THE MARINE UNDERWRITER'S ROLE IN MULTIMODAL TRANSPORT

In his paper delivered to the meeting of this Association in May last, John Birrell modestly suggested that his work offered no new scholarship on this subject. Indeed, this paper is now presented with similar thoughts, for this subject seems, more, to require periodic up-dating, rather than the presentation of a new view of an established theme.

If the role of the marine underwriter, in relation to the multimodal transport system is to be examined in depth, it is perhaps, advisable from the outset, to clearly express the point which is of vital concern to the marine insurance industry and that, in a nutshell, relates to the three liability regimes being considered, i.e. those of "strict liability", "uniform" and "network".

1. STRICT LIABILITY OF THE MTO

By the use of the strict liability system, the MTO would assume, it is said, full responsibility for any loss of or damage to the cargo, whilst in the course of transit.

The benefits deriving from this to the shipper, it is also said, would be, inter alia:

(i) A reduction in expenses by eliminating recourses and litigation on carrier's liability, the cargo and liability underwriter being one and the same; [2]

(ii) Reductions in workload for shippers: the shipper would no longer need a separate cargo policy, declarations of shipments etc.
This could be followed in natural course, to less accounting work, etc.

(iii) Dealing only with one party in the event of a claim;

(iv) A general statement that costs may be reduced by reason of a great spread of business to the liability underwriter shich should, in turn, reduce costs previously associated with marine cargo insurance;

(v) Provide powerful incentives for MTO to avoid accident costs [3]

At the risk of being accused of having a vested interest (a point which we do not oppose) the insurance industry does not believe that a system of strict liability within MMT concept, is in the overall and long term interests of the shipper (the word "shipper" being used in its broadest context). A closer analysis of the above statement will clarify the stand taken, thus far, by the Australian Marine Insurance Industry.

Firstly, the admitted statement that the Industry has a vested interest: In Australia alone, marine cargo insurance brought in premium to the insurance companies of $53 m in 1974/75 [1] and with the current rate of premium growth [5] in Australia, this figure could be reasonably expected to reach $85 m by 1979/80. If the strict liability concept were introduced, it is not inconceivable that the Australian Insurance industry alone (and I emphasise "Australia") would stand to suffer the loss of the major portion of this income. We do not believe that any major industry in Australia, can afford to lose revenue of this magnitude without there being some direct effect, on the community as a whole. A similar situation will, of course, prevail in most, if not all, of the so-called "developing" nations (infra)

Whilst not turning lightly from the financial aspect, we will now concentrate our attention on those areas, where we believe, a system of strict liability, leaves much to be desired and leaves a number of questions unanswered.

To revert to basic principles, it should be understood that a fundamental principle of sound insurance underwriting, is that the risk should be "spread" as widely as possible, by systems of co-insurance and re-insurance, so that any one particular loss will not call into question the financial stability of the insurer. In the majority of countries, this is achieved by appropriate legislation: in Australia, by the Insurance Act 1973 (Clth.) and Statutory Rules pursuant thereto.

If a strict liability concept were to be adopted, it is presumed that as no one MTO would be sufficiently adventurous to carry all of the potential liability himself, he would seek cover either, through the medium of his P. & I. Club or the traditional insurance (liability) market. What then, it may be asked, is the basic difference, between removing insurance premium from traditional sources and channelling it through liability sources and/or Protection & Indemnity Clubs? We believe the differences are vast and may even be irreconcilable.

In theory, such a change could vary between abolishing carrier's liability altogether, thus making protection and indemnity cover redundant and extending carrier's liability to the point where marine cargo insurance became completely un-necessary.

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

The other extreme solution, that of abolishing marine insurance by extending the carrier's liability in such a way that it becomes an absolute liability and covers all cargo losses, would probably be based on a fallacy, namely the assumption that, even in the case of an absolute liability, the carrier will continue to cover this practically unlimited liability, by joining a mutual P. & I Club. It must be noted, however, that P. & I. cover is a liability cover sui generis and that the viability of the present P. & I. Clubs is due to the substantially restricted scope of the carrier's liability as defined by the Hague Rules [6]. Should the scope of the club's liability be increased to include all of the non-fortuitous type risks, individual rating of each shipowner would be superfluous and individual carriers may tend to ignore loss prevention.

The final result of this would be that, rather than replacing the conventional marine cargo insurance, there would be a swing to expanded P. & I. clubs; expanded to the extent that it would be more expensive, less satisfactory and operated by a few large insurance companies?

The remaining alternative then, is to pass this "extended" liability cover, through the avenues of the traditional liability insurers in continental Europe, including the United Kingdom and United States.

Premiums for existing liability insurance are based on complicated formulae, involving areas such as, total possible/probable pay-out in the event of a maximum casualty, the shortest period during which the underwriter may be repaid (by subsequent premiums) for that major catastrophe, allowing even further losses will arise during the payback period.

If an extended liability, such as that envisaged under the MMT concept is to be borne by underwriters, then costs of buying this cover, would be much greater than costs at present. All of these factors would, in turn, be affected by the monetary level of liability decided upon.

A further point which must be considered, is the possible gaps which may arise in the liability of the MTO. Would the term "strict liability" which is bandied around with gay abandon, be interpreted in its strict legal sense, or would we find that there may be certain areas, for which the MTO would not wish to be responsible, e.g. the so-called "act of God" situation (currently covered by conventional insurance) or intermediate storage and warehousing beyond the control of the MTO (again currently covered by conventional cargo insurance). The academic discussion on such points thus far, whilst recognising possible "grey" areas such as these, have really failed to stipulate how "strict" the "strict liability" is to be.

Thus far, we appear to have ignored the problems which would inevitably be encountered by the Shipper and these are numerous. In particular, the shipper, at the moment, has a freedom of choice of the type of cover he chooses to avail himself of, the price he wishes to pay for that cover and if he has a dispute with his insurance company, he has a simple remedy: he can change underwriters. If he has a claim, his underwriters, hopefully, settle as quickly as possible (although it is acknowledged that some settlements are protracted) and then they, the underwriters, pursue the recovery action against the parties responsible. Under the strict liability concept, this task will be thrown straight back to the shipper/consignee.

True, the system may be streamlined for the MTO and an excellent revenue earner for him, but the same is certainly not true for the shipper. His own "in office" expenses will probably be higher and in all probability so will his rates of freight.

2. UNIFORM LIABILITY OF MTO

In principle, the insurance industry is not totally opposed to a uniform system of liability and believes, prima facie, that there would be benefits derived by all parties, i.e. MTO, shipper and underwriter.

The difficulty, however, arises in trying to establish an adequate level of liability. Should it be high, or should it be low? Should it be at the level of say, the existing limits of the Hague Rules or the existing limits of the Warsaw Convention?

As pointed out by John Birrell in his paper in May, a level of liability lower than that fixed by Convention or National laws, may well be illegal. It would follow then, that the level of liability must be pitched to the highest point, the result of which, must inevitably be higher costs of liability insurance and thus higher freight rates, so that, once more, the shipper is disadvantaged.

From the Underwriter's viewpoint, the only advantage would seem to lie in greatly facilitated recovery procedures.

3. NETWORK LIABILITY

The logic behind the network system is that, in combined transport, the liability limits and exceptions should remain appropriate for each of the particular modes of transport involved. These limits should be high enough to ensure that the respective carriers will take all possible steps to care for the goods in their charge but low enough to avoid the carriers or the MTO's being forced to pay large sums to insure their high liabilities with the consequent increase in freight rates or MTO costs [8].

One of the most frequent problems encountered by underwriters in pursuing claims' recoveries against carriers, is trying to establish whether the loss/damage has arisen whilst in the care, custody, control, etc. of the shipowner, road carrier, etc. and under a network system, this problem, presumably, would be eliminated.

Where it was possible to establish the point of loss, liability by national convention, law, etc. (whatever the limit chosen) would apply.

In theory, greater recoveries without litigation, should reflect favourably in lower premiums but it is doubtful whether this will prove to be the case. Any additional liability assumed by the MTO would have to be covered by his liability underwriters or P. & I. clubs and it would be unreasonable to assume that this would not be passed on to the shipper by way of increased freight.

CONCLUSION

It is the considered opinion of the insurance industry, that a network regime, initially, is desirable and to move over a period, through the gradual harmonisation of the existing Conventions, towards a uniform regime. This view is held partly in the belief that it will be possible to introduce a convention based on a network regime at a far earlier stage than one based on a uniform system [9].

Allowing for the proposed revision of the Hague Rules,existing Conventions (Warsaw, CMR, CIM and the Hague-Visby Rules), provide an adequate framework within which an MTO can operate. The shipper would, in our opinion, be least disadvantaged by the retention of these existing Conventions, modified into a network regime; especially in the overall insurance cost and related costs of transportation [10].

Throughout this paper, we have restricted our comments principally to Australia, because this country is our primary concern but we must not lose sight of the fact, that Australia is internationally regarded as a developing nation and it is significant to note the following endorsement by the UNCTAD Committee on Invisibles and Financing Related to Trade. It said:

> "(UNCTAD) endorses the UNCTAD conclusion that maintaining the present system of cargo insurance is essential and cannot be dispensed with and that any radical shift in allocation from cargo insurance to carrier's liability would be particularly detrimental to the interests of the developing countries. "

In addition, the International Union of Marine Insurance, summarises the position in the following terms [12]:

"A substantial extension of the liability of the shipowner leads to the necessity to make use of worldwide reinsurance facilities. The smaller the national insurance market, the greater is the need for such reinsurance arrangements. In developing countries with insurance markets with limited capacity, the larger part of the premium would go abroad, i.e. into insurance markets of developed countries. This assumes that the local market is prepared to accept any part of the liability insurance. The situation in respect of cargo insurance is different: the sums to be covered are generally smaller, present little or no capacity problem and therefore can be placed in the younger or small markets, with at least a substantial part of the premium perhaps remaining in the country.

If a country does not possess its own fleet and the liability is shifted over to the carrier, the latter will probably cover his insurance needs in his own country, hence the insurance markets of the countries without fleets may not benefit. This argument is also valid for "developed" countries having no fleet or only a small fleet.

The building up of national fleets by developing countries could be greatly hampered by the assumption of large liabilities by their shipowners. The premium to cover this liability would probably flow abroad either by way of direct liability insurance or if not, certainly by way of reinsurance."

This again relates to our own "vested" interests in respect of which, as pointed out above, we make no apology.

Finally, you will note from the Agenda, that it was the intention of the Insurance Council of Australia to report to you on any developments in regard to this subject, which may have arisen at the Paris Conference of the International Union of Marine Insurance. There were, in fact, a number of significant points of discussion. Firstly, it was learnt that the Governments of Australia, Canada, New Zealand and United States of America have joined together in developing an attitude which favours the adoption of the uniform system of liability with a high level of liability being imposed on the M.T.O.

There was a good deal of concern at this among European and United Kingdom delegates to the I.U.M.I. Conference because these Governments do have a considerable degree of influence in the world theatre. However on the other hand I learnt, whilst in London, that the United Kingdom Government intended to ratify the Visby Rules on 1/10/76. Only three more countries need to ratify the Visby Rules for them to become operative. And the comment was made that if the Visby Rules come into force the UNCITRAL draft convention revising the Hague Rules may never see the light of day. This state of affairs may have repercussions on the UNCTAD draft convention on multimodal transport.

Another subject, which I found of particular interest, concerned the lack of support, at this time, among marine cargo insurance markets to provide cover to shippers for the consequences of civil wars and strikes on land. The problems shippers faced in Angola and the Lebanon were highlighted and it was said that underwriters must take a fresh look at this problem with a will to find a commercially satisfactory cover for minor war risks on land. In centuries past war risk was the prime cover and although the "Waterborne Agreement" was sound when it was drafted, today, under Through Bills of Lading with multi-modal transport, the situation is not so clear. No solution had been found in the I.U.M.I. Cargo Committee's discussion but shippers have a right to know whether they are covered or not. As a result of this discussion it was agreed that the I.U.M.I. Council would study the problem and come forward with recommendations.

The last comment relates to General Average and the need to achieve a real and genuine simplification of administrative work in connection with General Average. This subject has been under intensive study by a special international joint working group for nearly two years and their efforts have been compounded by the advancing technologies of multi-modal transport-ation involving through Bills of Lading. One of the proposals is that there be uniform agreement for underwriters to accept primary liability for the cargo thus obviating the need for the cargo-owner to sign the Average Bond, and, in fact, this has been put into practice in some countries. But there are many problems to be solved, before Underwriters can reach general agreement.

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