Part one

Rules common to all types of insurance

General

Part 1 of the Plan is based on Part 1 of the 1964 Plan, various insurance conditions and practice. The insurance conditions that are relevant to Part 1 are first and foremost Conditions for hull insurance issued by the Central Union of Marine Underwriters (Cefor) and the Mutual Marine Insurance Associations' Premium and Insurance Conditions (PIC). These conditions were issued fairly frequently. In the general part of the Plan reference is initially made to the 1995 conditions. The abbreviation Cefor therefore stands for Cefor Form 246 A Oct. 1995, while PIC means the Mutual Marine Insurance Associations' Premium and Insurance Conditions 1 January 1995. On one point, viz. in relation to § 3-14 and § 3-24, subparagraph 2, relating to loss of class, change of classification society and periodic surveys, reference is, however, made to earlier conditions. This is due to the fact that the solutions adopted in the Plan on this point were incorporated in the conditions already in 1995, which means that it would create the wrong impression to refer to those conditions.

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

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

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

Chapter 1.

Introductory provisions

A number of provisions of a general nature, which are difficult to fit into the Plan's system in any other way, are compiled in this chapter. Provisions here and in the subsequent chapters are based on the 1964 Plan as well as on various insurance conditions. Hereinafter Cefor is used as an abbreviation of the hull insurance conditions issued by *Sjøassurandørenes Centralforening* and PIC for The Mutual Marine Insurance Associations' Premium and Insurance Conditions. (Translators note: In the Commentary these conditions, which were identical in nearly all respects, are referred to collectively as the special conditions or the previous conditions.)

§ 1-1. Definitions

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

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

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

In addition to the distinction between the person effecting the insurance and the assured, a distinction must be made between "the person effecting the insurance" and his authorised representative. A broker, agent or intermediary

is not the person effecting the insurance, but the authorised representative of the person effecting the insurance.

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

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

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

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

Sometimes the word "casualty" will be used where damage has arisen as a result of a peril that occurred at an earlier point in time, cf. the HEKTOR case, where the peril struck in the form of the falling bomb, (ND[1] 1950.458 NH, cf. below under § 2-11). A casualty without damage arising is also conceivable. This would be the case where a grounding occurred which did not result in any damage. A grounding of this type would require the assured to perform his

[1] ND = Norwegian Judgemens.

ordinary duties in the event of a casualty (cf. § 3-29 to § 3-31), even if it turned out later that the ship did not sustain any damage.
Definitions are also found in certain other places in the Plan, see e.g. § 2-8 (b), § 2-9 subparagraph 1 (b) and § 3-24.

§ 1-2. Policy

This paragraph corresponds to § 2 of the 1964 Plan and ICA section 2-2.
Subparagraph 1, first sentence, remains unchanged. A "policy" according to the Plan corresponds to an "insurance certificate" under ICA section 2-2. However, the term "policy" is so firmly established in marine insurance that it was deemed expedient to retain it. In contrast to the provision contained in ICA section 2-2, the insurer has no obligation to issue a policy unless the person effecting the insurance requests him to. Frequently other documents will have been issued which replace the policy, cf. below under § 1-3, in which event a policy would be superfluous.
Subparagraph 1, *second sentence,* relating to the content of the policy, corresponds to ICA section 2-2, subsection 1, first sentence, whilst the third sentence concerning the possibility of relying on the assumption that no other conditions apply than those appearing from the policy is derived from ICA section 2-2, last subsection. The rule to the effect that the insurer cannot invoke conditions to which no reference is made in the policy is a natural equivalent to the principle that the person effecting the insurance will be bound by the policy unless he raises an objection, cf. subparagraph 2. However, it would not be expedient to prevent the insurer entirely from invoking provisions that do not appear in the policy or the references contained in it. If the insurer can prove that the person effecting the insurance was aware of the relevant condition and that this was to form part of the contract, the parties' agreement shall prevail over the written contract, cf. in this respect also the solution contained in ICA section 2-2, last subsection.
According to ICA section 2-2, subsection 2 a-e, detailed requirements concerning conditions must be incorporated in the policy. This part of ICA section 2-2 is not sufficiently flexible for marine insurance.
Subparagraph 2 corresponds to § 2, subparagraph 2, of the 1964 Plan, but has been amended.
ICA sections 2-1 and 2-3 also contain a number of rules relating to the insurer's duty of disclosure. This type of rule is not required in marine insurance.

§ 1-3. Contracts entered into through a broker

This paragraph is new and has no parallel in ICA.

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

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

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

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

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

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

During the revision of the Plan, it was agreed to base the new Plan on the English procedure, according to which it is the actual contract document which is sent to the insurer for his endorsement and which subsequently forms the basis of the cover note. The purpose of this procedure is to secure documentation showing that a binding insurance contract has been entered into, and documentation of the relevant conditions. However, it was also considered desirable for the person effecting the insurance to be given access to the contract text at an earlier stage of the process than both the English and the Norwegian procedures allow, making it possible to lodge a complaint before a

binding agreement has been entered into. This may be achieved by sending the draft insurance contract (slip without endorsement) to the person effecting the insurance for his approval before it is sent to the insurer for endorsement.
The provision contained in § 1-3, *subparagraph 1*, therefore introduces a rule to the effect that the broker, when he has been instructed to take out an insurance, shall submit a written draft insurance contract to the person effecting the insurance for his approval. The draft insurance contract is meant to correspond to the English "slip" without endorsement from the insurer. Such a "slip" normally consists of a standard document of 2-3 pages. Due to the fact that the draft must be approved by the person effecting the insurance before it is sent to the insurer, the procedure becomes somewhat more formalised than the English one. It does, however, ensure that the person effecting the insurance gets the opportunity to see the intended conditions of the contract, as well as the chance to raise any objections he might have at an early stage.
It is a "written" draft insurance contract which is to be submitted. A verbal rendition of the contract is not sufficient, as such a procedure would not ensure the desired notoriety. However, an electronic confirmation is acceptable. In that event a transcript may be obtained, this will provide sufficient documentation.
The term "instructs ..... to take out an insurance" means standing instructions to take out insurance aimed at specific insurers and on specifically stated conditions. The intention is not to regulate the broker's acknowledgement of an order when the instructions are received, or the communications between the parties during the negotiation stage. This means that once the first contact between the person effecting the insurance and the relevant broker has been signed, it will normally take some time until the draft insurance contract can be sent to the person effecting the insurance.
The draft contract shall be sent to the person effecting the insurance "for his approval". Even if the provision does not impose on the person effecting the insurance any actual duty to lodge a complaint, it is presumed that he will react if he does not wish to enter into an agreement with the stated content. Passivity must therefore be regarded as "approval". The consequence of the fact that the person effecting the insurance "accepts" the draft contract is that he accepts that the draft is to provide the basis for a binding insurance contract. This must apply regardless of whether or not the draft is in accordance with any earlier insurance instructions given to the broker. In other words, by the approval of the draft the broker is authorised to effect a binding insurance contract with the

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

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

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

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

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

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

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

The significance of the fact that the insurance confirmation must be regarded as approved will vary, depending on whether it is merely the cover note which is incorrect, or whether the underlying contract is also incorrect. If the situation is that both the insurance confirmation and the contract have been given a different content from that of the draft contract, then an agreement has been entered into between the insurer and the person effecting the insurance which

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

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

If it is only the insurance confirmation which is wrong, while the draft contract is identical to the contract, the failure to object to the insurance confirmation will basically be of less significance: the agreement between the insurer and the person effecting the insurance is correct and the insurer cannot invoke the insurance confirmation. A complaint to the broker regarding the error in the insurance confirmation is nevertheless important in order to prevent this mistake from recurring in the policy and creating problems in the relationship between the policy, the insurance confirmation and the underlying contract.

This has to do with the duty of the person effecting the insurance to make a complaint under § 1-2, subparagraph 2, if he has any objections to the policy. If he fails to do so, he risks being bound by the "wrong" policy, even if the underlying contract is correct. In that event, the failure to object to the content of the insurance confirmation will result in the person effecting the insurance losing his right to hold the broker liable for the policy being given an incorrect content.

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

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

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

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

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

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

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

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

The reference to Norwegian background law entails that ICA becomes applicable as non-mandatory background law. However, ICA is of little

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

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

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

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

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

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

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

Subparagraph 3 regulates insurance on Plan conditions with a foreign leading insurer and is taken from § 147 of the 1964 Plan. In such cases, it is not very natural to use Norwegian jurisdiction as a starting point. If the foreign leading insurer does not accept Norwegian venue, the assured may have to institute legal proceedings abroad. However, the solution from the 1964 Plan is maintained to the effect that Norwegian background law shall also apply in such a case. In the event of litigation abroad, the foreign court will therefore have to rely on Norwegian law, unless the parties have agreed that the

background law of another country shall apply. Whether an explicit forum clause will also entail a reference to the substantive law of that country must be decided in accordance with general international rules of private law. The Plan also upholds the approach from § 147 of the 1964 Plan to the effect that the person effecting the insurance with a foreign leading insurer may sue the co-insurers in the leading insurer's venue, cf. subparagraph 3, i.f. However, in contrast to subparagraph 1, this is merely a right, and not a duty, of the person effecting the insurance. The provision is not only aimed at the leading insurer's general venue (home venue). It must also be possible to sue the co-insurers in all the venues where the leading insurer, according to law or contract, is obliged to accept lawsuits.

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

§ 1-5. Insurance period

This provision corresponds to § 4 of the 1964 Plan and ICA section 3-1.

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

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

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

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

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

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

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

Chapter 2.

General rules relating to the scope of the insurance

Section 1. Interest and insurable value

General

This section corresponds to the 1964 Plan chapter 2, section 1.
§ 5 of the 1964 Plan contained a provision as to what interests were deemed to be covered. This provision has been deleted; the scope of the relevant insurance will appear from the rules relating to the individual lines of insurance. It is nevertheless not the intention to change the reality behind the provision, *viz.* that it is not the object itself, but the assured's economic interest in the object, which is covered by the insurance. The interest terminology is a practical means of creating flexibility and variation in the insurance. In particular, it must be emphasized that it is possible to let several persons insure each their separate interest in the object (e.g., owner and mortgagee), and it is relatively simple to state the items of loss in respect of which the assured may claim cover under each individual insurance (the interest in the ship's capital value is covered by hull insurance, the income interests by freight insurance).
However, attention should be drawn to the fact that the word "interest" is also used with a somewhat different meaning in marine insurance, *viz.* as a designation of certain capital or income interests which are not covered by the ordinary hull or freight insurance, cf. chapter 14 relating to hull and freight interest insurances.

§ 2-1. Insurance unrelated to any interest

This provision is identical to § 6 of the 1964 Plan.
The provision establishes the traditional precondition for a valid insurance contract, i.e. that the assured must have an economic interest in the subject-matter insured. A "gambling insurance", where it has been clear from the outset that no insurable interest existed, is therefore invalid. Similarly, the assured must be precluded from invoking the insurance after the interest is no longer in his hands, for example, when the ship is definitely condemned in

prize or passes to a new owner. Nor will the new owner of the ship normally acquire the position of assured under the insurance contract, cf. § 8-1, subparagraph 1, to the effect that the assured must be specifically named in the contract, and cf. § 3-21 relating to change of ownership.

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

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

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

interest insured, and whether there is causation between the illegal situation and the damage.

§ 2-2. Insurable value

This provision is identical to § 7 of the 1964 Plan.
The provision that the insurable value is the full value of the interest at the inception of the insurance differs from general insurance law, where the insurable value is determined at the time of loss, cf. ICA section 6-1. The reason for the special rule in marine insurance was that it might be difficult to determine the value at the time of loss if the ship was far away. With today's communications systems, it will cause no problems to determine the value at the time of the loss, regardless of where the ship might be. Nevertheless, the traditional solution in marine insurance has been maintained on this point.
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 it seems more natural to operate with an insurable value for the anticipated daily income, cf. § 16-5, and tie the total limitation of the insurer's liability to a certain number of days.

§ 2-3. Assessed insurable value

This paragraph corresponds to § 8 of the 1964 Plan ICA section 6-2.
The provision regulates the extent to which an assessed insurable value is binding on the insurer. Hull insurances and hull interest insurances are, in practice, always effected with an assessed insurable value. In loss-of-hire insurance as well, valuation is very often used in one form or another. For the shipowners, it is important that a valuation is unconditionally binding on the insurer: an expanding shipowner's building programme is based on the ships' current freight income or, if a ship is lost, on its sum insured, and also the mortgagees need to know that they can rely on the hull valuation.
Under § 8 of the 1964 Plan the valuation was not binding on the insurer if the person effecting the insurance had given misleading information concerning the properties of the objects insured which it was important for the insurer to know of in connection with the valuation. This has been changed to the effect that the insurer may *only* demand that the valuation be set aside "if the person effecting the insurance has given misleading information" about the relevant

facts. The wording in the 1964 Plan was prompted by the prohibition against enrichment previously found in ICA section 75, subsection 3, cf. section 39, subsection 1, and was worded in such a way that it did not directly take any stance as regards the possibility of setting the valuation aside in cases other than when misleading information had been given. However, this was subject to the assumption that the provision would be interpreted antithetically, so that no revision of the valuation could take place unless misleading information had been given. The prohibition against enrichment has now been lifted, and the rule contained in § 2-3 has been rephrased in order to more clearly emphasize the principle that the valuation is binding. The reality of the new provision corresponds to ICA section 6-2, first sentence, but the wording is slightly different.

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

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

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

In ICA section 6-2, second sentence, reference is made to the rules relating to the duty of disclosure in the event that the person effecting the insurance has given incorrect information of importance for the valuation. In marine insurance, however, the rules relating to the duty of disclosure in §§ 3-1 *et seq.* are not applicable to misleading information which is only of importance for the determination of the valuation. The consequences of the misleading information in such cases are exhaustively regulated in § 2-3; there is no need for further sanctions in the form of exemption from liability or cancellation of contract as allowed by the rules relating to the duty of disclosure. However, in

the event of fraud, it follows from general rules of contract law that the agreement is void. And if information has been given which is misleading in relation to the valuation as well as significant for the actual effecting of the insurance, the insurer will obviously, in addition to a reduction of the valuation, have the right to invoke §§ 3-1 *et seq.* concerning exemption from liability for damage and, possibly, cancellation of the insurance.
The provision only regulates the setting aside of an excessively high valuation. The insurer should not have the right to demand that a valuation which is clearly too low be set aside with the effect that under-insurance will arise in the event of partial damage. Such a demand will hardly have any legitimate basis: to cover repair costs he has received a premium (casualty premium), which is, in principle, determined on the basis of the size, type and age of the ship, independently of the valuation.
Subparagraph 2 is taken from § 158 of the 1964 Plan, which authorized cancellation in the event of market fluctuations which resulted in material changes in the value of the ship. In practice, this provision was not applied. However, it has been customary for the shipowners to carry out ongoing assessments of the value of the ship during the insurance period, and for the fixed valuation to have been changed on the basis of negotiations in so far as it is no longer concordant with the value of the ship. The provision is based on this practice and establishes that both parties shall, in the event of a change in the value of the insured interest resulting from fluctuations in the economy, have the right to demand an adjustment of the assessed insurable value. It is only the valuation which can be changed in this manner; the insurance contract remains in force. In contrast to § 158 of the 1964 Plan, this provision applies to all forms of owner's insurance and not just to hull insurance.
If the parties do not agree whether or not the conditions for an adjustment of the valuation are met, or about a new valuation amount, *subparagraph 3* provides that the decision shall be made by a Norwegian average adjuster designated by the assured.

§ 2-4. Under-insurance

This paragraph is identical to § 9 of the 1964 Plan and corresponds to ICA section 6-1.
The provision maintains the principle of under-insurance if the sum insured is less than the insurable value, which means that the insurer shall merely

compensate the part of the loss that corresponds to the proportion that the sum insured has to the insurable value, cf. *first sentence.*

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

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

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

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

value. It is not the intention to make any amendments to this principle in the revision.

§ 2-5. Over-insurance

This provision is identical to the provision in § 10 of the 1964 Plan. The same result follows indirectly from ICA section 6-1, subsection 1.
Subparagraph 1 is identical to the earlier provision and requires no comments.
Subparagraph 2 relating to fraud is not found in ICA, but is in accordance with non-marine insurance conditions.

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

The provision corresponds to § 11 of the 1964 Plan and ICA section 6-3.
Subparagraph 1 establishes the principle of primary joint and several liability in the event of "double insurance", i.e. when then same peril is insured with two or more insurers, and corresponds to the rule contained in § 11 of the 1964 Plan. Basically it corresponds to ICA section 6-3, subsection 1: "If the same loss is covered by several insurances, the assured may choose which insurances he or she wishes to use until the assured has obtained the total compensation to which he or she is entitled". However, the wording of ICA does not rule out subsidiarity clauses (clauses to the effect that one insurance is subsidiary in relation to another), while there is a desire in marine insurance to keep the door open for such clauses, cf. subparagraph 2 below. The earlier term that the insurer is liable "according to his contract" has therefore been maintained.
Subparagraph 1 is applicable to three situations. In the first place, it applies to double insurance in the form of ordinary co-insurance. Here the individual sums insured will in the aggregate correspond to the valuation and each individual insurer will be fully liable according to his contract, regardless of the fact that other insurances have also been effected (cf., however, chapter 9, where a number of aspects of the internal relationship between the co-insurers are regulated).
In the second place, the provision becomes significant when there is "double insurance" in the traditional sense, i.e. where several parallel insurances are effected which in the aggregate will give the assured more compensation than the loss he has suffered. The provision in § 2-6 establishes that, in this case as well, the insurers are primarily jointly and severally liable to the assured within

the framework of the compensation to which he is entitled. The further settlement between the insurers is regulated in more detail in § 2-7.
The third situation where there is double insurance is when a loss is covered partly under the primary cover of an insurance, partly as costs to avert or minimise the loss under another insurance. In principle, this loss should be covered under the insurance which covers costs to avert or minimise the loss, cf. below under § 2-7. But also here the assured must initially be entitled to claim damages from both insurers according to § 2-6.
The size of the compensation to which the assured "is entitled" will depend on the insurance conditions. If the conditions authorize cover of varying amounts, it is the highest amount which is decisive for the size of the claim. Until the assured has recovered this amount, he may bring a claim against any of the insurers he wishes within the terms of the conditions which the relevant insurer has accepted.
The provision contained in subparagraph 1 is only applicable in the event of a conflict between two insurances covering the same peril. Hence, a conflict between an insurance against marine perils and an insurance against war perils is not a double insurance according to § 2-6. Nor is it double insurance if the cover is divided into several layers. In the event of layer insurances, each layer must, as mentioned above in § 2-5, be regarded as an independent interest. The insurer under one layer therefore does not become jointly and severally liable with the insurer under another layer, and a loss cannot be transferred from one layer to another if the insurer under one layer is, in exceptional cases, unable to cover a loss.
Subparagraph 2 is new and regulates the settlement if one insurance has been made subsidiary. The rule here is that the insurer who has subsidiary liability is only liable for the amount for which the assured does not have cover with other insurers. It should be superfluous to say this in the Plan text; the solution follows from the actual subsidiarity principle and does not give rise to any particular problems. However, because of the special rule contained in subparagraph 3, see below, an explicit provision was found to be the most expedient.
If several insurances are made subsidiary, there is a risk that the assured may be left without settlement because both or all of the insurers may invoke their subsidiarity clauses. Accordingly, in such cases, there is a need for a rule to protect the assured. A rule of this type was previously contained in section 43

of ICA 1930, which imposed on the insurers a primary pro-rata liability or, in the alternative, joint and several liability. This provision was considered unnecessary under the system in ICA 1989. During the Plan revision, it was decided that in such cases a primary joint and several liability should be imposed on the insurers vis-à-vis the assured, see *subparagraph 3*, which makes subparagraph 1 similarly applicable.

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

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

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

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

Subparagraph 1 regulates the internal settlement among the insurers in case of "double insurance" in the traditional sense, i.e. that the same interest is insured against the same peril with several insurers in such a manner that the total

amount of the assured's claims in connection with a certain loss exceeds the compensation to which he is entitled. When the assured has received what he is entitled to, the total amount of compensation shall be apportioned among the insurers according to the maximum amounts for which each of them was liable. This is an entirely internal settlement which does not concern the assured.
Within the individual type of insurance double insurance is not likely to arise very frequently. It would be by sheer accident that, for example, a shipowner were to take out hull insurance in excess of the valuation, or cover voyage freight twice. § 13 of the 1964 Plan contained a provision granting the assured the right to demand a proportional reduction of the sum insured in such situations. It has apparently not been applied in practice, and no corresponding rule is contained in ICA. This provision has therefore been deleted.
If a salvage operation concerns different interests covered by different insurers, there will seemingly be double insurance as regards costs of measures to avert or minimise the loss. However, here the rules in § 2-6 and § 2-7 are not applied; according to § 4-12, subparagraph 2, each of the insurers is only liable for that part of the costs which is attributed to the interest which he insures; in other words, there is no question of any apportionment under the rules of double insurance.
§ 12, subparagraph 1, second sentence, of the 1964 Plan contained a rule to the effect that if an insurer was unable to "pay his share of the compensations, it is to be apportioned over the others according to the above rules, but each insurer is never obliged to pay more than the amount for which he was liable to the assured". A similar provision in section 42, subsection 1, last sentence, of ICA 1930 was deleted in ICA, because it was regarded as unnecessary to encumber the statutory text with such detailed rules. The provision in the 1964 Plan is not referred to in the Commentary, and it has apparently not given rise to any problems in practice. It has therefore been deleted, also because the solution of a primarily pro-rata, in the alternative joint and several, liability follows from section 2, subsections 2 and 3, of Act no. 1 of 17 February 1939 relating to instruments of debt (*gjeldsbrevsloven*) anyway, and must be considered to be the main rule relating to recourse liability in Norwegian property law.
The provision in *subparagraph 2*, is new and is attributable to the fact that joint and several liability is introduced for the insurers if all of them have reserved the right to subsidiary liability to the assured. In that event, a recourse settlement among the insurers will be necessary if one or more of them have

initially been charged a higher amount than what their proportionate obligation indicates.

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

Section 2. Perils insured against, causation and loss

General

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

(1) the question of the extent of the perils covered under marine insurance; i.e. whether there are perils of a general nature which must be excluded in all types of insurances;

(2) definition of war perils and the scope of the liability of the insurers who cover marine and war perils, respectively;

(3) the question of whether to apply the apportionment rule or the dominant-cause rule in cases of concurrent causes;

(4) duration of the insurer's liability; the question of how to adapt the general maxim of insurance law that the insurer shall only be liable for losses which occur during the insurance period;
(5) the principles for dividing the burden of proof between the insurer and the assured.

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

This provision corresponds to § 15 of the 1964 Plan and Cefor I.1 and I.2 and PIC §§ 5.1 and 5.3.
In accordance with former law, an insurance against marine perils covers "all perils to which the interest may be exposed", cf. subparagraph 1, first sentence. This paragraph stipulates four positive exceptions from this point of departure, *viz.*:
(1) perils covered by war insurance,
(2) "intervention by a State power",
(3) "insolvency", and
(4) "release of nuclear energy".
As under the 1964 Plan, the perils are divided into two groups. A distinction is made between perils covered by the insurers against ordinary marine perils and perils covered by the insurers against war perils. The division is formally made by means of an exclusion of perils in the insurance against marine perils, cf. § 2-8 (a), and a cover of the excluded perils through a special war-risk insurance, cf. § 2-9. However, in reality the marine and war-risk insurances are two equal types of insurances on the same level which - with a few minor exceptions - each cover their part of a total range of perils. The perils covered by the war-risk insurance are specified, while the range of perils covered by the insurance against marine perils is negatively defined, covering any other form of perils to which the interest is exposed.
Because there is a negative definition of the range of marine perils, it is in reality described by reviewing the relevant exceptions. Such a review is given below, along with an overview of certain points where exceptions have been considered. However, initially it is deemed expedient to give a brief overview of the positive content of the range of marine perils, see for further details *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), pp. 49-54.
An insurance against marine perils covers, in the first place, perils of the sea and similar external perils. Perils of the sea mean the perils represented by the

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

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

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

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

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

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

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

Letter (b) excludes from the marine perils "intervention by a State power". It follows from § 2-9- subparagraph 1,(b), that an insurance against war perils covers certain types of intervention by a foreign State power, such as capture at

sea, confiscation etc. Depending on where the relevant ship is insured, the war-risk insurance will also cover requisition for ownership or use by such State powers, see § 2-9, subparagraph 1 (b), seen in conjunction with subparagraph 3. It already follows from the exception in § 2-8 (a) that this type of intervention will not be covered by an insurance against marine perils. In connection with the revision of the Plan, the issue of whether the war-risk insurance could also take over the risk of interventions made by the ship's "own" State power was examined. Such interventions have traditionally not been covered by insurance against marine perils either, see § 15 (b) of the 1964 Plan which excluded "measures takes by Norwegian or allied State authorities". Neither The Norwegian Shipowners' Mutual War Risks Insurance Association nor other war-risk insurers, however, found that they could assume such an extended cover, *inter alia* because it would probably be difficult or entirely impossible to obtain reinsurance cover of such a risk. In view of the fact that insurers against marine perils were not prepared to extend their range of perils, either, it was necessary to maintain the exception in § 2-8 (b). However, the wording of the exception in the 1964 Plan was regarded as unfortunate in connection with insurance of ships without any special connection with Norway. Even if the wording now chosen results in a certain overlapping between letters (a) and (b), it clearly underscores the vital point, *viz.* that as a main rule the insurer against marine perils is not liable for interventions by State powers.

As regards the definition of the term "State power" in letter (b), second sentence, reference is made to the explanatory notes to § 2-9.

The term "intervention" is not defined in § 2-8; however, the use of the term in § 2-9, subparagraph 1 (b), cf. subparagraph 3, and the explanatory notes to those provisions provide the necessary background for understanding the term. Interventions made as part of the enforcement of customs and police legislation will thus, as a main rule, be covered by the insurance against marine perils to the extent the losses are recoverable in the first place. Because there might be doubt on one point as regards the extent of the term, letter (b), third sentence, contains a negative definition. Measures taken to avert or minimise a loss shall not be regarded as an intervention by a State power, provided that the risk of such loss is caused by a peril covered by the insurance against marine perils. A corresponding rule was contained in Cefor I,2 and PIC § 5.3; it was introduced in Norwegian and English conditions after British authorities in 1967 considered bombing the "Torrey Canyon" following a casualty for the purpose

of limiting the threatening oil spill. The way the rule is now worded, it is aimed not only at the pollution situation, but at any potential damage that the ship might cause, as long as the risk of the relevant damage can be traced back to a peril covered by the insurance against marine perils. There is no reason to believe that this new wording will entail any major extension. Frequently the costs of such measures will in any event be covered by the relevant insurer as costs of measures to avert or minimise the loss.

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

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

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

The rule relating to seaworthiness in § 3-22 is exhaustive in relation to the insolvency exclusion clause and, as a special rule, overrides this exclusion. Thus, the assured will not lose his cover merely because a shipyard, due to a difficult economic situation, has performed unsatisfactory repairs rendering the

ship unseaworthy. The insurer may only invoke the defects if the assured was or should have been aware of their existence.

Letter (d) stipulates an exception in respect of the perils covered by the insurer against marine perils in respect of "release of nuclear energy". A corresponding exception is stipulated regarding the perils covered by the war-risk insurer, see § 2-9, subparagraph 2 (b). However, a certain cover may nevertheless be given if the ship is insured with the Norwegian Shipowners' Mutual War Risks Insurance Association, see § 2-9, subparagraph 3 (b). This exception was not stipulated in the 1964 Plan, but it was stated in the Commentary that such an exception would be included in the Special Conditions, see Cefor I.1 and PIC § 5-1, which have had a somewhat varying content over the years.

The provision is somewhat simplified in relation to the provisions in the Special Conditions, but the reality is the same as before. The insurer is not liable for losses caused by or in any way attributable to a nuclear peril, whether this peril is associated with the ship itself (nuclear-powered ships), the ship's cargo, an oncoming ship, land installations (e.g., nuclear reactors used for energy production), nuclear testing ("nuclear bombs" in war or during testing), or other installations or measures. It further appears from § 2-12, subparagraph 3, that the assured has the burden of proving that a loss is not caused by the release of nuclear energy, and from § 2-13, subparagraph 2, that if there has been a combination of nuclear energy and another peril, the entire loss shall be regarded as caused by the nuclear peril.

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

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

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

which triggers liability under the conditions applicable in the relevant branch of insurance.

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

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

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

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

renouncing a right of recourse which he would otherwise have had against a third party.

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

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

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

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

The conditions of the various types of insurances contain a number of provisions which shed light on the dividing line between ordinary expenses and losses which are covered by the insurance. From hull insurance § 10-3 and § 12-3 should in particular be mentioned. The provision in § 10-3 excludes "loss which is a normal consequence of the use of the ship, its tackle and apparel". § 12-3 addresses damage due to wear and tear and similar causes. Costs of repairing a part which is worn or corroded are never paid by the insurer, but

wear and tear is not an excluded peril. Casualties caused by wear and tear are therefore in the same category as other casualties. In other contexts as well, the provision goes far in imposing liability on the insurer for costs which, under the conditions in effect in other countries, would be regarded as operating expenses for the shipowner's account. This will be discussed in further detail in Chapters 10 and 12.

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

This paragraph corresponds to § 16 of the 1964 Plan. **The provision was formally amended in the 2002 revision, when the term "acts of terrorism" was added in subparagraph 1 (c).**

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

The Plan maintains the same division of the range of perils into war-risk insurance and marine-risk insurance as the 1964 Plan. Due to the fact that the exception for war perils in marine-risk insurance relates to the range of perils in war risk insurance (cf. § 2-8 (a)), no gaps in cover will occur other than those that follow from explicit provisions.

Formally speaking, war perils constitute an exception in general marine insurance. The insurer against marine perils is liable for "all perils to which the interest insured is exposed", with the exception of *inter alia* war perils. However, in war-risk insurance the range of perils is positively determined, and will (as a rule) comprise most of the perils excluded by the war-risk exception. However, this wording does not entail that general principles of insurance law, such as the principle that excluded perils should be subject to strict interpretation and that the insurer has the burden of proving that the loss is caused by a peril which is explicitly excluded from the cover, cf. § 2-12, subparagraph 2, shall apply. War-risk and marine-risk insurances shall in every respect be regarded as equal types of insurances on the same level. The excluded war peril shall not be subject to a strict interpretation to the

disadvantage of the marine-risk insurers and, from an evidential point of view, there is no difference.

The most important difference from the 1964 Plan is contained in § 2-9, subparagraph 1 (b), cf. subparagraph 3. In the wording of this provision, an attempt has been made to take into consideration two important aspects of developments since 1964. In the first place, the provision in the 1964 Plan was worded on the basis of the underlying understanding that the insured ship was Norwegian-owned and Norwegian-registered. This is no longer an obvious assumption. A series of Norwegian-owned ships are today registered under foreign flags; at the same time, foreign-owned and registered ships are frequently insured on Norwegian conditions with Norwegian or foreign insurers. In the second place, the provision in the 1964 Plan was worded on the basis of the conditions applied by The Norwegian Shipowners' Mutual War Risks Insurance Association. Because the commercial market offers war-risk insurance on separate conditions, however, there is a need for a co-ordination and differentiation of the conditions on this point.

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

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

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

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

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

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

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

The war-risk insurer is also liable for "the use of arms or other implements of war in the course of military manoeuvres in peacetime or in guarding against infringements of neutrality". The main problem here will be to decide when there is a case of "use of . . . other implements of war". If a ship collides with a naval vessel sailing in a perfectly ordinary manner, this will not constitute any use of implements of war. The same applies if, for example, a military plane crashes in a harbour due to engine trouble, or an ammunition depot blows up as a result of an ordinary "civilian" fire. The "use of implements of war" presupposes that the naval vessel (the aircraft, the ammunition) is used in a manner typical of its function as an implement of war, e.g., that during exercises the naval vessel disregards the rules relating to navigation at sea, that the aircraft crashes during dive-bombing exercises, or the ammunition stores blow up as a result of a failure to comply with the relevant safety regulations. An important question is how to evaluate the mistakes which the crew makes under the influence of the war situation. A war will normally make navigation conditions much more difficult than in times of peace. More concentration and alertness are required of the crew (e.g., while sailing in waters where lighthouses and navigation marks are out of operation), and an insignificant and excusable misjudgement may easily have disastrous consequences. To this must be added that the physical and mental pressure involved in wartime sailing may easily cause exceptional fatigue or other indisposition among officers and crew.

In the extensive case law during and after World War II it was regarded as clear that any faults or negligence committed by the master or crew relating strictly to their service as seamen should be regarded as an independent peril which fell within the marine-risk insurer's area of liability. In this respect international tradition was followed. This approach was maintained in the 1964 Plan and is carried on in the new Plan. Faults or negligence committed by the master or crew shall therefore be regarded as an independent causal factor, a peril which falls within the marine-risk insurer's area of liability. As the chances of faults and negligence being committed will, as a rule, be far greater in times of war than in times of peace because navigation is that much more difficult, this in actual fact means that also the marine-risk insurer must accept a general increase in risk owing to the war situation.

However, it is conceivable that faults or negligence on the part of the master or crew must be covered by the war-risk insurer, *viz.* where such fault or

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

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

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

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

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

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

The term "requisition" is also an enforced acquisition of the ship by government authorities, but the difference between requisition and confiscation is that, in principle, compensation is payable for the loss caused by the acquisition. This means that requisition is in actual fact the same as expropriation. As will appear from letter (b), third sentence, requisition for ownership or use will, as a rule, not be covered by a war-risk insurance. If the relevant ship is insured with The Norwegian Shipowners' Mutual War Risks Insurance Association, subparagraph 3 (a) provides that requisition by a foreign State power will be covered.

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

That difficult borderline problems may arise is demonstrated by two arbitration awards (the GERMA LIONEL award and ND 1988.275 the CHEMICAL RUBY), and a case that was settled (the WILDRAKE case). All of these are cited and commented on in *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), pp. 73-76. These decisions show that cover under the war-risk insurance is contingent on the shipowner being divested of the right of disposal of the ship, the authorities clearly exceeding the measures necessary in order to enforce police and customs legislation, and the intervention being motivated by overall political objectives.

Under the 1964 Plan, insurance against war perils did not cover interventions by Norwegian authorities, or by authorities of countries allied with Norway. However, under the definition in the paragraph of "a foreign State power", interventions by persons or organisations who unlawfully *passed themselves off as* a Norwegian or allied State power (e.g., a Quisling government) were covered by the war-risk insurance. During the revision of the Plan, the issue of whether it would be possible to extend the war-risk cover to include interventions from Norwegian or allied State powers was considered. However,

The Norwegian Shipowners' Mutual War Risks Insurance Association and the other war-risk insurers reached the conclusion that it would be difficult to cover interventions from Norwegian government authorities. One thing was that the existence of such an insurance might easily influence the assured's position in relation to the authorities. According to ordinary principles of expropriation law, the requisitioner must pay full compensation for the subject-matter requisitioned or - in the case of requisition for use - cover liability and any damage and reduction in value which the subject-matter of the requisition has suffered during the period of requisition. In this manner the losses caused by the intervention are distributed through society in general. If the loss had already been apportioned by means of insurance, there would be an obvious risk that the authorities (or the legislator) would attach less importance to the economic settlement with the person who was the victim of the intervention. However, it was of even greater importance that such extension of the range of perils under the war-risk insurance would require a guarantee that the reinsurance market was willing to accept it. Such a guarantee was unobtainable. However, the war-risk insurers felt that there was nothing to prevent an extension of the cover as regards interventions from allied State powers.
Based on an overall assessment, where also the insurance pattern currently seen in war-risk insurance was taken into account (see above for further details), the Committee decided on the arrangement outlined in § 2-9, subparagraph 1 (b), seen in conjunction with § 2-8 (b), under which interventions by foreign State powers are covered by the war-risk insurer.
The term "State power" is defined in § 2-8 (b). It also comprises persons or organizations exercising "supranational authority". Hence, if an intervention is implemented by representatives of a league of States (alliance, group, block), it must be regarded as an intervention by a State power. A requisition by NATO or a similar organization will accordingly not be covered by the insurance against marine perils under § 2-8 (b). The requisition will, however, be covered by the war-risk insurance, provided that this is effected with The Norwegian Shipowners' Mutual War Risks Insurance Association, regardless of whether or not the State of registration (possibly the State where the controlling ownership interests are located) is a member of the relevant league of States, see below for further details.
The term "foreign State power" is defined in § 2-9, subparagraph 1 (b), second sentence. The concept is structured so that *on the one hand* it covers all States

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

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

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

definitively of his use of the object are irrecoverable. However, what the authorities are going to use the ship for is irrelevant.
Letter (b), third sentence, provides that if the ship is requisitioned for ownership or use by a State power, this is not regarded as an intervention in relation to § 2-9, subparagraph 1 (b). The consequence of this is that, as a rule, such requisition will neither be covered under insurance against marine perils nor insurance against war perils. As § 2-9, subparagraph 3 (a) shows, however, this applies only if the ship is insured with an insurer other than The Norwegian Shipowners' Mutual War Risks Insurance Association. The fact that the result varies depending on which insurer the ship is insured with is due to the fact that the reinsurance market is not prepared to offer reinsurance cover of requisitions.
Letter (c) is **in substance** identical to the corresponding provision in the 1964 Plan. **In the 2002 revision, however, the term "acts of terrorism" was added to highlight the fact that such acts constitute a war peril. The terrorist attacks against the USA on 11 September 2001 caused uncertainty among reinsurers, etc. as to whether corresponding acts against ships, etc. would be covered under § 2-9 of the 1996 Plan. Although the answer was obviously affirmative, it was deemed appropriate in the revision to make this explicit.**
By "riots" is meant violence in the form of unlawful actual harm to people or property, caused openly and by a large number of people. The definition of regular criminal acts, for which the marine-risk insurer is liable, must first and foremost depend on whether the background to the riots is political, social or attributable to similar circumstances.
"Strikes" occur where employees in one or more enterprises cease work according to a joint plan and with a joint motive.
"Lockout" entails that one or more employers shut the employees out from the work place, normally as part of an ongoing wage conflict.
By "sabotage" is primarily meant wilful destruction which does not form part of the conduct of war, but which is connected with, for example, labour conflicts. War sabotage is a war peril which will also be covered under letter (a). The sabotage need not be aimed at the actual object insured. A "go slow" action among dock workers or seamen is aimed at the employers' interests in general, but if the action involves recoverable damage to the assured's property, the war-risk insurer will be liable for the damage under letter (c). Destruction carried out by a ship's crew as an act of vengeance or a protest demonstration

against the owner must be regarded as vandalism of property and is covered by the insurance against marine perils. The same applies to wanton destruction of property carried out by someone of unsound mind or under the influence of alcohol. The term “sabotage” presupposes that the action pursues a definite political, social or similar goal, see ND 1990.140 NV PETER WESSEL, where the court based its decision on the assumption that the costs of interrupting the ship’s voyage etc. in connection with a bomb threat must be covered by the hull insurer against marine perils as costs of measures to avert or minimise the loss. The external circumstances of the threat clearly indicated that this was an act that had no background in political, social or similar circumstances.

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

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

As is the case for sabotage, acts of terrorism will under certain circumstances fall within the scope of the term "war or war-like conditions". This will primarily be the case when acts of terrorism occur in connection with a war between several States. One example may be acts committed by resistance groups in an occupied country with a view to hurting or weakening the enemy, for instance through acts of terrorism against ordinary merchant ships. "War-related terrorism" will therefore - like war-related sabotage - constitute a war peril that is covered by both letter (a) and letter (c).

It is probably necessary to go one step further: acts of terrorism carried out in peacetime by resistance groups may also be so extensive that a "war-like condition" must be said to exist, see *Brækhus/Rein, Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 78. However, whether the act in question is regarded as an act of terrorism or as part of the conduct of war or a war-like act has no significance in practice for the cover.

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

Letter (d) also concords entirely with the 1964 Plan. During the revision, consideration was given to moving piracy to the range of marine perils in line with what was done in the English market some time ago, but the decision was made to maintain the earlier system.

By “piracy” is understood illegal use of force by private individuals on the open sea against a ship with crew, passengers and cargo. The use of force may take place by means of another ship, but the pirates may also have come aboard as members of the crew or passengers on the ship which they subsequently plunder. The purpose will normally be economic profit, but also an action that merely results in property damage or personal injury may constitute piracy. Piracy will often be organized by people who purport to exercise government authority (e.g., an exile government that captures vessels to call global attention to their cause or in order to finance their revolt). The practical difficulties that

would arise if a distinction had to be made between "piracy" and "measures by a foreign State power" are avoided by piracy being covered by the war-risks insurance, cf. letter (b).

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

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

Subparagraph 2, letter (a) and *letter (b)* is identical to § 2-8 *letter (c)* and *letter (d),* and reference is made to the comments above.

Subparagraph 3 extends the range of war perils for ships insured with the Norwegian Shipowners' Mutual War Risks Insurance Association. As regards *letter (a),* which entails that the war risks insurance covers requisition by a foreign State power (i.e. a State power other than that of the State of registration of the ship or the State where the controlling ownership interests are located), reference is made to the comments above on subparagraph 1 letter (b). *Letter (b)* is a continuation of the limited nuclear-risk cover, which The Norwegian Shipowners' Mutual War Risks Insurance Association afforded in the past. This cover presupposes that the ship has not proceeded beyond the ordinary trading limits.

§ 16, subparagraph 3, of the 1964 Plan contained a provision to the effect that the insurance against war perils would, in the event of a suspension of the insurance against marine perils caused by a seizure or requisition, "take over" the cover of marine perils under § 15. The provision has not been retained in its earlier form, but elements of the cover are found in § 3-17, subparagraph 2, and § 3-19, respectively.

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

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

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

§ 2-11. Causation. Incidence of loss

This provision corresponds to § 18 of the 1964 Plan.

§ 18 of the 1964 Plan contained rules relating to causation and the incidence of loss, i.e. the time of the casualty. According to subparagraph 1, the point of departure was that the insurer was liable for loss incurred when the interest insured was struck by an insured peril during the insurance period. This point of departure was modified in subparagraph 2 in respect of casualties resulting from latent defects or damage which the ship had at the inception of the insurance. Such casualties were to be borne by the insurer against marine perils for the period during which the new casualty arose or was discovered. However, the undiscovered damage was to be governed by the basic rule in subparagraph 1 and be referred back to the time when the peril struck.

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

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

The conclusion is therefore that the time when the damage becomes known is not very suitable as a criterion for deciding the time of casualty in marine insurance.

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

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

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

The adherence to the solutions of the 1964 Plan entails that Norwegian marine insurance law will still appear to have solutions on this point which are different from what applies under general Norwegian insurance law and

English marine insurance law. However, the differences should not be exaggerated. The incidence-of-loss problem has, on the one hand, not received much attention in general Norwegian insurance law, presumably because the problem is of little practical significance. On the other hand, the solutions in English marine insurance law are not automatically obvious once you get down to the more detailed problems. The best argument in favour of switching from "the peril strikes" criterion to a "the loss arises" criterion is therefore probably that the latter criterion gives an immediate and clearer indication of what the question consists of and what the solution is. During the revision, the Committee did not find this argument strong enough to justify throwing overboard the more well-established and proved criterion of "the peril strikes" as a basis for the solutions.

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

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

Once the peril has struck, subparagraph 1 entails that all damage attributable to this peril shall be allocated to the insurer who was liable at the time the peril struck. It is, however, a prerequisite that the peril does not consist of an unknown defect or damage, cf. the exception in subparagraph 2 and below.
Subparagraph 2 corresponds to § 18, subparagraph 2, of the 1964 Plan, but the text has been rephrased and simplified to a certain extent and furthermore clarified on one point. The provision retains the so-called "anti-Hektor" clause from the 1964 Plan, according to which the insurer is not liable for consequential damage that an unknown defect or damage has caused.
The provision regulates damage resulting from "defects or damage" which the ship had at the inception or expiry of an insurance, but which was unknown at the time. The term "defect" comprises each and every defect the ship may have, regardless of the cause of the defect. In practice, there was some uncertainty as to whether the regulation in § 18, subparagraph 2, of the 1964 Plan covered a situation where the ship during construction was "struck by" a fault in construction, material or workmanship, and where this fault subsequently resulted in damage to the ship. This provision was interpreted by some to mean that primary damage resulting from a fault arising during the construction of the ship must be transferred back to the time when the peril struck, which would mean that it might be the construction risk insurance that would have to cover this type of damage. This was an unfortunate solution from the shipowners' point of view, because it was uncertain whether and to what extent they would be entitled to indemnity under the construction risk insurance for such damage. This interpretation was, however, hardly correct and it is in any event not the intention to continue with such a solution. The word "defect" covers any defect in the ship, including faults in construction, material and workmanship, both during the building and any later repairs of the ship. If such a fault or defect results in damage to the ship, this will not be a case of "primary damage" which must be transferred back to the insurer who was liable when the peril struck. The defect in the ship arising from faults in connection with the building or repairs of the ship is regarded as a marine peril to the extent that it becomes the cause of a subsequent casualty, and it is the insurer during whose period of insurance the casualty occurs who becomes liable for the entire loss, cf. further details below.
The term "unknown damage" covers each and every form of damage, regardless of the nature or cause of the damage. It is only the damage itself

which has to be unknown; it is irrelevant whether the damage derives from a previously known casualty, cf. ND 1950.458 NH HEKTOR, or whether also the actual harmful event is unknown, for example, where the ship sustains unknown damage during repairs.

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

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

The term "casualty" primarily refers to the situation where a latent "defect" results in damage to the ship. If the ship is sailing with a latent fault or defect, there is no damage that may extend to some other part of the ship. This is why the term "casualty" is needed to emphasize that loss or damage resulting from a latent defect shall be brought forward to the time when the damage or loss (the casualty) occurred. If, for example, a defect resulting from an error in design or faulty material during the building of the ship results in damage to part of the ship, the defect must be regarded as a "marine peril which strikes the ship at the time when the casualty occurs". The damage shall in that event be covered by the insurer who was liable when the casualty occurred and shall

not be transferred back to the construction-risk insurer, cf. above regarding the term "defect". However, liability is contingent upon the fault or defect having resulted in a "casualty"; in order for the insurer to become liable, the occurrence of, e.g., a fault in material in the form of a blister in the castings is not sufficient. If the blister is discovered before the fault has resulted in a casualty, the assured will be liable for any costs of replacement or repairs. "Casualty" in this connection means physical damage to the ship resulting from the fault, for example, in the form of a part having cracked or broken. It is, however, not necessary for the crack to be visible to the naked eye; it is sufficient for it to be ascertainable by means of advanced technical methods.

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

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

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

The term "an extension of the damage to other parts" refers to a development of damage which originates with latent damage, possibly latent damage resulting from a fault or defect in the ship which occurred in connection with

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

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

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

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

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

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

The principle in subparagraph 2 applies to all types of loss or damage covered by the insurance. This means that also costs to avert or minimise the loss in

connection with a later casualty, possibly an extension of the original damage, shall be carried forward to the "new" insurer.

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

A problem which has been discussed in practice is how to deal with latent damage which develops continuously over time, so-called "slow motion" damage. Such continuous damage development is relatively common, for example, in connection with extraordinary corrosion. This may happen to all types of latent damage, regardless of the original cause of the damage, and

regardless of whether it is an extension of damage within the part that was originally affected by a fault or damage, or an extension of damage that also includes other parts. In practice, the costs of repairing this type of damage have, in certain cases, been allocated on a pro-rata basis over the insurances that have been in effect while the damage developed. It is not the intention to prevent such practice where such an allocation may be seen as expedient.
In the event of damage that develops over time, it may be difficult to establish the periods during which the individual incidents have arisen. If the assured is unable to prove during which period an incident has arisen, he runs the risk that no insurer will be willing to cover the damage. In practice associated with § 18, subparagraph 2 of the 1964 Plan, this problem has been solved by the insurer of the consequential damage also having covered the primary damage if it has not been possible to pinpoint in time when the peril that resulted in the primary damage occurred. The Committee also wishes to maintain this practice.

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

This paragraph corresponds to § 19 of the 1964 Plan.
The provision deals with the burden of proof, i.e. which of the parties bears the risk that a certain fact cannot be established. If the judge, after having evaluated all the evidence adduced in the case, does not find one fact more probable than another, the doubt shall be to the disadvantage of the party who has the burden of proof on the point in question.
According to *subparagraph* 1, the assured has the burden of proving "that he has suffered a loss of the kind covered by the insurance and of proving the extent of the loss". The provision is based on the general principles of the burden of proof in insurance contracts. It is established law that the assured has the burden of proving that he has an insurable interest, that this interest has sustained a loss as a result of a peril covered by the insurance, and of establishing the extent of the loss. Subparagraph 1 is somewhat more detailed in the description of the assured's burden of proof than the corresponding provision contained in § 19 of the 1964 Plan, but the intention has not been to make any amendments on points of substance. Due to the all-risk principle, the assured's burden of proof is relatively easy; if a loss, which is covered by the insurance, has occurred, it is up to the insurer to prove that the cause is a peril excluded from the cover.

The assured's burden of proof also includes the fact that the peril has struck at a time when the insurer covers the risk, cf. § 2-11. When an older incident of damage is discovered, there are sometimes no certain indications as to whether it arose during one or the other insurance year. In such cases, it would not be reasonable to invoke the burden-of-proof rule contained in § 2-12 against the assured. If both insurances are taken out on Norwegian conditions, there will in all probability not be any problems in this connection, cf. *inter alia* the rule relating to advance payments contained in § 5-7.

§ 19 of the 1964 Plan did not contain any rule relating to the insurer's burden of proof. However, it follows from the Commentary that, if the insurer wanted to claim that the loss was attributable to a specific cause which was excluded in the insurance conditions, for example, unseaworthiness, it was the insurer who had the burden of proof on this point. Also this is concordant with general insurance law. However, it is more expedient for such a rule to be contained in the Plan text and not merely stated in the Commentary, cf. *subparagraph 2,*.. However, this rule applies merely as a point of departure; any special rules relating to the burden of proof take priority over the main rule contained in § 2-12, subparagraph 2, cf., e.g., § 3-3, subparagraph 2, § 3-9, subparagraph 2, § 3-18, subparagraph 3, § 3-22, subparagraph 2, § 3-23, subparagraph 2, § 3-25, subparagraph 1, and others. As mentioned in the Commentary on § 2-9, the provision shall not be applied to the relationship between cover against marine perils and cover against war perils.

Subparagraph 3 provides a special rule relating to the burden of proof in the event of perils in connection with release of nuclear energy. This provision must be seen in connection with the limitation of liability relating to nuclear perils in § 2-8 (d) and § 2-9, subparagraph 2 (b). The rule to the effect that the assured's burden of proving that a loss is not attributable to such perils follows the solution in the insurance conditions. The special problems that arise when it is uncertain whether a loss was caused by a marine peril or a war peril are discussed below in § 2-16.

§ 2-13. Combination of perils

The paragraph is identical to § 20 of the 1964 Plan.

The provision maintains the rule of apportionment as the causation principle when a loss is caused by a combination of perils, i.e. when a loss is caused

partly by a peril covered by the insurance and partly by a peril which is not covered by the insurance.

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

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

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

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

because of faulty installation and partly because of events in connection with a casualty;
(2) if the loss is partly attributable to perils covered by the insurance and partly to factors for which the assured, because of his subjective position, must bear the risk himself (undisclosed risk factors, unseaworthiness of which the assured was aware, gross negligence on the part of the assured during the rescue operation);
(3) if the loss is attributable to the materialization of perils insured against during several insurance years. For example, the ship sustains latent damage by a casualty in 1994, and this damage, combined with heavy weather or some other peril in 1995, causes a new casualty.
In marine insurance the problem of a combination of perils was first noticed in cases involving a combination of marine and war perils. During World War I (1914-18), a large number of casualties of this nature took place. In a judgment of fundamental importance (*ND 1916.209 SKOTFOS*) the Admiralty Court, with the support of the Supreme Court, established that the entire loss was attributable to "the factor which is regarded as the dominant cause of the accident". During the subsequent years a series of judgments were given in conflicts between insurers against marine perils and insurers against war perils. A feature common to these decisions was that it required a very strong war peril for the court to regard that peril as the dominant cause. If faults of any significance had been committed by the crew, such faults were practically always regarded as the dominant cause, with the result that the casualty in its entirety fell upon the marine-risk insurer.
The marine-risk insurers objected to the fact that this led to an essential part of the increase of the marine risk attributable to a war situation (darkened lighthouses, removal of navigation marks, sailing in convoys etc.) being imposed on them. In connection with the revision of the Plan in 1930 it was therefore decided to adopt a rule of apportionment. In the event of a combination of causes, the relative strengths of the various perils were to be evaluated and the loss apportioned, taking into consideration the significance of the individual causal factors. Instead of a choice between two extreme solutions (either A or B being liable for the entire loss), this method offered a whole range of middle-of-the-road solutions, making it possible to choose in each individual case the apportionment which would seem to best fit in the specific circumstances of the case.

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

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

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

During the revision, the issue of whether to revert to a dominant-cause rule for combinations of causation other than a combination of war and marine perils as well was considered. The advantage of such a solution would be to have a causation rule that 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. Also considerations of fairness favour such a solution: the assured has paid a premium to be covered against certain risk factors and has no reasonable claim to be covered against other perils.

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

The rule of apportionment shall apply in all cases where "the loss has been caused by a combination of different perils". It shall therefore apply to both a combination of two or more objective causal factors and to a combination of objective causal factors and subjective negligence. It shall also apply regardless of whether it is a combination of two independently acting causal factors which result in a casualty, or a combination of causes where a casualty is combined

with a subsequent event and results in new damage, cf. ND 1977.38 NH VESTFOLD I. In this light, all the rules in the Plan aimed at negligence on the part of the person effecting the insurance or the assured are formulated as strict causal rules and must be supplemented with the rule of apportionment contained in § 2-13.

The most important situation from a practical point of view - a combination of marine and war perils and similar perils - is, however, in the same way as in 1964, subject to separate regulation in § 2-14.

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

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

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

have increased the probability of a subsequent loss. The greater the risk, the greater the importance to be attributed to the earlier cause.
If the loss is a result of a *combination of two objective causes in a causal chain* in the sense that a new cause interferes in the course of events after a casualty has occurred and results in a further loss, the first cause - i.e. the casualty - shall carry the most weight, cf. ND 1941.378 NV VESLEKARI and ND 1977.38 NH VESTFOLD I. Here the loss should be apportioned according to the degree of probability of the first casualty triggering the subsequent peril and consequently the new damage. The higher the degree of probability, the greater the weight to be attributed to the first peril.
In both of the combination situations referred to above, the loss may also have occurred by a combination of objective perils covered by the insurance and subjective negligence. As mentioned, the rule of apportionment may, in such cases, have a similar function as the reduction system has in the event of subjective negligence under ICA. The element of deterrence will be better served if it is possible to make some deduction from the compensation instead of having more rigid rules according to which the assured loses the entire cover in the event of any fault on his part. In connection with minor faults, it would otherwise be tempting for the judge to reach the conclusion that "it has not been proved to his satisfaction" that the assured has shown negligence if the alternative is a loss of the entire cover. Here it would also be natural to base the apportionment on an evaluation of probability, and attach weight to the subjective negligence depending on the degree of probability that it would result in a loss. This will normally be concordant with an evaluation of the degree of fault: the higher the probability of a given action leading to a loss, the more serious the fault will normally be deemed to be. ND 1981.347 NV VALL SUN gives an example of a combination of dereliction of duty and other causal factors.
The provision in § 2-13 contains a new *subparagraph 2* relating to losses that are wholly or partly caused by a nuclear peril. This provision must be seen in the context of the limitation of liability relating to the release of nuclear energy in § 2-8 (d) and § 2-9, subparagraph 2 (b), and is taken from the Special Conditions.

§ 2-14. Combination of marine and war perils

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

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

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

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

has had the greatest impact on the course of events. As regards a combination of the casualty and a subsequent cause, an exception is furthermore made from the rule as regards an increase in costs of repairs, cf. below.

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

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

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

As mentioned above, an exception must, like the solution under the 1964 Plan, be made as regards the situation where there is a combination of several causes in a causal chain: As regards repair costs, only the perils that materialized before the casualty in question, and which have had a bearing on the physical damage sustained by the ship, shall be taken into consideration. By contrast, the increase in the cost of repairs caused by the war situation shall not be taken into

consideration, regardless of whether the price increase was a fact at the time of the casualty or did not occur until later (cf. ND 1943.417 NV HAARFAGRE). Otherwise the war-risk insurer might be held liable to pay 50% of the repairs of a strictly marine casualty, provided that the increase in prices of repairs has been sufficient.

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

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

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

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

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

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

the war-risk insurer. However, under the current special rule, the war-risk insurer has to bear the entire loss.

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

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

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

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

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

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

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

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

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

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

This paragraph is identical to § 23 of the 1964 Plan.
Special problems arise when the casualty has occurred under such circumstances that it is uncertain whether it is attributable to marine or war perils. The 1964 Plan introduced a rule of apportionment which is maintained in the new Plan. If it is impossible to decide whether the casualty is attributable to war or marine perils, liability shall be divided equally between the two insurers.
As regards the term "the more probable cause", this must be interpreted in the same way as the criterion "dominant cause" in § 2-14. This means that a 0-100 distribution shall only take place in the event of a distinctly greater probability that one of the two categories of perils has been the cause of the loss. If there is more than 60% probability that one of the categories has caused the loss, this category shall be deemed to be the "more probable cause", and there will be no allocation of liability, see in this respect ND 1989.263 NV SCAN PARTNER, where it was found that the marine peril (a gas explosion) was "the more probable cause".

Chapter 3.

The duties of the person effecting the insurance and the assured

General remarks

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

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

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

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

Section 1. Duty of disclosure of the person effecting the insurance

§ 3-1. Scope of the duty of disclosure

The provision corresponds to § 24 of the 1964 Plan and ICA section 4-1.
The *subparagraph 1* imposes on the assured an obligation to disclose all information which is material to the insurer. The obligation placed on the assured is an independent, active one; it is not enough for the assured to simply answer the questions asked by the insurer. ICA section 4-1, by contrast, has introduced a passive duty to respond, with the active duty to provide information as the exception. In marine insurance, however, it is natural to retain the Plan's approach with the active duty to disclose information. The person effecting the insurance is usually a professional and will, accordingly, have knowledge about what kind of information the insurer requires.
The approach of the 1964 Plan, namely that the duty of disclosure in § 24 is to be determined using objective criteria, that is, independently of whether the assured knew of a certain situation or whether the assured ought to have realised that the insurer would consider it important, has also been retained. Subjective knowledge is thus of no direct significance to the scope of the duty of disclosure, but is relevant to the nature of the sanction that the insurer may invoke in the event of breach of the obligation. The provisions of § 3-2 and § 3-3 which allow the insurer to limit his liability in the event of breach thus assume that the assured is in some way to blame for the breach of the duty of disclosure. The significance of having an objective duty of disclosure becomes evident in the insurer's right to cancel the insurance contract, cf. § 3-4. If the

insurer has not received material information, the insurer is entitled to cancel the agreement by giving fourteen days notice, even though the person effecting the insurance cannot be blamed for the fact that the information is incomplete. The Plan follows ICA sections 4-1 and 4-3 on this point.

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

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

The duty of disclosure applies "before the contract is concluded". Subsequent changes must be judged according to the rules concerning alteration of risk, cf. § 3-8 *et seq.* The difference is illustrated in the case ND 1978.31 Sandefjord ORMLUND, where a Norwegian second engineer with a dispensation to sail as a chief engineer was, after the conclusion of the insurance contract, replaced by

another Norwegian who did not have a valid certificate or any type of dispensation. The court treated the change as an issue of breach of the duty of disclosure, although the correct approach would have been to treat it as an alteration of the risk: see *Bull*: *Sjøforsikringsrett* (Marine insurance law), pp. 103-104, and *Brækhus/Rein*: *Håndbok i Kaskoforsikring* (Handbook of Hull Insurance), pp. 120-121.

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

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

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

When the person effecting the insurance subsequently corrects the information about the risk, the insurer may cancel the insurance contract pursuant to § 3-4.

If the person effecting the insurance later becomes aware of certain facts and negligently fails to report them, the insurer's liability will be limited according to § 3-3, subparagraph 2, second sentence.

§ 3-2. Fraud

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

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

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

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

The *subparagraph 2* is new, and gives the insurer the right to cancel other contracts with the person effecting the insurance on giving 14 days' notice where there has been fraudulent misrepresentation. The provision corresponds to ICA section 4-3, except that the cancellation under ICA takes immediate effect. The Committee found it appropriate to follow ICA in allowing the insurer to cut all ties with a client who has acted fraudulently. The period of

notice in ICA is, however, not sufficient for marine insurance, and so has been set at 14 days, in keeping with other notice periods in the Plan.

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

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

Both the sanction threshold and the sanction in ICA differ from the Plan's provision. The sanction threshold is higher in ICA and there are different levels of sanction. There is no reason, however, to raise the sanction threshold to "more than just a little blame attaching" in marine insurance. Here also, the starting principle for the sanction threshold in the event of misleading information should be that the insurer be put in the same position as he would have been in had he been given correct information. A sliding sanction scale of the kind found in ICA is not very appropriate in marine insurance.

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

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

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

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

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

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

Even though the insurer is protected by the principle of causation, he may have an interest in coming out of the insurance relationship, for example, because the evidence for the cause of a casualty may be unclear. Under *subparagraph 3*, the

insurer may cancel the insurance contract by giving fourteen days notice. As elsewhere in the Plan, "notice" here refers to the period of notice for cancellation. Also as elsewhere, the notice period referred to here starts to run from the time the person effecting the insurance has received the notice.

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

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

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

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

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

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

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

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

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

This paragraph corresponds to § 29 of the 1964 Plan and ICA section 4-14.
The provision imposes on the insurer an obligation to inform the person effecting the insurance if he intends to invoke a breach of the duty of disclosure. In the corresponding provision in the 1964 Plan, the insurer had no duty to give notice in the event of fraudulent or dishonest conduct. ICA section 4-14 imposes a duty to give notice even in the event of fraudulent conduct, and a corresponding rule has been introduced in the Plan.
Under the 1964 Plan, the insurer's duty to notify was not subject to any specific requirements as to form. ICA requires the notice to be in writing, and this requirement has been included in the new Plan.

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

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

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

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

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

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

Subparagraph 3 is new, and gives the insurer authority to obtain particulars referred to in the subparagraph 1 directly from the classification society and from relevant government authorities in the country where the ship is

registered or has undergone Port-State control. The provision is taken from the insurance conditions, cf. Cefor I, 19 and PIC § 5, no. 4. It has been reformulated somewhat, but the substantive content is largely the same. The person effecting the insurance is to be informed no later than when the particulars are obtained. Subparagraphs 1 and 3 may appear superfluous when the subparagraph 3 allows the insurer to go straight to the classification society. This is correct insofar as the classification society accepts the rule in the third paragraph. But because one cannot be sure that this will always be the case, there is still a need for the rules in the subparagraphs 1 and 2 as a supplement to the subparagraph 3.

Section 2. Alteration of the risk

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

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

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

The general rules on the effect of alteration of the risk are found in § 3-8 to § 3-13. The chances of their being invoked frequently are not great, as the practical instances of alteration of the risk are dealt with by specific provisions. In addition, the rules on seaworthiness and safety regulations in chapter 3, section

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

§ 3-8. Alteration of the risk

This paragraph corresponds to § 31 of the 1964 Plan and ICA sections 4-6 and 4-7.
The general rules on alteration of the risk correspond to ICA sections 4-6 and 4-7, but the definitions of alteration of the risk, the sanction threshold and the nature of the sanction are all different. As mentioned earlier, the issue of harmonisation with ICA provisions has been examined, but it was decided to retain the rules of the Plan.
An insurance contract is one under which an insurer is to bear the risk of specified perils to which the insured interest is exposed. If one of these perils increases in intensity, this will not constitute an alteration of the risk which the insurer can then invoke. Thus, § 3-8 does not require the assured to notify the insurer if the ship runs into extremely bad weather or ice-filled waters. Accordingly, it is necessary to distinguish between alterations of the risk which constitute a relevant condition which triggers the provisions of the insurance contract, and ones which do not. *Subparagraph 1* sets out two general conditions which must be met: there must have been a change in the factual circumstances which affect the nature of the risk and this must amount to a breach of the implied conditions upon which the contract was based. For both

aspects, the decisive factor will be the interpretation of the insurance contract in question. The issue becomes one of whether the insurer should be bound to maintain the cover without an additional premium in the new situation which has arisen, or whether it would be reasonable to give the insurer the opportunity to employ the sanctions provided in the Plan. On this point it becomes necessary to fall back largely on general principles of insurance and contract law; exhaustive exemplification is not possible here.

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

§ 31, subparagraph 2 of the 1964 Plan contained a rule on loss of class as an alteration of the risk, while the additional insurance conditions dealt with loss of class and change of class under separate rules, cf. Cefor I. 23, and PIC § 5, 5. During the revision, the view was taken that the general rules on alteration of the risk did not provide a suitable regulatory framework for dealing with classification problems. Accordingly, the issue has been dealt with specifically in § 3-14.

Subparagraph 2 is new, and originates from the conditions, cf. Cefor I, 22 and PIC § 5, 13, which applied to both operating companies as well as changes in ownership and share transfers. The specific rules governing changes in the ownership structure of the company have been left out, as they are not necessary. A transfer of shares in the holding company will not in itself be of any significance for insurers; the crucial factor will be if there is a change in the company which is responsible for the operation of the ship. The rule on change of management company has been maintained here, while the rule on change in ownership has been moved to § 3-21 and is dealt with in more detail there.

The provision is based on a presumption that a change in manager or operating company will be of significance to the insurer. The result in the conditions was that cover automatically terminated in the event of a change of this type. This appears unnecessarily stringent. A milder reaction is obtained by explicitly classifying a change in manager or the company responsible for the technical / nautical operation of the ship as an alteration of the risk. The assured must notify the insurer of this type of change pursuant to § 3-11, and the insurer has the right to cancel the contract regardless of whether notification is given,

cf. § 3-10. If an event insured against occurs, the insurer will be free from liability if it can be shown that the insurer would not have accepted the risk had he known that the change would take place, cf. § 3-9, subparagraph 1. If it can be shown that the insurer would have accepted the risk but on other conditions, the insurer will only be liable to the extent it is established that the loss is not due to the alteration of the risk, cf. § 3-9, subparagraph 2. This type of sanction structure gives the insurer sufficient protection against this kind of change.
The conditions linked the lapse of insurance cover to the "manager", "technical / maritime management" or "commercial management". The expression "commercial management" is unclear, however, and covers a long list of parties: cf. *Brækhus/Rein*: *Håndbok i Kaskoforsikring* (Handbook of Hull Insurance), p. 211-212 and has, accordingly, been deleted, while the terms "manager" and "technical / maritime" management have been retained. The expression "manager" has a long tradition in marine insurance law, and covers the company which has the overall responsibility for the ship's technical / maritime and commercial operation. A change of manager will thus entail a change in all management functions, i.e. technical, maritime and commercial management. The term "manager", by contrast, does not encompass a company which is only responsible for part of the ship's operation. If the management function is shared, it will be crucial for the purposes of insurance which company is responsible for the "technical / maritime" operation. The technical / maritime management function will usually be combined in one company, and the functions must be combined in this way for the change to automatically constitute an alteration of the risk pursuant to § 3-8, subparagraph 2: if the technical and maritime functions are split up among more than one company, a change of one of these companies will not automatically constitute an alteration of the risk but may, depending on the circumstances, constitute a general alteration of the risk under § 3-8, subparagraph.1 Likewise if there is a change in 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 the subparagraph 1is high, an insurer wishing to protect his position where there is a change in the company which takes care of functions other than technical / maritime operation must include a specific clause to that effect.

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

This paragraph is identical to § 32 of the 1964 Plan.
See the Commentary on § 3-3 with respect to the burden of proof and causal connection.

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

This paragraph is identical to § 33 of the 1964 Plan.
The rule corresponds to ICA section 3-3, first paragraph, second sentence, although ICA also requires that the notice of cancellation be reasonable. ICA also contains rules on how the cancellation is to be carried out. These rules are superfluous in marine insurance.

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

This paragraph corresponds to § 34 of the 1964 Plan.
The *first sentence* imposes on the assured an obligation to inform the insurer in the event of an alteration of the risk. The *second sentence* allows the insurer, in the event of a failure to notify, to cancel the contract or take other action. The period of notice has been changed to 14 days, in keeping with the rules for the duty of disclosure.
ICA section 4-7, second paragraph, contains a rule to the effect that the rules on alteration of the risk may not be invoked if the assured has taken reasonable steps to notify the company as soon as the assured knew about the change. This provision does not fit very well into the Plan system.

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

This paragraph is identical to § 35 of the 1964 Plan, and has its counterpart in ICA section 4-6, first sentence.
Subparagraph 1 sets out the same rule for alteration of the risk as that in § 3-5, second sentence regarding the duty of disclosure. It is only the rights referred to in § 3-9 and § 3-10 that the insurer loses once circumstances have returned to normal, however, and not the right under § 3-11. The obligation to give notice of relevant alterations of the risk is so important from the insurer's standpoint that an assured who has been negligent in this respect must be prepared to face cancellation on 14 days' notice, even if the original situation has subsequently been restored.
Subparagraph 2, first sentence, prohibits the insurer from invoking an alteration of the risk when measures have been taken to save human life. This provision

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

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

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

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

while the salvage operation was being carried out, but this would have been too stringent.
A salvage operation which the assured opts to carry out contrary to § 3-12, subparagraph 2, will alter the risk so that he will have a duty to give notice under § 3-11. If the assured neglects this duty, the insurer may use that negligence as a basis for cancelling the insurance contract, even though the salvage is completed without damage to the ship, cf. the comments above on subparagraph 1.
In determining the salvage reward, consideration shall also be given to damage and loss sustained by the salvor, cf. Norwegian Maritime Code (*Sjøloven*) section 442, no. 1 letter (f). Under section 446, first paragraph, damage sustained by the salvor shall receive first priority when the salvage reward is distributed. Insofar as the salvage reward is sufficient to cover the assured's loss, the insurer should be free from liability, cf. 1996 Plan § 5-18, which applies *mutatis mutandis* to the rules on claims.

§ 3-13. Insurer's duty to notify

This paragraph corresponds to § 36 of the 1964 Plan and has a parallel in ICA section 4-14.
The provision is identical to the one regarding the duty to notify in § 3-6 above.

§ 3-14. Loss of class or change of classification society

This paragraph corresponds to § 31, subparagraph 2 of the 1964 Plan, , and the conditions, cf. Cefor I, 23 and PIC § 5, 7.
As mentioned earlier, § 31, second subparagraph, of the 1964 Plan set out the rule that a loss of class or change of classification society was to be deemed an alteration of the risk. This rule was changed in the conditions, which prescribed automatic termination of insurance cover in such cases. The conditions covered both loss of formal class and failure to carry out periodic surveys. During the Plan revision, there was agreement that there was a need for a stern sanction in the event of loss of class or change of classification society. For this reason these aspects are now dealt with separately under this paragraph. Automatic termination of cover is too strict a sanction for failure to carry out a periodic survey, and has therefore been dealt with in the rules relating to safety regulations, cf. § 3-25, second subparagraph.

Subparagraph 1 sets out the principle that, at the time the insurance cover commences, the ship shall be classed with a classification society approved by the insurer. The provision corresponds to the subparagraph 1, first sentence of the additional conditions.

Under the conditions subparagraph 1, second sentence, loss of class or change of classification society led to automatic termination of the insurance, although cover would remain in effect until the ship reached port. This approach has been maintained in § 3-14, *Subparagraph 2, first and second sentences*. The text does state, however, that the insurance cover will not terminate if the insurer expressly consents to the change in the ship's class status. The provision ensures that the assured may not argue that he has informed the insurer, who has then given tacit acceptance. As under the conditions, cover is maintained in any event until the ship reaches the nearest port. In keeping with the formulation of § 3-7, subparagraph 2, the closest safe port in accordance with the insurer's instructions is specified, cf. also the commentary on § 3-7. The rule applies to loss or change of class; a change in class may occur even as the ship is *en route*.

Subparagraph 3 corresponds to the conditions second subparagraph, nos. 1 and 2. The wording has been somewhat simplified, but the reality is unchanged. The provision sets out what is to be deemed a loss of class. Because some classification societies cancel the ship’s class when a casualty has occurred, it is explicitly stated that loss of class resulting from a "casualty which has occurred" is not to be deemed a loss of class. In this situation it the assured should, obviously, not be deprived of cover. It does not matter in this connection whether the casualty is covered by insurance not. The insurance remains intact, even if the class is suspended following a casualty which is not covered, e.g., because the ship was not seaworthy.

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

The provision to the effect that the insurance automatically terminates in the event of change of class may appear unreasonable if the shipowner has simply

forgotten to notify the insurer, and it is obvious that the insurer would have approved the new classification society. If the insurer invoked the rule in such a case, it would be possible, depending on the circumstances, to set aside the insurer's decision by virtue of Contracts Act (*Avtaleloven*) section 36. The Plan's provision also opens the door to unfortunate differential treatment: insurers may show lenience towards "good" clients, while more troublesome clients may see the rule used against them. If the assured can document unfair differential treatment, it may be possible to have the termination of cover set aside.

§ 3-15. Trading limits

The provision corresponds to § 37 of the 1964 Plan and the conditions, cf. Cefor II-IV and PIC §§ 6-8.

The 1964 Plan had general rules applicable when the ship navigated beyond the trading limits, burden of proof and duty to notify in §§ 37-39. The provisions of § 37 and § 39 were replaced with more detailed rules in the conditions, cf. Cefor II-IV and PIC §§ 6-8, which also defined the trading limits as such. The conditions operated with three categories: permitted limits; excluded limits; and limits inside permitted limits where the shipowner could only sail upon payment of an additional premium. It was possible for the shipowner to request dispensation from the exclusions for voyages in the second category.

The rules in the insurance conditions have remained unchanged for many years. Consequently, there was agreement during the Plan revision that they should be incorporated into the Plan. The rules are based on a tripartite division: ordinary trading limits, excluded trading limits (areas where there is no cover unless express prior dispensation has been given), and conditional trading limits (areas in which the ship may sail subject to an additional premium). *Subparagraph 1, first sentence* gives a negative delimitation of the ordinary trading limits, which comprise all waters except those which are defined as excluded or conditional areas. This provision corresponds to Cefor II, subparagraph 1, and PIC § 6, subparagraph 1. The description of the three categories of trading area has been incorporated into the Plan by way of a separate appendix. *Subparagraph 1, second sentence*, which originates from § 39, subparagraph 1 of the 1964 Plan sets out the rule that the person effecting the insurance is under an obligation to notify the insurer at whenever the ship is sent beyond the ordinary trading limits. The sanction for failure to notify will

depend on which type of trading limit has been exceeded, as stated in subparagraphs 2 and 3.

Subparagraph 2, deals with navigation in conditional trading limits. The ship may still sail in these areas, but the insurer may charge an additional premium and impose other conditions. The provision corresponds to the subparagraph 1, first sentences of Cefor III and PIC § 7. If the person effecting the insurance does not want to accept the additional premium or the conditions, it may request suspension of cover, in which case cover will cease while the ship is in the area subject to the additional premium. This was the effect of the subparagraph 1, second sentence of Cefor III and PIC § 7, but it is not necessary to state this explicitly. If the insurer has not been given prior notice as required by subparagraph 1, second sentence, the additional premium and any special conditions must be set when the insurer is informed at a later time that the ship has sailed in a conditional area. This is in accordance with the subparagraph 2of Cefor III and PIC § 7. In these cases, the person effecting the insurance must simply accept the conditions imposed by the insurer for the period the ship was in the conditional area. Failure to notify will not have any other consequences for the person effecting the insurance unless damage occurs, cf. *subparagraph 2, second sentence*. If damage occurs in a situation where the ship navigates into a conditional area with the consent of the assured and notification has not been given, an additional deduction of 1/4 is to be made for each casualty but subject to a maximum of USD 150,000. This provision is new, and the rationale is that the assured would have nothing to lose if there was not any sanction for a failure to give notice. This might lead to the assured being tempted to wait and only report to the insurer in the event of damage occurring. The deductible here applies only to damage, and not total loss. It is also a precondition for the application of the additional deductible that the assured has consented to the trading limit being exceeded. If the ship enters into the conditional trading limit without the consent of the assured, e.g., where the master or crew makes a mistake, or ice brings the ship into a conditional trading limit, any damage occurring will not trigger the extra deductible. The insurer will, however, be entitled to charge an extra premium or impose special conditions.

Subparagraph 3 sets out the rules for navigation in excluded trading areas limits, and differs to a certain extent from the conditions. The *first sentence* allows the assured to sail in excluded trading areas provided he has obtained advance permission from the insurer. The permission may be subject to certain

conditions, e.g., payment of an additional premium. If the assured does not accept the conditions or has not requested dispensation, cover will be suspended from the moment the ship enters the excluded area. This is somewhat stricter than Cefor III and PIC § 7, which allowed the cover to remain in effect even if the person effecting the insurance had not requested dispensation. The insurer's sanction in such situations was limited to being able to impose additional premiums and possibly special conditions after the fact, cf. subparagraph 2of Cefor III and PIC § 7. For the insurance to be suspended, however, the master must have acted intentionally in exceeding the trading limit. The provision concords in this respect with the subparagraph 1, first sentences of CEFOR III and PIC § 7, which also required that the assured consent to the trading limit being exceeded. A requirement of consent by the assured is not necessary, however, when intent on the part of the master is a prerequisite: it is difficult to imagine that the ship could sail into an excluded area with the consent of the assured but without the master acting intentionally. Accordingly, the provision has not been maintained.

Suspension pursuant to the subparagraph 3 will apply only as long as the ship is inside the excluded area, cf. *second sentence*, which is taken from the subparagraph 1, third sentences of Cefor III and PIC § 7.

Cover will not be suspended if the ship navigates into an excluded area as part of measures being taken to save human life or to salvage ship or goods, cf. the reference to § 3-12, subparagraph 2, in the *third sentence*, which is taken from § 37, subparagraph 2 of the 1964 Plan.

If a casualty occurs after insurance cover has resumed following a deviation, the general rules on causation in § 2-11 apply. If it is known that the ship sustained damage while it was outside the trading limits, the insurer will not be liable for new casualties occurring as a result of that damage. These casualties must be attributed to the ship having been "struck by a peril" during the suspension period, cf. § 2-11, subparagraph 1. Since the damage is known, the special rules on unknown damage in the subparagraph 2 would not apply. If separate hull cover was taken out during the deviation, new casualties will be covered by that policy. If, however, the ship had sustained damage while it was outside the trading limits which had not been discovered, new casualties arising from the undiscovered damage will fall entirely under the ordinary hull insurer.

Here, as elsewhere, the rules on apportionment apply. If a subsequent casualty is partly due to known damage which occurred during the suspension period

and partly due to perils to which the ship is exposed at a later time, the insurer will only be liable for a proportionate share of the loss, cf. § 2-13.
The rules on trading limits in an insurance policy are, in principle, independent of the rules in the ship's trading certificate governing the area where it is permitted to trade. For smaller vessels, a trading certificate issued by the ship's flag state is used instead of class approval and loss of the ship's trading certificate is dealt with specifically in § 17-4, subparagraph 2. However sailing outside the areas permitted by a trading certificate would, in relation to the insurance contract, be a breach of a safety regulation regulated by § 3-24, or in the case of fishing vessels and smaller coasters, § 17-5, letter b.

§ 3-16. Illegal undertakings

This paragraph corresponds to § 40 of the 1964 Plan.
The provision has no direct parallel in ICA.
Subparagraph 1 establishes that use of the ship for illegal purposes or activities constitutes a special alteration of the risk. Subparagraph 3, according to which the insurance terminates if the ship is substantially used for the furtherance of illegal purposes, has its origins in the 1930 ICA section 35, which prohibited insurance of an "illegal interest"; see also the Commentary on § 2-1 and § 2-8 above. NL 5-1-2, which forbids contracts which offend decency, is based on somewhat different criteria, but leads to substantially the same result.
Under subparagraph 1 the insurer is free from liability for "loss that is a consequence of the ship being used for illegal purposes". Judging the causation issue may give rise to difficulty. It is not sufficient that the ship runs aground on a voyage with an illegal purpose about which the assured knew. The damage must, to a certain extent, be a foreseeable consequence of the illegal undertaking, e.g., where the vessel must venture into hazardous waters in connection with a smuggling operation and runs aground. The more detailed application of this rule is a matter which must be left to the courts.
It is also a requirement that the assured "did not know nor ought to have known" of the illegal nature of the undertaking at a time when it would have been possible for the assured to intervene. If the crew uses the ship for illegal purposes without the knowledge of the assured, this is a risk against which the assured should be protected. Once the assured learns of the matter, however, the assured must intervene promptly, failing which the insurer may cancel the insurance contract on 14 days' notice, pursuant to the *Subparagraph 2.* The

period of notice was three days under the 1964 Plan, but this has now been amended to conform with the other notice periods. The burden of proving good faith lies with the assured.

An activity or undertaking is illegal not only when it violates the laws of the flag State, but also when it is unlawful under the laws of the State which has authority over the ship in the situation in question. The issue of whether the ship had a duty to comply with prohibitions or orders of another country's authorities must be determined in each situation, cf. also the comments to § 3-24.

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

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

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

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

This paragraph corresponds to § 41 of the 1964 Plan.

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

The *Subparagraph 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. § 2-8, or war risks, cf. § 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 § 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, 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 § 3-21. The *second and third sentences* are identical to the corresponding provisions of the 1964 Plan, except that the notice period for cancellation has been changed to 14 days, and the proviso has been added that the port must be "safe", cf. § 3-17 and § 3-14.
The *Subparagraph 2* creates an exception to the main rule in the subparagraph 1 for cases where the ship is insured with the Norwegian Shipowners' Mutual War Risks Association. In keeping with § 41, subparagraph 2 of the 1964 Plan, the war risks cover will not be suspended if the ship is requisitioned by a foreign State power, cf. definition of that expression in § 2-9, subparagraph 1, letter (b), second sentence. Insurance against war risks will also take over from insurance against marine perils under § 2-8 in the same manner as was provided for earlier under the 1964 Plan, cf. § 16, subparagraph 3.

§ 3-18. Notification of requisition

This paragraph corresponds to § 42 of the 1964 Plan.
The *Subparagraph 1* imposes on the assured a duty to notify the insurer if the ship is requisitioned or is redelivered, while *subparagraph 2* gives the insurer authority to demand a survey of the ship when the requisition is over and the ship has been returned. When the insurance comes into effect again after a requisition, the same types of causation problems arise as when the insurance cover has been suspended due to the ship navigating beyond the trading limits. The Plan's general rules on causation also apply in the event of requisition, cf. § 2-11. If the ship has sustained unknown latent damage during the requisition period, the insurer will bear the risk of the later effects of that damage. Consequently, the insurer has a specific interest in receiving notice of the return of the vessel, so that a demand for a survey may be made pursuant to the

second subparagraph. Latent damage discovered in the survey shall be deemed to be "known" for the purposes of § 2-11. If the survey reveals that the ship is a significantly worse risk than prior to the requisition, the insurer may then cancel the insurance pursuant to § 3-17, subparagraph 1, second sentence.
If the ship sustains a casualty after it is returned, and the insurer wishes to plead that the casualty is due to a casualty or circumstance which occurred while cover was suspended, the burden of proof will be on the insurer, cf. § 2-12, subparagraph 2. If the shipowner fails to report the return of the vessel, thereby depriving the insurer of the opportunity to obtain evidence, it is reasonable to then place the burden of proof on the assured. The last subparagraph is to this effect.

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

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

§ 3-20. Removal of ship to repair yard

This paragraph corresponds to § 44 of the 1964 Plan.
Subparagraph 1 imposes on the assured an obligation to notify the insurer if a removal of the ship to a repair yard entails an increase in the risk. The provision reproduces § 44, subparagraph 1 of the 1964 Plan with the addition that the risk must be increased due to the damage. Notice is necessary to give the insurer the opportunity to assess whether to object to the removal, cf. below. It is sufficient to give notice to the claims leader, cf. § 9-6.
A "removal" of the ship means that it will undertake a voyage, under its own propulsion or under towage, exclusively for the purpose of being brought to a dry-dock or repair yard. The voyage will not be regarded as a removal if the ship is in such good condition that it takes a new cargo to the port where the survey or repairs are to be carried out. It may be deemed a "removal", however, even if the ship retains a cargo which was on board at the time the casualty occurred; the decisive factor will be whether the ship is in such condition that

the shipowner may incur liability for unseaworthiness if a new cargo were to be taken on board after the casualty has occurred.

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

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

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

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

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

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

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

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

The assured must be notified of a disclaimer of liability under the subparagraph 2, first sentence, before the removal is commenced, so that the assured and the other insurers may arrange necessary additional insurance. If the assured has failed to notify the insurer pursuant to the subparagraph 1, the insurer has no opportunity to object to the removal, and thus will not be liable for any loss arising during or as a consequence of the removal, cf. subparagraph 2, second sentence. The risk is, in that case, transferred to the assured and not to another insurer, cf. wording of § 12-13, subparagraph 2. This may seem a rather stringent sanction for negligence on the part of the assured, but it is difficult, from a legal standpoint, to come up with any other satisfactory rule. A rule freeing the insurer in question from loss due to the extra risk during the removal, for example, would create major difficulties in evaluating causation.

§ 3-21. Change of ownership

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

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

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

The provision only applies in the event of a transfer to a "new owner". Thus, if a transfer is simply part of an intra-company re-organisation which does not entail a change in the actual ownership interests, the insurance will continue in effect in the usual manner. Nor will a change in the shareholder structure of a ship owning company be covered by the rules.
The provision affects all types of insurance relating to the ship, and not just the hull insurance.
The insurance will lapse only as regards casualties which occur after the change in ownership. If the ship has known, unrepaired damage at the time of the transfer for which the insurer is liable, the vendor has a conditional claim against the insurer which can be transferred along with the ship, cf. commentary below to § 12-2.
When the insurance terminates pursuant to § 3-21, the person effecting the insurance may claim a reduction of the premium pursuant to § 6-5.

Section 3. Seaworthiness. Safety requirements

§ 3-22. Unseaworthiness

This paragraph corresponds to § 45 of the 1964 Plan.
The provision establishes the right of the insurer to avoid liability on the grounds of unseaworthiness of the vessel. ICA contains no equivalent provision since this type of rule must be drawn up as a safety requirement. During the revision, an assessment was made as to whether the rules might be reformulated as safety regulations for larger vessels as well, so that there would be only one set of rules. The requirement of seaworthiness has played such a key role in marine insurance, however, that it was decided that it is still justified to retain a provision dealing with unseaworthiness as a central element in the rules.
The rules are unchanged, apart from the assured now having the burden of proving lack of causal connection between unseaworthiness and a casualty, as in the case of breach of a safety regulation. The background for this is that, during the Plan revision, the view was taken that the rules on seaworthiness and the rules concerning safety regulations should be co-ordinated. The committee did not find it appropriate to extend the protection of the assured by establishing a milder form of sanction, say, by way of provisions on providing for a reduction of the claim. On the contrary, given the experience of recent

years with sea-going tonnage, the issue of whether more stringent rules were needed was examined. Long-term shipping crises with poor earnings have led to a low rate of renewal of the fleet and an increase in the average age of vessels. This factor, combined with reductions in maintenance at a number of shipping companies, have resulted in some ships becoming weakened by rust and corrosion and, in a number of cases, having worn-out machinery. In addition, there is a trend towards recruiting deck and machine officers from low-wage countries with a correspondingly low level of education, cf. discussion in *Brækhus/Rein*: *Håndbok i Kaskoforsikring* (Handbook of Hull Insurance), p. 179.

Most cases of corrosion have been resolved through § 175 of the 1964 Plan, which frees the insurer from liability for primary damage resulting from wear and tear, corrosion and insufficient maintenance. In addition, in 1992 a special rule was introduced in the conditions, under which the insurer is not liable for the cost of repairing hull damage which is a direct and immediate consequence of wear and tear, rottenness, insufficient maintenance or similar defects in the hull, cf. PIC II § 5, 17. But crack formations in the hull have also led to denial of all coverage due to unseaworthiness. For an example of how failure to carry out a requirement to check the ship's cooling system for corrosion has been judged using the rules on unseaworthiness, see ND 1993.330 Hålogaland HAVSTÅL, where the Court of Appeal found that the ship sank due to a leak or breakage in the sea-water cooling system.

During the revision, the conclusion was that the problems described would hardly be solved by tightening up the rules on seaworthiness, either generally or for certain types of damage, since the present rules were seen as sufficient to take care of the insurers' interests.

Subparagraph 1, first sentence sets out the relevant conditions: in order for the insurer to be free from liability, the ship must have been in unseaworthy condition, the assured must have known of this at a time when it possible for the assured to intervene, and there must be a causal connection between the unseaworthiness and the casualty.

The first condition is that the ship be unseaworthy. The Plan makes no attempt to specify what constitutes unseaworthiness. Nor can one simply apply definitions of unseaworthiness lifted from other contexts, e.g., from the rules on government inspection of ships or charter party law. Just the same, even though the term "seaworthiness" does not have the same meaning in all contexts, there

is a common core. It can be described starting with section 2 of the seaworthiness act (*sjødyktighetsloven*), as cited in the case ND 1973.450 NH RAMFLØY: [Translation] "A ship shall be deemed unseaworthy when, due to defects in the hull, equipment, machinery or crew or due to overloading or faulty loading or due to some other reason, it is in such condition that, in light of the intended voyage or activity, there is greater danger to human life than is normal for the operation in question". According to this definition, the ship is seaworthy if it maintains a certain minimum technical (hull, equipment, machinery) and operational (crew, loading) standard. The standard is a function of the navigation for which the ship is intended: for example, less is required for a ship which is to sail in closed waters than for one which is to sail on the open sea; requirements for summer voyages are less stringent than for winter voyages, etc. The decisive factor is the risk associated with sending the ship out to sea. The ship need not be so strong and well-equipped that the risk will not be greater "than is normal for the operation in question". This passage contains a reference to a normal standard: the ship is to have the strength, equipment and crew, etc., which experienced, careful people in the business consider necessary when the ship is to sail on the seas.

The concept of seaworthiness is also relative in time. From the time of sailing ships to the present, technical developments have made it possible to achieve substantial reductions in the degree of risk at sea; it is a natural parallel development that safety requirements are improved, and thereby seaworthiness standards as well. A sailing vessel which was considered seaworthy in the 1890s would not have been approved in a ship inspection today. The customary and thus acceptable degree of risk in shipping has changed dramatically in the past 100 years.

The fact remains, however, that a ship's seaworthiness varies depending on its age. The rules assume a uniform standard of seaworthiness. Thus a standard which is approved for older ships must also form the basis of the norm for newer vessels.

The issue of seaworthiness has been dealt with in a number of cases. Recent ones include: ND 1981.347 VALL SUN, which dealt with defects in the ship's machinery; ND 1977.138 Oslo, defects in the ship's equipment; ND 1982.328 Kristiansund HARDFISK and ND 1986.226 Namdalen SYNØVE, both of which dealt with stability; ND 1971.350 NH KARI-BJØRN, which dealt with crew

problems; and ND 1973.450 NH RAMFLØY, which dealt with crew and outdated charts.

It is not in itself determinative, for insurance purposes, that the ship has been found to be seaworthy by the ship inspection authorities which, pursuant to the Act no. 7 of 9 June 1903 relating to government control of the seaworthiness of ships, are empowered to supervise the seaworthiness of the merchant fleet. The insurer must be able to argue that the ship was unseaworthy at the time of departure, even though the government inspection authorities or classification society did not intervene. Just the same, if the ship has been classed or approved by the ship inspection authorities, there will be a presumption that the ship is seaworthy. And even if the ship is found to be unseaworthy despite a class or approval having been given, the appraisal done by the classification society or ship inspection authorities will have an impact on the issue of whether the assured was in good faith, cf. below. It is nevertheless important to stress that the assured has an independent responsibility for the seaworthiness of the ship, which can impose on the assured a distinct duty to act, especially when a considerable amount of time has gone since the last class survey or inspection.

The Plan operates on the assumption that the ship is to be classed, cf. § 3-14. This implies an assumption that all ships insured under the terms of the Plan are seaworthy. If a ship loses its class, this assumption will no longer apply, but then the stricter rules on loss of class in § 3-14 are triggered, and the insurance might lapse in its entirety. The issue of seaworthiness thus becomes immaterial when a ship loses its class. Seen in this light, the most important function of the provision on seaworthiness is in relation to defects arising between inspections or not discovered during the inspections.

The other condition in the subparagraph 1 is knowledge on the part of the assured. As under the 1964 Plan, the insurer may only invoke unseaworthiness if the assured knew or ought to have known of the ship's defects at such a time that it would have been possible for him to intervene. The subjective requirement applies, in principle, regardless of whether the ship is classed or approved, and regardless of which body has carried out any inspections. For most insurances the assumption in § 3-14 that a ship is to be classed, applies and the issue of seaworthiness of ships without class is of minor significance. The only type of insurance where the ship is not required to be in class is insurance of fishing vessels and coasters under chapter 17, cf. § 17-4. These

vessels are, however, subject to a requirement that they have a valid trading certificate according to the rules of the Maritime Directorate, cf. § 17-4, so that this form of control replaces that exercised by class.

Like the 1964 Plan, the 1996 Plan focuses on the knowledge of the assured, and ignores any knowledge of unseaworthiness which the master might have had. The issue of who is to be deemed the "assured" in relation to the seaworthiness requirement is dealt with using the usual identification rules, cf. § 3-36 to § 3-38. See also below on shipowners who act as master or member of the crew.

The knowledge of the assured is linked to the time where it was possible for him to intervene. It does not matter whether the unseaworthiness arose before or after the ship left port. With the communication systems now available, it is easy to report defects which have arisen at sea. If notice reaches the assured at a time and under circumstances which allow him to intervene, e.g., by giving specific orders to the master, then the assured must take this action. If the assured remains passive, and the unseaworthiness causes a casualty, there will be no claim under the insurance.

The third condition in the subparagraph 1 is that there must be a causal connection between the unseaworthiness and the casualty which has occurred. Making seaworthiness a relative concept implies that the assessment of whether there is a causal connection between the unseaworthiness and the loss will often go no further than the unseaworthiness assessment itself. If, following a concrete assessment, a court comes to the conclusion that the ship was unseaworthy, there will be little room left for examining the issue of causation, because causation-related considerations will have already played a key role in the appraisal of the seaworthiness issue.

The *Subparagraph 1, second sentence,* introduces a qualification to the rule in the first sentence. The provision is new compared to the 1964 Plan, but in theory the view has been that a rule like this should be read into § 45 of the 1964 Plan. If the assured is the master of the ship or a member of its crew, then faults in relation to navigation or other nautical matters must be disregarded. This exception is relevant in two ways. Firstly, it is clear that the wording will not protect the assured where he acquires knowledge of the unseaworthiness before the vessel leaves port. Here one cannot regard his fault as "nautical". Secondly, once the vessel has left port the assured is only protected if his fault relates to some nautical matter. The rationale behind the exception is the wish to align the position of a shipowner who acts as master or crew member as

much as possible with that of an ordinary shipowner. After the ship has left port, an ordinary shipowner will usually be dependent on the information he receives from the ship on matters relating to seaworthiness. If the master fails to report on such matters, an ordinary shipowner will be protected because it will not be identified with the ship's crew with respect to conduct "in connection with their service as seamen", cf. § 3-36, subparagraph 1. The rule ensures that masters and crew who are shipowners receive more or less the same protection for errors and negligence they commit "in connection with their service as seamen", insofar as such errors might relate to the seaworthiness of the ship and are committed on board after the vessel has left port. The term "nautical" is used rather than "in connection with their service as seamen" in order to be consistent in relation to the wording of § 3-25. The application of the term may differ in relation to unseaworthiness compared its application to breach of a safety regulation.

The *Subparagraph 2* deals with the burden of proof. The *first sentence,* which establishes the insurer's burden of proving that the ship was not seaworthy, is new, but merely reflects existing law. The insurer's burden of proof also includes the issue of whether there was unseaworthiness at a time when the assured had the opportunity to intervene. If the ship springs a leak whilst afloat, the burden of proof is reversed, and the assured must then prove that the ship was not unseaworthy. The word "afloat" implies that the ship was floating on its own buoyancy. During the revision, there was some discussion as to whether it was expedient to modify the wording in the Norwegian text, but the conclusion was that it was difficult to find a formulation which was equally to the point, even though more modern language could have been chosen. The rule implies a presumption that the ship is not seaworthy if it springs a leak. The presumption will only apply, however, to casualties in the form of leaks; for other types of casualties, e.g., fire or machine casualty of unknown cause, the usual rules apply. 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.

The presumption applies only to the question of whether the ship is unseaworthy, not the good faith of the assured. If the assured does not succeed

in refuting the assumption of unseaworthiness, the assured may then invoke good faith. Here as elsewhere, the burden of proving good faith rests with the assured, cf. subparagraph 2, *second sentence*.
The subparagraph 2, second sentence also requires the assured to prove that there is no causal connection between the unseaworthiness and the casualty. This provision is new. As mentioned earlier, the purpose is to have common rules on burden of proof for unseaworthiness and breach of safety requirements.

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

This paragraph is identical to § 46 of the 1964 Plan.
The *Subparagraph 1,* gives the insurer authority to demand a survey of the ship at any time during the insurance period for the purposes of ascertaining that the ship is in seaworthy condition. It is assumed that insurers will exercise caution in using the provision.
The insurer must always bear the cost of any survey he requests. If the survey reveals that the ship has defects which must be rectified and for which the insurer is liable, the Plan's other rules on liability of the insurer during repairs will be triggered, and the insurer will be liable for related expenses under the usual rules, although not for the assured's operating expenses for the ship or other financial loss incurred as a result of the repairs (but see § 12-13 on the ship's operating expenses during removal to a repair yard). The result is the same regardless of whether the immediate reason for the survey was a casualty. If no damage is found which must be repaired for the purposes of seaworthiness, the issue arises as to whether the assured should be indemnified for his loss. If a casualty or other similar circumstance covered by the insurance has occurred previously, the assured has, under general principles, the obligation to allow the ship to be inspected for the purpose of ascertaining whether there is damage. The expenses of the inspection may be claimed from the hull insurer, but the assured must bear the operating costs and loss-of-hire for the time the inspection is carried out (unless separate loss-of-hire insurance has been taken out, cf. Chapter 16). The expenses of unloading for a survey following a casualty are indemnified under special rules, usually general average, but also under § 4-12, particular measures taken to avert or minimise the loss. If no event has occurred which requires the assured to allow the ship to be inspected, but the insurer requests the survey due to a general suspicion of

poor maintenance, it is reasonable to have the insurer bear the full liability if the suspicion turns out to be unfounded. Accordingly, the *Subparagraph 3*, provides that the insurer shall, in such cases, indemnify the assured for costs as well as loss resulting from the survey.

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

§ 3-24. Safety regulations

This paragraph corresponds to § 48 of the 1964 Plan, conditions, cf. Cefor I, 23, subparagraph 3, and PIC § 5, 5, second subparagraph, third sentence, and ICA section 1-2, letter (e).

The provision defines the term "safety regulation". The sanctions in the event of breach of safety regulations are set out in § 3-25 and § 3-27, letter (c).

Under *subparagraph 1*, safety regulation is defined as an "order concerning measures for the prevention of loss". This definition is the same as under the 1964 Plan. ICA section 1-2, letter (e) contains a much more comprehensive and detailed definition of what is meant by the term "safety requirement". The term has been considerably expanded in relation to ICA 1930, principally due to problems associated with clauses that are formed as objective exclusions but which in reality imposed upon the assured a duty carry out specific actions designed to prevent loss. The new definition ensures that insurer cannot implement an objective exclusion in the cover in those areas set out in ICA section 1-2, letter (e).

Clauses formed as objective exclusions but which in reality impose an obligation on the assured to take precautionary measures have not posed much

of a problem in marine insurance, however, so that an equivalent definition is unnecessary here. The Plan has therefore retained the traditional definition of safety regulation.

Under the subparagraph 1, a safety regulation may arise in a number of ways. It may be issued by a government authority, stipulated in the insurance contract, imposed by the insurer pursuant to the insurance contract, or issued by a classification society. On this point as well, the Plan differs from ICA, which assumes that the requirement is part of the insurance contract. In marine insurance, there is still a need for other types of regulations than the ones which are reproduced in insurance contracts and made into specific requirements. This is especially true of requirements imposed by government authorities and classification societies. Provisions imposed at the international level, such as the SOLAS Convention of 10 June 1948, 17 June 1960 and 1 November 1974, and the ISM Code of 4 November 1993 will also constitute safety regulations falling under the scope of this provision, through legislation and regulations pertaining to seaworthiness, and through requirements prescribed by classification societies. How a requirement imposed by a government authority has come into existence is of no importance, cf. the case of ND 1973.450 RAMFLØY, which held that a requirement issued by a government authority could also include rules set out in legislation.

Some regulations, etc., provide primarily for internal control arrangements or the use of quality assurance systems for shipping companies (and possibly management companies). The ISM Code is perhaps the best example of this. Under the Code, the shipowner is to prepare a safety and environmental protection programme, which is to be implemented and maintained at all levels in the shipowner company. The routines are to be documented, a check is to be made on compliance, and they are to be the subject of review and evaluation. Shipping companies fulfilling the requirements will be issued a safety management document of compliance, and the ship belonging to the shipowner will receive a Shipboard ISM Certificate. As stated in the Commentary on § 3-25, breach of these requirements, etc., will not necessarily have any consequences for insurance cover, *inter alia* since it is the development of the safety arrangement *per se* which constitutes the safety requirement, and not the individual provision.

Government regulations and orders from classification societies receive the status of safety regulation from the time they are adopted or issued, regardless

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

Under the 1964 Plan, requirements imposed by a classification society only had the status of safety regulation in cases where there was an assumption that the ship was classed. This part of the rule has been eliminated, because the starting assumption in the new Plan is that the ship is classed.

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

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

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

The provision in the *Subparagraph 2* is new, and is taken from the earlier conditions on change of class, cf. Cefor I, 23, second subparagraph, third sentence, and PIC § 5, 5 second subparagraph, third sentence. This provision led to the assured automatically losing cover if he failed to comply with the requirement for periodic surveys. The background for the rule was that the insurers wanted better concordance between the provisions on formal and material class, so that not only the formal class requirement would be determinative for insurance cover. If the shipping companies are careless in fulfilling the requirements for a given class, it can easily take six months to a year before the class is cancelled, and the insurers do not wish to keep the risk for that long.

The opinion in practice was that this result was too stringent, cf. also *Brækhus/Rein*: *Håndbok i Kaskoforsikring* (Handbook of Hull Insurance), p 220, particularly with respect to Continuous Machine Survey (CMS). With CMS, the shipowner may, instead of having periodic surveys of all of the machinery, divide the machinery up into components and have a single component surveyed at a time. The issue then becomes whether failure to comply with the survey deadline for a single component shall lead to loss of insurance cover. During the revision, there was agreement that the sanction for failure to comply with periodic surveys was too stringent, and that the rules on safety regulations provided more appropriate sanctions. It was, strictly speaking, possible to manage without a specific rule: an order from the classification society, including the CMS order, would automatically constitute a safety regulation under § 3-24. In the event of breach of an order, the provisions of § 3-25 would automatically be triggered: the insurer could disclaim liability if the assured

could be blamed for breach and there was a causal connection between the breach and the casualty. Stating the requirement even more explicitly will have an educational effect, however, and the obligation to comply with periodic surveys has therefore been formulated as a separate safety regulation. The surveys may be ordered either by a government authority or a classification society. The provision places a duty on the assured to have the survey conducted by the given deadlines. Breach of this safety regulation will arise as soon as the deadline is exceeded. There is no requirement that the classification society react by sending a reminder or cancelling the class, cf. commentary above to § 3-16.

If the classification society grants postponement of a periodic survey, the provision will not be triggered and there will be no breach of a safety regulation. A postponement must have in fact been granted; it is not sufficient that the classification society would have allowed for a postponement if the assured had requested it.

The provisions on periodic surveys in § 3-24, cf. § 3-25, are a supplement to § 3-14. The classification society may at any time cancel the class in the event of breach of the duty to conduct periodic surveys, with the result that the insurance cover lapses in its entirety.

§ 3-25. Breach of safety regulations

This paragraph corresponds to § 49 of the 1964 Plan, conditions cf. Cefor I, 23, and PIC § 5, 5, second subparagraph, third sentence, and ICA section 4-8. Under ICA section 4-8, the assured must be more than a little to blame if breach of a safety regulation is to be invoked. The sanction is total or partial exemption from liability. Under the 1964 Plan, it was sufficient to have ordinary negligence for sanctions to be applied, and the sanction was complete exemption from liability. This approach has been maintained in the new Plan.

Under *subparagraph 1, first sentence*, the assured will lose insurance cover if he can be blamed for breach of the safety requirement and there is a causal connection between the breach and the loss. Under ICA section 4-8, the assured must be more than a little to blame if breach of a safety regulation is to be invoked. This approach has not been adopted in the Plan: in keeping with the 1964 Plan, sanctions may be applied to all forms of negligence. In deep-water hull insurance, the fault of the assured will often manifest itself by the assured failing to supervise his staff's compliance with applicable rules. The extent of

the assured's obligation must be determined on a case to case basis, cf. ND 1980.91 Hålogaland TOTSHOLM. If the assured has delegated supervision duties to the captain or officers on board, or to certain persons on shore (cf. the "designated person" in the ISM Code), he may be identified with them within the meaning of § 3-36, subparagraph 2.

The requirement of a causal connection between the breach of the safety regulation and the loss will often be difficult to meet for requirements like the ISM Code, which provides for more general internal control arrangements / quality assurance systems for shipowners, and under which breach of the formal requirements for creation and maintenance of the systems will less frequently be the cause of the casualty in question.

Once breach of a safety regulation has occurred, it follows from the provision that the assured will lose all insurance cover. This is a more stringent approach than under ICA, which provides for a discretionary scaling-down of liability.

The provision in § 2-13 on concurrent causes will, in some situations, lead to the same actual result, i.e. a reduction of the insurer's liability. A typical example of this is when a breach of a safety requirement has combined with an error committed by a member of the crew in his service as a seaman, cf. § 3-36, subparagraph 1, to cause the loss. Breach of safety requirements such as the ISM Code, 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 breach of the quality assurance system, etc., and the loss sustained.

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

The subparagraph 1, *second sentence* concords with the 1964 Plan and makes an exception from 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 breach entail loss of cover. Thus the rules in the first sentence do not apply when the negligence of the assured is "of a nautical nature". In that case, one falls back on the general rules applicable when the assured brings about the casualty, in § 3-32 and § 3-33. The concept "of a nautical nature" comprises not only the rules of navigation as such but, depending on the circumstances, may also include port and canal regulations, regulations for passing minefields and

other obstructions, regulations on the use of radio equipment in emergencies, etc.

If, however, the insurer has found it necessary to impose a special safety regulation at the time the contract is entered into, e.g., that the vessel must be used in sheltered waters, or that there must be special equipment on board for safety reasons, then there is reason to have more stringent rules. In those cases, the insurer must be able to invoke negligence committed by anyone who is under a duty on behalf of the assured to comply with the requirement or ensure that it be complied with, cf. *subparagraph 2, first sentence*, which concords with the 1964 Plan. Generally speaking, people who work in a senior position in the service of the assured will have a duty to comply with the requirement or ensure that it be complied with. The shipmaster, mates and engineers in particular are crew members who will be covered by the rule. In addition, the nature of the requirement in question will, to a certain extent, determine how far down in the ranks identification will take place.

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

The provision in the *subparagraph 2, second sentence*, is taken from the conditions, cf. Cefor I, 23, and PIC § 5, 5 second subparagraph, and must be read in conjunction with the rule in § 3-24 to the effect that periodic surveys constitute a safety regulation. Thus, as mentioned earlier, § 3-25 will automatically be triggered: the insurer may avoid liability if the assured can be blamed for the breach and there is a causal connection between the breach and the casualty. Depending on whether the periodic surveys are made into special safety requirements, there will be the possibility of expanding the identity of the assured under the second subparagraph. The change nonetheless produces a milder result than the conditions, under which a breach would entail automatic lapse of cover. The requirement of a causal connection implies that the assured must demonstrate that the casualty would have occurred even if the periodic survey had been carried out, i.e. that the casualty is in no way connected with circumstances which would have been revealed during the periodic survey.

Since the concept of safety requirement is as comprehensive as it is under § 3-24, the question may be asked whether the shipowner will be protected from the exclusion on the grounds that he was unaware of, say, government

requirements. This must be answered in the negative if it relates to requirements imposed by the flag State, cf. ND 1986.226 Namdalen SYNØVE. A concrete assessment must be made with respect to alleged ignorance of requirements imposed by another State. Depending on the circumstances, it must also be possible to accept as a defence that the assured has misinterpreted the requirements, although in a defensible manner, cf. ND 1982.328 Kristiansund HARDFISK.

§ 3-26. Ships laid up

This paragraph corresponds to § 47 of the 1964 Plan.
The 1964 Plan contained no rules on safety regulations for ships that are laid up, but § 47 made the rules on seaworthiness applicable to situations where ships were laid up. The new Plan has introduced special safety requirements for ships laid up in § 3-26. In addition, the insurer may invoke general rules on seaworthiness, without specific provision to that effect being necessary.
The *first sentence* imposes on the assured an obligation to prepare a plan for the lay-up and submit it to the insurer for approval. It is sufficient that the lay-up plan be forwarded to the claims leader, cf. § 9-3. The assured has an obligation to comply with the approved plan while the ship is laid up.
When supervision during lay-up is made a safety regulation, the conditions for the insurer being able to apply a sanction become somewhat different than those that applied previously. Under the 1964 Plan, the decisive question was whether there was a defect in the ship which the assured should have rectified. The new Plan, by contrast, adopts the approach of examining whether the lay-up plan has been followed. If the lay-up plan is not complied with, and the assured has been negligent, the burden will be on the assured to prove that the casualty is not due to a breach of the lay-up plan.
A lay-up plan should resolve four issues: it should state where the ship is to be laid up, set out guidelines for mooring while the ship is laid up, provide guidelines for supervision of the ship, and contain rules on minimum crew. It is not necessary, however, to impose any requirement that the ship must maintain its class. In practice, the periodic class survey will be postponed for the time the ship is laid up, and the ship will be able to keep its class provided it is inspected before being operated again.
The provision concerning the lay-up plan will only be applicable when the ship is to be "laid up". Brief stays in port for the purpose of loading or unloading or

bunkering will not trigger the requirement to prepare a lay-up plan. For that to happen, the ship must be taken out of operation and the crew reduced. If the ship lies in port for awhile with full crew, it is not "laid up". It is virtually impossible to set a limit for how long a stay must be before it constitutes "lay-up"; sometimes a ship will abruptly end a lay-up period because it has obtained a cargo assignment.
As a rule, a lengthy stay accompanied by a request from the person effecting the insurance for a reduction in premium will constitute "lay-up".
If the assured has prepared a lay-up plan and forwarded it to the insurer, and the insurer does not respond with any objections, this will usually be taken as tacit acceptance of the plan by the insurer. The insurer may not then invoke the provision if the assured follows the plan during the lay-up period.

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

This paragraph corresponds to § 50 of the 1964 Plan and ICA section 3-3, first paragraph, last sentence.
ICA section 3-3 contains general rules on cancellation. Under section 3-3, first paragraph, last sentence, the insurer may reserve the right to cancel the contract in the event of breach of safety requirements, provided that the termination is reasonable. There is a presumption that the cancellation is reasonable when it is linked to circumstances referred to in letters a-c of the Plan's provision, and so an additional requirement to this effect seemed unnecessary in the Plan.
Letters (a) and (b) allow the insurer to withdraw from the contractual relationship when the ship can no longer be considered seaworthy. The rule in letter (a) applies regardless of whether any degree of blame can be attached to the assured. It applies mainly to older and poorly maintained ships, when the point has been reached where the ship is no longer allowed to sail, or to ships on which construction defects have been discovered which render the ship unseaworthy.
The rule in *letter (b)* places on the shipowner a duty to carry out repairs in the sense that the insurer is entitled to cancel the insurance if the ship lies unrepaired for a long time. This assumes that there is not any legal impediment preventing the assured from carrying out the repair. The assured's lack of money is no excuse. Exercise by the insurer of his right to cancel will not trigger any obligation to pay the indemnity for unrepaired damage existing at the time of cancellation, cf. § 12-2, but nor does it free him from liability for such

damage. If the assured subsequently has the ship repaired, he can then demand the indemnity for that damage from the insurer.
Letter (c) specifies that cancellation in the event of breach of safety regulations may only take place when the regulation is of "fundamental significance", although it does not matter what kind of safety regulation it is. Cancellation may also take place when the breach is committed by a subordinate of the assured, provided that the person is under a duty to comply with the regulation or see that it is complied with. This will apply even if the regulation in question is not of the type referred to in § 3-24, subparagraph 2. For cancellation to take place, however, the regulation must have been breached intentionally or through gross negligence.
The notice period is 14 days, although it may not take effect before the ship arrives at the nearest port, cf. *first sentence*. In keeping with § 3-7, § 3-14 and § 3-17, the proviso is made that the port must be safe. The deadline in the 1964 Plan was seven days; it has been amended to conform with the other notice periods in the Plan.

§ 3-28. Contractual terms

This paragraph is identical to § 51 of the 1964 Plan.
The provision gives the insurer authority to impose requirements during the period of insurance, cf. § 3-24. 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 requirements made pursuant to this paragraph is expressly regulated in § 4-15. The effect of 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 requirement in question may not have been in effect at the time the contract was entered into.

Section 4. Measures taken to avert or minimise loss, etc.

§ 3-29. Duty of the assured to notify the insurer of casualties

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

Under *Subparagraph 1*, the insured has a duty to inform the insurer when a "casualty threatens to occur or has occurred". The rule corresponds to ICA section 4-10, third paragraph, but the duty to notify under ICA applies only when the event insured against has occurred; nor does ICA contain any requirement that the insurer be kept informed on an ongoing basis, as the Plan does. If there are several co-insurers, notice must be sent to each of them, although not if a claims leader has been appointed, in which case § 9-4 will apply, giving the claims leader authority to receive notice on behalf of the co-insurers.
The duty to notify is extended in *subparagraph 2* to apply to the master as well, meaning that negligence on the part of the master may be invoked under § 3-31.

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

This paragraph corresponds to § 53 of the 1964 Plan and ICA section 4-10, first paragraph.
The *first sentence* places on the assured a duty to avert or minimise the loss, while the *second sentence* requires the assured to consult with the insurer. The provision corresponds to ICA section 4-10, first paragraph, although that provision does not contain any duty to consult with the insurer. It is somewhat superfluous to impose a duty on the assured to consult with the insurer, since it is already part of the duty to notify and the duty to keep the insurer informed of further developments under § 3-29. The provision serves as a good signal, however, and has, accordingly, been maintained.
In the 1964 Plan, the duty of the assured to act was formulated as encompassing "what he can" do to avert and minimise the loss. In accordance with ICA section 4-10, first paragraph, this wording has been replaced with "what may reasonably be expected of the assured".
The duty to take measures to avert or minimise the loss will be present when there is an impending danger of a casualty occurring, and when the loss is to be minimised after the situation has been brought under some degree of control.
Under § 53, third sentence of the 1964 Plan, the assured was under a duty to comply with the requirements imposed by the insurer, unless the assured ought to have known that they were based on incorrect or insufficient information. This provision has been deleted because it raised the possibility of difficult conflicts of interest between the assured and the insurer, and possibly also between insurers *inter se*. For example, a situation could be envisaged where the

ship had small cracks in the cylinder liners or other minor damage which did not make the ship unseaworthy, but which nonetheless had to be repaired. Under § 53, last sentence, the loss-of-hire insurer could require that the shipowner request a seaworthiness certificate and continue to sail to avoid loss-of-hire. On the other hand, the shipowner would have a clear interest in having the repair carried out at once, particularly if he had a high daily indemnity under the loss-of-hire insurance. If there was a danger that the cracks could develop and cause a casualty, then the hull insurer would also have an interest in having repairs carried out promptly. The assured could then find itself in the position of receiving conflicting requirements from different insurers, a most unfortunate situation. Moreover, circumstances such as these should really be assessed under the rules in § 3-22 or § 3-24, and it would be unfortunate if the insurer would instead be able to use § 3-30 as authority to impose requirements on the assured.

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

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

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

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

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

If the assured neglects his duty to report a casualty under § 3-29 or implement measures to prevent a casualty or salvage the ship under § 3-30, the insurer shall be free from liability for loss which would not have occurred if the assured

had fulfilled his obligations, cf. *subparagraph 1*. The sanction threshold is the same as in ICA, although the sanction is different. ICA uses a sliding scale in the same way as the other rules in Chapter 4 of ICA, while the Plan starts with the principle that the insurer shall not cover loss resulting from the negligence. Even though the attitude in principle during the Plan revision has been not to go over to the sliding scale rules based on the ICA pattern, consideration was given as to whether it would lead to greater consistency in the Plan rules generally if a system similar to that in ICA was to be adopted. The conclusion was that the existing system should be maintained.

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

Section 5. Casualties caused intentionally or negligently by the assured

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

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

damage. In contrast to many of the rules in sections 3 and 4 a higher degree of fault is required before the insurer is relieved of liability.

§ 3-32. Intent

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

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

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

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

§ 3-33. Gross negligence

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

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

1971.350 NH KARI-BJØRN, ND 1976.132 Gulating TUVA, and ND 1977.138 OSLO.

Both the Plan and ICA operate with a progressive reduction of the insurance cover when the casualty has been caused by gross negligence. ICA section 4-9 sets out a number of factors which are to be specifically taken into account in assessing the reduction: the degree of fault, the course of events relating to the damage, whether the assured was in a state of self-induced intoxication, and circumstances generally. § 3-33 of the Plan refers simply to "the degree of fault as well as the prevailing circumstances generally". "Circumstances generally" is such a wide-ranging expression that it includes the other factors listed in ICA. In deep-water hull insurance, it will be especially the "course of events relating to the damage" which will be of significance for the reduction of the insurer's liability. The factor of "self-induced intoxication" is more relevant to coastal hull insurance, but can also become relevant for deep-water hull cover, especially if there has been a delegation of the ship owning functions which entails that the assured must be identified with the ship's captain or officers, cf.. § 3-36.

"Intoxication" means that intoxicating substances have influenced the user in such a way that he or she acts in a way other than would have been the case had he or she not consumed the intoxicating substances. It is not possible to link the definition of "intoxication" to a set alcohol percentage in the blood, as is done, for example, in section 22 of the road traffic act (*veitrafikkloven*), which sets the limit for "influenced by alcohol" at 0.5 per thousand. A review must be made in each case of the effect of the intoxicating substance on the individual to determine whether the assured acted while intoxicated. It is thus possible to be "under the influence" within the meaning of the road traffic act without being "intoxicated" within the meaning of the Plan.

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

error has been committed on board another of the assured's ships than the one covered by the insurance are dealt with under the "sister ship rule" in § 4-16.
In cases where the owner works as master or a member of the crew on board, § 59 of the 1964 Plan assumed that the courts would take account of the special position of the assured in their application of the discretionary scaling-down provided for in § 56 of the 1964 Plan relating to gross negligence. The assured was thus to be awarded full or nearly full indemnity when there was no reason to suspect that the casualty was intentionally brought about. This assumption has been used in practice: see, for example, ND 1971.350 NH KARI-BJØRN; and the intention has been to maintain this approach in the Plan.
If the assured has brought about the casualty through ordinary negligence, the insurer will always be fully liable, cf. corresponding rule in ICA 4-9, third paragraph. This will not apply, however, when the negligence can be brought under the scope of other rules, e.g., the rules on unseaworthiness or breach of safety requirements. In cases where the gross negligence has related to unseaworthiness or breach of a safety requirement, the courts have had a tendency to prefer to apply the rules on gross negligence instead of the rules on unseaworthiness / breach of safety requirements. The rationale has probably been that the rules on gross negligence offer the possibility for a discretionary reduction of cover, while the sanction for unseaworthiness is loss of cover in its entirety. It would be unfortunate if the same sort of tendency spread to deep-water hull insurance.

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

This paragraph corresponds to § 57 of the 1964 Plan and ICA, section 3-3, first paragraph, second sentence.
Subparagraph 1, first sentence gives the insurer the right to cancel the insurance without notice if the assured has intentionally brought about or attempted to bring about the event insured against, while the *second sentence* sets the period of notice at 14 days if the assured has brought about the casualty through gross negligence. The provision in the subparagraph 1 is unmodified, apart from the seven-day notice period for gross negligence being increased. The period of notice in the first sentence, which in reality allows for an element of punishment, has been maintained, even though ICA has no special rules for this type of situation.

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

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

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

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

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

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

Letter (b) corresponds to ICA section 4-13, but is designed somewhat differently due to the reference to § 3-12. The reference means that the assured has an unconditional right to expose the object insured to any peril for the purpose of saving human life, and that, "during the voyage" the assured may risk the object insured for the purpose of salvaging goods of material value. In the latter case, of course, one must consider the nature of goods the assured attempted to salvage when deciding whether or not the action was justifiable. The thing the assured attempted to salvage must normally have a fairly substantial value. But if the assured was under a pardonable delusion, the action must be accepted. Under general legal principles, the insurer will have a right of recourse against the owner (insurer) of the goods that benefited from the salvage. If the ship sustains damage to salvage its own cargo, the insurer will have a right of recourse against the goods owner (goods insurer) if the shipowner would not have been liable for the damage to the cargo. In these types of situation, the

action will usually be aimed at saving both vessel and goods, in which case the rules on general average, chapter 4, section 2, will come into play.
A relevant provision in this connection is § 4-12, subparagraph 2 of this Plan, which sets out the rules to be applied when the assured has taken measures to avert or minimise the loss which are aimed simultaneously at protecting more than one of his insurers.

Section 6. Identification

General remarks

The rules on the duty of disclosure and duty of care are aimed directly at the person effecting the insurance and the assured, respectively. However, there will often be other persons who act on behalf of the person effecting the insurance or the assured. The person effecting the insurance and the assured will often be different people or companies, and there may also be several assureds covered under one insurance contract. The difficult question which then arises is to what extent the insurer may invoke against the person effecting the insurance or the assured, errors or negligence committed by someone else, i.e. to what extent are the assured and the person effecting the insurance to be identified with their helpers, employees etc. (Translator's note: This problem is referred to in Norwegian insurance law as the problem of "identification" (identifikasjon) and this term has been used in the translation of both the Plan text and the Commentary although it will not be immediately familiar to people who are used to Anglo-American legal terminology.)
The issue of identification must, in principle, be kept separate from the issue of who is the person effecting the insurance or the assured. If a limited liability company is stated as being the person effecting the insurance or the assured, actions taken by the management (Board of Directors / Chief Executive Officer) of that company will be deemed to be actions of the company itself; the company management *is* the company. By contrast, the issue of whether action taken by other persons in the company can prejudice the position of the company is one of identification; those employees *are not* the company.
Problems of identification in marine insurance arise in four different relationships:

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

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

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

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

2. Identification between the assured and his servants

In the 1964 Plan, identification between the assured and his servants was regulated generally in § 59 with respect to the ship's master and crew. The Plan also contained special rules, for example § 18, subparagraph 2, § 49, subparagraph 2 and § 52, subparagraph 2. In addition, § 175 on limitation of liability for damage resulting from inadequate maintenance, etc., meant that the

assured had to accept that his position would be affected if the master or crew were responsible for lack of maintenance. In other cases, it became necessary to fall back on the reference to general rules of law in § 61.
ICA contains a complete regulation of these matters in section 4-11. Section 4-11, third paragraph, applies to commercial insurance, and opens up the possibility of identification with specified persons or groups, provided they are stated specifically in the contract. This means that in marine insurance of merchant ships, one is free to regulate the issue of identity in the insurance conditions. ICA assumes, however, that no identification may take place beyond what is stated in the contract. Consequently, there can be some doubt in marine insurance as to how far identification can be taken if it is not specifically regulated in the insurance conditions.
During the Plan revision, there was agreement that the specific rule on the crew and master in § 59 of the 1964 Plan should be retained, see § 3-36, subparagraph 1 of the new Plan. At the same time, the broad reference to general rules of law in § 61 of the 1964 Plan is no longer sufficient. Given the current regulation in ICA, it is uncertain whether there are any "general rules of law" on the matter anymore. Accordingly, the Plan must go further in setting out which servants the assured must accept that he will be identified with. § 3-36, subparagraph 2, attempts to resolve this.

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

The issue of identification between the assured and the person effecting the insurance was not regulated explicitly in the 1964 Plan, but the commentary stated that there was to be full identification between the assured and the person effecting the insurance in areas where sanctions were linked to negligence on the part of the person effecting the insurance (duty of disclosure / premium) . In addition, § 129 contained a specific rule for situations where the object insured was in the custody of the person effecting the insurance: the rules on the duties of the assured then applied to the person effecting the insurance, and a co-insured third party was to be identified with the latter.
In ICA the starting premise is the opposite: there is to be no identification between the assured and the person effecting the insurance, see section 7-3, first paragraph. Exceptions are possible, however.

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

4. Identification of assureds *inter se*

The 1964 Plan had no general rule governing the relationship between assureds, although § 60 contained a rule on identification between the assured and co-owners of the insured ship. In addition, Chapter 7 (primarily § 129) and Chapter 8 (primarily § 134, subparagraph 1) contained rules on identification between the assured and third parties and mortgagees, respectively. The issue of identification, in other cases, had to be resolved through a reference to general rules of law as provided for in § 61.
ICA has solved the identification problem by taking as a starting point that co-assureds are not to be identified with each other, see section 7-3, first paragraph, although some exceptions are also possible here.
As mentioned earlier, since the new ICA has come into force, some uncertainty prevails as to what general rules of law are. Accordingly, during the Plan revision it was necessary to undertake a general regulation of identification between assureds. The decision was made to group the relationship of assureds *inter se* and between the assured and co-owners under a common rule, see § 3-37. This approach implies that the provision also regulates the relationship between the party who has the decision-making authority for the operation of the ship and a mortgagee or other co-insured third party. To prevent any possible misunderstanding references to the rules governing identification have been made in § 7-1 and § 8-1.

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

This paragraph corresponds to § 59 and § 61of the 1964 Plan.
Subparagraph 1 sets out the important principle that there shall be no identification with the master or crew in respect of faults or negligence committed "in their service as seamen". The provision corresponds to § 59 of the 1964 Plan. The background for the provision is that faults or negligence committed by the master and crew are one of the risks for which the shipowner should have unconditional marine insurance cover. The wording "faults or

negligence ... in connection with their service as seamen" indicate the contrast with errors touching on the commercial functions which the ship's master may sometimes carry out on behalf of the shipowner. Identification issues with respect to commercial errors must be resolved using the general rule in subparagraph 2. The crucial factor will then be whether the master or crew have been given decision-making authority in matters of material significance for the insurance. However, insofar as the error is committed "in connection with their service as seamen", it is of no import whether it is the master or the crew who has been entrusted with the authority. For example, the master is responsible for the seaworthiness of the ship pursuant to Norwegian Maritime Code section 106, first paragraph. There will, however, not be identification in respect of negligence relating to the seaworthiness of the ship, because this is an error "in connection with [his] service as [seaman]". The same will apply if authority has been delegated to the master in relation to implementation of safety requirements, unless the specific identification rule in § 3-25, subparagraph 2 applies. Faults and negligence relating to delivery of cargo in a general average situation are discussed in greater detail in the Commentary on § 5-16.

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

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

Subparagraph 2 of § 3-36 corresponds to § 61 of the 1964 Plan. While the latter provision applied to both the relationship between the assured and its servants and the relationship between the person effecting the insurance and its servants, the subparagraph 2 of § 3-36 only aims to regulate the relationship between the assured and his servants, cf. the wording "against the assured". The provision states that the assured shall be identified with "any organisation or individual to whom the assured has delegated decision-making authority

concerning functions of material significance for the insurance, provided that the fault or negligence occurs in connection with the performance of those functions". The purpose of the provision is to state what is regarded as established law by specifying in somewhat more detail how far identification is carried in current marine insurance. There is no intention to introduce any changes to the rules that have applied so far.

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

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

The criterion for identification in the subparagraph 2 is based on the view that the shipowner must be free to organise ship operations as he sees fit, but that the assured must bear the consequences of the management model chosen. If

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

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

Identification applies in relation to "organisations or individuals". The provision thus encompasses identification both externally and internally, although the most relevant in practice is external identification. External identification refers to all cases where authority of importance for the insurance is entrusted to organisations other than the assured's own, e.g., where one or more central operational functions are transferred to other companies. Internal identification refers to cases where the assured must be identified with those persons in the 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 the subparagraph 1 with respect to internal identification. The starting premise in relation to the master and crew is that there shall be no identification in respect of faults or negligence committed in connection with their service as seamen, cf. *supra*. The approaches which have crystallised in practice under § 59 of the 1964 Plan will thus set a limit for the application of § 3-36, subparagraph 2. There will not usually be identification with the master or crew in other areas, either, although exceptions may be envisaged where the shipowner has no land-based organisation having authority for the area in question, and has thus left management functions of importance for the insurance with the captain. In that case, it would seem obvious that the shipowner must be identified with the captain to the extent he or she makes mistakes in the performance of those functions.

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

personally carrying out supervision, cf. ND 1973. 428 NH HAMAR KAPP-FERGEN, where the Supreme Court left the question open. In other words, identification presupposes that the error is committed during the performance of management functions on behalf of the assured.
Moreover, identification will only arise in the relationship between the assured who has responsibility for the operation of the ship and the party to whom the assured hands over decision-making authority. The provision does not resolve the issue of identity between a mortgagee or other co-insured third parties and the assured who is responsible for the operation of the ship. In other words, identification applies only downwards in the organisational hierarchy linked to the operation of the ship, and not laterally among several parties because of their status as assureds under the policy. Identity between assureds is regulated in § 3-37. On the other hand it follows from the provision that delegation of the kind referred to in § 3-36 also has effect in relation to other assureds, cf. below.
As mentioned earlier, the purpose of § 3-36 is to continue the approach taken under the 1964 Plan. The intention is not, however, to "freeze" development. The provision is aimed at resolving the questions which have been relevant under the 1964 Plan and which have been raised during the revision. Development may lead to other types of identification problems arising than those referred to, which might make some modification of the rules necessary.

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

This paragraph corresponds to § 60, § 129 and § 134, subparagraph 2 of 1964 Plan.
The provision regulates faults and negligence committed by the assured or co-owners of the insured ship and, to a certain extent, brings together and expands on 1964 Plan § 60, § 129 and § 134, subparagraph 2. It also has its counterpart in ICA section 7-3, first paragraph.
Unlike § 3-36, which concerns identification between the assured and his servants, § 3-37 regulates the issue of identification between several assureds, and between the assured and co-owners of the ship.
The provision deals with the issue of identification in relation to any assured, cf. the wording "against the assured". It makes no difference what kind of right in the ship provides the basis for acquiring status as an assured. The provision thus encompasses § 60 of the 1964 Plan, which regulated identification in

relation to insured co-owners, § 129, which regulated identification in relation to co-insured third parties, and § 134, subparagraph 2, which regulated identification in relation to mortgagees. The approach in relation to mortgagees and other co-insureds has been retained as a matter of form through references in § 7-1 and § 8-1.

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

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

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

The criterion for identification is that the assured or co-owner has "decision-making authority for the operation of the ship". The criterion is taken from § 60 of the 1964 Plan, but there the requirement was that the co-owner be a

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

Unlike § 3-36, which deals with cases where several person or organisations may have been given authority resulting in identification downwards through the organisational hierarchy, the decision-making authority under § 3-37 is concerned with the situation where one person or organisation has the overall or ultimate authority. If operational responsibility is shared, the crucial factor will be who has organised the division, and who has the ultimate responsibility for allocation of resources between the persons or organisations responsible. The identification provision in § 3-37 must be read in light of § 3-36. If an assured who has the overall decision-making authority for the operation of the ship delegates authority to other organisations or persons, that assured must accept being identified with them provided that the conditions under § 3-36, subparagraph 2, are met. At the same time, each of the other assureds must accept being identified with the assured who has delegated the authority in question pursuant to § 3-37. This means that there will be identification with all assureds in all cases where errors are committed by persons or organisations who have authority in relation to functions of importance for the insurance and the conditions for identification under § 3-36, subparagraph 2 are fulfilled.

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

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

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

The provision is new.

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

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

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

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

Chapter 4.

Liability of the insurer

General

Chapter 4 contains a number of general rules relating to various forms of loss which are indemnified by the insurer. The rules are not exhaustive, and must in each type of insurance be co-ordinated with the provisions contained in the special parts of the Plan and in the relevant policy. Generally speaking, the rules which are relevant to more than one of the various branches covered by the Plan have been compiled in this chapter, while provisions that are relevant to only one branch are dealt with in the special parts of the Plan.
Under § 2-11, subparagraph 1, the insurer is liable "for loss incurred when the interest insured is struck by an insured peril during the insurance period". This means that in the event of a casualty occurring as a result of a peril covered by the insurance, the insurer is liable for any loss that is not explicitly excluded from cover. However, it must be emphasised that this does not mean that each and every loss is recoverable provided that there is a causal relation between the loss and a peril covered by the insurance. The Plan contains a number of provisions relating to losses that are not recoverable, and these provisions must, depending on the circumstances, also be applicable by analogy. In cases of doubt, the solution must therefore be found through an interpretation of the rules of the Plan relating to the scope of liability, supplemented by other sources of law, in particular the legal tradition in marine insurance law.

Section 1. General rules relating to the liability of the insurer

§ 4-1. Total Loss

This paragraph is identical to § 62 of the 1964 Plan.
The provision establishes the traditional principle in insurance law that the assured, in the event of a total loss, is entitled to claim the sum insured, however, not in excess of the insurable value. In the event of a total loss, the insurer's liability is thus subject to a double limitation: it can neither exceed the sum insured nor the insurable value. The sum insured is the amount for which

the interest is insured, and on the basis of which premium is calculated. The sum insured does not, however, say anything about the value of the interest insured; this value is determined by the "insurable value". The insurable value is set at the full value of the interest at the inception of the insurance, cf. § 2-2, or by agreement between the parties about the assessed insurable value, cf. § 2-3. Normally, the insurable value will have been assessed and be identical to the sum insured. In that case the insurer will, in the event of a total loss, pay the valuation amount.

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

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

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

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

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

This paragraph is identical to § 63 of the1964 Plan.

The question concerning the interest insured will normally be regulated under the individual type of insurance. However, it should also be contained in the general part of the Plan for pedagogical reasons.
The provision reflects the fact that the marine insurer's liability is normally limited to losses consisting of destruction or reduction in value of the actual interest insured. Consequential losses sustained by the assured as a result of the casualty are not recoverable. However, the paragraph does no more than indicate a general principle, and must in many situations be read in conjunction with the liability rules in the chapters relating to the particular types of insurance.
The exception for "general economic loss" is aimed at any general loss the assured may suffer in his trade as a result of a casualty. The casualty may result in his being forced to reorganise his business or to re-route other ships, whereby his earnings are reduced or his administration and operating expenses are increased. Such losses are not recoverable.
The other main group of non-recoverable losses are losses arising from the delay of the insured ship caused by the casualty. The term "loss of time" is aimed at the assured's operating expenses and his loss of freight. However, the Plan provides a special rule for compensation on a number of points in this respect as well, see § 12-11 and § 12-13 relating to loss of time in connection with the invitation to submit tenders and operating expenses during removal of the ship to a repair yard, § 12-7, § 12-8 and § 12-12 which, in different contexts, take into consideration the loss of time which the assured suffers as a result of the casualty, and the rules relating to the special types of insurance aimed at covering loss of time, in particular chapter 16.
The terms "loss due to unfavourable trade conditions" and "loss of markets" contemplate the situation where the ship, due to a casualty, will miss the opportunity to benefit from favourable trade conditions and can only be put into service in a lower freight market. Losses of this nature are never recoverable. To avoid any misunderstanding, the limitation of liability is extended to comprise also "similar losses resulting from delays".

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

This paragraph is identical to § 64 of the 1964 Plan.
Under § 5-12, the insurer is not obliged to provide security for claims brought by a third party against the assured, which are covered by the insurance.

However, if the assured incurs expenses in order to obtain such security, these must, according to the first sentence, be recoverable as expenses incurred due to the casualty. That the expenses must be "reasonable" implies *inter alia* that the assured cannot claim compensation of the costs incurred by providing security for amounts which clearly and considerably exceed the third party's claim.
§ 5-7 allows the assured, under certain conditions, the right to demand payment on account. Thus, before providing security for a third party's claim, he must submit to the insurer the question of whether the claim should be met by a payment on account. If he has failed to do so, the insurer will not be liable for the costs in connection with the provision of security, *cf. second sentence.*
If it is uncertain whether the insurer is liable for an invoice from the repair yard, the insurer is not obliged to make any payment on account under § 5-7. If the shipowner in such situations does not have money to pay the repair invoice, a bank guarantee may have to be provided pending a settlement from the insurer. If the insurer later proves to be liable, the question arises as to whether the insurer must also pay the commission on the bank guarantee. In practice, the provision has been interpreted to mean that it only concerns costs in connection with the provision of security for liability to third parties. However, during the revision of the Plan, there was general agreement that the insurer should have an obligation to cover costs in the above mentioned situation as well. If the shipowner had raised a loan and paid the repair yard in cash, the insurer would have had to pay the interest on the compensation under the rules set out in the insurance contract. To be consistent, it seems reasonable that in such an event, the insurer must also pay the costs of providing security. However, it is not necessary to amend the provision in order to authorize this solution; it is covered by the wording as it was in the 1964 Plan.
If owner's repairs are carried out concurrently with casualty repairs, the commission must be apportioned on a proportional basis. If some of the work is paid for in cash, while a bank guarantee is provided for the balance, the cash portion as well as the guarantee must be apportioned according to the proportion of owner's repairs / deductible to the amount for which the insurer is liable.

§ 4-4. Costs of litigation

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

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

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

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

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

The term "necessary costs" has, according to long-standing and uniform practice, been subject to a relatively strict interpretation. Costs connected with the shipowner's surveyor are only recoverable if the insurer has had the opportunity to participate in the survey, and liability is normally limited to the expenses of one technical consultant from the shipowner's company. The insurer's liability for the technical consultant is furthermore limited to the time the repairs take, and include maintenance expenses in connection with travelling to and from the place of repairs. Travel expenses in connection with the settlement of repair invoice are also recoverable, but planning of repairs before the ship's arrival and administration costs are not.

As regards other costs, practice has been that the insurer does not cover internal costs or the costs of hiring someone to draw up a general invoice or retaining legal or expert assistance. During the Plan revision, it was agreed that internal costs and expenses for external assistance that should have been obtained internally should not be recoverable. However, the cost of obtaining outside expert opinions in order to clarify technical or legal questions, for example, an opinion from the University of Trondheim to document that corrosion damage had in reality been caused by wet rot, should be covered. On this point "necessary costs" must therefore be subject to a slightly wider interpretation than former practice. The same applies to expenses for external legal assistance,

provided that the legal assistance is in the nature of expert assistance. It cannot be a condition that the issue is taken to court; other legal assistance must be covered as well. However, if a conflict concerning the insurance ends up in court, the recovery of litigation costs is subject to the condition that the case is won. If the assured loses the case, he has no claim against the insurer, and in that event the insurer is obviously not liable to pay the litigation costs, either. If the assured partly wins the case, a reasonable amount of costs should be covered.

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

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

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

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

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

involved in the pursuit of the counterclaims will then have to be apportioned between them in proportion to their interests in the litigation.
According to practice, the term "several interests" does not comprise the assured's uninsured interests, for example in the form of under-insurance or deductible. If the assured has such uninsured interests, the insurers will cover the costs in their entirety without making any apportionment. This nevertheless does not apply to costs associated with the pursuit of a counterclaim; the counterclaim shall be distributed between the assured and the insurer, depending on the proportion between the insured and the uninsured interests, and the costs must then be apportioned in the same proportion.
In practice, exceptions have also been made from the principle that regard shall not be had to uninsured interests if it is a question of large deductibles in the form of insurances in layers in the assured's hands. Even if the point of departure should be that no apportionment is to be made over such uninsured interests, regardless of how large they are, it must be correct to distribute the costs between the insurer who is liable for the deductible and the other insurers if the deductible is insured.
The rule of apportionment in § 4-6 applies regardless of whether it should prove later that the claim is lower than the deductible. In such cases the assured's claim will not be recoverable as such, but his costs will be recoverable in full, cf. § 12-18, subparagraph 3, which provides that these costs are recoverable without any deductible. However, if it is already clear from the start that the loss or liability is lower than the deductible, the insurer will not be liable for the costs.
§ 12-14 contains a special rule relating to the apportionment of accessory costs of repairs.

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

General

The rules relating to costs of measures to avert or minimise loss, including salvage and general average, establish whether the assured is entitled to recover costs he has incurred by initiating measures to avert or minimise loss. It is a fundamental principle in all non-life insurance that costs incurred in order to avert or limit a casualty are recoverable, provided that the measures causing

the costs are deemed to be reasonable and sensible. The certainty of obtaining cover will give the assured an additional motive to initiate measures to avert or minimise loss. Furthermore, general considerations of fairness suggest that the insurer should cover such costs since he is the one who will greatly benefit from such measures being taken.

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

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

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

and § 4-12. To the extent that the insurers have acceded to such agreements, these will obviously take precedence over YAR in the event of a conflict of rules.

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

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

The new Plan retains on the solutions from the 1964 Plan, based on the traditional system in marine insurance. However, the heading has been changed so that it emerges clearly that the section in reality also comprises salvage awards, even though this is only reflected indirectly in the individual provisions. The sequence and content have furthermore been adjusted in order to achieve a certain simplification. In an introductory provision, § 4-7, the general criteria for covering loss arising from measures to avert or minimise loss are established. The scope of the insurer's liability for general average contributions etc. appears from § 4-8 to § 4-11, while the scope of liability for costs of particular measures to avert or minimise loss is placed in a new provision, § 4-12, at the end of the section.

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

This paragraph is new.

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

The first part of the provision corresponds largely to § 68 of the 1964 Plan as regards the criteria for the costs being recoverable. The decisive criterion is that a "casualty threatens to occur or has occurred". This is a fundamental condition for compensation of costs of particular measures to avert or minimise loss.

Under the rules of general average, this condition corresponds to the "common safety" principle, which states that if the interests involved are exposed to a common risk during the voyage, the costs in connection with averting that risk shall be apportioned among those interests in proportion to the value each of them represents. An example of a common peril is where the ship takes a heavy list and threatens to go down. Relevant costs may, for example, be a salvage award paid to a salvor or compensation to a cargo owner who suffers a loss because his cargo is jettisoned in order to right the ship.

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

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

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

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

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

(2) In addition to the imminent danger mentioned above under (1), a further requirement is that the assured or a third party has initiated measures of an extraordinary nature. Whether the measures are of such a nature must be decided on a case-to-case basis. On this point, the 1964 Plan contained an explicit enumeration of a number of elements, in relation to which the question of the extraordinary nature or foreseeability of the measure was to be evaluated, *viz.* "the ship's voyage, the nature of the cargo and the circumstances prevailing when the voyage was commenced". These elements were included primarily with a view to P&I insurance. Given the fact that the Plan no longer applies to P&I, there is less need for such an enumeration. This part of the provision has therefore been deleted, but the elements may, of course, still carry

weight in the concrete evaluation of the type of measures that are deemed to be extraordinary. Losses arising through an ordinary and foreseeable use of the ship and its equipment do not entail compensation under the rules relating to measures to avert or minimise loss, and the same applies to costs the assured must expect may arise in the course of the voyage. It is hardly possible to give any further guidance; the decision must be made on a case-to-case basis.
In practice, the distinction between ordinary and extraordinary measures has particularly caused problems in connection with what has traditionally been described as "increased ordinary voyage expenses", cf. the exception for operating expenses referred to in the Commentary on § 4-2, and under item 10 below. These are expenses that must be anticipated from time to time during the voyages of a ship, e.g. due to problems relating to weather and currents, or minor technical problems regarding the ship. One example is where the ship's stern tube is damaged with the result that oil is leaking out. The voyage may nevertheless be continued by refilling new oil as and when necessary, but the question is whether the expenses of extra oil shall be regarded as "extraordinary". Practice has been fairly restrictive as regards the compensation of this type of expenses. It has been alleged that practice is too strict, but during the Plan revision it was decided that the best course was still to leave the distinction between ordinary and extraordinary measures to be settled by existing practice.
(3) Only losses which the assured has suffered as a result of an intentional act by the assured or others will be recoverable as costs of measures to avert or minimise loss. For further details, see below under (5). Damage caused by forces of nature or injurious acts by outside third parties without any intentions to avert or minimise loss is only compensated under the general indemnity rules in the insurance conditions. However, at any rate for particular measures to avert or minimise loss, it must be sufficient that the intent comprises the actual action that caused the damage. It is thus not necessary that the person in question realized that the act entailed a risk of damage, nor that the intent comprised all or parts of the loss that occurred, cf. ND 1978.139 NV STOLT CONDOR and ND 1981.329 NV LINTIND.
(4) In order for a loss to be covered by the rules relating to measures to avert or minimise a loss, it must have been sustained for the purpose of averting or reducing a loss covered by the insurance. This was earlier expressed by the wording that the measures had to be implemented "in order to avert or

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

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

(6) A further requirement is that the measures "must be regarded as reasonable". The text has been somewhat simplified on this point as well. In the 1964 Plan, the requirement of reasonableness was linked to "the prevailing circumstances at the time they were implemented". This simplification is also not intended to change any points of substance. The requirement must be regarded as a sort of safety valve for the insurer and plays a very minor role in practice. It is obvious that the assured must have a wide margin for misjudgements once the casualty is a fact or the risk of a casualty is imminent. In this connection reference is made to § 3-31, where gross negligence on the part of the assured is required in order for the insurer to be entitled to plead that the insured has neglected his duty to avert and minimise the loss. Whether or not the measures taken were justifiable must be judged in the light of the situation as it appeared to the assured when the peril struck. That the subsequent course of events showed that he was mistaken is therefore in principle irrelevant. It is thus not necessary that there was a *de facto* situation that warranted the implementation of measures to avert or minimise the loss; the deciding factor is that the assured *believed* that the situation was that serious. However, it is a prerequisite that the assured has shown due diligence. If he was wrong, his conduct must be judged under the rules in Chapter 3,

Section 5, of the Plan relating to casualties caused intentionally or negligently by the assured. If he has, through gross negligence, misjudged the situation, the compensation may be reduced or be forfeited altogether under § 3-33. Measures to avert or minimise loss will often be implemented by others acting on behalf of the assured, in particular the master and other members of the crew. If they implement measures that must be described as unjustifiable in the situation in question, this will normally constitute faults or negligence committed in connection with their service as seamen, against which the assured is covered under § 3-36. The insurer must also normally accept liability if the misjudgement is attributable to an outsider who intervenes on his own initiative in order to safeguard the assured's interests.

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

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

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

(10) Under the cover of costs of measures to avert or minimise loss, the insurer is liable for all types of loss and not just those for which he would have been

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

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

§ 4-8. General average

This paragraph corresponds to § 70 of the 1964 Plan.

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

and the contribution shall only be paid in so far as it covers losses in connection with measures to avert a total loss.

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

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

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

to articles 13 and 14 of the Salvage Convention of 1989. The solution also follows from YAR 1990 and 1994, rule VI.

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

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

Under *subparagraph 2*, the insurer is liable for the contributions which according to the rules of general average fall on the interest insured, even if the assured is precluded from claiming contributions from the other participants in the general average adjustment. The rule is concordant with the solution in the 1964 Plan, and is relevant if the assured (normally the shipowner) is liable to the other interested parties for the event that has made the general average act necessary, cf. in this respect Rt. 1993.965 FASTE JARL. In that event, the assured cannot claim contributions from those parties. This applies e.g. if the ship must be considered unseaworthy in relation to the cargo, or if it has deviated from the route it was bound to follow according to the contract of affreightment. However, the gravity of the assured's conduct will rarely be such as to result in his forfeiting his right to compensation from the insurer under the insurance conditions as well. This will only be the case if the unseaworthiness was of such a nature as to threaten the safety of the ship, cf. § 3-22, or the deviation has taken the ship outside the trading areas, cf. § 3-15, subparagraph 3. Where the assured has maintained his rights vis-à-vis the insurer, the traditional solution is to impose on the insurer liability for the losses that must be deemed to have been incurred in order to save the interest insured. The loss suffered by the assured due to the fact that his right to claim general average contribution from the cargo is forfeited will be covered by the P&I insurer.

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

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

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

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

In a number of situations it is obvious that carrying out a general average adjustment would be uneconomical. If the assured has in that event failed to claim contributions from the other interested parties, the hull insurer has in

practice compensated the losses that would have been recoverable in the general average adjustment. This practice will be carried on; it is to the advantage of the assured as well the insurer.

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

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

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

entitled to claim compensation for damage to or loss of the object insured under the rules in § 4-10 if he finds that this gives him more favourable cover.
When deciding whether and to what extent loss, expenses etc. are recoverable under subparagraph 3, it follows from subparagraph 3, *second sentence*, that the provisions in the York-Antwerp Rules 1994 shall be used as a basis, regardless of what rules the contract of affreightment might contain relating to general average. Cover under YAR does not, however, apply to interest and commission, the costs of which will have to be recovered under § 4-3 and § 5-4 of the Plan, cf. the reference to § 4-11, subparagraph 2, second sentence.

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

This paragraph is identical to § 71 of the 1964 Plan.
The provision is necessary in order to implement the apportionment among the insurers with whom the assured has taken out his insurances. For the uninsured interests, the assured shall bear his own proportionate share.

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

This paragraph is identical to § 72 of the 1964 Plan.
The provision authorizes compensation for general average damage to the ship under the rules relating to particular average if this leads to a more favourable result for the assured. In practice, the question has also been raised as to whether the assured may choose particular average where these rules do not give a more favourable result, but where the general average adjustment takes a long time. This problem may be solved, however, by the assured demanding payment on account in respect of the particular settlement under § 5-7, and possibly receiving a supplementary settlement if it should prove later that the general average adjustment leads to a more favourable result.
When the rules in § 4-10 are being applied, the hull damage to the ship must be considered collectively to the extent the incidents of damage are attributable to one and the same general average act. The assured cannot demand that some damage shall be recoverable under the general average rules whilst other damage shall be subject to the particular rules.
In the decision of whether compensation under the rules relating to particular loss is more favourable than compensation under the general average rules, the question of whether the contributions in general average from the other

participants are irrecoverable shall not be taken into consideration. This was previously explicitly stated in the Special Conditions, cf. Cefor 1.15, subparagraph 2, and PIC, § 5 no. 6, subparagraph 2. Giving the assured the right to settlement under the rules of particular average because, for example, the cargo owner can refuse to contribute, would be interference in the established apportionment between the hull and P&I insurers.
Nor shall interest be included in the calculation as to which settlement will be the more favourable for the assured.
For the items of loss which are not comprised by this rule - i.e. salvage awards, "common benefit" expenses and other costs - an ordinary general average adjustment must take place. The insurer will thus be liable for the costs that are apportioned to the assured's interest, and the assured must claim from the other interested parties for their contributions. Here as well, however, the assured is entitled to payment on account for his own contribution in accordance with § 5-7.
Where the insurer indemnifies hull damage according to the rules relating to particular average, he is subrogated to the assured's claim against the other participants in the general average, but not in respect of the difference between a settlement according to the rules relating to particular average and a settlement according to the general average rules. This was earlier stated explicitly in the conditions (cf. Cefor 1.15, subsection 1, third sentence, and PIC § 5, no. 6, subparagraph 1, third sentence), but still applies. Nor will the insurer be subrogated to the assured's claim against the P&I insurer for the hull damage if the contributions are irrecoverable, irrespective of whether the loss of or damage to the object insured is recoverable under the rules relating to general average or under the rules relating to particular damage. This was also explicitly stated in the Special Conditions (cf. Cefor 1.15, subparagraph 3 and PIC § 5, subparagraph 3) but, on this point as well, the intention has not been to make any changes.

§ 4-11. Assumed general average

This paragraph corresponds to § 73 of the 1964 Plan.
As mentioned in the introduction to this section, the general average rules shall also apply when measures have been taken to save a ship in ballast ("assumed general average"), cf. *subparagraph 1*. The rules also apply to losses incurred in order to complete the ballast voyage even though the costs were not incurred to

save the ship, e.g. expenses accruing during the ballast voyage where the ship has to put into port for the purpose of carrying out repairs necessary for the safe completion of the voyage. The general average rules become decisive both for the question whether the degree of the peril was sufficient for the assured's sacrifices to be recoverable, and for the question as to what sacrifices are recoverable.

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

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

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

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

As mentioned in the explanatory notes to § 4-7, during the Plan revision, the view was that it was expedient to state the criteria for the insurer's liability for

costs of particular measures to avert or minimise loss in a separate provision. The provision in § 4-12, subparagraph 1, corresponds to those parts of § 68 of the 1964 Plan which deal with the scope of the insurer's liability, but the wording in the Plan has been partly replaced by the corresponding wording in ICA section 6-4. Reference is otherwise made to the explanatory notes to § 4-7 as regards the principles for compensation of costs of particular measures taken to avert or minimise loss.

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

Subparagraph 2 regulates the situation where a measure to avert or minimise loss is aimed at saving several interests without the general average rules becoming applicable. In that event, there shall be a proportional apportionment

of the loss among all of those who have benefited from the measures in accordance with the principle on which the general average is based. The provision corresponds to § 69 of the 1964 Plan, but has been moved, cf. the explanatory notes to § 4-7. ICA contains no corresponding rule, but the principle of apportionment is regarded as a general principle in insurance law. However, the apportionment of the loss under this paragraph is not entirely consistent. In the first place, it is established practice that the separate insurances against total loss (hull and freight interests) are not brought into such an apportionment settlement, cf. the Commentary to § 5-13. Secondly, the principle is subject to certain limitations if a measure is aimed at saving the ship, and if the assured in the event of a loss of the ship would also have suffered a loss that was not covered under any insurance. In that case, the insurer will in principle be liable for the entire loss resulting from the measure. Thus, the fact that the ship is valued at a lower amount than the market value (cf. above under § 4-8) is not taken into account, nor will the assured have to bear the portion of the loss which would by an apportionment have fallen on his uninsured income interest. If a liability covered by the insurance has been averted, the fact that a deductible has been agreed which would have resulted in the assured having had to cover part of the liability himself shall not be taken into account, either. However, on one point an exception has been made in practice and the rule of apportionment applied, *viz.* where the ship's accessories are lost and later saved. The Plan does not aim at making any change to the principles on which this practice is based.

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

Special problems arise in connection with measures to avert or minimise loss which aim at averting partly liability which the P&I insurer would have had to cover, and partly liability or damage which the hull insurer or another insurer would have had to cover. The most common example in practice is the aversion of collision liability. Such liability will, according to the rules in chapter 13 of the Plan, be covered by the hull insurer to the extent that it falls within the sum insured, and does not concern personal injury, loss of life or other types of loss which are specifically excluded in § 13-1. Liability which the hull insurer (or the hull-interest insurer, cf. 14-1) does not cover, will be covered by the P&I insurer. Liability for life injuries is the most important. When measures are taken to avert a collision, it will often be possible to establish with a high degree of

certainty that liability has been averted for the hull insurer as well as for the P&I insurer, but it will normally be very difficult to establish how large a proportion of the liability each of the insurers would have had to cover. It is not possible to give any simple guidelines for this apportionment; it must be resolved on the basis of the estimated extent of "the interests threatened".

Section 3. Liability of the assured to third parties

§ 4-13. Main rule

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

§ 4-14. Cross liabilities

This paragraph is identical to § 75 of the 1964 Plan.
Under § 4-14, *first sentence,* the Plan maintains the principle of cross-liabilities in connection with liability of the assured to third parties. The principle is in accordance with established customary Norwegian marine insurance law, cf. *Brækhus* in AfS 4.468-69 with references, and is of the greatest practical importance in connection with collision settlements. This is best illustrated by a somewhat stylised example:
The insured ship A has collided with ship B. The blame fraction is one half. A's hull damage is 300, the time loss 120, a total of 420. B's loss totals 350. The settlement between the ships under section 161, subsection 2, of the Norwegian Maritime Code can be drawn up in two ways. One could either say that the total loss is 770, that each of the parties shall bear one half, i.e. 385, and that this is achieved by the ship having sustained the smallest loss, B, pays 35 to A. Such a single-liability settlement results in a single claim. Or A could also be held liable to pay half of B's loss, i.e. 175, and B to pay half of A's loss, i.e. 210. These two claims are set off against each other, with the result that B must pay the balance of 35 to A. This is the cross-liability settlement.
In the relationship between the parties, the result will be the same regardless of which principle is adhered to. In the ensuing settlement between the individual shipowner and his insurers, the choice between the two methods of settlement will, however, be of great importance. The reason for this is that the compensation obtained from the other ship will often, to a greater or lesser extent, be credited to other persons than those who shall bear the liability of the oncoming ship. The compensation from the oncoming ship shall, as regards the

loss of time, fall to the shipowner (if appropriate, the loss-of-hire insurer, cf. chapter 16), whereas the compensation for hull damage shall normally be divided proportionately between the hull insurer and the owner, cf. § 5-13, subparagraph 2. Liability towards the oncoming ship, however, shall as a rule be covered in its entirety by the hull insurer, cf. chapter 13 (sometimes the P&I insurer will also come into the picture, see below). If the settlement between the shipowner and the insurer is based on the cross-liability principle, it is the gross liability amounts before the set-off that shall be debited and credited respectively under these rules. If, however, the single-liability principle is adopted, there will be only one amount, the liability balance, to be apportioned. If the balance is in the oncoming ship's favour, it shall be debited to the hull insurer as liability insurer. If it is in the insured ship's favour, it shall be divided proportionately between the owner and the hull insurer. In the light of the cross-liability settlement, the single-liability settlement may lead to the result that a claim from the oncoming ship, which shall accrue to a person, e.g., compensation for loss of time payable to the owner, is used as a set-off to cover the liability of the oncoming ship which, under the insurance conditions, should be covered in full by the hull insurer.

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

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

In the event of a single-liability settlement, there will only be one amount, *viz.* the balance of 35 in A's favour, which shall be divided proportionately between A and his hull insurer. As A's total loss was 420, this means that the compensation from B gives a refund of 35 / 420 = 1 / 12, and we get the following settlement:

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

There can be no doubt that the cross-liability settlement is preferable; it gives the shipowner exactly the refund from the other ship warranted by the portion of blame. In the event of a single-liability settlement, the refund is reduced, in our example from 1 / 2 to 1 / 12, despite the fact that the oncoming ship has been held liable for one half of the loss.

The collision settlement will sometimes also affect the P&I insurer: firstly where the liability of the oncoming ship exceeds the limit of the hull insurer's liability, cf. § 13-3 and, secondly, in the event of so-called indirect personal-injury and cargo liability. For personal injury caused by a collision, both ships are jointly and severally liable, cf. section 161, subsection 3, of the Norwegian Maritime Code; under US law the same also applies to liability for cargo damage. It is therefore conceivable that the oncoming ship B must pay compensation for personal injury, or for damage to the cargo on board the cargo-carrying ship A and that, in the settlement with A, B attributes half of the compensations paid to A. A may again have suffered far more extensive damage from the collision than B, which would mean that a settlement of the hull damage alone would give a substantial profit in A's favour. However, this is wholly or partly set off by B's refund claim in connection with the personal injury and cargo damage

compensations. In this case as well, the final balance that emerges from the external settlement must be divided into claims and counterclaims according to the cross-liability principle, given that the indirect liability for personal injury and damage to the insured ship's own cargo shall be attributed to the P&I insurer, cf. § 13-1, subparagraph 2 (b), (c) and (i). See also *Brækhus* 1. c. pp. 482-97.

Special difficulties arise where one or both of the colliding ships limit their liability. In the relationship between the ships, the limitation will, under the laws of most countries, be effected in respect of the liability balance, in other words, on the basis of the single-liability principle, cf. the Limitation of Liability Convention of 1976, Art. 5 and section 172, last subsection, of the Norwegian Maritime Code. In consequence hereof, the calculated gross liability will not concord with the balance which is in actual fact paid, and the normal cross-liability settlement in the relationship between the shipowner and his insurers will not be correct. In English marine insurance, which is based on cross-liability as the principal rule, this has led to a switch to single liability as soon as one of the involved ships limits its liability, cf. I.T.C., Hulls, no. 8.2.1. However, this solution results in an unfortunate discontinuity. An insignificant increase in liability, making limitation applicable, may result in a very substantial reduction of the reimbursement of the owner's loss of time. Danish and Norwegian practice has instead adopted a modified cross-liability settlement in the limitation cases by reducing the largest gross amount of liability in the insurance settlement by the same amount by which the liability balance in the external settlement has been reduced as a result of the limitation rule, see further *Brækhus*, 1. c., pp. 469-82 and 497 *et seq.* This method of settlement was also approved by the Norwegian Supreme Court in the FERNSTREAM case, ND 1963.175, and it is explicitly adopted as a basis in the Plan, cf. § 4-14, *second sentence*. For the sake of clarity, the *third sentence* of the paragraph specifies how the settlement shall be effected when the limitation is applied to the liability balance.

Incidents causing mutual damage and liability that affect the insurance settlements do not occur only in connection with collisions between ships, although collision cases are probably predominant. The cross-liability principle must also be applied in a case such as the following: a cargo of slimes which is carried by the insured ship becomes liquid. The ship, which does not have the necessary longitudinal bulkheads, takes a list and ends up turning over and

going down. The accident was due partly to negligence of the cargo owner: he had failed to say that the slimes were of a particularly difficult type, and partly to negligence of the ship: even when carrying ordinary slimes, the ship should have had longitudinal bulkheads. In the claims settlement, the cargo owner's (partial) liability for the loss of the ship will, to some extent, be offset by the owner's (partial) liability for the loss of the cargo. In the ensuing insurance settlement, the balance must be broken down as follows: the compensation the cargo owner pays for the loss of the ship must be covered by the hull insurer, while the compensation to the cargo owner for the loss of the cargo must be paid by the P&I insurer.

In the above example, it is assumed that both the assured's own loss and his liability to third parties are covered by insurance. However, the cross-liability principle must be applied, even if it is only the assured's own loss, or only the liability, which is insured. The individual insurer's liability shall not depend on how the assured has covered his other interests. For this reason, the application of the cross-liability principle has been authorised specifically with a view to liability insurance in this paragraph and with a view to the apportionment of subrogation claims in § 5-13, subparagraph 1.

§ 4-15. Unusual or prohibited terms of contract

This paragraph is identical to § 76 of the 1964 Plan.

The collision liability covered by the hull insurer will normally have been incurred vis-à-vis a third party with whom the assured does not have any contractual relationship. However, it is conceivable that the assured's contracts may be of significance, especially in connection with liability to owners of tugboats or quays, canals and similar installations the ship has used.

Under *letter (a)*, the insurer shall always cover liability based on terms of contract that must be considered customary in the trade concerned. In offshore contracts, it is customary to use limitations of liability in the form of "knock-for-knock" clauses, which entail that the contracting parties shall cover damage to their own objects, even if the other contracting party may be held liable for the damage under general law of damages. Such clauses must in this context be considered "customary". However, limitation of liability clauses in offshore contracts are often linked to a waiver-of-subrogation clause in the claimant's insurance contract, whereby the insurer waives the right to seek recourse

against the assured's contracting party. In that event, the question whether such limitation of liability clauses are customary is of little independent significance.
The limitation of liability in *letter (b)* relates to § 3-28, which authorizes the insurer to prohibit or require the use of certain contractual forms.
In contracts for repairs, it is not unusual to find clauses to the effect that everything that is scrapped during repairs shall accrue to the repair yard, without compensation. Such clauses are also binding on the insurer according to custom and practice and by analogy from § 4-15, cf. *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), pp. 603-6064

§ 4-16. Objects belonging to the assured

This paragraph is identical to § 77 of the 1964 Plan.
If two of the assured's ships collide, the ships' hull insurers will cover the damage they have sustained. If the ships had belonged to different legal entities, the ship that was at fault would have also had to cover the other ship's loss of time, deductions, deductibles concerning the hull damage and other economic losses that the owner has suffered because of the collision. This liability would normally have been covered by the hull insurer of the ship at fault. No such liability can arise when both ships belong to the same person. The assured will suffer a corresponding reduction in his cover and the hull insurer of the ship at fault will not be liable for loss of time, etc. for which he otherwise would have been liable. This is not reasonable. The Plan therefore prescribes, in conformity with earlier law, that a fictitious collision settlement shall be effected between the ships. Compensation shall be calculated as if they had belonged to different persons. This so-called "sister-ship rule" is customary in international marine insurance.
The same applies where the ship has run into other objects belonging to the assured, e.g., a quay or a wharf. In this case, the insurer shall cover the liability the assured would have incurred if the quay or wharf had belonged to a third party, based on the view that the insurer's liability should not be reduced because of the coincidence that the ship has run into the assured's own property.
The sister-ship rule represents a positive extension of the liability cover. Hence, it cannot be invoked against an insurer who has only insured the "innocent" ship. He will only be liable for the ship's hull damage in accordance with the insurance contract. On the other hand, liability under this provision for the

insurer of the ship at fault is subject to the condition that he would have been liable under the rules of the Plan if the claimant had been an outside third party. Accordingly, if the insurer would not have been liable for the collision liability, etc., on account of the rules in chapter 3, including the identification rules, he will also be free from liability to the assured under the current provision.

Another question is whether the insurer of the "innocent" ship will have recourse against the assured in his capacity as owner of the ship at fault. The question is first and foremost of interest when the ship at fault is not insured and is, accordingly, not of any great practical significance. The correct solution must be that his position as assured under the innocent ship's insurance protects him against such a recourse claim to the same extent that he has a claim against his own insurance. This means that it is the general rules in chapter 3 of the Plan which decide the question.

If a fault was committed on board both of the colliding ships, the application of the sister-ship rule must be "based on the calculated gross liabilities before any set-off", cf. § 4-14.

The extended cover under § 4-16 applies only to loss of or damage to objects other than the insured ship and its supplies and equipment, cf. second sentence. Damage to such objects is not recoverable under these rules.

A corresponding "sister-ship rule" is applied when the ship is salvaged or receives assistance from another vessel belonging to the assured, cf. § 10-11.

§ 4-17. Determination of the liability of the assured

This paragraph corresponds to § 78 of the 1964 Plan and ICA section 7-8, subsection 1.

ICA section 7-6 contains a provision which gives an injured third party a direct claim against the wrongdoer's liability insurer. This provision is not appropriate in marine insurance. Consequently, for insurances taken out on the basis of the Plan, an injured third party will have no such right to direct action. This is reflected in *subparagraph 1* of the provision.

However, an injured third party under ICA section 7-8, subsection 1, is protected against the compensation being paid to the assured without the latter having proved that the injured party's claim has been honoured. Furthermore, the injured party will have a direct claim against the insurer if the assured is

insolvent, cf. section 7-8, subsection 2. These provisions are mandatory in marine insurance as well, cf. ICA section 1-3, subsection 2.
Subparagraph 2 is based on § 78, subparagraph 1 of the 1964 Plan. However, the 1964 Plan laid down a requirement that the assured's claim had to be determined in certain specific ways in order for the insurer's liability to be triggered. This has been modified to a certain extent: the provision now sets out a number of procedures the assured may follow in order to document his claim. The deciding factor for the insurer's liability is, however, that the claim is justified, not that the relevant procedure has been complied with. This is reflected in *subparagraph 3.* Consequently, if the assured has, contrary to the umpire's decision, cf. § 15-11, accepted that a dispute shall be decided by arbitration, the insurer must cover the assured's liability under the arbitration decision, provided that the assured is able to prove that he would have incurred liability even if he had complied with the umpire's decision, cf. *Brækhus/Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 572.

Section 4. The sum insured as the limit of the liability of the insurer

§ 4-18. Main rule

This paragraph corresponds to § 79 of the 1964 Plan, and Cefor I.3 and PIC § 5.7.
This provision establishes the principle that the insurer is liable up to the sum insured for each individual casualty and shall apply in all branches where a sum insured is agreed.
Subparagraph 1, first sentence, is based on § 79 of the 1964 Plan, subparagraph 1. The insurer is liable with up to one sum insured for "loss caused by any one casualty". The term "any one casualty" is discussed in further detail below.
Subparagraph 1, second sentence, is based on the Special Conditions (Cefor I.3, and PIC § 5.7), but with certain amendments. The provision is bound up with the traditional principle in insurance law that the insurer, in addition to the sum insured, is liable for costs of measures to avert or minimise loss. Under the 1964 Plan, the insurer originally had unlimited liability for these costs. However, this liability was limited in the Special Conditions (Cefor I.3, and PIC § 5.7) so that the costs of measures to avert or minimise loss basically had to be covered up to the sum insured under § 79, subparagraph 1, or possibly the separate sum insured under § 196. There was nevertheless a certain extension of the cover: if

the separate sum insured under § 196 of the Plan was not used to cover costs of collision or measures to avert or minimise such liability, the balance could be used to cover costs of measures to avert or minimise damage to or total loss of the ship to the extent that such measures exceeded the sum insured.
According to this, the cover under the Special Conditions of costs to avert or minimise loss were more limited than the corresponding cover under ICA. Under ICA section 6-4, the rule is that the insurer is fully liable for costs of measures to avert or minimise loss. During the revision of the Plan, there was general agreement that the limitation in the Special Conditions went too far. The intention was originally that the P&I insurers were to cover the costs of measures to avert or minimise loss which were not recoverable under the hull insurance. However, this applied only to the Norwegian P&I insurers, and the assured therefore ran the risk of being without cover if he had a foreign P&I insurer. Nor was the solution laid down in any agreement, and it was therefore uncertain to what extent it would be complied with in practice. The regard for the interests of the assured therefore warranted a certain expansion of the scope of cover. Out of regard for the reinsurers, however, cover of costs of measures to avert or minimise loss had to be subject to a limitation. These conflicting interests have been resolved by the introduction of a separate sum insured for the costs of measures to avert or minimise loss stipulated in subparagraph 1, second sentence. This sum insured comprises the total costs of measures to avert or minimise loss for the relevant insurance under the Plan. For hull insurance, this means that both costs of measures to avert or minimise loss associated with the property insurance, as well as costs of measures incurred to avert collision liability, are included. Such a solution concords with the solution in the English conditions.
If the sum insured for property damage under a hull insurance has not been exhausted by compensation paid for such damage, it should be possible to use the excess of the sum insured to cover costs of measures to avert or minimise loss that exceed the separate sum insured for such costs. This solution is reflected in subparagraph 1, *third sentence.* On the other hand, it should not be possible to transfer the separate sum insured for the collision liability under subparagraph 2 and § 13-3 for the purpose of covering costs of measures to avert or minimise loss in this way. The provision relating to a separate sum insured for collision liability contained in *subparagraph 2* and § 13-3 is bound up with the regulation of the owner's liability. According to the Limitation of

Liability Convention of 1976, the owner is liable up to a certain amount per ton, regardless of the fate of the ship. Without a separate sum insured for collision liability, collisions with extensive damage to both ships may result in the P&I insurer having to cover a substantial part of the collision liability.
The fact that the insurer covers collision liability "separately" means that he does not cover collision liability within the actual hull insurance sum. Thus, whatever might be left of the ordinary sum insured after the damage to the ship has been covered shall not be used to cover liability. The separate sum insured for collision liability has been fixed at an amount equal to the sum insured under the hull insurance, cf. § 13-3.
It follows from the regulation in § 4-18 that the limit in terms of amount of the insurer's liability is connected with "any one casualty". The question whether one or more casualties occurred will rarely give rise to problems. Difficulties do not arise until a series of events occur in rapid succession or with a strong mutual causal connection. In that event, the distinction between one and several casualties must be decided on a case-to-case basis. Some guidance may be found in practice in connection with § 12-18 concerning deductibles; also the deductible shall be calculated for the individual casualty. However, the content of the casualty concept will not necessarily be the same in both connections.
The question as to when successive events constitute one or more casualties may arise in three standard scenarios:
1. One and the same peril materializes several times. By way of example, a ship sustains hull damage while navigating in ice on a number of clearly separate occasions, cf. e.g. ND 1974.103 NH SUNVICTOR, which concerned the question relating to the number of deductibles under an Anglo-American deductible clause. As a rule, this problem will concern the number of deductibles. The ship will normally be a constructive total loss if several incidents of damage exceed the sum insured. However, in principle it may in such situations also be a question whether the insurer shall be liable up to more than one times the sum insured.
2. Damage caused by one event interacts with new circumstances and results in further damage. By way of example, the steering gear of a ship is damaged in a collision with the result that the helm is locked in a starboard position. Before the crew manages to stop the engine, a new collision occurs. As regards property-damage cover, in this group of events as well, it will be the question of deductibles which is the most interesting. However, in the event of several

successive collisions, the total collision liability may become so extensive that the question of whether the insurer is liable for up to one or several times the sum insured becomes relevant.

3. One incident of damage requires several repairs. The typical example is that the first repairs were inadequately performed, or that they were not thorough enough, cf. ND 1977.38 NH VESTFOLD I, which concerned the question whether new damage resulting from errors committed during the repairs of the engine after a grounding was to be regarded as a consequence of the grounding. If the first damage has been repaired before the next one occurs, there may also be a need for more than one sum insured.

There is no case law regarding the distinction between one and several casualties in relation to the sum insured. Certain elements may be taken from ND 1974.103 NH SUNVICTOR and ND 1977.38 NH VESTFOLD I, cf. above. In addition, some guidance may be found in case law concerning limitation of liability under section 175 no. 4 of the Norwegian Maritime Code, which ties the limit of liability to "the sum total of all claims arising from one and the same event". If it is a situation where the ship collides with several other ships in quick succession, causing a total loss exceeding the sum insured for the collision liability, the natural thing to do would be to tie the solution to the decision regarding the owner's right to limit his liability to third parties. However, also in other cases where a limitation of liability under the Norwegian Maritime Code is relevant, the interpretation of the term "one and the same event" in the Norwegian Maritime Code may help shed some light on the question concerning the distinction between one and several casualties in relation to the sum insured. Reference is made to ND 1984.129 TØNSNES, where damage to seven net loops in the course of roughly one hour was regarded as caused by one event; and ND 1987.160 NY DOLSØY, where it was regarded as one event that contaminated bunkers delivered with an interval of 24 hours to two ships within the same fishing area caused damage to the machinery of these vessels. Accordingly, the question whether one or several casualties have occurred in relation to the sum insured must be the subject of a case-to-case evaluation, where the following elements may come into play:

1. Is there a close connection in terms of location and time between the successive incidents of damage, or are the new accidents of a totally independent nature? Taking the two limitation of liability judgments referred to above as a point of departure, it is nevertheless hardly possible to stipulate very

strict requirements as to connection in time and place in order for several incidents of damage to be regarded as one casualty. As long as the incidents occur within a 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, suggest that the distinction between one and several casualties varies depending on whether it is a question of more than one sum insured or more than one deductible.

3. Does the initial damage or its cause entail an increased risk of new damage, or is the last incident a result of a "generally prevailing risk of damage" which would have occurred with the same effect independently of the first damage or its cause?

§ 4-19. Liability in excess of the sum insured

This paragraph corresponds to § 80 of the 1964 Plan and ICA section 8-4, subsection 6.

It is a traditional principle in marine insurance that the assured, in addition to the cover which the insurance affords him within the limits of the sum insured, is entitled to separate cover of a number of accessory expenses and other losses which the casualty has caused him. In the 1964 Plan, all these expenses were stated in § 80. In the new Plan, loss caused by measures to avert or minimise loss has been isolated for separate regulation in § 4-18, cf. above. The other accessory costs, however, are still mentioned in § 4-19.

Letters (a) and (b) state the expenses that are to be covered in addition to the sum insured: costs of providing security, of filing suit against or defending a suit filed by a third party, costs in connection with the claims settlement, costs of necessary measures to preserve the object insured and interest on the compensation.

It furthermore follows from § 15-21, which concerns liability for the removal of war wrecks, that the war-risks insurer covers such liability even if the sum insured is exceeded.

§ 4-20. Limit of liability where loss is caused by a combination of perils

This paragraph corresponds to § 81 of the 1964 Plan.
The provision is based on ND 1956.323 NH PAN, where the question was how the limitation up to the sum insured was to be applied in the event of a casualty with a "mixed cause". Liability for the damage to the ship was apportioned, with the marine insurer covering 40% and the war-risks insurer 60%. The costs of repairs, etc. exceeded the hull valuation, but the assured demanded full compensation, alleging that each of the insurers was liable for his share of damage to the ship up to his sum insured. The Supreme Court rejected the claim on the grounds that the assured shall not "in a case of a combination of different perils, be in an economically more advantageous position than if there had been no combination of different perils". This solution has been adopted as a basis in § 4-20.

§ 4-21. Right of the insurer to avoid further liability by payment of the sum insured

This paragraph corresponds to § 82 of the 1964 Plan.
Under *subparagraph 1*, the insurer may avoid further liability by paying the sum insured. There is no time-limit on the insurer's right to limit his liability.
The principle in subparagraph 1 is only applicable in property insurance. The insurer cannot invoke the provision if the assured, contrary to his wishes, wishes to institute legal proceedings regarding liability covered by the insurance. In that case, it is necessary to resort to the rules contained in § 5.11. If the assured in such a case is supported by the umpire, but liability which absorbs the entire sum insured is nevertheless imposed on the assured in the legal proceedings, the insurer shall cover the litigation costs under the general rules.
If the insurer pays the sum insured in accordance with § 4-21, the further salvage operation will be for the assured's own account and risk. If the salvage operation is successful, the assured will keep the wreck, but he must pay the full cost. However, he may claim compensation for the costs he has incurred before he was informed that the insurer had decided to pay the sum insured.

The measures the assured has implemented prior to that time are for the insurer's account, even if the costs do not accrue until later.
This apportionment of risk has caused certain problems where the assured has entered into a salvage contract before the insurer has paid the sum insured. If the contract does not allow the assured to cancel the contract without paying salvage, the insurer will be liable for the salvage expenses; here the measure has been "implemented", cf. subparagraph 2. If, however, the assured has the right to get out of the salvage contract, the insurer has the right to order him to do so, and may in that event pay the sum insured according to subparagraph 1, and avoid further liability. These principles must apply regardless of whether the salvage contract has been entered into on a no-cure-no-pay basis or is based on an hourly rate.
Subparagraph 3 establishes that the insurer has no right to take over the object insured under § 5-19, where he chooses to pay the sum injured under subparagraph 1.

Chapter 5.

Settlement of claims

Section 1. Claims adjustment, interest, payments on account, etc.

§ 5-1. Duty of the assured to provide particulars and documents

This paragraph corresponds to § 83 of the 1964 Plan, Cefor I.29, and PIC § 5 no. 8, and ICA section 8-1, subsection 1.

Subparagraph 1 is identical to the 1964 Plan and also corresponds to ICA section 8-1, subsection 1. The provision establishes the duty of the assured to provide the insurer with such information and documents as are required for the purpose of settling the claim. It is irrelevant whether the insurer has specifically requested such information; the duty concerns any and all information the insurer, from an objective point of view, requires. The duty of disclosure applies both in relation to the claims leader and in relation to the co-insurers. In practice, the insurer often raises a series of specific questions related to the settlement. Incorrect answers to these questions represent a clear breach of § 5-1, subparagraph 1. However, the provision shall also apply where the assured, on his own initiative, gives incorrect information or withholds information which he should understand is of significance for the insurer. The duty of the assured to provide information is, in other words, an active and not a passive duty of disclosure.

The requirement to provide information may vary in the different types of insurance. In loss-of-hire insurance, the duty of disclosure under § 5-1 entails that the assured shall make all accounting material that shows the ship's earnings, relevant bills, invoices, etc. available to the insurer in so far as this is necessary in order to calculate the correct compensation.

If the assured neglects his duty under subparagraph 1, he risks forfeiting his right to claim interest for the time lost, cf. § 5-4, subparagraph 2. However, loss of interest would normally only be a reasonable sanction where the assured has failed to comply with an explicit request from the insurer for a specific item of information or a specific document. However, an exception must be made for the general invoice. If the assured fails to submit this, he risks forfeiting his

right to claim interest under § 5-4, subparagraph 2, even if he has not received any specific request from the insurer.

Subparagraph 2 is new and regulates the insurer's sanctions if the assured, intentionally or through gross negligence, fails to fulfil the duty to provide information stipulated in subparagraph 1. The 1964 Plan did not contain any sanctions against the failure to comply with this duty of disclosure through intentional or gross negligence, although the 1964 Plan subparagraphs 2 of § 92 and § 99 (cf. currently subparagraphs 2 of § 5-9 and § 5-16), contained such sanctions for certain special situations. However, there is no reason why the failure to fulfil the general duty to provide information under § 5-1 should result in a more lenient reaction than the failure to comply with the other provisions. Accordingly, subparagraph 2 establishes that, in the event of the assured, intentionally or through gross negligence, failing to fulfil the duty of disclosure, the insurer is not liable for any loss that would have been averted if the duty had been fulfilled.

If the assured has acted fraudulently in connection with the claims settlement, the traditional point of departure in insurance law is that the assured forfeits any claim against the insurer. This point of departure had been softened in the 1964 Plan, where § 83, subparagraph 2, merely stated that compensation might be reduced or lapse altogether where the assured had fraudulently or dishonestly neglected his duty of disclosure. However, this rule was considered important in practice, and the alternative, a reduction of liability was therefore abolished in the Special Conditions, cf. Cefor I.29 and PIC § 5.8, which stated that liability lapsed where the assured had fraudulently or dishonestly neglected his duty of disclosure.

The solution in the Special Conditions has been maintained in the new Plan, cf. *subparagraph 3, first sentence*. This rule may seem strict if the fraud is of secondary importance and concerns only certain losses, and there is consequently a risk that the courts may in such cases fail to hold that fraud has been committed. However, the loss of all rights concords with the point of departure in ICA, section 8-1, section 2.

In the 1964 Plan, fraud was placed on a par with "dishonesty". This is in accordance with the solution in ICA, which applies to an assured who, in connection with a claims settlement, deliberately gives incorrect or incomplete information which he knows or must understand may result in the payment of a compensation to which he is not entitled. This solution has not been

maintained in the new Plan, under which a total loss of rights will only be relevant in the event of fraud. This is the most consistent procedure in relation to the other rules relating to subjective duties, and also makes it unnecessary to decide the difficult question as to what the term "dishonest" implies.
§ 83, second sentence of the 1964 Plan equated fraud and dishonesty with the situation where the assured refused to provide information from the classification society. This rule has been amended and moved to § 3-7, subparagraph 3.
Subparagraph 3, *second sentence*, is new and gives the insurer the right to cancel any agreement with the assured by giving 14 days' notice if the assured has acted fraudulently. This provision is taken from ICA section 8-1, subsection 3, although that section stipulates only one week's notice. Because it is important that the assured be given clear information as to where he stands as soon as possible, it follows from the *third sentence* that the insurer shall act without undue delay after he has become aware of the fraudulent act, cf. the corresponding rule in § 3-6.

§ 5-2. Claims adjustment

This paragraph corresponds to § 84 of the 1964 Plan and ICA section 8-2, subsection 1.
The *first sentence* to the effect that the insurer shall issue the claims adjustment as promptly as possible is identical to the 1964 Plan. However, the second sentence of the 1964 Plan contained more detailed time-limits: In the event of a settlement under the rules relating to a total loss, the claims adjustment was to be issued at the latest within 14 days, and in other cases at the latest within 3 months after the insurer had received the necessary particulars and documents. The provision was connected with § 89 relating to due dates, which was tied to the time-limits in § 84 and § 86 relating to interest, which authorized penalty interest plus 1% in relation to the ordinary rate of interest if the due date is not adhered to. However, in the Special Conditions the system of interest on overdue payments had been superseded by a common rate of interest.
The approach of the new Plan is to establish a due-date and interest system that is somewhere in between the solution in the 1964 Plan and the solution in the Special Conditions. On the one hand, there is reason to show caution when it comes to imposing interest on overdue payments. The sharp calculation of time-limits in subparagraph 1, second sentence, in the 1964 Plan has therefore

been taken out of the Plan text and does not have any direct impact on the due date. The insurers should nevertheless endeavour to meet a deadline of 14 days for total losses and 3 months for other settlements.
On the other hand, a common rate of interest before and after the due date will not give the insurer very much of an incentive to be quick about the claims adjustment if the market rate is higher than the policy rate. The possibility cannot be disregarded that the courts may in such a situation apply the Act relating to interest on overdue payments (*Morarenteloven*), even if the Plan did not contain any rules relating to interest on overdue payments. The due date in § 5-6 therefore refers to the criterion "as promptly as possible" in § 5-2, first sentence, and a rule relating to interest on overdue payments has been introduced in § 5-4, subparagraph 4. An insurer who fails to pay compensation within six weeks after the "as promptly as possible" period has expired must pay overdue interest.
The provision in the *second sentence* is taken from § 84, subparagraph 2, first sentence of the 1964 Plan. The 1964 Plan also contained a provision to the effect that the insurer had one month to decide whether or not to accept the average adjuster's calculation. This rule was deemed to be superfluous and has been deleted.

§ 5-3. Rates of exchange

This paragraph corresponds to § 85 of the 1964 Plan, Cefor I.12 and § 5.2 of PIC. Subparagraphs 1 and 2 are unchanged. It is standard international practice that the conversion from one currency to another in the claims adjustment is based on the rate of exchange on the date of the assured's disbursement, cf. *subparagraph 1, first sentence*. This means that the assured bears the exchange risk for the period of time between the disbursement and the final claims settlement.
As regards general average as well, it is standard international practice for the conversion of currencies to be based on the rate of exchange on the date of disbursement. If, in exceptional cases, a different rate of exchange has been applied, the insurer has the right to attempt to have the actual average adjustment changed. If the adjustment is confirmed by the courts of the country concerned, the settlement should be made on the basis of the average adjustment.

Subparagraph 2 regulates the conversion of costs that have not been paid when the settlement takes place. The claims adjustment is "issued" when the completed adjustment is sent from the insurer to the interested parties. Hence, there is a change in the rate of exchange during the intervening period from the time the actual adjustment is completed until it is ready for issue, a supplementary adjustment must be made.
Subparagraph 3 is new and is taken from the insurance conditions, cf. Cefor I.12, and § 5.2 of PIC. The provision regulates the conversion of NOK amounts in the policy in the event of the sum insured being in a foreign currency; the conversion to the currency of the policy is based on the banks' latest official selling rate before the insurance came into force. The rule relates to the fact that the policies may contain deductibles stipulated in Norwegian Kroner, and that a conversion into the currency of the policy may therefore be required.

§ 5-4. Interest on the compensation

This paragraph corresponds to § 86 of the 1964 Plan, Cefor I.14, and § 5.9 of PIC and ICA section 8-4.
According to § 86, subparagraph 1, first sentence of the 1964 Plan, the assured could claim interest as from one month after the date on which notice of the casualty was received by the insurer. The basis for the time-limit was changed in the Special Conditions in accordance with Act no. 100 of 17 December 1976 relating to interest on overdue payments to "the date on which notice of the casualty was sent to the insurer", cf. Cefor I.14 no. 1 and § 5.9 no. 1 of PIC. This solution has now been incorporated in the Plan, cf. *subparagraph 1, first sentence*. This provision concords with ICA section 8-4, subsection 1, but here interest does not accrue until two months from the date indicated.
In the event of a total loss, it is therefore the notice of the casualty, and not the claim for total loss, that forms the basis of the duty to pay interest. This also applies to condemnation, even if it takes a long time to decide the question of condemnation. If the matter is delayed because the assured is late in submitting the request, the question of applying the rule in subparagraph 2 may arise. Under § 11-7, subparagraphs 1 and 2, the assured's right to compensation for total loss will, in certain cases, be contingent on the expiry of a certain time-limit. However, under § 11-7, subparagraph 3, he may claim compensation without awaiting the expiry of the time-limit if he can prove that he will not

recover the ship. In such cases, the obligation to pay interest will accrue one month after the assured proves that he has definitively lost the ship.
In the event of the insurer having to refund the assured's disbursements, interest does not accrue until the date of the disbursement, cf. subparagraph 1, *second sentence*, which is identical to the 1964 Plan. Thus, no interest is charged on costs that have not yet been incurred. Under ICA section 8-4, subsection 2, interest does not accrue until two months after the disbursement.
If the assured has had disbursements at different times, interest shall be calculated separately for each disbursement. In such cases, the deductible shall be apportioned over the various disbursements on a proportional basis so that the assured can only claim interest on that part of the disbursement which exceeds the relevant proportion of the deductible, cf. the explanatory notes to § 12-18.
The provision in subparagraph 1, *third sentence*, is new, and states that the interest accrues from one month after expiry of the period for which the insurer is liable. This rule is taken from ICA section 8-4, subsection 3. The Loss of Hire Conditions contained a similar provision in Cefor Form 237, § 14, subparagraph 1, but the starting point there was one month after the completion of the casualty repairs. However, there is no reason why the duty to pay interest shall be postponed until the repairs have been completed if the insurer's liability is limited to a shorter period.
The provision in *subparagraph 2, first sentence*, is unchanged and regulates the duty to pay interest if the assured fails to provide information under § 5-1; in that event, he cannot claim interest for the loss of time resulting from the delay. This provision corresponds to ICA section 8-4, subsection 4, first sentence.
By making payments on account the insurer will, to a large extent, eliminate the duty to pay interest. If the assured refuses to accept such payments on account, or if he unrightfully refuses to accept settlement, wholly or in part, he cannot claim interest for the resulting loss of time, cf. subparagraph 2, *second sentence*, which is new and taken from ICA section 8-4, subsection 4, second sentence.
§ 86, subparagraph 3 of the 1964 Plan, set the rate of interest at the savings bank rate of interest. The provision was tied to the mandatory rule in section 24 of the 1930 ICA. However, under the Act relating to interest on overdue payments, the rate of interest in section 24 was tied to the rate of interest of the said Act. Given that the provision was also mandatory for hull insurance for ocean-going vessels, the rate of interest of the Special Conditions was changed

accordingly. In ICA 1989, section 8-4, subsection 5, the reference to the rate of interest in the Act relating to interest on overdue payments has been retained, but the provision is no longer mandatory in insurance for ocean-going vessels. After 1989, the determination of interest in the Special Conditions has been based on collective, annual negotiations, where the rate of interest has, in some cases, been substantially lower than the statutory rate of interest.

During the Plan revision, there was agreement that the annual negotiations concerning the rate of interest, due to the continuous fluctuations in the market rate of interest. In order to establish a calculation system where the Plan rule automatically reflects the general level of interest at the time in question, the rate of interest has been tied to NIBOR (Norwegian Interbank Offered Rate) if the sum insured is given in Norwegian Kroner, and LIBOR (London Interbank Offered Rate) if the sum insured is in some other currency, cf. *subparagraph 3, first sentence*. By NIBOR is meant the interest offered by the leading Norwegian banks for interbank loans in NOK for the interest period in question in the Norwegian Interbank Market, i.e. the market where the banks can obtain deposits in Norwegian Kroner through the international swap market. NIBOR will vary depending on the life of the loans. In the Plan, the six-month NIBOR has been adopted as a basis, because it is somewhat more stable than the three-month rate of interest.

If the sum insured is in another currency, the six-month LIBOR shall be used. By LIBOR is meant the rate of interest determined for interbank loans in the relevant currency for the corresponding period in the London Interbank Market. The rate of interest is determined at 11:00 a.m. London time with effect from and including spot, i.e. two banking days after the setting of the rate of interest. Average rates of interest for various periods are easily available in all major banks.

The mark-up on NIBOR and LIBOR is calculated at 2%.

As regards the time to which the rate of interest shall be tied, there are basically three alternatives. The rate of interest may be tied to the time when compensation is paid. This is the logically correct solution, but it is complicated, because it is necessary to calculate the interest for each individual payment. Another alternative is to tie the interest to the time of loss. This solution is also complicated, however: there will be a rate of interest for each insured event, and it may also be difficult to pinpoint the individual incident in time. A final alternative is to tie the rate of interest to the time when the insurance contract

was entered into. This is the simplest solution, and the one on which the Plan is based, cf. subparagraph 3, *second sentence*. The rate of interest shall be determined as at 1 January "of the year the insurance contract comes into effect". By this is meant the time when the individual insurance policy takes effect. If the insurance has been renewed with the same insurer, the time of renewal is decisive. In order to prevent interest becoming dependent on major, random fluctuations in the market, the Plan Committee has relied on an average rate of interest for the last two months of the year preceding the coming into effect of the insurance agreement. The relevant average rate of interest will be calculated on request by most banks.

Subparagraph 4 is new, and states that, after the due date, interest on overdue payments accrues according to section 3, subsection 1, of the Act relating to interest on overdue payments. This provision corresponds to ICA section 8-4, subsection 5, but it also refers to section 2, subsection 2, of the Act relating to interest on overdue payments.

Pursuant to ICA section 8-4, subsection 6, interest shall be covered in addition to the sum insured. This rule follows from § 4-19 (b).

If the claims leader has had disbursements on behalf of the insurers, he will be entitled to charge interest under § 9-11.

§ 5-5. Disputes concerning the adjustment of the claim

This paragraph is identical to § 87 of the 1964 Plan.

Subparagraph 1 sets out a right for both parties to demand that the adjustment be submitted to an average adjuster before the matter is brought before the courts. The average adjuster shall not make any arbitration award, but merely give his opinion as to how he believes the claims settlement should be effected. Experience shows that this provision has had a litigation-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. Also the insurer will normally accept an average adjuster's decision that is not in his favour.

Subparagraph 2 states who shall bear the costs of submitting the matter to an average adjuster. When the average adjuster submits his opinion, he must also decide this question.

Even if no claims adjustment exists, there may be grounds for litigation between the assured and the insurer, *viz.* when the latter has refused a request for condemnation, or has repudiated a claim on the ground that no recoverable

casualty has taken place. *Subparagraph 3* makes the provisions contained in subparagraphs 1 and 2 similarly applicable to such situations.
If the assured and the insurer, after having obtained the average adjuster's opinion, cannot reach an agreement about the claims settlement, the dispute must be referred to the ordinary courts. The Plan does not contain any general rule relating to arbitration or to the application of the rule of apportionment in § 2-13. However, there is obviously nothing to prevent the parties from agreeing on arbitration in connection with a dispute.

§ 5-6. Due date

This paragraph corresponds to § 89 of the 1964 Plan.
The time-limit stipulated in the 1964 Plan was one month, but in practice this turned out to be too short. It has therefore been extended to six weeks. The time-limit takes effect from the claims adjustment "is or should have been issued", cf. for further details § 5-2. If the time-limit is exceeded, the calculation of interest will be affected, cf. § 5-4, subparagraph 4.

§ 5-7. Duty of the insurer to make a payment on account

This paragraph corresponds to § 90 of the 1964 Plan. The provision has a parallel in ICA section 8-2, subsection 2, which provides that the insurer shall make a payment on account if it is clear that it is liable for at least part of the claim.
Subparagraph 1, first sentence, gives the assured contractual entitlement to a payment on account. In § 90 of the 1964 Plan, the obligation to make a payment on account to the assured was made subject to "substantial disbursements to cover loss". This has been amended to "major expenses or losses" in order to emphasize that this duty also applies to loss-of-hire insurance. The duty to make payments on account applies only to "major" expenses or losses; in that event, the assured is entitled to an "appropriate" payment on account. The criteria are discretionary, and leave a lot of latitude. If the assured requests a payment on account concerning expenses which he has not yet paid, the insurer has the right to pay the amount directly to the third party in question, cf. *second sentence*.
However, an unconditional legal duty to make payments on account may not be advisable for the insurer. If he refuses to make a payment on account in a case that later turns out to involve major recoverable damage, he may become

liable for the loss which his refusal to make a payment on account may have caused the assured, e.g. by his vessel being sold by forced auction. In order to protect the insurer against such a risk, *subparagraph 2, first sentence* states that the duty to make payments on account shall only exist if the insurer does not have "reasonable doubts as to his liability". It goes without saying that a payment on account does not decide anything with regard to the question of liability, but to avoid any misunderstanding, this has been stated explicitly in subparagraph 2, *second sentence*.

The insurer may deduct outstanding premiums from the payment on account and from the final claim, without this having to be stated explicitly.

Under § 90, subparagraph 3, of the 1964 Plan, the insurer was entitled to claim interest at the rate in force for savings banks on payments on account. This has been changed to the same rate as the policy rate, cf. the reference to § 5-4, *subparagraph 3, first sentence*. For payments on account of amounts recoverable in general average, it follows from the *second sentence* that the rate of interest for the average adjustment shall apply as long as the general average interest accrues, cf. YAR 1994, rule XXI.

The insurer's interest claim under subparagraph 3 will normally be deducted from the final claim. However, if the interest exceeds the assured's outstanding claim, the insurer may claim a corresponding reimbursement.

In practice, it has turned out that owners have from time to time received excessive payments on account. In that event, the payment on account must be considered equivalent to a loan from the insurer, and interest shall be charged in the usual manner on the entire excess amount. The rate of interest should be the same on the payment on account and the claims amount.

The provision in subparagraph 3, *third sentence*, is new and establishes that in loss-of-hire insurance the insurer may demand interest on payments on account from the same time as the policy interest accrues, i.e. one month after expiry of the period for which he is liable. The reason for the rule is that the assured's loss under loss-of-hire insurance accrues as the period of repairs progresses, even if the insurer, formally speaking, starts to pay interest only as of one month after expiry of the period for which he is liable. In real terms, a payment made during the period of repairs is more in the nature of compensation rather than a payment on account.

§ 5-8. Payment on account when there is a dispute as to which insurer is liable for the loss

This paragraph is identical to § 91 of the 1964 Plan.

According to the *first sentence*, the insurers shall make a proportionate payment on account of the compensation if there is a dispute as to which one of them is liable. A dispute as to which insurer is liable for a certain loss should not be to the detriment of the assured. Until it has been finally decided which of the insurers is liable for the loss, the assured may not demand any payment on account under § 5-7, and special authority is therefore required in order for him to claim a payment on account from the insurers who may conceivably be liable. The wording to the effect that the insurers shall make a "proportionate payment on account" means that the disputed claims amount shall be divided equally among them. The duty to make payments on account applies only in the relationship between insurers who have in principle accepted liability, but who do not agree which one of them has to pay. If one of the insurers has any other objections to the claim, e.g. that the loss was caused by the assured by an act which is in breach of the insurance conditions, none of the insurers is obliged to make any payment on account, cf. *second sentence*.

Where the insurers' contingent liability for the loss does not represent the same amount, the payment on account shall be based on the lowest liability in order to avoid the assured having to repay the proportion of the payment on account which refers to a compensation he will not be awarded.

This provision may become applicable in a number of situations. It will apply to the relationship between the marine- and war-risks insurers if it is a question of an apportionment of the loss under § 2-14 or § 2-15. Further, the principle will be applicable if it is a question of referring the liability for damage back to a former insurer in accordance with § 2-11, subparagraph 2. Also conceivable is a dispute as to which of several successive casualties has caused a certain loss where the casualties occurred during the insurance periods of different insurers.

Similar conflicts may also arise in the relationship between the hull insurer and the P&I insurer. If the provision is to apply in such conflicts, however, it is a prerequisite that the P&I conditions contain a reference to the Plan.

Section 2. Liability of the assured to third parties

§ 5-9. Duties of the assured when a claim for damages covered by the insurance is brought against him

This paragraph corresponds to § 92 of the 1964 Plan.
The provision is closely bound up with § 3-29 concerning the duty of the assured to notify the insurer of a casualty.
Subparagraph 1 applies first and foremost where the assured is held liable for a loss which he has caused a third party, but it may also become applicable where a third party makes a claim for a salvage award or payment for repairs. Accordingly, the *first sentence* of the paragraph uses the term "liability" and not "liability to pay damages".
In the event of a dispute with third parties, the assured and the insurer will normally have common interests. However, there may be cases where a certain conflict exists, first of all in the event of fault on the part of the assured. Consequently, the insurer must have unconditional and immediate access to all documents and other evidence, cf. *third sentence*.
Under the 1964 Plan, the insurer also had the right to be represented by his own counsel. This provision has been deleted. As a party to the litigation, the assured may, pursuant to section 43, subsection 2, of the Civil Procedure Act (*Tvistemålsloven*), only be represented by one counsel. If the insurer wishes to be joined as a party to the action, the ordinary rules relating to joinder of causes of action and accessory intervention apply.
Under *subparagraph 2*, the insurer may only plead that the assured has been in breach of his duty if the assured has shown intentional or gross negligence, cf. also § 3-31 as regards failure to fulfil the duty to avert and minimise loss.

§ 5-10. Right of the insurer to take over the handling of the claim

This paragraph is identical to § 93 of the 1964 Plan.
The *first sentence* states that the insurer may, subject to the consent of the assured, take over the handling of a claim brought against him. From the insurer's point of view, it will always be desirable to be able to take over the handling of the assured's disputes with third parties. In this area the insurer has the widest experience, and it will therefore normally also be in the assured's own best interest to give his consent. That the insurer takes over the case obviously does not imply acceptance on his part of any obligation to pay the amount for which the assured may be held liable; in order to avoid any misunderstanding, this is stated explicitly, cf. *second sentence*.
The insurer does not have an unconditional right to take over the handling of the claim, nor to bring an action in the name of the assured. Such a solution

could be unreasonable vis-à-vis the assured in situations where he himself has interests in the dispute, which are of greater economic importance than the insurer's, for example, in connection with his own counterclaims concerning loss of time. It is also conceivable that both the hull insurer and the P&I insurer will want to take over the case when it is evident that they will be covering each their part of the assured's liability. In that event, the most reasonable procedure will be for the assured himself to conduct the case on behalf of both insurers.

§ 5-11. Decisions concerning legal proceedings or appeals

This paragraph corresponds to § 94 of the 1964 Plan.

Difficult questions may arise where the assured and his liability insurer disagree as to how to handle a dispute with a third party, for instance, whether to accept an offer of an out-of-court settlement, or whether to accept or appeal against a court decision. Relevant questions are: who is authorized to make the decisions, the insurer's liability if the assured refuses to comply with his decision, and liability for litigation costs in connection with the various outcomes the dispute may have. The situation is made even more complex by the fact that there will often be two liability insurers behind the assured - the hull and the P&I insurer, respectively - and the fact that their interest in the outcome of the assured's dispute with a third party may differ. The following example shows how the conflict may arise: insured vessel A has collided with vessel B, which is lost with a valuable cargo and many passengers. The cargo on board vessel A is also damaged. Disputes arising from the collision are to be tried under American law. By a judgment of a court of first instance, the fault has been attributed entirely to A, but the owner has been granted the right to limit his liability. The owner and the hull insurer want to appeal against the judgment with a view to obtaining an apportionment of fault, under which the owner would obtain partial cover of his loss of time, and the hull insurer would obtain a reduction of the collision liability and partial cover of the repair costs. The P&I insurer objects to an appeal for two reasons: partly because an apportionment of fault would impose an indirect liability on him for half of the damage to A's own cargo and partly because he fears that the superior courts would not only place the entire fault with vessel A, but would also find this to be a case of fault, which would deprive the owner of the right to limit liability. Unlimited liability for damages would first and foremost affect the P&I insurer,

given that the hull insurer's liability for collision damages is limited to the sum insured, cf. § 13-3.

Normally the parties will reach an agreement. In case of disagreement, the parties will as a rule consult internal expertise. However, if one of the parties brings the matter to a head, there must be rules to fall back on.

Under *subparagraph 1*, conflicts between the assured and the insurer about the filing of suits or appeals shall be decided with binding effect by an arbitrator designated by the Association of Norwegian Average Adjusters.

Subparagraph 2 lays down certain principles the arbitrator shall adhere to in his decision. The basic rule is that he must choose the solution which, in his opinion, will in all probability result in the least overall loss for the assured and his insurers, cf. *first sentence*. A crucial point in this connection will be the risk of the assured being denied the right to limit his liability by the court of appeal. However, subparagraph 2, *second sentence*, also indicates a factor which the arbitrator shall not take into account. As evidenced by the example given above, the P&I insurer will sometimes prefer the fault for a collision to be placed solely with the assured, in view of the fact that he will thus avoid the so-called "indirect cargo liability". The assured will have a similar interest in relation to the hull insurer if he has not taken out P&I insurance. However, attempting to have the degree of fault of the insured vessel reduced through a hearing of the case by a higher court must at all events be a legitimate interest worth protecting. A rule has accordingly been incorporated to the effect that the arbitrator shall not take into account the advantage which the assured or his P&I insurer may have through an acceptance of, or an attempt to be allocated, a higher degree of fault than necessary in a collision case.

The arbitrator shall decide the conflict of interest between the assured and his insurers with final effect, but there are no enforcement measures vis-à-vis the assured if he does not comply with the arbitrator's directions. The assured's failure to do so will affect both the liability of an insurer in whose favour the arbitrator's decision was made, and the payment of the litigation costs, cf. *subparagraph 3*. If the insurer wants to accept an offer of an out-of-court settlement or a court decision and is supported on this point by the arbitrator, he shall cover the liability which would have been imposed on the assured by the out-of-court settlement or a court decision, cf. *first sentence*. If the insurer wishes to lodge an appeal and is supported by the arbitrator, he will cover the liability he anticipated would be imposed on the assured by a superior court

and which he has accordingly offered to cover. It is therefore important that, during the arbitrator's consideration of the matter, the insurer makes it clear to him exactly what he wants to achieve by lodging an appeal. As mentioned in § 4-21, the insurer does not in such situations have the right to pay out the sum insured for the liability and refuse any further involvement in the case.
Should it turn out that the arbitrator was wrong, and the assured's choice was justified so that the insurer in actual fact incurs less extensive liability than that which he had declared himself prepared to accept, it is reasonable that he shall also pay his proportionate share of the litigation costs. This is explicitly stated in the *second sentence*.

§ 5-12. Provision of security

This paragraph is identical to § 95 of the 1964 Plan.
Under *subparagraph 1*, the insurer has no legal obligation to provide security. Such an obligation could result in liability for him vis-à-vis the assured in cases where the security is provided too late, or where no security is provided at all due to unforeseen difficulties. However, in practice the claims leader will, to a large extent and at the assured's request, provide security for liability covered by the insurance, and this practice will obviously continue. If the insurer refuses to provide security, and the assured is able to document that this refusal constitutes arbitrary discrimination, he may claim compensation from the insurer.
Subparagraph 2 states explicitly that the provision of security does not imply an acceptance of liability.
The costs involved in the provision of security constitute an expense that follows from the fact that liability has been invoked against the assured. If the insurer covers the liability, he must also cover these costs. However, if it turns out that the liability does not concern him, the assured shall refund him his expenses, cf. *subparagraph 3*.
The questions which arise in the relationship between the claims leader and the co-insurers in connection with the provision of security are discussed in § 9-7.

Section 3. Claims by the assured for damages against third parties

§ 5-13. Right of subrogation of the insurer to claims by the assured for damages against third parties

This paragraph is identical to § 96 of the 1964 Plan.

Subparagraph 1 establishes the insurer's right to be subrogated to the assured's claims against third parties. When the assured has a claim for damages against a third party on account of a loss, either wholly or in part, e.g., as a general average contribution or as compensation for collision damage, the insurer will automatically be subrogated to the assured's claim against the third party when he pays compensation under the insurance contract.

The insurer is subrogated to "the rights of the assured against the third party concerned". This entails that he takes over the claim for damages regardless of the basis on which it is founded. However, this does not apply where the assured has a claim by virtue of another insurance contract. Here the special rules relating to double insurance contained in § 2-6 and § 2-7 shall apply. If one of the insurers is liable by virtue of the rules relating to costs of measures to avert or minimise loss, however, the entire loss shall be covered by that insurer, cf. § 2-7, subparagraph 3.

The insurer is subrogated to the claim as it is in the assured's hands. If there is a maritime lien or some other security connected with the claim, the insurer may exercise this right, cf. ND 1939.269 NH CONGO.

The insurer only takes over claims for damages that are connected with the interest insured and refer to the very losses that the insurer has covered. If the assured has suffered any other loss that is not covered under the insurance (e.g., loss of time in connection with a collision), he retains the claim for damages or the claim for contribution in respect of these items.

The rule in subparagraph 1, second sentence, is referred to in connection with § 4-14.

Subparagraph 2 regulates the situation where the insurer is only partly liable for the loss. In marine insurance the situation will often be that the insurance conditions provide that the assured shall bear part of the loss in the form of deductions or deductibles. In that event, the assured shall retain a proportion of the claim for damages against the third party concerned equivalent to the loss he has sustained himself, cf. *first sentence*. The claim shall also be divided when the value of the interest affected by the loss is estimated to be a higher amount in the relationship between the assured and the third party than in the relationship between the assured and the insurer, and the third party is only liable for a proportion of the loss, or is unable to cover the full value of the interest, cf. *second sentence*. Hence, the claim for damages shall be divided

proportionately if the ship becomes a total loss as the result of a collision and its value is estimated to be higher than the hull valuation, whilst the third party, due to the rules relating to limitation of liability, pays a smaller amount in damages than what the insurer has paid to the assured. Conversely, if the value of the ship in a collision case is estimated to be an amount equivalent to or lower than the hull valuation, the insurer shall keep the entire claim for damages, unless the assured has also suffered other losses.

It is the assured's claim against third parties which may be subjected to a proportionate division, and not the amount of damages which may be paid. The insurer shall invoke his proportion of the claim in his own name. If the assured does not wish to pursue his part of the claim, he is free to drop it. If both the insurer and the assured invoke their claims, it would be natural to try these claims in the same action; such action shall then be conducted in the names of both parties.

Where it is the assured's claim that is divided, it is superfluous to issue rules relating to the apportionment of the costs of recovery. Each of the parties shall bear the costs that have been necessary in order to recover his own claim.

If the claims brought by the assured and the insurer against the third party concerned are not met in full, for example because the third party only has limited liability or is insolvent, the assured competes on a par with the insurer. The Plan has not adopted the rule that is common in types of insurance of a more social nature to the effect that the assured's claim for damages prevails over that of the insurer in the event of the relevant third party's bankruptcy.

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

If the third party's liability is stipulated in another currency than the one set out in the insurance contract, the insurer shall bear the risk of any exchange loss during the period between the event involving liability and the enforcement of the recourse claim. On the other hand, the insurer shall also have the advantage of any exchange gain. Hence, the rule in subparagraph 3 shall not apply here.
A special question arises where several insurers are entitled to a proportion of the claim for damages. The problem poses no difficulties if the various insured interests are assessed separately in the claims settlement. However, if the ship is a total loss as a result of a collision, the compensation will be fixed at one specific amount, representing the value of the ship, including the value of a lost charterparty, if relevant. In practice, it has been disputed how the compensation received shall be apportioned among the hull insurer, the hull-interest insurer and the freight-interest insurer. One solution is to make an apportionment also among the total-loss insurers. In the alternative, the traditional layer distribution of the total-loss insurances may be adopted, and the hull insurer must be given first priority to compensation to the extent of his claim. The hull-interest insurer will then be given second priority, whilst the freight-interest insurer will only get his share if there is still anything left of the compensation. The reason for this solution is that it would not be reasonable if, in the event of a total loss, the hull insurer's claim for damages were to be affected by the extent of the freight-interest insurance that the shipowner has taken out.
During the revision, there was general consensus that in the normal situation where the hull value is equal to or higher than the market value, the hull insurer should be given priority. In the event of a total loss with a subsequent refund from the party causing a loss of NOK 3 million and a hull valuation of NOK 18 million, the hull insurer should receive the entire compensation if the market value is lower than NOK 18 million. In these cases, the hull interest and the freight-interest insurers will not get anything. If, however, the hull valuation is lower than the market value, an apportionment must be made so that each insurer receives a proportion of the compensation equivalent to his share of the market value. The excess amount accrues to the assured. If the market value in the example above is NOK 25 million and the hull interest is insured at NOK 4.5 million, the hull insurer will thus receive 18/25 of NOK 3 million, the hull-interest insurer 4.5/25 of NOK 3 million, and the owner 2.5/25 of NOK 3 million.

The insurer's right of subrogation to claims by the assured for damages against third parties is also regulated in § 5-22. The relationship between these provisions appears from the Commentary on that provision.

§ 5-14. Waiver of claim for damages

This paragraph is identical to § 97 of the 1964 Plan.
The paragraph regulates the effect of the assured's waiver of his right to claim damages from a third party. It is primarily applicable in connection with damages in a contractual relationship where the assured has waived in advance his right to claim damages from the other party to the contract.
As mentioned in § 4-15, the question of whether the waiver can be considered customary in the trade in question must be evaluated on a case-to-case basis. An advance waiver of the right to claim damages may, for example, occur in contracts concerning pilotage or towage. In some cases, the ship may be able to obtain a contract where the other contracting party undertakes greater liability for any faults that may be committed, in return for higher remuneration. It is difficult to make any general statements about the assured's right to choose the less expensive alternative. Whether it would have been reasonable to demand that he, by incurring a somewhat higher expense, obtain a contract which would have been more satisfactory from the insurer's point of view must be decided on a case-to-case basis.
Sometimes clauses are used where the party to a contractual relationship who is likely to sustain damage waives any and all claims for damages to the extent his loss is covered by an indemnity insurance. When such a "benefit-of-insurance" clause becomes applicable between the parties, no claim for damages arises which the insurer can take advantage of. The clause will accordingly have to be evaluated under this paragraph.
If the waiver is not made until after the claim for damages has arisen, the situation will be covered both by this paragraph and by § 5-16. The assured will obviously always have the right to waive the proportion of the claim that accrues to him. If he waives the insurer's proportion, the deciding factor must be whether the insurer would have had to accept the waiver if it had been made before the claim arose, cf. *Brækhus/Rein: Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 600.

The provision does not cover the situation where the assured has waived the entire claim for damages after the insurer has exercised his right of subrogation. In that event, the assured is not entitled to waive the claim.

§ 5-15. Duty of the assured to assist the insurer with information and documents

This paragraph corresponds to § 98 of the 1964 Plan.
As regards the interpretation of subparagraph 1, reference is made to what is stated in § 5-1, subparagraph 1.
§ 98, subparagraph 2, second sentence, of the 1964 Plan, contained a provision to the effect that, in the event of litigation between the assured and a third party, the insurer would be entitled to be represented separately. This provision has been deleted. This is a question that should be solved in accordance with the law of procedure in the country where the case is being tried by the courts, cf. in this respect the explanatory notes to § 5-9.

§ 5-16. Duty of the assured to maintain and safeguard the claim

This paragraph is identical to § 99 of the 1964 Plan.
Under *subparagraph 1*, the assured shall secure a claim against third parties on behalf of the insurer. The provision is particularly relevant where the owner has the right to claim general average contributions from the cargo. The owner has the right to refuse to surrender the cargo unless the consignee assumes personal liability for the contribution (signs an "average bond") and, possibly, provides security. This provision implies that it is the owner's duty to obtain a general average bond before the cargo is surrendered.
If the assured, intentionally or through gross negligence, breaches subparagraph 1, the assured is liable for the loss incurred by the insurer due to such failure, cf. *subparagraph 2*. If the assured realized that it was a case of general average, surrendering the cargo without taking care of the necessary formalities with a view to securing the right of recourse will normally constitute gross negligence. In that event, the owner cannot lodge a claim for the entire general average damage against the hull insurer, cf. the comments on § 4-9. If the fault was committed by the master of the ship, the question arises as to whether the assured is to be identified with the master, cf. § 3-36. Normally, it will be a question of the delegation of the decision-making authority that provides the basis for identification. If the hull insurer is to cover the entire

general average by agreement, normally in the form of a GA-absorption clause, cf. § 4-8, subparagraph 3, this problem will admittedly not arise. In that event, the owner will be entitled to claim compensation for the entire damage from the hull insurer, even though it would not have been covered in general average.

§ 5-17. Decisions concerning legal proceedings or appeals

This paragraph is identical to § 100 of the 1964 Plan.
When the assured has a claim for damages against a third party, the latter will very often have a counterclaim against the assured. Such counterclaims must often be covered by the P&I insurer, whereas the claims for damages will usually accrue to the hull insurer. Accordingly, in such situations, there is the same need for an impartial decision on the litigation issue as when a third party brings a claim for damages against the assured.
The provision does not apply when the disagreement between the assured and the insurer merely consists of differing assessments of the chances of getting the claim for damages upheld, taking into account the costs involved in enforcing it. As mentioned in § 5-13, the assured and the insurer will, in such a situation, have the right to pursue or waive their share of the claim, at their own discretion.

§ 5-18. Salvage award which entails compensation for loss covered by the insurer

This paragraph is identical to § 101 of the 1964 Plan.
Under section 446 (f) of the Norwegian Maritime Code, the material loss sustained by the salvor in connection with the salvage operation shall be taken into account when the salvage award is determined. Under section 451, subsection 1, of the same Code, any damage to the ship or cargo caused by the salvage operation shall be paid for out of the salvage award before anything is distributed among owner and crew. The payment of a salvage award does not entail that the insurer's liability ceases, but that the salvage award shall be considered in the same way as an ordinary claim for damages. However, it would not be correct to say that the insurer "is subrogated" to the salvage award claim, cf. § 5-13. The claim for a salvage award is not a "claim for damages"; the assured does not have an unconditional right to receive a salvage award covering the damage the ship has sustained in connection with the salvage operation. It must therefore be stated explicitly that the assured

shall, to the extent that the salvage award includes the cost of repairing damage to the vessel, refund the insurer whatever the latter has paid in settlement of the assured's loss, cf. *subparagraph 1*. The assured's obligation to reimburse the insurer will, first of all, comprise the proportion of the salvage award with which he is credited in advance in a settlement under section 451, subsection 1, of the Norwegian Maritime Code, to cover damage to the ship. If this part of the salvage award is not sufficient, for instance, because damage to the ship was underestimated during the salvage award case, the assured shall also be obliged to reimburse the insurer out of the remainder of the salvage award which he has received.

The reference to §§ 5-13 *et seq.* entails that the assured's share of the salvage award shall be divided between him and the insurer according to the same rules as those applicable to ordinary claims for damages. The assured is therefore entitled to retain a proportion equivalent to deductions and deductibles that he himself has borne. Furthermore, the assured shall, in relation to the insurer, be obliged not to waive the right to claim a salvage award to any exceptional extent, nor to neglect to pursue any claim to recover a salvage award which has arisen.

Section 4. Right of the insurer to the object insured upon payment of a claim

§ 5-19. Right of the insurer to take over the object insured

This paragraph corresponds to §§ 102 and 103 of the 1964 Plan.

Subparagraph 1 is a merger of subparagraphs 1, first sentences, of §§ 102 and 103 of the 1964 Plan, and confirms the principle that, upon payment of compensation, the insurer is subrogated to the assured's rights in the object insured or such parts thereof as he has indemnified. The rule applies to damage as well as to total loss, and entails that the insurer takes over all the objects which are comprised by the sum insured or the compensation which is paid, cf. *first sentence*.

In case of damage, the greatest practical significance of the principle is in hull insurance, where repair work will often result in a quantity of scrap iron becoming available, in addition to damaged parts of a certain value. However, in a number of cases such parts will be left with the repair yard, either in return for the assured being credited for the value of the material in the repair

settlement, or because a clause is incorporated in the repair contract to the effect that everything that is scrapped during the repairs will accrue to the repair yard without compensation, cf. *Brækhus/ Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 604. This will normally reduce the repair invoice for the insurer, and this means that there shall be no transfer to him under § 5-19. However, the rule becomes applicable if the remaining parts do not accrue to the repair yard, but are sold to a third party. In that event, the proceeds must accrue to the insurer, or possibly be divided between the insurer and the assured under § 5-13, cf. below.

In the event of a total loss, the insurer is subrogated to the title to the wreck. The title comprises the wreck with all appurtenances that were covered under the insurance at the time the total loss occurred.

The insurer is entitled to waive ownership if he has explicitly made a statement to that effect no later than upon payment of the compensation. The insurer is therefore able to protect himself against the burdens that may be associated with owning what is left of the object insured or parts thereof and disposing of same. Under the 1964 Plan, this rule applied only to total losses; now it also covers the damage situation. This right will, however, be particularly relevant in the event of a total loss, where wreck-removal and pollution liability may be imposed on the owner of the wreck. In hull insurance, where the question is most relevant, the risk is admittedly limited by § 5-20, subparagraph 1, which states that the insurer shall not bear the costs of removal that are not covered by the sale of the wreck. However, the position as owner of the wreck may expose the insurer to the risk of incurring liability for damages to third parties.

In practice, there have been cases where the insurer has wanted to take advantage of the value of the wreck without taking over the title to the wreck, *inter alia* for fear of potential pollution liability, cf. below. The Plan does not open the door to such a solution. If the insurer wants to take advantage of the value of the wreck, he will also have to take over ownership. There is, however, nothing to prevent the insurer and the assured from agreeing to the assured selling the wreck to a third party and having the proceeds deducted from the total loss compensation, or paid to the insurer if the total loss compensation has already been paid to the assured. However, the insurer does not have any right to demand this procedure if the assured refuses to co-operate.

If the insurer takes over the ship, a change of ownership will in principle take place, with the consequence that the ship's insurances will cease, cf. § 3-21. If

the ship subsequently causes pollution liability, this will accordingly be the insurer's own risk, cf. below in § 5-20, unless the risk of a pollution liability had already struck the ship at the time when the title to the ship passed to the insurer.

In practice, it is conceivable that the wreck is sacrificed (is sunk or bombed) in order to avoid pollution liability. If the wreck had a certain value when it was sacrificed, it may be alleged that the hull insurer's interest in the wreck value of the ship was sacrificed in order to safeguard the interests of the assured and the P&I insurer in avoiding pollution liability. In that event the assured, and subsequently the P&I insurer, should be liable for the wreck value in relation to the hull insurer. If the hull insurer has taken over the wreck after having paid total-loss compensation, or having clearly indicated before the ship was sacrificed that he is willing to take over the wreck, he must accordingly have a claim against the assured. However, the hull insurer will normally hesitate to do this because of the risk of having to cover pollution liability. Thus, if the hull insurer has adopted a wait-and-see approach before the wreck is sacrificed, he is only entitled to claim a refund for the wreck value from the assured or the latter's P&I insurer, if he establishes that he would have taken over the wreck.

The insurer is only subrogated to the right to the whole or parts of the object insured to the extent that he has covered the loss. In case of a total loss, the sum insured becomes payable without any deductions or deductibles. The insurer then takes over the full title to the wreck, unless there is under-insurance, cf. the reference to § 2-4. Such a situation will rarely arise in hull insurance for ocean-going vessels when using assessed policies, but the exceptional cases it is reasonable that the assured is entitled to his proportionate share of what is left. Under the 1964 Plan, the reference to § 9 concerned only total losses - after the merger of the two provisions, it also comprises cases of damage.

In the event of damage, however, the assured will often have to bear a proportion of the loss himself, in which case he will have to keep a corresponding proportion of the value of the parts or objects which have been replaced or compensated. The apportionment must be effected in the same way as when the assured has a claim for damages against a third party in connection with the damage, cf. the reference to § 5-13 in *subparagraph 3*.

§ 5-20. Charges on the object insured

This paragraph corresponds to § 104 of the 1964 Plan.

Subparagraph 1 regulates the position where the insurer is ordered to remove objects (wreck, equipment) which he has taken over. In the 1964 Plan, the rule applied only to the insurer's take-over of the wreck; now it also applies to damage, e.g., where the insurer has taken over ownership of a lost anchor or other parts according to § 5-19 and has later been ordered to remove them. Under section 18, subsection 3, cf. section 20, of Act no. 51 of 8 June 1984 relating to port authorities (*Havne- og 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. § 4-13. However, liability for the removal of the wreck may arise after the insurer has taken over title thereto under § 5-19. Given that the hull insurer is entitled under the Plan to waive title to the wreck, one might think that he should also be fully liable for the costs of removal in the cases where he has decided to take over the wreck. However, there is a long-standing tradition in marine insurance law that the assured (in reality his P&I insurer) shall refund the insurer the proportion of the costs which exceeds the value of the removed wreck. In practice, an order to refund the costs of removal will only be issued where the wreck is worthless and the responsibility for the removal could appear to be a trap for the hull insurer if he has failed to waive title to the wreck.

If the wreck founders after the insurer has taken it over, but as a consequence of the same casualty which resulted in the payment of the total-loss claim, the assured (his P&I insurer) shall pay the removal costs, if any. The liability must here be regarded to have arisen as a consequence of a casualty that occurred while the insurance was in effect. If, however, the wreck founders in consequence of a new casualty which occurs after it was taken over by the hull insurer, the assured (his P&I insurer) will not be liable for the removal costs under subparagraph 1. A hull insurer who takes over a wreck that is afloat should therefore consider taking out separate P&I insurance for the wreck-removal risk. As regards what constitutes a "new casualty", reference is made to the comments in § 4-18.

If the wreck suffers a new casualty after the insurer has taken it over, and the impaired condition of the ship after the first casualty is a contributory cause, the wreck-removal liability should nevertheless lie entirely with the hull insurer, cf.

also *Brækhus/Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 605.

Under certain P&I insurance conditions, the insurance coverage ceases in the event of a casualty. In practice, such provisions have been applied as an authority for the P&I insurer to withdraw from the insurance contract before the details of the casualty have been finally clarified. The question then arises whether the hull insurers by taking over the wreck risk also taking over increased liability for the removal of the wreck, possibly also a pollution liability, as owners of the wreck. If the Plan has been used as background law for the P&I insurance, such a clause cannot exempt the P&I insurer from liability. A deciding factor must be when "the peril struck", not when liability arose and, as regards wreck-removal liability and pollution liability resulting from a total loss, the peril will have struck when the casualty occurred. Consequently, the fact that the insurance ceases before the wreck has to be removed or the actual pollution occurs is irrelevant to the P&I insurer's liability.

If the P&I insurance is effected on conditions with a background law other than the Plan, other solutions may well be reached as regards the P&I insurer's liability. However, it is difficult to see how the liability of the hull insurer as owner of the wreck can be increased even if the P&I insurer withdraws. If liability for the wreck-removal and potential pollution is a foreseeable consequence of the casualty that triggered the total loss, this must basically be the liability of the assured as the person causing the damage. The fact that the P&I insurer refuses to cover this liability means that the assured is left without insurance cover, but it cannot imply that liability is transferred to the new owner, *viz.* the hull insurer. Another matter is that it may be difficult to decide what are foreseeable consequences of the total loss and what constitutes a new casualty. The solution to this question must follow the general principles for the distinction between one and several casualties, cf. above.

Charges that do not concern the insurance, e.g. maritime liens for claims not covered by the insurance, do not concern the insurer, cf. *subparagraph 2*. The assured must cover such charges, regardless of whether or not he is personally liable for the claim.

The provision concerns only charges that have arisen before the title to the object insured passed to the insurer. If the wreck, after having become the property of the insurer, causes damage for which the owner becomes liable, it is

the insurer, and not the assured, who must cover this liability. Nor will the insurer be entitled to claim cover under the assured's P&I insurance.
Under the laws of some countries, the owner of the wreck has the right to abandon it to cover his liability for damages to a third party. If the owner is held liable after the title to the wreck has passed to the hull insurer, the owner must nevertheless be able to exercise his right to limit liability in the event of abandonment. A rule to this effect is explicitly stated in *subparagraph 3*. The rule of abandonment entails that the hull insurer loses the proceeds from the wreck, but it must apply even if the hull insurer does not cover the liability which attempts are made to limit, cf. *Brækhus/Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), p. 602.
The provision presupposes that the ship is "abandoned". If the ship is sunk as a measure to avoid pollution liability, this does not constitute "abandoning the ship". Such loss shall therefore be charged to the P&I insurer as costs of measures taken to avoid pollution liability.

§ 5-21. Preservation of the object insured

This paragraph is identical to § 105 of the 1964 Plan.
Under § 3-30, it is the assured's duty to take measures to avert or minimise loss, and under § 4-12 the insurer shall cover the costs involved in such measures. However, it may be doubtful whether these rules are applicable if it has already been established that a total loss has occurred, e.g., that the ship will be condemned. The paragraph therefore establishes that it is the assured's duty to preserve the wreck for the insurer's account until the insurer gets the opportunity to safeguard his own interests, irrespective of whether or not the total-loss claim has been paid. This also applies if it takes time to decide the total-loss question, and considerable costs are incurred in keeping watch, paying port fees, etc. If, however, the insurer has accepted liability for the total loss vis-à-vis the assured, but stated that he is not willing to incur costs involved in preserving the object insured, the assured must respect this decision. Any expenses incurred will, in that event, be his risk.
If the assured fails to perform his duties, he may, depending on the circumstances, incur liability for damages to the insurer.
If the insurer refuses to take over the wreck, he will not be liable for costs involved in measures that are subsequently taken.

§ 5-22. Right of subrogation of the insurer in respect of damage to the object insured

This paragraph is identical to § 106 of the 1964 Plan.

When the insurer takes over the object insured, the question arises as to what will happen to the claims for damages the assured has against third parties in connection with damage to the object insured. If a claim has arisen from the casualty that has resulted in a total loss, the matter is clear. The insurer will be subrogated to the claim under the general rules contained in Chapter 5, section 3, of the Plan. However, it is conceivable that the ship has some older damage for which a third party is wholly or partly liable, or that new damage occurs after the occurrence of the casualty entitling the assured to a total-loss compensation, but before the compensation has been paid. In those cases, it may be doubtful whether the insurer can also be considered to have compensated the damage when he pays the total-loss claim, so that the rules in Chapter 5, section 3, may become applicable. To avoid any misunderstanding, it is therefore stated explicitly in the *first sentence* that the insurer shall also take over such claims.

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

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

The *second sentence* establishes that the insurer does not have any right of subrogation to the assured's claim against third parties under insurance contracts. As regards insurance claims relating to older damage, the provision is bound up with the rule in § 11-1, subparagraph 2, to the effect that the hull

insurer cannot make any deductions for unrepaired damage when he pays compensation for a total loss, and with the fact that, according to standard practice, he furthermore does not have recourse against the insurer who may be liable for the damage, cf. the explanatory notes to § 11-1. As regards casualties which occur after the casualty entitling the assured to total-loss compensation, the result also follows from § 11-9, subparagraph 1, according to which the insurers who are not liable for the total loss are not liable for new casualties occurring after the casualty that resulted in a total loss, either. Thus, if the ship has suffered an extensive casualty as a consequence of marine perils, and the insurer against marine risks wants a war-risk cover of the value which the wreck will represent to him in case of condemnation, he will have to take out a separate war-risk insurance from the moment the assured requests condemnation.

Section 5. Limitation etc.

General

Section 5 concerns questions relating to limitation. It follows from the Limitations Act of 18 May 1979 no. 18, section 28 (*Foreldelsesloven*), that the parties cannot, before the claim has arisen, agree on longer limitation periods than the law provides. The provision comprises agreements on the commencement and length of the limitation period as well as requirements to prevent it from running. The regulation of these questions in the new Plan must therefore not result in longer limitation periods in relation to the insurer than that what would follow from section 3 no. 1 of the Limitation Act, which provides that a claim becomes statute-barred three years from the earliest date when the claimant is entitled to satisfaction of his claim. However, section 30 of the Limitations Act opens the door to special regulation in special legislation, and such special regulation is contained in ICA section 8-6. ICA section 8-6 is not a mandatory provision in marine insurance for ocean-going vessels. However, if the regulation in ICA on this point is departed from, the mandatory protection of the insurer in the Limitations Act will nevertheless become applicable.

In the Plan it was decided to take the rules of ICA for a basis in this area. This entails a number of amendments and simplifications in relation to the rules of the 1964 Plan. § 107 of the 1964 Plan relating to time-limit for notification of

casualty has been retained, but amended. 1964 Plan § 108 contained a rule relating to time-limits for taking legal action where the insurer had refused the claim. In that event, the claim became time-barred if the assured had not taken legal action or demanded that the dispute be submitted to an average adjuster under § 87 within one year of receiving the insurer's notification of the refusal. If the dispute was submitted to an average adjuster, and his opinion went against the assured, the claim became time-barred, unless the assured had taken legal action within six months of receiving notification of the average adjuster's decision. At the same time § 110 of the Plan indicated that the limitation period would not commence while the dispute was pending before the average adjuster. This solution was probably in violation of the Limitations Act with the result that the assured ran the risk of the claim becoming time-barred under § 110 before the time-limit under § 108 had expired, if more than two years had elapsed between the casualty and the insurer's refusal. This could come as quite a surprise for the owner, and the rule has therefore been deleted.
§ 109 of the 1964 Plan contained a provision relating to an extension of the time-limit on account of hindrance on the part of the assured. This problem is today regulated in section 10, nos. 2 and 3, of the Limitations Act. Through a reference to the Limitations Act in § 107, subparagraph 3, the former § 109 has therefore become superfluous. Also this provision has therefore been deleted.
The real limitation rules were contained in § 110 of the 1964 Plan (three years' limitation) and § 111 (ten years' limitation). These provisions have now been combined into one limitation rule patterned on ICA section 8-6.

§ 5-23. Time-limit for notification of a casualty

This provision corresponds to § 107 and § 109 of the 1964 Plan, cf. Cefor I.27, PIC 5.11 and ICA section 8-5.
The paragraph does not contain any actual limitation rule, but a passivity rule which supplements § 3-29 and § 3-31.
According to *subparagraph 1*, notice of the casualty shall be given to the insurer within six months of the assured, the master or the chief engineer of the ship becoming aware of it. The time-limit of six months concords with § 107 of the 1964 Plan as well as the Special Conditions, cf. Cefor I.27 and PIC 5.11. Under ICA section 8-5, subsection 1, however, the time-limit is one year. Due to the assured's duty of notification under § 3-29, it will only rarely occur that the insurer has not been notified at an earlier stage. At the same time the purpose of

the time-bar rules, *viz.* to prevent the assured from delaying notification in order to destroy evidence, thereby making it more difficult for the insurer to refuse the claim, indicates that the time-limit should be short. The six-month time-limit has therefore been retained.

The time-limit commences from the moment "the assured, the master or the chief engineer of the ship" became aware of the casualty. This gives greater possibilities for identification than the 1964 Plan did, where the only criterion was the assured's knowledge, but it concords with the Special Conditions. On the other hand, the time-limit in the Special Conditions also commenced if "the assured ought to have become aware of" the casualty. This rule invited difficult discussions between the parties and has therefore been deleted.

A failure by the assured to notify the insurer of a casualty will often be due to the fact that he has not himself received any notification of the casualty from the master. Such failure will under § 3-36 be regarded as a fault committed by the master in connection with his service as a seaman, which cannot be invoked by the insurer. This provision entails greater possibilities for identification in that the assured bears the risk of the master or chief engineer of the ship failing to give notification.

The words "the chief engineer of the ship" must be read literally. In the coastal trade the chief engineer will often be replaced by an "engine man". The knowledge of an engine man is not sufficient to trigger the time-limit under § 5-23.

The time-limit commences from awareness of "the casualty". When the insurer becomes liable for the assured's liability to a third party, "the casualty" is the actual event causing the damage. The assured must notify the insurer of this event within six months, provided that he had reasonable grounds for believing that a claim for damages would be brought against him.

Subparagraph 2 stipulates an absolute time-limit for notification of 24 months regarding anything other than hull damage below the light waterline. This provision is new in relation to the 1964 Plan, but was contained in the Special Conditions, cf. Cefor I.27 and PIC 5.11, both subparagraph 2. If this rule should have an unfortunate consequence in a particular situation, section 36 of the Contracts Act may become applicable.

Subparagraph 3 refers to section 10, nos. 2 and 3, of the Limitations Act and, as mentioned above, covers problems which were earlier regulated in § 109 of the 1964 Plan. The relevant provisions in the Limitations Act regulate the fact that

the limitation period cannot be prevented from running because of Norwegian or foreign law or some other insurmountable obstacle. In that event, a claim becomes time-barred at the earliest one year after the obstacle ceased, however, always provided that the limitation period cannot be extended by more than a total of 10 years. The extension rules do not apply to claims for damages. The reference to the Limitations Act implies a departure from § 109 of the1964 Plan on two points: In the first place, the Limitations Act stipulates, in contrast to the former § 109, a final limitation period (10 years according to no. 3); secondly, the limitation period in section 10, no. 2 of the Limitations Act is one year after the obstacle ceased, whereas the time-limit in the Plan was "as soon as it was possible" to exercise the assured's rights. The reference to the Limitations Act furthermore corresponds to ICA section 8-5 *in fine*.

§ 5-24. Limitations

This paragraph corresponds to §§ 110 and 111 of the 1964 Plan, and ICA section 8-6.

The 1964 Plan operated with two limitation rules: § 110 stipulating a limitation period of three years and ten years according to § 111. As mentioned above, the limitation rules of the 1964 Plan have been superseded by solutions based on the system of ICA. This entails that §§ 110 and 111 of the 1964 Plan have been combined to form one joint limitation provision patterned on ICA section 8-6. At the same time, certain adjustments have been made and a new provision introduced in subparagraph 2 relating to the limitation of the assured's liability for damages. The most important *de facto* amendment is that the limitation period runs even if the claim is pending before the average adjuster. This amendment is due to the fact that it is doubtful whether the limitation rules in the Limitations Act and in ICA provide legal authority for making an average adjustment affect on the limitation period. The way the rules are worded now, the limitation rules in the Plan become ordinary limitation rules, where the limitation period can only be prevented from running by the assured taking legal action to prevent this. If the insurance is divided among several co-insurers, the assured has to prevent the limitation period from running vis-à-vis all the co-insurers, cf. the explanatory notes to § 9-4.

The main rule concerning limitation is contained in *subparagraph 1, first and second sentences*, which stipulate that the limitation period is three years from the end of the calendar year during which the assured acquired the necessary

knowledge of the facts on which the claim is based. The term "acquired the necessary knowledge of the facts on which the claim is based" is taken from ICA and the Limitations Act and must be interpreted to mean that it is sufficient for the assured to know that a claim exists - he is not required to have knowledge about its extent. The assured therefore cannot invoke that he does not possess the necessary knowledge merely because the claim is pending before an average adjuster. On the other hand, both ICA and the Plan must be interpreted so that the assured must understand that he has a claim. The limitation period will therefore not start running until the assured becomes aware of the fact that the damage is caused by an incident that is covered by the insurance. It is also important to emphasize that the insurer will often recognize - explicitly or tacitly - that the assured has a claim, at the same time as there is uncertainty, and perhaps disagreement, concerning its magnitude. In that event, the recognition of the existence of a claim of the assured will in itself be sufficient to prevent the limitation period from running. Accordingly, if, for example, the ship's damage following a casualty has been surveyed and temporarily repaired, and an estimate has been made of the costs of postponed permanent repairs, this must be interpreted as a recognition on the part of the insurer of the assured's claim, unless he makes explicit reservations against any liability at all.

Subparagraph 1, *third sentence*, stipulates an absolute limitation period of 10 years, and concords with § 111 of the 1964 Plan, and ICA section 8-6, subsection 1, second sentence.

The provision in subparagraph 1 must, as far as hull insurance is concerned, be seen in conjunction with the rule relating to a five-year time-limit for repairs of damage, cf. § 12-6. This is not a real limitation rule, because it implies that also the insurer's liability for costs that he has in actual fact accepted will cease. In practice, it will nevertheless to a large extent have the same effect.

The reference to the rules relating to limitation of the assured's liability for damages in *subparagraph 2* is taken from ICA section 8-6, subsection 2. While the insurer's liability under ICA becomes time-barred under the same rules as those applicable to the assured's liability for damages, the assumption in the Plan is that this shall only apply if the rules relating to the assured's liability for damages provide a longer limitation period than the ordinary limitation rules. This specification is bound up with the special limitation rules in Chapter 19, notably section 501, of the Norwegian Maritime Code. Of particular relevance

in relation to hull insurance is section 501, no. 3 relating to claims for compensation arising from collision, which become time-barred two years from the day the damage was caused. If the claim against the insurer became time-barred at the same time as this claim for damages, this would result in a shorter limitation period than the ordinary one, whilst the purpose of the provision in ICA was to allow the assured to benefit from a possibly longer limitation period for the claim for compensation.

If the limitation period for the assured's claim for compensation is equal to or longer than the ordinary limitation period, the limitation period for the insurance claim will run in parallel with the limitation period for the claim for compensation. If the assured receives and pays the claim from the claimant immediately before it becomes time-barred, he risks that the claim against the hull insurer becomes time-barred before he has had time to lodge a claim against him. However, neither ICA nor the Limitations Act opens the door to introducing any further time-limits for the assured in this situation.

Subparagraph 3 is identical to ICA section 8-6, subsection 3, and refers to the Limitations Act. However, on one point the rules of the Limitations Act do not apply: The ten-year time-limit under § 5-24, subparagraph 1, second sentence, cannot be extended on account of ignorance or other obstacles according to section 10 of the Limitations Act.

Chapter 6.

Premium

General

Chapter 6 contains rules on the payment of premium, additional premiums and reductions of premiums in certain situations. The chapter has been greatly simplified in relation to the 1964 Plan, which contained a number of provisions that in practice were seldom or never applied. Accordingly, the following provisions have been deleted:

1. § 114 of the 1964 Plan, which contained rules on premium reminders as an alternative to the ordinary procedure in the event of non-payment of a premium in § 113 (now § 6-2). The provision corresponded to ICA section 5-2, subsection 1, cf. section 5-1, but under ICA the premium reminder is obligatory. The detailed and formal procedure was not very appropriate for shipowners' insurance, however, and the provision was thus not used in practice.
2. § 115 of the 1964 Plan on fraud and dishonesty, subparagraph 1 of which affirmed that the full premium was to be paid in the event of invalidity due to fraud or dishonesty, conflicted with declaratory background law. In addition, the provision was of minor practical significance and of hardly any preventive effect.

Subparagraph 2, which conferred on the insurer entitlement to the full premium if the liability lapsed partially or in its entirety in the event of breach of the rules in Chapter 3 or § 83, subparagraph 2, was superfluous. If the first breach led to the contract not being binding, it followed that no premium was paid either, cf. above. If, however, the consequence of the breach was that the insurer was entitled to disclaim liability for a casualty which had occurred, the contract ran in the usual manner, in which case a full premium was, of course, payable. If breaches of duties of disclosure or care led to the insurer cancelling the contract, it would already follow from § 121 (now § 6-5) that no premium would be paid for the time after the cancellation.

3. § 117 of the 1964 Plan on additional premiums when the risk became greater than originally assumed due to incorrect information or an alteration of the

risk, without the insurer being able to invoke §§ 26 or 32, was viewed as impractical.

4. Also § 119 of the 1964 Plan, on lapse of the entitlement to the premium when no risk attaches to the insurer, and § 120, on the reduction of the premium when the sum insured is greater than the insurable value, were impractical. Most situations in which the risk is reduced can be resolved using the provision in § 6-5. If an exceptional situation arose which could not be brought within the provision or resolved through negotiations, background law, i.e. the Contracts Act (*Avtaleloven*) section 36: the doctrine on failure implied basic assumptions, (translators note: roughly equivalent to frustration in Anglo-American law) could possibly be used to resolve the most inequitable situations.

5. §§ 123-125 of the 1964 Plan on the calculation of return of premium during a stay in port were unnecessarily comprehensive and detailed, but the solutions have been worked into the Commentary on § 6-6 on return of premium in the event of a stay in port.

In practice, the payment of the premium will often take place through a broker. Under English law, the broker is, in that case, liable to the insurer for the premium. By contrast, the 1964 Plan assumed that the issue of premium was a matter between the person effecting the insurance and the insurer and that the broker simply acted as the agent of the person effecting the insurance when the premium was paid through the broker. This approach has been maintained in the new Plan. Since the broker is an intermediary and not a party to the contract, there is no need for a broker's cancellation clause as is used in English insurance conditions to allow the broker to cancel the contract if the person effecting the insurance does not pay the premium. The broker's status as an intermediary also makes it unnecessary to regulate the broker's relationship to the premium in the Plan text, although the use of a broker for paying the premium is referred to below in the Commentary where it is natural to do so.

In practice, it has been problematic that current payment routines lead to brokers being in possession of premiums and thereby earning interest income. This problem has been solved with the new broker regulations of 24 November 1995 no. 923.

§ 6-1. Payment of premium

This paragraph corresponds to § 112 of the 1964 Plan, as well as ICA section 5-1, first sentence.

Under *subparagraph1, first sentence,* the person effecting the insurance is "liable to pay the premium". The rule in § 112 of the 1964 Plan was that the premium was to "be paid by" the person effecting the insurance. The premium may, however, be paid by another party, for example the assured. The key point of the provision is thus that responsibility for the payment rests with the person effecting the insurance.

For a person to have the status of "person effecting the insurance" and thus be liable for payment of the premium, it is a precondition that the person acts in his own name and becomes, in his own capacity, a party to the contract. If the insurance has been taken out as an agent in the name of another, then the principal is the person effecting the insurance. If a manager takes out hull insurance on a ship which is co-owned by several shipowners, the manager will often act as an agent for the owners, giving the owners the status of persons effecting the insurance. In bareboat chartering, however, the bareboat charterer will most often be listed as the person effecting the insurance, for example because the charterer wishes to have the status of co-assured under the insurance contract. In the mutual associations the status of person effecting the insurance will usually depend on who has been accepted as a member on the association and not on whose account the insurance has been taken out, cf. ND 1983.79 DH FRENDO, where the owners of the insured ships were listed in the policy and given status as members of the association. As such, they were deemed to be persons effecting the insurance and held liable for the premium, despite the fact that, under the charterparty, the bareboat charterer was to keep the ship insured for his own account and was responsible for effecting the insurance and for all contact with the insurer.

Subparagraph 1, *second sentence* states that the premium falls due on demand in the absence of any agreement to the contrary. Under the 1964 Plan, the premium was due "on the day on which the insurance comes into force". In practice, notice that premium is due is always sent out later than the time the insurance comes into effect. Linking the deadline for payment of the premium to the time when the insurance comes into effect ostensibly gave the insurer the opportunity to charge interest for late payment and possibly cancel the contract due to non-payment before a notice of premium was even sent out. Furthermore, the amendment is in line with the insurance conditions in terms of advance premiums and additional premiums, cf. PIC § 4, 2, and is substantially equivalent to ICA section 5-1, first sentence. ICA section 5-1,

second sentence also contains a rule on premium notices and payment deadlines. In marine insurance there is no need for an additional deadline of this nature, as the premium is due immediately on demand.
It follows from what has been said by way of introduction that the rules on payment deadlines establish to when the insurer is to have received payment of the premium. Accordingly, it is not sufficient that the person effecting the insurance has paid the amount to the broker.
Subparagraph 2 contains a provision on interest on overdue payments and refers to the rules in the Act Relating to Interest on Overdue Payments of 17 December 1976 no. 100. The provision is taken from the Special Conditions, cf. Cefor I, 14, no. 3, and PIC § 5, 9 no. 3. The reference to the Act Relating to Interest on Overdue Payments implies that interest begins to run one month after demand for payment pursuant to subparagraph 1.

§ 6-2. Right of the insurer to cancel the insurance in case of non-payment of premium

This paragraph corresponds to § 113 of the 1964 Plan.
The provision corresponds to ICA section 5-2, with the difference that the ICA provision contains detailed rules on obligatory premium reminders, cf. also § 114 of the 1964 Plan, and rules on protection of the person effecting the insurance if the non-payment is due to unforeseen impediments for which he cannot be blamed. There is no need for such comprehensive protection in marine insurance, and ICA section 5-2, including subsection 2 on unforeseen impediments is, accordingly, not applicable to insurance based on the Plan.
By contrast, ICA section 5-3, on when payment is deemed to have taken place, does apply to marine insurance as well. For the person effecting the insurance to be able to invoke the provision in the event of late payment, however, the premium must have been sent to the insurer. A delay in sending the amount from the person effecting the insurance to the broker is, accordingly, irrelevant, cf. the general comment above.

§ 6-3. Premium in the event of total loss

This paragraph corresponds to § 116 of the 1964 Plan.
Subparagraph 1 is identical to § 116 of the 1964 Plan, and is in line with established international practice in shipowners' insurance to the effect that the full premium is to be paid for the current insurance year when a total loss has

occurred. In loss-of-hire insurance, total loss occurs when the entire liability period is expended.

Shipowners' insurance is usually taken out for a year at a time, meaning that the insurer will be able to demand one year's premium. In mutual insurance the rule has been adapted to the insurance conditions.

A precondition for the application of the provision in subparagraph 1 is that the insurer actually pays total loss compensation during the insurance period. If the insurer is able to disclaim all or part of the liability because the total loss is due to a peril which is not covered by the insurance, the insurer should only be able to demand full premium for that period during which he bore the risk. This is expressed in *subparagraph 2*. If the loss is caused by a combination of marine perils and war perils and liability is to be shared equally between the two groups of insurers pursuant to § 2-14, the marine perils insurer may only demand half of the premium for the remaining portion of the insurance period. If the loss is partly caused by another peril that is expressly excluded and liability is apportioned according to the general apportionment rule in § 2-13, the reduction in premium must be adjusted to reflect the apportionment fraction.

Under the 1964 Plan it was assumed that the exception in § 116, subparagraph 2, only applied in the case of objective exclusion of perils. In the event of breach of the duties of disclosure or of care, the person effecting the insurance was to pay the full premium regardless, pursuant to § 115 subparagraph 2. This provision has now been deleted, cf. the introduction to this chapter, with the consequence that the exception in § 116, subparagraph 2, will also cover a situation in which the total loss is totally or partially due to breach of the duties under Chapter 3. Consequently, the person effecting the insurance will always be entitled to a reduction of or to be released from the obligation to pay premium for the remaining insurance period, in so far as the insurer can disclaim liability for the total loss, wholly or in part. Full premium shall always be paid for the time up to the casualty, unless the contract is invalid, cf. above.

In the event of an ordinary total loss, the ship's insurances lapse at the time of the loss. Accordingly, the premium shall only be paid up to that time, unless either the insurer in question is liable for the total loss, or there is a specific provision in the insurance conditions on the right of the insurer to receive a premium. However, in the event of condemnation or abandonment, or if the insurer wishes to avail himself of the deadline under § 11-2, subparagraph 2, to

attempt to salvage the ship, there will be a period of uncertainty during which one will not know whether total loss compensation will be paid, or whether the other insurances will lapse or continue to run in return for full premium during the period of repairs, cf. ND 1945.433 Oslo HAAKON JARL. If, in such cases, it turns out that total loss compensation is to be paid, it followed from subparagraph 2, second sentence in § 116 of the 1964 Plan, that the risk for the other insurers had to be deemed lapsed as at time of the casualty. This provision has been deleted, although the intention is not to effect any changes on points of substance. If the ship has been abandoned, the risk must be deemed to have lapsed at the last time there was any information about the ship.

The 1964 Plan also contained a rule on depositing the premium until the issue of total loss was finally settled. This has also been found to be superfluous and has, accordingly, been deleted. If the issue is still not resolved at the expiry of the insurance period, the issue of a possible extension of the insurance, and the issue of the insurer's entitlement to a premium, must be resolved under the rules in §§ 11-8 and 6-4.

§ 6-4. Additional premium when the insurance is extended

This paragraph is identical to § 118 of the 1964 Plan.

Subparagraph 1 must be viewed in connection with the right to an extension of the insurance period. The provision is of significance in relation to both hull insurance and the separate insurance for total loss, cf. reference to the hull insurance rules in § 14-3.

If, after arriving in port, the ship turns out to be condemnable, an insurer who is not liable for the total loss will not be liable for new casualties occurring after the casualty which caused the total loss, cf. paragraph 11-9, subparagraph 1. In cases such as this, the insurer may only demand a premium for the time up to the casualty, cf. the explanatory notes to § 6-3. There can accordingly be no question of extending the insurance.

Under § 11-9, subparagraph 2, the insurer who is liable for the total loss shall cover all collision liability occurring after the casualty but before compensation is paid and which falls under the hull insurer's liability pursuant to the rules in Chapter 13. In this case, however, the insurance will not be “extended pursuant to § 10-10”, cf. subparagraph 1 of this paragraph, and the insurer cannot demand a separate premium for this liability cover. As soon as it is discovered

that the ship is condemnable, it is clear that the insurer who is liable for the total loss is to receive a full year's premium, cf. § 6-3, subparagraph 1. The liability of the other insurers is deemed to have lapsed as at the time of the casualty.
Subparagraph 2 regulates the entitlement of the insurer to a premium when it is not known at the expiry of the insurance period whether the assured will be entitled to demand compensation for total loss under the rules in § 11-2, subparagraph 2, § 11-7 and § 15-11. If, at the expiry of the insurance period, the ship is stranded, but the insurer wishes to avail himself of the right to attempt to salvage it pursuant to § 11-2, subparagraph 1, no premium shall be paid as long as it is not known whether the salvage attempt will be successful. If the ship is salvaged before expiry of the deadline, it will normally have sustained damage that would make the extension rules in § 10-10 applicable. The premium will then begin to run again from the time the assured "gained control of the ship", which in this situation will mean that is has been re-floated and can once again commence moving to a repair yard. If, however, it turns out that the ship is condemnable, the rules set out in the preceding paragraph will have to be applied.
Under §§ 11-7 and 15-11, the assured may demand compensation for total loss upon expiry of certain specified time periods when the ship has disappeared, been abandoned by the crew or taken from the assured. If, at the expiry of the insurance period, it is not known whether compensation for total loss will be demanded under one of these rules, all payment of premiums is to cease. If compensation for total loss is subsequently paid, the settlement of premiums must take place along the lines described above pertaining to a case of condemnation.
Even though the time limit under one of the above-mentioned paragraphs has expired, the assured may, however, still keep the issue of compensation open if, due to economic factors, he prefers to have the ship back rather than receive total loss compensation. This will be particularly relevant in wartime. If the ship is found before the assured has claimed compensation for total loss, the insurance shall under § 11-8 be extended until the ship has reached port, and the rules in § 10-10 shall apply after that. Under the present paragraph, subparagraph 2, the premium will begin to run again from the time the assured, or someone on his behalf, gains control of the ship.
If the ship becomes a total loss after it has been found but before the extended insurance extension has expired, the insurer may not demand a new, full year's

premium. What the insurer may claim pursuant to § 6-3 in the event of total loss is the entire "agreed premium", but an extension of insurance does not imply any agreement on insurance for a new insurance year. In this case, an additional premium shall only be paid for the period as of when the assured gained control of the ship until it was lost.

§ 6-5. Reduction of premium

This paragraph corresponds to § 121 of the 1964 Plan and ICA § 3-5 relating to termination of the insurance during the insurance period.
Under the 1964 Plan, a pro-rata reduction of the premium could only be claimed if the insurance period became shorter than agreed upon or if the insurance was rendered inoperative pursuant to §§ 37, subparagraph 3, 41 and 44. The authority for the pro-rata reduction is now generalised, so that a pro-rata reduction may also be effected when the suspension is due to circumstances attributable to the assured or the person effecting the insurance, e.g., when the ship navigates into an excluded trading area with the consent of the assured, cf. § 3-15, subparagraph 3.
The paragraph only applies to a reduction of the contractually agreed charge for the insurance. This does not, of course, exclude the insurer being entitled to demand compensation from the person effecting the insurance or the assured, if he has sustained an economic loss due to the circumstance which has caused the insurance to lapse and the conditions for compensation are otherwise met.
During the revision, there was also discussion as to whether the shipowner needs to have the possibility of cancelling 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 cancel the contract in these types of situations. If there is an obvious disparity between the agreed premium and the risk incurred, the parties will usually agree on some premium reduction. If not, the issue may have to be resolved under the rules on failure of implied basic conditions or in Contracts Act (*Avtaleloven*), section 36.

§ 6-6. Reduction of premium when the ship is laid up or in similar situations

This paragraph corresponds to § 122 of the 1964 Plan, Cefor V.1, subparagraph 1, and PIC § 9.

§ 122 of the 1964 Plan did not contain any basis for a return of premium, but stated that if the parties had entered into an agreement on the matter, the premium reduction was to be calculated according to the rules in §§ 123-125. These rules were modified somewhat in the Special Conditions, cf. Cefor V 1, subparagraph 1, and PIC § 9. The present paragraph is based on the solutions in the Special Conditions, with some modifications.

The condition in *subparagraph 1*, to the effect that the entitlement to a return of premium is subject to the ship having been in one location for an uninterrupted period of at least 30 days with no cargo on board, is taken from the Special Conditions. The date of arrival and the date of departure are not to be included in the calculation of the length of stay. It makes no difference, for the purposes of the calculation, if the old insurance policy expires and a new one begins to run while the ship is in port; the decisive factor is the cumulative stay.

The provision assumes that the ship is lying "at one location for an uninterrupted period". Moving the ship within a port area is not to be deemed an interruption, unless the move is part of the voyage and the ship is held up before final departure. The issue of whether there is one or more locations (ports) must be decided as a question of fact according to the geographic and commercial circumstances at the place in question. §§ 123 and 124 of the 1964 Plan and Cefor V.3 and PIC § 9.3 contained detailed regulation on these and other questions. Even though the provisions are not repeated in the text of the Plan, it is assumed that the calculation method in future shall be based on the same principles.

The provision in subparagraph 1 only applies when the ship is laid up or more or less laid up, cf. the condition "with no cargo on board". This is a somewhat more narrow formulation than in the Special Conditions, which set out common rules for lay-up and other stays in port, etc. The ordinary reduction of premium rules should not usually be applied, however, in the case of a stay in port which occurs more or less by chance, during which the ship is earning full freight, cf. the criticism of the Special Conditions in *Brækhus/Rein*: *Håndbok i kaskoforsikring* (Handbook of Hull Insurance), pp. 340-341. Nevertheless, it is not a precondition for negotiations for a premium reduction that the ship is without freight income. Negotiations must also be possible in a situation in which a rig is laid up with full freight income but with orders to reduce operating expenses as much as possible.

The Special Conditions also contained a prerequisite that the ship be laid up "under safe conditions" and detailed provisions as to how these requirements were to be met. This has been deleted. Given that the provision now applies only to lay-up and similar stays, because under § 3-26 the insurer is to approve the lay-up plan, and the requirement for safe conditions thereby becomes superfluous. In addition, the issue of safe conditions should affect the scope of the premium reduction and not be a condition for the return of premium.
When the conditions have been met, the assured is entitled to "demand negotiations" for a reduction of premium. This is a change in relation to earlier practice. While § 122 of the 1964 Plan assumed that the scope of the premium reduction was a subject for negotiation, the Special Conditions operated with set return-of-premium rates. The general rule was that the return of premium was to be 90% with a minimum premium of 0.35% p.a. During the revision, there was agreement that the issue of return of premium had to a be a subject for negotiation and not a general and automatic right for the assureds, *inter alia* because a set rate might possibly be in conflict with the rules on price collaboration in the Competition Act (*Konkurranseloven*). Accordingly, the return of premium rates must be agreed upon individually. This may be done either at the time the insurance contract is entered into or at a later time when lay-up, etc. enters the picture. This last approach is the most practical because that is when one has the best overview of the factual circumstances, although it does give the insurer a clear advantage in negotiations.
Particular return-of-premium issues arise when the ship is laid up at a shipyard. It follows from the general rule that the assured will not be entitled to a return of premium in such cases, but may negotiate with the insurer for a premium reduction if the conditions in subparagraph 1 are met. It is nevertheless as common to obtain a return of premium in the case of la stay at a shipyard as it is in the event of ordinary lay-up. Even though the navigation risk will be reduced, the total risk may in fact increase caused by to the increased risk of damage due to fire or explosion. In certain circumstances the question may therefore rather be whether an additional premium should be paid for the stay at a shipyard. This issue must be resolved by applying the ordinary rules on alteration of the risk. If the stay at the shipyard is a relevant alteration of the risk under § 3-8, the insurer may cancel the insurance pursuant to § 3-10 and then demand an increase in premium to resume the cover.

Subparagraph 2 corresponds to § 125 of the 1964 Plan, but letter (b), which stipulated that the insurer was entitled to the full premium during a stay in port when the ship was in a port at which it could only call subject to an additional premium, has been deleted. This is also an issue that must be left to the parties to negotiate.

§ 6-7. Claim for a reduction of premium

This paragraph corresponds to § 126 of the 1964 Plan.

§ 126 of the 1964 Plan contained deadlines for the bringing of claims for a reduction of premium, but made no provision for sanctions if the deadline was not complied with. The deadline provision has, accordingly, been amended to become a pure time-bar rule, so that the claim lapses if the deadline is not complied with. The provision applies whenever the duty to pay premium of the person effecting the insurance lapses wholly or in part under the rules in Chapter 6.

The "insurance year" means a period of one year, starting at the time the insurance came into effect. If the insurance contract is continuous, the insurance year will be a period of one year, starting from the time of expiry of the preceding insurance year. The insurance year may coincide with the calendar year, but need not do so.

Subparagraph 2 of the 1964 Plan provision conferred on the insurer the right to charge a reduction fee if the claim for a premium against the person effecting the insurance lapsed. This provision was of little significance in practice and has been deleted.

Chapter 7.

Co-insurance of mortgagees

General

Co-insurance of a mortgagee's interest is part of a larger set of problems concerning co-insurance of the interests of third parties. The new Plan is based mainly on the rules of the 1964 Plan. The reason for this is that the rules on cover of a mortgagee's interest in the 1964 Plan enjoy the acceptance of at least Norwegian financial institutions and a new round of discussions on how far the cover of the mortgagee's interest should go was not deemed desirable.
In the 1964 Plan, the rules were developed so that there was one set of rules for co-insurance of a third party in Chapter 7 and a chapter on co-insurance of mortgagees in Chapter 8. In principle, Chapter 7 established independent co-insurance cover, while the cover under Chapter 8 was not independent. However, § 129 contained a provision on the loss of the rights of the assured owing to acts or omissions of the person effecting the insurance which cut so deeply into the independent cover that the two types of cover were, in reality, quite similar. The differences were, in reality, also very minor in relation to the other rules in the two chapters.
In the new Plan, the sequence of the chapters has been reversed so that insurance of a mortgagee's interest is placed first in Chapter 7, while Chapter 8 contains rules on insurance of other third-party interests. The rules on cover of a third party's interest have also been brought more in line with the rules on insurance of a mortgagee's interest, so that the rules are now substantially simplified. The provision in § 133 of the 1964 Plan on change of ownership has been moved to Chapter 3, section 2, on alteration of the risk, cf. § 3-21.
ICA chapter 7 contains rules on co-insurance of a mortgagee's interests in non-life insurance. The general rule in ICA is that the holder of a registered charge on a vessel is automatically co-assured under the owner's insurance, cf. § 7-1, and also has an independent claim against the insurer, cf. § 7-3. This means that the mortgagee is co-assured, regardless of whether the insurer has received any declaration to that effect, and that the mortgagee does not lose his protection due to acts or omissions on the part of the person effecting the insurance or

other assureds. Under this provision, the rights of the mortgagee would remain intact if, for example, the shipowner brought about the casualty intentionally or through gross negligence. From the point of view of the mortgagee, the rules of ICA give a very satisfactory solution. However, marine insurers have not been willing to bear the extra risk which this solution implies, which is why the ICA rules are not followed in § 7-1, subparagraph 1.
Since the Plan proceeds from the assumption that mortgagee cover is not independent, in some cases there may be a need for expanded cover of the mortgagee's interest. This can be resolved by giving the mortgagee independent co-insurance, or by establishing completely independent cover for the mortgagee, i.e. cover which is not linked to the owner's insurance. In Chapter 8 a provision has been incorporated which allows for the possibility of independent cover of a third party's interest linked to the shipowner's insurance, see. § 8-4.

§ 7-1. Rights of a mortgagee against the insurer

This paragraph corresponds to § 134 of the 1964 Plan and ICA section 7-1.
Subparagraph 1, initially sets out the rule on automatic co-insurance of the mortgagee's interest. The mortgagee is co-assured even though notice is not given pursuant to the subparagraph 2; the consequence of failure to give such notice is simply that the mortgagee cannot have the benefit of the protection provided for in §§ 7-2 to 7-4. This approach is in line with ICA section 7-1, which carries automatic co-insurance for holders of registered charges in the absence of any agreement to the contrary.
The paragraph applies when the ship is "mortgaged", i.e. it is only aimed at charges created by agreement. Maritime liens and enforcement liens are not covered by co-insurance under the shipowner's policies. At the same time, there is no requirement that the charge be registered, but if the mortgagee's right on the ship is not legally protected, his right as a co-assured will not be protected as against the creditors of the shipowner, cf. Rt. 1939.343 NH. The protection under ICA section 7-1 is based on slightly different criteria: that provision applies to any charge or other form of security interest, but assumes that the right is legally protected.
Subparagraph 1 also establishes the principle that the co-insurance is not independent. On this point the Plan deviates from the solution in section 7-3, cf. section 7-1, of ICA which grants the holder of a registered mortgage an

independent right against the insurer, independently of the assured. In the revision of the Plan it was not deemed expedient to go that far.

In the 1964 Plan, this principle was expressed by stating that the mortgagee's rights against the insurer did not exceed those of the owner. In insurance law, however, one speaks of the "person effecting the insurance" as the party to the insurance contract and of the "assured" as the one who is entitled to compensation, cf. § 1, letters (b) and (c) of the Plan. Consequently, from a purely terminological point of view, it is not wise to bring the concept of "owner" into this three-way relationship; the insurer does not deal with the "owner" in an insurance contract. Moreover, linking the mortgagee's right to the owner's creates a lack of clarity regarding the cover. The mortgagee is one of several assureds under the contract; the issue is with whom the mortgagee is to be identified. The owner will normally also be the assured, but this need not be so, in which case it is of little use to link the mortgagee's right to that of the owner.

Instead of linking the mortgagee's right to the owner's right under the contract, the choice has been made to resolve the identification problems generally in §§ 3-36 to 3-38 and refer to those provisions in § 7-1. The rule in § 3-37 implies that the mortgagee must be identified with the assured or co-owner who has decision-making authority for the operation of the ship. This means that the mortgagee does not acquire any greater rights than the person who is responsible for the operation of the ship. If the party in charge of the operation of the ship is responsible for a breach of safety regulations or sends the ship into excluded trading areas without giving notice to that effect, the mortgagee will thus have to accept a loss of cover under § 3-24 or § 3-15, subparagraph 3, provided that the other conditions for sanctions on the part of the insurer are met.

§ 136 of the 1964 Plan contained a special rule on navigating outside the trading area to the effect that if the mortgagee expressed a willingness in advance to pay an additional premium and provided security for that purpose, the insurer could not invoke failure to give notice or failure to pay premium on the part of the assured against the mortgagee. This provision has been deleted: if the ship navigates into a conditional trading area without giving notice, the sanction is that the assured, in the event of damage, only receives compensation subject to a deductible of one fourth, however, up to a maximum of USD 150,000, cf. § 3-15, subparagraph 2, and this should also apply as regards the mortgagee.

If the responsible assured have delegated decision-making authority which is of material significance for the insurance to another organisation or person, § 3-36, subparagraph 2, cf. § 3-37, entails that the mortgagee must also be identified with that person or organisation. If responsibility for the operation of the ship has been delegated to several parties, the mortgagee must be identified with all of those responsible parties. Nor does the mortgagee acquire any greater rights than the assured if the insurer have 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 BIRO and Rt. 1995.1641 TORSON.

However, the cover is independent in relation to other co-assureds who are not responsible for organising the operation of the ship, for example co-owners without such responsibility or other mortgagees. If they make a mistake, the cover of that mortgagee remains intact.

It also follows from the reference to § 3-38 that the mortgagee must be fully identified with the person effecting the insurance. If the person effecting the insurance breaches his obligation to give correct and complete information or to pay the premium, the mortgagee will not have any rights against the insurer, either. General principles of contract law dictate that the mortgagee must also be identified with any assistants the person effecting the insurance may use, for example, if the contract is entered into through a broker.

Naturally, the mortgagee does not acquire any greater rights than the assured in relation to limitations of liability that are not linked to the issue of breach of obligations for the assured, for example, the war risk exclusion in an insurance against marine perils or the exclusion for insolvency. This is true even though the limitation of liability may seem like a reaction to negligence on the part of the assured, but is drawn up completely objectively, e.g., the limitation of liability for damage caused by inadequate maintenance in § 12-3. It is unnecessary to spell this out explicitly in the Plan text.

The principle of dependent co-insurance leads to a degree of uncertainty for the mortgagee. If, for example, the ship, with the knowledge of the assured responsible, sets out to sea in an unseaworthy state and is lost due to the unseaworthiness, the mortgagee risks being left without cover. For insurance of ocean-going ships, this "subjective risk" is extremely small. It is, however, conceivable that the mortgagees may wish to insure themselves against this risk

as well. This can be resolved through independent mortgagee cover in connection with the shipowner's insurance, cf. § 8-4. For ships trading in American waters, the mortgagee may also need to take out Mortgagee Interest Additional Perils (Pollution) insurance (MAP) to ensure priority for his mortgage in situations where clean-up costs, etc. in relation to the American Oil Pollution Act give maritime liens on the ship priority over charges created by agreement.

The fact that the mortgagee's cover is not independent does not mean that the person effecting the insurance may arbitrarily give up his, and thereby the mortgagee's, rights under the insurance. Several provisions in §§ 7-2 to 7-4 serve to protect the mortgagee against this eventuality and against the prospect of compensation being paid out by the insurer without it benefiting the mortgagee. To achieve this protection, however, the mortgagee must arrange for the insurer to receive notice of the creation of the charge, see *subparagraph 2* of the paragraph. If the mortgagee fails to give notice, but the insurer learns of the creation of the charge in some other way, this must be sufficient for the expanded protection to apply, however.

The rule in *subparagraph 3* is a regulation: the mortgagee is covered pursuant to §§ 7-2 to 7-4 even if the insurer neglects to give the prescribed notice.

§ 7-2. Amendments and cancellation of the insurance

This paragraph corresponds to § 135 of the 1964 Plan and ICA section 7-4, subsection 1. **It was amended in the 2002 revision, see subparagraph 1, second sentence.**

The provision states that amendments to or cancellation of the insurance contract may not be invoked against the mortgagee unless he has been notified by the insurer. This expands somewhat the mortgagee's protection in relation to the general rule in § 7-1, and goes slightly further in protecting the mortgagee than did the 1964 Plan, cf. below. The wording has also been simplified in accordance with the formulation in ICA section 7-4, subsection 1. **In the 2002 revision, however, it was emphasized that, upon cancellation of a war risk insurance contract, the position of the mortgagee is no better than that of the person effecting the insurance himself, see the reference to § 15-8, subparagraph 1, second sentence.**

Under § 135, subparagraph 1 of the 1964 Plan the rule was that the "owner" could not "amend, cancel or terminate the insurance contract" with binding

effect. In the new Plan, the reference to the "owner" has been deleted since the "owner" is not a party to the contract with the insurer, cf. above. Instead, the text states directly that amendments or cancellations may not be invoked against the mortgagee, cf. the formulation in ICA section 7-4, subsection 1. The reality of the approach is intended to be the same as under § 135, subparagraph 1 of the 1964 Plan.

§ 135, subparagraph 2 of the 1964 Plan imposed a duty on the insurer to notify the mortgagee in the event of cancellation and when the insurance lapsed pursuant to the rules concerning premium reminders. The rules concerning premium reminders have been deleted in the new Plan, so that this part of the provision has been rendered superfluous. In addition, the insurer's duty to notify has been expanded in the new Plan, in line with ICA section 7-4, subparagraph 1 to apply to amendments to the insurance as well. The provision implies that the mortgagee is entitled to be notified in the event of amendments to the insurance contract during the insurance period and in the event of renewal of the insurance. He will not be notified, however, if the insurance expires because it is not renewed, cf. below. The duty to notify rests with both the leading insurer and the co-insurers. The notice period is the same as in the 1964 Plan § 135, subparagraph 2, i.e.14 days, while the notice period in ICA section 7-4 is one month.

The provision in ICA section 7-4, subsection 1 applies to expiry as well as to amendments and cancellations. In marine insurance, however, it is not expedient to require the mortgagee to be notified when the insurance expires. A marine insurance contract signed on the terms of the Plan lapses automatically upon expiry of the insurance unless it is renewed by the person effecting the insurance, cf. § 1-5, subparagraph 3, and a duty to notify would have required the insurer to keep track of failures to renew. Furthermore, the Plan contains a number of rules to the effect that the insurance expires automatically or is suspended without the insurer having to be aware of this, cf. § 3-14 on loss of class or change of classification society, § 3-15 on trading area and § 3-21 on change of ownership. In such cases, it will not be possible for the insurer to give notice before he received notice himself of the reason for the expiry, which can take a long time. The issue of expanded protection of the mortgagee's interest upon sale of the ship is usually resolved by the purchaser always taking out new insurance as of the time of take-over.

§ 7-3. Handling of claims, claims adjustments, etc.

This paragraph corresponds to § 137 of the 1964 Plan and ICA section 7-4, subsection 2.

Subparagraph 1 corresponds to the 1964 Plan which, however, linked the right to negotiate to the owner. As mentioned in the commentary on §§ 7-1 and 7-2, it is not always the "owner" who is entitled to compensation. Consequently, the rule has been modified so that the relevant decisions may be taken without the participation of the mortgagee.

Under ICA section 7-4, subsection 2, the insurer may not negotiate the settlement of claim with the person effecting the insurance or pay compensation to him with binding effect on the mortgagee. In marine insurance, by contrast, it is most practical for the person effecting the insurance or the person who is responsible for the operation of the ship to have authority to negotiate with the insurer. It would be inexpedient and bothersome to involve the mortgagee in every single settlement of a claim. Moreover, § 7-4, which ensures the mortgagee reasonable control over the payment of compensation, gives his interests sufficient protection. If, exceptionally, the mortgagee wishes to be in a better position in relation to the claims settlement, this must be agreed separately with the insurer. An agreement of this type may be reached right up to the time of payment of the compensation.

Under *subparagraph 2*, the right to compensation for total loss may not be waived, in full or in part, to the detriment of the mortgagee. The rule is taken from § 137, subparagraph 2 of the 1964 Plan, which, however, was only aimed at the owner, cf. the comments above. During the Plan revision, an assessment was made as to whether to expand the protection of the mortgagee to apply to every payment of cash compensation (including compromised total loss), cf. § 12-1, subparagraph 4 and § 12-2, but this was deemed unnecessary. The mortgagee will in such cases have the protection afforded by § 7-4, subparagraph 3.

§ 7-4. Payment of compensation

This paragraph corresponds to § 138 of the 1964 Plan and ICA section 7-4, subsection 2, and section 8-3, subsection 2, first sentence.

The provisions in subparagraphs 2 to 4 correspond to ICA section 7-4, subsection 2 although the Plan rules are somewhat more detailed. *Subparagraph 1* gives the mortgagee priority in the event of total loss. The rule follows § 138,

subparagraph 1 of the 1964 Plan which, however, only applied in relation to the owner. Parties other than the owner may also be entitled to compensation and the rule was accordingly made more general.

Subparagraph 2 regulates the settlement of partial losses. This provision has also been taken from the 1964 Plan. If the insurer arranges for the compensation to go towards the cost of repairs or to cover possible liability towards a third party, the mortgagee's interest will normally be protected, since the value of the object mortgaged is usually restored in such cases. Consequently, the mortgagee should not be able to object to such a payment and there is therefore no reason to require his consent. The threshold for payment is 5% of the insured value. Under the 1964 Plan, a maximum limit of NOK 200,000 also applied. This limit has been removed, for practical reasons. If a lower amount is needed, a separate agreement must be reached for that purpose.

A particular issue arises when the shipowner goes bankrupt after the repairs have been carried out but before the shipyard has received payment. If the ship is still at the shipyard, the shipyard may retain the ship to enforce payment of the entire repair invoice. The insurer will, in relation to the mortgagee, not be able to pay out the amount to the bankrupt estate unless the shipyard has been paid in full, cf. the wording "upon presentation of a receipted invoice for repairs carried out". The natural course of events may then be that the insurer pays the shipyard directly in such cases. If, however, the shipyard has not exercised its possessory lien and has let the ship sail, it is difficult to see why it should be in a better position than an ordinary creditor. In these types of situations, it is better to fall back on general rules of bankruptcy law, which implies that the insurance compensation goes into the bankrupt estate and that the shipyard only has a claim for a dividend. This approach should not create particular problems for the mortgagee.

Subparagraph 3 also corresponds to the 1964 Plan which, however, only applied in relation to the owner. The provision has been made general so that the mortgagee's right to give consent applies in relation to everyone, cf. the comments above.

The provisions in subparagraphs 1 to 3 only apply in relation to mortgagees holding security in the capital value of the ship. During the revision, a new *subparagraph 4* has been introduced to give a mortgagee holding security in the ship's freight income the same security in the event of loss-of-hire as other mortgagees have in relation to payments under the hull cover. However,

mortgagees holding security in the value of the ship or other security have no claim to protection in relation to payment under the loss-of-hire insurance.
Subparagraph 5 concerning payment upon presentation of a receipt is, strictly speaking, superfluous under Norwegian law. Under ICA section 7-8, subsection 1, the insurer is liable towards third parties if he pays compensation to others without having ascertained whether the claims of the third parties have been covered. It has nonetheless been retained out of consideration for the international market.
Subparagraph 6 relates to the insurer's right to set-off. The provision is taken from § 138, last subparagraph, of the 1964 Plan and corresponds to ICA section 8-3, subsection 2, but here the right to set-off is limited to the premium (as opposed to claims) from the same insurance contract during the last two years. Since set-off may be relevant to claims other than the premium, for example, for disbursed advances for previous damage which exceeds the repair invoice, the expanded right to set-off in the Plan has been retained. However, it is reasonable to limit the right to set-off to claims which arise from the insurance contract for the ship in question, since it is not possible to require the mortgagee to keep abreast of premium arrears or other claims which arise for the assured's other ships. Furthermore, it is reasonable to operate with a certain time frame. The rule implies that, with respect to premium arrears, the insurer may not count on the right to set-off against future compensation for more than two years' premium arrears.
The time limit is linked to payment of the compensation. This may entail some inconveniences if there are two years of premium arrears at the time of the casualty. In that case, the insurer will not simply be able to deduct these arrears in the compensation to be subsequently paid. The insurer must, however, have the opportunity to draw up an advance calculation as soon as the extent of the casualty has been established, and set off two years' arrears in that calculation. It is furthermore a condition that the right to set-offs may only be used once per casualty. The insurer may not, in the middle of a dragged-out settlement of claim, prepare successive advance calculations and compensate more than two years' premium arrears altogether.
The limitation on the right to set-offs does not only apply to payment of total loss compensation when the mortgagee is to be paid in full, but also to payment of compensation for damage. From the point of the view of the mortgagee, it is of fundamental importance that the insurance ensures at all times that the

shipowner has the necessary funds to carry out repairs so that the ship may be kept in operation.

Section 8, subsection 1, of the ICA also contains a provision which limits the insurer's right to set off claims against the assured. Only due premiums from the same or other insurance contracts with the insurer may be set off. This provision does not fit into marine insurance and has therefore not been adopted in the Plan. Consequently, the insurer must therefore have the right to set off any claims according to the ordinary set-off rules.

Chapter 8.

Co-insurance of third parties

§ 8-1. Rights of third parties against the insurer

This paragraph corresponds to § 127 of the 1964 Plan and ICA section 7-1, subsection 3, and section 7-2.

Under ICA section 7-1, subsection 3, insurance relating to ships is for the benefit of any holder of a registered title, a mortgage or other registered security in the ship. In the event of a sale of the object insured, a mandatory co-insurance protection furthermore covers the buyer under ICA section 7-2. Co-insurance for the benefit of other categories of third parties must be explicitly agreed, cf. ICA section 7-5.

In the Plan, ICA's solution has been maintained as regards mortgagees, regardless of whether the right is registered, cf. § 7-1 of the Plan. However, for other third parties the basic principle of the Plan is that these third parties are not co-insured unless co-insurance has been explicitly agreed, cf. § 8-1, *subparagraph 1*. This applies also to those third parties who have an automatic co-insurance protection under ICA section 7-1, subsection 3, and section 7-2. The solution concords with § 127, subparagraph 1 of the 1964 Plan. It is based on a wish to protect the owner from a situation where parts of the compensation have to be paid to co-owners or others with registered rights in the ship without the assured having cleared this in advance.

Questions of relevance for the protection of contractual mortgagees are exhaustively regulated in chapter 7. The rules in chapter 8 essentially apply when, in exceptional cases, a specific and explicit agreement is concluded to the effect that the insurance shall also apply for the benefit of other third parties than the contractual mortgagees, cf. subparagraph 1. The most frequently occurring example is in connection with insurance of drilling rigs and other offshore installations, cf. § 18-9. Also owners of equipment etc. which, according to § 10-1, subparagraph 1 (b) is comprised by the ship's hull insurance may, however, also want status as a co-insured, cf. below.

As mentioned initially in chapter 7, the basic principle in the 1964 Plan was that third parties who were co-insured under §§ 127 *et seq.* had an independent

protection in relation to the insurer. The new Plan adopts the reverse point of departure: co-insurance under § 8-1 is not independent, which means that a co-insured third party must accept identification in accordance with the same pattern as the mortgagee, cf. the reference to the identification rules in § 3-36 to § 3-38. The reference is the same as the one used in § 7-1 for a mortgagee, and reference may therefore be made to the explanatory notes to this provision. Additionally, as regards identification with the helpers of the responsible assured, and between the co-insured third party and the person effecting the insurance, reference may be made to the explanatory notes to § 7-1. The same goes for the insurer's right to invoke limitations of strict liability vis-à-vis a co-insured.

Nor will a third party who is co-insured under chapter 8 obtain any rights at the expense of the mortgagee's rights under chapter 7.

In marine insurance third party interests will in particular be relevant for hull insurance. In this connection there may be a whole series of third parties with economic interests in the ship's capital value, for example, a buyer who has taken over the ship, or who has entered into an agreement to buy the ship at a price which is lower than the valuation, a long-term charterer who has entered into a contract on favourable conditions, a repair yard which has a lien on the ship as security for the repair invoice, or a holder of a maritime lien. If any of these categories are to be co-insured under the owner's insurance, this must thus under § 8-1, subparagraph 1, be explicitly agreed. The same applies to third parties who own or have a security interest in equipment on board the ship. According to § 10-1, such equipment will be covered by the ship's hull insurance. However, the question whether the relevant third party is co-insured will have to be decided by § 8-1.

Subparagraph 2 states which rules in chapter 7 will be similarly applicable to co-insurance according to § 8-1. The reference to § 7-3, subparagraph 1, relating to claims handling and determination of compensation supersedes § 131 of the 1964 Plan. Under § 131 of the 1964 Plan, the rule was that the assured was not bound by decisions related to the claims adjustment or the claims payment if the insurer knew, or ought to have known, who the assured was. This rule has been deleted. If the assured wants a better position, this has to be agreed with the insurer. If not, the insurer may pay the compensation without the contribution of the co-insured.

The reference to § 7-4, subparagraph 6, relating to the insurer's right to set offs, supersedes § 132, subparagraph 3 of the 1964 Plan. This entails that a co-insured third party will have the same right as the mortgagee to limit the insurer's right to claim a set-off. Under the 1964 Plan, his rights were more extensive, given that there was no two-year time limit in contrast to the provision in § 7-4, subparagraph 6.

§ 8-2. Duty of disclosure

This paragraph corresponds to § 128 of the 1964 Plan.
Where a third party is co-insured, his rights will depend on the existence of a valid insurance contract. A failure to fulfil the duty of disclosure on the part of the person effecting the insurance may invalidate the insurance contract wholly or in part, cf. chapter 3, section 1, of the Plan, and a co-insured third party must accept that the insurer invokes this rule, despite the fact that no fault attaches to the third party.
The provision in § 8-2 regulates the case where a third party is in possession of information that has a bearing on the insurer's assessment of the risk. If the third party knows that the insurance is being effected in his favour, he has the same duty as the person effecting the insurance to give the information he has to the insurer, and his negligence will be assessed under the general rules relating to the duty of disclosure contained in the Plan, cf. *subparagraph 1*. This provision is taken from § 128, subparagraph 2 of the 1964 Plan. The rule means that on this point there will be a difference between mortgagees and other co-insured parties, given that a mortgagee will not be subject to any duty of disclosure under chapter 7.
§ 128, subparagraph 1 of the 1964 Plan imposed a duty on the person effecting the insurance to inform the insurer whether the assured knew that the insurance was effected. If the person effecting the insurance intentionally or negligently had failed to give the information he should have given, the relevant third party was to be regarded as being aware of the insurance and having failed to disclose the information which he should have disclosed, cf. § 128, subparagraph 2, second sentence. These provisions have been deleted. It is sufficient to establish a duty of disclosure for the co-assureds who are aware of the fact that the insurance is effected: if a co-assured is unaware of the insurance, it is hardly conceivable that he has failed to comply with the duty of

disclosure (or other duties) in a blameworthy manner. In that event, the insurer can only invoke § 3-4 relating to cancellation of the insurance.

The effect of a co-assured's failure to fulfil his duty is that he risks losing his insurance cover according to the same rules that apply in relation to the person effecting the insurance. This concords with the solution in the 1964 Plan. The rules in § 128 of the 1964 Plan, however, did not take a direct stand on the question of whether other assureds would lose their right under the insurance if the co-assured concerned neglected his duty of disclosure. In such cases other assureds should not be identified with the one who neglects his duties, unless the co-assured in question is the one who has the decision-making power concerning the running of the ship, cf. the reference to § 3-37 in § 8-2, subparagraph 2. In that event, the identification rule in § 3-36 shall also apply: if the co-assured has delegated all or part of his authority so that the conditions for identification under § 3-36 are met, faults on the part of the person who has been given such authority must be placed on a par with faults on the part of the co-assured himself in relation to the other co-assureds. The provisions in § 3-37 and § 3-36 basically do not apply to the duty of disclosure, but the reference entails that the criteria for identification shall apply similarly. Normally, however, the co-assured will not be in such a situation that there is any question of identification.

The provision only governs the co-assured's neglect of his duty of disclosure. This has to do with the fact that these rules are aimed at the person effecting the insurance, and that a special authority is therefore required to impose a duty of disclosure on the co-assured. The rules relating to the duty of care, on the contrary, are aimed directly at the assured. If a co-insured third party fails to comply with any of these duties, the insurer will therefore be entitled to invoke these rules directly.

According to § 129 of the 1964 Plan, the rules relating to the loss of the assured's rights vis-à-vis the insurer were similarly applicable to acts and omissions on the part of the person effecting the insurance if the object insured was in the custody of the person effecting the insurance or with someone holding it on his behalf. This rule applied regardless of whether the assured was at fault. This rule is superfluous, given that the co-insurance of a third party's interests is, as a rule, not independent, cf. above under § 8-1. In that event, the assured will under any circumstances lose his rights if the person effecting the insurance neglects his obligations.

§ 8-3. Amendments to and cancellation of the insurance contract

This paragraph corresponds to § 130 of the 1964 Plan and ICA, section 7-4, subsection 1.

According to ICA section 7-4, subsection 1, a co-insured third party has, as mentioned, a far-reaching protection against the assured or the insurer amending or cancelling the contract. In the Plan, however, it has, in accordance with the solution in the 1964 Plan, been decided to give the person effecting the insurance a far-reaching authority on behalf of a co-insured third party. However, under the 1964 Plan, the authority was limited to such situations where the insurer neither knew nor ought to have known that the person effecting the insurance was not authorised to make any decisions regarding the insurance. This rule has been superseded by a general rule to the effect that amendments or cancellation may be invoked vis-à-vis the co-insured party. Where the co-assured appears in the policy, the insurer will always know who he is. The limitation under the 1964 Plan to the right of the person effecting the insurance to make decisions regarding the insurance will therefore not be of any great significance in itself. If the co-insured party wants a stronger position, this will have to be agreed with the insurer.

§ 132, subparagraph 1, first sentence of the 1964 Plan, contained a rule to the effect that the insurer could, vis-à-vis the assured, invoke his rights against the person effecting the insurance when the latter defaulted on his obligation to pay premium. This provision has been deleted. It follows from the reference to § 3-38 in § 8-1, subparagraph 1, that there shall be full identification between the co-insured third party and the person effecting the insurance. It furthermore follows from the current paragraph that the insurance contract may be cancelled with effect for a co-insured third party.

§ 132, subparagraph 2 of the 1964 Plan, dealt with § 119 and § 120 regarding the lapse of the right to premium. These provisions have been deleted, and § 132, subparagraph 2, consequently becomes superfluous.

§ 8-4. Co-insurance of third parties. Extended cover

This paragraph is new.

The provision gives extended protection compared to chapter 7 and §§ 8-1 *et seq.* due to the fact that the co-insured third party is not identified with the negligence of the person effecting the insurance or the negligence of the

assured. The independent cover may be used both in relation to a co-insured mortgagee and a co-insured party with other interests.

The wording is taken from ICA, section 7-3, subsection 1, but the provision also and in actual fact concords with the supplementary covers that already exist in the market under the title "Extended insurance on mortgagee's interest". The purpose of this provision is to protect third parties against the insurer invoking faults or negligence that are regulated in chapter 3 and in § 5-1. This means that the insurer can neither plead breach of the duty of disclosure on the part of the person effecting the insurance, nor a failure to meet the obligations of care on the part of the other assureds, e.g. the violation of a safety regulation. If the insurer cannot invoke breach of the duty of care on the part of the other assureds, he obviously cannot invoke breaches of such regulations by someone who has been delegated a decision-making authority from the assured, so that in relation to the latter assured an identification shall be made in accordance with § 3-36. However, the co-insured party must accept an identification under § 3-36, subparagraph 2, if he himself has the decision-making authority for the running of the ship and in this connection delegates functions of significance for the insurance to others.

Nor does the provision contain any protection of the position of co-insured parties if the person effecting the insurance fails to pay premium. In that event, the insurance will lapse according to the ordinary rules in chapter 6.

Furthermore, the rules in chapter 7 shall apply if the third party is a mortgagee, and the rules in chapter 8, if the insurance concerns anything other than the mortgagee interest.

Like co-insurance under § 7-1 or § 8-1, co-insurance according to § 8-4 is limited to the owner's insurance. If a third party needs a cover which stands on its own feet, he must take out an independent insurance of the mortgagee interest or any other interest, if relevant.

Chapter 9.

Relations between the claims leader and co-insurers

General

Chapter 9 contains rules relating to the relationship between the claims leader and the co-insurers. In practice, both hull insurances and the separate insurances against total loss are covered with a number of insurers who separately take on a portion of the risk. Each of these partial insurances is based on an independent agreement and the insurers issue separate policies.
As a main rule, an owner does not want to negotiate the insurance conditions with each individual insurer, but confines himself to reaching an agreement with one individual insurer (the rating leader), or with a few insurers. Such agreements are normally accepted automatically by the others. The relationship between the rating leader and the other insurers is not regulated in the Plan.
Additionally, as regards questions which arise during the insurance period - first and foremost questions in connection with casualties, salvage and the claims settlement - one of the insurers (the claims leader) will normally represent all of the insurers vis-à-vis the assured. The basis for this is often contained in what is known as a claims-leader clause. However, the 1964 Plan established a few explicit rules relating to the relationship between the claims leader and the other insurers, and these rules have essentially been retained in the Plan. § 147 of the 1964 Plan, which provided the right to sue the co-insurers at the claims leader's venue, has, however, been incorporated in § 1-4, subparagraph 1 (c) of the Plan for insurances with a Norwegian claims leader, and in subparagraph 3 for insurances with a foreign claims leader.
Furthermore, the claims leader's authority has been expanded, see first and foremost § 9-3, and new rules have also been introduced relating to the question as to how to deal with the claims leader's disbursements in the event of the co-insurer's bankruptcy, and relating to the claims leader's right to interest on disbursements in § 9-10 and § 9-11, respectively.
Questions that have not been regulated must, as before, find their solution on the basis of business considerations on a case-to-case basis. In the event of

conflicts, it will be necessary to fall back on any agreements that may have been entered into, possibly supplemented with general background law.
The rules contained in this chapter will only be applicable with respect to co-insurers who have also given insurances on Plan conditions.

§ 9-1. Definitions

This paragraph corresponds to § 139 of the 1964 Plan.
Subparagraph 1 defines the term "claims leader" as the one who is stated as claims leader in the policy. In practice, "claims leader" is used as the designation of the insurer who is to have contact with the assured in case of a casualty, who is to be in charge of the salvage operation and effect the claims settlement. The powers which under § 9-3 to § 9-9 are conferred on the claims leader are essentially in accordance with what has in practice been deemed to fall within his scope of competence.
Under English law a distinction is normally made between "rating leader" and "claims leader". The Norwegian term "hovedassurandør" under the Plan comes closest to "claims leader".
Subparagraph 2 deals with the other co-insurers.
The provisions in chapter 9 concern all types of insurance covered by the Plan, but they are most relevant for hull insurance. If several types of insurance have been effected for the ship, one claims leader must be designated for each type of insurance. The claims leader for hull insurance therefore only binds the hull insurers, not the insurers who have taken out hull or freight-interest insurance, war-risk insurance or loss-of-hire insurance.
As the rules in § 10-13 and chapter 14 show, however, there is a close connection between the ordinary hull insurance and the hull- and freight-interest insurances. It would therefore be practical if the decisions made in the relationship between the assured and the hull insurers were binding to a certain extent on the interest insurers as well. According to § 14-3, subparagraph 4, a certain community has therefore been established between the claims leader under the hull insurance and the interest insurers as well.
The possibility of entitling the claims leader for hull insurance to bind the loss-of-hire insurer was discussed during the revision, but rejected as inexpedient. In exceptional cases, an owner may choose an insurance package with one claims leader for all the insurances. The rules in chapter 9 shall apply in such cases as well. Normally, the claims leader for the hull insurance will then be

designated as the overall claims leader, with the result that he will bind all other insurers, even if he himself merely has a share in the hull cover.
The rules contained in this chapter 9 are based on the assumption that one of the insurers has explicitly been designated as claims leader when the insurance is effected. The assured is thus free to decide whether he wants to cover all parts of the interest with independent insurers, who will in that case not be mutually dependent on each other. If he wants the advantages that the claims-leader arrangement entails, he must therefore designate one of his insurers as the claims leader and notify those among the other insurers whom he contacts. It is not a condition that the claims leader knows who the co-insurers are, however, although certain rules will not become effective unless the assured has notified the claims leader about who the co-insurers are, see in particular § 9-4 about notifications of casualties.

§ 9-2. The right of the claims leader to act on behalf of the co-insurers

This paragraph corresponds to § 140 of the 1964 Plan.
Subparagraph 1 establishes the general principle that the claims leader has the right to bind the co-insurers in relation to the assured to the extent that this follows from §§ 9-3 *et seq.* The arrangement is based on an extensive relationship of trust among the insurers, and it is therefore emphasised that when acting on behalf of all the insurers, the claims leader shall, as far as possible, take into consideration all the insurers' interests. He is also required to consult the co-insurers whom he knows of, provided that time permits and the matter is important. 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.
What shall be deemed "matters of importance" and which co-insurers the claims leader should contact where the insurance is split into many parts must be decided according to the practice that has developed.
Subparagraph 2 contains a rule concerning the authority of the claims leader that is of great importance. If the claims leader has vis-à-vis the assured taken a decision that falls within his scope of authority under § 9-3 to § 9-8, the decision will be binding on all co-insurers in relation to the assured.
This authority shall only apply within the area where the rules contained in this chapter confer authority on the claims leader. However, there is nothing to

prevent a provision in the agreement with the assured to the effect that the claims leader shall have either a wider or a more restricted scope of authority than indicated by the Plan. The extent of this authority will depend on an ordinary interpretation of the agreement. According to the general principles of the law of contract, the steps taken by the claims leader vis-à-vis the assured will be binding, provided they come within the agreed scope of authority, and the assured does not have any reason to believe that the interests of the co-insurers have been disregarded.

Steps which fall outside the scope of authority will, however, never be binding on the co-insurers, regardless of what the assured might believe about the claims leader's right to act.

If the co-insurers wish to reduce the authority that the claims leader has under the rules in this chapter, they must make an explicit reservation to that effect on the conclusion of the agreement.

If the claims leader, or one of the other co-insurers, due to special circumstances is prevented from reacting to negligence on the part of the assured or the person effecting the insurance, this will obviously not affect the legal position of the other co-insurers.

§ 9-3. Lay-up plan

This provision is new.

According to § 3-26, the assured shall if the ship is to be laid up draw up a lay-up plan and submit it to the insurer for his approval. It is not practical to send this plan to all the co-insurers; it must be sufficient that it is approved by the claims leader. Other notifications pursuant to chapter 3, e.g., if a ship proceeds beyond the trading areas according to § 3-15 must, however, be sent to all insurers.

§ 9-4. Notification of a casualty

This paragraph corresponds to § 141 of the 1964 Plan.

According to § 141, subparagraph 1, of the 1964 Plan, the assured could only bind the co-insurers by giving notice to the claims leader if he had in advance requested the claims leader to pass on any notifications to the co-insurers. This provision has been amended: the point of departure is now that notifications of a casualty may be given to the claims leader with binding effect on the co-insurers, cf. *subparagraph 1*. It is of great practical importance for the assured

that, in the event of a casualty, he can look to the claims leader. If the co-insurers want a stronger position, this must accordingly be agreed separately.
Subparagraph 2 regulates the claims leader's obligation to pass on notifications to the co-insurers. This provision corresponds to the 1964 Plan, but it is emphasised that the notice shall be passed on "as soon as possible". The provision is in the nature of a regulation. No sanctions are imposed if the claims leader procrastinates. Under the rule in subparagraph 1, such procrastination will be for the co-insurers' risk and accordingly of no concern to the assured. A failure to give notification will accordingly not affect the assured's claim against the co-insurers. If a co-insurer suffers a loss as a result of the failure to give notification, e.g., due to the fact that he does not manage to submit his objections to the claim in time, he may have to claim compensation from the claims leader under the general rules of the law of damages.
In practice, it will often be the broker who notifies the claims leader of the casualty, and the broker will then normally notify the co-insurers at the same time. If there is an assumption or it has been agreed with the co-insurers that notifications to the co-insurers under subparagraph 2 may be passed on through the assured's broker, delay on the part of the broker will be the co-insurers' risk. If they suffer a loss, they will have to lodge a claim against the broker. They cannot recover the loss from the claims leader and refer him to recourse against the broker.
The paragraph is first and foremost aimed at notification of casualties, cf. § 3-29, the submission of claims for compensation, cf. § 5-23, and demands that the claims adjustment be submitted to an average adjuster, cf. § 5-5. But the provision also becomes significant during the further proceedings in connection with claims settlements. A co-insurer who is within the scope of the paragraph cannot plead that the assured has forfeited a right by passivity, provided that the assured has vis-à-vis the claims leader done whatever is necessary to maintain his right.
However, the provision does not apply in relation to § 5-24 relating to limitation. The limitation period must therefore be prevented from running in relation to each individual co-insurer. A different rule would be inexpedient and would in reality have to be based on the assumption that a judgment in an action against the claims leader would also have effect vis-à-vis the co-insurers. Nor is it sufficient to prevent the limitation period from running in relation to the co-insurers that the claims leader grants the assured an extension of the

limitation period. However, the assured may stop the period from running by bringing a collective action against all the co-insurers in the venue of the claims leader, cf. § 1-4, subparagraph 1 (c) and subparagraph 2.

§ 9-5. Salvage

This paragraph corresponds to § 142 of the 1964 Plan.
The provision authorises the claims leader to decide if, and in the event how, a salvage operation shall be conducted, and to decide when to abandon the salvage operation or whether the insurer shall exercise his authority to limit his liability for the salvage costs by paying the sum insured. The claims leader's authority on this point is in accordance with standard practice.
§ 142 of the 1964 Plan furthermore authorised the claims leader to decide what regulations should be issued in accordance with § 53. This authority to issue regulations has, however, been deleted in the new Plan, and the provision has therefore been deleted.

§ 9-6. Removal and repairs

This paragraph corresponds to § 143 of the 1964 Plan.
The provision authorises the claims leader to grant requests for removal to a repair yard under § 3-20 and to make decisions concerning repairs.
The claims leader's decision-making authority in relation to § 3-20 is new and is based on practical considerations. The decision-making authority relating to repairs, however, is taken from the 1964 Plan and concords with established practice. However, § 143, second sentence, of the 1964 Plan stipulated an exception as regards the question whether the ship was to be repaired at all, or whether the assured's request for condemnation should be granted. The reason for the exception was that the insurers might have conflicting interests, in particular where the claims leader had granted the owner a loan which he could perhaps only be expected to repay in the event of a total loss. The individual co-insurer had therefore been given an independent right to have the question of condemnation further elucidated by a removal of the ship for a survey under § 166, or by inviting tenders. The provision had to be seen in conjunction with § 43 of the 1964 Plan, which gave the co-insurers the right to limit their liability for damage resulting from the removal by refusing to accept it. In practice, the relationship between insurers who had and insurers who had not approved the removal caused problems: if the removal later proved successful with the result

that the ship was not condemned, the question arose as to whether an insurer who had not approved the removal was to benefit from the result of the removal despite the fact that he had not borne any part of the risk associated with it. The co-insurers' right to make an independent evaluation of the question of removal furthermore raised a communication problem: when the decision regarding a removal was to be taken, all the insurers concerned had to be notified. This could result in delays in a situation where quick decisions were of the essence. In order to prevent such conflicts of interest between the insurers and delays as regards the condemnation decision, the Plan has authorised the claims leader to decide also this question of removal on behalf of all the insurers.

It follows from § 9-2, cf. § 14-3, that the claims leader's authority according to § 9-6 applies both in relation to the co-insurers under the hull insurance and in relation to the insurers under the separate total-loss insurances. However, the authority does not apply in relation to the insurers under other insurances. These insurers may therefore demand that the ship be removed according to § 11-6. The co-insurers' claims leader must in that event have the right to choose whether the hull insurers and the separate total-loss insurers shall participate in the removal or avoid further liability by paying the sum insured, cf. § 4-21.

§ 9-7. Provision of security

This provision corresponds to § 144 of the 1964 Plan.

Subparagraph 1 regulates the claims leader's right to commission from the co-insurers upon the provision of security. Under § 5-12 the insurer does not have any obligation to provide security for the assured's liability to third parties. However, in practice the hull insurer will to a large extent provide security for the assured's liability for salvage awards and collision compensation whenever required in order to prevent an arrest of the insured ship. Such security will normally be provided by the claims leader. The 1964 Plan did not contain any rules relating to commission for the claims leader when he in this manner in the interests of all the insurers provided guarantee for collision liability vis-à-vis the person suffering the loss or for salvage award vis-à-vis the salvors. However, it was accepted in practice that the claims leader was entitled to a commission, and this practice has now been explicitly established in the Plan. The commission is set at 1% and is charged once and for all, not on a perannum basis.

The claim for commission is subject to the condition that the guarantee is provided in "the interest of all the insurers". This will be the case if the person suffering the loss or the salvor demands a bank guarantee, and the claims leader is required to provide a guarantee vis-à-vis the bank because the assured is unable to obtain a guarantee himself against ordinary commission, cf. in this respect former practice.

Subparagraph 2 corresponds to § 144, subparagraph 1, of the 1964 Plan, but has been somewhat simplified. The provision discusses the effect of the claims leader informing the co-insurers that he has provided security for the assured's liability for collision compensation or salvage award. Such notification deprives the assured of his position as creditor as regards cover of the liability invoked against him. If a co-insurer who has received such notification pays compensation in connection with the liability directly to the assured, he risks having to pay all or part of the amount again to the claims leader to the extent that the latter's provision of guarantee has become effective.

Subparagraph 3 corresponds to § 144, subparagraph 2 of 1964 Plan and limits the co-insurer's right to plead a set-off when security has been provided. As mentioned in the explanatory notes to § 7-4, the insurer has the right to set off any claims against the assured in respect of insurances on Plan conditions. This applies to outstanding premiums as well as to any other claims arising from the insurance contract. Unless otherwise agreed, a co-insurer's right to plead a set-off against the assured may also be exercised against the claims leader when the guarantee has become effective and the claims leader has a right of recourse. However, according to the Plan, the co-insurer's right is subject to the condition that he has reserved the right to plead a set-off prior to the provision of security. In practice, the claims leader will normally decide the question regarding security alone, which means that a co-insurer cannot expect to have the opportunity to make a reservation in connection with a notification of the provision of security according to § 9-7. Accordingly, a co-insurer who wants at all times to be certain that his claims against the assured can be set off must keep the claims leader continuously informed of the magnitude of his claim.

It is only against the claims leader that the right to plead a set-off may be forfeited. If the assured himself covers the liability and the guarantee is released, the co-insurer may, of course, plead a set-off, cf. ICA section 8-3. Subparagraph 3 applies to all types of claims arising out of the insurance contract, including claims pertaining to other vessels.

It is conceivable that a creditor directs his claim against another ship that belongs to the assured, and that the claims leader for the ship to which the liability pertains provides security in order to obtain the release of the other ship. The rules in this paragraph shall also apply to such a situation, given that no express condition has been stipulated to the effect that the purpose of providing security is to prevent the arrest of the insured ship.
The rules shall only apply, however, where the provision of security concerns a claim of the type described in this paragraph, i.e. collision liability and salvage award. If the claims leader has provided security for a claim of a different type, e.g., a repair yard's outstanding claim, the co-insurers have an unconditional right to plead a set-off without making any special reservation in accordance with subparagraph 3.

§ 9-8. Disputes with third parties

This paragraph is identical to § 145 of the 1964 Plan.
The claims leader should also be empowered to represent all the co-insurers in the event of legal proceedings against a third party. The paragraph authorises him to make the necessary decisions in connection with the legal proceedings and may be invoked vis-à-vis the courts as a basis for a general power-of-attorney to conduct the case. However, 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.

§ 9-9. Claims adjustment

This paragraph is identical to § 146 of the 1964 Plan.
The provision establishes that it is the claims leader who is responsible for the claims adjustment. In accordance with established practice, this is binding on the co-insurers, provided that it is in accordance with the insurance conditions. This implies that the claims leader's discretionary decisions are binding, provided that the discretion is deemed to have been exercised within the framework of the conditions. If, on the other hand, he, for example, includes as recoverable a loss which, according to a correct interpretation of the Plan and the policy, must be considered to be excluded, the co-insurers will not be bound. The co-insurers must also be entitled to contest a discretionary decision

if the discretion has been exercised in such a manner that it must in reality be regarded as a departure from the conditions in favour of the assured.
In practice, it is customary for the claims leader's authority to be specified in a so-called claims-leader clause. In such clauses, the claims leader's authority will often be extended in relation to § 9-9, e.g. to also cover "settlements" or "compromised total loss settlements". An extension of the claims leader's authority has been regarded as a market question which must be solved in the individual insurance, and not through a general extension of the scope of § 9-9.

§ 9-10. Insolvency of a co-insurer

This paragraph is new.
The provision regulates the risk of a co-insurer becoming insolvent when the claims leader has had disbursements, part of which the co-insurer should have paid.
According to the *first sentence*, the assured bears the risk of a co-insurer's insolvency if the claims leader has had disbursements on behalf of the assured. This concords with what has been assumed in practice, and may be justified by considerations of consequences. If no claims leader had been appointed, the assured would have had to bear the risk of the co-insurer's insolvency, because the other co-insurers would merely have had pro-rata liability in proportion to their share of the insurance. This would have applied both to the actual payment of compensation and to the disbursements which were made by the assured to third parties in connection with the claims settlement, and which were recoverable under the insurance, e.g., disbursements for survey. The claims-leader system should not give a different result in an insolvency situation. The system indicates that the assured is the claims leader's principal, which means that under general rules of contract law he is liable for disbursements made by the claims leader on his behalf.
Disbursements made by the claims leader on behalf of all the co-insurers, on the other hand, are in principle no concern of the assured's. In that event, it must therefore be the joint risk of all the insurers if one of the co-insurers becomes insolvent. The *second sentence* establishes that the insolvent co-insurer's share of these disbursements shall, at least initially, be borne by the claims leader. Whether and to what extent the expenses shall subsequently be distributed among the solvent co-insurers will depend on market practice.

The provision raises the question of the distinction between disbursements made on behalf of the assured and disbursements made on behalf of all the insurers. Disbursements related to the claims leader's consideration of, e.g. questions regarding salvage award, collision liability or grounding liability, are made on behalf of the assured. The same applies to the guarantee commissions. These are disbursements which might just as well have been made by the assured himself, but which the claims leader has undertaken on his behalf as a service. The same must apply to expenses for technical or legal assistance, and for that part of the claims leader's claim for a fee that is tied to an average adjustment, if any. The rest of the claims leader's fee claim in connection with the claims adjustment and expenses for survey is, however, claims or disbursements on behalf of all the insurers. If the claims leader leaves it to an average adjuster to make a claims adjustment in accordance with § 5-2, the average adjuster's fee must also be no concern of the assured's.

§ 9-11. Interest on the disbursements of the claims leader

This paragraph is new.

In practice, the claims leader will often make disbursements on behalf of all the insurers, e.g. for surveys. Accordingly, there is a need for a rule which entitles him to charge interest on these disbursements. For disbursements made by the claims leader on behalf of the assured, the duty to pay interest for the co-insurer is in actual fact already implicit in the assured's right to interest under § 5-4. However, it has sometimes been difficult in practice to gain acceptance for this view in the international insurance market. The provision therefore explicitly establishes that the duty to pay interest also applies to disbursements made by the claims leader on behalf of the assured.

It is the duty of the claims leader to show loyalty as regards the recovery of outstanding disbursements. If the policy interest rate according to § 5-4 is for a period of time higher than the market rate, he may not sit on the claim in order to thus increase the interest payable by the co-insurers.