage to the environment. It appears from Section 446 (b) of the Norwegian Maritime Code,

cf. Article 13 sub-clause 1 (b) of the Convention, that the ordinary salvage reward shall be fixed taking into account "the skills and efforts of the salvors in preventing or minimising damage to the environment". The concept "damage to the environment" is defined in further detail in Section 441 (d) of the Norwegian Maritime Code of 1994, cf. Article 1 (d) of the Convention. If therefore the result of the salvor's efforts is that the vessel has been salvaged, wholly or in part, at the same time as damage to the environment has been prevented or minimised, this will be taken into consideration and the salvage reward will be increased. The total salvage reward will be apportioned in the general average adjustment which shall take place after a salvage operation, cf. Rule VI (a) sub-clause 2 of the York-Antwerp Rules. The vessel's general average contribution will be covered by the (hull) insurer in the normal manner according to the rules in Cl. 4-8. If the conditions for a general average adjustment are not met, either because the vessel, freight and cargo belong to the same person, or because the vessel is in ballast, the (hull) insurer will nevertheless cover the vessel's contribution in an assumed general average adjustment under the rules of Cl. 4-9 and Cl. 4-11 respectively.

If the salvor has incurred costs in connection with "salvage operations in respect of a vessel which by itself or its cargo threatened a risk of damage to the environment", he is entitled to a special compensation from the owner equivalent to his expenses, see Section 449, first sub-clause, of the Norwegian Maritime Code, cf. Article 14.1 of the Convention. If the vessel has been salvaged, wholly or in part, such special compensation shall, however, be paid only to the extent that it exceeds the fixed salvage reward, see Section 449, first sub-clause, second sentence, of the Norwegian Maritime Code, cf. Article 14.1 of the Convention. However, it is not a condition for claiming special compensation that the efforts were a success in the sense that damage to the environment was prevented or minimised. But, if the efforts were successful, "the special compensation may be increased by about 30 % of the expenses incurred by the salvor", and if deemed "fair and just" by "up to 100 %", see Section 449, second sub-clause, of the Norwegian Maritime Code, cf. Article 14.2 of the Convention. This special compensation is not recoverable in the general average adjustment, see Rule VI (b) of the York-Antwerp Rules and, accordingly, will not be covered by the (hull) insurer as part of the vessel's general average adjustment contribution.

It follows from the provision that the assured's liability for such special compensation is recoverable under insurance of fishing vessels and small freighters according to the rules in the liability section. This is subject to the condition that liability is provided for by Section 449 of the Norwegian Maritime Code of 1994, or rules of law in other countries which are based on Article 14 of the International Convention on Salvage of 1989. Liability may also be provided for in contract clauses which are based on this Convention, see e.g. Lloyd's Open Form (LOF 2011) Cl. D. Given that liability for special compensation must be regarded as a special rule relating to costs of measures to avert or minimise loss, cf. Cl. 4-12 relating to costs of particular measures

taken to avert or minimise loss, liability is not recoverable within the sum insured under Cl. 21-26, but under the separate sum insured for costs of measures to avert or minimise loss, cf. Cl. 4-18, sub-clause 1, second and third sentences, and the Commentary on Cl. 21-26.

Clause 21-13. Liability for bunker oil pollution damage and damage to the environment

Former Cl. 17-41.

Sub-clause 1 **of the provision establishes that the insurer covers the assured's liability for bunker oil pollution damage in accordance with the provisions laid down in national legislation that are based on the provisions of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunker Convention). Through this provision, cover under the Plan is expanded to include all liability under the Bunker Convention. This approach tallies with practice, where it has been customary for the parties to agree on a corresponding expansion of cover by incorporating a special Clause in the insurance contract.**

Sub-clause 2 **establishes that the insurer covers the assured's liability for damage to the environment. Vessels trading in the waters of the states in the European Economic Area are liable for damage to the environment pursuant to the rules of the EU Directive 2004/35CE of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. The purpose of the Directive is to establish a framework of environmental liability based on the 'polluter-pays' principle, to prevent and remedy environmental damage. The Directive applies where environmental damage and damage to protected species and natural habitats are concerned, to occupational activities which present a risk for human health or the environment. The Nordic countries have made the rules of the Directive part of their national law. In Denmark, the relevant acts are Act of 17 June 2008 No 466 relating to environmental damage (Lov om undersøgelse, forebyggelse og afhjælpning af miljøskader - Miljøskadeloven) and Act of 22 December 2006 No 1757 relating to environmental protection (lov om miljøbeskyttelse); in Finland, Act of 29 May 2009 No 383 relating to remedying certain environmental damage (Lag om avhjälpande av vissa miljöskador); in Norway, Act of 19 June 2009 No. 100 Relating to the Management of Biological, Geological and Landscape Diversity (Nature Diversity Act) – (lov om forvaltning av naturens mangfold - naturmangfoldloven); and in Sweden, the Environmental Code of 11 June 1998 (Miljöbalken).**

Clause 21-14. Stowaways

Former Cl. 17-42.

The provision regulates expenses and liability relating to stowaways. The assured's liability and direct expenses resulting from the vessel having stowaways on board are covered. Such liability is first and foremost relevant in the event of deportation, etc., if the stowaways get ashore in a port where they are not wanted.

The term "direct expenses" merely covers "out-of-pocket expenses" in contrast to loss of earnings.

According to the second part of the provision, an exception is made for expenses for board and lodgings which could otherwise have been provided on board. Such maintenance expenses will normally be so low that there is no point in having the insurance cover them.

This provision applies only to "stowaways". It does not cover the situation where the vessel takes refugees on board for humanitarian reasons.

Clause 21-15. Liability for fines, etc.

Former Cl. 17-43.

According to *sub-clause 1 (a)*, the assured's liability for immigration and customs fines is covered regardless of who has committed the offence. It is sufficient that the assured becomes liable and that liability has been incurred in direct connection with the running of the vessel. This latter requirement will normally be satisfied if the assured becomes liable for the conduct of the crew or the passengers, even if the offence has no connection with the service or the vessel. The possibility of the assured becoming liable in such cases is a risk in connection with the running of the vessel.

The precondition for the cover is that it is a question of "fines", i.e. a definite penal sanction. Charges in the form of customs duties or taxes are not covered, even if they might be of a certain penal nature.

***Sub-clause (b)* covers fines resulting from the conduct of the crew. Such fines are covered regardless of the nature of the fine, but the cover concerns only fines caused by the master or the crew. Fines attributable to offences committed by passengers or the assured's people ashore are not covered.**

Under *sub-clause (c),* expenses in connection with orders for deportation of the crew, passengers or other persons accompanying the vessel without belonging to the crew are covered. For the assured, such expenses are in effect the same as fines when he is liable for them. The provision concerns all persons who have accompanied the vessel, i.e. also persons who are neither passengers nor members of the crew, e.g. an itinerant repairman. However, the deportation of stowaways is covered under Cl. 21-14. The cover also extends to a deportation which is foreseeable, e.g. where passengers go ashore or crew is signed off in a port where they have no permit of residence and no home journey has been arranged for them.

The cover under sub-clause 1 presupposes that the assured has "liability" for the fine or the expenses, i.e. a personal liability. However, *sub-clause 2* extends the cover to include such cases where payment can be enforced by detaining the vessel, e.g. by a formal arrest or by denying clearance to depart, or by obtaining security in the vessel, e.g. because there is a maritime lien or some other legal mortgage for the claim. A fine for which the assured is not liable and where payment furthermore cannot be enforced is, however, not covered by the liability insurer.

***Sub-clause 3* makes an exception to the insurer's liability under sub-clauses 1 and 2 for a certain number of specified fines. *Sub-clause 3 (a)* excludes fines resulting from overloading of the vessel. By "overloading" is meant that the vessel lies lower in the water than the allowed mark, normally due to excess cargo, bunkers, ordinary water or ballast water. The reason for the exception is that overloading entails a significant increase in the risk of damage to vessel, cargo and passengers. A similar exclusion is contained in *sub-clause 3 (b)* as regards the fact that the vessel has more passengers than allowed.**

The exclusion in *sub-clause 3 (c)* concerning illegal fishing has to do with the fact that increased competition combined with reduced fish resources has resulted in an increased risk of excessive fishing. Many coastal states have strict regulations for permitted fishing zones, the use and size of equipment and prohibition against fishing certain types of fish. Fines resulting from a breach of these rules should not be covered by the liability insurance.

***Sub-clause 3 (d)* excludes fines resulting from inadequate maintenance of lifesaving or navigation equipment and is based on the increased focus on safety. Lifesaving equipment includes not only life boats and life buoys, but also equipment such as life jackets, flares and water tight lights. Maintenance of this equipment includes routine repairs and replacements. By navigation equipment is meant e.g. radar, echo sounders and charts. Most coastal states have minimum requirements regarding the lifesaving equipment which must be on board the vessel. Breach of such regulations will normally result in a fine, which is thus not covered under the liability insurance.**

The exclusion in *sub-clause 3 (e)* concerns the flag state's requirement that a ship shall at all times carry the mandatory certificates on board. As far as Norway is concerned, this is a certificate required by the Norwegian Maritime Directorate. According to Cl. 21-3 the insurance cover will lapse if the valid certificate lapses. In that event, the exclusion in sub-clause (e) is superfluous. The provision is therefore only relevant where the vessel does have a valid certificate, but it is not on board.

Clause 21-16. Liability for social benefits for the crew

Former Cl. 17-44.

***Sub-clause 1* establishes that the insurance covers the assured's liability for certain specific social benefits for the crew in accordance with the law or collective wage agreements.**

Under *sub-clause 1 (a),* the care and maintenance of the crew on shore in the event of illness or injury are covered. The provision reflects the fact that a seaman who has fallen ill or been injured is, under Section 4-6 of the Norwegian Ship Labour Act, entitled to nursing for the assured's account, on board or ashore, for the duration of his service. If he is ill or injured on termination of his employment, he has the same rights for up to 16 weeks. It is only the expenses for care and maintenance ashore which are covered, not on board the vessel.

The insurer also covers costs in connection with the crew's travel home, including maintenance, in the event of illness or injury or following a shipwreck, cf. *sub-clause 2 (b).* A seafarer who is left in a Norwegian or foreign port due to illness or injury, or who in signing off suffers from an illness which would have made signing off necessary, is, under Section 4-6 of the Norwegian Ship Labour Act, entitled to a free journey home with maintenance for the assured's account. If his service terminates as a result of a shipwreck or condemnation, the seafarer is entitled to a free journey home with maintenance, cf. Section 4-6 of the Ship Labour Act.

According to *sub-clause 1 (c),* costs in connection with the funeral and sending home of the cinerary urn and the deceased's effects are covered. The assured is obliged to cover such expenses if a seafarer dies whilst still in service or whilst he is entitled to nursing or whilst he is travelling for the assured's account, cf. Section 8-3 of the Ship Labour Act.

***Sub-clause 1 (d)* provides for an extension of liability to include liability under collective wage agreements for costs relating to the crew's travel home, including maintenance, in the event of the illness or death of a close relative. This extension was taken from Gard's rule 27 d and Skuld's rule 7.6.1, and brings the liability insurance under Chapter 21 in line with the other P&I covers as far as this point is concerned.**

Clause 21-17. Travel expenses for replacement crew

Former Cl. 17-45.

The *first sentence* establishes that the insurer must cover the necessary expenses of a replacement, and is based on the fact that a number of countries have rules concerning minimum manning and refuse to let a vessel leave a port unless these requirements are met. If the master or an officer of a vessel falls ill or dies, it may therefore be necessary to have a replacement in order for the vessel to be allowed to leave the port. The cause of death, injury or illness is irrelevant, but the illness or injury must be the primary reason for the termination of service. Only the expenses related to the outward journey are covered, but the place of departure is irrelevant. The cover includes all expenses, e.g. ticket, meals, accommodation during the journey, etc. The cover is, however, subject to the condition that the expenses are deemed "necessary". If an acceptable replacement can be found locally, therefore, the assured does not have the right to send a replacement from elsewhere at the insurer's expense.

The *second sentence* restricts the cover further. Only expenses for travel to the first port of call following the death, or the port where the person in question signed off, even if the replacement is in actual fact sent to a port further away, are recoverable.

Clause 21-18. Expenses for disinfection and quarantine

Former Cl. 17-46.

The *first sentence* deals with the cover of the costs of quarantine orders and disinfection of the vessel. By "quarantine orders" is meant orders from public authorities, and the expenses are "necessary" to the extent that they must be incurred in order to comply with the order. The reason for the order is irrelevant. It may be a current danger of infection or a general fear of infection.

The cover of necessary expenses in connection with the disinfection of vessel or crew is limited to cases of infectious diseases on board and does thus not cover extermination of insects, bugs, vermin, etc. Nor does it apply to preventive measures, unless they constitute measures to avert or minimise loss.

Under the *second sentence*, operating expenses during the stay will not be covered. Loss of time and other consequential losses will also fall outside the scope of cover.

Clause 21-19. Limitation due to other insurance, etc.

Former Cl. 17-47.

The definition in *sub-clause (a)* concerns losses which according to their nature are insurable under a hull insurance according to Part II of the Plan, or Part IV, Chapters 17 and 20, or other insurances for ocean-going ships in Part III of the Plan. The provision establishes a strictly complementary delimitation between the liability insurance and the above mentioned insurances. It is irrelevant whether the insurance in question has in actual fact been effected or whether it is limited quantitatively so that the assured will not get full cover, cf. "according to their nature". This applies both in relation to limitations which follow from the actual standard conditions, and limitations which follow from individually agreed deductions or deductibles. However, an important exception to this rule concerns collision liability, cf. below.

Furthermore, the cover provided under Plan provisions is of decisive importance. If the assured has taken out insurance on conditions which afford a cover inferior to that of the Plan's provisions, this will accordingly not result in any extension of the scope of cover of liability.

Overlapping between hull cover and liability cover occurs, partly where the liability insurer covers damage to or loss of the assured's effects, and partly where the hull insurance covers the assured's liability, see further *Brækhus/Rein*: *Handbook of P&I Insurance*, pp. 248 *et seq.* The most frequently occurring overlapping situation concerns collision liability, where the hull insurer according to Cl. 13-1, cf. Cl. 17-16, covers liability in connection with a "collision" caused by the vessel with accessories, equipment and cargo, or tug used by the vessel. However, this cover is subject to a whole series of limitations, cf. Cl. 13-1, sub-clause 2, Cl. 17-16, sub-clause 2, and Cl. 17-17 and Cl. 20-14, where the liability insurer comes in (with the exception of Cl. 13-1, sub-clause 2 (a), cf. below). In addition, the liability insurer covers liability which is not covered by the rule in Cl. 13-1, cf. Cl. 17-16. Reference is made here to the Commentary on Cl. 13-1 and Cl. 17-16, and to *Brækhus/Rein* 1.c. pp. 250 *et seq.*

According to *sub-clause 1 (b), first sentence*, the liability insurer does not cover losses as mentioned in Cl. 13-1, sub-clause 2 (a), i.e. liability which arises while the vessel is engaged in towage, or which is caused by the towage, unless it is a salvage operation. The reason for this exclusion Clause is the increase in the collision risk which arises when the insured vessel engages in towage. The *second sentence*, however, modifies this exclusion as regards liability incurred during towage of a vessel belonging to the same fishing team.

***Sub-clause 1 (c)* concerns losses as mentioned in Cl. 4-16 and contains a delimitation in relation to fire insurance, cargo insurance or other general insurance. According to Cl. 4-16, the liability**

insurer will in certain cases be liable for damage to the assured's own property. However, also on this point, the liability insurer's liability is strictly complementary to general insurance. Losses which according to their nature are insurable under the said general insurances fall outside the scope of the liability insurance. The provision means that the assured normally may not claim compensation for damage to his own cargo according to Cl. 17-35. Such damage could have been covered by cargo insurance.

Sub-clause 2 **represents an important exception to the principle that liability insurance is complementary to hull insurance. The liability insurer covers collision liability which exceeds the amount which the assured may claim under a hull insurance with a sum insured which is equivalent to the full value of the vessel. The liability insurance here provides a complementary excess cover of the assured's collision liability.**

The excess cover concerns liability in excess of "the amount which according to Cl. 13-3 is recoverable under a hull insurance with a sum insured that covers the full value of the vessel". The "full value" of the vessel means the value (normally the market value) at the time the casualty occurs, not the insurable value in relation to the hull insurance, which is the full value of the interest at the inception of the insurance, cf. Cl. 2-2. However, the agreed hull value will be relevant as an element in the assessment of the real value. If the vessel is undervalued, the excess cover does not apply to the amount between the agreed hull value and the "full value" of the vessel.

Sub-clause 2, second sentence**, provides a separate rule regarding collision liability for collision with the assured's own vessel, cf. Cl. 4-16. For excess collision liability for sister ships, a deduction will be made for amounts which could have been covered under insurances as mentioned in sub-clauses (a) and (c). On this point the cover is thus subsidiary also in relation to insurances mentioned in sub-clause (c).**

Sub-clause 3 **makes the liability insurance partly subsidiary, partly complementary, in relation to benefits from the Norwegian National Insurance scheme, pension schemes, the Occupational Injuries Insurance and other personal insurance benefits funded by the liable employer. The provision comes in addition to the protection against liability for personal injury which the assured, and hence the liability insurer, already have under Norwegian law pursuant to Section 3-1, third sub-clause, and Section 3-7 of the Norwegian Compensatory Damages Act (NCDA), and which entails that a deduction shall be made in the claims settlement (on an exact amount basis or on a discretionary basis) for the relevant benefits, at the same time as the assured will normally not have any liability to the party who makes the payments. However, the delimitation in sub-clause 3 goes further than the rules of the NCDA.**

The provision applies to any type of personal injury, regardless of who the injured party is, and therefore covers any liability for personal injury covered under Cl. 17-34. In addition, it applies to the liability for social benefits for the crew, cf. Cl. 17-44.

According to *sub-clause 3 (a)*, the cover has been made subsidiary to national insurance benefits and benefits from employee or occupational pension schemes. The deciding factor here is the actual amount which the injured party receives from the said schemes. The provision applies only to "employee or occupational" pension schemes. Private pension insurance agreements which the injured party might have therefore fall outside the scope of cover.

As regards benefits covered by insurance agreements which are mandatory under collective wage agreements and which are funded by the liable employer, the cover of liability has, however, been made complementary, cf. *sub-clause 3 (b)*. The provision is relevant where the assured becomes liable for persons of whom he is the employer, i.e. the vessel's crew and any other employees who might be injured in connection with the running of the vessel. If the assured in his capacity of employer has neglected to take out the mandatory insurance, defaulted on payments of premium, etc., and therefore does not obtain a deduction for these benefits in accordance with Section 3-1, third sub-clause, of the NCDA, the assured must cover this part of the liability himself.

***Sub-clause 3 (c)* makes the cover of liability complementary to the occupational injury insurance. The 1996 Plan referred to the Norwegian Occupational Injuries Insurance Act of 16 June 1989 no. 65. The Nordic 2013 Plan refers to the relevant industrial injuries insurance legislation instead.**

According to Section 3 of the Norwegian Occupational Injury Insurance Act, an employer is obliged to take out insurance to cover industrial injuries and industrial diseases for his employees. Losses which according to their nature are covered under this insurance are removed from the liability cover. This applies both in relation to the assured's own employees, to persons whom the assured uses in the service of the vessel, but of whom the assured is not an employer, and for total outsiders, e.g. an injured party on an oncoming vessel in connection with a collision. As regards the industrial injuries insurance, the assured therefore bears the risk that other employers have in actual fact fulfilled their obligation to take out insurance. In practice, the injury will be covered by a pool arrangement if no industrial injuries insurance has been taken out. In view of the fact that the insurance companies involved have recourse against both the employer and the party causing the injury (the assured), cf. Sections 7 and 8 of the Norwegian Occupational Injury Insurance Act, cover under the assured's liability insurance may give the industrial injuries insurance company a motive for a recourse claim against him.

However, such injuries should remain with the employer or with the industrial injuries insurance companies jointly.

Clause 21-20. Safety regulations/Ref. Clause 3-22 and Clause 3-25

Former Cl. 17-48.

This rule is patterned on the limitation of liability rule in *inter alia* Gard's Conditions, but in the form of a safety regulation. The assured's duty to incorporate disclaimers of liability is tied directly to his right to exclusion of liability and limitations of liability according to current rules of law.

By "current rules of law" is meant the rules in force in the state where the liability arises, as well as relevant international conventions. As far as Norway is concerned, the rules are first and foremost contained in Sections 171 *et seq.* of the Norwegian Maritime Code.

In view of the fact that this is a special safety regulation, the loss of cover is subject to the condition that the assured or anyone who on his behalf is obliged to comply with the regulation, has been negligent, and that there is a causal connection between the negligence and the liability, cf. Cl. 3-25, sub-clause 2.

Clause 21-21. Assured's fault

Former Cl. 17-49.

***Sub-clause 1* regulates the causing of an event insured against by a negligent act or omission. The provision supplements and modifies Cl. 3-32 *et seq*. It follows from Cl. 3-32 that the insurer does not cover liability which the assured has intentionally caused, whereas in the event of gross negligence a reduction may be made under Cl. 3-33. However, under Cl. 17-49, the rules have been made stricter: the insurer is completely free from liability if the assured has brought about the loss by gross negligence, or on the basis of a negligent understanding of rules of law or contractual terms. The reason is the very comprehensive liability cover, *inter alia* in view of the fact that the insurance covers the assured's contractual liability.**

The deciding factor according to the first alternative is that the loss was "brought about" by the assured "by a grossly negligent act or omission". The assessment of the negligence shall therefore be tied to the act or omission, and not to the consequent damage. The gross negligence is not required to have been deliberate.

The second alternative is a special rule relating to mistakes of law in connection with the performance of a contract. In such cases the criterion gross negligence is often difficult to apply. In a business context the assured will often have to take chances, and he may not automatically be deemed to have been grossly negligent if he chooses a solution which may lead to liability. He makes his choice between the various possibilities based on an evaluation as to what will give him the best result. If he is lucky, the profit is his. If he is unlucky, he should not be entitled to transfer the loss to the liability insurer. The rule acquires special significance in relation to so-called "liberty" clauses in charterparties, i.e. deviation, ice, war or strike clauses.

Conception of law is "wrong" when it is in contravention of clear law or practice. That the understanding is "uncertain" means that it is disputed, so that one must be prepared that the courts resolve the issue in the disfavour of the assured. It is not decisive whether arguments may also be submitted in favour of the assured.

Sub-clause 2 **lays down special rules for an assured who is master of the vessel (the master owner) or a member of the crew. The provision was patterned on Cl. 3-25, sub-clause 1, without this entailing any major changes on points of substance. Reference is furthermore made to the Commentary on Cl. 3-25, sub-clause 1, second sentence.**

Clause 21-22. The insurer's rights in the event of liability

Former Cl. 17-50.

By the term "the liability amount" is meant the lowest of the injured party's claim, the limitation amount under the law and the insurer's maximum liability under Cl. 21-25.

Sub-clause 2 **refers to the mandatory provision in Section 7-8 of the Norwegian Insurance Contracts Act. The fact that the injured party does not otherwise have a direct claim against the insurer appears from Cl. 4-17, sub-clause 1.**

Clause 21-23. Liability for loss that occurred during other transport, etc.

Former Cl. 17-51.

Sub-clause (a) **refers to Sections 254 and 274 of the Norwegian Maritime Code, while *sub-clause (b)* refers to Section 285 of the same Act. The provision must also be seen in conjunction with the basic principle in Cl. 17-33 to the effect that the liability insurer only covers loss that occurred in direct connection with the operation of the insured vessel.**

Sub-clause (a) excludes liability for cargo arising during the period prior to loading or after discharging or during transport to and from the vessel covered by the insurance when the cargo is not in the carrier's custody. If the cargo is in the carrier's custody, e.g. where it is carried out to the vessel in the carrier's boats, the assured will be liable under Section 274 of the Norwegian Maritime Code, and the liability must normally be deemed to have occurred in direct connection with the operation of the vessel. For passengers a corresponding distinction shall apply according to *sub-clause (d).*

It follows from sub-clause (b) and *sub-clause (c)* that the assured's liability to passengers and cargo is not covered while passengers or cargo are in transit with or in the custody of another carrier. As far as the cargo is concerned, it follows from Section 285, second sub-clause, of the Norwegian Maritime Code that the assured can in such cases normally disclaim liability. The same follows from Section 431, subsection 3, of the Norwegian Maritime Code as regards passenger transport.

Clause 21-24. Limitation of liability for fishing vessels

Former Cl. 17-52.

The provision refers to the "knock-for-knock" principle which is mentioned in the Commentary on Cl. 17-9 and Cl. 17-16. When several vessels are fishing together in the same fishing team or as pair trawlers, damage to the assured's own and other vessels with accessories and catch is foreseeable. It is therefore more expedient for the individual owner to cover damage to his own object, possibly via his hull insurance, than having a claims settlement in connection with the liability insurance.

Clause 21-25. Limitation of the insurer's liability for measures to avert or minimise loss

Former Cl. 17-53.

Basically, the liability insurer covers costs of measures to avert or minimise loss according to the rules in Cl. 4-7 *et seq.* Provided that the conditions are met, the insurer will be fully liable regardless of the nature of the loss, damage or expenses in question. As regards liability insurance, however, Cl. 21-24 contains a number of restrictions to this principle. The provision must be regarded as a continuation of the restrictions which follow from Cl. 4-12 concerning particular measures to avert or minimise loss. This means that it cannot be interpreted antithetically, but must be supplemented with Cl. 4-12.

Sub-clause (a) **is based on the point of view that proper loading and stowage is an operating expense which the assured shall pay himself. This also applies if the work is initially done so inadequately that it has to be done over again. The vessel may be "too heavily loaded" without being overloaded in the ordinary sense.**

Sub-clause (b) **excludes costs incurred in connection with measures which were or could have been taken by the vessel's crew or with the proper use of the vessel or its equipment. Typical costs here are wages and overtime of the crew and bunkers consumption. If such costs were to be covered as costs of measures to avert or minimise loss in all cases where the measures must be regarded as unforeseeable or extraordinary, cf. Cl. 4-12, this could result in an unnecessarily complicated settlement. The distinction between operating costs and costs of measures to avert or minimise loss is often difficult to make. Certain costs are to be regarded as operating costs even if they are incurred in connection with measures which, seen in isolation, are unforeseeable or extraordinary, e.g. a minor deviation to avoid a storm centre. It is therefore important to have an inflexible rule in order to reach a conclusion. The provision entails that costs as mentioned in sub-clause (b) are not covered, even if the measures are of an extraordinary nature or are qualified as unforeseeable. Wages and bunkers in connection with a port of refuge call in order to recondition the cargo shall therefore not be covered. As regards the use of the vessel, it is, however, a condition that it is "justifiable". If it is necessary to force the engine so that there is a deliberate risk of damaging it, the costs of potential damage shall not be covered. Similar considerations apply to the exclusion in *sub-clause (d).***

Sub-clause (c) **entails that the liability insurer will not cover as a cost of measures to avert or minimise loss the liability the assured may incur if such a measure delays the vessel.**

Clause 21-26. The sum insured as a limit to the insurer's liability

Former Cl. 17-54.

The limitation also applies if the injured party files the claim directly against the insurer. If the assured, according to current rules of law, is entitled to limit his liability to the injured party, the insurer is obviously also entitled to invoke this limitation *vis-à-vis* the injured party.

The sum insured applies only to the actual liability for compensation associated with the casualty. If costs of measures to avert or minimise loss have also been incurred, special rules shall apply in accordance with Cl. 4-18, sub-clause 1, second and third sentences.

Sub-clause 2 **specifies that payments under Cl. 4-19 are made in addition to the maximum amount of the insurance contract.**

Clause 21-27. Deductible

Former Cl. 17-55.

In accordance with the other deductible provisions of the Plan, the actual amount of deductible has been removed from the provision.