THYNNE & MACARTNEY
LIBRARY

Seminals (Maritime)

(3)

THE IMPLICATIONS FOR MARINE INSURERS OF THE CARRIAGE OF GOODS BY SEA IN THE 1980'S

Prepared for the Annual Conference of the
Maritime Law Association of Australia and New Zealand
Wellington, New Zealand, 13 - 15 September, 1979,

by M.A. Hill, F.C.I.I.,
Assistant General Manager,
GRE Insurance Ltd.,
on behalf of
The Insurance Council of Australia

THE IMPLICATIONS FOR MARINE INSURERS OF THE CARRIAGE OF GOODS BY SEA IN THE 1980'S

Prepared by M.A. Hill, F.C.I.I.
on behalf of
The Insurance Council of Australia

THE BASIC ISSUES

Over the centuries, marine insurers have proved their ability to adjust to changes in transportation methods and will undoubtedly take in their stride such new developments as may occur in the 1980's and beyond. Currently it is changes in the law associated with the transportation of goods by sea rather than changes in the actual methods of transportation themselves which are exercising the minds of marine insurers. On present indications, the 1980's promise to give them more than enough exercise.

In examining the implications for marine cargo insurers of possible developments in the 1980's in relation to the laws associated with the sea carriage of goods, it is firstly necessary to review the background to cargo insurers' interest in the liability of carriers of goods by sea.

Marine insurance exists to relieve the shipper of goods of the financial burden arising from the risks of accidental loss of or damage to the goods whilst in transit. Other risks associated with the transit such as the consequences of delay and loss from market conditions are not normally the subject of marine insurance. Whilst marine insurance was initially only available to cover certain major risks such as perils of the sea, fire, war etc. and was restricted to transit by sea, the available coverage for most types of cargo has progressively widened to embrace all risks of loss or damage from accidental external causes and now extends to cover the whole period of the transit from warehouse to warehouse by road, rail, sea or air.

Marine insurers are vitally interested in the extent of the shipowner's legal liability for loss of or damage to the goods in transit through the operation of the equitable principle whereby, on settlement of a loss, the insurer is subrogated to the cargo owner's rights of recovery, if any, against the shipowner. The extent to which such recoveries are obtained directly affects insurers' claims costs and their assessment of premium rates.

Legislators have seen fit to restrict the freedom of shipowners to contract themselves out of their common law liability, as bailees for reward, for the consequences to the cargo owner of their negligence in the performance of the contract of carriage. In Australia and New Zealand, the law in this respect is defined in the 1924 Hague Rules as embodied in the Sea Carriage of Goods Acts of both countries and in judicial interpretations of the Rules since 1924. This law defines the types of loss for which the shipowner is responsible and imposes monetary limits on the extent of that liability.

The common law liability of shipowners is further restricted, as a matter of public policy, by the principle of overall limitation of liability of owners of sea-going ships as enacted in the U.K. Merchant Shipping Acts of 1894 and 1900 which were incorporated into Australian and New Zealand law and which have not been amended since, in spite of the adoption by other countries of subsequent International Conventions relating to such limitation.

The business of shipowners is the carriage of goods by sea. The business of marine cargo insurers is to bear the risks of loss of or damage to the cargo inherent in such carriage. However, it is generally accepted that the shipowner should by law have a liability for any loss or damage due to his negligence sufficient to give him a financial incentive to take care of the goods as obviously any loss to the goods is a loss of wealth to the community notwithstanding that the loss may be compensated by insurance. The principle presupposes that the loss or damage is such as to be preventable by the exercise of due diligence in the performance of the contract of carriage by the shipowner, his servants and agents.

Leaving aside the moral argument that a shipowner, as much as any other person or organisation, should not be allowed to escape the consequences of his own negligence, or that of his servants or agents, it may be said that the imposition of liability on a shipowner and/or any increase in the statutory monetary limit of that liability in relation to loss of or damage to cargo is only supportable to the extent that it does in fact cause the shipowner to take greater care of the cargo and does in fact contribute to the minimisation of such loss of or damage to the cargo.

Marine insurers are far from convinced that in practice the actual occurrence of loss or damage to cargo would in most cases be in any way reduced by the imposition of increased liability on the shipowner. In a competitive shipping market where the shipper has a choice of shipping companies, there is a commercial incentive in any case for a shipowner to take reasonable care of the cargo quite apart from any liability he may or may not incur to compensate for its loss or damage.

Would the Captain of the "Lake Illawarra" have avoided demolishing the Tasman Bridge in Hobart with the resulting loss of the ship and its cargo if he had known that his employer The Australian National Line would be liable to compensate the cargo owners for their loss? Would a shipowner exercise greater care in the employment of his servants or agents if he had a greater responsibility for the consequences of their negligence? Would the incidence of theft, pilferage and damage reduce if the shipowner's liability was increased? In practice, it is doubtful whether the imposition of liability would have any material effect on the incidence of such losses.

Given that:-

1. Comprehensive insurance at competitive terms is readily available to the cargo owner and that most cargo owners avail themselves of it.

2. Any liability which it may be considered desirable to impose on a shipowner for loss of or damage to the cargo will in most cases already be covered by the insurance effected on the cargo by the cargo owner.

3. Any recovery effected by the cargo owner from the shipowner reduces the cargo owner's claim on his insurance policy, either by the deduction from the insurance claim of any such recovery actually effected or by settlement of the claim in full under the policy with subsequent exercise by the insurer of the cargo owner's right to compensation from the shipowner under subrogation.

- then the issue in the final analysis resolves itself into the extent to which the burden of losses should ultimately be apportioned between shipowners and their insurers on the one hand and the insurers of the cargo on the other.

Wherever the losses ultimately fall, their cost will be reflected in the cost of transportation either in the form of freight or in the form of cargo insurance premiums. The cargo owner and the community at large are accordingly interested in keeping losses to a minimum, the cargo owner is interested in receiving prompt compensation for any losses that do occur and all parties have an interest in minimising the costs involved in resolving the actual apportionment of losses between the shipowner and the cargo owner (or in most cases in reality between the shipowner's insurer or Protection and Indemnity Club and the cargo insurer) as these costs too are reflected in the cost of transportation.

Provided the overall cost of losses, including any costs of resolving their apportionment between shipowner and cargo insurer, are not increased, it may be argued that any increase in the liability of shipowners is immaterial as any resulting increase in freight rates is balanced by a compensating reduction in insurance premiums. However, this argument fails to recognise the effect on a country's balance of payments of

increased freight rates even if balanced, perhaps, by reduced marine insurance premiums on cargo.

In countries dependent to a large extent on foreign-owned shipping for the carriage of their overseas trade (which certainly includes Australia and New Zealand), the payment of freight constitutes one of the largest invisible debits in their balance of payments. On the other hand, the payment of premiums for cargo insurance, to the extent that insurance is effected within the country, is not reflected in the invisibles segment of the country's balance of payments.

Thus any significant transfer of the cost of the ultimate burden of cargo losses from cargo insurers (in a country where this cost is reflected in premiums paid largely to insurers in the domestic insurance market) to shipowners (where this cost is reflected in freight charges paid largely to foreign-owned shipping companies) has a real, detrimental effect on a country's balance of payments. This has been recognised in studies undertaken by UNCTAD and any such effect, however substantial, can hardly be in the best interests of Australia and New Zealand, both with substantial deficits in their invisible balance of payments.

It is also widely recognised that the import of goods on C.I.F. terms where cargo insurance is readily available at competitive terms in the country of import, constitutes an unnecessary, invisible import and many countries around the world have moved to encourage insurance of imports to be effected in their own domestic insurance markets. Similarly, encouragement is given to the sale of exports, wherever possible, on C.I.F. terms so as to maximise foreign exchange earnings.

Reference should be made to the so called overlapping or double insurance in respect of shipowner's liability and cargo insurance which may appear on superficial examination to exist. In fact there is no overlapping as the loss is only ultimately borne by one of the parties or its insurers and there is, strictly speaking, no double insurance as both parties stand in a different relationship to the insured goods. The co-existence of marine cargo insurance with the shipowner's liability cover has been accepted by all countries within the exhaustive studies

undertaken by UNCTAD but the likely overall increase in costs arising from the imposition of potentially heavy liabilities on shipowners, whilst such risks remain covered by cargo insurers, has been identified.

PRELUDE TO THE 1980'S

During the whole of their working lifetimes, today's marine insurers in Australia and New Zealand have enjoyed relative stability in the practice and legal basis both of marine insurance and in the related subject of liability of carriers of goods by sea. The Marine Insurance Act which codified the law of marine insurance has withstood the test of time and has not required amendment since its enactment in 1909. Similarly, the Carriage of Goods by Sea Act incorporating the 1924 Hague Rules has been unaltered in over 50 years although insurers have urged the adoption of the 1968 Hague/Visby Rules which update the 1924 Rules and recognise the changes in shipping practices, particularly the advent of containerisation. The statutes governing the overall limitation of liability of the owners of sea-going ships have remained unammended for almost 80 years.

The only changes with which marine insurers had to contend were judicial interpretations of the Hague Rules, which have left very little ground requiring finer definition, and amendments to the marine insurance clauses of the Institute of London Underwriters which have very wide international acceptance and which provide an internationally recognised standard of marine insurance conditions.

This state of affairs existed up to the early 1970's and might have continued indefinitely had not the developing countries, through their increasing influence in the United Nations, called into question the whole basis of carriers' liability and marine insurance which these countries saw as having been imposed on them by the old economic order and which they suspected of being detrimental to their interests.

The winds of change which commenced as a light breeze in 1971 when UNCTAD commissioned UNICTRAL to commence the review of the 1924 Hague Rules and the 1968 amendments have now increased to almost gale force and threaten to blow the cargo insurer and with him the cargo owner, well off the charted course of facilitating international commerce for the benefit of mankind and particularly of the less well off nations. To question the established order of things may be all very well but it is irresponsible to lightly discard centuries of practical experience and it may be seriously questioned whether some of the proposed changes will not in fact be to the detriment of the developing nations.

It is to be hoped that the exhaustive studies of UNCTAD have brought about and will continue to bring about a much better appreciation of the complexities of the laws and practices of liability and insurance related to the carriage of goods by sea and of their economic effects. Unfortunately, the international conventions resulting from these studies appear to be more the result of political trade-offs and compromises than the result of a careful evaluation of the expert practical advice of those directly involved in, and affected by, the existing laws and practices.

With its review of the Hague Rules having culminated in the adoption of the United Nations Convention on the Carriage of Goods by Sea (the 1978 Hamburg Rules) and with its studies on the liability of multimodal carriers having resulted in a Draft U.N. Convention on International Multimodal Transport to be submitted shortly to a diplomatic conference, UNCTAD has now turned its attention to marine insurance itself. Having issued a report on the legal and documentary aspects of the marine insurance contract, it has now appointed a committee to produce a set of international "model" marine policy conditions and rules of a non-mandatory nature. How these will be received by marine insurers and their clients remains to be seen but it will be unfortunate if the result is different sets of insurance conditions instead of the uniformly accepted Insitute clauses in current use.

THE 1980'S AND BEYOND

1. The Hamburg Rules

Volumes have already been written on the Hamburg Rules since their adoption at the 1978 diplomatic conference and they will continue to be the subject of critical analysis for many years to come.

If a basic objective of the revision of the existing Rules was improved definition of losses to be borne by the carrier and reduced costs, including litigation costs, of effecting recovery of such losses from the carrier, then the Hamburg Rules must surely be regarded as a monumental failure. The text of the Convention is far from ideal and the Rules present major problems of interpretation due to inconsistent drafting and the omission of language well known to the maritime law.

They certainly represent a shift in liability from cargo to ship although the real extent of the shift is open to argument. The omission of the exclusion of liability in respect of errors in the navigation or in the management of the ship alone will result in a material increase in shipowners' potential liability which, as with any such increase, must be reflected in higher freight costs.

Marine insurers are not interested in increased recoveries from carriers per se. They are not anxious to subrogate themselves out of business and the implications to the balance of payments of countries largely dependent on foreign-owned shipping services of increased freight rates to cover shipowners' increased liabilities have already been referred to. Informed commentators are unanimous in their view that the introduction of the Hamburg Rules will result in an overall increase in insurance costs and thus in the costs of transportation.

The disadvantages to Australia and New Zealand of ratification of the U.N. Convention appear to be all too obvious - increased uncertainty, increased administrative costs of shipowner,

cargo owner and cargo insurer, increased overall insurance costs and detrimental effect on the balance of payments. The economic interests of both countries would best be served by not ratifying the Convention as, apart from the dubious political mileage to be gained from supporting a Convention primarily motivated by pressure from the developing countries and the promise of full employment for maritime lawyers, it is hard to see either country deriving any advantage from ratification.

Marine insurers believe the sensible course would be to return the Hamburg Rules to the drawing board in an attempt to overcome their many deficiencies whilst retaining the better features. This appears unlikely to happen unless a period of years elapses without the Rules having come into effect through their ratification by the required minimum number of countries. It is understood that a year after the Convention only one country, Egypt, has so far ratified although several others have indicated an intention to do so.

What is perhaps more likely to happen is that the Hamburg Rules will come into effect through ratification by sufficient countries (which are unlikely to include many significant trading nations) so that for the foreseeable future and probably indefinitely, there will be several liability regimes in force concurrently and the ideal of one internationally accepted regime is unlikely ever to be realised. Marine insurers already have to cope with two regimes, the 1924 Hague Rules, largely in force internationally and the 1968 Hague/Visby Rules, adopted by a number of countries including U.K. This could be overcome by the adoption by Australia and New Zealand of the 1968 Rules as advocated by marine insurers.

In the event that the Hamburg Rules are adopted, marine insurers will need to pay greater attention to the weight/value ratios of the cargo they insure as with some types of cargo the higher limits and the revised package or kilo basis of the Rules will mean a recovery of full value from the shipowner under subrogation where the shipowner is held to be liable for its loss whereas the present $200 per package or freight unit recovery potential is too small to affect the premium

rating of specific commodities even though recoveries effected do have a bearing on premiums charged to individual assureds.

The combination in the Rules of an increased liability limit of approximately A$2.75 per kilo with the elimination of the defence of negligent navigation is of particular significance for the insurers of bulk cargo as with many such cargoes the actual value will be below the per kilo limit. This opens the possibility of a recovery in full from carriers of at least the invoice value of the cargo in the event of total loss by collision or stranding caused by negligent navigation and this could become a significant factor in the calculation of F.P.A. cargo premium rates.

Under the new Rules the shipowner will be liable even for the consequences of casualties resulting from perils of the sea unless he can prove they occurred without, inter alia, navigational fault on the part of the Master or crew. Each case will require careful examination and much legal dispute. Disputes over liability for general average contributions are likely to be protracted as cargo interests will not be prepared to contribute unless the carrier can prove that he took all measures that could reasonably be required to avoid the occurrence giving rise to the general average and its consequences.

2. The Limitation of Liability of Owners of Sea-going Ships

The 1957 International Convention in this respect came into force internationally in 1968 but the relevant law in Australia and New Zealand still consists of the Merchant Shipping Acts of 1894 and 1900 of the United Kingdom. These Acts have been updated on several occasions over the years in U.K. but rather incredibly no updating of Australian and New Zealand law has occurred. As a result, in those cases where the shipowner is able to limit his liability, very low limits by today's standards of about A$16 a ton of the ship's tonnage for property claims and A$30 a ton for personal claims apply.

The ability to limit overall liability in certain cases, particularly to such low amounts, has obviously benefitted shipowners and their P & I. Clubs and has materially restricted the claims which would otherwise have been recoverable. Two examples can be quoted, the first involving the "Lake Illawarra" Tasman Bridge disaster in 1974. In this case, the accident was found to be caused by negligent navigation and under the Hague Rules the shipowner was exempted from any liability to compensate cargo owners for the A$2,000,000 loss of the cargo. This exemption did not apply to the cost of damage to the bridge of some A$10,000,000, to the loss of several lives in vehicles which plunged off the bridge into the river nor to the value of the vehicles themselves but with a vessel of only some 7,000 tons, the overall limitation fund would not have exceeded some A$325,000. In the second example in 1977, the owners of a Chinese ship which caused A$1,000,000 damage to the Wallaroo jetty were able to limit liability to A$171,249, much to the chagrin of the South Australian government.

In practice, limitation of liability has had only a restricted effect on marine cargo insurers as in many instances where the right to limitation was available, either cargo loss was not involved or cargo loss was due to a peril in respect of which the shipowner was exempted from liability in any case under the Hague Rules. This situation will change if the Hamburg Rules are adopted as the Hague Rules' defences will no longer be available to the shipowner and in the case of many maritime casualties, where it is anticipated that the shipowner will be unable to discharge the onus placed on him to prove that he took all measures that could reasonably be required to avoid the occurrence and its consequences, the cargo owner and his insurer will become vitally interested in the extent to which the shipowner may be able to limit his overall liability, both to cargo and property on or off the vessel and in respect of personal claims excluding crew claims.

The Australian Government has recently introduced legislation to enable it to ratify the 1957 Convention and it is anticipated that the new limitation law will be applicable in Australia by mid 1980. It is not clear whether the New Zealand Government will follow the

Australian example. In addition to considerably updating and improving the legislation, the new law will increase the limits for each ton of the ship's tonnage from approximately A$16 to $57 for property claims and from A$30 to $179 for personal claims. Limitation will not be allowed in respect of damage caused to harbour works or for wreck removal.

Insurers will need to consider the combined effect of the Hamburg Rules and the 1957 Limitation Convention in those cases where the shipowner is held to be liable for cargo loss. This can be complicated as the shipowner's liability under the Rules is calculated on the per package or shipping unit basis or on the weight of the cargo whereas the limitation fund is calculated on the size of the carrying vessel at some $57 per net shipping ton as defined in the Convention. All concerned will spend many happy hours working out the arithmetic but it is clear that shipowners and their P.& I. Clubs will face very heavy potential liabilities in respect of cargo loss resulting from maritime casualties, the effect of which has already been demonstrated.

3. International Multimodal Transport

Both Australia and New Zealand are involved in multimodal transport and are accordingly very interested in the UNCTAD Draft Convention shortly to be submitted to a diplomatic conference. Marine insurers support the need for a Convention but are deeply concerned that, as with the Hamburg Rules, those charged with its formulation may have insufficient appreciation of the practical issues involved in any proposed liability regime and in particular the insurance and balance of payments implications.

It seems logical that the basis of liability of the multimodal transport operator (M.T.O.) should closely follow that of the Hamburg Rules although insurers would feel much happier if they had more confidence in these Rules. The preamble to the Draft Convention "recognises the need to have particular regard to the special interest and problems of developing countries" including inter-alia the "maximum use of local insurance", hardly something which has been adequately reflected in the Hamburg

Rules with its shift away from local cargo insurance to overseas shipowner insurance.

Under the present liability conditions of responsible M.T.O.'s, the law applicable to a loss identified as occurring during one particular leg of the transit e.g. the sea leg, is that applicable to that particular mode of transport e.g. the Hague Rules and where the point of occurrence of the loss cannot be so identified, a fixed basis and limit of liability applies. This is known as a modified network system of liability.

Under a pure network system with no residual basis of liability to apply in the event of inability to determine the precise point of occurrence of the loss, the carrier could allege the loss occurred on a leg of the transport where the carrier is free to contract himself out of liability e.g. road transit in most Australian States and the cargo owner's claim might fail. Given the practical difficulties in multimodal transport of positively identifying the point of occurrence of a loss, the modified network basis appears to be both equitable and logical and is supported by marine insurers.

The alternative basis is uniform liability where the same liability regime applies throughout irrespective of point of occurrence of the loss. Whilst this has the attraction of obviating any need on the part of the cargo claimant to attempt to establish the point of occurrence of the loss, the M.T.O. still needs to establish this to pursue recovery against the actual carrier responsible for the loss.

In considering network v. uniform or any permutation of them, it is necessary to examine both the legal basis of liability which it is intended should apply to any particular loss and the monetary limitation of the M.T.O.'s liability for that loss. The actual basis of liability and of limitation has been left for resolution at the diplomatic conference but the Draft Convention contains alternatives omitting reference to monetary limits:-

Article 18 - Limitation of Liability

A: Uniform amounts throughout on same basis as Hamburg Rules.

B: As in "A" but where the international multimodal transport does not, according to the contract, include carriage of goods by sea, a higher limit based on weight only shall apply.

Article 19 - Localised Damage

(i.e. situation where mode on which damage occurred is known.)

A(i): Limit of the applicable law (e.g. Hague Rules) to apply in all cases or (ii) only where it is higher.

B: Full provisions as to basis of liability and limit of the applicable law (e.g. Hague Rules) to apply in all cases.

It is understood that Australia favours 19.A, believing that the Multimodal Convention provisions should apply in all situations whereas other countries, notably U.K., favour B, believing that that the provisions of unimodal conventions (e.g. Warsaw Convention) and national laws should apply to situations where the mode on which damage occurred is known.

It appears that 19.B when the mode on which damage occurred is known, with the provisions of the Multimodal Convention and the limits of Article 18.A, where it is not, is the most logical, practical and equitable basis and this overcomes the problem of having different liability rules applying to two lots of cargo involved in the same loss simply because one lot of cargo is covered by a multimodal transport document and the other is not. This is in fact the modified network system referred to earlier which is the system already operated by responsible M.T.O.'s.

Conversely, either 19.A(i) or (ii) with 18 is a uniform system of liability applying the terms of the Multimodal Convention throughout with variations only in the limit of liability in respect of localised damage either in all cases - 19.A(i) or only where the limit is higher than the Multimodal Convention limit - 19.A(ii). In a case of localised damage, this basis can still leave one cargo owner able to recover from the M.T.O. with another unable to recover from the unimodal carrier

simply because of the type of documentation issued even though the cause of loss is the same in both cases.

Marine insurers will await with interest, and some trepidation, the outcome of the diplomatic conference and it should be pointed out that marine insurers have long since anticipated multimodal transport by their warehouse to warehouse coverage. The matter of liability in practice, will in most cases be one to be resolved between the respective insurers of the M.T.O., the actual carrier and the cargo owner.

4. International Convention for Safe Containers

This Convention lays down requirements for the structure, testing, inspection, approval and maintenance of new and existing containers used in international transport, excluding air transport and was adopted in 1972.

Marine insurers welcome the legislation recently introduced to enable Australia to ratify this Convention as a constructive step towards minimisation of cargo loss caused by defective containers - a matter of increasing concern to insurers as containers become older and more likely to lead to cargo damage, particularly water damage.

5. Insured or Full Liability Bills of Lading

Whilst not directly connected with possible changes in the law relating to carriage of goods by sea, the UNCTAD deliberations on the liability of unimodal and multimodal carriers have given impetus to the concept of an insured or full liability bill of lading and this is a matter which seems likely to continue to concern marine insurers in the 1980's.

The concept of eliminating the marine insurance policy in international shipments by either combining it with the bill of lading or by the carrier accepting bailee liability to the extent normally covered by insurance conditions is not new. In fact the Matson Navigation Company introduced such a scheme in their container service between U.S.A. and Hawaii as long ago as 1958. It initially provided "door to door" full

liability but this was abandoned after only 3 years as the company felt it was needlessly paying claims of connecting carriers, namely railroads and truckers and liability was restricted from 1961 to losses which could be proved to have occurred whilst the cargo was in the hands of the shipowner. The entire scheme was abandoned by Matson in 1976 and shippers were advised to effect their own insurance.

Overseas Containers Ltd. and Associated Container Transport Ltd. attempted in 1968 to introduce a mandatory combined transport bill of lading and insurance certificate in their container operations between Australia and U.K. but their efforts proved totally abortive due to customer resistance, particularly to the mandatory nature of the proposed scheme.

A proposal was made that the insured bill of lading remain optional for those shippers who wish to make use of it, and that other shippers should continue to buy marine cargo insurance themselves under the traditional regime of separate co-existence of cargo insurance and carrier's liability cover. The container lines admitted at the time that such an optional scheme would produce uncompetitive premium charges to shippers due to selection against the carrier and UNCTAD stated in their 1975 report on marine insurance (Ref. TD/B/C.3/120) "under an optional insured bill of lading scheme, shippers with good claims records would insure their risks separately and the shipowner would have to accept in his package cover all the rejects; rates would soar and the package deal would become impracticable."

It was accordingly surprising to see OCL in 1975 test marketing an optional scheme on the U.K. - Australia route on the basis of a full liability bill of lading but, as far as can be ascertained, this was not received with any more enthusiasm by shippers than was the 1968 proposed scheme. Nevertheless, indications are that OCL still sees this as a potentially profitable business venture and that they have not yet finally abandoned the project. Accordingly, whilst it is impractical in this paper to expose in detail all the

inherent defects of the proposed scheme, it is appropriate at least to look at some of the most obvious adverse features, bearing in mind that under the full liability bill of lading, cargo insurance would disappear:-

1. Security

Acceptance of liability by a carrier is no substitute for the security offered by an insurance policy. The solvency of insurers is regulated by Governments (e.g. in Australia under the Insurance Acts) but there is no authority to regulate the solvency of carriers. The shipper would also lose the protection of the Marine Insurance Act.

OCL have announced that their liabilities under the scheme would be substantially self-insured and that they are not insurers. As far as is known, the scheme does not have the acceptance of the London Clearing Banks or the Australian Bankers' Association.

UNCTAD have argued strongly and convincingly against the substitution of largely uninsured carriers liability for marine cargo insurance.

2. Economy

Due to the problem of selection against the carrier, it is hard to envisage the additional cost of acceptance of full liability by a carrier being competitive with the insurance premiums of at least the shippers with good claims records. This is particularly true when the respective costs are equated with the established and protected value of an insurance policy as compared with the doubtful practical value of a full liability bill of lading.

3. Claims

The full liability bill only applies to losses which can be proved to have occurred whilst the goods were in the hands of the carrier. With anything other than door to door shipments by the carrier, the cargo owner would still need insurance to cover risks before delivery to and after collection from the carrier.

Given the very real problem with container shipments of concealed

damage and of proving precisely where the incident giving rise to damage or shortage occurred, the cargo owner faces the prospect of being unable to recover under either the full liability bill or the insurance policy. Even with door to door shipments, the carrier is likely to take a less sympathetic view of concealed damage than is the consignee's own insurer.

The same strict rules as to time for filing claims apply under the full liability bill as apply under conventional bills with obvious implications.

4. Detrimental Economic Effect

The adverse effects on the balance of payments of a shift away from cargo insurance to extended carrier's liability to those countries largely dependent on foreign-owned shipping have already been discussed. In view of its basic deficiencies, it is hard to envisage OCL's full liability bill of lading concept gaining much commercial acceptance if in fact they decide to press ahead in spite of all opposition.

However, in the unlikely event of widespread acceptance, this would have a very real adverse effect on the invisibles deficits of Australia and New Zealand in that the extra charge for acceptance of full liability would materially increase the already large freight cost deficits of both countries. Even if part of the insurance effected by the carrier in respect of his liabilities was to be placed in the insurance markets of Australia and New Zealand, this would do little to reduce the impact in that the larger part of the additional freight would never find its way into any insurance market due to the fact that the carrier would be substantially self-insuring his liabilities.

Insurers believe that quite apart from the defects from the cargo owner's point of view in insured or full liability bill of lading schemes, governments should be aware of their economic effects. Marine insurers in Australia and New Zealand need make no apology for appearing to be motivated by self interest. They firmly believe that on this matter, their interests, the interests of their clients and the overall best interests of their countries, clearly coincide.

EPILOGUE

Whilst marine underwriters may look back with nostalgia to the halycon days

- when International Conventions and other ground rules of their business and of trade in general resulted from the expert deliberations of experienced practitioners,

- when governments governed and left trade to find its own practical solutions,

- when the combined pressures of consumerism and the political will of the emerging nations did not require them to justify in detail every facet of their business,

- and before intense broker-generated international competition brought out the worst suicidal tendencies of some insurers,

they must of necessity look forward, if not with confidence, then at least with pride in their profession and armed to defend the vital role they play in smoothing the flow of international commerce and the valuable contribution they make to the prosperity of their countries.

Melbourne, 1979.