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MARINE INSURANCE

Legal and documentary aspects of Latin American
marine insurance legal régimes

Report by the UNCTAD secretariat

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I. INTRODUCTION

1. In resolution 3(VI), adopted by the Working Group on International Shipping Legislation at its sixth session, held from 18 to 26 June 1979, it was recommended to the Committee on Shipping that work be undertaken within the Working Group at the expert level to formulate a set of standard clauses to marine insurance contracts by:

- (a) examining the existing marine insurance policy conditions and practices used in national markets covering international business;
- (b) investigating the different legal systems governing marine insurance contracts;
- (c) in the light of these studies, and bearing in mind the suggestions contained in sections V and VI of the report of the UNCTAD secretariat (TD/B/C.4/ISL/27 and Corr.1), drawing up a set of standard clauses as a non-mandatory international model.

2. In response to the views expressed at the sixth session of the Working Group and in order to assist the work to be undertaken within the Working Group, the UNCTAD secretariat has prepared a report analysing certain Latin American marine insurance legal régimes. In view of the number of countries in the region, it was decided to choose a few countries that would give some illustration of the legal régimes involved. The countries studied, which are Spanish-speaking, are Argentina, Chile, Colombia, Ecuador, Mexico and Peru.

3. As a result of the time constraints and restrictions on the length of documentation, as well as the difficulties experienced in obtaining adequate information, this report will not be a comprehensive analysis of all aspects of the marine insurance legal régimes studied. Rather, it is intended as a general aid to the Working Group in its investigation of the different marine insurance legal régimes and is thus limited to an analysis of certain major aspects of the legislation and standard policy forms for hull and cargo insurance, and to some market practices affecting marine insurance policies in the countries under consideration.

4. The report is based to a certain extent on information provided by an expert from one of the countries studied, who acted in the capacity of consultant to the UNCTAD secretariat.

II. LEGAL AND DOCUMENTARY ASPECTS OF LATIN AMERICAN MARINE INSURANCE REGIMES

A. The legislation

5. As a rule, the legislation governing marine insurance contracts is contained in a section of the national commercial code applicable to insurance contracts in general and in a separate section specifically applicable to marine insurance. In the case of Argentina, there is a general Insurance Act of 1967 applicable to all insurance contracts, including marine insurance contracts to the extent that they are not contrary to specific laws or the nature of marine insurance, and also a special chapter referring to marine insurance in the Navigation Act of 1973. In Mexico there are provisions in the Code of Commerce on marine insurance, the Insurance Contract Act of 1935, which is applicable to marine insurance to the extent that its provisions are not incompatible with the Code of Commerce, 1/ and a specific chapter on marine insurance in the Navigation and Maritime Trade Act.

6. Since the legal systems of all the countries analysed belong to the civil law tradition, the French Code of Commerce of 1807 and the Spanish Codes of Commerce of 1829 and 1885 have had a noticeable influence on them. However, a special reference needs to be made to the marine insurance provisions in the Commercial Code of Colombia, since they reflect in many respects the influence of the English Marine Insurance Act of 1906 (hereafter referred to as MIA, 1906).

1. Essential elements of the contract and contents of the policy

7. It is generally required that the marine insurance contract be evidenced in writing and embodied in a policy. 2/ However, under Argentine law the marine insurance contract is deemed to be concluded upon the agreement of the parties and the policy is considered as a means of evidence. 3/ Furthermore, under Chilean law, verbal insurance contracts are valid on a provisional basis and the parties are authorized to demand the issuance of a policy. 4/

8. Some Commercial Codes prescribe the essential elements of a contract, the absence of which will render the contract null. Colombian law requires (a) an insurable interest, (b) an insurable risk, (c) a premium and (d) a conditional liability of the insurer. 5/ Ecuadorian law provides for a similar list, but specifies in addition (a) an insurer, (b) an applicant for insurance and (c) an amount insured or the insurer's limit of liability. 6/ Chilean law does not contain such a list, but instead provides that if there is no insurable interest or if the premium has not been stipulated the contract is null. 7/ Peruvian law does not expressly lay down the

1/ Insurance Contract Act, article 3.

2/ For example, the Codes of Commerce of Peru (article 750), Colombia (articles 1036 and 1046), Ecuador (article 6, title XVII) and Mexico (article 812).

3/ See Insurance Act, article 11.

4/ Code of Commerce, article 515.

5/ Code of Commerce, article 1045.

6/ Code of Commerce, book II, title XVII, article 2.

7/ Code of Commerce, articles 518 and 541.

essential elements of an insurance contract, but it does stipulate that in order to be valid, the marine insurance contract must be in writing and signed by the contracting parties. 8/ Argentine law requires an insurable interest and, in hull insurance policies, a declaration of the value of the vessel. 9/

9. Most of the national laws considered here specify the data which the policies should contain, such as the names of the insurer and assured, whether the assured is contracting on his own behalf or on that of another, the subject-matter insured, the value of the subject-matter to be insured, the insured risks, the premium, the amount of insurance (the sum insured) and the commencement and termination of the risk. 10/

2. Imperative provisions

10. Most of the laws of the countries studied by and large leave the parties free to agree upon insurance conditions as they choose, apart from a few imperative provisions with which compliance is required. Some legislations specify in one article which provisions are imperative, and thus not alterable by contract, as in the French marine insurance legislation of 1967, 11/ whereas other legislations do not appear to do so. Within the time available to the UNCTAD secretariat, it has been unable to identify all the provisions of the legislations studied which are considered to be imperative. Nevertheless, it has been informed that the Commercial Code provisions stipulating the essential elements of the insurance contract listed above (see para. 8) are imperative, as are also the Argentine Navigation Act requirement that hull insurance contracts shall be null unless the value of the vessel is declared, 12/ the stipulation in Peruvian and Mexican law that the marine insurance contract shall be null if it is effected on the lives of the crew or passengers, on crew wages, on illegal goods, on goods subject to a bottomry loan, on vessels habitually engaged in smuggling, or on objects for which a false valuation has been knowingly set, 13/ the prohibition in Colombian and Ecuadorian against providing insurance for fraud, gross negligence or purely facultative acts by the assured, 14/ and the requirement in Peruvian law that, to be valid, the marine insurance contract must be embodied in writing in the policy. 15/

8/ Code of Commerce, article 750. It appears that coverage is granted in practice when the contracting parties agree on the terms of the insurance, whether or not the policy has been issued.

9/ Insurance Act, article 2, and Navigation Act, article 426.

10/ See the Codes of Commerce of Colombia (article 1047), Chile (article 516), Ecuador (article 7, title XVII), Peru (article 751) and Mexico (article 813).

11/ For example, the Mexican Insurance Contract Act, which provides in article 193 that all the provisions of the Act are imperative except those which expressly provide for the parties to agree otherwise, and the Argentine Insurance Act, which gives a list of imperative provisions in article 158.

12/ Navigation Act, article 426.

13/ Codes of Commerce of Peru (article 794) and Mexico (article 856). See also the Code of Commerce of Chile, articles 522 and 1218.

14/ Codes of Commerce of Colombia (article 1055) and Ecuador (article 11, title XVII).

15/ Code of Commerce, article 750.

11. Furthermore, from an analysis of the wording of the relevant provisions, there would appear to be several other imperative provisions in the legislations studied. For example, the prohibition in Chilean law against providing insurance for the personal acts of the assured, 16/ and the requirement that the marine insurance contract will be valid only if there is an insurable interest and a stipulation of the premium 17/ appear to be imperative, as does the Argentine law requirement that marine insurance contracts relating to a period before they were entered into must state on the policy that the transport has commenced or that the assured is unaware of the fact, as well as the latest news received concerning it. 18/ As to the identification of other national imperative provisions, it would appear that, in view of the diversity of national legal systems and the complexity of the subject, the most effective means of obtaining a comprehensive international survey may be to obtain the advice of marine insurance experts from the countries represented at the Working Group as each subject is dealt with by it.

3. Insurable interest

12. The Peruvian Commercial Code does not expressly require the assured to have an insurable interest for an insurance to be valid, nor does it indicate the time at which an insurable interest must be vested in the assured, that is, whether the assured must have an insurable interest at the time of entering into the insurance contract or only at the time of loss. Furthermore, there are no judicial decisions on the issue. Of the other legislations studied on this point, most contain provisions expressly requiring the existence of an insurable interest for the marine insurance contract to be valid, 19/ and most stipulate that the marine insurance contract is a contract of indemnity thus preventing the assured from profiting from a loss. 20/

13. Actual definitions or descriptions of what constitutes an insurable interest vary from country to country, though all have the common goal of identifying those interests which are considered to be legitimate subjects of insurance. Article 518 of the Commercial Code of Chile requires the assured to have an insurable interest at the time of entering into the contract, whether as owner, co-partner, trustee, usufructuary, lessee, creditor or custodian, or generally in any way which would make him interested in the preservation of the object insured. Article 1083 of the Colombian Commercial Code states that any interest is insurable if it is capable of being subject to a monetary evaluation and any person whose property may be directly or indirectly affected by the occurrence of a risk has an insurable interest. Article 27 of the Commercial Code of Ecuador contains a description of insurable interest, which is generally reflected in article 60 of the Argentine Insurance Act and article 85 of the Mexican Insurance Contract Act as any economic interest that a person has in preventing an accident.

16/ Code of Commerce, article 552.

17/ Ibid., articles 518 and 541.

18/ Navigation Act, article 417.

19/ Codes of Commerce of Colombia (article 1045), Ecuador (article 2, title XVII) and Insurance Act of Argentina, article 2. Generally speaking, the insurable interest must exist at the time the contract is entered into, and continue to exist until the contract is terminated. See, for instance, the Commercial Code of Ecuador, article 29, and the Insurance Act of Argentina, article 81.

20/ Codes of Commerce of Chile (article 517), Colombia (article 1088), and Ecuador (article 32, title XVII).

14. Before dealing with the issue of whether marine insurance policies can be assigned, it should first be noted that all the legislations studied contain general provisions regulating the continued application of the marine insurance contract if the subject-matter of the insurance is sold. 21/ Furthermore, hull insurance policies frequently contain provisions restricting the application of the policy in the case of a change of ownership of the insured vessel. 22/

15. All the legislations analysed envisage the possibility of assignment of marine insurance policies by providing that the policy may be made out to the order of the assured, in which case it can be transferred by endorsement, 23/ and Chilean and Argentine legislation permits in addition the use of bearer policies. 24/ In the event of an assignment of the policy, the assignee will have all the rights of the assignor in the policy and, similarly, the insurer will be able to rely on all the defences against the assignee that were originally available against the assignor.

16. All the laws of the countries studied provide for situations in which the parties enter into the contract of insurance after the occurrence of a risk or after the insured property has safely arrived at the point of destination. Under all the laws, the contract of insurance will be null if the assured knew of the loss of the insured object at the time of entering into the contract, or the insurer was aware of its safe arrival. 25/ Argentine, Mexican, Peruvian and Chilean law create a presumption of knowledge on the part of the parties to the contract if, in the case of Argentine law, the news of the loss or safe arrival has already reached the place where the contract was entered into, the domicile of the assured or the place where the assured gives orders for the entering into of the contract; 26/ or, in the case

21/ See, for example, the Codes of Commerce of Chile (article 531), Colombia (article 1107) and Ecuador (article 43); the Mexican Insurance Contract Act, articles 106-108, and the Argentine Insurance Act, article 82.

22/ For example, article 13, Argentine general conditions for hull insurance (a standard set of general conditions exists for hull and cargo insurance, drafted under the auspices of the Chamber of Marine Insurance). Furthermore, article 429 of the Argentine Navigation Act provides that a change of ownership involving more than half of the value of the vessel or the transfer of the management of the vessel to a person other than the owner results in the termination of the contract of insurance as of the date of the transfer. See also article 30, general conditions used by Popular y Porvenir, Compañía de Seguros of Peru, in its hull insurance policy, "Póliza de Casco y Maquinaria de Buque o Embarcación", and article 36, general conditions used by Panamericana del Ecuador, S.A., in its hull insurance policy, "Seguro de Casco y Maquinaria de Buques". (It has not been possible to determine whether a standard set of general conditions exists in the Ecuadorian market. The secretariat has used the policies issued by Panamericana for hull insurance as well as its cargo policy, "Póliza de Seguro de Transportes", and reference has been made to them in this report as Ecuadorian general hull or cargo conditions.)

23/ Codes of Commerce of Colombia (article 1051), Ecuador (article 8, title XVII), Mexico (article 817) and Peru (article 755).

24/ Insurance Act of Argentina, article 13, and Code of Commerce of Chile, article 514.

25/ Codes of Commerce of Colombia (article 1706), Ecuador (article 932), Chile (article 1229), Mexico (article 859) and Peru (article 797) and the Navigation Act of Argentina (article 411).

26/ Ibid. In addition, article 417 of the Navigation Act of Argentina provides that if an insurance is applicable to a period of time before the contract is entered into, the assured must stipulate in the policy that the transport has commenced, or that he is ignorant of the fact, and the last news received concerning it, otherwise the policy is null.

of Mexican or Peruvian law, if there has been sufficient time to communicate the news to the place where the contract is entered into; 27/ or, in the case of Chilean law (on the assumption that news travels on the average of eight kilometres per hour), the news has arrived at the place of contracting. 28/ Chilean, Peruvian and Mexican law specifically provide for insurance contracts on a "good or bad news" basis (the equivalent to "lost or not lost" in English law). 29/ This, in effect, eliminates the presumption of knowledge otherwise created by the respective laws and thus makes such contracts valid, unless it is proved that the parties already knew of the loss or safe arrival before entering into the contract. 30/

4. Insurable value

17. As stated earlier, the marine insurance contract is considered to be a contract of indemnity and consequently the assured should not profit by a loss. As a reflection of this principle, marine insurance uses the concept of the insurable value of an object, which is its actual value plus certain allowances, and acts as the basis for determining the proper indemnity payable to the assured for the loss of his property.

18. The legislations analysed generally contain provisions specifying the factors to be taken into account in determining insurable value. In the case of hull insurance some national legislations, such as that of Peru, do not specifically refer to determining the insurable value, and in those that do, there is usually only a generalized reference to the value of the hull, its outfit, provisions and stores at the commencement of the insurance. 31/ For cargo insurance, the legislation in both Mexico and Peru contains identical provisions which state that when the value has not been fixed in the policy, the insurable value shall be determined by commercial invoices and by declarations of brokers or experts on the basis of the price of the merchandise at the port of loading plus loading costs, freight and customs duties. 32/ In the national legislations of Chile, Ecuador and Argentina, the basic elements constituting insurable value are generally the same as those stipulated above though reference is made to the insurance premium as well. 33/ On the other hand, Colombian law states that insurable value shall be determined by the cost at destination plus a reasonable percentage for profit. 34/

19. It is possible to stipulate a value for the subject-matter of the insurance in the policy itself, and in the case of hull insurance in Argentina it is a requirement

27/ See foot-note 25/, supra.

28/ Code of Commerce of Chile, article 1230.

29/ See section 6(1), MIA, 1906.

30/ Codes of Commerce of Chile (article 1230), Peru (article 798) and Mexico (article 860).

31/ See, for example, Navigation Act of Argentina, article 426, and Code of Commerce of Colombia, article 1709. Such provisions are similar in effect to that of section 16, MIA, 1906. See also Navigation and Maritime Commerce Act of Mexico, article 244.

32/ Codes of Commerce of Mexico (article 829) and Peru (article 767).

33/ Codes of Commerce of Chile (article 1220) and Ecuador (article 923) and Navigation Act of Argentina, article 440. In the case of the codes of Chile and Ecuador, the reference to insurance premium is in place of customs duties.

34/ Code of Commerce, article 1709. Presumably what is meant by the term "cost" is "market value".

for the validity of the contract. 35/ In English law 36/ the use of an agreed value is binding on the parties as to the insurable value of the object, except in the case of fraud. Thus, with full insurance, the assured can recover the whole amount of the agreed value of an object totally lost even though at the time of loss the actual value was considerably less. Excessive over-valuation may be grounds for voiding the entire policy on the basis of fraud, gambling or non-disclosure but not for reducing the valuation. 37/

20. The legislations analysed on this point do not treat the legal effect of a value stipulated in the policy in a uniform manner. In some of them, the stipulated values are treated as creating only a presumption of the insurable value. Thus, if the stipulated value is exaggerated vis-à-vis the actual value, the insurer will be able to reduce the amount of the insurance to the actual value even in the absence of any fraudulent intent on the part of the assured in fixing the value. 38/ An exception to this approach is Colombia, where the code of commerce contains provisions that are similar in effect to the approach of English law; thus under such law the use of an agreed value stipulated in the policy is binding on the parties as to the insurable value. 39/ The Codes of Commerce of Chile and Ecuador, although establishing the general principle that such stipulated valuations merely create a presumption of the insurable value, nevertheless have a provision which states that, once the insured object has safely arrived or has been subject to loss or damage, no reduction can be made to the value stipulated in the policy. 40/ It is understood that it is the practice for insurers in countries where the value stipulated in the policy is not completely binding not to question the valuation in determining the indemnity except in cases of gross over-valuation vis-à-vis the actual value.

21. The principle that marine insurance is a contract of indemnity, thereby limiting reimbursement for loss of the insured property to its insurable value, is also reflected in the case of multiple insurance contracts covering the same object against the same risks. All the legislations analysed contain provisions limiting the total indemnity collectable by the assured in such situations to the extent of the loss up to the actual value of the insured object, or agreed value in the case of Colombia. 41/

35/ Navigation Act, article 426.

36/ Article 27, MIA, 1906. Agreed values are also binding under French law (see articles 11 and 41 of the 1967 French law on marine insurance). However, in practice, they are used only in hull insurance and not in cargo. See document TD/B/C.4/ISL/30, paragraphs 73-76.

37/ Arnould, J. The Law of Marine Insurance and Average, vol. I., in British Shipping Laws, vol. 9 (London, Stevens and Sons, Limited, 1961), pp. 368-369.

38/ See, for example, the Codes of Commerce of Peru (article 765, and article 761 as to profit), Mexico (articles 832 and 827), Ecuador (article 925, first paragraph) and Chile (article 534 and article 1222, first paragraph), and the Argentine Navigation Act, article 426 (as to hull insurance, appraisal value applicable unless proof of "considerable diminution" of real value). Proof of fraudulent intent in fixing the value usually nullified the insurance.

39/ Code of Commerce, articles 1713 and 1752.

40/ Codes of Commerce of Chile (article 1222) and Ecuador (article 925).

41/ Codes of Commerce of Colombia (articles 1092 and 1752), Chile (article 525), Peru (article 795) and Ecuador (article 36, title XVII), the Insurance Act of Argentina, article 68 and the Navigation and Maritime Commerce Act of Mexico, article 229.

Most legislations require the assured to reveal all other insurances either at the time of contracting (assuming he is aware of the fact) or at the time of making a claim on the policies. 42/ The legislations of Chile and Peru make the first contract in time valid for the risk, the other contracts being null except to the extent that the first does not cover the full insurable value of the object, 43/ whereas the other legislations make all the contracts proportionally liable. 44/

5. Insurance of the acts of the assured

22. The national legislations studied differ to some extent on the question of the insurance of the acts of the assured. The legislations of both Ecuador and Chile exclude losses caused by an act of the assured. 45/ The legislation of Argentina provides that all interests of the vessel, cargo or freight can be insured against any risk of navigation, with the exception of risks originating in the intentional act ("hecho intencional") of the owner of the insured interest. 46/ It also excludes, unless otherwise agreed, losses arising from the intentional misconduct ("hecho ... realizado con dolo") or gross fault of the assured or his land-based servants and agents. 47/ Colombian legislation excludes losses attributable to intentional misconduct ("dolo") or gross fault of the assured, the person who took out the insurance or the beneficiary. 48/ Mexican law relieves the insurer of liability for losses caused by the intentional misconduct or bad faith ("dolo o mala fe") of the assured; however, it requires a mere fault of the assured to be covered by the insurer, the only exclusion permitted in the contract being for the assured's gross fault. 49/

23. As to the exclusion of losses arising from acts of the master and crew, Peruvian law excludes losses arising from the barratry of the master, 50/ unless otherwise agreed, whereas Mexican law includes these, unless otherwise agreed. 51/ Chilean and Ecuadorian law exclude losses arising from the intentional misconduct ("dolo") or fault of the master, unless otherwise agreed. 52/ Colombian law states that losses caused by insured risks are covered even if they originate in the intentional misconduct or culpable acts ("conducta dolosa o culposa") of the master or crew. 53/ Under

42/ See, for instance, the Code of Commerce of Colombia, articles 1076 and 1093, the Insurance Act of Argentina, article 67, and the Navigation and Maritime Commerce Act of Mexico, article 228.

43/ Codes of Commerce of Chile (article 525, but see also article 526) and Peru (article 795).

44/ Insurance Act of Argentina, article 67, but see also article 69; Code of Commerce of Colombia, article 1092; Navigation Act of Mexico, article 229, and Code of Commerce of Ecuador, articles 36 and 37, title XVII.

45/ Codes of Commerce of Ecuador (article 955) and Chile (article 1260).

46/ Navigation Act, article 410.

47/ Navigation Act, articles 433 (hull) and 438 (cargo).

48/ Code of Commerce, article 1730.

49/ Insurance Contract Act, articles 77 and 78.

50/ Code of Commerce, article 769. For a definition of barratry, see foot-note 99/, *infra*.

51/ Code of Commerce, article 830.

52/ Codes of Commerce of Chile (article 1260) and Ecuador (article 955).

53/ Code of Commerce, article 1730.

Argentine law, hull insurance coverage includes the consequences of the fault of the master, crew and pilots, but excludes, unless otherwise agreed, the consequences of their intentional misconduct ("actos dolosos"). 54/ In the case of cargo insurance, Argentine law expressly stipulates that the insurance coverage shall include, unless otherwise agreed, losses rising from intentional misconduct ("dolo") or fault of the shipowner, master, crew and pilots not involving the intervention of assured. 55/

6. Omission or inaccurate statement by the assured

24. The Commercial Code of Peru provides that an insurance contract is null if the assured makes an inexact representation, whether or not in good faith, which could influence the estimation of the risks, or fails to disclose or conceals facts or circumstances that would influence the execution of the contract. 56/ Under this rule the insurer may annul the contract, even when the non-disclosure or misrepresentation is unrelated to the cause of the loss. It appears therefore that the rule established under Peruvian law is similar to English law. 57/

25. The Commercial Code of Chile lays down a fairly similar rule, 58/ as does the Mexican Insurance Contract Act. 59/ Mexican legislation expressly provides for the policy to be voidable by the insurer even though the non-disclosed or misrepresented information has had no influence on the loss. It also contains additional rules for continuing the insurance in certain cases, as, for instance, when the insurer provoked the non-disclosure or misrepresentation or he knew or should have known of the omitted or misrepresented information.

26. On the other hand, the Commercial Codes of Colombia 60/ and Ecuador 61/ provide as to all insurance contracts that if the assured, in response to a questionnaire proposal form, fails to disclose or misrepresents facts or circumstances, which, if known to the insurer, would have inhibited him from entering into the contract or would have made him stipulate more onerous conditions, then the contract is voidable by the insurer. If the non-disclosure or misrepresentation of such material information did not arise in connection with the use of a questionnaire proposal form by the insurer, then the contract will be voidable only if the non-disclosure or misrepresentation occurred as a result of the fault of the assured. However, under Colombian law, if the non-disclosure or misrepresentation occurred without the fault of the assured, then the contract is valid but the indemnity for loss will be reduced in proportion to the difference between the premium charged and the premium appropriate to the real nature of the risk. Under both laws, non-disclosure or misrepresentation will not nullify the contract if the insurer had the correction information at the time of entering into the contract or if he later accepted it.

54/ Navigation Act, articles 432 and 433.

55/ Ibid., article 439.

56/ Code of Commerce, article 376.

57/ See sections 17-20, MIA, 1906.

58/ Code of Commerce, articles 556 and 557.

59/ Insurance Contract Act of Mexico, articles 8-10 and 47-51.

60/ Article 1058.

61/ Article 14, title XVII.

27. Under Argentine law, every non-disclosure or misrepresentation of information known to the assured - even if occurring innocently - which, in the opinion of experts, would have prevented the insurer from accepting the contract or would have made him modify its terms had he known the true nature of the risk, will render the insurance contract null. 62/ The insurer has three months after learning of the non-disclosure or misrepresentation to nullify the contract. However, if it is alleged that the non-disclosure occurred without an intent to deceive on the part of the assured, then the insurer has the option either of annulling the contract or of readjusting its terms in agreement with the assured. 63/ In all cases, however, if a loss occurs during the three-month period in which the insurer must annul the contract, the insurer is not liable for any indemnity under the contract. 64/ It would appear from this last provision that the insurer would also not be liable for any losses that occur before the insurer has knowledge of any non-disclosure or misrepresentation of material information. Nor does there seem to be any requirement that the loss be attributable to the non-disclosed or misrepresented information. It is now known whether there have been any court decisions interpreting this provision.

28. At least some of the legislations analysed contain provisions similar to those of French law (see document TD/B/C.4/ISL/30, para. 27) obliging the assured to notify the insurer of any subsequent increase of the risk after the contract has been entered into. For example, Colombian legislation 65/ requires the assured to notify the insurer in writing of unforeseeable facts or circumstances which arise subsequent to the entering into force of the contract and which are of such a nature that had they existed before the contract was signed they would have had to be disclosed. If the modification of the risk arises from the will of the assured, the notification must be given 10 days before the event and if not, within 10 days after he becomes aware of the modification - it being presumed that he will be aware of the modification 30 days after it occurs. Upon notification, the insurer has the option of terminating the contract or of readjusting its terms. Failure to give timely notification results in the automatic termination of the contract.

62/ Insurance Act, article 5.

63/ Ibid., article 6.

64/ Ibid., article 9.

65/ Code of Commerce, article 1060. See also, Code of Commerce of Ecuador, article 16, title XVII and Insurance Contract Act of Mexico, articles 52 and et seq.

B. The policies: hull and cargo insurance

1. General observations

29. A distinctive feature of marine insurance policies in many Latin American countries is that locally drafted policy forms, which contain general insurance conditions based on national commercial codes, may be combined in one form or another with policy clauses used in the English market. The UNCTAD secretariat has previously identified some examples of this practice, citing, for example, an El Salvadorian policy which incorporated the Perils Clause of the Lloyds' S.G. Form with an express stipulation that English "doctrine, case law, practice and custom" shall govern its interpretation. ^{66/}

30. With regard to the countries analysed in this report, it is known that English Institute Clauses are usually attached to hull and cargo policies in Argentina and Peru. It appears that the attachment of American or English Institute Clauses is also permitted in Mexico. In connection with the attachment of the English Institute Clauses to Latin American general conditions, it should be noted that it is usual for attached portions of a policy to override the general conditions in the case of a conflict between the two.

31. The use of different national policy clauses, originating as they do in different legal bases in the common and civil law traditions and reflecting different national legislation, i.e. the national commercial codes on the one hand and the English Marine Insurance Act of 1906 and common law jurisprudence on the other, inevitably creates certain difficulties in interpretation, since neither set of clauses or conditions has been designed to be incorporated with the other. It has been asserted that this system of combining different sets of national clauses to form the legal basis of the marine insurance contract causes uncertainty and confusion whenever it is necessary to evaluate a certain coverage or to determine whether and to what extent a casualty is covered by the policy.

32. There is the additional problem of which law will apply to the respective components. The countries utilizing this mixed system appear to approach the issue differently. The case of the El Salvadorian policy has already been cited in this respect (see paragraph 29). In the Argentine market, there is a clause in the standard general conditions which calls attention to the fact that the contract is subject to the Insurance Act of that country. The English Institute Cargo Clauses used are translated into Spanish with a virtually identical notation to the one cited in the El Salvadorian policy that English law shall govern its interpretation.

33. In the Peruvian market there is no standard set of general conditions at the moment, ^{67/} nevertheless most of these make reference to the Code of Commerce in the application of certain of their provisions, so it would appear that the parties to a contract incorporating such general conditions intend the Peruvian Code of Commerce to apply to its interpretation. The English Institute clauses used in the Peruvian market are translated into Spanish, with the English version given on the reverse side, and

^{66/} See document TD/B/C.4/ISL/27 and Corr.1, paras. 46-47.

^{67/} The Peruvian Association of Insurers (APESEG), which comprises all insurance companies in the Peruvian market, is apparently in the process of drafting a set of standard general conditions for the market.

with the name of the Peruvian Association of Insurers (APESEG) appearing at the top together with a reference to the Institute of London Underwriters and the identification of the relevant set of clauses. Unlike the Argentine market, however, there is no notation on the additional clauses expressly applying English law to the interpretation of the English Clauses. In the absence of any other stipulation in the particular conditions referring to English law, it must be assumed that the Peruvian Code of Commerce is used to interpret such clauses as well. However, it is known that there is a policy used in the Peruvian market which contains a set of general clauses existing in conjunction with a set of clauses resembling in large part the wording of the Lloyds' S.G. Form, to which English Institute clauses are regularly attached. A provision in the general conditions of this policy form stipulates that "All questions of liability arising under this Policy are to be governed by the laws and customs of England insofar as they are not in conflict with any stipulation of the Peruvian laws regarding internal public policy." ^{68/} Another policy contains a provision in an annex to be attached to the particular conditions, which appears to apply Lloyds' usages, practices and customs in adjusting claims for loss or damage under "all risks" conditions, reference being made in the context to the English Institute Cargo Clauses (All Risks). ^{69/} However, regardless of stipulations in the policy referring to English law, in both the Argentine and Peruvian markets the imperative provisions of the respective national laws, as is indicated in the clause quoted above, would apply to the policy clauses in any case.

34. The analysis of the policies of the selected Latin American countries undertaken in this section is of necessity generalized in view of the number and diversity of the policy clauses. Moreover, owing to the number of policies involved, it was not possible to include an analysis of the policies used in all the countries that were studied in the previous section on national legislation. Nevertheless, an attempt has been made to provide an overview of the scope of the general conditions of the various policies used in the region and their impact on the indemnity payable for loss or damage. Since what is established by the general conditions may well be altered by the attachment of additional clauses, including English Institute Clauses, this aspect has also been treated by the report whenever possible. In many instances a proper analysis of the policy required a more detailed knowledge of the jurisprudence and market practice of the country or countries concerned than the secretariat was able to obtain in the time available, and in such cases this has been indicated.

2. Scope of the insurance

(i) Included risks.

35. Judging from the policies analysed, there does not appear to be any uniformity of approach to the granting of coverage among the countries studied. To take cargo insurance first, it may be said in broad terms, with certain inevitable qualifications, that the general conditions used in Argentine, Ecuadorian and Peruvian cargo policy forms apparently operate by setting forth a broad grant of coverage and then limiting it by enumerating the risks for which coverage is not provided, whereas Mexican and

^{68/} Clause 20, general conditions used by El Pacífico, Compañía de Seguros y Reaseguros of Peru, in its Marine Open Policy.

^{69/} Article 27, annex to particular conditions, applicable to floating policies, issued by Popular y Porvenir of Peru.

Colombian policies provide coverage by enumerating the risks for which coverage is granted. 70/ Nevertheless, it should be pointed out that in Peru there is no standardized set of general conditions for the market. Consequently in addition to the aforementioned policies which provide coverage through an all risks grant subject to exceptions, there is also a policy which reproduces the English Lloyds' S.G. Form and thus provides coverage by enumerating the risks in the manner of the English system.

36. In article 3 of a set of Peruvian general conditions for cargo insurance, 71/ it is stipulated that the policy covers, in respect of maritime risks, loss or damage of the goods insured caused by fortuity of force majeure as a result of: storm, shipwreck, stranding, collision, involuntary change of route, voyage or vessel, by jettison, fire and generally by all other accidents and risks of the sea. 72/ The words at the end of the phrase quoted above "and generally by all other accidents and risks of the sea" are interpreted to refer to all other accidents and perils in a broad sense so that the effect of the clause is virtually that of an all-risks grant of cover as to maritime risks. This interpretation is consistent with what appears to be a general trend in civil law jurisdictions in the interpretation of such a phrase and is reflected in the legislation of some other Latin American countries. 73/ Separate provisions set forth an option for coverage on "Free of Particular Average" or "Total Loss" conditions. 74/ "Free of Particular Average" conditions apply unless agreed otherwise. However, by the terms of the relevant provision, particular average is covered if it results from shipwreck, stranding, impact, fire or collision.

37. Argentine general conditions 75/ for cargo insurance contain as a risks clause the identical wording quoted above and is interpreted in the same manner. 76/ Separate provisions set forth an option for coverage on "Free of Particular Average" conditions in the same manner as the Peruvian conditions referred to above, or for coverage on "With Particular Average" conditions. 77/ However, the Ecuadorian general conditions for cargo insurance offer coverage in a different manner. Article 1 entitled "Forms of cover" states that the insurance covers the risks to which the goods are exposed during the course of the insured voyage unless expressly excluded. It then provides three alternative scopes of cover, "Free of Particular Average",

70/ However, it should be noted that an additional clause exists in the Mexican market to provide cover for "all risks" by means of a broad grant of cover minus exceptions, which can be attached to the general conditions.

71/ Used by El Sol, Compañía de Seguros General of Peru.

72/ Special provision is made in article 5 for land transport for which coverage is limited to loss or damage caused by force majeure.

73/ As reflected in the Code of Commerce of Ecuador, article 929, title VII, see foot-note 86, infra. Also see Code of Commerce of Peru, article 768.

74/ Articles 8 and 9, general cargo conditions used by El Sol.

75/ Argentine general conditions continue to refer to the old provisions of the Commercial Code although these provisions were abrogated by the enactment of the Insurance Act No. 17,418 in 1967 and of the Navigation Act No. 20,094 in 1973. Nevertheless, in a chapeau to the general conditions or in a specially stamped notation, reference is made to the fact that the Insurance Act applies to the insurance of marine, air and land transport risks as provided therein.

76/ Clause 1. Special coverage is provided in article 2 for land and inland waterway transport.

77/ Argentine general conditions, articles 7 and 8.

"With Particular Average" and "Against All Risks". Using the approach found in the French marine insurance market, the Ecuadorian "Free of Particular Average" (as well as the "With Particular Average") cover does not exclude types of losses (average) as the title suggests (see also document TD/B/C.4/ISL/30, paragraph 40); rather it merely specifies the risks for which cover is granted. Thus, article 2, entitled "Free of Particular Average", enumerates only those risks for which the coverage of loss or damage to the goods is granted. This is a distinct departure from the "all risks" minus exceptions approach, otherwise used by the market, but it reflects the approach used in the French market for "Free of Particular Average" conditions and the enumeration of the covered risks is, in fact, similar to that provided in the French cargo policy. ^{78/}

38. Article 3, entitled "With Particular Average", returns to the all risks minus exceptions approach by stating that coverage is given for loss or damage to the goods with the exclusion of designated risks for which cover will not be granted unless expressly agreed otherwise. In this respect it should be mentioned that, in the case of all three scopes of cover, a common list of exclusions limiting their scope in a uniform manner is to be found in article 6 of the general conditions. Thus, the special enumeration of excluded risks in article 3 is an additional list of exclusions designed to limit the extent of coverage only as to "With Particular Average" condition. Lastly, article 4, entitled "Against All Risks", states that coverage is extended to loss or damage of the insured goods (subject to the common list of exclusions in article 6). Presumably, this article, like article 3 on "With Particular Average", is to be read in conjunction with article 1, cited above, which states that the insurance covers the risks to which the goods are exposed during the transport.

39. As to those cargo insurance policies that enumerate the risks for which coverage is granted, the Mexican general conditions analysed ^{79/} stipulate the risks of fire; lighting; explosion; stranding, sinking or collision of the vessel; loss of complete packages falling overboard during loading, transshipment or unloading operations; and the contribution by the assured to general average and to salvage charges. For land transport the policy stipulates fire, lighting, explosion, fall of an aircraft, spontaneous combustion, collision, overturning or derailment of the vehicle or other means of transport, and collapse or breaking of bridges.

40. Colombian general conditions for cargo insurance ^{80/} divides coverage into four sections: Total Loss, Non-delivery, Pillage ("Saqueo") and Particular Average. It is stated in the general conditions that Total Loss coverage is basic and is included in the coverages against Non-delivery, Particular Average and Pillage. The enumerated risks in Total Loss coverage reflect to a certain extent the Mexican enumeration for maritime and land transport, though stranding and collision of the vessel and collapse

^{78/} See document TD/B/C.4/ISL/30, para. 39.

^{79/} Article 4 for maritime transport, and article 6 for land transport, of the general conditions issued by Seguros Internacional, S.A., Mexico, for cargo insurance "Póliza de Seguro de Transportes" (hereinafter referred to as Mexican general cargo conditions).

^{80/} There appear to be some minor variations between the general conditions used by different insurers in Colombia, and as far as possible these have been reflected in the analysis. References are made to the general conditions for cargo insurance used by Compañía de Seguros La Fenix de Colombia, S.A., "Poliza para Seguros de Transporte"; La Continental Compañía de Seguros Generales, S.A., "Póliza Específica de Transportes"; and Aseguradora Grancolombiana, S.A., "Póliza Automática de Seguros de Transportes".

or breaking of bridges are omitted. On the other hand, there are added acts to extinguish fire resulting from lighting or explosion, jettison, and the falling overboard of complete packages during carriage in the vessel as well as loss of a complete package by such risks as flooding, collapsing of piers, earthquakes, volcanoes, cyclones, hurricanes and tornadoes. 81/ Furthermore, the Total Loss cover also includes a subclause, entitled "Negligence and Latent Defects (Inchmaree)", which enumerates as additionally covered risks for goods carried on ocean-going vessels; bursting of boilers, breakage of shafts, latent defect in the machinery or hull, and fault or error in navigation or management of the vessel of the master, officers, crew, repairers or pilots. 82/

41. Non-delivery and Pillage coverages under the Colombian general conditions relate to non-delivery or disappearance resulting from misplacement and various types of theft. Particular Average conditions cover certain types of damage sustained by cargo in the course of handling and carriage, such as the consequences of mishandling, improper use of hooks, salt water, etc. as well as spillage resulting from broken packaging.

42. As to hull insurance, the Mexican market uses a policy that enumerates the risk for which cover is granted, whereas the Peruvian and Ecuadorian markets utilize policies that grant cover on an all risks minus exceptions basis. (In Argentina, it is understood that the insured risks are determined in each case in the particular conditions or other attached clauses and that it is usual to attach either English or American clauses.) Mexican general conditions for hull insurance provide coverage for the actual and constructive total loss of the vessel by enumerating the following risks: the force of the elements, explosion, lighting, stranding, sinking, fire and collision of the vessel. 83/ There is also an additional set of clauses which can be attached to the general conditions, which grant cover for particular average caused by an enumeration of risks. These clauses reflect the risks listed in the general conditions with the addition of handling, transshipment, unloading, etc. of cargo, and breakage, mechanical failure and wear and tear of any part of the vessel. 84/

43. The Peruvian policy analysed, which is understood to be used for most ocean-going vessels insured in the Peruvian market, covers total and constructive total losses caused by storm, stranding, shipwreck, collision, fire, forced change of route or

81/ The insurer undertakes to reimburse the assured for payments he is legally obligated to make under a Both to Blame Collision Clause in a bill of lading. Furthermore, there is a specialized definition of shipwreck (foot-note to clause 1(A)).

82/ At least one insurer omits this aspect from the total loss coverage in its standard general conditions, but includes it in a set of general conditions, contained in an annex to the policy, which overrides the standard set.

83/ As well as general average contributions and salvage charges. General conditions, article 1(a), issued by Seguros Océanica Internacional, S.A., of Mexico for hull insurance, "Póliza de Buques" (hereinafter referred to as Mexican general hull conditions).

84/ The clause makes it clear that repair or replacement of the broken, failed or worn part is not covered.

voyage, jettison and, in general, all accidents and risks of the sea. ^{85/} As stated in connection with cargo insurance, the phrase at the end "and, in general, all accidents and risks of the sea" makes the clause an all-risks grant of cover as to maritime risks.

44. Ecuadorian general conditions, in covering total and constructive total losses as well as salvage expenses, follow the format described above in connection with the Peruvian policy by listing several specific risks and then referring generally to other accidents or risks denominated perils of the sea, with the exception of the exclusions stipulated in article 4. ^{86/} The general conditions also cover damage to the vessel when caused by certain enumerated risks (shipwreck, stranding, collision or impact, and fire). ^{87/} Technically speaking, coverage for "damage" is based on the enumeration of perils approach. Nevertheless, in the context of the all-risks grant of cover for total losses, the over-all effect of the coverage is to grant an "all-risks" cover free of any damage (i.e., total losses only) unless caused by the specially enumerated perils (i.e., both damage and total losses are covered). Thus, the clause enumerating the risks against which damage to the vessel is covered essentially expands upon the type of losses covered by the policy and is not an expansion of the risk clause.

45. Although relating primarily to providing insurance protection against physical loss or damage to insured objects, Latin American hull and cargo policies, as is generally the case in other countries' marine insurance policies, extend their coverage to certain expenses incurred by the assured. For example, policies usually set forth the assured's obligation to undertake all reasonable measures to protect the insured object from further harm after the occurrence of an accident, and provide for the reimbursement of such expenses. ^{88/} However, in the case of Argentina, although not mentioned in the general conditions, such undertaking to reimburse the assured's expenses in such cases is provided by article 418 of the Navigation Act. ^{89/} As to

^{85/} Article 1 of the general hull conditions issued by Popular y Porvenir of Peru.

^{86/} Article 1 (a) of the Ecuadorian general conditions. Article 929, title VII, of the Code of Commerce states that risks of the sea are understood to mean those which are run by the insured objects (there follows a somewhat similar enumeration of specific risks as in the policy form) and generally, all accidents ("casos fortuitos") that occur on the sea ("en el mar"), except as expressly stated in the policy.

^{87/} *Ibid.*, article 1 (b).

^{88/} See, for instance, Mexican general cargo conditions, article 14, and general hull conditions, article 8; annex to the general conditions of La Fenix, articles 13 and 15; cargo conditions issued by El Sol of Peru, article 24; and general cargo conditions, article 19; and general hull conditions, articles 24 and 25, issued by Popular y Porvenir of Peru, Argentine general cargo conditions for cargo, article 19 and hull, article 9 set forth the obligation to take measures to protect the insured property from further harm but do not expressly provide for the reimbursement of the resulting expenses.

^{89/} At least one Peruvian policy does not provide for reimbursement of such expenses. The Peruvian Code of Commerce does not appear to contain a generally applicable provision obligating the insurer to reimburse the assured for expenses incurred while undertaking protective measures, though it does appear that there are certain provisions applicable to specific situations under which reimbursement may be obtained, e.g., articles 804 and 805.

hull insurance, at least one policy requires that such conservation, or "sue and labour", measures involving major expenses be undertaken only with the prior agreement of the insurer unless the undertaking of such measures was of such urgency that consultations with the insurer was not practical. Failure to obtain such prior agreement would result in eliminating the insurer's obligation to reimburse such expenses. 90/

46. As an example of other possible expenses, general average contributions are also generally covered by cargo insurance policies. 91/ Their coverage in hull insurance policies varies according to the policies, Mexican conditions automatically covering general average contributions and Peruvian and Ecuadorian policies excluding it unless specifically agreed otherwise. 92/ To the extent that English clauses are attached, the use of, for instance, the Institute Time Clauses, Hulls, includes such coverage. 93/

47. The most significant extension of the hull insurance policy beyond insurance for physical loss or damage of the insured vessel relates to the coverage of collision liabilities. None of the hull insurance general conditions analysed contained a clause automatically granting collision liability coverage. However, an additional clause, called the "Third Party Risk Clause" ("Clausula de Riesgos a Terceros"), exists in the Argentine market, and is designed to be attached to the basic hull policy. This clause, which is very similar in effect to the Running Down Clause contained in the English Institute Time Clauses, Hulls (clause 1) grants coverage for collision liabilities arising from a collision of the insured vessel with another vessel. To judge from the wording of the clause, it appears to offer supplementary coverage for collision liabilities in addition to the coverage offered under the basic hull policy for physical loss or damage to the vessel. The clause differs from the English Running Down Clause in one notable respect in that the latter stipulates a limit of coverage based on three-fourths of the agreed value of the vessel, whereas the Argentine clause leaves a blank space for this to be filled in on agreement with the assured, thereby permitting another proportion to be specified, such as four-fourths (100%) of the value of the vessel. The Argentine Clause also contains a paragraph similar to the English "Sistership Clause" (clause 2; Institute Time Clauses, Hulls) covering situations where the insured vessel collides with another vessel owned by the same person. Under this clause, in order to avoid the problem that a person cannot legally have a liability to himself, the vessels are treated, for the purposes of the insurance coverage, as being owned by separate persons. Moreover, in order to avoid disputes the clause provides for arbitration on the issue of liability.

48. In the Mexican market there is an additional set of clauses for insurance of the civil responsibility of the assured for collisions ("Endoso de seguros de responsabilidad civil del asegurado por abordajes"), which grants coverage for collisions with other vessels for a certain percentage (to be agreed upon with the insurer) of the resulting liability up to the sum insured. This set of clauses also includes a clause covering "sistership" type collisions.

90/ General conditions issued by Popular y Porvenir of Peru, articles 24 and 25.

91/ Ecuadorian general conditions, article 5(a); Argentine general conditions, article 12; general conditions issued by El Sol of Peru, article 19; general conditions issued by El Pacífico of Peru, article 14; Columbian general conditions, article 1(A)(b); and Mexican general conditions, article 4(c).

92/ General conditions of Mexico (article 1(b)); Ecuador (article 16); and Peru (issued by Popular y Porvenir) (article 1).

93/ Institute Time Clauses, Hulls, article 8.

49. If English clauses are attached, collision liability coverage can be obtained by the use of the Institute Time Clauses, Hulls (which contain the Running Down Clause in clause 1) or the Institute Amended Running Down Clause (1/10/71).

(ii) Excluded risks.

50. The risks expressly excluded in the marine insurance contract will in principle depend on how the coverage of risks is effected. If the contract uses the all risks minus exceptions approach, it is particularly necessary to exclude precisely every risk which it is not intended to cover by the contract of insurance. If, on the other hand, the contract enumerates the risks for which coverage is provided, there is no need in principle for risks to be excluded, unless it is intended to narrow the scope of cover granted by the enumeration of a specific risk. Frequently, however, such policies list exclusions merely to avoid any misunderstanding as to whether a particular risk is covered even though it is not technically necessary to enumerate the exclusion.

51. In analysing the excluded risks in hull and cargo policies, it is important to bear in mind that such policies are primarily insurances for physical loss or damage of the insured objects themselves arising from their exposure to maritime risks, to the exclusion of all financial or commercial loss as well as of damage stemming from the inherent nature of the objects insured. Furthermore, it is assumed that the assured will generally act in a prudent manner and take reasonable care to protect the insured object from harm. As has been pointed out in connection with the scope of insurance in the French marine insurance legal régime (see document TD/B/C.4/ISL/30, paragraph 54), it can generally be said that the majority of the exclusions in both hull and cargo policies reflect the application of these principles though, as mentioned above, the extent to which they are actually expressed in the contract will depend on the manner in which coverage for the insured risks has been granted. Also excluded from all hull and cargo policies are what are generally considered to be "war and strikes risks", so that the plain form of the policy relates only to what are considered to be "marine risks".

52. Some excluded risks of particular interest are discussed below.

- fault of the assured

53. As to cargo insurance, all of the policies analysed which grant cover by the all risks minus exceptions approach expressly exclude in one form or another loss or damage caused by the fault of the assured. Argentine and at least one set of Peruvian general conditions exclude loss or damage resulting from the "negligence or bad faith" ("negligencia o infidelidad") of the assured, his agents or their employees. ^{94/} Another Peruvian policy excludes the direct or indirect consequences of the act or fault of the assured or whoever acts on his behalf, ^{95/} and Ecuadorian general conditions exclude the consequences of any fault attributable to the assured. ^{96/} Of

^{94/} General conditions of Argentina (article 4) and Peru (issued by El Sol) (article 12(d)).

^{95/} General cargo conditions issued by Popular y Porvenir of Peru, article 7(b).

^{96/} Article 6. Also excluded are the consequences of violation of import, export and transit regulations, regulations of the carrier and false declarations.

the cargo policies analysed which grant cover by enumerating the risks (as in Mexico, Colombia and, at least in one case, in Peru), the fault of the assured is not generally excluded. 97/ However, in none of the policies analysed is it an enumerated risk for which cover is granted, so it would appear that the fault of the assured is not generally a covered risk. 98/

54. Most of the cargo policies analysed, whether granting cover by the enumerated perils approach or by the all risks minus exception approach, do not cover the consequences of certain types of misconduct or barratry 99/ of the master or crew. The extent to which such conduct is excluded varies according to the policy, some excluding a wide range of international misconduct and negligence and other excluding only barratry. 100/ However, Ecuadorian conditions do not expressly exclude such misconduct, though by "Free of Particular Average" conditions, which grant cover by enumerating the risks, it is not expressly covered either. 101/ Colombian conditions, as noted earlier (see paragraph 40) expressly include the risk of loss or damage caused by fault or error in the navigation or management of the vessel by the master,

97/ In some general conditions the consequences of such acts as fraudulent declarations, illegal trade and violation of laws or regulations are excluded if attributable to the assured. See, for example, general conditions, La Fenix of Colombia, article 3(b), and Mexican general conditions, article 11(II)(a).

98/ Special reference should nevertheless be made to article 78 of the Mexican Insurance Contract Act, which appears in this instance to be applicable to marine insurance contracts, wherein it is stated that the insurer will be liable for accidents even when caused by fault of the assured (see foot-note 49, and accompanying text, supra). The fault of the assured may nevertheless have an indirect effect on the occurrence of a risk, and the issue of whether the resulting loss or damage is covered by the policy may depend on the local rules of causation. However, some policies, such as are found in the general conditions used by Popular y Porvenir of Peru (see foot-note 95, and accompanying text, supra), exclude the direct and indirect consequences of the assured's fault.

99/ The definition of barratry varies according to the legal system. However, it is understood in Peru to refer to wilful misconduct of the captain or crew in benefiting themselves to the detriment of the shipowner and it is believed to have a similar meaning in other Latin American countries as well.

100/ Article 7(b) of the general conditions, "Seguro de Transporte Marítimo o Fluvial", used by Popular y Porvenir of Peru excludes the risks of "barratry, negligence, imprudence or drunkenness of the master or of any other member of the crew." Article 5(e) of Argentine general conditions excludes the risk of "Barratry or any culpable act ("hecho culpable") by the master or crew of the vessel, mutiny on board and damage arising from the abandonment of the vessel by its crew". Article 12(d) of the general conditions utilized by El Sol of Peru contains the same exclusion but adds the word "strike" to the list of possible acts. Article 11 (I) (c) of the Mexican general conditions excludes simply "barratry by the master or the crew".

101/ Article 955 of the Ecuadorian Code of Commerce excludes fraud or fault of the master or crew, unless otherwise agreed. As to "With Particular Average" and "Against all Risks" conditions, which grant coverage by the broad grant of cover minus exceptions approach and do not exclude any type of misconduct by the master or crew, it appears that such risks are covered. However, under "Free of Particular Average" conditions, which fail to include such risks in the enumeration of the risks covered, no agreement is made to cover them and the exclusion of article 955 appears to apply.

officers, crew, repairers or pilots. 102/ At least one Peruvian policy, which includes wording from the English Lloyds' S.G. Form, expressly includes the risk of "barratry of the master and mariners". 103/

55. As to hull insurance, Peruvian and Ecuadorian conditions exclude loss or damage caused totally or partially, directly or indirectly, by intentional misconduct ("actos dolosos") or inexcusable negligence of the shipowner, master, officers of the crew and certain other agents. 104/ Mexican conditions exclude physical loss or damage due to barratry of the master or crew, unless agreed otherwise, and also intentional misconduct ("dolo") or gross fault of the assured, as well as violation by the assured of any foreign or national laws or regulations if such violation directly influenced the occurrence of the loss or damage. 105/ The policy stipulates that lack of due diligence by the assured to maintain the vessel in a seaworthy condition 106/ and the loss by the vessel of its classification after the insurance has been taken out will be deemed to be cases of gross fault.

- inherent vice or defect

56. All the hull and cargo policies analysed exclude the consequences of inherent vice or defect, regardless of the manner in which coverage is granted. In cargo insurance, this is done by reference to the general concept of "inherent vice", sometimes in conjunction with an even more general reference to the "nature of the goods", 107/ and frequently with additional references to specific events which are normally considered to be included in the concept of inherent vice, such as "decay", "spontaneous combustion", etc. 108/

57. As to hull insurance, the Ecuadorian and Peruvian conditions analysed exclude damage or loss resulting from inherent defect, whether latent or not, even if it contributed to a risk of the sea. 109/ In Mexican general hull conditions, which grant cover by the enumeration of risks approach, no express reference is made to inherent or latent defects as insured or excluded risks. However, article 238 of the Navigation and Maritime Trade Act stipulates that the insurer will respond, unless agreed otherwise, for the damage or loss occasioned by latent defects of the object, unless he proves that the assured or the insurance agent knew of such defects or could have known of them if he had acted with normal diligence.

102/ Clause 1 (A) (c) Negligence and Latent Defects (Inchmaree), contained in Total Loss cover, the general conditions used by La Continental and the general conditions contained in the annex to the Transport Policy used by La Fenix of Colombia.

103/ Marine Open Policy used by El Pacifico of Peru.

104/ Article 4(d), Ecuadorian general hull conditions, and article 3(d), general hull conditions, issued by Popular y Porvenir of Peru. Both policies also exclude any consequence that the vessel may suffer as a result of any act of the master or crew on land. Articles 4(g) and 3(g) respectively.

105/ Mexican general hull conditions, articles 3 and 4. See Mexican Insurance Contract Act, articles 77 and 78, foot-note 49 and accompanying text, supra.

106/ Article 6 of the general conditions, which details the obligations of the assured in this respect.

107/ See, for instance, Ecuadorian general conditions, article 6.

108/ For instance, ibid., and Argentine general conditions, article 5(a). But see article 6 of the Mexican general conditions, which specifically include spontaneous combustion ("auto-ignición") as an insured risk in land transport.

109/ Ecuadorian general conditions, article 4(e) and general conditions issued by Popular y Porvenir of Peru, article 3(e).

- delay in cargo insurance

58. All of the cargo policies analysed exclude loss or damage caused by delay. Argentine conditions and two sets of Peruvian conditions expressly exclude delay even if caused by an insured risk of the policy, 110/ and Ecuadorian conditions exclude the consequences of delay from "whatever cause", 111/ Two sets of Peruvian conditions and Colombian conditions expressly refer to the exclusion of loss of market in connection with delay. 112/ Mexican conditions simply exclude the risk of delay without further qualification. 113/

- theft in cargo insurance

59. There is no uniform treatment of the risk of theft and/or pilferage in the general conditions analysed. Colombian general conditions offer specific covers for Non-delivery and Pillage ("saqueo"), which together appear to cover most forms of violent and clandestine theft of complete packages or portions thereof. As to Ecuadorian conditions the risk of theft is specifically excluded only in "With Particular Average" cover but not in "Against All Risks" cover, and it is not a listed risk in "Free of Particular Average" cover. 114/ The other policies analysed generally exclude theft expressly, though it would appear that some differences exist as to the types of theft excluded, 115/ or fail to list it as a covered risk 116/

110/ Argentine general conditions, article 5(b); general conditions used by El Sol of Peru, article 12(h); and the Marine Open Policy issued by El Pacifico of Peru. It should be noted that both Argentine and El Sol conditions refer to delay in dispatch ("retardo en la expedición"), technically meaning the initial sending off of the goods as opposed to delay in the transit itself; however, it is believed that it has the latter meaning in the countries where it is used. It should also be noted that the El Pacifico policy, which is largely based on the Lloyds' S.G. Form and is to be interpreted according to English law (see foot-note 68, and accompanying text, supra.), is clearer than English conditions on this point, since no reference is made in English policy clauses to the fact that the delay exclusion operates as provided by section 55(2) (b) of the MIA, 1906, even when the delay is caused by an insured peril. In this respect see also the Code of Commerce of Colombia, article 1731, and Colombian general conditions, foot-note 112, infra.

111/ General conditions, article 6(a).

112/ General conditions issued by Popular y Porvenir, article 7(d), and the Marine Open Policy issued by El Pacifico of Peru. Article 2(f) of the Colombian general conditions refers to loss of market caused by delay and not specifically to physical damage caused by delay. Article 1731 of the Colombian Commercial Code states that the insurer will not be responsible for any loss caused by delay even if the delay itself has been caused by an insured risk of the policy.

113/ General conditions, article 11 (II) (c).

114/ The additional list of exceptions intended to narrow the "With Particular Average" cover as compared to the "Against All Risks" cover lists "theft, pilferage and non-delivery" ("robo, rateria y falta de entrega"). See paragraphs 37-38 for a description of the three types of Ecuadorian cargo cover.

115/ Article 5(a) of the Argentine general conditions, and article 12(g) of the general conditions issued by El Sol of Peru expressly exclude theft only ("robo"), whereas article 7(d) of the general conditions issued by Popular y Porvenir of Peru excludes "theft, pilferage and non-delivery" ("robo, rateria y falta de entrega").

116/ As in the case of the Mexican general conditions and the Marine Open Policy used by El Pacifico of Peru. - It should be noted that the general conditions issued by El Pacifico incorporate the Lloyds' S.G. Form, but omit the word "thieves" (interpreted in English law to mean theft with violence) from the original wording of the S.G. Form.

depending on the approach of the policy in granting cover. Specific coverage is nevertheless possible, as indicated by the existence in the Argentine market of an additional clause covering theft, pilferage and non-delivery, which is designed to be attached to the general conditions upon the payment of a further premium, and also by additional clauses in the Mexican market covering theft and non-delivery. Coverage is also possible in markets using English clauses by attaching the Institute "All Risks" clauses or a separate Institute Theft, Pilferage and Non-delivery Clause, which is similar to the Argentine clause.

- war risks

60. All the policies analysed for both hull and cargo insurance, regardless of the approach used to grant cover, exclude what are commonly known as war and strikes risks. The usual practice is to require a special agreement for the coverage of such risks through the use of a separate policy or the attachment of relevant additional clauses based either on English Institute Clauses or on locally drafted clauses. 117/

(iii) Use of English clauses.

61. A brief description has been given above of the risks and exclusions stipulated in the basic policy forms containing locally drafted general conditions. To the extent English clauses are attached to such general conditions, as is the practice in some of the countries studied (see paragraphs 29-34), the ultimate coverage for such risks will be altered. Thus, it will always be necessary to analyse the different components of the policy in conjunction, bearing in mind that the attached clauses, whether consisting of locally drafted clauses or English clauses, are invariably considered to override whatever is provided in the general conditions in the case of conflict between the two.

3. Duration of the coverage in cargo insurance

62. The legislations of the countries studied generally contain provisions concerning the commencement and termination of the risks for cargo insurance. As a rule, these provisions provide that the risk commences when the loading operation starts or when the goods leave land in order to be shipped and terminates when the goods are safely landed. 118/ Colombian legislation, however, provides that the risk attaches from the moment the goods are in the custody of the ocean carrier at the place of origin until they are placed at the disposal of the consignee at the place of destination. 119/

63. However, in practice, the duration of the coverage of cargo insurance policies is almost invariably governed by an overriding provision in the policy itself. Argentine general conditions stipulate in article 6 that the risks commence from the moment that the goods are loaded in the place of their despatch and continue until they are placed on land at the point of destination. Additional provision is made for coverage up to 15 days while the goods are on board lighters or other craft used in the loading and unloading process as well as for continued coverage during delay in the departure of the carrying vessel, on condition that an additional premium is paid.

117/ For cargo insurance, local clauses covering strike risks and war risks have been noted to exist in Colombia, Mexico and Ecuador. There is a local clause covering strike risks for hull insurance in the Argentine market.

118/ See, for example, the Code of Commerce of Peru, articles 746 and 774, and the Argentine Navigation Act, article 437.

119/ Code of Commerce of Colombia, article 1711.

However, article 6 is overridden, as in the case in other markets where English conditions are utilized, such as Peru, by the warehouse to warehouse clause contained in the Transit Clause (clause 1) of the Institute Cargo Clauses. 120/ Ecuadorian general conditions stipulate in clause 9 that the insurance shall operate from warehouse to warehouse. It will commence with the loading of the goods on the vehicle which will initiate the transport, or, if there is no such vehicle, as soon as the goods are ready for shipment and leave the warehouse or place of storage at the point of origin, and terminate with the arrival or discharge of the goods in the warehouse of the consignee. By the special attachment of an additional clause "warehouse to warehouse" ("bodega a bodega"), the general conditions as to the termination of the coverage are altered to reflect more closely the terms of the warehouse to warehouse clause found in English conditions, including provision for early termination of coverage short of the designated destination in the case of storage of the goods by the assured other than in the ordinary course of transit, distribution of the goods by the assured, or the lapse of 60 days following their discharge from the ocean vessel at the port of destination.

64. Colombian conditions, 121/ in extending coverage from the warehouse of origin to the warehouse of destination, distinguish between the application of the maritime aspect of the coverage and the complementary interior insurance coverage. The former terminates with the "nationalization" or payment of custom duties on the goods or on the expiration of 30 days following discharge from the ocean vessel, while the latter continues until the time of arrival at the final warehouse designated in the policy or until the expiration of 30 days from the date of their "nationalization" or payment of customs duties. Mexican warehouse to warehouse coverage is provided by an additional clause, entitled "warehouse to warehouse for maritime shipments", which extends coverage from the moment the goods leave the warehouse at the point of origin until they are delivered to the final warehouse at destination or until the expiration of 15 days from the discharge of the carrying vessel if the warehouse is situated within the final port of destination, or of 30 days if it is outside the port.

4. Types of policies

65. Generally speaking, the legislations of the countries studied envisage the use of voyage policies, "round trip voyage" policies, 122/ time policies and, in some cases, floating or open policies for cargo insurance. As to cargo insurance, although not all legislations contain provisions governing floating or open policies, 123/ it is

120/ As well as the Craft Clause (clause 3), Institute Cargo Clauses.

121/ General conditions, clause 10, Commencement and Termination of the Risks, the form of which varies from company to company, involving in some cases the attachment of an additional clause.

122/ A round trip voyage policy is a type of policy in which the subject-matter is insured from the home port to the port of discharge and from that port to the home port or some other final port of discharge. Some legislations have special rules for cargo insurance, which provide for the reduction of premium in cases where the assured is unable to obtain sufficient cargo on the return trip. The Codes of Commerce of Peru (article 770), Chile (article 1271), Ecuador (article 965) and Mexico (article 832) are cases in point.

123/ The Code of Commerce of Colombia contains a provision (article 1050) describing the form of a floating policy and an "automatic" or open policy. The Argentine Navigation Act has certain provisions (articles 442 and 443) setting forth the rights and obligations of the parties to an open policy, such as, inter alia, the right of the assured to make declarations, or to correct declarations already made after the loss or arrival of the goods if the failure to make a timely declaration or the mistake in the original declaration was made in good faith.

understood that open policies ("póliza abierta", "flotante" or "automática") are in frequent use in the region and the current practices in connection with the use of such policies generally follow those existing in developed market-economy countries. Accordingly, special policy provisions exist relating, for example, to the obligation of the assured to declare all shipments coming within the terms set forth in the policy as well as the insurer's obligation to provide insurance coverage for all shipments so declared, to the issuance of a certificate of insurance, to cancellation of the policy, limit of liability per vessel, minimum standards for vessels used to transport the goods, etc. In the latter case, usually the Institute Classification Clause, or a variant thereof designed to achieve the same purpose, is applied to control the minimum standard of the vessels used as well as to increase the premium in appropriate cases.

5. The sum insured and agreed value

66. In addition to the provisions in national legislations concerning insurable values and the use and legal effect of agreed values, certain other provisions exist in the general conditions of marine insurance contracts concerning these aspects and, in general, the indemnity payable for loss or damage under the policy.

67. As to hull insurance, as a rule there do not appear to be specific provisions in the general conditions dealing with the legal effect of agreed values in the policy, so reliance is presumably placed on the relevant provisions of the national commercial codes or other applicable legislation (see paragraph 20). However, all the hull policies analysed contain a provision stipulating that the sum insured is the maximum liability of the insurers. ^{124/} Subsequent provisions, nevertheless vary the effect of this sum as a limitation. Some policies stipulate that the sum insured is the limit of liability for the entire period of the policy, whereas others indicate that it applies on a per voyage basis, thereby creating a new limitation of liability for each voyage undertaken. ^{125/} In either case, the sum insured is reduced after each claim on the policy; however, when the policies have a limitation on a per voyage basis, the sum insured is automatically reconstituted at the end of each voyage so that it applies in full for the next voyage as though there are as many policies as there are voyages. Those policies that establish the sum insured as a limit of liability for the entire period of the policy also contain a provision stipulating that the sum insured can be reconstituted after each claim to its previous full value by the payment of an additional premium. ^{126/}

8. It will be seen from the above analysis that under the general conditions studied, the system used for the treatment of the sum insured in the case of successive claims during the period of the policy more closely resembles the approach used in the French marine insurance legal regime (see document TD/B/C.4/ISL/30, paragraph 75) than that of the English legal regime, which treats the sum insured as the limit of liability of the insurers on a per accident basis. ^{127/}

^{124/} General conditions of Ecuador (article 22), Peru (used by Popular y Porvenir, article 15), Argentina (article 7) and Mexico (article 14).

^{125/} The per voyage basis for the application of the sum insured is established by the provisions which state, in effect, that each voyage of the insured vessel will give rise to a separate adjustment, each adjustment being considered as if a policy existed for each voyage. See general conditions of Ecuador (article 26) and Peru (used by Popular y Porvenir, article 17).

^{126/} See general conditions of Mexico (article 15) and Argentina (article 7).

^{127/} See section 77, MIA, 1906.

69. As to cargo insurance, the predominant feature of the policies analysed is that the indemnity payable for loss or damage of the insured goods is generally based on their actual value. In this respect the policies also reflect the system used in cargo policies in the French marine insurance market (see document TD/B/C.4/ISL/30, paragraph 73) rather than the English system which utilizes an agreed value that is binding on the parties for the insurable value of the goods. Thus, cargo policies generally stipulate that the limit of the indemnity payable is the sum insured or, if less than the sum insured, the value of the goods at the commencement of the insurance augmented by freight and other expenses connected with the transport of the goods, the insurance premium and an amount (usually 10%) representing the anticipated profit. 128/

6. Deductibles and franchises

70. A deductible may be described as an amount which must be exceeded before a claim is recoverable, and then only the amount in excess is payable. It is to be differentiated from a "franchise", which is the amount that must be reached before a claim is payable, but once attained the claim is payable in full.

71. To the extent English Institute Clauses are attached to Latin American policies, the provisions of those clauses will determine the existence and application of a deductible or franchise in place of any provisions in the general conditions of the policy. In hull insurance the Institute Time Clauses, Hulls, establish a deductible, the amount of which is to be set by agreement of the parties (clause 12). The Institute Cargo Clauses vary according to whether F.P.A., W.A., or All Risks clauses are used. "All Risks" conditions exclude any deductible or franchise. W.A. conditions refer to the percentage specified in the policy, so reference would have to be made in this case to the general or particular conditions of the policy. Lastly, in F.P.A. conditions, the applicable clause (clause 5) is to be read in replacement of any clause in the general conditions establishing a franchise.

72. As to the general conditions of the hull insurance policies studied, the approach varies according to the country concerned. Generally speaking, Mexican and Peruvian general conditions apply only to total or constructive total losses and consequently do not provide for a deductible or franchise.

128/ A typical provision is article 15 of the Argentine general conditions, which reads in the relevant part:

In any case of loss of or damage to goods, and even if the expressed value has previously been accepted, the Company will be entitled to require proof of the actual value, and if this appears exaggerated and the Company has not previously expressly approved a specific increase, it will be entitled to reduce the sum insured to the cost price plus 10%. The cost price shall be determined by means of the purchase invoices or, where appropriate, by the current prices at the time of loading, increased by all the loading expenses, non-reimbursable freight and the insurance premium, but without interest.

See also the general conditions of Peru (used by Popular y Porvenir, article 17, and particular conditions, article 12), Colombia (used by La Continental, clause 7) and Mexico (article 16).

73. However, in respect of Mexican conditions, there is an additional set of clauses which can be attached to the general clauses granting cover for particular average. This set of clauses contains a dual deductible of 3% of the value agreed in the policy or a sum agreed upon, whichever is less, but the deductible is not applicable to damage when the vessel has become stranded, has been sunk, burned or entered into a collision. 129/ There is another additional clause, which can also be attached to the policy when the above set of clauses covering particular average are used, applying a deductible (of a sum to be agreed upon) to particular average claims arising from each separate accident. 130/ Ecuadorian general conditions contain a provision (article 3) which envisages the possibility that the parties will agree to either a franchise ("franquicia no deducible") or a deductible ("franquicia deducible") and gives a definition of both terms. Argentine general conditions do not expressly provide for a deductible, though provision is made for "new for old" type deductions of one-third of the cost of new parts. In a set of particular conditions studied, a type of deductible is provided for by a provision which states: "For this policy to be valid, the assured must agree that a sum of not less than ... of the total value of the damage or loss shall not be covered by this insurance." 131/

74. As to the general conditions of the cargo insurance policies studied, both Ecuadorian and Colombian policies provide for the possibility of either a franchise or a deductible, depending on the agreement of the parties, and set forth a definition of both terms. 132/ Argentine general conditions provide for the possibility of a coverage "Free of Particular Average" unless caused by designated risks (i.e. "free of particular average unless") or "With Average" conditions. In the former coverage there is a deductible of 5% applied to average claims for all liquids. As to the latter coverage, provision is made for a franchise, the amount of which is to be agreed upon by the parties. 133/ In Peruvian policies, one set of general conditions incorporates a modified version of the Memorandum of the English Lloyds' S.G. Form, which applies a franchise to some commodities but makes others free of particular average. 134/ Another set of Peruvian general conditions provides for coverage on "free of particular average unless" terms without making provision for the use of either a franchise or deductible. 135/ Another set of Peruvian general conditions establishes that when particular average is covered it is subject to a franchise, the amount of which is to be agreed upon by the parties, unless special provision is made for the use of a deductible. 136/ The policy also stipulates the percentages to be deducted in addition to the franchise for designated commodities so as to take into account natural transport losses. 137/ Lastly, Mexican general conditions do not appear to provide for the use of a deductible or a franchise.

129/ Article 1, Endoso de seguro de avería particular (buques).

130/ Clausula de indemnización deducible (avería particular) (buques).

131/ Issued by Antorcha Compañía de Seguros, S.A. The amount is to be agreed upon by the parties to the contract.

132/ For Colombia, general conditions used by La Continental, clause 18; Ecuadorian general conditions, article 8. Article 945 of the Ecuadorian Commercial Code provides for a minimum 1% franchise.

133/ See the Argentine general conditions, articles 7 and 8. Article 438 of the Navigation Act provides for a 3% franchise unless agreed otherwise.

134/ Marine Open Policy used by El Pacífico of Peru.

135/ General conditions used by Popular y Porvenir of Peru.

136/ General conditions used by El Sol of Peru, article 14.

137/ Ibid., article 15.

C. Claims for loss or damage

75. The policies analysed generally contain provisions governing the obligations of the assured to give prompt notice to the insurers of any loss or damage. 138/ Frequently, provisions are also inserted detailing the need to contact the claims agent (comisario de averías) of the insurer to undertake a survey of the damaged goods or vessel. 139/

76. In determining the indemnity payable under a marine insurance policy, the claim is usually adjusted on the basis of the average, or damage, incurred (acción de avería) or on the basis of the abandonment of the property. Abandonment of the property results in the transfer of all the rights and liabilities of the property to the insurer and an adjustment of the claim as a total loss. 140/

77. National legislations and some policies stipulate the rules for determining the adjustment of the claim on the basis of the damage incurred. National legislations generally set forth the rules for determining the indemnity for hull insurance on the basis of an estimation of the necessary repairs or on the actual repairs undertaken, frequently providing for a "new for old" type deduction of one-third the actual or estimated cost of repairs. 141/ Rules are also laid down in either national legislations or the general conditions of the policy on determining an indemnity for partial loss or damage in cargo insurance. An example of such rules can be found in the Argentine general conditions for cargo insurance, which read as follows:

In the case of particular average on goods, the difference shall be ascertained between the cash return which the insured merchandise should have produced in the place of its destination, had it arrived in sound condition, and that obtained at a public auction after the damage suffered, or else, at the option of the insured, the deterioration in the merchandise shall be assessed by arbitrators, so that, in one or other of these ways, the percentage of loss can be determined, which percentage shall be indemnified by the company in respect of the quantity insured. ... 142/

78. With the exception of Colombia, most national legislations specify the precise grounds on which the assured may abandon the insured property. 143/ Policy conditions almost invariably contain a list of grounds for abandonment as well, in some cases expanding and in others narrowing the restrictive list of possibilities.

138/ For example, Mexican general hull conditions, article 9; general cargo conditions used by Popular y Porvenir of Peru, article 12; and Argentine general hull conditions, article 9.

139/ See, for instance, Argentine cargo conditions, article 20; Mexican general cargo conditions, article 15(c); and Mexican general hull conditions, article 10.

140/ Some policies, such as article 22 of Ecuadorian general cargo conditions, stipulate that the insurer may decline to accept the property even after paying for a total loss.

141/ For example, Argentine Navigation Act, article 435, and the Codes of Commerce of Peru (article 784) and Colombia (article 1754).

142/ Argentine general conditions, article 9.

143/ For example, Code of Commerce of Peru, article 802, and the Argentine Navigation Act, articles 457 and 460.

For example, Argentine hull and cargo policies generally reflect the list of grounds provided by articles 457 and 460 of the Navigation Act although with certain amendments, such as eliminating embargo or detention by order of a local or foreign government as a grounds for abandonment in hull insurance. Typical grounds for abandonment for hull insurance are shipwreck, total loss or the vessel being rendered absolutely unfit to navigate and unable to be repaired, lack of news, capture and damage or deterioration amounting to three-quarters of the value of the insured property. 144/ For cargo insurance typical grounds are lack of news about the vessel in which the cargo was transported, total loss resulting from shipwreck, material deterioration affecting three-quarters of the value of the insured property, the impossibility of the goods arriving at their destination and sale of the goods owing to deterioration in a port other than the port of departure or destination. 145/

79. Generally speaking, Colombian legislation more closely reflects the English legal regime than that of the other Latin American countries studied by making a distinction between actual total losses and a constructive total loss, a distinction not usually drawn in the other national legislations analysed, 146/ and generally reflecting the content of sections 56 to 63 of the NIA, 1906.

D. Market practices as to the placement of insurance: the use of agents and brokers

80. The use of insurance brokers in the Argentine, Colombian, Ecuadorian, Mexican and Peruvian markets is optional, however, their use is understood to be increasing in view of the complexity of marine insurance.

81. In the Peruvian local market, there is no clear distinction between an insurance broker and an insurance agent. In Argentine law, a distinction is drawn between an insurance agent, who regardless of his connections with an insurer, is authorized only to receive proposals for the conclusion or modification of insurance contracts, to deliver the documents issued by the insurer pertaining to the contract and to accept payment of the premium, 147/ and an agent "institorio", who is authorized to enter into insurance contracts directly on behalf of the insurer. 148/ In Ecuador, insurance brokers are regulated by the General Insurance Companies Act of 13 March 1967, which stipulates that a broker is an individual professionally engaged to negotiate and obtain insurance contracts on behalf of an insurance company. Therefore, such brokers are not independent agents unrelated to insurance companies. However, there also exist what are called "insurance placement agencies", which are either corporations or individuals, apparently unconnected with any particular insurer, who undertake to negotiate and obtain insurance contracts with one or several insurers. Mexican legislation provides only for insurance agents operating on behalf of an insurance company, though it is understood that certain agents with large portfolios operate in the manner of brokers.

144/ See, for example, the general conditions of Ecuador (article 15) and Argentina (article 2).

145/ Argentine Navigation Act, article 460, See also the general conditions used by El Sol, article 23 and, for a more restrictive list, the Ecuadorian general conditions, article 22.

146/ Although some policies expressly provide for the coverage of constructive total losses, defining the term to mean when the repairs amount to three-quarters of the value assigned to the vessel in the policy, as in article 2 of the Mexican general hull conditions, or when the damage caused by insured risks exceeds the value of the vessel in a state for normal navigation, as in article 2 of the general hull conditions used by Popular y Porvenir of Peru and article 2 of the Ecuadorian general hull conditions.

147/ Article 53, Insurance Act.

148/ Insurance Act, article 54.

82. In the case of Peru, the professional qualifications for an insurance broker are, known to be proof of Peruvian nationality and residence, compliance with tax commitments, the right to full exercise of civil rights, at least two years' experience in an insurance company or insurance producer enterprise, and proof of good conduct. In both Peru and Ecuador, insurance brokers are subject to control by the Superintendent of Banks and Insurance. It is understood that a draft law has been proposed in Argentina concerning the regulation of the activities of insurance agents which is currently being studied by the Legislative Advisory Chamber.

83. As a general rule it appears that the applicable regulatory provisions do not require the posting of a guarantee or impose other types of financial responsibility. However, brokers or agents are subject to the imposition of sanctions ranging from warnings to the annulment of their licences to operate in the event of misconduct. 149/

149/ For example, Supreme Decree No. 019-79-EF of Peru, article 12; and Reglamento de Agentes de las Instituciones de Seguros of Mexico, 29 September 1955, articles 18-31.