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INSURANCE

Marine cargo insurance

Study by the UNCTAD secretariat

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CONTENTS

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INTRODUCTION

(i) At its fourth session (July 1970) the Committee on Invisibles and Financing related to Trade, taking note of a decision of the Trade and Development Board 1/ and pursuing its own programme of work in the field of insurance, requested the secretariat to "undertake a study on marine insurance to serve the requirements both of the Committee [on Invisibles and Financing related to Trade] and of the Working Group on International Shipping Legislation". 2/

(ii) To meet the requirements of the Working Group on International Shipping Legislation which, at its first session, held in 1969, included marine cargo insurance in its programme of work, the study was to involve research into the present operational methods and practices of international cargo marine insurance and to analyse these methods and practices with a view to permitting conclusions as to the adequacy of the present structure and possible improvements in favour of shippers in general and shippers in developing countries in particular.

(iii) The programme of work in insurance of the Committee on Invisibles and Financing related to Trade is mainly based on the principle that "developing countries should take steps to enable their domestic insurance markets to cover in these markets - taking into account their national economic interests as well as the insured interests - the insurance operations generated by their economic activities, including their foreign trade, as far as is technically feasible". 3/ To meet the requirements of such an insurance policy, the study, in addition to its general analytical part as described in the preceding paragraph, would have to deal with the specific problems arising in the marine insurance markets of developing countries and the ways and means of promoting these markets.

(iv) For the above reasons, the present study on marine insurance is divided into two parts, the first dealing with the current terms and practices of international marine cargo insurance and the second with specific marine insurance problems in developing countries.

1/ Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 16 (A/7616), part three, para. 103.

2/ Official Records of the Trade and Development Board, Tenth Session, Supplement No. 4 (TD/B/318), paras. 91 and 92.

3/ Conference resolution 42 (III), para. 1.

(v) As regards Part One of the study, it should be recalled that marine cargo insurance is the oldest form of modern insurance. Over the ages it developed special features stemming from perils and risks inherent in shipping operations and influenced by a specific legal background, mainly based on British common law. Although established long ago, many of these features still exist and continue to influence the insurance protection provided against the economic consequences of cargo loss or damage in international trade. Knowledge of the normal methods and practices under which international marine cargo insurance is carried out, as set out in Part One of this study, may prove very useful to present and prospective marine insurers in developing countries, who might wish to operate in conformity with the generally accepted international standards. On the other hand, the description of the current structure is likely to pave the way for improvements, aimed in particular at better protection of the commercial and transportation interests of the developing countries.

(vi) Regarding the specific problems of developing countries as providers of insurance, the fact is that in most classes of insurance (including fire, motor vehicle, accident and crop insurance), the developing countries can implement the general insurance policy recommended by UNCTAD, that of covering locally the risks generated by their economic activities in a straightforward and direct manner, through appropriate regulations and an active promotion of their domestic insurance markets. A domestic insurance market should be made strong enough to provide adequate insurance cover of the risks arising in the country. If this condition is fulfilled, the right to purchase insurance directly abroad should be restricted. Measures should also be taken to encourage local investment of insurance funds derived from local insurance transactions. The UNCTAD secretariat has prepared a number of studies analysing ways and means of implementing this general policy.

(vii) For some classes of insurance (including reinsurance and marine cargo insurance) international considerations tend to complicate a straightforward implementation of the policy advocated in the preceding paragraph. An UNCTAD secretariat study 4/ analysed the problems facing the developing countries in the specific field of reinsurance and arrived at some conclusions which were considered by the Committee on Invisibles and Financing related to Trade at its sixth session and recommended for adoption by the Governments of developing countries. 5/ Part Two of

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4/ Reinsurance problems in developing countries (TD/B/C.3/106/Rev.1), United Nations publication, Sales No. E.74.D.II.

5/ Official Records of the Trade and Development Board, Thirteenth Session, Supplement No. 4 (TD/B/464), annex I, resolution 7 (VI).

the present study has a similar purpose, namely to analyse the specific problems of developing countries in the field of marine cargo insurance and to suggest appropriate solutions to these problems, with a view to promoting a larger participation of the insurance markets of developing countries in international marine cargo insurance.

(viii) The study in its present form is a revised version of an earlier draft prepared by the UNCTAD secretariat. In the preparation of the draft the secretariat was assisted by Mr. E. Pinckernelle (Hamburg); Mr. J.P. Panthakey (India); Mr. G. Elhakim (Egypt); Mr. P.A. Segueira (Iraq); Mr. A. Kunz (Switzerland); Mr. R. Rivera (Mexico); and Mr. G. Chéreau (France). The draft was revised in the light of comments and observations made during the meeting of an informal expert group held in Geneva from 3 to 7 March 1975, in which the following experts, acting in a personal capacity, participated: Mr. R. Dulzaides, Gerente de C.A. "La Seguridad" (Caracas); Mr. Gamal Elhakim, General Manager of the Kuwait Reinsurance Company; Mr. Hitoshi Ikeya, Overseas Manager of the Tokio Marine and Fire Insurance Company Limited (Tokyo); Dr. Ricardo Kuffler, Presidente de la Cámara de Aseguradores Maritimos (Buenos Aires); Mr. Alwin Künzler, Chairman of the Cargo Committee of the International Union of Marine Insurance (Zurich); Mr. Pierre Latron, Legal Adviser, Syndicat des Sociétés Françaises d'Assurances Maritimes (Paris); Mr. Ernesto Martínez, Senior Vice-President of the F.G.U. Insurance Group (Rizal/Manila); Mr. Carl McDowell, President of the American Institute of Marine Underwriters (New York); Mr. Stephen Ogunniyi, General Manager of the Marine and General Assurance Company Limited (Lagos); Mr. Raymond Porter of Lloyd's (London); Mr. Alexander Rankov, Director in the State Economic Enterprise "Bulfracht" (Sofia); Mr. R. Sidharta, General Manager of UMUMRE PT Reasuransi (Jakarta).

(ix) The secretariat is grateful to all who helped it to prepare and finalize the study by making a most valuable contribution, but is alone responsible for the final text of this document.

PART ONE

INSURANCE PROTECTION PROVIDED TO GOODS TRANSPORTED BY SEA

Chapter I

THE ROLE OF MARINE CARGO INSURANCE IN WORLD TRADE

Perils of the sea and other reasons for cargo loss or damage

1. The need to insure property against the economic consequences of its loss or damage is a fundamental feature of modern society. The more valuable the property and the more serious consequences of its loss or damage to the owner, the more imperative it is to insure it adequately. Particularly in the case of property representing substantial investments in commodities, manufactured goods and industrial plants, and involving outside financing, the owner of the goods as well as his creditors insist on ample insurance cover. Credit is becoming more difficult to obtain without such cover. Thus, merchants insure their goods in stock, farmers their crops, and industries their products, plants and machinery. The scope of the insurance cover sought in each case depends, of course, on the type of perils to which the goods concerned are exposed and on the degree of security their owners wish to attain.

2. Goods in transit are generally exposed to considerable additional perils, against which adequate insurance cover becomes even more essential. This explains the early development of marine insurance, which has been practised by merchants since the early days of overseas trade. It continues to play a very important role in world trade. In practically every import or export transaction, besides the main partners - the seller and the buyer of the goods and the indispensable carrier - insurers have an essential role to play both economically, through providing insurance cover and settling claims (with or without recourse against third parties possibly liable for loss of or damage to cargo), and financially, where the marine insurance policy is an ancillary document indispensable to the negotiability of the goods while in transit.

3. The main purpose of marine cargo insurance being to provide insurance protection against the economic consequences of cargo loss or damage, this study will now proceed to review the perils to which cargo is exposed and the loss or damage it can suffer while in transit.

4. The carrying vessel may sink or capsize with cargo on board as a result of such fortuitous accidents of the sea as heavy weather conditions, hurricanes and tycoons. The loss of the vessel may also be caused by its unseaworthiness, or by a navigational error on the part of the master or pilot. Finally, the sinking of the vessel may be the result of an act of a third party (in the case of collision) or of an act of war, riots and other warlike operations.

5. While these and other accidents are a joint menace to ship and cargo, the cargo itself can be totally lost in a number of cases when the ship is only damaged or has not been exposed to any danger at all. For instance, cargo may fall from the sling or otherwise fall into the water at the time of loading or unloading, without salvage or reconditioning being possible. Several parties may be at fault. Deck cargo, including containers, may be washed overboard or jettisoned in heavy weather or if the goods endanger the safety of the ship or other cargo.

6. Goods may be arrested (and not released), seized by the authorities, lawful or otherwise, or be the subject of litigation. They may be damaged by acts of war or warlike operations. Destruction of cargo on board at the moment of loading or discharging occurs in rare cases through the action of strikers, locked-out workers, saboteurs, or in riots or civil commotions. Theft of complete units on board or at the time of loading or unloading is a total loss of a part of the consignment. A special case of total loss is the non-arrival of goods due to overcarriage, (inadvertent carriage beyond the port of destination) unless the cargo or part of it is found later.

7. The incidence of damage to, or partial loss of, goods carried is much more frequent and on the whole more costly than in the case of total loss of cargo. The causes, kinds, and consequences of damage are many. Rust and/or oxydation damage may occur through contact with freshwater, seawater, ship's sweat or other cargo. Some goods are easily damaged by heating. Tea, coffee, cocoa, raw sugar, rice, coconuts, palm kernels, groundnuts and similar products are most susceptible to this kind of damage. Stowage of such goods requires knowledge and experience. Proper ventilation is of vital importance to the safe crossing of different climatic zones. There is imminent danger of sweat damage when a cargo is loaded in hot weather and the humidity of the air is high, and the ship then enters a more moderate zone or even encounters low temperatures.

8. Breakage occurs frequently, machinery being the main sufferer. If machines cannot be repaired at destination, even slight damage often causes heavy losses. In fact, if the machines must be returned for repair, the labour situation in the country of origin, added to freight and costs incidental to their return and reshipment, can make the repair more expensive than a complete replacement. Breakage of china, earthenware, enamelware, and glass, unless occasioned by a major accident, is generally kept within reasonable limits if the packing is adequate. The same applies to liquids in bottles or leakage of drums or casks. But breakage, bending, denting and scratching occur frequently on uncrated motor vehicles, tubes or other heavy materials.

9. Some goods are particularly vulnerable to theft and pilferage. The most coveted items are watches, cutlery, plated articles, expensive spare parts and accessories for motor vehicles, high quality textiles, clothing and clothing accessories and, most of all, canned food and bottled spirits, in other words anything that has a relatively high value per weight and volume, is scarce and rare in the countries of destination or in ports of call or can easily be disposed of on the black market

10. Loss or damage often arises under a rule peculiar to shipping called "general average". Goods are sacrificed in order to free the ship and cargo from an imminent common danger. This sacrifice can result in loss, damage, or both. Deck cargo is jettisoned to make the ship more stable (less top-heavy) in a storm and is generally lost. A ship is lightened when she is stranded or has run aground and is being refloated. The goods can be damaged more or less seriously. They can be damaged or completely spoilt by water when fire breaks out on board ship. Although under the York-Antwerp Rules applicable to general average, loss or damage may have affected only a few consignments on board the ship, and/or parts and equipment of the ship, all participants - the shipowner and all shippers, even those who had not sustained damage - must contribute proportionately to their vested interest in the venture.

11. The types of loss or damage to cargo, and their possible causes, that shipowners, exporters, importers and underwriters have to deal with in the daily routine of their business have been covered in the preceding paragraphs. There are, of course, other dangers, risks and perils, other kinds of damage and other causes. The variety of cargo shipped from and to all parts of the world is practically unlimited. New commodities come on the market. Technological development cuts both ways. Cargo is carried which by its nature is more susceptible to loss or damage. Ships tend to become larger and the higher value of goods shipped is higher. The vessels, their machinery and their equipment are becoming more powerful but also more complicated. The same applies to navigation instruments. Navigable waters become more crowded, voyages take less time, turnover of cargoes is heavier, labour becomes scarcer though sometimes better trained, but often reinforced by less qualified hands, and more frequently working under stress. New kinds of loss or damage occur which were not experienced before. Therefore the somewhat conventional list of possible incidents given here is far from complete.

Marine insurance instrumental to world trade financing

12. As already mentioned in paragraph 2 above, marine insurance plays an important role in the financial field as well. In order to understand this role, the prevailing pattern of financing in world trade should be described. What interests the exporter

of merchandise is to get back the price he has paid as quickly as he can, for the fastest possible turn-over of his capital is as vital to him as it is to any other businessman. On the other hand, he cannot part with the documents of title to the goods, particularly the bill of lading, before he has received payment. There are forms of payment, however, almost as valuable to him as ready cash. If a seller is sure that his draft has been or will be accepted and can therefore be negotiated with his bank, it is as though the buyer has paid cash. The consignee, too, is naturally interested in a quick turn-over of his funds. He, therefore, wishes to postpone payment of the goods until he has sold them and has received payment in his turn. This is where bank credit comes in.

13. The sales contract between the seller and the buyer will contain a payment clause. The most important and most frequently used clauses arise under collection arrangements and documentary credits respectively. Under a collection arrangement, the bank acts on the instructions of the exporter, and the documents of title representing the goods are exchanged at the importer's domicile and payment is made there. The services of a correspondent bank or of a branch office of the bank are required. In the case of a documentary credit, on the other hand, the instructions to the bank are given by the importer and the documents of title are exchanged, and payment made, at the exporter's headquarters. Here, too, the services of a correspondent bank will be required.

14. A collection arrangement may provide for (a) an exchange of the documents for payment in cash, the respective draft containing the clause "Documents against payment" (D/P); (b) delivery of the documents against acceptance of the seller's draft at 30, 60, 90 or more days after sight. The draft will then contain the clause "Documents against acceptance" (D.A.A.).

Under the documentary credits clause documents may also be exchanged for cash, but much more business is transacted under an agreement between the bank and the buyer whereby the bank, through its overseas branch or a correspondent bank, promises to accept, honour, or negotiate bills of exchange - drafts - drawn by the seller.

The seller or buyer can rarely dispense with the services of a bank. This is true where the buyer is a branch of the seller or vice versa, or where the volume of shipments is relatively small measured by the financial capacity of the seller or the buyer or where two-way dealings are involved, shipments of industrial or consumer products or investment goods going one way and, in exchange, raw material or tropical products going the other. The two parties may, in such cases, settle the balances through current account.

15. The technical details of the collection arrangement and the documentary credit, and how they are wound up, need not be gone into here. However, it should be stressed that the banks are very strict about the documents involved, for the two following reasons:

1. strict compliance must be insisted upon because otherwise the banks run the risk of the documents being refused and the drafts unhonoured by the consignees on the grounds of a discrepancy between the documents and the instructions given, or in the event of a claim for damages being made, which may happen frequently in a falling market;
2. the documents are more often than not negotiated for the purpose of financing the underlying commercial transaction.

In this connexion an important principle is generally observed, that of a strict separation of the "documentary aspect" of the commercial transaction from the "goods aspect", the banks being concerned only with the former and never with the latter. A bank deals in finance, not in goods. Normally it has no expert knowledge of the usages and practices of a particular trade. The documentary character of a banker's credit, as used in the international trade, cannot be overemphasised and on it is based the predominance of the two main instruments, the bill of lading and the insurance policy.

16. The complete set of documents (bill of lading, insurance policy, contract of sale, commercial invoices, consular invoices, certificates of origin and, in some trades, other documents as well) is not only a means of collecting the purchase price or of satisfying the bank that the goods are shipped and insured, but is also a security for financing of the commercial transaction enabling the bank to bridge the time lag between shipment and arrival of the cargo. In the case of a collection arrangement, the exporter would ask his bank to make an advance on the security of a documentary bill handed over to the bank for collection. In the instance of a bank's documentary credit, the exporter would ask the correspondent of his customer's bank, or his own bank, or a different bank altogether - depending on the conditions the banks can offer him - to discount or purchase the draft which he is entitled to draw under the documentary credit opened in his favour by the consignee. In all these cases the banking institutions will satisfy themselves first that the goods represented by the documents are insured, either by the surrender of an insurance policy together with other documents, or through confirmation by an insurer that such goods are adequately covered under a marine insurance contract.

17. In normal circumstances a foreign trade bank will not negotiate a draft unless it is accompanied by a complete set of documents. There are cases, of course, where banks are in current business relations with importers of high standing and will dispense with the production of policies or certificates for each individual shipment. They will then satisfy themselves that an open cover for their clients exists and the insurers will have undertaken not to make any payment of claims without the bank's consent, but insurers will always have to honour a policy or certificate with the bearer if the bearer clause is written into the policy or if the policy is endorsed in blank or to the bearer. In international trade, however, commodities often change ownership more than once while on their way from the place of production to the place of destination, and as it is not possible to deliver them physically to the respective buyer, the documents which are used as substitutes for the commodities are handed over. In these cases a duly endorsed policy or certificate is required in the same way as the bill of lading and the other documents. In several countries the policy, although it may be assignable, is not a negotiable instrument proper, but in the practice of business it is accepted as such. In fact, both the bill of lading and the insurance policy represent the cargo, or respectively the right to claim for lost or damaged cargo and, therefore, can be negotiated in the same way, but more easily of course, than the cargo itself.

Chapter II

MARINE INSURANCE COVER AVAILABLE FOR CARGO LOSS OR DAMAGE

Insurance interest in the goods

18. The perils to which cargo is exposed have been discussed in Chapter I. In so far as these risks are insurable, the cargo owner may take out an insurance against all or at least some of them. The shipper generally has a free hand in deciding what cover to choose among those offered by the marine insurance market, unless, of course, his consignee or banker have committed him to insure his consignments on specific terms. The types of marine insurance covers available, their limitations and the forms of contracts are analysed in this Chapter.

19. In international trade quite a number of people or corporate bodies may require the services of marine insurance in securing the indemnification of the cargo owner for any financial loss he may suffer if his goods are lost or damaged in transit, while awaiting transportation, or while waiting in the port of destination for delivery or transit to the consignee's warehouses. In insurance, the party effecting the insurance is generally called "the proposer" until the contract is in force. Then, the proposer becomes "the Insured" or "the policy holder". He must have at the time of the loss an insurable interest in the goods to be transported. Such insurable interest exists if he benefits from their preservation, that is to say from their safe arrival in an undamaged condition, or if he were to suffer a financial loss through their being lost or damaged.

20. The insurable interest in the goods can be original or derivative. The owner of a cargo at the time of shipment, or at the beginning of the journey, has an original insurable interest and is, therefore, entitled to insure that interest. Mortgagees, financing banks and confirming houses have an interest up to the amount of their mortgage, advance payments or surety offered. The ownership of the goods is sometimes passed more than once from one party to another and, therefore, the policy is made assignable in the same way as the bill of lading.

21. It is incumbent upon the party requiring the insurance cover to disclose to the insurer every material fact he is entitled to have concerning the risk proposed for coverage, including the nature of the cargo, its quantity and packing and the name of the carrying vessel. This information is intended to enable the underwriter to decide whether he is prepared to accept the risk and against what premium. This obligation imposed on the proposer is fair and reasonable because the underwriter does not conduct investigations into every risk offered. He has therefore to rely in general on the proposer's statements and good faith, and usually receives from him alone the necessary information concerning the risk.

22. The proposer may negotiate the insurance cover directly with the insurance company of his choice or avail himself of the services of an insurance broker. Insurance brokers are expected to act in the interest of the insured. They give advice as regards the most suitable cover for a particular risk, present all the features of such a risk to the underwriters and negotiate on behalf of the proposer the terms, conditions and rates of the insurance cover. However, many markets operate without the intervention of brokers and prefer a direct relationship between the insurers and their clients.

Types of marine cargo insurance cover

23. In all insurance markets providing marine cargo insurance cover, there are many types of cover available, ranging from comprehensive to restricted. Such a broad range of cover reflects the vast variety of goods transported and the different needs of the shippers, the insurance being tailored to these needs. The various types of cover offered in different countries have much in common, although the insurance clauses are often not identical, depending *inter alia* on the basic principles of the marine insurance law of each country. Some countries follow the "all risk" principle, which means that all risks are insured unless specifically excluded by the clauses or the wording of the insurance contract. Other countries apply the principle of "named perils", which means that only such perils are covered as are expressly named in clauses, or otherwise, in the text of the insurance contract.

24. Although in the end the two systems provide the same types of cover, the principle of named perils as practised in the United Kingdom is the one most commonly used. In fact, the British market has for long been the international centre for marine insurance and British practices in this field have influenced many countries on all the continents. It may therefore be useful at this point to provide an analysis of the system of clauses set up by the London market, which has been accepted and practised by a relatively large number of countries.

25. In Britain, cargo was traditionally covered on "with average" (WA) or "free from particular average" (FPA) terms. The perils insured against were generally those of the "ship and goods" (SG) policy as specified in the Marine Insurance Act, 1906, a policy form that was used both for hull and cargo. Its scope was limited because it was based on practices and usages developed at a time when damage to cargo played a minor part as compared with total loss, constructive total loss, general average, and salvage charges. The policy was formulated in the days of sail when cargo was lost or heavily damaged mostly in grave accidents due to storm, fire, collision, and stranding rather than during an uneventful voyage when nothing significant happened to the ship herself.

26. But long before the Marine Insurance Act was passed, competition on the world markets had drawn the attention of importers, wholesalers, retailers and even consumers, to ordinary damage and deterioration in quality. Profit margins of traders grew narrower and smaller losses or damage could therefore no longer be considered minor trading risks. When first introduced the "ship and goods" policy proved highly unsatisfactory to cargo owners. This led to the introduction of the FPA and the WA Institute Cargo Clauses mentioned above. But even then underwriters strove to restrict the cover to protection against loss and damage caused by fortuitous risks and to avoid cover against ordinary losses and those which are inevitable, such as natural wastage of certain commodities by evaporation, ullage, ordinary breakage of brittle commodities, and ordinary leakage of receptacles.

27. Subsequently, free competition on the London insurance market occasioned a considerable extension of the FPA and WA clauses, free agreements between the contracting parties being quite legal under the provisions of the Marine Insurance Act, 1906. In a large variety of wording of new policy clauses, a number of "extraneous perils" were included in the cover, such as petty theft and pilferage, short-delivery and non-delivery, sling and hook risks, mud and/or oil damage, freshwater damage, mould, mildew, and vermin damage, damage by other cargo and sweat damage. Admittedly, the demand for cover against a number of these extraneous risks was and is quite legitimate. In other cases, it was and is not, especially when loss or damage is caused by trading risks such as loss of market, delay, deterioration through inherent vice, penalties, or loss, damage or deterioration due to mistakes in manufacture, production, or packing, or damage done by the shipper himself in good or in bad faith. Such risks were considered as uninsurable, and some of them still are.

28. The widest cover provided in marine cargo insurance is the "all risks" cover. For quite a long time conservative underwriters opposed official recognition of the "all risks" clauses for cargo, but then such cover was frequently given by the majority of the market. In view of the pressing demand for a cover of all insurable risks which were outside the sphere of influence of the insured - especially those risks which were not caused wilfully or through gross negligence of the cargo owner, nor connected with inherent vice, delay, or loss of market - the Institute "all risks" cargo clauses were drawn up and officially approved for "voluntary" adoption. It was hoped that, if the clauses came into general use, all reasonable demands of the shippers would be satisfied; "reasonable demands" in this context meaning demands that did not trespass upon the field of uninsurable risks.

29. The following two clauses of the "all risks" cover are typical of this kind of cover:

- This insurance is against all risks of physical loss or damage to the subject-matter insured but shall in no case be deemed to cover loss, damage, or expense proximately caused by delay or inherent vice or nature of the subject-matter insured.
- Claims for loss or damage within the terms of these clauses shall be payable irrespective of percentage.

The word "risks" above is used deliberately. Cover is not given for "all loss or damage arising from whatsoever cause", but only for losses by external fortuitous causes. Claims for "ordinary" or "inevitable" losses - which do not constitute "risks" - are not to be met. Loss, damage, or expense proximately caused by delay, or inherent vice, or nature of the goods are expressly excluded. Therefore, inherent vice which manifests itself in packing material is not covered either.

30. Owing to the manner in which they have evolved from each other, by successive extension, the three prevailing types of marine cargo insurance cover, namely the "free from particular average (FPA)", the "with average (WA)" and the "all risks" cover, have a great number of clauses in common, but on the other hand, some very substantial differences. Regarding the former, all three types of cover provide comprehensive insurance against:

(a) total loss of the whole cargo, constructive total loss of same, and total loss of any apportionable part.

(b) direct liability for general average sacrifice, and general average contributions.

(c) salvage charges, particular charges, and sue and labour charges.

(d) particular average irrespective of percentage of loss, if it is caused by the vessel being stranded, sunk or burnt, or if the loss is attributable to fire or collision, or to discharge of cargo at a port of distress.

31. It is precisely in the field of particular average due to causes other than those mentioned in point (d) that the three main types of marine cargo insurance cover differ most. In fact, particular average (which is a partial loss or damage of cargo proximately caused by an insured peril) is fully covered by an "all risks" contract, with the exception of ordinary losses, such as customary ullage or loss in weight. A "with average" cover includes particular average only if it attains a certain stipulated percentage and only as a result of heavy weather while a "free from particular average" cover excludes partial losses completely, unless, of course, they are due to circumstances described in point (d).

32. Thus, for instance, the "all risks" clauses include, while the "free from particular average" and the "with average" clauses exclude (unless due to circumstances stated above) cover for partial losses caused by leakage and breakage, heating, fresh water damage, damage by other cargo, petty theft, pilferage and non-delivery. All three prevailing types of marine cargo insurance cover exclude, of course, loss or damage caused by delay or inherent vice or nature of the goods, as well as loss or damage caused wilfully by the cargo owner. Short delivery or non-delivery, referring to the failure of cargo, or of part of it, to arrive at the destination without any evidence to show the cause of loss, can be insured as extensions to "FPA" and "WA" clauses, but these are not covered unless they are specially mentioned as insured perils.

33. In France and other European countries the "all risks" policy covers all losses except those listed explicitly in the policy as being excluded. Under such a policy all the insured has to do in case of a claim is to furnish evidence that loss or damage occurred; should the insurer wish to refuse the claim on the grounds of it being due to an excluded risk, it is then up to the insurer to prove this fact. The "FPA"policy in these countries is based on the opposite principle and only covers those risks which are expressly listed in the policy, thus excluding all other loss or damage. Both types of policies, however, cover contributions to general average, in a very comprehensive manner.

<u>Specific trade clauses</u>

34. The clauses of the three above types of cover are designed to meet the requirements of shippers of general merchandise. They can be applied to all sorts of goods. In some special cases, however, shippers have found these standard clauses inadequate for the protection of their interests. Special conditions had to be negotiated and agreed between shippers and underwriters to provide policy conditions adapted to the specific nature of the particular commodity shipped.

35. Marine markets generally consider it appropriate to agree with the respective trade associations on standard forms of clauses. The perils insured against under these clauses are typical for each commodity and are concurrent with losses from fortuitous risks. The flour trade clause, just to give an example, covers "all claims whatever - irrespective of percentage - for damage to the flour insured, arising from all dangers and hazards of transportation including loss from short weight through bags being broken or torn in transit, but excluding claims caused by weevils, insects, worms and grubs". Such specification of details of the perils covered and perils excluded cannot be provided for except under such specific trade clauses. Similar trade clauses exist for such items as coal, corn, jute, rubber, sugar, frozen products and timber.

36. The trade clauses adopted by the Institute of London Underwriters drawn up jointly with Lloyd's and the Liverpool Underwriters' Association apply to shipments to and from the United Kingdom. However, many markets use these clauses or similarly tailored clauses because they have, in practice, proved to serve the interests both of the traders and the underwriters alike. They make unmistakably clear what is and what is not covered.

Cover of war and political risks

37. In the aggregate "all risks" Institute Cargo Clauses there are two which exclude war and other political risks, namely cargo loss or damage due, on the one hand, to capture, seizure, arrest, restraint or detainment, and, on the other, to strikes, labour disturbances, riots or civil commotion. Should either of these clauses, or both, be deleted in the contract, then the current Institute War Clauses and/or the current Institute Strike Clauses are deemed automatically to form part of the contract in question.

38. It does not appear necessary to quote here the wording of the relevant Institute War and Strike Clauses. However, there are varieties of the former in order to cover the many forms of transportation. The Institute War Clauses simply reinstate the exclusions of war risks and include expressly loss of or damage due to hostilities, war-like operations, civil war, revolution, rebellion, insurrection or civil strife arising therefrom, as well as mines, torpedoes, bombs, or other engines of war. The Institute Strike Clauses reinstate the exclusions of strike risk, and include expressly theft and pilferage or other loss of, or damage to the property, by the persons listed in the exclusion. It is worth noting in this connexion that the American War Risk Clauses exclude arrest or seizure of the cargo by the country of origin or of destination. Roughly speaking, war cover is only given while the cargo is waterborne, i.e. excluding pre-shipment and post-discharge risks, a limitation which, incidentally, does not apply to mines and derelict torpedoes. Special provisions are made for the case of a trans-shipment. In the Institute Strike Clauses no "waterborne" restriction to the protection is made.

Commencement (attachment) and termination of cover

39. Although originally marine insurance only covered the cargo while waterborne - whence its name - today the cargo owner often requires cover for the entire period his goods are en route from his supplier to their final destination. In order to ensure inclusion in the cover of the inland portion of the transit at both ends, the "warehouse to warehouse" clauses were drafted. These clauses vary according to the means of transport on the main voyage. In special trades a "transit clause" is used

instead of a "warehouse to warehouse" clause. All kinds of clauses provide cover for goods insured from the moment they leave the warehouse of the shipper named in the policy and continue while goods are transported by land, awaiting shipment, during loading operations, sea-voyage, discharging and inland transit, until final delivery to the consignee at the place indicated in the policy.

40. A time-limit is granted to the insured after arrival of the goods at the port of destination for the discharging operation and customs clearance. The time-limit stipulated is longer if the final destination is inland or at least outside the port area. The coverage terminates on expiry of the applicable time-limit or on delivery of the goods to the consignee at the place of destination as stated in the policy, whichever occurs first. However, the cover may be extended beyond the time-limit provided for in the clauses, but notice must be given to the insurer before expiry of the cover within the meaning of the respective clause and on payment of an additional premium.

The marine insurance policy

41. A marine insurance contract is usually made in writing and referred to in the insurance policy. The policy serves as evidence of the existence of the contractual relations between the insured and the insurers and sets forth what these relations are. In some countries the marine insurance contract is not valid unless it is incorporated in a marine policy. This is the case in the United Kingdom and other countries which follow the Anglo-Saxon pattern of law. In other countries, such as France and Germany, the marine insurance contract acquires validity through the mere consent of the parties. In spite of this difference in the legal character of the insurance contract, the marine insurance policy is universally recognized as a necessary document for the transaction of international trade.

42. Though the particulars which every cargo policy should contain are a matter of national legislation of the country where the policy is issued, it is common practice to include the following items:

(i) name of the insured or name of the person or body who contracts the insurance on his own or another's behalf;

(ii) name of the insurer or insurers;

(iii) subject-matter of the insurance, namely the goods shipped or to be shipped, their nature, packing, quality, etc.;

(iv) the sum insured;

(v) voyage or period of time, or both, as the case may be;

(vi) name of the vessel or description of another conveyance by which the goods are transported, including the proposed sailing date or the attachment of the risk;

(vii) perils covered and excluded;

(viii) loss payee, if property is mortgaged;

(ix) in addition, policies may or may not show the premium rates agreed.

43. As regards point (iii), the subject-matter of a marine cargo policy are the goods which are transported for commercial purposes. The term "goods" does not include personal effects belonging to a passenger. Some goods, by reason of their nature, cannot be covered by an ordinary insurance policy. This applies to livestock, bullion, specie and other valuables, explosives, and narcotic drugs, (illegal shipment of the matter being uninsurable altogether). Although goods shipped on deck are not normally covered by an ordinary policy because of their exposure to greater hazards, they can be declared specifically in order to enable the underwriter to estimate the peril and fix an appropriate rate. In a number of countries goods which are subject to deterioration or leakage must be specifically described unless the general policy expressly covers these kinds of goods. In all cases the subject-matter must be clearly described in the policy in order to make it identifiable in case of loss or damage.

44. The sum insured must correspond to the insured person's interest in his cargo because a marine insurance policy is a contract of indemnity. Its object is to place the person insured in the same financial position as he enjoyed before the occurrence of the loss. A cargo insurance contract must not serve as a means to realise a profit. The insured, however, is the only one who can estimate his financial interest because he has calculated the price of the goods shipped, the cost of shipment and the expected profit if the goods arrive safe and sound. Considering the principle that it is not the cargo that is insured but the owner's interest in it, underwriters will not contest the cargo owner's valuation unless the expected profit included in the valuation appears exaggerated because it is unobtainable in the market even in the most favourable circumstances. This would turn the policy into a gambling contract, at least for that part of the sum insured which exceeds the value of the cargo and the reasonably expected profit.

45. Most single shipment policies are voyage policies and the ports of shipment and of destination are shown in them. Preliminary and additional voyages, if any, must also be roughly designated. Cargo "time policies" are mostly "declaration" policies or "open covers", and for the purposes of the insured shipper, certificates or endorsements are issued which become part of the shipping documents. The name of the vessel is important for identification of the cargo in case of loss or damage.

First, the quality of the vessel or conveyance affects the premium rate. Secondly, the name of the vessel must also be declared in order to enable the insurer to check his aggregate commitment on that vessel; in fact, he may be committed through various channels on shipments of several cargo-owners using the same vessel.

46. The statement in the policy of the perils insured and the perils excluded is all-important because in overseas trade most policies are made payable at destination, and the settling agent must be aware of the conditions stipulated. He can only do so if the conditions are specified in the policy or certificate. The insertion of the premium rate is optional in most countries. When policies change hands by assignment, as they frequently do in international trade, the shipper may consider the rate which forms part of his calculation as a matter of his own concern.

Cargo policies

47. The above explanation of the particulars to be contained in policies refers mostly to ordinary single shipment policies. However, for the convenience of both shippers and underwriters the markets have developed labour-saving systems which at the same time ensure that the merchant is covered at any time for all his shipments if he is an exporter, and for all consignments if he is an importer, or for a certain group of his business, as soon as he runs the risk, even before he becomes aware of his interest in a cargo, or in case he or his staff inadvertently fail to insure or declare his interest prior to the attachment of the risk, or omit the insurance or declaration altogether. These systems are:

(i) floating policies;

(ii) open covers;

(iii) block policies.

48. A floating policy is issued for an agreed value covering all future shipments of the insured. The shipments must however be declared. Each time a shipment is made the sum insured by the policy is reduced according to the value of the goods. This procedure continues until the total value of the goods declared has reached the sum insured as indicated in the floating policy, in other words, until the policy expires. The premium is paid in advance for the full sum insured and not on each shipment. A floating policy always contains the following stipulations:

- a limit per conveyence or ship's bottom;
- a classification clause if sea-transit is covered, according to which additional premium will be charged if the vessel is overaged or has not the highest classification;

- a location clause limiting the insurer's liability for cargo while awaiting shipment;
- a scale of premiums applicable to the different kinds of goods.

Whenever required, certificates of insurance are issued for individual shipments which - though not strictly in the legal sense but for all practical commercial and banking purposes - take the place of the master policy. Upon expiry the floating policy may be renewed or a new cover taken out.

49. "Open covers" are generally used nowadays because they offer certain advantages as compared with floating policies. It is not convenient for a merchant to arrange insurance for each shipment separately, or to have to renew a floating policy each time it expires. A higher amount in the latter is no alternative because the total premium must be paid upon the signing of the policy. Open covers are either effected for a 12-month period and therefore renewed annually, or on continuous basis. They may include a scale of premium rates for the various commodities covered, and they must also contain a cancellation clause, especially since the premium rates may prove inadequate in the course of the year. Nevertheless, it is considered a great advantage by the insured to have, failing a cancellation, fixed rates for calculation purposes. If the cover includes war-risks, and/or strike risks, the period of notice is seven days for the risk. For marine perils it is mostly 30 days although in some markets the period of notice is very short indeed (48 hours in the United States).

50. According to English law an open cover is not legally enforceable but is considered a gentleman's agreement between the insured and the underwriter, the former being bound to declare all the shipments falling within the scope of the cover, and the latter to accept the declaration and to sign policies issued accordingly. On the Continent and in other countries similar covers exist and serve the same purpose by giving the same service. There, the arrangement takes the form of a policy - under a variety of names - and the underlying insurance contract is legally enforceable. If the cover is a policy, the individual documents are not single policies - although they go sometimes under that name - but certificates of insurance, the character of which was explained above under the heading of "Floating Policies". Under an open cover, or the continental equivalent, premiums are mostly debited in current account and settled at the end of a period of three months.

51. "Block policies" - sometimes called "merchandise floaters" - are mainly used for small but numerous sendings dispatched by hand, mail, road, rail, or on inland waterways. Here, too, there is an upper limit per consignment but, as in an open

cover, no aggregate limit for all sendings. Declarations are made periodically, mostly once a year. A flat premium is charged and is adjusted on every renewal according to the turnover and loss experience of the previous year. No certificates are issued. The block policy is little used in overseas trade.

Limitation of cover

52. Among the limitations and restrictions contained in floating policies and open covers the following are the most important:

(i) the classification clause;

(ii) the location clause.

No policy or agreement is likely to exist without these.

53. The classification clause is included in all floating arrangements - policies or otherwise - which contain a scale of premium rates, the reason being that the rates are calculated for ships placed in the highest class by one of the Classification Societies. The class of a ship is found in the shipping register of the society concerned. The codes for first-classed and lesser classed ships vary from society to society. For an underwriter, the age, type and state of maintenance of a vessel are important. In addition, an underwriter may take into account the flag, the ownership and the management. The name of the master - which in the age of sail was always given when a marine risk was proposed to the underwriter and, indeed, appeared in each policy far into the age of steam - is of no importance these days as regards age, type and fitness of the ship, since the underwriter now relies upon the shipping registers.

54. Classification societies exist in many shipowning countries. At present, the main internationally recognized classification societies are:

American Bureau of Shipping	(USA)
Bureau Veritas	(France)
Germanischer Lloyd	(Germany)
Lloyd's Register of Shipping	(UK)
Nippon Kaiji Kyokai	(Japan)
Norske Veritas	(Norway)
Polski Rejestr Statków	(Poland)
Register of Shipping of the USSR	(USSR)
Registro Italiano	(Italy)

An insurer who takes out an open cover or floating policy normally insists on a provision in the cover requiring that shipments must be effected on classified vessels, and that the age of the vessel does not exceed 20 years, (lately reduced to 15 years) or else an additional premium has to be agreed. The clause used for this purpose is the classification clause.

55. Location clauses are necessary in order to limit the insurer's liability to an amount which he is able to bear, taking into account his reinsurance arrangements. The amount for which cover is opened represents the limit of the sum to be insured for any one shipment "per bottom". Goods awaiting shipment may accumulate in a particular locality, or several consignments might be sent off for shipment by different steamers from the same port or even from the same dock or jetty. These will accumulate if they belong to the same person insured and will fall under the same cover. To avoid this the Institute of London Underwriters drafted the location clause in which a figure can be inserted up to which amount such accumulation is covered, and it is for the insured to see to it that such accumulation is avoided. The sum to be insured in the clause may be the same as the limit of the cover or, by agreement, may be a somewhat larger amount. The amount applies only to preshipment risks and does not prejudice the shipper in respect of accumulations at the port of discharge or beyond. Insurers realise that it is impossible for the insured to have an influence on the flow of transportation overseas.

Chapter III

COST OF MARINE CARGO INSURANCE

Rating in marine cargo insurance

56. A number of factors influence the cost of marine cargo insurance, which explains why rating in this class of insurance business is mostly based on individual judgement and experience rather than on any uniform tariffs. In fact, the decision of an underwriter on whether to commit himself to a proposed marine cargo insurance cover and, if so, at what premium rate, is generally based on his evaluation of a series of factors of which the most important are the following:

- perils to be insured against, namely the type and scope of the cover sought;
- insured value of the cargo;
- nature of the commodity transported, and its packing;
- origin and destination of the goods;
- mode of transit and type of the carrying vessel;
- past loss record of the insured.

Scope of the insurance cover

57. As already mentioned in the preceding chapter, there are several types of insurance cover ranging from the broadest to the most restricted. It is important, of course, when calculating the premium, to take into account the perils the cargo is to be insured against. In general, the cheapest cover is for total loss only or "free of particular average"; next come covers "with average" but excluding extraneous risks; the most expensive is the "all risks" cover, especially when extraneous risks are included. Once the basic rate is established, additional charges must be made if such perils as breakage, leakage of receptacles, tearing of bags, theft, pilferage, rust or oxidation, contact with other cargo and damage by disinfection are to be included in the policy.

Insured value of the cargo

58. The premium of marine cargo insurance depends on the sum insured, which, in principle, must be equal to the insured person's interest in his cargo, because a marine insurance policy is a contract of indemnity. Its object is to place the insured in the same financial position which he enjoyed before the loss. This aim can only be achieved if the interest is fully insured, in other words if the insured value is not less than the cargo owner's interest in the subject matter. If the insured value is smaller, there is a case of underinsurance; unfortunately, insurers are often confronted with underinsured cargo when settling claims.

59. Undervaluation leads to underinsurance, and according to the law of most countries the underinsured portion of the risk is deemed to be covered by self-insurance and is treated accordingly. In case of total loss, the amount insured is paid to the policy holder, who, of course, will not be fully indemnified, that is to say he will not be in the same position in which he would have been had no loss occurred. The procedure in case of a partial loss is the same. If only part of the consignment is lost (say, 30 bags of coffee out of a lot of 100), the cargo owner will be paid that percentage of the whole amount insured as the lost part bears on the whole consignment (in the above example 30/100). In case of damage to cargo the settlement is equally simple, provided the damage can be ascertained in terms of percentage of the damaged goods.

60. A cargo insurance contract must not serve as a means of realising a profit when a loss occurs. However, the insured alone can estimate his financial interest because he has calculated the price and costs of the goods shipped and expects a profit if the goods arrive safe and sound. Considering the principle that it is not the cargo that is insured but the interest of the owner in it, underwriters do not challenge the cargo owner's valuation unless the expected profit included in the valuation appears exaggerated because it is unobtainable in the market even under the most favourable circumstances. This would turn the policy into a gambling contract, at least for that part of the sum insured which exceeds the value of the cargo and a reasonably expected profit.

61. Overinsurance can take two forms: double insurance and over-valuation. National laws provide, in general, for measures to correct both double insurance and overvaluation, because they are at variance with the principle that only true interests in a transport of goods can be insured, and, in the absence of such interests, insurance must be avoided.

62. Double insurance occurs mostly when a shipper takes out a cover in ignorance of the fact that another person or body, say, the supplier of the goods, has also insured the cargo for his own account or for account of whom it may concern. This will happen if the terms of the purchase contract are either ambiguous or have been misinterpreted, or if both parties have insured in order to be on the safe side. In the United Kingdom, France and many other countries, the insured is given an option to claim against the insurers in such order as he deems fit, but in practice each policy is ratably reduced, and a return of premiums is made on the amount of the reduction.

In some countries where the legal system is modelled on the old French law - which has not been valid in France since 1967 - only the earliest dated policy is valid and subsequent policies have to be cancelled and the premium returned. If two or more policies are issued on the same date, they have to contribute proportionately and the premium received in excess has to be returned proportionately as well.

63. Overvaluation, if a fraudulent act on the part of the insured, leads to cancellation of the policy, so that no claim is paid and no premium returned. An inadvertent overvaluation can be remedied by reducing the valuation to the actual interest the insured has in the shipment and the premium paid in excess returned. If the insurer claims fraud, which happens very rarely indeed, the onus of proof lies with him.

Nature of the cargo

64. The nature of the cargo is, of course, very important. High oxidizing cargo, such as some chemicals, and cargo which generates heat spontaneously, like oil seed extractions, are to be considered with caution. The degree of fire hazard involved will determine the rate. In practice stowage conditions on the ship greatly upset the hazard calculations; for instance, cargo stowed near the boiler walls greatly increases the chance of spontaneous combustion by producing unfavourable temperature conditions. Likewise, piecegoods stowed along ship's walls may increase dampness and consequent mildew formation. Contact with other cargo, for instance foodgrains stowed in close proximity to chemicals giving out obnoxious vapour, may render the foodgrains unfit for human consumption.

65. All the above factors cannot be ignored, and in given sets of circumstances may justify the loading of the rate. The same is true of packaging which can be a physical risk as well as a moral hazard, since inadequate packaging may invite pilferage. The underwriter must be informed of the quality of the packaging used and must also know what kind of packaging is required for each sort of cargo. If he knows the customer, he will have had some experience as to whether that particular insured prefers first-class packaging rather than save packaging expenses and pay higher premiums owing to deterioration of his loss record.

Voyage and carrying vessel

66. There are a great number of factors influencing the premium under this heading. As regards the voyage itself, the main elements involved are duration of the voyage, possible hazardous passages and expected variations in temperature.

67. As regards duration, the length of the voyage itself need not directly increase the insured hazard and thus affect the rate, because the Institute clauses and other policies always exclude consequences of delay and subsequent deterioration. Indirectly, however, a prolonged voyage contributes to aggravating the damage, either latent or otherwise, and thus increases the hazard. For example, the voyage from India to the United Kingdom via the Suez Canal normally took 15 days for a fast run, while routing via the Cape takes approximately 30 days, or twice the normal period.

68. Apart from aggravation of damage already present, or increase in possibilities of damage, the hazards of the sea are also increased, because the undertaking is exposed to the elements of nature for twice the normal duration and therefore, reasonably, calls for a loading. The principle would be the longer the duration the higher the rate, though not in the same proportion.

69. Regarding hazardous passages, certain voyages involve passage through dangerous waters and narrow straits where the chances of collision and grounding are great. However cautious the navigation, (excluding human failure), the chances are that visibility may be bad or the waters turbulent, thus increasing the risk of a casualty. Such factors are also taken into consideration by the underwriter when computing an equitable rate.

70. As regards temperature variations, voyages to, from or through the tropics, affect the rates because of a greater degree of temperature variations and humidity, in respect of certain cargo and also in respect of the nature of risks covered, such as mildew damage. Here the special skills and experience of an underwriter are required. The variations may be so great, almost from nil to 100 per cent, that it is almost impossible to enumerate them. For instance, temperature variations may have no effect on rates for machinery and machinery parts which are not subject to rusting,but edible oil in bulk may draw a high percentage of the basic rate as additional premium.

71. A second set of factors affecting rating is related to port conditions. Many ports have hydraulic or electric equipment to handle normal cargo, but apart from this limited machanization, most ports lack modern equipment such as fork lifts, conveyor belts, pneumatic machines to handle bulk cargo of grains and fertilizers, In a large number of cases the ships have to depend upon their own tackle, or even to unload on lighters. Nevertheless,the shipping trade is undergoing a drastic change. Palletization and containerization are bound to increase and represent a larger portion of total shipments, replacing whenever practicable the conventional loose package handling; major ports will, therefore, benefit from modernizing and improving their port facilities to handle palletized and containerized goods.

72. Due to increasing volumes in trade, most ports find it difficult to provide sufficient storage space. The only alternative for these ports is to expand vertically and have large warehouses. With the introduction of container traffic, however, vertical expansion may not solve the problem, since containers are better stored on hard ground, in piles of two or three. This, of course, requires vast areas of vacant land, with heavy mobile cranes to lift the containers.

73. A reliable watch and ward system helps to prevent theft and pilferage. Many ports have extended their activities without taking the follow-up measures of increasing their staff to safeguard cargo. Ports with a bad pilferage record are heavily penalized, if cover is required against theft, pilferage and non-delivery. Some ports are so notorious, that cover may not be available at all for certain types of cargo. For instance, cover against theft, pilferage and non-delivery of tea transported from India to Afghanistan via Karachi is not available unless a very high rate is paid.

74. On the other hand, ports which are properly equipped, have ample storage facilities and also maintain an adequate watch and ward system, benefit from specially low rates. Details of conditions in the various ports are to be found periodically in the Lloyds publications, and this information is readily available to the underwriters. American, French and other professional institutions also provide useful information of this type to their members.

75. The last factor, but a very important one, is the quality (the class) of the carrying vessel. The Institute of London Underwriters classification clause and similar clauses existing in other markets are guidelines for determining the degree of seaworthiness of the vessel. Ships complying with these clauses will generally be considered standard vessels and are insured at normal rates. For non-compliance with any of these clauses, either wholly or in part, carrying vessels attract an additional premium, depending upon the degree of hazard. Tonnage built during the Second World War is heavily penalized for its inferior construction and inability to stand the stress of weather, as proved by a large number of total losses in recent years.

76. Other non-classified vessels are also penalized for non-existent or insufficient navigation aids, construction not conforming with the requirements of the classification societies and low safety factor. Vessels over 30 years old (20 years on some markets), are considered a definite risk; insurers also view as risky the practice of converting old vessels into container ships. All the above cases justify a loading of the normal rates. On the other hand, special types of carrying vessels, specifically built for certain transports, improve the risk.

Loss record of the shipper

77. Another factor influencing the insurance premium is the proposer's reputation. If the proposal is made through a reputable broker, that alone may give the underwriter some assurance. True, bad accounts are sometimes found also among reputable shippers. Nevertheless, some shippers, as a matter of business tactics and calculations, prefer the principle of having the cheapest quality and supplier, and employing the cheapest packaging rather than preserving a good claims record and therefore obtaining the lowest insurance rates.

Individual risk judgement and tariff rating

78. In marine insurance, owing to the great variety of risks and perils to be covered, and to the different degrees of influence exercised by the aforesaid factors, two cargo risks are rarely identical. This makes it very difficult to set up scales of rates for each category of business. Each risk being different, it must be quoted on its own merits. On the other hand, practically none of the various factors enumerated above can be measured in figures, but the experience acquired allows for some sound judgement. There are, however, some marine insurance markets where tariffs have been introduced either on the basis of an agreement by the insurers themselves, or through the direct intervention of the Government.

Rating of war risks

79. In time of peace, war rates are purely nominal unless transit is effected within areas involved in local wars. War risks premium rates are issued by the London market and are amended from time to time in order to be adapted to the state of war or tension in various areas of the world. With the exception of the United States and some other markets, insurers all over the world apply the rates and conditions of the London market, and failure to follow these terms results in difficulties of finding reinsurance for such acceptance. Reinsurers insist on strict application of these terms and rates as a condition of their treaties or facultative reinsurance acceptances. The same applies to the rating of strike risks.

Influence of recoveries on rating

80. As will be shown in another chapter of this study, the carrier or other parties may in some cases be made responsible for cargo loss or damage within the limits of their professional liability. In such cases, the marine insurer takes recourse against the responsible third party by using his subrogation rights, and seeks to recover at least part of his claims paid, up to the amount of the total claim paid to the insured. However, most marine insurers tend to limit their recourses to major recovery cases as well as to straightforward ones, because litigation on a great number of minor cases may become very costly and offset the gains of recoveries. For obvious reasons, the expectancy of recoveries influences cargo insurance rates to a considerable degree.

Chapter IV

SETTLEMENT OF CLAIMS FOR CARGO LOSS OR DAMAGE

Claims for cargo loss or damage

81. Claims occur under all types of insurance, and payment of claims constitutes the main service rendered by the insurance industry. In property insurance, a claim is the demand for indemnification of a financial loss suffered by the insured party owing to an unforeseen event. In property insurance, it must be remembered, only the legitimate interest in the subject-matter can be insured and, therefore, only such legitimate interest can form the object of that demand, and not the property itself. This is why the settlement of the claim is not made in the form of a restitutio in naturalibus, that is to say a restitution of the lost or damaged object, but in money only. The cost of repair or reconditioning, if any, is also refunded in money.

82. In marine cargo insurance, claims can be made for three main kinds of losses: total loss, particular average and general average. Added to these are claims for sue and labour charges incurred by the insured. As claims procedures differ in each of these cases, they are dealt with separately in the following paragraphs.

Total loss claims

83. A total loss means that a cargo is either completely destroyed or so damaged that the owner cannot use it or dispose of it commercially. Cargo that is burnt or has sunk without there being hope of salvage, or which has otherwise lost its original nature, is deemed to have suffered a total loss. Cargo which is salvaged sound from a sinking or sunken ship but cannot be shipped to its destination is considered a total loss as well. As a rule, the fact of a total loss is hardly ever contested by an insurer. The sinking, burning or impossibility of disposal cannot give rise to much doubt, provided the facts are obvious or can be proved, which is mostly the case.

84. Loss of a cargo's original nature, however, is more difficult to establish. Differences of opinion may arise, for instance, as to whether or not foodstuffs or raw materials have become unfit for human consumption, whether unexposed files became exposed in connexion with an insured event, or whether machinery is broken or otherwise damaged, or simply not functioning, or is beyond repair. If the cost of repair or reconditioning and forwarding to destination exceeds salvaged value after reconditioning or repair, that would constitute a "constructive total loss". Whether cargo became a total loss or lost its original nature, or whether it is a case of particular average is often decisive in acknowledgement of a claim. That occurs whenever insurance is made "free from particular average, unless stranded ...".

85. In case of an obvious total loss the services of a surveyor can be dispensed with. This is the case, for instance, when the ship has sunk with her cargo on board, but in the event of a total loss due to the cargo losing its original nature, or in the case of

a constructive total loss, the surveyor's services become particularly important for it is not only his task to establish the extent of the damage, but also to verify the circumstances of the accident, in particular the actual cause of the loss.

Particular average claims

86. All damage sustained through insured perils, which is not a total loss within the meaning of the term as defined above, is considered as particular average. The procedure for dealing with claims for particular average is based on the fact that conditions on which marine insurance is contracted are many and varied, and that in case of a loss it is just as important to discover its cause as it is to establish its extent. This is one of the reasons why the cargo owner will have to give notice to the insurer or his agent as soon as he becomes aware of the loss or damage, another reason being that the insurer needs to be informed of his liabilities as soon as they arise, in order to be able to make the necessary provisions. It is also incumbent on him to do so because the insurer and the cargo owner must co-operate in seeking to minimize the claim. Immediate notice must also be given to the shipowner or his local representative. Cargo claims are as often as not dealt with between the insurer and a party other than the one which took out the policy because a marine insurance policy will usually have been assigned by the original insured to other parties, to banks for instance, and finally to the consignee. All policies show the name of the insurance company or Lloyd's agent at destination. In the event of loss or damage, application must be made to that agent for survey. When advised of damage, the agent will appoint an expert surveyor or carry out the survey himself.

87. The surveyor, who is an independent and impartial expert and is not concerned with policy conditions, will determine the cause of the loss and agree the extent of the loss with the cargo owner or his representative. He will then draw up his survey report accordingly, and the report will be transmitted to the interested party. The report will also include data necessary for the assessment and settlement of the claim or for the question of recourse, such as date of arrival of the conveyance (usually the carrying vessel), date of discharge, date of delivery to consignee's warehouse, and date of the surveyor's receipt of the application for survey. The applicant will have to pay the surveyor whether the claim falls within the scope of the insurance or not, and that is why the policy should be produced to the agent in case of doubt, in order to avoid unnecessary costs in respect of a claim that would finally be declined under the insurance terms. Later the claimant will, of course, include the fee or fees in his claim.

88. The purpose of the survey report is to prove the following:

(a) the cause of loss or damage;

(b) the extent of loss or damage;

(c) that the loss or damage occurred within the time the insurance was in force (under a warehouse to warehouse clause, for example) and where the loss or damage occurred;

(d) the fact that survey was applied for and made within the prescribed time-limit if the policy contains such a time-limit.

89. If the policy or certificate includes a payment clause, such as "claims payable at destination by ...", the consignee will present the documents to the settling agent (in most cases he is also the claims agent), who will have to consider the claim. If a payment clause is not included in the policy, the documents must be sent to the office which issued the insurance document, or to the insurer's head office. The claims documents will consist of:

- the policy or certificate;
- the bill of lading;
- the supplier's invoice and packing list;
- the survey report;
- the claimant's claims invoice;
- the port authorities' certificate;
- the correspondence, or copy thereof, with the local shipping agent concerning the loss or damage.

90. In cargo insurance, as in many other property insurance classes, claims are based on the insured value which is agreed and, in case of a total loss, the amount insured in the policy is paid, less non-incurred expenses, as applicable. In the event of partial loss, the percentage of depreciation must be determined. This will be applied to the insured value. In many markets, when goods arrive at destination in a damaged state, the percentage of depreciation is determined by comparing the gross sound-arrived value with the gross damaged-arrived value. These values are based on the market values on arrival. The surveyor will agree the depreciation with the consignee. If they are unable to reach agreement, it may be necessary to sell the goods, mostly by auction, in order to find the percentage of depreciation. If this becomes necessary, the gross proceeds are compared with the gross amount which the goods would have realized if sold in sound condition at the same place and on the same day, and the percentage of depreciation is calculated accordingly. The insurer then pays the same percentage of the insured value plus reconditioning charges, if any, plus the cost of the sale and the survey and other fees.

91. The procedure is different if a damaged cargo can be repaired or reconditioned, thus regaining its full value. The damage then is the actual cost of repair or reconditioning and forwarding to destination. This cost is, of course, borne by the insurer. No calculation, such as described above, will be necessary, that is to say,

the cost will not be fixed in relation to the sound value and the respective percentage paid of the insured value, since such a procedure would probably put the cargo owner in a better position than he would have been in had no damage occurred. If, however, the insured value is lower than the sound-arrived value - instead of higher - then there is a case of underinsurance, and the cargo owner will only be able to recover from the insurer such percentage of the repair or reconditioning cost as the underinsured value bears on the sound arrived value. The cargo owner then has to bear that part of the cost for which he went uninsured.

92. In general, the procedure followed in cases of underinsurance can be more easily understood if one recalls the principle that in such cases the policy holder is his own insurer for the uninsured part. The claims settlement will be made as if the interest were fully insured, but the total indemnity due will be shared out just as in the case of a co-insurance between the insurer or insurers and the policy holder in his capacity of self-insurer. This procedure, which is provided for by the insurance law and practice of all countries, is to avoid having insurers pay the claim in full if they received a premium for only part of the risk. This is also why the underwriter, when issuing or countersigning a general average bond, will investigate whether the cargo subject to general average is fully insured or not. If it is not, he will require a counter-guarantee from the cargo owner, undertaking to indemnify his insurer for any amount paid on the grounds of the general average settlement to the general average community in excess of what he is responsible for in accordance with the amount insured. Under the same principle the policy holder remains entitled to his share in any recoveries because he is considered a co-insurer in that respect as well.

<u>General average claims</u> 6/

93. Handling of general average claims is very different from the procedure connected with claims for total loss and particular average. General average is basically unconnected with insurance law. It is part of the contract of affreightment which governs the relations between shipowner and shipper in respect of sacrifices and expenses, made by the ship's master whenever the common venture is imperilled or an accident is imminent or has actually happened. The object of such sacrifice or expense must be preservation of the common venture. Therefore, any losses resulting from extraordinary voluntary sacrifices or from expenses incurred in order to preserve the ship and her cargo come within general average and must be borne proportionately by all who are interested in the venture.

6/ For more details, see York-Antwerp Convention.

94. The parties having to contribute to the sacrifices are, of course, those which were interested - at the time when the sacrifices were decided upon and made by the ship's master - in the successful completion of the common venture, that is to say in saving the ship and her cargo. These parties are the ship (the shipowner); the cargo (the cargo owner) and the freight (usually the shipowner). Of these, the ship (the shipowner) and the cargo (the cargo owner) are self-explanatory. But the freight (or the party interested in the freight) may also benefit from the safe arrival of the cargo and, therefore, be a party to the venture in those cases where the contract of affreightment provides for freight to be earned by the shipowner not before the delivery of the cargo or before the cargo is ready for delivery at the stipulated port of destination, irrespective of whether the freight has been prepaid or not. In such cases the shipowner is interested in the safe arrival of the ship and cargo and, therefore, he or whoever is entitled to the freight, is a party to the common venture. It is, therefore, quite fair that he should contribute to the sacrifices and other losses or damage caused by general average measures in the interest of all the parties, proportionately to the value of the freight due to him.

95. All the parties named can take out insurance against the risk of general average. The cargo owner always does, because cases of general average are quite frequent. Moreover, by insuring the general average, the cargo owner receives from the insurer an important service, namely a guarantee for payment of the contributions to the shipowner, which facilitates immediate delivery of the cargo to the policy holder. It should be remembered that in case of underinsurance, the insurer will require a counter-guarantee from the cargo owner for the uninsured portion. The shipowner, who is legally considered a trustee of the general average community, will require either payment in cash of a general average deposit, or a guarantee, before delivering the goods, and a guarantee is acceptable to him if issued directly, or endorsed, by the insurer. General averages may be complicated to draw up. The normal practice is for a general average adjuster to be appointed to prepare the report and negotiate the settlement. Frequently the exercise takes up to one or several years, depending on the complications and negotiations involved in reaching agreement among the parties. The report sometimes reaches the proportions of a thick volume, especially when a full cargo of break-bulk shipment is involved.

Sue and labour charges

96. Almost all marine cargo insurance policies contain a proviso to the effect that it is the insured's duty to make every effort to avert a claim upon his insurer and to minimize losses covered by the policy. Against this obligation the insurer should indemnify the insured for all expenses incurred by him on this count. This proviso is

called the "sue and labour clause" and it allows the refund of expenses actually paid by the insurer to avert the claim or minimize the loss irrespective of any other loss which the insurer may be called upon to bear even when there was a total loss of the cargo insured.

Salvage

97. In marine insurance the term "salvage" means not only what has been recovered from ship or cargo after an accident at sea, but also the amount or remuneration to a salvor who has rescued a ship and/or cargo under a contract. Such a contract is mostly made in the form of the Lloyd's Standard Form of Salvage Agreement. Standardization is a useful practice because, in an emergency, neither the shipowner nor the master - who frequently has to act on his own responsibility - have time to bargain or negotiate the salvage conditions. Alternatively, salvage may be awarded to a salvor who has saved, or helped to save, the ship and/or her cargo independently of any contract.

98. Salvage charges are neither general average nor sue and labour charges. In practice however, they may be apportioned as if they were and are recoverable from the insurer if incurred in connexion with an insured peril. There are several salvage associations, one of the most prominent being the Salvage Association in London. The Association does not itself take part in salvage activities and, indeed, does not own salvage equipment. Its activities consist of surveying and supervising of salvaging operations, and the services of the Association are frequently required in preparing the insurer's case for litigation. The purpose of the Association is to protect commercial interests as regards wrecked and damaged property, but it does not intervene except at the request of the owners or insurers of maritime property.

Recoveries from third parties

99. Shippers or other cargo owners may have certain rights or remedies against a third party who may be responsible for loss or damage sustained by the cargo. If shippers exercise these rights and remedies themselves, the insurer is only liable for the difference between the insured value and the amount recovered from a third party. In rare cases of a cargo owner going uninsured for some reason or other, he will exercise these rights himself. If he is insured and for practical reasons refrains from exercising his rights and remedies, he will claim under his marine insurance against the insurer, who in turn will take recourse against the third party liable. In most cases, but not in all, the party possibly liable will be the carrier, as well as warehousemen and port and customs authorities. A party not in contractual relations with the cargo owner may in some cases be liable for loss or damage. Other shipowners, for instance, or other cargo owners who have shipped dangerous cargo, may be liable in case of collision.

100. In practice, the insurer will act for the insured party because as a rule he is better qualified and equipped to do so. His intervention has a twofold advantage. He provides a valuable service to his insured and he can conduct the recourse as he thinks best and need not instruct his client as to how he should proceed, which he would be entitled to do by law, or under policy conditions. The intervention of the insurer is usually based on "subrogation". The use of subrogation by the insurer on behalf of the insured will be explained later, since it is better to do so after the question of carriers' liability has been dealt with, as recourse is mostly taken against the carrier rather than against other third parties.

Jurisdiction and litigation

101. Cases of litigation are relatively rare in marine cargo insurance; at any rate, in number they represent only a fraction of the cases brought before the courts by cargo owners or their insurers against carriers. If, however, a difference of opinion arises between the insurer and the insured and the insurer refuses to pay the claim or part of it, the insured may take the case to court. Causes for disagreement may be: whether or not an insurable interest existed, warranties have been complied with, the policy was in force when the loss or damage occurred, and/or the loss or damage resulted from a peril insured against, possible misrepresentation, illegality of the shipment or occurrence of a total loss.

102. Marine cargo policies covering international cargo shipments do not always contain a provision regarding the legal domicile and the law applicable to the insurance contract. Failing a specific provision in the policy, the law of the country in which the policy was issued will generally apply. This does not mean, however, that legal action can only be taken in that country, since jurisdiction, namely the law applicable, is one thing, legal domicile, or the place where an insurer can be sued, is another. Legal action can be brought against the insurer in any country, but in practice an insurer will be sued only in a country where he has funds available against which judgement can be enforced. In other words, a legal title is not worth much in a country where the defendant who lost his case is not in funds.

103. In this connexion, it should also be remembered that lawsuits between the insured and the insurers are rare. Consequently, international insurance markets have hardly any experience of the court's attitude in the field of jurisdiction and legal domicile in cases of litigation between insurer and insured. The uncertainty of the legal situation in this respect has one great advantage in that it has added to the natural reluctance of insurers to resort to legal action, quite apart from the very high cost of international litigation which the losing party would have to bear. Most of the doubtful claims therefore are either compromised, or an *ex gratia* payment is made by the insurer.

Chapter V

CARRIER'S LIABILITY AS REGARDS CARGO LOSS OR DAMAGE

Professional liability

104. In most professions, and especially in those servicing a wide public, there is a very widespread practice of insuring professional liability against loss of life, bodily injury, and loss or damage to property that might be caused to clients or third parties. The person taking out insurance cover for his professional liability obviously does not know in advance the identity of the persons who might suffer death or injury, nor what property might be lost through his fault, neglect, omission or error. Professional liability insurance does not cover life or property of clients or third parties, but only serves to insure the policy holder against possible claims arising out of his inadvertent fault or omissions.

105. A shipowner's business is complex and difficult. Many are the risks and perils to which his ship, crew, passengers and cargo are exposed. So is his liability towards the persons mentioned above, towards other shipowners, other property and, last but not least, towards the shippers and consignees. It is the latter form of professional liability of the shipowner, that is to say towards the owners of the transported goods and their business partners, which falls within the scope of the present study and will be dealt with here.

106. As in all professional liability, carrier's liability for cargo loss or damage, in theory, conforms to the general rule that a carrier is to be held responsible only to the extent to which loss or damage can be considered as resulting from his fault, neglect, omission or error. In practice, however, both for historical reasons and because of the inherent difficulties in proving fault or omission on the part of the shipowner, the situation is much more complex. Instead of it being a matter of fact - which is often difficult to prove - carrier's liability has become a legal matter, subject to special national and/or international law.

Historical background

107. Until the beginning of the last century, merchants and shipowners were mostly one and the same person. Shipmasters were as often as not the merchant-shipowners' partners in the venture the ship embarked upon, and in most cases they not only had a share in the ship under their command but also in the cargo carried. The question of cargo liability then hardly arose. If a contract of carriage was made between a shipowner or a master-shipowner and an independent merchant, it usually covered the whole capacity of the ship; in other words, the ship was given in charter. Liner shipping was practically unknown in the age of sail.

108. Furthermore, in those days seafaring meant fighting against the elements of nature, and shippers - whether or not they were co-owners of the carrying vessel - were conscious of the hazards connected with their venture. Compared with the frequency of loss or damage caused by the perils of the sea, the cases where the ship was responsible were negligible. Most accidents could be attributed in good faith to the perils of the sea. Cargo could easily be checked and carefully handled. Holds were relatively small, the assortment of commodities limited, and loading, stowing, and unloading operations were effected unhurriedly. Under these circumstances, even if readily admitting liability, except for accidents beyond control of a competent shipmaster or an efficient and conscientious shipowner, the carrier still did not lay himself open to the risk of shouldering a heavy burden of liability.

109. Towards the middle of the last century, however, things began to change quickly. The vessels and their loading capacity became larger and the turnover of cargo grew in quantity and speed. The value of vessels and cargoes increased and consequently time became an important factor in the cargo owners' and the shipowners' calculations. Shipowners found it difficult to control at all times the cargo they had received for shipment. The causes of loss or damage grew in number, collision cases became more frequent owing to the growing density of traffic, the variety of cargo carried increased, and cargo claims grew larger in number and amount, while the incidence of cases attributable to the perils of the sea became, not absolutely but relatively, smaller. Shipowners were called upon to pay damages more frequently than before and, consequently, the need to define more specifically the limits of liability of the carrier became imperative.

110. Owing to the absence of a codified specific maritime law and to the very liberal limits set down under the common law, the shipowners, taking advantage of the freedom of formulating contracts of carriage as they wished, began to include more exoneration clauses in what had initially been very simple bills of lading. This misuse by many shipowners of their para-monopolistic power brought about a series of legislative interventions aimed at limiting the absolute freedom of contract in shipping. Many countries introduced, at national level, special legislation on the carriage of goods by sea. In the international field, the need for a supra-national agreement became more acute. The International Law Association was convened in the Hague in 1921 and drafted the Hague Rules, which were incorporated three years later in an "International Convention for Unification of certain Rules of Law relating to Bills of Lading", submitted for signature in Brussels on 25 August 1924. The Convention was signed and ratified by all major shipping nations and by most other countries, while some countries, not formally parties to the Agreement, have made enactments in accordance with these Rules.

Carriers' liability under the Hague Rules

111. The purpose of the Hague Rules was to provide an operational legal framework for implementation of the aforementioned principle that shipowners should be liable for cargo loss or damage due to their fault, omission, neglect or error, or that of the ship, which they could have avoided, and that they should be exempt from liability for loss or damage caused by events outside their control, such as perils of the sea, force majeure and other fortuitous, unforeseeable or uncontrollable events. A strict legal analysis of the Hague Rules being totally outside the scope of the present study[7/], it is sufficient to state here that from a practical point of view the Rules deal with three distinct sets of problems: when the shipowner is deemed to be liable unless he proves otherwise, when the shipowner is exonerated a priori unless the shipper proves him at fault and, finally, the limitation of the amount of the carrier's liability. Connected with the first two problems is the question of the onus of proof.

(a) Unseaworthiness of the vessel

112. According to the provisions of the Rules, the shipowner is in principle liable for loss or damage caused by the unseaworthiness of the vessel, seaworthiness being the capability of a vessel to meet the conditions of modern transport at sea. However, the shipowner is not liable in every case for the consequences of unseaworthiness. If the vessel is not seaworthy although the shipowner has exercised due diligence before and at the beginning of the voyage to make the ship seaworthy, he is exempted from liability. Thus, there are two cases for exoneration: 1. the deficiency that constitutes a fact of unseaworthiness may have escaped the attention of a conscientious carrier even when exercising due diligence; 2. other circumstances beyond the carrier's control may have brought about unseaworthiness of the vessel after the beginning of the voyage. Regarding the onus of proof for claims exoneration, the Hague Rules placed it on the shipowner in both cases.

(b) Inadequate loading, handling, stowing and discharging of the goods

113. Another set of duties imposed on the ship by the Hague Rules concerns adequate loading, handling, stowing, keeping and discharging of the goods carried. The carrier is fully liable for claims arising out of an infringement of these duties. Of all the duties named above, stowage is the most important. Inefficiently stowed goods, stowage in the same hold of different kinds of cargo which ought not to be stowed together and inadequate protection against sweat are the more frequent causes

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7/ In this connexion see report of the UNCTAD secretariat on "Bills of Lading", TD/B/C.4/ISL/6/Rev.1.

of damage. Another claim that is often made against the carrier concerns cargo received by him but not unloaded at destination. In the case of "overcarriage" the carrier must be given time, within fair and reasonable limits, to find the missing cargo shipped to another port of call and to re-ship it to the destination originally stipulated. Shortage can be due to theft and pilferage, which the carrier is duty bound to prevent while the goods are in his custody.

114. In cases of shortage or non-delivery it is virtually impossible for the carrier to exonerate himself, unless the shortage is due to the nature of the goods, such as natural shrinkage or desiccation. In all other cases of loss or damage due to handling or stowing, the carrier has the right to prove absence of an infringement of the above duties, in accordance with the basic principle that his liability is limited to the consequences of fault or negligence.

(c) Catalogue of explicit exonerations

115. The Hague Rules contain a long catalogue of explicit exemptions of the carrier from any liability for cargo loss or damage resulting from the causes listed. The causes of exoneration of the shipowner from his liability can be put under three separate headings:

(i) cases where loss or damage occurred as a result of, among other things, "Acts of God", perils of the sea, "force majeure", acts of war, quarantine restrictions, riots or strikes;

(ii) cases of loss or damage due to acts or omissions of the shipper or his agents, to inherent defect or vice of the goods, to inadequate packing or to inadequate markings;

(iii) cases of loss or damage caused by nautical errors or faults in the navigation or management of the ship, or by fire on board unless caused by the actual fault or privity of the carrier.

(d) Limitation of liability by amounts

116. Under the Hague Rules, the carrier's liability for cargo loss or damage is limited to £100 (sterling) per package or unit. A higher limit may be agreed by the contracting parties. This amount was agreed upon in 1924. The equivalents of this sum in other currencies, to be found in the enactments of other countries, have meanwhile been devalued to varying degrees, in some countries to such an extent that an indemnification had to be regarded as being very close to nominal. This was recognized by English shipowners, bankers, and underwriters as early as 1950, when, on the 1 August, the Gold Clause Agreement was made and the limit increased to £200 (sterling) "Lawful Money of the United Kingdom". Many other maritime nations have taken similar action at national level and introduced more realistic liability limits.

Applicability of the Hague Rules

117. The Hague Rules apply only to shipments by sea of goods other than live animals and deck cargo, for which a bill of lading had been issued, one of the purposes of the Brussels Convention being the negotiability of the bill of lading, an aim which is generally acknowledged as having been attained. The rules apply from the time the goods are loaded on board to the moment when they are discharged from the ship. This principle raises the question as to when the loading begins and when the unloading ends. If loading is effected with the ship's tackle, the carrier's responsibility factually - if not always legally - covers the time from the moment the cargo comes into contact with the tackle, in practice mostly when it is hooked on, until it is deposited on the quay or into the lighter at destination. There are, however, many modern means of loading and unloading and this often requires an individual decision on the merits of the case.

118. As regards liability before loading and after discharge, failing an agreement between the contracting parties the shipowner would, in theory, have a "reception liability". In practice, however, all bills of lading contain an exoneration clause because the carrier has virtually no control over the way in which the goods are handled and cared for at terminals, wharfs, quays, in lighters, or on land conveyances. The enterprises of wharfingers and warehousemen are often under State or public ownership. In these cases their liability has just as narrow limits and the onus of proof is just as difficult to satisfy as when claims are made against port or customs authorities. This is the main reason why shipowners insist upon the respective exoneration clauses. Some national laws (in France, for instance) nevertheless limit the right of the shipowner to exonerate himself.

The Brussels Protocol, 1968

119. The official full name of the Brussels Protocol, the contents of which are more frequently referred to as the "Visby Rules", is the "Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 24 August 1924". The Protocol has not yet been ratified. Cargo liability claims thus remain governed by the Hague Rules or equivalent national legislations.

120. Among the amendments introduced by the Visby Rules, the one referring to limitation of liability by amounts is of particular importance in connexion with the present study. If the Visby Rules come into force, the limitation by amounts, which today differs from country to country, would become uniform, since the Rules provide for a limit of ffrs. 10,000 per package or unit, or ffs. 30 per kilogramme of gross weight, whichever

is the highest. The ffr. is a Gold Franc; particulars of weight and percentage of gold are given. Furthermore, the valuation of goods is made clearer in the Visby Rules than in the Hague Rules and the answer is given to the question of how packages, pallets, or similar means to consolidate goods are to be treated with regard to the limitation. The respective paragraph of the Visby Rules makes no mention either of containers - but what applies to pallets may also apply to them - or of cargo shipped in bulk, or of what constitutes a "unit" in this connexion.

Chapter VI

INSURANCE COVER AVAILABLE FOR CARRIER'S LIABILITY

Protection and Indemnity Clubs

121. As shown in the preceding chapter, the Hague Rules place the shipowners under a specific legal regime of professional liability for cargo loss or damage. Although this specific regime is also based on the general principle of any liability law which states that when there is no fault or negligence there is also no liability, it differs substantially in its details from the liability regimes applicable to most other professions, for which professional liability cover is provided by the conventional insurance market in accordance with national commercial and insurance legislations.

122. In order to cover their specific liability, as governed by national and/or international maritime law, the shipowners have agreed to give each other mutual protection, and for this purpose mutual associations were formed. Today these are generally referred to as Protection and Indemnity Clubs. This term appears very adequate indeed in view of the fact that all members are engaged in the same trade (a trade which is justly considered as particularly exposed to all sorts of dangers), that they give each other full protection for the risks involved, and that in the majority of the Protection and Indemnity Clubs financial liability of the members towards them is unlimited, so that members are co-responsible with everything they own. Indeed, mutuality of the clubs goes so far that the courts have decided that Protection and Indemnity Clubs cannot be considered as insurers.[8/]

123. It is maintained that the formation of the first Protection and Indemnity Club was occasioned by a court decision in 1836, in which a shipowner's claim on his insurer was turned down because, according to the judge, a collision was not a peril of the sea, a decision which also led to the creation and application of the Running Down Clause in hull policies. In about 1850 to 1860, the early Clubs chiefly provided their members with protection against their liability for personal injury and loss of life and connected costs and expenses, as well as protection for that part of collision liability which was not covered by underwriters under the Running Down Clause. These and other liabilities, falling on shipowners under the laws of England during the years that followed, were covered under what later came to be known as the "Protection Class".

124. The so-called "Indemnity Class" came into being much later. The "Steamship Owners' Mutual Protection and Indemnity Association" was established in Newcastle-on-Tyne in 1874, after the attention of shipowners had been drawn to cargo liability by a court

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8/ For carriers' insurance protection provided outside the Protection and Indemnity Clubs see paragraphs 140 and 141.

decision (the "West Hope" case) which declared as null and void the very narrow limitation of the owner's cargo liability in the contract of carriage. It is through the Carriage of Goods by Sea Act of 1924, that the Indemnity Class acquired the great importance it has to this day.

125. In view of the fact that the bulk of protection and indemnity cover is placed with Protection and Indemnity Clubs in England, this study mainly refers to the English Mutuals. However, it should be mentioned that the Protection and Indemnity Clubs in Scandinavia, their rules, practices and organization, are more or less, but rather more than less, modelled on the English. The same is true of the Clubs in the United States and Japan, although the latter's activities are limited to protection.

Mode of operation of Protection and Indemnity Clubs

126. Because of the mutual character of the Clubs, members are both insurers and insured. The relation between the Club and a member acting in his capacity of the insured is governed by the Rules, which are drawn up by the General Meeting. The Rules deal with the entry of ships by members, risks covered, exceptions and limitations. These contain clauses the equivalents of which are often found in conventional insurance policies. It should be mentioned that the Articles of Association, on the one hand, and the Rules, on the other do not very clearly draw the line between the rights and duties of the shipowners as members and as insured, a fact which is characteristic of mutual insurance schemes.

127. Compared to insurance companies Protection and Indemnity Clubs operate in quite different ways both in the field of premiums and in that of building up reserves. Instead of providing cover at fixed rates, the Clubs apply the system of "Calls". On the basis of its past experience, at the beginning of each business year a Club makes an estimate of the approximate requirements expected for claims, individual expenses and costs, as well as overhead charges. That total amount is apportioned between the members. In earlier days of protection and indemnity history, the allotment was made in equal shares per gross registered ton, but today the principle of individual underwriting is applied. Each member's share is called the "Advance Call" and must be prepaid. Subsequently, the Club may collect one or more "Supplementary Calls", as the management may think fit, on the grounds of the claims meanwhile reported and the estimated financial requirements for them. Claims not reported but expected must be included in the estimate.

Conditions of protection and indemnity cover

128. The cover offered by Protection and Indemnity Clubs to their members - or in isolated cases also to non-members - is a wide one, applying to both Protection and

Indemnity Classes[9]. It should be remembered that under the Protection Class, cover is given for risks resulting from carriage of passengers, liabilities, cost and expenses connected with ships' crews and consequences of collisions. The Indemnity Class covers claims connected with carriers' cargo liability, as well as fines, cost or expenses arising from infringement of laws and regulations, such as customs regulations. Compared with the great variety of cover provided by the Protection and Indemnity Clubs for all kinds of the shipowner's liability, cover for cargo loss or damage is only a minor part thereof. Bearing in mind the purpose of the present study, the rules which refer to cargo liability, are as follows:

Liability for loss or shortage of cargo or other property

Loss of cargo or other property intended to be or being or having been carried in an entered ship arising out of any breach by the owner or by any person for whose acts, neglect or default he may be legally liable of his obligation or duty as a carrier by sea properly to load, handle, stow, carry, keep, care for, discharge and deliver such cargo or property, or out of unseaworthiness or unfitness of the entered ship.

Liability for damage to or responsibility in respect of cargo or other property

Damage to or responsibility in respect of cargo or other property intended to be or being or having been carried in an entered ship arising out of any breach by the owner or by any person for whose acts, neglect or default he may be legally liable of his obligation or duty as a carrier by sea properly to load, handle, stow, carry, keep, care for, discharge and deliver such cargo or property, or out of unseaworthiness or unfitness of the entered ship.

129. Furthermore, the shipowner is entitled also to recover the extra cost (in excess of the cost which would normally have been incurred by him under the contract of carriage) of discharging or disposing of damaged or worthless cargo, provided that he is liable for such cost and that he cannot recover the same through recourse from any other party.

Exceptions and limitations

130. There are, of course, a number of exceptions and limitations to the protection and indemnity cover. Only such exceptions and limitations as refer to carriers' cargo liability will be dealt with within the framework of this study. Here the most important prerequisite for cover is the incorporation of the provisions of the

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9/ Some Clubs have abolished the distinction between the Protection Class and the Indemnity Class and offer instead a unified cover, known as Class I cover.

Hague Rules in the contract of carriage. Failing such incorporation, the Protection and Indemnity Club is liable only for such indemnification as would have arisen if the Hague Rules had been claused in the bills of lading. The shipowner can, however, give notice in writing to the managers stating the terms of the contract of carriage, the moment he becomes aware of his extended liability. This will then be insured by the Association, at the shipowner's expense.

131. There are further limitations in the case of cargo being shipped under a "Through Bill of Lading" and only part of the carriage is effected on the "entered" (covered) ship. A shipowner "shall be entitled to recover from the Association loss of or damage to or responsibility in respect of cargo or other property being carried by a means of transport other than the entered ship, for which the shipowner may be liable under a Through or Transhipment Bill of Lading or other form of Contract of Carriage issued for a carriage partly to be performed by an entered ship; but the Club shall have power at any time to prohibit, for use in any particular trade, any form of Through or Transhipment Bill of Lading or other form of Contract of Carriage under which the owner of an entered ship may become liable for loss of or damage to cargo by a means of transport other than the entered ship".

132. Furthermore, for goods carried under an "Ad Valorem" Bill of Lading the shipowner is not entitled to recover liability costs and expenses in excess of a maximum of US$ 2,400.00 per unit, piece or package unless the excess value is declared by the shipowner to the Club prior to shipment and the necessary particulars of the shipment given. The managers of the Club may grant such cover and effect corresponding insurance as they think fit, at the expense of the shipowner. "Ad Valorem" Bills of Lading are, however, rare. Shippers mostly ship their valuable goods as ordinary cargo without declaring the value to the shipowners. They take out a conventional cargo insurance policy declaring the right value including expected profit and expenses at destination. In fact, an insurance policy covering the full value of the goods is generally much cheaper than the loading for obtaining an "Ad Valorem" freight rate.

133. The Rules concerning deviation are somewhat complex. Opinions vary on what is deemed to constitute deviation, but as a rule the shipowner will rely upon being covered if deviation is beyond his control. The most frequent reason for a deviation is the offer of a contract of carriage of goods waiting for shipment in a port off the shortest route. In this case, as indeed also in the event of a deviation not authorized by the shipowner, the latter's notification to the Club will restore his insurance protection, probably against payment of an insurance premium, or part thereof, at the managers' discretion. Shipment of cargo on deck without a corresponding remark in the bill of lading is deemed to constitute deviation in a number of countries.

134. It will have been observed that most of the above exceptions and limitations concern acts and omissions from which a qualified and conscientious shipowner would either abstain altogether, or notify his club. In most cases such notification - possibly against payment of, or participation in an insurance premium - will remedy the situation. There is broad scope for the managers' discretion in the settlement of claims, and they will exercise their discretion wherever the event underlying an exception or limitation was beyond the shipowner's control, or if the managers are satisfied that the shipowner acted or made the omission in good faith. In any event the shipowner's position appears to be strong.

Deductibles

135. The Rules of all Protection and Indemnity Clubs provide for certain deductibles. Their rates vary according to the Club and according to the risk insured under the various clauses of the Rules. Higher deductibles can of course be agreed between the member and the underwriter in order to save part of the contribution or in order to improve the loss experience of the member. The deductible is the priority amount in excess of which the member is indemnified by the Club. Deductibles serve a double purpose. The Club, that is to say the community of members, wants to give the individual member only such cover as he really needs in order to be able at any time and in any circumstances to carry on with his shipping business. He shall not make claims for loss, liability, cost, or expenses which can never endanger his solvency no matter how often that happens. Secondly, the administrative expenses of the Club are to be kept as low as possible in the interest of all members, and the administration must not be encumbered with a very large number of small claims.

Underwriting and rating

136. In the early days of Mutual Protection and Indemnity Clubs, say a hundred years ago, until sometime in the first quarter of this century, shipowners operated comparable ships in comparable trades and everyone was more or less exposed to the same risks and liabilities. Each Club member, therefore, paid the same rate per gross registered ton and these contributions formed a fund to meet the expected total liabilities. The supplementary and final calls, too, were apportioned equally per gross registered ton. This system proved inadequate and no longer equitable when shipping developed. Types of ships, their size and propulsion, their cargo and trade became much more diversified. The claims records of members began to show considerable differences and, last but not least, shipowners varied the terms of their coverage from the basic terms either by reason of deductibles or because they wanted to bear some of the risks and perils themselves. Individual underwriting and rating became necessary.

137. Meanwhile, competition on the freight markets and the need for more precise calculation required a certain change in the system of calls. Often both the Clubs and their members wanted to avoid the uncertainty of future calls. In some countries taxation may also have played a part. The present practice in some of the larger Clubs is to charge larger advance and correspondingly smaller supplementary and final calls. The advance call made on a member is to cover at least the routine claim likely to be made by him, a contribution towards exceptional claims - exceptional in amount and nature - in respect of all the ships entered, towards reinsurance costs and towards cost of management.

Claims

138. Cargo claims are presented to shipowners almost exclusively by cargo insurers. Some writers speak of 95 per cent. This is due to the need for marine cargo insurance in international trade, particularly as regards the methods of financing imports and exports. The claims departments of insurance companies are better qualified to handle claims than most cargo owners, be they shippers, consignees, bankers, or other parties, who all find this service given by insurers extremely useful. They present claims to the insurance companies, receive payment relatively quickly and leave it to the insurance companies to fall back on the carrier under the principle of subrogation.

139. It is only when a claim is likely to exceed the deductible that the shipowner will act upon instructions of his Protection and Indemnity insurer. If confronted with a potential liability claim that would fall on his Club he is required by the Rules to consult with the managers without delay. If abroad, he will contact his Club's correspondents. The network of correspondents runs into many hundreds and no port of any importance anywhere in the world is without a correspondent. Once a member gives notice of a claim that goes beyond the daily routine or is likely to develop to a certain size, the Club takes over conduct of the proceedings. The bigger Protection and Indemnity Clubs have a large staff wholly concerned with assisting members. Depending on the merits of each case the claim is either settled, compromised, or defended in arbitration or in judicial proceedings.

Carriers' liability cover outside the Protection and Indemnity Clubs

140. Acting on a request from the French Government, the French market recently drafted two new insurance policies designed to cover the liability of shipowners and marine cargo operators so as to make it possible for both groups to obtain, on the French market, the guarantee of cover for their respective public liabilities. These policies cover most of the risks accepted by the Protection and Indemnity Clubs.

However, it should be stressed that, contrary to the Clubs' practice of affording globally unlimited covers, the French market covers are limited in value and might therefore not fully meet the requirements of shipowners.

141. A similar cover, based on protection and indemnity terms but provided by marine insurance underwriters at fixed premiums, has been in existence for many years in the United States of America. However, the results of the few stock companies and of one large mutual which have been providing this protection and indemnity cover have not been very encouraging so far, and the bulk of the American shipowners' liability business is placed with Protection and Indemnity Clubs in the United Kingdom.

CHAPTER VII

CO-EXISTENCE OF MARINE CARGO INSURANCE AND CARRIER'S LIABILITY COVER

Respective roles of property insurance and of liability cover

142. Although both covers - one provided by marine insurers to cargo owners and the other provided mainly by the Protection and Indemnity Clubs to shipowners - concern cargo loss or damage, they are of a very different nature and serve clearly different purposes. Both are nevertheless essential. Without the former, shippers would be exposed to the danger of loss of or damage to their goods due to many fortuitous causes beyond their control and would be unlikely to find credit for their business transactions. Without the latter, shipowners would have to bear risks far exceeding their financial capacity and the shipping market would become so narrow that it would cease to play its role in world trade. Thus a certain "co-existence" of marine cargo insurance and of carrier's liability cover seems indispensable. This co-existence in no way constitutes a duplication in cover or "double insurance", because two different parties are protected, one against loss of property and the other for professional liability.

143. Within the context of the present study, it seems important to emphasize some fundamental differences between property insurance such as the marine cargo insurance, on the one hand, and liability insurance such as carrier's liability cover, on the other. These differences are to be found:

(i) in the relation between the insured party and the subject-matter that is exposed to certain perils;

(ii) in the existence of a sum insured in property insurance, and of a limit of liability in liability insurance;

(iii) in the rating or premium calculation;

(iv) in the handling and settlement of claims.

144. As regards marine cargo insurance, the subject-matter to be insured is well known to the proposer, who must have a legitimate interest in its preservation. The insured cargo is adequately described, its value estimated, the perils to which it is exposed evaluated and a premium rate based on all the above factors calculated. In case of loss, the marine insurer will satisfy himself that the loss occurred and that it was proximately caused by a peril insured against. Payment of the claim will be made without undue delay, settlement having been negotiated between two parties - the insured and his insurer - who know each other and who have entered into business relations because they trust one another.

145. The situation is quite different in the case of the carrier's liability cover. The carrier takes out a policy to protect himself against financial loss if he has to pay indemnity for loss caused to goods transported by him, but in so doing he does not know who these shippers will be and what property will be exposed to perils of loss or damage through his fault or negligence. Under these circumstances no sum insured can be evaluated; instead, a so-called "limit of liability" may be fixed, which is a difficult and sometimes hazardous decision.

146. For the above reasons, rating in carrier's liability cover is a greater problem than in marine cargo insurance. The uncertainty as to the nature of possible liability claims and of the amounts involved leads to higher safety margins. In other words, while in marine cargo insurance the insured pays a premium for the exact value of the subject-matter as risk, the carrier's liability cover has to provide a sufficiently high global limit, and a correspondingly high premium has to be paid simply to cover the often remote chance that an accumulation of adverse circumstances can lead to an extraordinarily high liability claim.

147. Claims in carrier's liability cover are always dealt with between the shipper who suffered the loss, or his cargo insurer, and the Protection and Indemnity Club of the carrier. The Club, so to speak, steps into the shoes of the carrier claimed on. The question of goodwill does not come in, where two complete strangers have become antagonists. Nothing more and nothing less can be expected from the Club than the amount his client, the carrier, is legally liable to pay in damages - provided he is at all liable - and the amount the Club has to pay as an indemnity under its Rules and contract. These two prerequisites for an indemnity will be very carefully examined by the Club. Questions of fact and of law are involved, and litigation is not infrequent if the loss suffered or the damage done is substantial and therefore is worth the cost and expense of a thorough investigation, including expert and legal advice.

148. It should be recalled that the protection and indemnity cover is a professional liability insurance sui generis. In fact, although the shipowner receives a liability cover for loss of or damage to any cargo he may have to carry, irrespective of the unknown total value of cargo accumulated on his ship at any given moment on his professional liability as carrier is clearly defined both qualitatively and quantitatively, according to the Hague Rules applicable in his case. The impact of these clear delimitations on the functioning of the Protection and Indemnity Clubs is of paramount importance. Without such delimitations, the Clubs could hardly provide the carriers' liability cover in such a simplified form, but would require much more sophisticated insurance institutions.

149. However, irrespective of the special features of the protection and indemnity cover - specific limits of liability due to the Hague Rules, and substitution of fixed premiums by the so-called "calls" - the protection and indemnity cover shares one fundamental characteristic with all other liability insurances: it cannot replace property insurance in providing absolute and unconditional security to the owners of the goods, to banks and other credit institutions as regards safe arrival of, or full indemnity for, lost or damaged cargo. As pointed out in Chapter I of this study, the bill of lading accompanied by a marine insurance policy constitute a negotiable set of documents representing the cargo to its full agreed value. No merchant or bank would be willing to acquire instead a pending liability claim with all its inherent uncertainties.

Is there any overlapping between marine cargo insurance and protection and indemnity cover?

150. If both the cargo owner and the carrier are adequately covered by marine cargo insurance and by the protection and indemnity cover respectively, it may appear that there is some overlapping in the two covers. In fact, both covers seem to protect the interest in the goods on their way overseas, the former as a property insurance by indemnifying the respective owners of the cargo for loss of or damage to their property, the latter as a liability cover by making it possible for the shipowners to meet their obligations if and when recourse against them under their legal liability as carriers is taken.

151. In order to reply to the above question, a distinction must be drawn between formal and real risk bearing, and reference made to the system of subrogation as applied in practice. It is precisely for practical reasons that the marine cargo insurer formally provides a full cover "as if" the carrier's liability and the protection and indemnity cover did not exist. Thus protected, the cargo owner need not worry about the carrier's liability, his good or bad will, or even his solvency. He can negotiate his goods on the basis of the bill of lading and of the marine insurance policy and receive the agreed indemnity in case of loss or damage. However, should the carrier be liable for the loss or damage, the cargo owner then surrenders to his insurer - from whom he has received full payment for his claim - all his rights vis-à-vis the carrier.

152. The system of subrogation prevents any overlap in risk bearing because it precludes the cargo owner from obtaining more than the full indemnity. Any cargo loss will be paid ultimately only once, either by the marine insurer or, if the carrier is liable, by him or his Protection and Indemnity Club to the extent of his liability.

It is only to that latter extent that the carrier buys the protection and indemnity cover corresponding to a clearly defined volume of risk bearing. As regards the marine insurer, although his cover is complete, in fact the risk bearing which it involves does not include that part of risk borne by the carrier's liability cover.

153. The above facts of risk sharing are fully reflected in the rating of both the Protection and Indemnity Clubs and the marine cargo insurers. As already stated in Chapter III, rating in marine cargo insurance is based on past experience, and part of that past experience is related to recoveries of claims following recourses against carriers and their Protection and Indemnity Clubs. In other words, although the marine cargo policy may show a very extensive range of risks covered, the respective rating is based on the experienced net cost of this kind of cover after deduction of the usual recoveries from third parties. Thus, the fact that there is no overlap in the bearing of risks means that there is none in the premiums paid for cargo insurance and the protection and indemnity cover.

154. An entirely different question is whether the present limits of the carrier's liability, as defined by the Hague Rules, are optimal from the point of view of the aggregate cost of premiums paid for insurance protection, or whether by increasing or reducing the carrier's liability (which would automatically place a measure of risk bearing on the cargo insurer) a lower total cost could be obtained. This important question will be analysed in Chapter VIII.

Mechanism of subrogation

155. Subrogation is not a subject of insurance alone, but it is met with very frequently in that field of economy. In insurance, it is defined as the right of the insurer to any remedies which the insured may have against others responsible for loss in respect of which a claim has been paid. Subrogation is incorporated in the laws of most countries. In insurance, the principle of subrogation is primarily applied to prevent the insured from obtaining more than a full indemnity. The insurer takes the place of the insured. He is entitled to every right and remedy of the insured and his right is a twofold one: in case of payment of a total loss, the property rights to salvaged and/or reconditioned goods pass on to the insurer without an assignment; in any case, all rights to take recourse against the party liable for the loss or damage are also passed on to the insurer.

156. The insurer is entitled to recover only up to the amount which he has paid. Under the relevant legal provisions automatic subrogation applies only after payment of the loss. Therefore, if the insurer wants to dispose of the damaged or salvaged cargo, or to pursue a claim against a carrier before he has paid the insurance claim, he will be given a letter of subrogation by his insured, or by any other beneficiary, empowering the insurer to file a claim against the third party in the beneficiary's name. The letter of subrogation contains an assignment of all rights and remedies against such third party.

157. In order to enable the insurer to make use of his rights of subrogation, the insured must make every effort to preserve his rights against third parties which are likely to be liable for the loss. In particular, his duty is:

(a) to notify the carrier - on land or afloat - the port or customs authorities, and any other parties possibly responsible, of the loss or damage which occurred; the marine carrier must be notified within the time limit specified in the bill of lading or charter party, and the inland carrier, port and customs authorities within the period provided in the bye-laws;

(b) to invite the carriers, authorities and others who may be concerned, to take part in a joint survey to be made by these parties and the insurer's claims agent, or his surveyor;

(c) not to give clean receipts when the goods are in a doubtful condition;

(d) to serve the claim on the party liable, within the period stipulated in the bill of lading, the waybill of the carrier, the laws and regulations, or other legal provisions applicable in the particular country or place.

158. Apart from these specific duties, the insured has to fulfil the demands made under the principle of his obligation to avert or minimize the damage, such as to give all information called for by the insurer, and to surrender to him all documentary evidence in his possession which may have a bearing on the third party liability claim. If the insured renounces any of his rights against a third party, the insurer will no longer be under obligation to honour the insurance claim, but only, of course, to the extent of the amount he would have been able to recover from a third party if the claim of the insured had not been waived, time-barred or otherwise prejudiced.

Problems related to recourse of cargo insurers against carriers

159. When availing themselves of their right of recourse against carriers for loss of or damage to cargo, marine cargo insurers are often faced with a number of problems, mostly related to proving that the loss or damage was sustained under circumstances involving the carrier's liability. In this connexion the shipowner and his agents

have an enormous advantage over the cargo owner and his insurer, through having better access to the holds where the goods are stored; they can thus correct and/or conceal conditions which may have caused damage to cargo - such as water in the holds, improper stowage, holds in a state of disrepair - and then issue a cargo report whitewashing the shipaand disclaiming liability.

160. The position of the cargo owner and his insurer is much more difficult. In fact, their access to the ship is limited and in many cases they can only intervene after the cargo has been discharged, not to speak of cases where damage is discovered only after unpacking of the goods at final destination. In many countries, procedures are very slow, so that by the time surveyors are appointed it is often too late to carry out an investigation of the causes of damage before the goods are discharged. Furthermore, in some countries there are conflicting local laws on the definition of when the ship's liability ends: is it when the goods leave the ship's tackle, or is it only when they are safely stored within the facilities of the port?

161. Most bills of lading include a clause requiring arbitration and litigation to take place in the country of residence of the shipowner who issued the bill of lading. This clause creates a problem for local marine insurers, because arbitration awards and litigation expenses abroad are quite costly. Hence, marine insurers seek arbitration or litigation abroad only when the claim is large enough to warrant the expenses. The shipowner and his Protection and Indemnity Club are thus spared a great number of minor claims.

Chapter VIII

OTHER POSSIBLE SOLUTIONS FOR CARGO LOSS OR DAMAGE COVER

Radical changes as regards the carrier's liability

162. In the preceding chapter the question has been asked whether certain changes in the present level of liability of the carrier as regards cargo loss or damage might produce a drop in the aggregate cost of marine cargo insurance plus cover for liability related to cargo, whether provided by a Protection and Indemnity Club or by other liability insurers. In theory, such changes could vary between abolishing carrier's liability altogether, thus making protection and indemnity cover redundant, and extending carrier's liability to the point of becoming an absolute liability, thus making marine cargo insurance unnecessary. It would seem, however, that both of these two extreme solutions would introduce considerable practical difficulties, so that the reallocation should be considered rather within the framework of "co-existence" of cargo insurance and protection and indemnity cover.

163. Liability of the carrier cannot be abolished altogether for both ethical and economic reasons. From the ethical point of view, no society would ever agree to one of its members being freed a priori from all consequences of faults, omissions or gross negligence committed inadvertently or even intentionally. As for the economic reason, the minimum of carrier's liability is the limit beyond which the shipowner loses interest in his claims record, that is to say when he becomes tempted to save cost and expenses by neglecting all measures aimed at loss prevention. The saving would hardly result in lower freight rates, but it would certainly generate more frequent and higher cargo losses. The loss or damage occasioned by this neglect would constitute an important waste of goods and the cost would have to be borne by the consumer.

164. The other extreme solution, that of abolishing marine insurance by extending the carrier's liability in such a way that it becomes an absolute liability and covers all cargo losses, may seem more tempting, but this first impression would probably be based on a fallacy, namely the assumption that even in the case of an absolute liability the carrier will continue to cover this practically unlimited liability by joining a mutual Protection and Indemnity Club operating on the lines described in the preceding chapter. In that chapter, however, a warning was given that the protection and indemnity cover is a liability cover sui generis, and that the viability of the present Protection and Indemnity Clubs is due precisely to the substantially restricted scope of the carrier's liability as defined by the Hague Rules.

165. In fact, an absolute liability of the carrier, leading to total abolition of marine cargo insurance, would mean two things:

(a) that all cargo loss or damage, due to any cause whatsoever within or beyond the carrier's control and responsibility, would be covered by his liability;

(b) that there would be no limitations by amount, which means that the carrier would have to settle claims for the full value of lost or damaged goods.

It is important to examine the impact these two extensions of liability would have on the operation of the Protection and Indemnity Clubs and on the cost of their cover.

166. As regards point (a), an extension of liability to cover all risks would inevitably change the entire rating system of the Protection and Indemnity Clubs. In fact, these Clubs today provide cover for risks over which, in principle, the shipowner has some influence, hence the individual rating according to each carrier's claims records, which prompts each shipowner to try to keep his claims record as low as possible. Should the cover now be extended to include all other fortuitous and unpreventable risks - which are in general much more numerous and costly - individual rating would become almost pointless and each shipowner would tend to lose interest in having a good claims record. A general deterioration in loss prevention would follow.

167. Moreover, the shipper, who would have passed on all liability to the carrier, would be less willing to incur expense on loss prevention because individual shippers would hardly receive any recognition for such points as good quality of merchandise and adequate packing. Under the new system many shippers would try to economize at the expense of carrier's liability cover, which would lead again to more waste and higher prices for the consumer, especially as many other shippers would, in order to compete, be compelled to do the same.

168. With regard to point (b), it should be borne in mind that in property insurance the sum insured corresponds exactly to an agreed value of the goods covered, while in a global professional liability insurance a limit of liability must be selected at a level high enough to cover possible accumulation of valuable cargo exposed simultaneously to total destruction. As explained earlier, the element of uncertainty generally leads to much higher premiums. Furthermore, the use of modern vessels (container-ships, for instance) may, under a regime of unlimited liability of the carrier, lead to potential accumulations of cargo with such enormous liability amounts that even the largest insurance company, with its vast reserves, substantial solvency margin, and world-wide reinsurance arrangements, might face difficulties in carrying such a heavy risk.

169. It seems certain that the Protection and Indemnity Clubs, under their present specific structure based on mutuality, would not be the proper institutions to cover the absolute and unlimited liability of their members for all the unknown goods accumulated on each of their vessels. Moreover, the Clubs would not be allowed by the insurance supervisory authorities to do so even if they wanted to, because by insuring *de facto* the property of the public at large (the cargo) under the new regime, they

would cease to serve a restricted group of members (the shipowners) and would thus lose their character of private Clubs and become in fact full-scale insurers operating in property insurance under a liability make-up. Consequently, all the rules and regulations of insurance legislation and supervision (in particular those concerning solvency) would have to be made applicable to Protection and Indemnity Clubs, which would be forced to take over the functions of insurance companies, and the entire reform aimed at eliminating marine cargo insurance would result in its being replaced by a more expensive and less satisfactory extended liability insurance operated by a few very large insurance companies. Such a concentration would be particularly detrimental to the interest of the developing countries.

Insured bill of lading

170. The above reasoning is confirmed by a recent experiment undertaken by a certain number of carriers, who recognized the impracticability of any substantial extension of their liability within a protection and indemnity cover and resorted to the opposite solution, that of buying on the traditional insurance market (through a grouping including Lloyd's and company underwriters) a package cover for hull, machinery, containers, cargo, various interests ashore and their liability. As regards cargo, what the carriers concerned bought was a conventional cargo (property) insurance of the "all risks" type with all necessary additional clauses (war, riots, etc.) and the usual exclusions (such as inherent defect in quality, vice of cargo and delay). The limit of the cargo cover "per ship's bottom" was six million pounds sterling. Their liability cover was based on the Hague Rules.

171. Thus covered, the carriers concerned were able to issue an "insured bill of lading", which they proposed to banks and financing institutions as a negotiable document replacing both the conventional bill of lading and the accompanying cargo insurance policy. The purpose of this solution was twofold: first, to reduce expenses by eliminating recourses and litigation on carrier's liability, the cargo and the liability insurer being one and the same; secondly, to solve a certain number of its specific problems related to multimodal container traffic. In fact, the initiators of the insured bill of lading were mainly operating in multimodal container transport. The experiment presents some interesting aspects of the problem of cost and expenses which will be analysed in the following paragraphs.

172. As regards the conventional transport of goods under an insured bill of lading scheme, the question arises whether the hoped for savings in settling claims would really materialize and if so, whether they would be large enough to compensate for certain other disadvantages. From the carrier's point of view and that of his insurer (who is no longer insurer of the cargo owner), the savings in the settlement of claims would appear to be considerable. First, there would be no recourses against the

carriers, since claims would in any case be paid out of the same pool. Secondly, there would be no further need for adjustments of "general average", the hull and cargo insurer being one and the same. Everyone must readily agree that measures aimed at eliminating or restricting general average would contribute considerably to reducing costs.

173. However, from the cargo owner's point of view things look a little different. By losing all direct contacts with the insurer (although, ultimately, he has to pay the cargo insurance premium, included in the freight), the shipper would tacitly accept that the great majority of claims would be settled under the cargo account, even when the shipowner would have been normally at fault and professionally liable. Such a development would tend to have similar effects to those described above, admitting the assumption of abolishing carrier's liability altogether, a possibility rejected as unethical and uneconomical. In the case of the insured bill of lading, abolition of carrier's liability would appear less extreme, but in practice an agreement between the carrier and his insurer to put most claims on the cargo account rather than the liability account would have essentially the same effects.

174. Furthermore, under the traditional regime where the cargo owner is also the policy holder, he chooses his insurer, settles with him all claims (including those with recourse against the carrier), receives more favourable terms if his claims record is a good one, and can adapt the insurance cover to his specific requirements. Under the insured bill of lading scheme, the cargo owner enjoys none of the above advantages: first, the carrier chooses the insurer; secondly, the shipper himself must handle all his claims settlements; finally, within the carrier's package cover the shipper's good claims record is not taken into consideration and the cover itself is a uniform one, possibly too broad or insufficient for the particular type of goods transported.

175. In connexion with the shipper's disadvantages mentioned above, a proposal was made that the insured bill of lading should remain optional for those shippers who wish to make use of it, and that other shippers should continue to buy marine cargo insurance themselves under the traditional regime of separate co-existence of cargo insurance and carrier's liability cover. From a technical point of view, this solution is a most impractical one. In fact, nothing is more dreaded by insurers than the following adverse selection: under an optional insured bill of lading scheme, shippers with good claims record would insure their risks separately and the shipowner would have to accept, in his package cover, all the rejects; rates would soar and the package deal would become impracticable.

176. Last but not least, entrusting carriers with purchase of the entire insurance cover for cargo loss or damage - and bearing in mind that the majority of shipowners are from a few developed market economy countries - would result in a further concentration of

marine cargo insurance in the hands of the insurance markets of the developed countries concerned. Such a result would be harmful to the emerging insurance markets of the developing countries and would clearly be at variance with recommendation 42/III adopted by the third Conference (Santiago, May 1972), according to article 1 of which "developing countries should take steps to enable their domestic insurance markets to cover in these markets - taking into account their national economic interests as well as the insured interests - the insurance operations generated by their economic activities, including their foreign trade, as far as is technically feasible".

Specific liability problems of container traffic

177. As mentioned above, the main reason for the 1968 proposal to introduce the insured bill of lading was the desire to solve some specific problems related to the multimodal container traffic. The promoters of the insured bill of lading scheme were in fact two large container operators of powerful shipping lines interested in container traffic between Europe and Australia. The use of a "Combined Transport Bill of Lading with an Insurance Certificate" - which was the official name of the proposed document - was meant to rationalize the clerical work in container traffic. It was also meant to solve the problem of "claused" documents when containers moved from one carrier to another, by eliminating the need to blame one specific carrier for loss or damage found when containers were opened at destination.

178. The latter problem is a real one. In combined multimodal transport, recourse against individual carriers is in many cases impossible because of the difficulty of ascertaining in whose hands and through whose fault the loss or damage occurred. As is only natural, each carrier tends to deny responsibility; furthermore, since the limits of liability by amount are so different for road, train and sea transport, the shipper and his insurer cannot be indifferent as to who in the combined transport is going to be made liable and pay the claim.

179. The way in which the aforementioned container operators proposed to solve this problem under the insured bill of lading scheme was to provide an "all risks" warehouse to warehouse insurance cover through their package deal, including the preliminary voyage and an additional inland voyage in the country of destination by a suitable conveyance. The carrier's level of liability, fixed within the package deal, would no longer concern the shipper. The container operators being shipowners, their insurers could, if they so wished, take recourse against the other carriers in cases where the liability of those carriers could be easily established, but this again would be of no concern to the shippers, not even to the fully insured shipowners, although it might to some extent affect the cost of the shipowners' liability cover within the package deal.

180. By proposing the insured bill of lading scheme for multimodal container traffic, the operators in question had, as stated above, some very good arguments in their favour. Nevertheless, their proposal was declined by the British Shippers' Council and by the largest shippers concerned, on grounds very similar to those given above in connexion with conventional transport of goods by sea. The shippers concerned declared that they had more favourable insurance arrangements of their own, their main advantages being lower premium rates and the direct contact between the shippers and their marine insurers. The British Shippers' Council rejected the proposal because many of its members objected to making the inclusion of cargo insurance in the bill of lading compulsory, instead of leaving the decision to the shippers. On the other hand, a package cover provided to the shipowners and including hull, carriers' liability and cargo insurance - the latter only on an optional case-to-case basis - was not acceptable to the insurers for sound technical reasons of adverse selection, already explained above.

181. Rejection of the proposal of an insured bill of lading has not brought a solution to the specific insurance problems of container traffic operators and insurers any closer. As regards the shippers, owing to the fact that the marine insurance market provides them with cargo insurance cover from warehouse to warehouse, the situation created by multimodal container traffic is not a matter of major preoccupation to them. It is true that the shippers may face an increase in cargo premiums caused by additional difficulties met with by their cargo insurers in recovering claims attributable to the liability of any of the carriers participating in the multimodal transport; however, this increase is not large and is amply compensated by a decrease made possible by reduced cargo loss or damage occurring through better protection of containerized goods, especially when containers are used in the warehouse-to-warehouse system, that is to say in cases where the goods are put into containers in the warehouse of the sender and are discharged in the warehouse of the consignee, the containers remaining unopened during the journey.

182. Since the whole problem of intermodal transport of goods is being examined at present by an Intergovernmental Preparatory Group with a view to preparing an international convention, the insurance aspects of container traffic are adequately dealt with by the Group. In order to avoid duplication, the reader is referred to the Intergovernmental Preparatory Group's work programme and container traffic problems will not therefore be dealt with further in the present study.

Partial revision of carrier's liability regime

183. None of the radical solutions analysed above (complete abolition of the carrier's liability, its extension to become an absolute liability, and the insured bill of lading scheme) seem to meet the basic requirements of shippers, carriers and other parties

involved in international trade. This fact leads us back to the existing system of co-existence of cargo marine insurance taken out by the cargo owners and the protection and indemnity cover provided to the carriers. Within this system, it is worth examining whether some partial reallocation of risks and duties would improve the services and/or reduce the aggregate costs.

184. Here again, we have to consider possible changes under two main headings:

(a) an extension of the scope of carrier's liability as regards risk bearing;

(b) an extension of the limitations by amount of carrier's liability.

In theory, a third point might be added, namely the problem of the onus of proof, but in practice this problem is closely connected with point (a) above and has to be dealt with under the same heading.

185. As pointed out in Chapter V of the present study, the catalogue of explicit exonerations of the carrier's liability contained in the Hague Rules comprises three kinds of exoneration, namely cases of loss or damage caused by perils of the sea and other events clearly beyond the control of the shipowner and his staff, cases of loss or damage due to acts or omissions of the shipper and his agents and, finally, cases of loss or damage related to errors in navigation or in the management of the ship, and fire on board. It should be borne in mind that in all these cases the shipowner is exonerated from liability unless the shipper or his insurer prove that loss or damage was actually caused by his fault.

186. Taking into account all the arguments considered so far in the present study, it will be agreed that the optimum level of liability for a carrier is the one where he is fully liable for cargo loss or damage due to causes within his control, and free of liability for causes beyond his control. In fact, moving away from this optimum level in any direction would diminish the carrier's eagerness to prevent losses, either because he would not be liable even when at fault, or because he would be liable anyhow, whether the fault was his or not.

187. By applying the above rule of an optimum level of liability to the catalogue of exonerations contained in the Hague Rules, it becomes evident that the exonerations referring to perils of the sea and other fortuitous causes, as well as those related to acts and omissions of the shipper and his agents, are fully justified. On the other hand, nautical errors and fire on board are more often than not well within the control of the shipowner and therefore exoneration a priori does not seem logical. A revision of the Hague Rules with a view to improving the situation as regards carrier's liability connected with nautical errors, fire on board, and some other exemptions is now under way. In fact, a new draft convention governing the liability of carriers for goods

which they transport by sea has emerged from four years of work by a United Nations group. It will be presented to the United Nations Commission on International Trade Law in March 1976, allowing time for Governments and organizations to submit comments in the interim.

188. With reference to point (b) in paragraph 184 regarding an extension of the limitation by amount of the carrier's liability, two things should be borne in mind: first, the Visby Rules (see end of Chapter V), if ratified, would already introduce a considerably higher limit of liability by amounts which, in addition, would be uniform in all countries; secondly, it is open to shippers, even under the present regime, to declare the full value of their consignments and have the carrier's liability extended to that amount. Shippers hardly ever make use of that possibility simply because they prefer to insure the full value of their goods under a cargo insurance cover, the premium for such cover being cheaper than the increase in freight charges when these charges are calculated by the carrier not in terms of weight or space but of value.

189. In conclusion, while it seems absolutely necessary to create a clear pattern of shipowner's liability both easily applicable and reducing litigation to a minimum - as regards the amounts of carrier's liability per package, unit or kilo - there is no need to introduce limits which would be higher than the real value of the ordinary cargo. As already explained in other chapters of the present study, liability insurance cover provided globally for a relatively high total amount is generally more expensive than property insurance cover for the exact value of each individual consignment. Hence the need to maintain the global liability "per ship's bottom" within reasonable insurable limits. By doing so, the aggregate cost of cargo insurance, plus carrier's liability cover, reaches its most economic level.

PART TWO

MARINE CARGO INSURANCE IN DEVELOPING COUNTRIES

Chapter I

MARINE INSURANCE MARKETS IN DEVELOPING COUNTRIES

Marine cargo insurance business in general

190. The economies of most developing countries depend heavily on foreign trade. The pattern of these economies is based on the production and export of a limited number of specific raw materials - such as cotton, rubber, sugar and minerals - and on the import of all other products, including foodstuffs, clothing and machinery. In spite of many successful efforts towards diversification on the one hand and industrialization on the other, the degree of dependence of most developing countries on imports from abroad for the bulk of consumer goods remains very high. In order to be able to finance these imports, the developing countries must intensively promote the export of their raw materials. This situation leads to very high foreign trade figures.

191. Transportation of goods from and to most developing countries generally involves long sea voyages during which the goods are exposed to considerable perils. Marine cargo insurance cover against the economic consequences of loss of, or damage to, the imported and exported goods represents an important expenditure and should therefore be considered by insurance markets of the developing countries as a potentially very promising class of insurance business. However, only a few developing countries have succeeded so far in insuring locally a substantial part of their foreign trade.

192. This negative state of affairs is due to various factors, often historically connected with the pattern of international trade during the colonial period when marine insurance was considered part of the services (such as banking and shipping) that were closely associated with the main developed markets and essential to their smooth functioning. It was only natural, therefore, that these developed markets should have provided all the services necessary for trading. Techniques, policies, conditions and practices were thus established according to the needs of the countries concerned and under their particular legal systems.

193. Whatever the historical reasons, the fact is that marine cargo insurance evolved from old traditions into a somewhat complex class of insurance, which required a high degree of specialization and considerable experience. Many countries, even among the developed ones, have not succeeded so far in establishing true national

marine insurance markets and continue to depend heavily on a few large marine insurance centres. In this connexion a self-perpetuating situation (vicious circle) can easily arise, owing to the fact that a local marine insurance market receiving only a very limited volume of cargo business cannot provide adequate cover and satisfactory services, while the inability to provide such cover and services may prevent a more substantial volume of marine insurance business from coming to this market. Such a phenomenon is very common in insurance, the technique of which is based on the theory of large numbers; unless an insurer succeeds in establishing a relatively large portfolio of homogeneous risks in a given class of insurance he can hardly be expected to operate adequately in this class.

194. But why do traders in developing countries tend to take their marine cargo insurance abroad? Until relatively recently one of the typical features of the insurance markets in many developing countries was the predominance of foreign insurers who were represented, in these countries, by a large number of operating units compared with the volume of business available in these markets. Besides their commercial activities, import/export trading firms owned by foreigners acted as agents of foreign insurance companies. In many cases, these agencies started as "house agencies", dealing only with the cover of their own trade; but as there were no laws or regulations requiring the placing of insurance risks in the local markets, some of these agents went on writing general marine cargo insurance risks for the direct account of foreign insurance head offices, without constituting any local portfolios. This behaviour largely explains the small volume of marine business which was written in most developing countries.

195. The change in the political and economic status of developing countries has been followed by a trend towards promoting local insurance markets and setting up domestic insurance institutions or companies to carry out the coverage of local risks. In several cases this trend led to regulations aimed at the limitation of the operations of foreign insurers, or even their complete exclusion from the local market. In markets serviced exclusively by domestic insurers, there may exist several national companies (private, State-owned, or both) or a single institution (State monopoly). Marine cargo insurance business is carried on, in principle, by most domestic insurance companies transacting general insurance business. In developing countries, insurance companies dealing exclusively in marine insurance are practically non-existent.

196. Yet a number of factors inherent in the structure and the *modus operandi* of the insurance industry in developing countries cause most merchants to take out marine insurance abroad. As suggested in paragraph 193, those negative factors stem mainly

from the lack of a sufficient volume of business, which is in turn a reflection of the preponderant position held in that business by traditional insurance markets. The negative factors mentioned are thus both the cause and the effect of a distorted situation in many developing countries which the countries concerned are trying to correct. It is useful therefore to attempt first to single out these factors.

197. First, the international marine insurance markets avail themselves of experienced and technically qualified underwriters who have a thorough knowledge of the nature of the perils and risks to which goods in transit are exposed. This knowledge and experience enables them to determine what sort of cover is most suited to each type of trade. Such knowledge and experience is not available in the domestic insurance markets of most developing countries. This assertion, however, calls for a clarification: obviously skills can only develop when professional opportunities are available to technicians. It is therefore true to say that the lack of skills and technical know-how is a result of the weaknesses of the markets rather than the other way round.

198. Secondly, as the volume of marine business written in the insurance markets of developing countries is comparatively small, there is not a sufficient spread of risks; furthermore, the expenses of small portfolios are relatively higher. As a result, local marine markets in developing countries are often compelled to quote higher premium rates than those offered by the international markets. As lower cost is an important factor determining the attitude of the exporter or the importer, preference is given to the market which offers lower premium rates.

199. Thirdly, as a large proportion of marine cargo risks sometimes involves substantial values, which are frequently subject to accumulation aboard vessels, at terminals, or in warehouses, local marine markets find it difficult to cover them, because of their restricted underwriting capacity. International markets, with their vast underwriting limits and their extensive business links with other insurers and reinsurers can, on the other hand, absorb such high values, capacity being no problem.

200. Fourthly, international marine cargo insurers differ from local marine markets in developing countries in that they dispose of a wide network of expert loss adjusters, capable of offering adequate services with regard to claims settlement. Moreover, international marine insurers maintain close relationships with the best legal and banking services, factors which are vital for prompt and speedy settlement of claims. Insurers in developing countries often lack some of these facilities, a situation which may result in delay in the surveying and settlement of claims. The prompt settlement of claims is, of course, a vital factor in insurance.

201. Finally, the major consideration when taking an insurance cover is the certainty of being indemnified promptly in case of loss. Owing to the currency situation in many developing countries, the mobility of funds has not always been guaranteed. This is one reason why importers and exporters in developing countries are tempted to take out marine cargo insurance abroad. Due to this same currency situation, furthermore, many insurers in developing countries cannot issue insurance policies in a foreign currency. Since the majority of foreign trade contracts are drawn up in terms of foreign currency, it is natural that trade partners prefer to get covers in these currencies to facilitate replacement in case of loss.

202. As stated above, the insured in developing countries tend to seek cover abroad mainly for reasons closely linked with the situation mentioned in paragraph 193; in other words, they are the consequence rather than the cause of the fact that an insufficient volume of marine cargo insurance business is placed on the national insurance markets of the developing countries. Should a developing country succeed in breaking the vicious circle and secure for its national marine insurance market a constant flow of a large volume of business - namely, the bulk of the cover for a considerable volume of foreign trade - this market would gradually overcome its traditional weaknesses and develop into a stable marine insurance market providing both adequate cover at fair prices and satisfactory services to users.

203. Obviously such a fundamental change in marine insurance cannot be achieved without some major changes in the traditional patterns of foreign trade. As was to be expected, resistance to such changes developed initially. Fortunately, the large international insurance centres have recently accepted the UNCTAD thesis that developing countries should, among other things, promote their domestic marine insurance markets, recognizing that a certain protection of emerging local industry is warranted if imposed on a temporary basis. Leading representatives of the above international insurance centres have furthermore agreed that in the long run, the wider the spread of fully developed reliable marine insurance markets, the better will the interests of the users be served, and this can only improve the flow of international trade provided, of course, that each of these new markets develops properly, acquires the necessary expertise and experience and reaches a size which makes marine cargo insurance operations technically safe and economically worthwhile.

Trade patterns affecting the marine cargo insurance business

204. In principle, where and by whom an import or export of goods is insured depends on the kind of trade contract used. The conditions of the contract of sale, or in their absence the corresponding laws, establish not only the liabilities of the parties involved but also their rights. Among other things, the insurable interest

of the contractors at various stages of the transaction can be determined on the basis of such a contract. It is of particular importance to the marine insurer to know exactly when the ownership of the goods passes from the seller to the buyer, because in the event of loss of or damage to the goods it is essential to establish which party must bear the loss and be indemnified according to the provisions of the insurance policy.

205. In view of the complicated nature of the task, no attempt will be made in the present paper to analyse the main principles of the various laws which deal with the problem of ownership. Suffice it to say that while under Roman law the ownership is transferred at the moment of the signature of the contract of sale (perfecta emptione periculum ad emptorem), under Germanic law the ownership is transferred when the goods are delivered. The British Sale of Goods Act, 1893, follows the Roman law. In section 32 it provides that: "Where, in pursuance of a contract of sale, the seller is authorized as required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is, prima facie deemed to be a delivery of the goods to the buyer." 10/

206. Quite apart from the provisions of the various laws, the parties in a contract of sale may, however, determine special conditions, that is to say special terms of sale, some of which have been standardized and become recognized internationally. In this connexion, the INCOTERMS 1953 of the International Chamber of Commerce, codifying and interpreting the main terms used in foreign trade, play a preponderant role. As regards their effect on marine insurance, the Incoterms may be classified into two groups, namely those where insurance is bought by the seller (e.g. C.I.F., Ex-Ship,) and those where it is bought by the buyer of the goods (e.g. F.O.B., C. & F., F.A.S.,). For the purpose of the present study, it is sufficient to explain briefly the two main cases in each group, namely the C.I.F. and the F.O.B. terms, since the effects of the other Incoterms as regards insurance are bound to be similar either to C.I.F. or to F.O.B. terms.

207. Under the C.I.F. rules, the seller must contract for the carriage of goods to the agreed port of destination and pay the freight and load the goods on board the vessel at the port of shipment; he must also contract and pay for the insurance cover; thereafter the buyer must bear all risks until the goods arrive at the final

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10/ Victor Dover "A handbook to marine insurance", London, 1962.

destination point. In other words, under C.I.F. rules, the seller's responsibility ends when he has delivered the goods on board the ship and from then on they travel at the buyer's risk, although the seller is responsible for the payment of freight and the marine insurance premium. Although no specific provision is made in the Incoterms as regards the transfer of ownership, it can safely be inferred that it either happens when the seller loads the goods on board the vessel at the port of shipment and receives the bill of lading, or when he delivers this bill of lading to the buyer. It should be noted that the two concepts of the transfer of the risk and of ownership are not identical.

208. It therefore follows that from the point of view of risk bearing there is no fundamental difference between C.I.F. and F.O.B. terms. In the latter, the responsibility of the seller ends at exactly the same point, namely when he has delivered the goods to the shipowner who was designated (and paid) by the buyer. The fact that under the F.O.B. terms it is the buyer who is responsible for contracting (and paying) for carriage of the goods and marine insurance in no way alters the position as regards transfer of the risk and of ownership. Both under the C.I.F. and F.O.B. terms it is invariably the buyer who bears all the risks from the time the goods pass the ship's rail at the port of shipment. He should therefore have the right to choose his insurer in both cases.

Insurance of imported goods by the buyer

209. The principal parties usually involved in an import transaction and having an interest in insuring the imported goods are the foreign seller, the domestic buyer and, where applicable, the banks or other institutions financing the transaction. As regards the buyer, it stands to reason that whenever the domestic insurance market is able to provide locally adequate marine insurance cover at a competitive price and with good servicing, he is interested in purchasing this cover on his own market from an insurer known to him and from whom he may expect a prompt and proper settlement of claims. In other words, it is in his interest to choose F.O.B. or C. & F. terms.

210. In principle, a seller should not have any objection to selling F.O.B., especially when the arrangements for payment are on the basis of a letter of credit or against delivery of documents. The situation may be different in cases where the seller, although not responsible for the goods after their delivery F.O.B., may fear that in case of loss of or damage to the goods and failure of the buyer to meet his obligations, the recovery of the price may be prejudiced. Problems of exchange control in the buyer's country may also affect the seller's position. However, all these problems can be solved. The insurance markets already provide special policies designed to meet any specific additional requirements of the seller without overlapping

with the main policy providing protection for the goods in transit. The seller's bankers will also be satisfied if his insurance needs are adequately met.

211. It is historically correct to say that the F.O.B. contract was formulated as an instrument of international trade at an earlier date than any other type of contract. It seems natural that such a contract might have been most suitable to the seller during the late eighteenth and early nineteenth centuries when regular shipping lines were not yet established and such modern instruments as telegraph, radio and postal services, were not yet developed. However, as regards developing countries, most of which were colonies or semi-colonies at that time, all their imports used to be arranged on C.I.F. terms, for the simple reason that they did not have their own shipping and insurance services and had to rely entirely on the services provided by the metropolitan countries. Under present conditions, the developing countries should endeavour to alter the situation and enable their markets to provide marine insurance cover for their imports.

212. As already mentioned above, the principle of the protection of an incipient industry in a young and rising nation is generally accepted. The superiority of one country over another in a branch of production often arises only from having started sooner. This is indeed the case in the international marine insurance markets, where some nations have had the opportunity to build up their markets much earlier and to acquire broad skills and experience in this field. Plans should be formulated and implemented to move the emerging marine insurance markets of developing countries towards similar efficiency, to service the insured and to support their national trade. Suggestions on how this should be done will be discussed in the next chapters of the present study.

Chapter II

PROMOTION OF MARINE CARGO INSURANCE MARKETS THROUGH REGULATORY MEASURES

Regulatory measures in general

213. As shown in the preceding chapter, the main obstacle to the sound development of marine cargo insurance markets in many developing countries is the lack of a substantial volume of marine insurance business covered in these markets. Lack of expertise, inadequate rating and insufficient servicing should be considered as effects rather than causes of the above situation. Nevertheless, since causes and effects tend to create market conditions which block further development, the marine insurance markets of most developing countries can hardly be expected to find their way out of this situation unless some effective measures are taken at the national level, involving appropriate regulatory action by the authorities concerned.

214. Recourse to regulatory measures is a more or less current practice in insurance. In fact, insurance legislation in many countries, both developed and developing, stipulate that in most main classes of insurance domestic risks must be insured in the domestic insurance market of the country concerned and cannot be taken out to be insured directly abroad. Exemptions from this rule are often granted in cases of risks which cannot be insured locally, as well as for reinsurance operations in general and, quite often, for marine cargo insurance. As regards the latter, some countries believe that the traditional notion of a domestic risk does not fully apply to goods in transit, since the perils involved are neither restricted to a specific place, nor do they concern a single nation, several places and interests being involved in international transactions such as imports and exports. Furthermore, some developing countries, depending heavily on their foreign trade with developed countries, are very hesitant to take measures directed at changing current practices in marine cargo insurance, for fear of impairing their foreign trade in general and their exports in particular.

Measures aimed at insuring imports in the local market

215. In the case of exports, there may be valid legal and economic grounds for rejecting the principle of regulatory measures by the exporting country. The situation is basically different for imports where, as was shown in the preceding chapter, it is invariably the importer who is the owner of the goods from the moment they are loaded on board the carrying vessel, and it is the importing country which pays the premium of the cover, whether or not such payment is reflected separately in its balance of payments. Even in cases where the foreign exporter is formally responsible for providing insurance cover, namely under a C.I.F. contract, the

shipment represents a national risk for the importing country to the extent that its cost is included in the C.I.F. price of the commodity and, consequently, is ultimately paid by the importer. Hence, many developing countries consider that the basic principle of insuring national risks in the local market should apply in the case of imports.

216. It is true, however, that the legal and economic interpretation of the question of nationality may sometimes lead to uncertainty. Developing countries should therefore make it clear, in their insurance regulations, that the latter prevails over the former. This principle may be laid down in different ways, depending mainly on the extent to which developing countries wish to enforce it. The following paragraphs will describe the three most common systems available to these countries, a number of which have already adopted them. The impact of these regulations is illustrated by the fact that in the developing countries which require local insurance of their imports the marine premium ranks first or second in terms of volume of business among all other classes of insurance business transacted, whereas in countries where no specific regulations are laid down marine insurance tends to be an almost marginal class of domestic market business.

217. A straightforward solution to the problem is that of prescribing by law that transportation of goods imported into the country shall be insured with companies legally established and duly licensed therein. Such a regulation generally curtails the possibility of selling C.I.F. to the country, because adoption of C.I.F. conditions of sale could lead to some sort of double insurance contracted for the same shipment and hence entail unnecessary costs. The regulation in question therefore brings about F.O.B. or C&F conditions as a general pattern for imports.

218. The general rule of local insurance for imports may, however, be subject to a degree of flexibility. Not all imports, for example, are negotiated under normal contracts of sale and aid programmes are a clear example of this. In these cases the Government may waive its right of strict enforcement of the local insurance rule if such a waiver is conducive to more favourable terms in trade relations. An example of this is India where, although it was stipulated in 1962 that all insurance on government accounts was to be placed with a local insurance pool, shipments to India from the United States under an aid programme were insured on a 50 per cent each basis in India and the United States. This, however, may be considered an exception to the general rule and it did not prevent imports under the Colombo Plan from Australia and Canada, among others, from being insured in India. Another case of a special arrangement made on a country-to-country basis was a recent agreement

between Algeria and the People's Republic of China, under the terms of which each country would underwrite 50 per cent of the value of the goods exchanged between them.

219. Consequently there is nothing to prevent the requirement of local insurance for imports from being applied with sufficient flexibility when broader national interests must prevail over insurance interests. In addition to the particular case of aid programmes described in the preceding paragraph, there are some other imports which are effected under the terms of a specific contract of sale but as a transfer of capital goods or primary materials, made to their overseas branch offices by corporations whose head-offices are in the exporting country. Similar cases may also arise where the transportation of goods is not a commercial operation proper involving two different corporations or entities - the seller and buyer - and the resident consignee does not have a proper "insurable interest" in the transported commodities. All these cases are frequently subject to the obligation of placing insurance locally, but some countries take the view that this basic rule should only be enforced for purely commercial transactions.

220. Some countries feel, however, that a strict regulation compelling all imports to be insured locally is not the most suitable course to follow. A line of action has developed which considers the matter of foreign insurance for imports to be a commercial problem rather than a purely insurance problem. As pointed out before, prevailing practices of exporting C.I.F. to developing countries do not primarily concern the selection of the insurance company but that of the pattern of the commercial contract. Thus, the second system consists in restricting the choice of the commercial contracts for imports to F.O.B. or C&F, among other possibilities provided in the Incoterms formulas. Thus, although there is no formal compulsion to buy insurance in the domestic market, the local importer is made legally liable for these risks and must therefore satisfy the basic requirement and cover the risk in the country.

221. However, as already mentioned above, not all imports in a country are made on the basis of commercial contracts. There are a relatively large number of shipments that do not relate to two different and independent tntities and for which no formal contract is established. In other cases when the principal office in a developed country ships goods to its branch in a developing country, the insurance is usually placed in the form of open covers or floating policies arranged by the former, and the commercial contract is drawn accordingly. Therefore the obligation of F.O.B. conditions for contracts of sale will not automatically guarantee that the goods will be insured locally; in other words, it does not automatically ensure local coverage for these shipments.

222. It may therefore be accepted that, whatever the advantages of the regulation whereby F.O.B. conditions are imposed for imports, the system will not operate fully if it is not supplemented by appropriate additional measures. Some countries have indirectly found a solution to the problem by providing that banks will open documentary credits only if the contract of sale includes F.O.B. or C&F terms. In other countries (e.g. Syria) this system has been supplemented by requiring that insurance be provided locally for imports made by a local branch office of the foreign exporter - a condition which presupposes that the links between the exporter and the importer can always be identified, which is obviously not the case. The reasoning underlying these prescriptions is that in most cases commercial transactions resort to one of two instruments: bank credit or resident agency of a foreign exporter. These two channels can be more easily controlled than a system entailing a detailed examination of the documents for all shipments arriving in the country.

223. As to imports financed by foreign loans, it may not be deemed appropriate to subject them to conditions which could encumber the bargaining position of the local importer. In fact, for these shipments the foreign financing body also has an "insurable interest" over the commodities for which a credit is granted, and it might be considered necessary for such an agency to participate in the choice of the insurer. If this were not so, the foreign financing agency might consider it necessary to buy another insurance cover for the same goods and thus increase their price.

224. A third group of measures involves the mechanisms of both import licences and foreign exchange control. While the basic principle of the national characteristics of import risks subsists, the way in which this principle is dealt with puts a particular emphasis, through these measures, on the foreign exchange component of marine insurance and on the need to make sparing use of it if the cover is available in the local market. Thus import licences may only be granted against the presentation of an insurance policy or an insurance certificate providing evidence of local insurance. This means that at least some marine insurances would become compulsory.

225. In some markets where the above procedure has been adopted, domestic insurance companies have sometimes been requested by importers to issue insurance certificates for non-existent insurance covers, or have issued insurance certificates under policies on very restricted conditions, while the goods have already been insured in a foreign market with insurers considered for various reasons to be more acceptable to the contracting parties. Some violations, of course, defeat the purpose of the measure. Imports which are not subject to licences also fall outside the scope of

the basic rule of local insurance, but these are considered to be imports for which no foreign exchange is required (for instance, aid programmes, personal effects and other non-commercial shipments), so that in these cases marine insurance bought abroad does not adversely affect the national interest.

226. Other measures falling more specifically under the exchange control scheme may also be devised. Well-known among these schemes are those consisting of either a refusal to assign foreign exchange for imports in excess of F.O.B. values (the difficulty here is to check the accuracy of these values) or an allocation of foreign exchange for C.I.F. values, on the understanding that foreign exchange representing the difference between C.I.F. and F.O.B. value is available to the local importer for other commercial operations for which the national authorities would not normally grant foreign exchange. The aims, scope and limitations of these measures are so evident that they do not need to be described. Suffice it to say that it may be difficult to enforce them fully, mainly because the F.O.B. or C.I.F. prices declared by the local importer may take into account certain commercial considerations and not necessarily reflect the real position.

227. The preceding paragraphs have sought to describe the different methods developing countries may resort to in attempting to attract marine business for imports to their local market. The national market is generally understood to be the insurance companies authorized to operate in a given country, that is to say those that have met the legal and other administrative conditions for so doing. However, in some countries (Argentina is one example) the principle of insurance for imports on the national market has been interpreted in such a way as to debar from transacting insurance of imports not only the foreign insurance markets but also the foreign companies duly established in the country,namely, those to whom the national authorities have granted a licence to transact insurance business in the country. Some observers question whether it is reasonable to authorize foreign insurance companies to operate in a national market in respect of fire, motor vehicle and similar undoubtedly national risks, and to preclude them from operating in the marine branch which is much more international by definition. An additional problem that arises in this connexion is the criteria under which a company qualifies as a domestic concern.

Measures concerning the insurance of exports

228. If similar reasoning were to be adopted in respect of insuring exports, it would follow that the exporting country should not take legal measures in this field, the absence of regulations being a logical corollary for measures taken on the import side. This line of thought is clearly expressed in a publication of the central

reinsurance institute of a large developing country, which points out that "whoever buys from us has the fullest freedom of contracting wherever he wishes the services of transportation and insurance, as a corollary of the same rights we claim from our international suppliers as regards our imports".

229. Other developing countries take a different view in this matter and consider taking legal measures aimed at promoting an active participation of their national insurance market in export business as well. Insurance of risks related to exported shipments presents a positive opportunity to the local insurance market and to the country as a whole. To some extent the opportunity is even more valuable than that related to imports, for goods damaged or lost in the case of exports will generally be replaced by national products bought in local currency, while in the case of imports goods lost or damaged will have to be replaced by foreign goods, resulting in double expenditure of foreign currency. Nevertheless, the enforcement of legal measures requiring local marine insurance for exports should ensure that such measures do not conflict with any regulations of the importing country aimed at insuring its imports locally; otherwise double insurance might result, which would be an economic waste. Negotiations between the two countries concerned often help to avoid such a danger.

230. However desirable legal measures for local insurance of exports may be in theory, in practice the policies followed in this field by most developing countries have been based on a realistic approach dictated by the need to give local exporters the broadest possible freedom of action in their transactions with foreign importers. The fact that the efforts of most governments are mainly directed at facilitating the export of their national products does not need to be emphasized here. Restrictive measures in the marine insurance field could have adverse effects on this policy and therefore be detrimental to the promotion of exports. Furthermore, when the credit and reputation of many insurance companies in developing countries have not yet been established internationally, there is a marked preference for the foreign importer to resort to his own underwriters, whom he knows and with whom he has global arrangements for his world-wide activities. These facts may induce exporters in developing countries to feel more at ease in their negotiations with their clients if they can offer F.O.B. or C&F terms of sale. Hence governments in developing countries have generally abstained from attempting too strongly to make the local insurance market participate in the business.

231. Some developing countries have succeeded in promoting local insurance of exports when transactions are made with countries where no specific regulations for marine business exist, or when some special commodities are concerned (such as copper,

uranium and oil) which are subject to particular export conditions. For instance, in Pakistan shipments are generally made on F.O.B. terms for conventional exports such as cotton, cotton yarn, hides, skins, and wool. However, some export items such as fresh fruit, carpets, rugs, sports goods, cement and manufactured items are shipped on a C.I.F. basis and are insured in Pakistan. Exports to developing countries, especially those near Pakistan, are also covered with Pakistani companies, while practically all exports to socialist countries are sent F.O.B. The relevant factor in this example is that no legal provision is responsible for this situation. It merely illustrates the possibility for developing countries to insure a substantial part of their exports even when they cannot regulate the matter on strictly legal terms.

232. Exporters in some countries are encouraged to contract local marine insurance not by laws relating specifically to this field, but in the indirect form of tax rebates, drawbacks and export credits which are primarily directed at promoting and supporting the exporters' efforts to increase their sales abroad. The modalities of these mechanisms may differ from one country to another and these differences derive more particularly from the individual taxation systems. Basically, these modalities consist of refunds of direct or indirect taxes on account of these exports. The refunds are normally based on the total amount of the export value, with the result that if insurance were arranged by the foreign importer, or if the export were made on an F.O.B. basis, the basis for calculating the rebates and other facilities would be lower than if insurance were effected in the exporting country.

Degree of enforcement of regulatory measures

233. In examining the compulsory measures that developing countries have laid down for marine insurance an important question arises: to what extent are these measures effectively applied and what are the loopholes that permit local traders to evade the regulations?

234. The general feeling is that in countries where local marine insurance for imports is compulsory, effective control is carried out by the authorities to ensure that the obligation is fully met. One form of such control is to require an insurance policy for customs clearance in which the importer can prove that marine insurance has been contracted in the local market. But even this kind of surveillance may not be fully effective in every case. For example, only a nominal low coverage insurance may be bought in the country while, for the same shipment, the real full cover is effected abroad. The result is that the customs authorities are satisfied, having been presented with an insurance policy for nominal coverage of the shipment, while the real insurance cover has been transacted with a foreign company, or the operation

actually carried out under C.I.F. terms of sale. Other ingenious and subtle practices are devised, particularly when local insurance is much less favourable in economic terms, than insurance available in foreign markets.

235. With reference to exports, in most cases one cannot speak of exporters breaking any regulations since, as pointed out before, there are, in general, no legal constraints against their taking out insurance abroad. However, it may be appropriate to refer here to other measures which tend to hinder government efforts to encourage exporters to take out local marine insurance. One method is to keep a double set of ledgers, a procedure used on a large scale in a number of countries. It is obvious that when a commodity is billed for less than its real value the exporter can neither buy insurance for its true value - in which case the tax authorities would be suspicious about the accounts - nor for the value shown in the false accounts - in which case the exporter would be underinsured and would himself bear a substantial part of the marine risks. The solution, when these illegal practices are engaged in, is to let the importer arrange the insurance, so that the liability for the transported commodities is transferred to the buyer as soon as they are loaded on board.

236. An area in which governmental intervention aimed at increasing the volume of marine business placed on the local insurance market is most successful, is the one where internal instructions are given by the authorities concerned to the government-controlled industrial and commercial enterprises to cover their marine insurance risks exclusively with national insurers, mostly with the State-owned insurance corporations. In Argentina, for instance, the State-owned company "Caja Nacional de Ahorros y Seguro" underwrites all business emanating from the State, provincial government and State-controlled or semi-State-controlled industries and concerns.

237. In concluding this chapter, it is worth repeating that any regulatory measures directed at increasing the volume of marine insurance business transacted in a developing country can only be effective if the insurance demand originated by these measures finds an adequate supply in the local market. Further, the obligation to insure cargo locally can only be met if a company or group of companies is established in the country and is technically and financially able to cover the risks. Again, the obligation imposed upon local traders to resort to the national market is less likely to be opposed when the local insurance institutions provide an efficient and economic service comparable to that offered in other areas. That is why some of the developing countries which have sought to ensure broader local market participation in the insurance business have seen to it that the obligations of local importers (or exporters) have been supplemented by measures concerning the proper supply of insurance cover by the national marine insurance market. These problems are dealt with in the next chapter.

Chapter III

LOCAL SUPPLY OF MARINE CARGO INSURANCE COVER

Problems related to local supply of marine cargo insurance cover

238. As a result of the policy proposed above, aimed at increasing the participation of the insurance markets of developing countries in providing marine cargo insurance cover, the domestic insurance companies in some of these countries may be faced with a series of technical problems related to their capacity to provide such cover. In fact, the domestic insurance companies may have to:

- develop sufficient underwriting capacity, necessary for accepting the business proposed by the merchants of their country and for providing adequate cover, as regards both types and reliability of cover based on spread;
- rate the risks, taking into account the need to keep the cost of cover at moderate levels while securing reasonable underwriting results;
- properly service their claims (including foreign exchange cases) and secure recoveries.

An analysis of the present situation in these three areas may help the domestic insurance companies of developing countries to find adequate solutions to their technical problems.

Underwriting of marine cargo insurance

239. Underwriting capacity is the ability to give cover for risks proposed and consists of the underwriter's own retention plus the available reinsurance covers. The underwriting capacity of most marine insurers in developing countries depends much more on the reinsurance facilities available to them than on their own retention potential. This is due to the fact that the marine cargo insurance business is normally characterised by wide variations in risks insured and values covered. Moreover, it is always vulnerable because of the strong possibility of risk accumulation which is often not controllable. The retention capacity of most marine insurers in developing countries being relatively low, at least in comparison with the volume of risks which they may be called upon to assume, acceptance of risks depends primarily on the ability to make extensive use of reinsurance facilities. This situation compels domestic underwriters to obtain maximum reinsurance facilities enabling them to meet the demand of their national marine cargo insurance market as fully as possible.

240. The task of determining the underwriting capacity required by a given marine insurance market is difficult. One first needs to explore, at the market level, the different types of risks to be insured and the extent of cover which may be required by each risk. Then the insurers have to measure what portion of such risks they can safely retain for their account. One of the factors to be considered in choosing the retention limits is the quality of the individual risks of the portfolio and their loss experience. However, the volume of the retained premium also plays a role when fixing the insurer's net retention. In fact, the insurer should always ensure that a balance exists between his net premium and his net liabilities. A third factor to be taken into consideration is the insurer's financial situation, namely the size of his capital and reserves and the nature of his investments. With an increase in these funds, the insurer could consider retaining a larger part of the risks underwritten by him.

241. After fixing his own retention limits the insurer has to arrange the reinsurance covers which would absorb the balance of risks covered by him. In some developing countries the individual amounts at risk in the marine field may not be very high. However, one often finds marine insurers committed to a considerable number of risks susceptible to loss or damage as a result of a single occurrence. This is due to the accumulation hazard. Accumulation is very frequent in developing countries due to many factors, mainly to lack of sufficient shipping information, the congestion of ports and warehouses and the slow procedure of loading and unloading of goods. To protect themselves against accumulation hazards, marine insurers usually take excess of loss covers which limit their loss per any single occurrence to a fixed amount which they can afford. This cover is intended to protect the net retention of the insurer or the whole of his marine account.11/

242. Since reinsurance plays an important role in providing marine insurers with underwriting capacity and protection in case of adverse experience, and in the absence of local reinsurance facilities, there is a tendency in many developing countries to rely heavily upon foreign reinsurers. This results in a heavy outflow of marine insurance business, which largely defeats the purpose of increasing the participation of developing countries in providing locally marine cargo insurance cover. Several developing countries have taken corrective steps to reduce dependence

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11/ For more details on the subject of reinsurance see the UNCTAD document entitled "Reinsurance problems in developing countries", TD/B/C.3/106/Rev.1.

upon foreign reinsurance. Two types of measures have been taken in this direction. One was designed to enhance the local retention capacity of the individual insurers and of the market as a whole by means of co-insurance and pools and the other to promote domestic reinsurance facilities.

243. Co-insurance consists in the sharing of insurance contracts among a number of direct-writing insurance companies, which are jointly responsible to the insured. The very fact of collective participation of many local companies in the cover of each risk results in a more intensive use of the retention capacity of the local insurance market. Examples of such an arrangement are the co-insurance schemes in Pakistan, and Venesuela applicable to marine insurance policies covering governmental imports. This business is distributed among all domestic companies, each according to its capacity. The use of the aggregate capacity of the domestic companies reduces the need for outside reinsurance to an absolute minimum.

244. Under a national pool system risks underwritten by insurers operating in the market are wholly or partly put in common and then redistributed back to the ceding companies, according to their individual retention capacity. The idea behind the pools is that risks which exceed the capacity of individual companies can be retained to a larger extent in a country if the joint potential capacity of the local insurers is utilized. Apart from this consideration of reducing the need for foreign reinsurance, domestic pools in marine insurance are useful in avoiding unsound competition.

245. Many developing countries, in an attempt to keep as much business as possible inside the country have created local reinsurance facilities. This is generally achieved by setting up domestic reinsurance institutions, which usually involves some compulsory reinsurance cessions. An example of this is the Ghana Reinsurance Corporation which receives compulsory and treaty cessions from local sources. Another example is the Pakistan Insurance Corporation which receives compulsory treaty and facultative cessions from the local companies and a major part of these cessions is retroceded to direct-writing companies in the country to augment the spread of their portfolio and this in turn maximises the retention and acceptance capacities of the companies concerned.

Types of cover offered in developing countries

246. The various types of cover available in developing countries are normally those which are offered by the main international markets. Their different risk components vary from country to country. As these types of covers and clauses have long been in use in international trade and numerous legal decisions have clearly and accurately determined their meaning and implications, marine insurers in developing countries had to adopt them in order to make their own marine cargo policies universally recognized and accepted.

247. However, the utilization of some clauses may create problems if there is a lack of consistency between the legal background against which such clauses were originally conceived, and the national texts which provide the legal framework applicable in the country. In Argentina, for instance, it has been found that the national Code of Commerce and the Civil Code provide different backgrounds for some provisions included in the Institute Cargo Clauses. Hence, a new set of clauses is being drawn up in Argentina for marine cargo. It appears that while the proposed clauses do not substantially depart from the clauses of the Institute of London Underwriters, they will conform more to domestic legislation and will be derived more directly from the provisions of local codes. Developing countries should endeavour to adapt their policy conditions and clauses to meet both the requirements of the international characteristics of marine insurance, and the general legal provisions applicable in their countries. Special clauses should also be drawn up regarding risk coverage in respect of their traditional export products.

248. When Free of Particular Average (FPA) and With Average (WA) types of cover are used in developing countries, some customary extensions reflecting specific conditions prevailing in these countries, are required. The most noted extensions are:

- Theft, pilferage and non-delivery

  In many developing countries some consumer goods are virtually unobtainable. Experience has shown that shipments of such goods are extremely vulnerable to the risk of theft, pilferage and non-delivery, a situation which justifies taking an extension to cover these extra hazards.

- Freshwater damage

  Most of the developing countries have subtropical or tropical climates where rain represents a real threat to the safety of goods transported, especially if stowage conditions at ports are not adequate. Demand for the extension of marine cover to include loss or damage caused by rain and freshwater is therefore frequent in developing countries.

- Breakage and leakage

  Many developing countries lack modern equipment for handling cargo. Their extensive reliance on manpower and the use of hooks in loading and unloading goods thus increases the possibility of breakage and leakage of goods transported in these countries. An extension of cover to include these risks is thus frequent in developing countries, and insurers operating there have to comply with the wishes of their clients.

249. A type of cover which is resorted to with growing frequency in developing countries is the "All Risks" cover, which includes ordinary marine risks plus extraneous perils but excludes inherent vice and delay. "All Risks" cover is used in developing countries particularly for imports of machinery and equipment in view of the many hazards involved. The "All Risks" cover is not used as much for the exports of developing countries in view of the nature of the commodities exported.

250. On the other hand, many developing countries are vulnerable to political and social tensions. Risks of war, civil war, military coups, insurrections, strikes and riots induce shippers and consignees, having goods imported from,exported to or in transit through these countries to take cover for such risks in conjunction with their marine insurance policy.

Marine cargo rating in developing countries

251. The rating of marine cargo insurance risks, generally done by the direct-writing companies, depends on the past experience and judgement of the underwriters who take into consideration, on a case to case basis, the characteristics of the risk to be covered. The direct-writing companies usually consult their reinsurers before fixing rates for valuable shipments, new commodities, or special types of cover, especially if a share of the risk has to be reinsured on a facultative basis. It seems, however, that there is an increasing tendency in developing countries to introduce marine cargo tariffs, at least for specific shipments and voyages. These tariffs are usually prepared by local insurance committees or groups of marine underwriters operating in the market (Egypt, Pakistan) or by the central local reinsurer (Brazil). They provide rates for each commodity, to which surcharges should be added or discounts given according to packing, the type of carrying vessel, port conditions, storage facilities and so forth.

252. The reason for setting up marine cargo tariffs may differ from one country to another, but it is believed that two considerations for doing so prevail. First, the market may lack experienced underwriters who are able to give proper ratings for the risks to be covered, in which case a marine cargo tariff serves as a rating structure that more or less responds to the experienced cost of risks and prevents the quoting of totally uneconomic rates which may affect the sound operation of the marine branch. Secondly, when unrestricted competition exists in a market, thus tending to cut rates down to an uneconomic level, an established tariff may put an end to practices which constitute a threat to the soundness of the local marine market. In fact, although competition between underwriters may be to the advantage of the insured when practised on a moderate scale, excessive competition involving competitors of unequal strength (especially large foreign insurance concerns and emerging domestic insurers) is a danger to the national insurance market as a whole.

253. Various problems may nevertheless arise out of the application of a marine cargo insurance tariff:

- A marine cargo tariff, especially when based on a list of commodities, can never be complete because the list of insurable commodities is too long to be contained in a tariff. Moreover, new types of commodities emerge every day and sufficient experience has to be gained before providing a tariff rate for them.
- The rating of a commodity does not only depend on the particular experience of the commodity but also on a variety of factors such as the type of coverage required (Total Loss Only, Free of Particular Average, With Average, All Risks), the extent of cover (port to port, warehouse to warehouse, extension after arrival at destination,), the nature of packing, the form of stowage, claims record the classification of the carrying vessels and the cost of business (brokerage, agency commission). All these factors cannot possibly be embraced by a tariff, at least not in sufficient detail.
- Tariff rates generally lack the degree of flexibility which is the basis of good underwriting. For instance, a tariff cannot take into consideration the favourable experience of an insured. Hence, efforts and measures aiming at loss minimization are not encouraged.

254. Considering the pros and cons of setting up tariffs for marine cargo insurance, some developing countries have chosen to set tariffs at minimum rates, subject to surcharges either provided by the tariff or left to the discretion of the underwriter. Tariffs may, moreover, be imposed only on selective shipments and selective ports where unhealthy competition is practised and/or in respect of those marine cargo risks which by law have to be insured locally (e.g. imports into Pakistan, Egypt and Iraq). In Bombay there is no obligation to insure exports locally, although there is a tariff for exports to Middle Eastern and Far Eastern ports. The reason for this seems to be that the Bombay marine market is well-established in those areas.

255. Needless to say, the successful operation of a cargo tariff in a market requires, above all, the existence of measures restricting direct insurance abroad. Failing such measures, international competition and the level of rates quoted by international markets will not only paralyse the application of the tariff but cause the bulk of business to be sent abroad to take advantage of the competitive rates and other benefits which may be offered there. Furthermore, tariff rates, to be adequate, should be reviewed frequently, in order to adapt them to the experience gained, especially in view of the constant changes in packing, stowage and transport. Delay in revising

tariff rates may cause prejudice to underwriters if the tariffs applicable to some commodities continue to be underrated for any length of time. It may also lead to loss of business if experience reveals that the tariff is overrated and thus induces recourse to self-insurance.

256. Although rating of ordinary marine cargo risks is customary in every country, whether on the basis of tariffs or individually on a case-by-case basis, this is not true of war, strikes, riots and civil commotion risks for which the conditions and rates applied are normally those quoted by the London Market or a few other national markets. These rates vary, of course, according to the conditions prevailing in different parts of the world. Insurers in developing countries follow the London Market's decisions (or those of the markets of France, or the United States, for example). Reinsurers all over the world support these decisions by inserting in their marine treaties with direct insurers a clause requiring adherence to the conditions and rates of the London Market or other designated markets.

Level of marine cargo insurance costs in developing countries

257. The volume of marine cargo insurance business written in developing countries being relatively small, net premium rates, as well as acquisition and administrative expenses tend in principle to be higher than those of the international markets. Rates quoted by local insurers under similar risk conditions would therefore be expected to be higher, but this is not always the case. In fact, in markets where local insurance of marine cargo risks is not required by law, the quoting of rates higher than those offered by the international markets would lead directly to the purchase of marine covers from abroad if they are cheaper. Local insurers are thus compelled to align their rating to the level of the international markets and to use the reinsurance facilities available to them to achieve the necessary spread of risks and expenses.

258. On the other hand, in countries where the insured is compelled by law to contract marine coverage locally, the home markets may become monopolistic because of the absence of foreign competition. As a result, insurance pricing may rise. However, experience proves that this is usually a temporary situation for if a local market is adequately structured and enough reinsurance facilities are available, local marine cargo insurance may not be more expensive at all. Even where a slight difference in rates does occur, it should not be considered a serious drawback to the principle of local coverage of marine insurance in view of the other important advantages accruing therefrom for the country concerned, including foreign exchange savings. However, if rating became unduly high, because of the absence of foreign competition, the result for the national economy would be clearly negative.

259. Accordingly, the developing countries which have restricted the freedom to take out marine cargo insurance abroad have in many instances laid down a number of rules aimed at controlling to some extent the cost of marine insurance cover. The example of Iran may help to illustrate the interrelation between adequate price control and regulatory measures concerning local insurance of foreign trade. A marine cargo tariff has been in effect in Iran since 1964/65. This tariff represented minimum rates to which companies were allowed at their discretion, to add additional premiums according to the conditions of, among other things, packing, routing and experience. This resulted in Iranian tariffs being quite high compared with the rates quoted by international markets. As a result, many Iranian importers defected from the local insurance market. This led to substantial rebates being offered by the local companies, sometimes reaching 40 per cent of the official tariffs. The result was that the market underwent rapid and unsound fluctuations, going from an expensive official tariff - which tended to drive the local traders away from the national market - to unsound competition which the market could not afford. Fortunately an end was put to these unsound practices by the Bimeh Markazi, the supervisory authority and central reinsurer of Iran, through the compulsory application of a duly modified tariff.

Control of marine cargo insurance rates

260. Cost control in the field of marine insurance should, at first sight, be based on the following considerations: basically the criteria under which tariff levels are computed should take into consideration the broadest possible national experience; when this experience is lacking, international prices should serve as indicative prices. The different factors that dictate a certain premium rate (claims, commissions, expenses, security loading) are clearly not only the result of a random process which invariably tends to give a mean figure, but may be subject to modifications. To give a simple example, improvement of the loading and unloading facilities will curb the loss ratio and, to the extent that this ratio is reflected in the global market experience and is a component of the premium rate, the result will be that the improvement of port conditions will after a given period of time be translated into a reduction in insurance rates. Similar considerations will apply to commissions and expenses incurred by the underwriters.

261. The national insurance authorities have a positive role to play in this field, involving two consecutive steps: the first is directed at making the national market attain the lowest possible loss ratio and the second aims at reflecting any improvement of this loss ratio in the tariffs. By and large, however, it does not seem that national insurance authorities are properly equipped to carry this out effectively. Either the national insurance laws do not provide for these duties, or the insurance services lack sufficient technical expertise to give practical effect to these principles. This contrasts with examples such as Poland, where the Ministry of Shipping convenes a conference on loss prevention each year, in which all interested parties (including insurers, shippers, shipowners and port authorities) participate. There is evidence that measures adopted at these meetings yield substantive results. In addition, the national insurance company (Warta) is said to allocate large sums to loss prevention measures in general, particularly those affecting marine insurance operations.

262. The question therefore relates not only to the individual efforts of the different marine underwriters, but more particularly to the activities of central bodies (including technical committees and associations) which are in a better position to consider national interests as a whole, to gather global and meaningful national statistics on marine operations and to extract valid conclusions therefrom. Their influence over local transportation conditions, port facilities, storage and packing methods is also an important factor.

263. Central reinsurance institutions may play a positive role, inter alia because of the possibility of their securing more accurate and comprehensive statistical data from their developing markets. In addition, the functions of central reinsurance institutions with compulsory cessions generally include the global retrocession of all national surpluses abroad. As a result, more favourable conditions may be obtained from the international reinsurance market than if these surpluses were placed directly by the individual companies of the national market.12/ This could be translated into lower local rates, if such saving benefited the companies ceding marine cargo business. However, some central reinsurance institutions are reluctant to pay equally high commissions for compulsory cessions; furthermore, they encourage their ceding companies to apply high tariffs rather than reasonably low tariffs from which less profit would be derived. The issue is very much linked with the basic operations policies of the institutions and the extent to which national interests prevail over purely commercial objectives.

12/ See UNCTAD secretariat study "Reinsurance problems in developing countries", TD/B/C.3/106/Rev.1.

Underwriting results of marine cargo insurance

264. Statistics published by several developing countries regarding the operation of their marine cargo business generally show underwriting surpluses. Deficits only appear in the case of occasional major losses. Where local marine insurance cover is required or encouraged, the value of premiums rises more rapidly than the claims payable. However, the experience of developing countries in this field is too short for an assessment to be made, and the experience of world-wide markets tends to show that in marine business there are cycles of prosperity and adversity, not only in particular local markets but in all marine markets throughout the world.

265. The marine insurance markets in developing countries are relatively young and have not been able so far to accumulate substantial marine funds. They may thus face serious difficulties in the event of an adverse experience cycle. Underwriters in developing countries may also be confronted with two further perils: the accumulation of risks caused by the growing fleet of larger ships which are being used more and more for the transportation of goods, and the general inadequacy of port facilities in developing countries in the face of a growing volume of trade and the introduction of new methods of carriage and packing.

266. In an attempt to reduce and check the amount of losses incurred, some insurers in developing countries themselves supervise the loading and unloading of cargo insured by them in the docks and control the storage and final transport conditions until goods are delivered to their final destination. This experience has always proved to be extremely useful but often expensive. It was then felt that collective action between companies writing marine business would make the supervision of loading and unloading more efficient and less expensive. Claims minimization organizations were therefore set up in some countries, including Egypt and Iraq. Their main task is to supervise unloading and stacking operations, to arrange for a survey if packages show signs of external damage, ensure safe stacking in storage, and finally carry out insurance surveys for the account of insurance companies if necessary. In some cases claim minimization organizations undertake the task of handling recoveries from carriers and protection and indemnity clubs. The experience of these organizations has been quite encouraging and better claim ratios and services are being achieved.

267. Another measure which could lead to an improvement in the results of this class of business is the reduction of acquisition costs and overhead expenses. Insurance agents and intermediaries are generally paid in developing countries, particularly in respect of marine business. Because of its highly technical nature and the lack of specialization in this field, most of the agents and intermediaries in these countries spend their time canvassing for business, leaving it to their insurance companies to

carry out the task of rating, issuing policies, settling claims, exercising subrogation rights, and so forth. Under such circumstances, payment to these canvassing agents of commissions comparable to those paid to agents who manage marine portfolios on behalf of their companies would be completely unjustified. Companies should, moreover limit the number of their agents operating in a certain area by ensuring that only approved agents can act as intermediaries for marine business. This would considerably reduce unsound competition between agents in the local market. As regards overhead and operational expenses, only efficient management and more training for the staff can bring them down.

268. Other possible ways of improving the results of the marine business, to be applied as necessary, are:

- incorporation of some reasonable franchise or deductible in the insurance conditions;
- insurance of particular kinds of cargo under more restrictive conditions;
- improvement in the packaging of goods;
- using a different shipping line to convey the goods;
- using a different route, if this can be done for the goods concerned.

Servicing marine cargo claims

269. The main elements in handling marine cargo claims are evidence of loss, claims adjustment and claims settlement. Marine cargo insurers in developing countries do not usually encounter many difficulties in handling local claims which relate mainly to imports insured in the country, unless it is a case of general average when many interests are involved. Insurers normally have claims staff whose task it is to adjust and settle losses. The surveys are often conducted jointly by the insured and the insurer; sometimes they are jointly carried out with the carrier. In most developing countries there are also independent surveyors who specialize in carrying out surveys of goods.

270. While the settlement of local claims does not present major problems, the handling of claims occurring abroad, specifically in respect of exports insured locally, requires a network of foreign surveyors, average agents and settling agents practically everywhere the exported commodities are delivered. Such requirements are easily met by large insurance companies operating in many countries in view of their global marine arrangements all over the world. Conversely, domestic companies in developing countries, as long as the scope of their operation remains limited, are reluctant to embark on establishing such costly services abroad, their receipts in the marine branch not warranting the expense. In addition, as regards the settlement of claims abroad, possible restrictions of transfer and convertibility of currency prevalent in many developing countries may make it difficult for insurers to settle such claims promptly.

271. The latter factor explains why some foreign clients of exported goods prefer to cover their shipments in their own countries. It also largely explains the reluctance of some domestic insurance companies in developing countries to make efforts to cover export business; they simply prefer to avoid the difficulties referred to above. Here international companies operating locally may have a clear advantage over domestic insurers. However, in some markets where authorities wish to increase the local coverage of exports, local insurers may employ international claim settling agents who have a network of correspondents in the main ports. Accordingly, claims for exports insured locally can be directed to these agents, and the latter are empowered to arrange surveys and to effect loss adjustment. Furthermore, the authorities may allow insurers covering exports to keep revolving bank accounts abroad in order to allow their settling agents to pay claims directly and promptly. These two parallel steps have, for instance, been adopted in Pakistan by the bigger companies writing marine insurance business and the results are most encouraging.

272. Efficient and prompt settlement of claims, of course, helps considerably to strengthen an insurer's position. As far as marine insurers in developing countries are concerned, the lack of sufficient trained staff often results in poor claim services, delays and, in some instances, litigation. Many marine insurance companies in these countries lack staff and the claims assessed by the local agents have therefore to be processed or at least reviewed at their head offices prior to payment. Contacts with head offices are normally made by correspondence, a time consuming process.

273. On the other hand, many shippers in developing countries are not fully conversant with claims presentation procedures and survey requirements. Submission of documents to the insurers may be delayed and this sometimes leads to misunderstandings over the settlement of claims. Furthermore, there is a considerable amount of usage and customs behind the settlement of claims in the marine cargo field. Insurers in many markets of developed countries settle the claims presented to them in accordance with such usages beyond what appears to be payable under the strict letter of the policy. Conversely, insurers in developing countries, because of insufficient experience, tend to adhere strictly to the letter of the policies and ignore usages. This lack of flexibility causes delays in settling claims and often leads to litigation.

<u>Litigation and recovery of marine cargo claims</u>

274. Many developing countries do not have marine insurance laws of their own but have to rely upon the legislation and case law of other countries which have a long tradition and practice in this specific field. Although this situation in itself provides an element of security to trade partners, because they know that internationally recognized rules will be applied to their disputes, local

interpretations of these rules may create some difficulty. Legal procedures are very slow in most developing countries. Litigation takes a long time to settle, and by that time the amount in dispute may have increased considerably due to legal costs and interest charges. This is particularly true for cases of general average which require a long time to adjust. Furthermore, legal proceedings in marine cargo insurance in developing countries are relatively expensive as very few lawyers can adequately handle marine lawsuits. In view of these considerations the majority of the assured and their insurers prefer to remain out of court and settle their differences by negotiation.

275. Claims recoveries from carriers raise many problems for insurers in developing countries. The main reason for this is that most carriers try to avoid or to limit their liability and they are frequently able to do so because of the lack of facilities and other unfavourable port conditions prevailing in most developing countries. The present limits for survey imposed by the bills of lading do not take into consideration the congestion of docks and inadequate tally at the ports of discharge.13/ In many cases it is impossible for insurers in these countries to arrange a joint survey and to lodge a claim against the carrier in three days. Moreover, surveyors appointed by cargo owners or by insurers are often not allowed to carry out their surveys before the goods are discharged. This leaves no opportunity for the insurer to prove that the loss or damage is attributed to the carrier.

276. It should, however, be recognized that many insurers in developing countries do not apply to shipping agents for surveys, and do not lodge claims against carriers. They consider recourse against the carrier a costly procedure which does not often lead to positive results because of the present scope of exemptions accorded to shipowners by the Hague Rules. The difference between the limits of liability as provided by these rules and the real value of goods involved in the loss is largely responsible for this attitude. Many insurers in developing countries go even further and do not include recovery from carriers in their premium rating calculations, it being their view that in most cases recoveries are not practicable.

13/ See UNCITRAL proposals regarding revision of the Hague Rules.

Chapter IV

INTERNATIONAL AND REGIONAL FACILITIES

Need for international co-operation

277. The very nature of marine cargo insurance and its close relationship with international trade transactions makes operations in this class of business dependent to a considerable extent on services rendered internationally by certain specialized collective bodies. Traditional marine cargo insurance markets in Europe were the first to experience the need for such bodies and helped to set them up through collective action by the marine insurers at the national level. Subsequently, marine markets in America developed their own marine servicing bodies on more or less similar lines and some of these institutions have succeeded in gaining recognition.

278. As shown in the preceding chapter, the marine cargo insurance markets of developing countries suffer from certain weaknesses which are peculiar to them, affecting all areas of operation - underwriting, rating, handling of claims and recoveries. Owing to the relatively reduced size of these markets and lack of expertise, it is hardly possible for most of them to set up adequate servicing bodies either within the individual domestic companies or even at the national level. It is therefore absolutely essential that their domestic companies make extensive use of existing international marine facilities. By using such facilities these companies will not only be able to operate more successfully on their local markets but, in addition, they will gain a measure of international recognition as their operations will have been conducted in conformity with international practices.

Facilities related to underwriting and rating

279. A marine underwriter cannot possibly possess first-hand knowledge of the seaworthiness of every vessel carrying goods to be insured with him, nor of the conditions in ports to which the goods insured with him are to be shipped or delivered. However, such information, essential to providing cover and quoting the appropriate rates and conditions, is available internationally. In fact, most large maritime countries have organizations which specialize in classifying ships by their seaworthiness, based on their age, construction, design, propellers, loading gears, storage conditions, and so forth. On the other hand, several national insurance organizations and some insurance companies regularly publish reports on the conditions of the major ports of the world, including port facilities, storage possibilities, congestion and safety measures taken. A number of publications provide underwriters all over the world with invaluable information on vessels and their movements. Insurers in developing countries should arrange for all this information to be available to them.

280. Marine cargo insurance policies used in developing countries are generally similar to the policies issued by the international markets and in most cases the British form of policy is adopted. However, these policies reached their present form after a long period of adjustment and interpretations backed either by case law or by legislation in the country of origin. Due to the lack of expertise in many developing countries, the insurer may not be fully conversant with all the particulars which contributed to formulation of the marine policy in use. Furthermore, when a dispute is brought to court, the insurer may find that the local legal interpretation is completely different from the international practice in marine insurance. Such a state of affairs is obviously not conducive to the proper operation of marine insurance in a developing country. It is therefore essential that local insurers, helped by the appropriate international bodies, co-operate fully with the legislative authorities of their country to ensure that national legislations depart from international practice only in exceptional cases of imperative national necessity.

281. Underwriters in developing countries are faced with the problem of new developments in world trade, whether in the mode of transportation, cargo handling, packing or any other element, which have a bearing on underwriting of risks. Naturally, policy conditions and clauses have to be adjusted to agree with such changes. Some national bodies, originally created to serve their marine underwriters, today play a very significant role in the drafting and classification of marine cargo clauses to suit and cope with the development of world trade. The clauses issued by such institutes have become universally recognized, though there is nothing that binds underwriters to follow them. The underwriters in developing countries can draw on their experience to satisfy their requirements.

282. The International Union of Marine Insurance (IUMI), in co-operation with the International Chamber of Commerce (ICC), has published tables of practical equivalents for marine clauses adopted in many countries in an attempt to make this matter clear to the shippers, bankers and underwriters. The Union also publishes cargo loss prevention recommendations to promote greater efficiency in world trade and to eliminate unjustified waste. Members of the Union are increasingly aware of the fact that in order to carry out many of the recommendations and other technical measures called for by the underwriters from all over the world, a concerted action at the international level is required to bring about the necessary improvements in the practice of marine cargo insurance.

283. The problems of rating in developing countries have been dealt with extensively in the preceding chapter. As regards international co-operation in rating, reference must be made to the assistance provided by international markets - mainly by

underwriters, brokers, co-insurers and reinsurers - in assessing risks and quoting rates, especially for new commodities with which local underwriters have had no experience, and also for high value consignments which require extensive direct-writing and reinsurance facilities.

Facilities related to handling of claims

284. Even assuming that marine underwriting can be conducted entirely by the services of a local underwriter in a particular country, implementation of marine policies almost always requires measures and action to be taken abroad as well. It is hardly possible for each underwriter to establish his own services wherever the goods insured by him are transported; hence, marine insurers in each country must have access to adequate collective facilities abroad to enable them to carry out their surveys, adjustment and settlement of claims. But even at home, where the adjustment of claims often requires expert specialized knowledge, developing countries should encourage international professional bodies to operate in their territories while they develop their own expertise in this field.

285. Some leading insurance companies of developed countries and their national associations, as well as Lloyd's, have at their disposal large networks of correspondents in the main ports of the world. The services of these networks of agents are not restricted to their principals, and they act on behalf of any other insurer who wishes to entrust to them the assessing and adjusting of his claims. Such arrangements are clearly of great importance to insurers in developing countries who cannot afford the high cost of maintaining their own services abroad.

Recoveries from carriers

286. Waiting time in many congested ports often runs into weeks and when the ship can finally discharge the operation is effected in haste. Many ships therefore leave port before proper measures can be taken to make the carrier liable for loss of or damage to cargo. Moreover, some shipowners are not fully represented in many ports. Recovery of the loss from the carrier may be very difficult in these conditions. To sue the shipowners for the liability, marine insurers therefore need the help of specialized recovery agencies which work for more than one company or even more than one market. There are recovery agencies already working on a world-wide scale which have a strong position and broad experience. Their services are far more satisfactory than those of a local lawyer who does not specialize in marine matters and does not have the necessary international contacts.

Regional facilities and co-operation

287. Regional arrangements could either be related purely to collective servicing of individual insurers of the region as regards such matters as handling of claims, rating and loss prevention (services similar to those provided by international collective

bodies), or include co-operation in the operational field as well, in the form of regional exchange of marine insurance business on a company to company basis, or of a multinational marine cargo insurance pool. When considering such wider operational co-operation, reference should be made to the UNCTAD secretariat study on "Reinsurance problems in developing countries"[14/] the conclusions of which remain applicable *mutatis mutandis* in the field of marine cargo insurance. The present study deals only with the more restricted form of regional co-operation aimed at providing collective regional facilities to local marine underwriters.

288. With regard to underwriting and rating, a regional consultative body could provide valuable services in, among other things, risk evaluation and rate-fixing, harmonization of policy texts and compilation of global statistical data. Furthermore, the regional consultative body could represent the underwriters of the region and defend their interests in international meetings on such subjects as marine insurance and shipping legislation. A better way of establishing such a regional body would be to have the marine underwriters in each country join national marine insurance associations which in turn would form a regional committee or federation.

289. As regards the handling of claims, it is very important for a marine insurer to have at his disposal an adequate service for average and claim settlement in all ports through which goods covered by him may be in transit. A collective arrangement between the marine insurers in a region could prove very useful, such as an agreement that marine insurers in their respective countries would, on a basis of reciprocity, handle marine claims on behalf of the original underwriter, this service to include surveying, adjustment, settlement and recovery. In terms of costs this arrangement would result in considerable savings for the underwriters parties to the agreement while reducing their dependence upon foreign international bodies for doing this work. Furthermore, such an agreement might contribute to lessening the negative impact of currency restrictions on the settlement of claims within the region.

290. Cargo loss prevention is an area in which public authorities, shippers, carriers and marine insurers should co-operate, since cargo losses affect a country's whole economy. Insurance companies in most developing countries have little power to initiate action in this field. However, insurance companies of a whole region, if they joined forces, might be able to persuade their governments to participate in regional loss prevention activities, for which technical assistance could be sought and obtained from abroad, namely from international organizations within or outside the United Nations family.

14/ Document TD/B/C.3/106/Rev.1.